44517-4-II
No. ~~87418-2~~
SUPREME COURT
OF THE STATE OF WASHINGTON

RITH KOK, as Administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, as a beneficiary of the Estate of SAMNANG KOK; RORTH KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; RY SOU KOK, individually and as a beneficiary of the Estate of SAMNANG KOK, individuals

Petitioner,

v.

TACOMA SCHOOL DISTRICT NO. 10, a municipal entity under the laws of the State of Washington,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

As recognized by the trial court when it granted the Tacoma School District No. 10's (the "District" or "School District")[1] Motion for Summary Judgment in this case:

> [F]irst and foremost there's a universal agreement that what happened on that day was a tragedy. It was a tragedy. *But a tragedy does not equate to legal responsibility.*

(Tr. Summ. J. Mot. 46:16-19, Dec. 16, 2011 (emphasis added), attached at App. 2.)[2] While the facts of this case can easily be sensationalized, the case was appropriately decided as a matter of law. After exhaustive briefing and significant deliberation, the trial court acted in accordance with well-established law in (1) granting the District's Motion for Summary Judgment, (2) denying Plaintiffs' Motion for Reconsideration; and (3) denying Plaintiffs' Motion to Vacate Court [sic] Summary Judgment Order of December 16, 2011 and for Recusal/Disqualification of Judge ("Motion to Vacate").

This case is about a shooting that happened at school – not a "school shooting." The shooting occurred on January 3, 2007, on the first day back from a two-week winter break and before the school day had even started. Student Samnang Kok ("Kok") was shot and killed by fellow student Douglas Chanthabouly ("Chanthabouly") at Henry Foss

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[1] The District is the Respondent on appeal and was the Defendant below.

[2] *See also Hewitt v. Spokane P. & S. R. Co.*, 66 Wn.2d 285, 297, 402 P.2d 334 (1965) (Hill, J. dissenting) ("The law recognizes that there is such a thing as an injury for which no one is liable.").

High School ("Foss"). Chanthabouly was a diagnosed paranoid schizophrenic, who was receiving medical treatment for his illness. He began attending Foss in April 2005, and never before exhibited aggressive or confrontational behavior toward other students there. Nor did any of his medical providers express concerns – either to the District or to anyone else – that Chanthabouly might harm another person. The shooting was wholly unexpected.

Appellants[3] repeatedly, and without qualification, equate paranoid schizophrenia with violence toward others. This is established neither by science nor by law. The right of mentally ill children to not only attend school, but to attend general education classes (often referred to as "mainstream classes" or "mainstreaming") is a cornerstone requirement mandated by federal and state laws applicable to students with disabilities. It is undisputed that public schools must afford this right to students with disabilities, including those with mental health conditions. Of particular relevance to this case, neither Chanthabouly's medical providers nor his actions at school indicated he posed a risk to the safety of other students. Simply put, the District acted in compliance with all applicable federal and state laws in admitting and educating Chanthabouly primarily in general education classes.

[3] The Estate of Samnang Kok, its beneficiaries, and his parents are the Appellants on appeal and were the Plaintiffs below. They are referred to herein as the Appellants rather than the Koks to avoid confusion with Kok when he is referred to individually.

Chanthabouly's actions in shooting and killing Kok, while tragic, were not reasonably foreseeable. No genuine issues of material fact exist and judgment as a matter of law for the District was properly granted. For the same reasons, the trial court did not abuse its discretion in denying Plaintiffs' Motion for Reconsideration. As such, the trial court's decisions should be affirmed.

Further, Judge Lee did not abuse her discretion in failing to vacate the summary judgment order and disqualify or recuse herself. There is no allegation of any connection between either the defendant and Judge Lee or defense counsel and Judge Lee. Nor is there any allegation that Judge Lee's spouse or his law firm has been involved in this case in any way. Further, once Plaintiffs raised their concerns about Judge Lee's spouse's status as an attorney who works at a firm that has government clients, including school districts such as the defendant, Judge Lee obtained an ethics opinion on the matter. Judge Lee followed the guidance of that ethics opinion when she ruled on Plaintiffs' Motion to Vacate. Consequently, Judge Lee did not abuse her discretion in refusing to disqualify or recuse herself and in denying the request to vacate her ruling on summary judgment. Accordingly, those decisions should be affirmed.

II. STATEMENT OF THE CASE

A. At the Time of this Appeal, Only Appellants' Negligence Claim Survives and is at Issue.

Plaintiffs filed the Complaint on July 31, 2008, and the case was immediately assigned to Pierce County Superior Court Judge Linda Lee.

(CP 3.) Since the time of filing, both the number of parties and claims in this case substantially narrowed. As a result, at the time the trial court ruled on the District's Motion for Summary Judgment, the only remaining claim at issue was of negligence.

Approximately two months before the close of discovery and over three years after the case was filed, the School District filed Defendant's Motion for Summary Judgment. (CP 45.) After multiple rounds of briefing and after the Court granted two CR 56(f) continuances,[4] the motion was finally heard. (CP 1912.) Following a lengthy oral argument, Judge Lee granted Defendant's Motion for Summary Judgment and dismissed the case. (CP 1909-11.)

Plaintiffs filed a Motion for Reconsideration. (CP 1914-59.) However, before that motion could be heard, Plaintiffs filed a Motion to Vacate based on the fact that Judge Lee's spouse's law firm, Vandeberg Johnson, has performed unrelated work for the Tacoma School District. (CP 2123-30.) After another round of briefing, oral argument was heard on Plaintiffs' Motion to Vacate, and the Court took the motion under advisement. (CP 2547-48.)

While considering that motion, Judge Lee elected to obtain an opinion from the Washington State Ethics Advisory Committee on whether it was inappropriate for her to hear this matter because of the remote connection between one of the parties and her spouse. (Ethics

[4] (CP 1655-1858.)

Advisory Comm., Op. 12-02 (Apr. 6, 2012), attached at App. 3-4). The Committee determined it was not, and in accordance with that opinion and underlying legal authority, Judge Lee denied Plaintiffs' Motion to Vacate. (CP 2549-55.) Judge Lee then heard oral argument on Plaintiffs' Motion for Reconsideration, and subsequently denied that motion. (CP 2568-69, 2571.) This appeal followed.

B. Factual Overview

1. Overview of January 3, 2007

January 3, 2007, was the first day back to school after a two-week winter break. That morning, Foss administrators were in the hallways supervising their students' return to school and welcoming them back from their two-week winter break. (CP 160.) Teachers were also present, providing additional supervision, opening their classrooms, and exchanging greetings. (CP 162-63.)

One of the teachers, Randy Cruz, walked past the alcove in the school's "300 hallway" between 7:15 a.m. and 7:20 a.m. on the way to his classroom. As he glanced at the alcove, he saw Chanthabouly sitting on a bench. (CP 165.) At the time, Mr. Cruz "didn't really think much of it." (*Id.*) Shortly after Mr. Cruz walked by, Principal Don Herbert and Assistant Principal Bryon Bahr crossed paths at the alcove. (CP 162-63, 167.) At the time, it seemed like a typical first morning back from winter break – the two administrators simply said hello as they crossed paths and continued walking the school's hallways. (CP 167.)

Less than a minute later, Chanthabouly walked across the alcove to a bank of lockers where Kok was standing. Without warning, Chanthabouly shot Kok. (CP 169-79.) It was 7:26 a.m. — the first bell after the two-week break was still four minutes away. (CP 144, 181.) Kok was instantly rendered unconscious and died at the scene of the shooting. (CP 144, 183.) Chanthabouly left the building without threatening or attempting to harm anyone else. (CP 172.) Ultimately, he was convicted of second-degree murder for Kok's death.

2. Brief Overview of Paranoid Schizophrenia

Schizophrenia is a mental illness that occurs in 0.5% to 1.5% of the worldwide population. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION 308 (Michael B. First et al. eds., 4th ed. 2000) (hereinafter DSM-IV-TR). Paranoid schizophrenia is one of five subtypes of schizophrenia.[5] DSM-IV-TR at 303. "The classic features of paranoid schizophrenia are having delusions and hearing things that aren't real." *Paranoid Schizophrenia*, MAYO CLINIC, http://www.mayoclinic.com/health/paranoid-schizophrenia/DS00862 (last visited Oct. 3, 2012, at 1:32 p.m.). Paranoid schizophrenics may be able to function better in society than those suffering from other types of schizophrenia. DSM-IV-TR at

[5] The other types of schizophrenia are (1) disorganized schizophrenia; (2) catatonic schizophrenia; (3) undifferentiated type; and (4) residual schizophrenia. DSM-IV-TR at 303. In addition, a separate diagnosis exists for Schizoaffective Disorder, which includes some of the symptoms of schizophrenia along with depressive, manic, or other symptoms. DSM-IV-TR at 319-20.

314. As stated in advice given by the Mayo Clinic to those who may be suffering from paranoid schizophrenia:

> With paranoid schizophrenia, your ability to think and function in daily life may be better than with other types of schizophrenia. You may not have as many problems with memory, concentration or dulled emotions. Still, paranoid schizophrenia is a serious, lifelong condition that can lead to many complications, including suicidal behavior.

Id. The cause of schizophrenia has not been conclusively determined. Paranoid schizophrenia, along with the other forms of schizophrenia, is a brain disorder. It is likely that both genetics and environmental factors play a role in causing schizophrenia. *Id.* It is generally accepted that "*most individuals with Schizophrenia are not more dangerous to others than those in the general population.*" DSM-IV-TR at 304 (emphasis added).

