69837-1

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NO. 69837-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LANE POWELL, P.C., an Oregon Professional Corporation,

Respondent,

v.

MARK DeCOURSEY and CAROL DeCOURSEY, individually and the marital community composed thereof,

Appellants.

REPLY BRIEF OF APPELLANTS

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RULES & STATUTES

A. ARGUMENT IN REPLY

1. APPELLATE REVIEW IN THIS CASE IS *DE NOVO.*

a. Respondent Ignores the Holding of the *King* Case

In re King, 168 Wn.2d 888, 232 P.3d 1095 (2010) establishes the appellate review standard for this case. There the Court said, "Questions as to whether undisputed facts violate due process or the appearance of fairness doctrine are legal and reviewed de novo." *Id.* at 899.

Lane Powell ignores this holding, and ignores the *King* case entirely. Here, as in *King*, the appellants have not challenged any finding of fact. *Id.* at 898. As in *King*, the facts are undisputed. Lane Powell does not deny that the trial judge's wife was employed by Windermere. Nor does it deny that the judge's marital community derived a pecuniary benefit from the commissions that the judge's wife earned selling real estate properties listed with Windermere. Since all of the facts underlying the DeCourseys' appearance of fairness and due process claims come directly from the trial judge's own financial affidavits that he filed with the Public Disclosure Commission, no one disputes any of those facts. CP 2724-2740. Here, as in *King*, the de novo appellate review standard applies.

b. Respondent's Reliance on *Chamberlin* is Misplaced

Lane Powell cites to the sentence in *State v. Chamberlin*, 161 Wn.2d 30, 37 n.4, 162 P.3d 389 (2007) which reads, "Outside of scenarios involving a clear and nondiscretionary duty to recuse, the decision 'will necessarily involve the exercise of discretion.'" There are several reasons

why this passage from *Chamberlin* is not on point here.

In *Chamberlin* the defendant claimed that the trial judge was *actually* biased (not that there was an *appearance* of bias), and this factual allegation *was* disputed. In that case, Judge Hancock issued a search warrant for the search of the defendant's home. "Based largely on evidence uncovered in that search, Chamberlin was charged" with two felony drug offenses. *Id.* at 35. Chamberlin then made a motion to suppress the evidence, arguing that the search warrant was improperly issued. He contended that since Judge Hancock had issued the warrant, he was actually biased and could not impartially decide whether he erred when he issued it. The judge said he did not believe he was actually biased, and promised that "he would review the warrant for issues he might have missed and, if wrong, suppress the evidence." *Id.* at 36.

At the suppression hearing, Chamberlin asked that Judge Hancock recuse himself. *Id.* Judge Hancock had not yet made any discretionary ruling in the case. Despite the fact that Chamberlin still had the right to file an affidavit of prejudice, he did not exercise that right, and Judge Hancock denied his request for recusal. *Id.* He also denied Chamberlin's motion to suppress, and found Chamberlin guilty in a bench trial. *Id.*

On appeal Chamberlin argued that due to actual bias Judge Hancock should have recused himself and had another judge decide the suppression motion and preside over the trial. The Supreme Court rejected that claim:

> Chamberlin argues that Judge Hancock displayed ***actual bias*** when he stated that he was sure that he had read the application for the

> warrant and the sworn testimony in support of the warrant. In its proper context, the statement does not show bias. Judge Hancock said that he did not remember issuing the warrant. But, assuming he did, "[I] also believe I would be capable of fairly and impartially hearing any motion to suppress despite the fact that I issued the warrant." He said that he would review the warrant for issues he might have missed and, if wrong, suppress the evidence. In context, the statement has a different meaning. Judge Hancock was explaining that he believed he could, and would compartmentalize the proceedings and be unbiased. ***We find no actual bias under these facts***.

Id. at ¶ 16 (emphasis added). Moreover, the Supreme Court noted that Chamberlin could have simply exercised his statutory right to affidavit the trial judge. *Chamberlin*, 161 Wn.2d at ¶ 18, citing RCW 4.12.050.[1]

Unlike, *Chamberlin*, this case is ***not*** a case where the claim raised is that the judge was actually biased. If it ***were*** such a case, then there ***would*** be disputed facts. In an actual bias case with ***disputed*** facts, such as *Chamberlin,* the *King* de novo review standard is not applicable. But it is fully applicable in the present case where the *only* disputed issue is one of law: whether an objectively reasonable person considering the undisputed facts would have reason to doubt the trial judge's ability to be impartial.

Second, unlike the defendant in *Chamberlin,* who failed to file an affidavit of prejudice even though he *knew* the facts that gave rise to his reason to doubt the trial judge's ability to be impartial long before the judge had made any discretionary ruling, the DeCourseys did *not* know that the judge was married to a Windermere employee until long after the

[1] "RCW 4.12.050 permits a party to change judges once as a matter of right, upon a timely motion, without substantiating the claim of prejudice. This means that a party or

judge had made several discretionary rulings. And once they did learn of that fact, they immediately *did* file a statutory affidavit of prejudice. Thus, this is *not* a case where the DeCourseys consciously refrained from exercising their rights under RCW 4.12.050 despite full knowledge of the facts. Defendant Chamberlin knew from the very start that Judge Hancock was the judge who issued the search warrant for his home, and yet failed to exercise his statutory right to remove him. The DeCourseys did *not* know that the trial judge's spouse was a Windermere agent because the judge did not disclose that fact. Unlike Chamberlin, the DeCourseys did not gamble on getting rulings that they liked, only to later seek a second bite at the apple by making a tardy motion for recusal. They brought their motion on August 9, 2012, three days after discovering that the judge's wife was a Windermere real estate agent with a pecuniary interest in the financial health and well-being of the Windermere company. CP 2715.

That pecuniary interest constitutes the third reason why *Chamberlin* is inapplicable. Judge Hancock had no pecuniary interest at stake in the *Chamberlin* case. But here the trial judge and his wife *did* have a pecuniary interest in seeing to it that Windermere's good name was not tarnished, and thus they did have a personal interest in seeing to it that the DeCourseys did not have the financial resources to continue to wage their negative publicity campaign against Windermere. Thus, *Chamberlin* is not on point.

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attorney can replace the assigned judge without demonstrating why a fair and impartial

c. Respondent's Reliance on *Bilal*, *Kauzlarich* and *Mauseth*, Is Misplaced.

Lane Powell also purports to rely on *State v. Bilal,* 77 Wn. App. 720, 893 P.2d 674 (1995). But that case involved a defendant who moved for recusal of the trial judge "after Bilal assaulted him in open court." *Id.* at 721. The court of appeals noted that all jurisdictions agree that a litigant who deliberately attacks a judge is not thereby able to force the judge out of the case by arguing that he can no longer be