3. Overview of Chanthabouly's High School Education in the Tacoma School District.

Appellants claim a great deal of confusion regarding what schools Chanthabouly attended and at what time. (App. Br. at 14) Although, as explained in the District's Reply in Support of its Motion for Summary Judgment, this information could easily have been obtained with the simple submission of an interrogatory to the District on this topic,[6] it is clear that Chanthabouly attended the following high schools during the following times:

[6] All of this information is also available in documents produced during discovery.

- Stadium High School: 8/02 – 1/28/03[7]
- Foss High School: 1/31/03 – 8/22/03[8]
- Mt. Tahoma High School: 8/25/03 – 3/8/04[9]
- Oakland Alternative High School: 3/9/04 – 7/22/04[10]
- Mt. Tahoma High School: 9/13/04 – 1/27/05[11]
- Foss High School: 4/20/05 – 1/3/07[12]

The reasons for his mobility are easily understood and not uncommon. Chanthabouly initially enrolled in high school at Stadium, but then transferred to Foss High School to attend school with his siblings. (CP 1361-62.) He and his siblings then transferred from Foss to Mt. Tahoma High School when his family moved residences within Tacoma and their assigned attendance area school became Mt. Tahoma. (CP 1367.) Following problems with attendance and grades, Chanthabouly was transferred to Oakland Alternative High School for a portion of a semester to participate in its credit recovery program. A transfer to Oakland for a period of time is a common option pursued by students who are trying to get back on track academically or who have had truancy problems, and Oakland exists in part to serve this need. Following significant improvements at Oakland, Chanthabouly returned to Mt. Tahoma at his mother's request, rejoining his sister and brother. (CP 457.)

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[7] (CP 1289-98.)
[8] (CP 1300.)
[9] (*Id.*)
[10] (*Id.*)
[11] (*Id.*)
[12] (*Id.*)

On January 16, 2005, during the time period he was enrolled at Mt. Tahoma High School, Chanthabouly attempted suicide at his home. (CP 455-56.) Following that incident, he received inpatient treatment at Fairfax Hospital in Kirkland until February 6, 2005. (CP 1302.) After his discharge from Fairfax, he began receiving services from Comprehensive Mental Health ("CMH"). (CP 480.) On April 13, 2005, his CMH caseworker conferred with the District regarding Chanthabouly's enrollment. (CP 1370-71.) He was reassigned to Foss at his mother's request. Chanthabouly's CMH caseworker met with a Foss vice principal and school psychologist on April 18, 2005, to help facilitate Chanthabouly's enrollment there. (*Id.*) He began attending Foss on April 20, 2005, with a part-day schedule. (CP 88.) By the fall of 2005, Chanthabouly was attending Foss as a full time student and he remained a full-time student at Foss until January 3, 2007. (CP 1286.)

4. Clarifications Regarding Chanthabouly's Experiences at Mt. Tahoma High School.

Chanthabouly's time at Mt. Tahoma High School is of little relevance to this case because it was *prior* to his diagnosis of and treatment for paranoid schizophrenia. Regardless, for the purpose of establishing an accurate record, the District is compelled to correct the factually inaccurate statements included in Appellants' Brief.

First, contrary to the assertions by Appellants,[13] Chanthabouly's sister did not observe him behaving oddly at Mt. Tahoma High School. She, in

[13] (App. Br. at 17.)

fact, testified that she only could recall with certainty him behaving strangely at home:

> Q When you talked about your observing Doug speaking to himself, is that something you observed at home?
>
> A Correct.
>
> Q Did you ever observe it at school?
>
> A No.

(CP 1386.)

> Q When he would talk about "You guys are out to get me," was that something that he would say at home, related to family members?
>
> A He said it to us, yeah.
>
> Q Did he ever say it at school to people, that you observed?
>
> A No.

(CP 1391.) Accordingly, it is inaccurate for Plaintiffs to state that Donna Chanthabouly witnessed her brother acting oddly at Mt. Tahoma. Further, it is undisputed that she never witnessed his behavior at Foss at all during the 2005-2007 time period, as she did not attend school there. (CP 1375.)

Second, although Appellants make reference to it repeatedly as having been part of a pattern of conduct, there is only a single allegation of Chanthabouly being involved in an altercation or fight at school where he was struck in the head while at Mt. Tahoma. The evidence demonstrates that *if* Chanthabouly was in fact in a fight and knocked out at Mt. Tahoma, that no one reported it to the school at the time.

Q Did you, at any point, when you had this conversation or afterwards, ever go talk to anybody at the – like the principal's office or –

A No.

Q – security about the fact this was going on?

A No.

Q When it was going on, did your friends or anybody –

A No.

Q – talk to the school staff?

A No.

Q Just something you just didn't talk to –

A No.

Q No? Okay. Didn't want to be a narc or anything like that? Was that kind of the way it was?

A No. It's – you know, when you're young and you – I guess in our environment we were growing up in, we were just taught a different way to handle things.

And I would go back and do things differently now from what I know, but back then, we just – we lacked so much, what we should have done.

Q You keep it in the family?

A Yeah. Our culture is like that. They teach us to be like that.

(CP 1429-30.) Moreover, the documents relied upon by Appellants demonstrate that the school responded to any concerns later raised by Chanthabouly's mother. Specifically, he was transferred to Oakland

Alternative High School after he was struck in the head. (CP 457) In addition, the school administration met with Chanthabouly in an effort to determine who the perpetrators were. (CP 1435.)

5. Chanthabouly Had No Behavioral Issues at Foss High School.

After returning to school full-time in the fall of 2005, Chanthabouly was referred for a special education eligibility evaluation to determine if he needed special education services as a student with an emotional/behavioral disability.[14] (CP 91.) Chanthabouly was found to be a student eligible for special education services at the conclusion of the evaluation. (CP 93.) As a student eligible for special education services, Chanthabouly could not be excluded from regular educational opportunities solely as a result of his diagnosis. *See* RCW 28A.155.010; 20 U.S.C. §1412(a)(1)(A). Students with mental illnesses – such as Chanthabouly – have the same right to attend school as any other student, and specifically cannot be excluded from school because of their disability.[15] *Id.* The law also requires that the District ensure Chanthabouly was educated to the maximum extent possible with non-

[14] *See* WAC 392-172A-01035(1)(a) and (e)(ii) ("a student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: ... an emotional behavioral disability ... and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services. ... *Emotional/behavioral disability includes schizophrenia.*" (emphasis added)). *See also* 34 C.F.R. §300.8(C)(4)(ii).

[15] With respect to the State's obligation to educate children, s*ee generally* Wash. Const. art. IX, § 1; RCW 28A.150.220.

disabled peers in the general education setting. *See* WAC 392-172A-02050.

Chanthabouly's special education eligibility evaluation identified him as being in need of specially designed instruction to improve his written language skills, as well as to assist him in improving his social skills. (CP 93.) Under his Individualized Education Program ("IEP"), Chanthabouly attended one special education writing class each day. All of his other classes were regular education, or mainstreamed, classes. (CP 95-103.) According to his special education teacher, Chanthabouly was improving socially while at Foss. (CP 122-23.) His report cards also reflect that his grades were improving (CP 105-07.)

At the time that Chanthabouly's special education evaluation was being performed, it was determined that some prior records were missing from Chanthabouly's cumulative file from his earlier years in school. (CP 475.) There is no indication that any documents are missing from his cumulative file for Mt. Tahoma, Oakland, or Foss – the last several years of his education. His complete transcript has grades for all of his courses from every school he attended. (CP 86.) Chanthabouly's discipline history was maintained in the electronic Student Information System ("eSIS") database, and included one short-term suspension from 2002 for defiance of authority, which is essentially insubordination – when a student does not follow a staff member's request. (CP 342.) Chanthabouly did not receive any other suspensions or expulsions

between 2002 and January 3, 2007 – if he had, they would also be in eSIS. (CP 1286.)

As part of his special education eligibility evaluation in the fall of 2005, Chanthabouly's teachers were asked to submit observation forms regarding his behavior and functioning in the classroom. As summarized by the school psychologist, teachers noted that: "[Chanthabouly] is very quiet and does not interact with teachers or peers. He is described as polite and very cooperative." (CP 109, 128-32.) Also included in Chanthabouly's special education eligibility evaluation file are records from his mental health providers, which were reviewed by the school psychologist. (CP 199.) Although these records include a Crisis Plan developed by Comprehensive Mental Health dated July 14, 2005, the plan also indicates that Chanthabouly had no history of engaging in assaultive behavior toward others and no history of using weapons. (CP 111.)

Notably, a Mental Health Assessment from Pierce County dated February 8, 2005, states that Chanthabouly "has never been assaultive towards others." (CP 114.) Chanthabouly, his mother, and his uncle also completed the Ohio Youth Problem, Functioning, and Satisfaction Scales on February 8, 2005. (CP 121-24.) This is an instrument administered to youth who receive mental health services.[16] The results indicate Chanthabouly had no trouble at all with any of the following: "1. Arguing

[16] *Ohio Department of Mental Health* Instruments, OHIO DEPARTMENT OF MENTAL HEALTH (Aug. 17, 2011 at 11:35 am) http:// www.mh.state.oh.us/ what-we-do/ protect-and-monitor/consumer-outcomes/ instruments/ index.shtml.

with others; 2. Getting into fights; 3. Yelling, swearing, or screaming at others; or 4. Fits of anger." (CP 121-24.) These results are consistent with Chanthabouly's educational history, which reveals entirely no aggressive, violent, or assaultive behavior toward peers or staff at Foss High School.

While guidance counselor Yates testified that he did not maintain his personal notes regarding Chanthabouly,[17] he also testified that he took special efforts to ensure he would be aware of any issues that arose with Chanthabouly:

> THE WITNESS: Okay. One thing that I did do and I stated before is that I single-handedly put him with teachers that I knew that he would do well with, and I knew that if there was an issue, those teachers would let me know and I could react immediately, so that's how I picked the teachers that he had. And that's how I continued to do for him because I knew that he was going to have – if he had an issue, I wanted to make sure that he was in the least contained environment that I could get to him, if I needed to.
>
> Q (By Mr. Lindenmuth): Physically get to him?
>
> A If I needed, if he needed out of the room, then I would do that.
>
> Q Okay.
>
> A Yes.

[17] These records are not part of a student's cumulative file and were disposed of in the normal course of business. (CP 1019-20.)

Q Did you try to –

A But all my teachers were aware that if there was any indication, anything out of the normal, they needed to contact me.

Q Okay.

A Yes.

Q Okay. Did you tell them that he had a prior suicide attempt?

A I didn't tell them that. I just told them that he had a situation and that it would be helpful for me to help this young man if I knew if there was something out of the ordinary that was going on that he didn't explain to me.

Q Okay.

A So if I got a call, I knew I had to go to the classroom immediately for whatever the issue might have been.

Q Okay.

A Yes, and I made myself available for that.

(CP 1396-97.) Even with these precautions, no teacher ever raised any non-academic concerns about Chanthabouly to Yates. (CP 1402-03.)

Moreover, Appellants point to no evidence whatsoever that Chanthabouly was ever in a fight – or even an argument – while attending Foss. The Assistant Principal who was assigned Chanthabouly's portion of the alphabet while at Foss testified that Chanthabouly was never referred to him for discipline or other concerns. (CP 1408.) Chanthabouly's guidance counselor testified that his teachers never came to him with any concerns about Chanthabouly's behavior. (CP 1402-03.)

Mitch Herd, the security guard at Foss, never recalls Chanthabouly being in any altercations – as either the perpetrator or the victim. (CP 1413.) Nor did anyone – students, teachers, or parents – ever raise concerns with Herd regarding Chanthabouly's behavior at Foss (CP 1418.)

6. Foss High School Was Not Chanthabouly's Medical Provider.

Schools are educational, not medical, institutions. From the time of his suicide attempt forward, Chanthabouly was receiving medical care from medical professionals – first Mary Bridge Children's Hospital,[18] then Fairfax Hospital,[19] then Comprehensive Mental Health,[20] and then his primary care physicians at Portland Avenue Clinic.[21] Chanthabouly's doctors managed his medication and his medical condition.[22]

The District received limited medical records from Fairfax Hospital and Comprehensive Mental Health regarding Chanthabouly and his condition, none of which indicated that he posed any risk to other students. (CP 76.) Even if the District had received the complete records from all of Chanthabouly's medical providers up to the time of the shooting, none of them would have indicated any risk of harm to others. (CP 202-208.) Like with his educational records, there is simply no

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[18] (CP 202. Exhibits 13-16 to the 8/19/11 Leitch Decl. were filed under seal and appear to have been inadvertently omitted from the Clerk's Papers. A supplemental designation of records has been made and the Clerk's Papers will be supplemented. This supplemental designation will contain the contents of CP 202-208, which are the placeholders for these documents.)

[19] (CP 203.)

[20] (CP 206.)

[21] (CP 208.)

[22] (CP 202-208.)

indication in Chanthabouly's medical records prior to the shooting that he might exhibit violent or assaultive behavior toward others. *Id.*

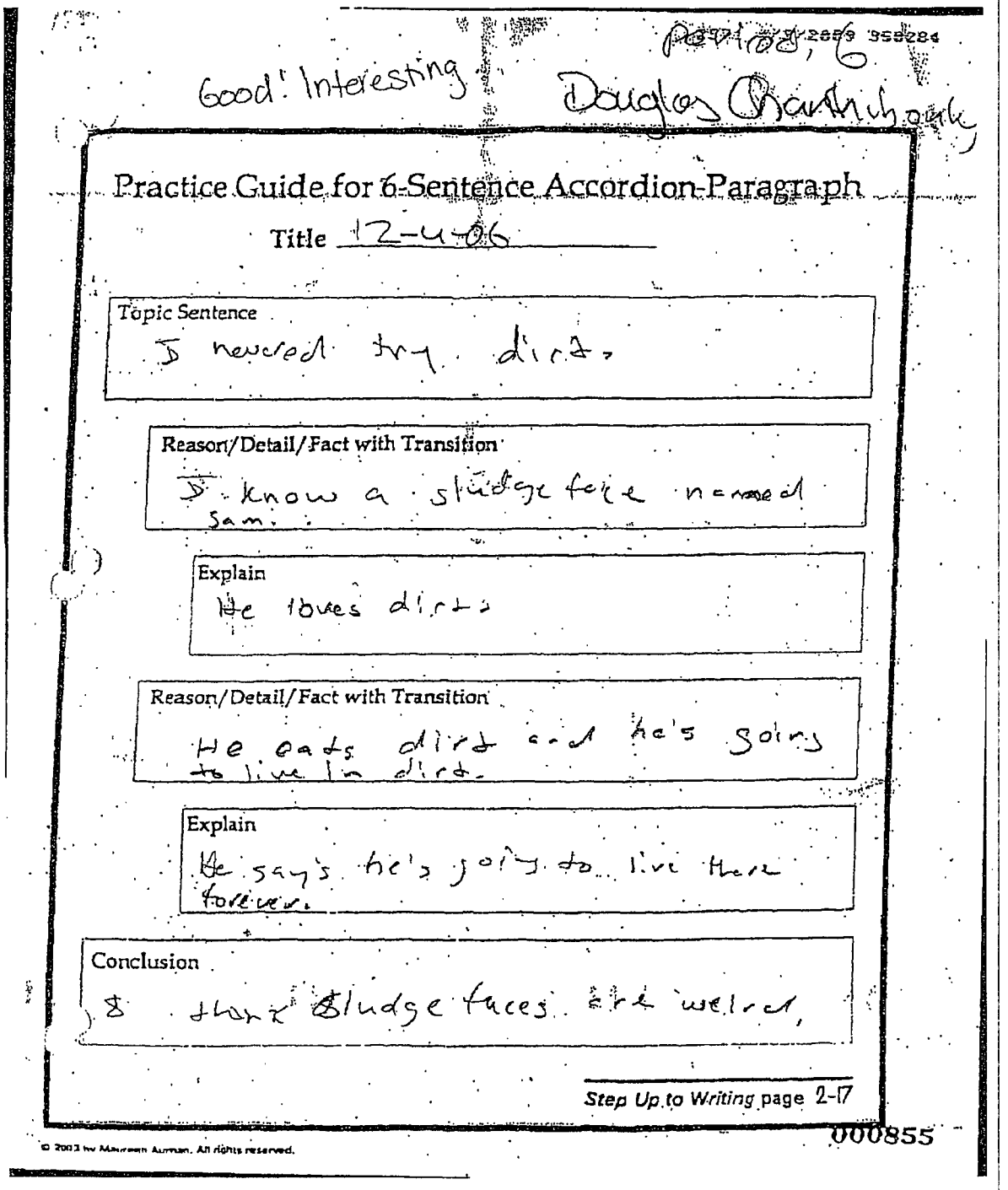
Chanthabouly's doctors managed his medication and his medical condition. As prescribed by those doctors, Chanthabouly took his medication in the morning and at night – not at school. (CP 212.) In Appellant's expert's own opinion, Chanthabouly's mother was responsible for his medication compliance. (CP 211-12.) In fact, Appellant's expert is not aware of any instance of a school in Washington being responsible for monitoring a student's medication for paranoid schizophrenia.[23] (*Id.*) Accordingly, Chanthabouly received his medical treatment from medical professionals who, among other things, developed and monitored his medication regimen – as is their duty. The District, on the other hand, evaluated and provided services to Chanthabouly to assist him with his educational needs – as is its duty.

7. Chanthabouly's Homework Assignment Was Not a Threat.

In Chanthabouly's criminal trial, the prosecution introduced only one document in what was ultimately a failed attempt to establish premeditation: a writing assignment dated December 4, 2006, from Chanthabouly's special education writing class. (CP 215.) Plaintiffs' expert witness, Jack Martin, testified that this assignment constituted a "lethal threat" on its face. (CP 218-20.) However, contradicting that assessment, he admitted that he was not able to think of any school

[23] Appellant's expert has little to no experience in working with schools and is not an expert on their duties, obligations, or the restrictions imposed upon them. (CP 700.)

shooting in the United States where a written threat was as veiled or as vague as the one purportedly contained in this assignment. (CP 224-25.) The worksheet is included in its entirety below:



Good! Interesting Douglas Barthelme

Practice Guide for 6-Sentence Accordion-Paragraph

Title 12-4-06

Topic Sentence
I never'd try dirt.

Reason/Detail/Fact with Transition
I know a sludge face named Sam.

Explain
He loves dirt.

Reason/Detail/Fact with Transition
He eats dirt and he's going to live in dirt.

Explain
He says he's going to live there forever.

Conclusion
I think sludge faces are weird.

Step Up to Writing page 2-17

(CP 215.) While the content of the writing assignment may be odd, particularly to those outside of the education field generally or the special education field specifically, a review of its plain language indicates that it is not a precursor to violent behavior.

There is no indication that the "Sam" in the writing assignment is a reference to Samnang Kok. Further, the assignment clearly states that (1) Sam "loves dirt;" (2) that it is Sam himself who says "he's going to live there forever;" and (3) that Chanthabouly thinks these things are "weird." (*Id.*) Nowhere in the assignment does it indicate that Chanthabouly will take any action at all. The assignment does not say that Chanthabouly put Sam in the dirt or that he is going to do so. Chanthabouly appears to be a passive observer in this writing – all of the action is being taken by Sam. (*See generally, id.*)

According to the Department of Justice and Federal Bureau of Investigation's joint publication *The School Shooter: a Threat Assessment Perspective*, there are three levels of threats:

> ***Low Level of Threat:*** A threat which poses a minimal risk to the victim and public safety
> - ★ Threat is vague and indirect.
> - ★ Information contained within the threat is inconsistent, implausible or lacks detail.
> - ★ Threat lacks realism.
> - ★ Content of the threat suggests person is unlikely to carry it out.
>
> ***Medium Level of Threat:*** A threat which could be carried out, although it may not appear entirely realistic.

- ★ Threat is more direct and more concrete than a low level threat.
- ★ Wording in the threat suggests that the threatener has given some thought to how the act will be carried out.
- ★ There may be a general indication of a possible place and time (though these signs still fall well short of a detailed plan).
- ★ There is no strong indication that the threatener has taken preparatory steps, although there may be some veiled reference or ambiguous or inconclusive evidence pointing to that possibility – an allusion to a book or movie that shows the planning of a violent act, or a vague, general statement about the availability of weapons.
- ★ There may be a specific statement seeking to convey that the threat is not empty: "I'm serious!" or "I really mean this!"

High Level of Threat: A threat that appears to pose an imminent and serious danger to the safety of others.

- ★ Threat is direct, specific and plausible.
- ★ Threat suggests concrete steps have been taken toward carrying it out, for example, statements indicating that the threatener has acquired or practiced with a weapon or has had the victim under surveillance.

DEPT. OF JUSTICE ET AL., THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 9 (Mary Ellen O'Toole ed. 1999), *available at* http://www.fbi.gov/stats-services/publications/school-shooter (last visited Oct. 10, 2012, at 1:11 p.m.). (*See* CP 57-58.) An example provided of a *low level* threat is an email from one student to another which states:

"You are a dead man." *Id.* An example of a *medium level* threat is a video made for a class assignment that "shows student actors shooting at other students on the school grounds, using long-barreled guns that appear real." *Id.* An example of a *high level* threat is an anonymous phone call to the principal that states "There is a pipe bomb scheduled to go off in the gym at noon today. I placed the bomb in the locker of one of the seniors. Don't worry, it's not my locker. I just placed it there because I can see it from where I will be sitting – and will know if someone goes to check on it." *Id.* When viewed in comparison to these examples, it is self-evident that Chanthabouly's writing assignment does not even amount to a low-level threat.

8. Literature on "Warning Signs" Stresses Against Using them in the Manner Advocated by Plaintiffs' Counsel.

Appellants reference documents that they assert show Chanthabouly had a heightened risk of committing a violent act because he exhibited certain select "warning signs" – mostly that he was a "loner." (App. Br. at 36-39.) However, if Appellants' approach were accepted, nearly every student in a public high school would be considered a potential source of school violence because nearly every teenage child fits in some of the categories listed at some juncture.

Appellants assert that there is a link between being a victim of bullying and perpetrating violence. (App. Br. at 36.) However, when the entire document Appellants cite is reviewed, it becomes clear that the

literature is actually asserting that being a bully (not a victim) is connected to violence.[24] Specifically, it states:

> Bullying is often a warning sign that children and teens are heading for trouble and are *at risk for serious violence.* Teens (particularly boys) who bully are more likely to engage in other antisocial/delinquent behavior (e.g., vandalism, shoplifting, truancy, and drug use) into adulthood. They are four times more likely than nonbullies to be convicted of crimes by age 24, with 60 percent of bullies having at least one criminal conviction.

(CP 646 (emphasis added).) The article merely warns victims of bullying not to carry a weapon because it does not make them safer. (CP 647.)

Appellants excerpt portions of the publication *Early Warning, Timely Response* published jointly by the U.S. Department of Education and the U.S. Department of Justice. (App. Br. at 36-37.) However, Plaintiffs notably omit the following cautionary advice from their excerpt:

> None of these signs alone is sufficient for predicting aggression and violence. *Moreover, it is inappropriate – and potentially harmful – to use the early warning signs as a checklist against which to match individual children.*

(CP 657 (emphasis added).) Yet using it as a checklist is exactly what Appellants' counsel are attempting to do. In addition, Appellants ignore the comment that the early warning signs listed are not equally significant. This is especially revealing when looking at the early warning signs

[24] Separate from the misrepresentation of this material, there is simply no evidence that Chanthabouly was, in fact, a victim of bullying at Foss.

omitted by Appellants: (1) uncontrolled anger, (2) patterns of impulsive and chronic hitting, intimidating, and bullying behaviors, (3) intolerance for differences and prejudicial attitudes, (4) drug use and alcohol use, and (5) serious threats of violence. (CP 658-60.) Appellants do not even attempt to argue that Chanthabouly exhibited these symptoms. Likewise, Appellants make no argument that Chanthabouly exhibited any of the signs of imminent violence included in this article. (CP 660.)

Moreover, even the "warning signs" that Appellants assert Chanthabouly did exhibit are misleading. (*See* App. Br. at 37-38.) While it is accurate to characterize Chanthabouly as socially withdrawn[25] and someone who had attempted suicide,[26] Appellant's other characterizations are not supported by the record in this case. After Chanthabouly was diagnosed and began treatment there is no evidence that he felt isolated or rejected,[27] was a victim of violence,[28] that he was uninterested in school,[29] that he had written or verbal expressions of violence,[30] that he had any

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[25] (App. Br. at 37-38 ("social withdrawal" and "[i]s on the fringe of his/her peer group with few or no close friends").)

[26] (*Id.* at 38 ("has threatened or attempted suicide").)

[27] (*Id.* at 37 ("feelings of isolation and rejection").) However, the document Appellants reference actually lists "excessive" feelings of isolation and "excessive" feelings of being alone. (CP 657.)

[28] (*Id.* ("being a victim of violence and feeling persecuted").) Further, the document Appellants reference discusses "youth who feel *constantly* picked on, teased, bullied, singled out for ridicule, and humiliated at home or at school." (CP 658 (emphasis added).) There is no evidence that Chanthabouly was ever picked on, teased, or bullied at Foss High School.

[29] (*Id.* ("little interest in school and poor academic performance").)

[30] (*Id.* at 37-38 ("written and verbal expressions of violence" and "reflects anger, frustration and the dark side of life in schools, essays [sic] or writing projects")

discipline problems,[31] that he had a history of violent or aggressive behavior,[32] that he was involved with a gang,[33] that he was bullied or bullied others,[34] that he blamed others for his problems,[35] or that he was depressed or exhibited significant mood swings.[36] In fact, the evidence shows that his grades were improving,[37] that he had no discipline problems at Foss High School,[38] and that he had no issues with fellow students at Foss High School.[39] Accordingly, Appellants' assertion that these "warning signs" – which allegedly should have informed the District that Chanthabouly would commit a violent act – even existed is unsupported by the record.

III. SUMMARY OF ARGUMENT

A. The Motion to Vacate was Properly Denied Because Judge Lee had No Duty to Be Aware of Her Spouse's Firm's Clients or to Disqualify/Recuse Herself from the Case.

There is no allegation of any direct connections between Judge Lee and either the defendant or defense counsel in this case. The only allegations are that (1) Judge Lee's spouse's law firm has done unrelated work for the School District; (2) that Judge Lee's spouse has done

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[31] (*Id.* at 37 ("history of discipline problems").)

[32] (*Id.* ("past history of violent and aggressive behavior").)

[33] (*Id.* at 37-38 ("affiliations with gangs" and "is involved with a gang or anti-social group on the fringe of peer acceptance").)

[34] (*Id.* at 38 ("has been bullied and/or bullies or intimidates peers or young girls").)

[35] (*Id.* ("tends to blame others for difficulties and problems s/he causes her/himself").)

[36] (*Id.* ("is often depressed and/or has significant mood swings").)

[37] (CP 105-07.)

[38] (CP 1408.)

[39] (CP 1408, 1413.)

unrelated work for the School District; and that (3) someone from Judge Lee's spouse's law firm acted as her campaign manager. These types of remote, contingent, and speculative interests do not reasonably bring into question a judge's partiality. As such, Judge Lee did not abuse her discretion in denying the Motion to Vacate.

Further, prior to ruling on the Motion to Vacate, Judge Lee went to the extra effort of obtaining an opinion from the Ethics Advisory Committee for the State of Washington. Based on the specific facts of this case, the Committee opined that Judge Lee had no obligation to recuse herself from the case. Her ruling followed this opinion and should be affirmed.

B. The Motion for Summary Judgment and the Motion for Reconsideration Were Properly Decided Because Chanthabouly's Actions Were Not Foreseeable.

A school district has a duty to protect its students only from reasonably anticipated dangers. In the nearly two years from the time Chanthabouly was diagnosed with and began receiving treatment for paranoid schizophrenia to the day of the shooting, the District had absolutely no information that indicated he presented any risk to other students. The District had a legal obligation to enroll Chanthabouly in general education classes and all the evidence indicates that Chanthabouly was making academic progress at Foss while enrolled primarily in general education classes. Chanthabouly had zero disciplinary issues at Foss. His teachers reported no concerns about him. He was not in any verbal or

physical altercations. And his medical providers did not indicate that he posed any risk to those around him.

The shooting occurred on the first day back to school after a two-week break, before the start of first period. At least one teacher, an assistant principal, and the school principal passed by the location of the shooting within minutes before it happened. The teacher specifically remembers seeing Chanthabouly. None of them recall anything out of the ordinary.

Chanthabouly did not have a personal history of aggressive or violent behavior that would have alerted the school that there was a risk of him hurting another student. Nor did his behavior in the short amount of time he was at school on the morning of the shooting raise any concerns. Based on these considerations, Chanthabouly's actions were not foreseeable. Because foreseeability limits the scope of duty, the District did not have a duty to protect Kok from Chanthabouly's actions on the morning of January 3, 2007.

IV. ARGUMENT

A. Judge Lee Properly Denied Plaintiffs' Motion to Vacate and to Disqualify Her from the Case.

1. The Trial Court's Decision is Reviewed Under an Abuse of Discretion Standard.

A judge's decision regarding whether to disqualify or recuse herself from a case is reviewed for abuse of discretion. *Tatham v. Rogers*, 283 P.3d 583, 590 (Wn. App. 2012); *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). Similarly, a trial court's ruling on a motion to

vacate brought under CR 60(b) is also reviewed for abuse of discretion. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 120-21, 904 P.2d 1150 (1995). As such, the entirety of the trial court's decision on Plaintiffs' Motion to Vacate is reviewed solely for abuse of discretion.

Abuse of discretion has been repeatedly explained by Washington courts as existing "only when no reasonable man would take the position adopted by the trial court." *Morgan v. Burks*, 17 Wn. App. 193, 198, 563 P.2d 1260 (1977). The trial court's decision will not be disturbed unless there is a "clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In other words, the decision reached by the trial court need not be the decision that would be reached by the reviewing court – it need only be defensible.

2. Judge Lee Properly Denied Plaintiffs' Motion to Disqualify/Recuse Her from the Case.

Although Appellants note "[d]ue process, the Appearance of Fairness Doctrine, and the Code of Judicial Conduct" (the "Code") as potential grounds for requiring disqualification of a judge,[40] they base their argument solely on appearance of fairness grounds.[41] As such, only that theory is before the Court.

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[40] App. Br. at 52.

[41] *See* App. Br. at 52-57. Below, Appellants based their arguments on the CJC and on appearance of fairness grounds. Appellants have never argued a due process concern.

Under Washington law, there is a presumption that the trial court performs "its functions regularly and properly without bias or prejudice." *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 136, 252 P.3d 406 (2011). Thus, in order to articulate an appearance of fairness claim, the "party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias." *Id.* at 137. If sufficient evidence is presented to meet this standard, then the court considers whether the appearance of fairness doctrine was violated. *State v. Garland*, 282 P.3d 1137, 1150 (Wn. App. 2012). The test for determining if the appearance of fairness doctrine was violated "is whether a reasonably prudent and disinterested observer would conclude that the claimant obtained a fair, impartial, and neutral trial." *Id.*, quoting *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996).

Here, Appellants concede that no actual bias is alleged. (App. Br. at 55; CP 2498.) Accordingly, they must show evidence of potential bias to even articulate an appearance of fairness claim. *West*, 162 Wn. App. at 137. In support of their allegation of potential bias, Appellants reference the following facts:

- Judge Lee's spouse's law firm, Vandeberg Johnson, represented the District in entirely separate and distinct legal matters;
- Judge Lee's spouse, a real estate attorney who practice includes government clients, represented the District on unrelated real estate matters in the past; and

- A member of Vandeberg Johnson acted as Judge Lee's campaign manager.[42]

(App. Br. at 52.) On their face, none of these are significant enough issues to raise concerns of potential bias – there is no allegation of any connection between Judge Lee and defense counsel, nor is there an allegation of any connection between Vandeberg Johnson and the instant case. Moreover, even assuming they do create a potential bias, the appearance of fairness doctrine was not violated.

In support of their conclusion that the appearance of fairness doctrine was violated, Appellants rely entirely on *Tatham*. (App. Br. at 54-57.) However, *Tatham* is easily distinguished from the instant case. In *Tatham*:

- the trial court judge and plaintiff's counsel were sole partners in the same law firm;[43]
- the plaintiff's counsel was riding with the judge when he was arrested for DUI, posted his bail, and may have acted as his personal attorney;[44]
- the plaintiff's counsel was the trial court judge's campaign manager;[45]
- the plaintiff's counsel contributed $2,000 to the trial court judge's reelection campaign;[46]

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[42] The fact that a member of Vandeberg Johnson acted as Judge Lee's campaign manager was not raised below, and therefore is waived on appeal. *See State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). Further, there is no legal support for the argument that this would create an issue under the appearance of fairness doctrine. (*See* App. Br. at 52-57.) Surely, a trial court judge cannot be expected to be aware of all of her campaign manager's clients and to recuse herself from any cases involving them.

[43] *Tatham*, 283 P.3d at 589.

[44] *Id.*

[45] *Id.*

[46] *Id.*

- the plaintiff's counsel designated the trial court judge as her alternate attorney-in-fact on a durable power of attorney that allowed him to manage all her property if her spouse was unable to do so;[47] and
- the trial court judge appointed plaintiff's counsel as a county court commissioner.[48]

In this case, to the contrary, there is no connection whatsoever alleged between defense counsel and Judge Lee. (App. Br. at 52-57.) And Appellant's assertion that "[t]he difference between this case and the *Tatham* case is only a matter of degree," is disingenuous; the "matter of degree" is exactly what is at issue when examining an appearance of fairness issue.

Appellants cite no cases in which a connection between the presiding judge's spouse's law firm and a party is sufficient to require the judge's disqualification from a case. (*See* App. Br. 52-56.) Further, the case law on point indicates that no disqualification is required. For example, in a case with remarkably similar facts, *In re Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992), the judge's spouse represented the defendant in other matters and received fees therefrom. In requesting disqualification, the plaintiff argued that the judge's "spouse is a partner in a firm that has represented [the defendant] on various occasions and that, as a result of that relationship, she and her spouse benefit from fees from that client and that, accordingly, her impartiality might reasonably be questioned." *Id.* at 105-106. In rejecting this argument, the court held that

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[47] *Id.* at 589-90.

[48] *Id.* at 590.

this type of "'remote, contingent, or speculative' interest is not one 'which reasonably brings into question a judge's partiality.'" *Id.* at 106. In other words, the appearance of fairness doctrine is not even implicated because this type of tenuous connection does not raise a question of potential bias.

Even if the appearance of fairness test were implicated, however, the court stated that the proper test is whether a "'reasonable person, knowing all the circumstances,' would believe it improper for the judge to sit in the case in question." *Id.* Applying that test to the facts, the *Billedeaux* court found: "If a reasonable person knew all the relevant facts, he or she would know that *any interest that could be attributed to [the judge] in the fate of her husband's law firm's sometime client is so remote and speculative as to dispel any perception of impropriety.*" *Id.* (emphasis added). The same is true in the case.

Further, Judge Lee did not take Appellant's motion lightly. Rather, before ruling, she obtained an ethics opinion addressing the issue. (*See* App. 3-4.) Indeed, Judge Lee specifically posed the following question to the Ethics Advisory Committee:

> Does CJC 2.11(A)(2)(c) require a judicial officer to recuse in a case where the law firm of the judicial officer's attorney/spouse has represented a party, but not in the matter before the judicial officer, and the attorney/spouse has represented one of the parties in matters unrelated to the case before the judicial officer?

Id. In response, and based on the facts of this case, which were also provided, the Ethics Advisory Committee opined that there was no requirement for Judge Lee to recuse herself from this case. *Id.*

This opinion is consistent with the existing law on the subject. According to American Jurisprudence:

> Generally, *a financial interest within the meaning of the disqualification statute is not shown by the fact that the judge's spouse in an attorney who occasionally represents one of the parties in the case in matters other than the instant case*, and a movant must do more than allege that law firms are interested in as many clients as they can get, that the judge's spouse's firm would like to keep the defendant as a client, and that if a defendant loses the lawsuit it will take its legal business elsewhere.

32 Am. Jur. 2d Federal Courts § 102 (emphasis added). Notably, even under the facts in *Tatham*, the Court of Appeals held that only the durable power of attorney held by the trial court judge disqualified him from properly hearing the case.[49] *Tatham*, 283 P.3d at 598. Here, where the only connection is that Judge Lee's spouse and his firm occasionally represent the District in other matters, the law is well established that no disqualification is required.

Appellants also assert that the School District is a "significant customer" of the Firm. (App. Br. at 54.) While it is not relevant to the legal analysis of this issue, it is worth noting that Appellants provide no

[49] The court held that other aspects of their relationship should have been disclosed, but did not require the judge's disqualification. *Id.* at *38.

support for this statement. In fact, Judge Lee's disclosures to the Public Disclosure Commission indicate that the District was merely one of 14 public entities in 2007 and 16 public entities in 2008 that paid more than $10,000 in legal fees to Vandeberg Johnson. (CP 2187-88; 2207-08.) The disclosures do not identify the private persons or entities the law firm represents, nor the amount of fees paid by them. As such, there is no evidence in the record under which one could conclude that the District is a "significant customer" of Vandeberg Johnson.

Here, as in *Turngren v. King County*, 33 Wn. App. 78, 86-87, 649 P.2d 153 (1982), the record "demonstrates without question that the judge's previous decision had not been based on any bias, prejudice or personal knowledge of disputed evidentiary facts, but rather was based on [her] evaluation that the record was without any issue of material fact." Judge Lee's denial of the Appellants' request that she disqualify or recuse herself from the case was in accordance with established law and was not an abuse of discretion. As such, the trial court's decision should be upheld.

3. The Trial Court Properly Denied Plaintiffs' Motion to Vacate its Summary Judgment Ruling.

Appellants' motion to vacate the summary judgment ruling, including its motion to disqualify Judge Lee, was based on CR 60. (CP 2251-2264.) Although Appellants do not specify the subsection of CR 60 – either on appeal or below – they appear to have based their motion on CR 60(b)(1), maintaining the trial court's decision should be vacated

based on "irregularities." (CP 2264.) The only "irregularity" alleged is Judge Lee's failure to disqualify or recuse herself from this case. As such, because Judge Lee did not abuse her discretion in failing to disqualify or recuse herself from this case, she did not abuse her discretion in declining to vacate her ruling on summary judgment. As such, the trial court ruling denying the Motion to Vacate should likewise be affirmed.

B. Summary Judgment was Appropriate in this Case Where Chanthabouly's Actions Were Not Foreseeable.

1. The Trial Court's Order Granting the School District's Motion for Summary Judgment is Reviewed De Novo.

A trial court's order granting summary judgment is reviewed *de novo*. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 69, 170 P.3d 10 (2007). Summary judgment avoids the time and expense of a useless trial on issues that cannot be factually supported or, if factually supported, cannot lead to an outcome favorable to the non-moving party as a matter of law. *Burris v. General Ins. Co. of Am.*, 16 Wn. App. 73, 75, 553 P.2d 125 (1976). Summary judgment is proper where the pleadings and evidence on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 70. *See also* CR 56.

Summary judgment is appropriate when reasonable persons could reach but one conclusion from the evidence presented. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). A defendant is entitled to summary judgment when there is an absence of

evidence supporting an element essential to the plaintiff's claim. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). A defendant may merely challenge the sufficiency of the plaintiff's evidence as to any material issue. *Id.* In response, a non-moving party cannot rely simply on the pleadings but "must establish specific and material facts to support each element of his or her prima facie case." *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 852, 991 P.2d 1182 (2000). Moreover, any affidavit used to do so "must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions." *Las*, 66 Wn. App. at 198. Utilizing this standard, summary judgment was appropriately granted in favor of the District in this case.

2. School Districts Have a Duty Only to Protect Their Students From Reasonably Anticipated Dangers; They Do Not Have a Duty to Ensure the Safety of Students.

A school district's obligation is only to "protect students in its custody from reasonably anticipated dangers." *Jachetta v. Warden Joint Consol. Sch. Dist.*, 142 Wn. App. 819, 824, 176 P.3d 545 (2008) (citing *J.N. v. Bellingham Sch. Dist.*, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994)) (emphasis added). A "district is not an insurer of the safety of its pupils." *Travis v. Bohannon*, 128 Wn. App. 231, 238, 115 P.3d 342 (2005). While it is not disputed that a district has a duty to exercise reasonable care to protect students from the harmful actions of fellow students, "the district is not liable merely because such activities occur." *Peck v. Siau*, 65 Wn.

App. 285, 293, 827 P.2d 1108 (1992). "Rather, the district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable only if the district knew, or in the exercise of reasonable care should have known, of the risk that resulted in their occurrence."[50] *Id.* (internal citations omitted).

A school district has a duty to "exercise such care as a reasonably prudent person would exercise under the same or similar circumstances." *Jachetta*, 142 Wn. App. at 824 (quoting *J.N.*, 74 Wn. App. at 57). The duty "to use reasonable care only extends to such risks of harm as are *foreseeable*." *J.N.*, 74 Wn. App. at 57 (emphasis added). The *"concept of foreseeability limits the scope of the duty owed"* by a school district.[51] *Id.* (quoting *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989)) (emphasis added). The question of whether a harm is foreseeable may be decided as a matter of law if reasonable minds cannot differ on the question. *J.N.*, 74 Wn. App. at 57. *See also e.g. Jachetta*, 142 Wn. App. at 827 (upholding summary judgment where (1) district acted in accordance with law and its policies in readmitting student who issued death threat after mental health examination, and (2) threatened student's

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[50] Appellants cite to Restatement (Second) of Torts § 315. (App. Br. at 43-44.) Section 315 is consistent with the established case law regarding school district's duties toward their students and does not require separate analysis herein.

[51] Although Appellants cite Restatement (Second) Torts § 316, which pertains to the duty of a parent to control their child, this section has never been applied to a school district in Washington. Clearly, although Chanthabouly returned to school successfully from many other school breaks, the District has no knowledge regarding Chanthabouly's actions during the two-week winter break immediately preceding the shooting as a parent would. Further, the duties of parents are also limited by foreseeability. *See Schwartz v. Elerding*, 166 Wn. App. 608, 270 P.3d 630 (2012).

PTSD was not foreseeable); *Peck*, 65 Wn. App. at 923 (upholding summary judgment where alleged sexual assault by librarian was not foreseeable); *Halladay v. Wenatchee Sch. Dist.*, 598 F. Supp. 2d 1169, 1175-76 (E.D. Wash. 2009) (granting summary judgment where student who was alleged victim of bullying left district following one-day suspension for making death threat where there was no evidence that district was aware of any bullying and harm, if any, was not foreseeable).

Appellants rely on *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) to assert that the District was responsible for "every aspect" of Kok's well-being while he attended school and that it had a duty to protect him from a "universe of possible harms." (App. Br. at 51.) However, even under the circumstance of *Niece*, where a woman with a "total inability to take care of herself" was raped by a male staff member in an institutionalized care setting, the court noted that the group home's duty to protect *Niece* was limited "by the concept of foreseeability." *Niece*, 131 Wn.2d at 50. Accordingly, *Niece*, as the other case law discussed herein, requires foreseeability in order for a duty to be imposed on the District.

Likewise, the Appellants rely on Restatement (Second) Torts § 320 in support of their assertion that the District had a duty to anticipate what happened. (App. Br. at 46-47.) However, § 320 only requires that a person "exercise reasonable care" to prevent a third party from intentionally harming another when the person both has the ability to control the third party and knows or should know of the necessity for

exercising such control. Restatement (Second) of Torts § 320 (1965). As an example, the Restatement provides:

> [A] schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur.

Id. cmt. d. Here, there is no evidence that Chanthabouly was in the habit of being at all confrontational with anyone at Foss High School, much less violent. Further, § 320 is consistent with the previously articulated case law that requires a school district to protect only against *reasonably foreseeable* dangers.[52]

Appellants open their brief with a quote from *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) about school shootings like those at Columbine, Thurston, and Santee.[53] (App. Br. at 1.) *LaVine* is inapposite legally because it is a First Amendment case, where the District was sued for expelling a student long enough to have a psychiatric evaluation done of him after he submitted a poem to his English teacher describing a school shooting and subsequent suicide. *Id.* at 983-84.

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[52] Restatement (Second) Torts § 319, which has not been applied to a school district in Washington, is also consistent with the requirement of foreseeability. (*See* App. Br. at 45.)

[53] These were all conventional school shootings. In Columbine, 13 people were killed and 21 were injured, not including the shooters. In Thurston, two people were killed in addition to the shooter's parents and 22 were injured. In Santee, two people were killed and 13 were injured. This case is not a conventional school shooting; it is a shooting that happened at school.

Nonetheless, the two sentences following Appellants' quote provide context to the legal environment schools are working in:

> Although schools are being asked to do more to prevent violence, the Constitution set limits as to how far they can go. Just as the Constitution does not allow the police to imprison all suspicious characters, school cannot expel students just because they are "loners," wear black and play video games.

Id., 257 F.3d at 987. Thus, the reasonable foreseeability standard must take into account the federal and state constitutional, statutory, and regulatory limits placed on the District. The District cannot keep a student out of school, or out of general education classes, on a whim. The risk of harm must be reasonably foreseeable.

In this case, there is simply no evidence that supports the conclusion that the District should have reasonably foreseen Chanthabouly's actions. Contrary to Appellant's assertions, it is not sufficient to maintain that the District should have reasonably anticipated Chanthabouly's actions based solely on his diagnosis. In fact, the District was legally required to mainstream Chanthabouly and not to discriminate against him solely on the basis of his diagnosis. None of Chanthabouly's medical providers informed the District that he posed any danger to others. Nor did Chanthabouly have disciplinary issues at Foss High School. As such, Chanthabouly's actions were not foreseeable and the trial court ruling must be upheld.

3. The District Was Obligated to Enroll and Educate Chanthabouly in a Mainstream Environment.

In examining whether a risk of harm was foreseeable, courts take into account the District's legal obligations towards its students. *Jachetta*, 142 Wn. App. at 825-26 (noting the school district "reasonably acted in accord with the law and its policies" in allowing student to return to school). In this case, based solely on Chanthabouly's diagnosis as a paranoid schizophrenic, Appellants assert that Chanthabouly should not have been allowed to attend Foss High School. (App. Br. at 31.) However, this view was not voiced by any of Chanthabouly's medical providers prior to the shooting, and the District was legally required to provide Chanthabouly with a mainstream education.

Specifically, the District is prohibited by Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131–12134) and by Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(b)(2)(A)) from discriminating against a student on the basis of his or her disability. The District also has similar obligations to disabled students under the federal Individuals with Disabilities Education Act (IDEA) and state law. *See* 20 U.S.C. § 1400 *et seq.*; RCW 28A.155.010. Indeed, the legislative intent behind today's special education laws is specifically to prevent students like Chanthabouly from being excluded from public education on the basis of fear and prejudice:

> In the Education of the Handicapped Act (EHA or the Act), as amended, , Congress sought 'to assure that all handicapped children have available to them ... a free

> appropriate public education which emphasizes special education and related services designed to meet their unique needs, and to assure that the rights of handicapped children and their parents or guardians are protected.' When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be 'perhaps the most important function of state and local governments,' congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school system altogether, many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out. *Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the education needs of 82 percent of all children with emotional disabilities went unmet.*

Honig v. Doe, 484 U.S. 305, 309, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (internal citations omitted) (emphasis added). On this foundation, the state and federal laws were developed specifically to provide for the participation of students such as Chanthabouly in the regular education environment.

Moreover, absent a compelling reason, special education students – including those with mental illnesses – must be mainstreamed to the

maximum extent possible.[54] WAC 392-172A-02050; WAC 392-172A-03090; 20 U.S.C. §1412(a)(5)(A). Their placement can be changed only for educational reasons or when they commit acts subjecting them to discipline, and – even then – only in accordance with state and federal special education statutes. *See generally* WAC 392-172A *et seq.*; 20 U.S.C. §1400 *et seq.* Here, Chanthabouly did not commit any acts that subjected him to discipline while he was a student at Foss High School – from April 2005 through January 2007. As such, given that he was making appropriate academic progress and not having behavioral issues,[55] the District was legally prohibited from removing him from mainstream classes or placing him in a more restrictive environment. *Id.* The District cannot be punished for following well-established law.

4. Chanthabouly's Criminal Actions Were Not Foreseeable Under Washington Law.

Appellants assert that "[c]learly, under Washington law, it is well recognized that the criminal misconduct perpetrated by one student against another is a reasonably foreseeable danger of which a school district should appropriately guard against." (App. Br. at 49.) This statement is, at best, misleading. While the criminal nature of an act does not make it *de facto* unforeseeable, nor does it make it *de facto* foreseeable. *McLeod*, 42 Wn.2d at 321 (holding "[w]hether or not an intervening act is criminal in nature is a fact to be considered in determining whether such act was

[54] Mainstream is defined as: "to place (as a handicapped child) in regular school classes." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994).

[55] (CP 1408, 1413.)

reasonably foreseeable"). Intentional or criminal conduct is not, by rule, unforeseeable unless it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Niece*, 131 Wn.2d at 50. If the conduct is not, by this rule, unforeseeable, the court must determine whether the conduct was reasonably foreseeable as it would with any non-criminal conduct.

a. Appellants Do Not Allege on Appeal that a General Field of Danger Existed.

Appellants rely on two cases, *McLeod* and *J.N.*, in support of their proposition that the criminal nature of Chanthabouly's act makes it foreseeable. (App. Br. 49-50.) Neither case supports Appellants' argument. In addition, both cases were decided primarily on the "general field of danger" analysis, which is not raised on appeal.

In *McLeod*, the court found that there was a question of fact regarding whether it was foreseeable that a darkened room under the bleachers might be utilized for acts of indecency when the students were unsupervised. *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 323-24, 255 P.2d 360 (1953). Although the misconduct in *McLeod* was criminal in nature – rape – the court did not determine that the rape was a reasonably foreseeable danger that the school was required to guard against. In fact, *McLeod* did not ultimately deal with the criminal nature of the act at all. Instead, it focused on the general field of danger posed by the unsupervised room. *Id.* at 323-24. It was solely on that basis that the

McLeod court determined the issue of foreseeability should be decided by a jury. *Id.*

Similarly in *J.N.*, the other case relied upon by Appellants, involved the repeated sexual assault of a first-grade student by a fourth-grade student. *J.N.*, 74 Wn. App. at 51. The court specifically stated that the foreseeability of the criminal nature of the act in question was not the appropriate question. *Id.* at 58. Rather, the appropriate inquiry in that case was also the foreseeability of the general field of danger – defined in the case as the risk of harm to a student by another student caused by "arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised restrooms." *Id.* at 59. The court held that a reasonable juror in that case could find the supervision inadequate and, therefore, that "a jury could reasonably conclude that [the student's] actions fell within the general ambit of hazards which should have been anticipated by the District." *Id.* at 60 & n.4.

Appellants do not assert – on appeal or below – that there was a general risk of danger. They do not allege a general risk of school shootings or a general risk of violence in the hallway due to a lack of supervision, or any other general risk.[56] As such, the issue in this case is not the general field of danger of a school shooting or of violence in the

[56] No such allegation could succeed, as the act was committed without warning, in the open, in a well-supervised, normally safe environment. Indeed, the principal, an assistant principal, and a teacher had all separately passed by the location where the shooting occurred only minutes before. (CP 162-63, 165, 167.)

hallway, it is the risk of a specific harm – that Chanthabouly would cause significant physical injury to a fellow student.

b. The District Could Not Have Reasonably Foreseen Any Specific Risk Posed by Chanthabouly.

There is no evidence to support that Chanthabouly presented a specific risk of harm to other students. As a general rule, evidence of an individual's antisocial, unruly, or hostile behavior is not sufficient "to establish that a defendant with a supervisory duty should reasonably have anticipated a more serious misdeed." *J.N.*, 74 Wn. App. at 60. However, previous aggressive or violent behavior by a student can provide sufficient evidence to put a school district on notice of possibility of a specific harm inflicted. "Clearly, where the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific appropriate procedures for the protection of other children from the potential for harm caused by such behavior." *Id.* at 57. In such a situation, a jury could find that "reasonable school personnel would have foreseen the injury to plaintiff." *Id.* at 62.

1) Chanthabouly Had No History of Assaultive Behavior at Foss.

In *J.N.*, the fourth-grade student had a repeated history of physically-aggressive behaviors – such as kicking, hitting, body butting, and pushing. *Id.* at 52. Further, the District had clear notice of these behaviors as the staff members had repeatedly reported them. *Id.* at 52-53. In addition, although he had not previously acted out sexually, the fourth-

grade student had utilized sexually inappropriate language and the school suspected he had been the victim of sexual abuse. *Id.* at 52 & 61 n.5. Given these factors, the court found sufficient questions of fact regarding the specific harm inflicted for the case to survive summary judgment.[57] *Id.* at 59-62.

No such facts exist here. There is no evidence from the time Chanthabouly was diagnosed with paranoid schizophrenia – in 2005 – to the time of the shooting – in 2007 – that he engaged in any physically-aggressive behaviors. Appellants repeatedly assert that Chanthabouly's diagnosis alone was sufficient to place the District on notice of the possibility of the risk of harm in this case. (*See e.g.* App. Br. at 2, 5, 45.) However, a student cannot be excluded from public education solely on the basis of his mental illness. (*See* Section IV.B.3.) And unlike the student in *J.N.*, Chanthabouly exhibited no violent, aggressive, or assaultive behaviors at Foss High School that foreshadowed violence toward another person.

2) Chanthabouly Did Not Threaten Other Students, Either Specifically or Generally.

The only alleged item of concern Plaintiffs have raised is Chanthabouly's December 4, 2006, writing assignment. (CP 215.) This assignment is insufficient on its face to place the District on notice of a risk of harm. It only references someone or something named "Sam"

[57] The case survived summary judgment based on general field of danger supervision issues, but the court noted that there was sufficient evidence for it to survive on this basis as well.

choosing to eat and live in dirt, which Chanthabouly thought was "weird." (*Id.*) The writing threatens no one.

Writings in other school shootings, by contrast, have indicated a clear basis for concern. For example, Michael Carneal – a 14 year-old student who killed three students and wounded five others at a morning prayer circle around the school's flagpole – wrote extremely violent and gruesome stories about throwing an M-80 at a judge, the deaths of classmates, and commandeering the school.[58] *James v. Wilson*, 95 S.W.3d 875, 909 (Ky. Ct. App. 2002). Similarly, several of the cases cited by Appellant in their brief provide examples of writings that are disturbing on their face:

- "Constantly I can feel the gun in my pocket. 3rd period, 4th, 5th then 6th period [sic] my time is coming. I enter the class room my face pale. . . Then he starts taking role. Yes, my math teacher. I lothe [sic] him with every bone in my body. Why? I don't know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and every one in the class sit [sic] there in shock. BANG he falls to the floor. . ." *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 980 (11th Cir. 2007).
- "As I approached, the classroom door, I drew my gun and, threw open the door, **Bang, Bang, Bang-Bang**. When it all was over, 28 were, dead, . . ." *LaVine*, 257 F.3d at 983.
- "The notebook also details the group's plan to commit a 'Columbine shooting' attack on Montwood High School or a coordinated 'shooting at all the district's schools at the

[58] The court in that case noted: "No task is more fundamental to teaching or inherently discretionary than evaluating assignments and deciding whether the content is sufficiently alarming to warrant additional review by parents and/or officials." *James v. Wilson*, 95 S.W.3d 875, 909 (Ky. Ct. App. 2002).

> same time.'" *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007).

In contrast, the assignment in this case, submitted by a student with no disciplinary problems, cannot reasonably be interpreted as a threat.

This fact becomes even more apparent upon examination of the Department of Justice and Federal Bureau of Investigation's example of a low level threat – an email that states "You are a dead man." DEPT. OF JUSTICE ET AL., THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 27 (Mary Ellen O'Toole ed. 1999), *available at* http://www.fbi.gov/stats-services/publications/school-shooter (last visited Aug. 19, 2011, at 8:49 a.m.). That threat is described as "vague and indirect," "lack[ing] detail," and lacking a description of the means to carry out the threat. *Id.* However, the threat "You are a dead man" is – on its face – significantly less vague than any threat contained in Chanthabouly's writing assignment.

Under these facts, to argue that there is a material question of fact regarding foreseeability requires viewing the case purely in hindsight and holding the District "liable merely because such activities occur." *Peck*, 65 Wn. App. at 293. There is simply no evidence to support the assertion that it was foreseeable that Chanthabouly posed a specific risk of harm to his fellow students.

3) Chanthabouly's Medical Records Did Not Indicate He Presented a Risk to Other Students.

The medical records obtained during Chanthabouly's special education evaluation indicated that he was not a threat to others. (CP 76.)

Acting in accordance with knowledge obtained from medical professionals is reasonable for schools – which are educational, not medical, institutions. *See Jachetta*, 142 Wn. App. at 825-27 (district "reasonably acted in accord with the law and its policies when it relied on the assessment of a mental health care professional" that a student posed no danger to safety). Moreover, even if the District had obtained and reviewed all of Chanthabouly's medical records prior to the shooting, it would have found no indication of assaultive or violent behavior. (CP 202-208.[59]) There is no reason to think that, in the absence of assaultive or violent behavior, the school district would be in a better position to determine Chanthabouly's propensity for violence than the mental health professionals who examined and treated him. Accordingly, the enrollment, placement, and supervision of Chanthabouly were undertaken in accordance with state and federal requirements and were reasonable in light of the facts and circumstances known at the time.

C. The Trial Court's Denial of Plaintiffs' Motion for Reconsideration was Proper.

The decision of a trial court to deny a motion for reconsideration is reviewed for abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011); *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 832, 225 P.3d 280 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or when it is "exercised on untenable grounds or untenable reasons." *McCoy*, 163 Wn.

[59] *See* n. 18.

App. at 758. Appellants assign error to the trial court's denial of their motion for reconsideration,[60] but fail to set forth any arguments specific to the motion for reconsideration. Accordingly, for the same reasons the trial court properly granted the motion for summary judgment in this case, the motion for reconsideration was properly denied.

V. CONCLUSION

This was not a school shooting. It was a shooting that happened at school. Chanthabouly was required by law to be admitted to public school and educated in a mainstream environment. His medical providers, who were the experts responsible for his medical care, did not view him as a threat to others at any time. His behavior at Foss High School was never aggressive or confrontational in any way. At least three staff members passed by, supervising the hallways, in the minutes before the shooting occurred. They saw nothing that caused them alarm on the first day back from a two-week break. Chanthabouly shot and killed Kok without warning. He then left the building without threatening anyone else. Kok's death was tragic, but it was not reasonably foreseeable by the District. As such, the trial court's rulings were in accordance with the law.

[60] (App. Br. at 4.)

The District respectfully requests that this Court affirm the trial court's orders (1) granting summary judgment; (2) denying the Motion to Vacate; and (3) denying reconsideration.

RESPECTFULLY SUBMITTED this 11th day of October, 2012.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Michael A. Patterson, WSBA No. 6702
Charles P.E. Leitch, WSBA No. 25443
Sarah E. Heineman, WSBA No. 33107
Attorneys for Respondent

No. 87418-2
SUPREME COURT
OF THE STATE OF WASHINGTON

RITH KOK, as Administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, as a beneficiary of the Estate of SAMNANG KOK; RORTH KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; RY SOU KOK, individually and as a beneficiary of the Estate of SAMNANG KOK, individuals

Petitioner,

V.

TACOMA SCHOOL DISTRICT NO. 10, a municipal entity under the laws of the State of Washington,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

DEPARTMENT 19

RITH KOK, Plaintiff,	)	No. 08-2-10977-7
vs.	)	
TACOMA SCHOOL DISTRICT, Defendant.	)	SUMMARY JUDGMENT MOTION

VERBATIM TRANSCRIPT OF PROCEEDINGS

December 16, 2011

Pierce County Courthouse

Tacoma, Washington

before the

HONORABLE LINDA CJ LEE

REPORTED BY: KELLIE A. SMITH, CCR, RPR

For the Plaintiff: PAUL LINDENMUTH
Attorney at Law

For the Defendant: CHARLES LEITCH
Attorney at Law

others. If he was throwing fists and everything else and he exhibited that, then I'd say it's a different story. Then it would be like JN. But it's not like JN. In this case, the record's clear. I would submit the decision's clear. I appreciate your time and accommodation.

THE COURT: Thank you. There was a lot provided to the Court in support of and in opposition to the summary judgment motion, and I have reviewed what was provided to the Court, both in support of and in opposition, including Mr. Chanthabouly's deposition on December 8th, as stated earlier. I have reviewed every line of every page submitted to this Court at least three times. There are some universals that come through in all of the paper that's been provided, as well as universals in position. I think first and foremost there's a universal agreement that what happened on that day was a tragedy. It was a tragedy. But a tragedy does not equate to legal responsibility. That is the negligence standard that this Court must apply, which includes duty, breach of duty, causation and damages. And Mr. Lindenmuth, you are very passionate about your client's position, and it's clear you know the record very well. However, in pouring through all of these records, I have to agree with

State of Washington

Ethics Advisory Committee

Opinion 12-02

Question

Does a judicial officer's obligation under CJC 2.11(B), which states that a judicial officer shall make reasonable efforts to keep informed about the personal economic interests of the judicial officer's spouse, extend to affirmatively making inquiries of (1) the attorney/spouse's clients and (2) the clients of the attorney/spouse's law firm?

Does CJC 2.11(A)(2)(c) require a judicial officer to recuse in a case where the law firm of the judicial officer's attorney/spouse has represented a party, but not in the matter before the judicial officer, and the attorney/spouse has represented one of the parties in matters unrelated to the case before the judicial officer?

The judicial officer heard a summary judgment motion in a personal injury case (negligence and wrongful death) and ruled in favor of the defendant school district on the motion.

After the ruling, plaintiff's counsel brought to the judicial officer's attention the fact that the judicial officer's attorney/spouse is a member of a law firm that has a "school law practice group" and that the judicial officer's attorney/spouse represents school districts (including the defendant) in real estate and land use matters. The information presented came from the law firm's public Web site and the judicial officer's PDC filings (i.e., Web site where the attorney/spouse's law firm and the judicial officer's PDC filing listing the defendant as a public entity that had paid more than $10,000 to the attorney/spouse's law firm in the calendar year).

The public Web site of the attorney/spouse's law firm does not list any clients of the law firm. The plaintiff's counsel also submitted a 2011 "Roster of School Law Attorneys" that lists the attorney/spouse as doing real estate and land use work for school districts and lists five school districts that the attorney/spouse has done work for, including the defendant school district. The judicial officer is not familiar with the "roster" and does not know if it is a public document and no information was provided in the document before its presentation by plaintiff's counsel.

Answer

CJC 2.11(B) provides in pertinent part that a judge shall make a reasonable effort to keep informed about the personal economic interests of the judge's spouse. "Economic interest" is defined in CJC Terminology as meaning ownership of more than a de minimis legal or equitable interest.

Based on the representations above, CJC 2.11(B) does not require the judicial officer to affirmatively make inquiries into the attorney/spouse's clients and the clients of the attorney/spouse's law firm as to the parties appearing before a judge unless there is an independent circumstance which would cause the judicial officer to believe that such an inquiry should be conducted.

If the judicial officer learns that his or her spouse's firm represents and/or has represented one of the parties in the proceeding, the judicial officer should disclose that on the record when he or she becomes aware of that relationship. Absent independent circumstances requiring disqualification, the judicial officer may continue to

preside over the matter.

CJC 2.11(A)(2)(c) requires a judicial officer to disqualify in cases in which the judicial officer's spouse has more than a de minimis economic interest that could be substantially affected by the outcome in the proceeding. The facts outlined in this opinion do not meet that threshold because the attorney/spouse has no economic interest in the outcome of this proceeding, therefore, there is no requirement that the judicial officer recuse.

Opinion 12-02

4/6/2012

No. 87418-2
SUPREME COURT
OF THE STATE OF WASHINGTON

RITH KOK, as Administrator of the Estate of SAMNANG KOK, deceased; MAKAI JOHNSON-KOK, as a beneficiary of the Estate of SAMNANG KOK; RORTH KOK, individually and as a beneficiary of the Estate of SAMNANG KOK; RY SOU KOK, individually and as a beneficiary of the Estate of SAMNANG KOK, individuals

Plaintiffs,

v.

TACOMA SCHOOL DISTRICT NO. 10, a municipal entity under the laws of the State of Washington,

Defendant.

CERTIFICATE OF SERVICE

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I hereby declare on the date provided below, I caused to be delivered via Legal Messenger,

1. Respondent's Motion for Leave to File Over-Length Response Brief; and

2. Respondent's Brief with Appendix

to the following individual(s):

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on October 12, 2012.

Sharon K. Hendricks, Paralegal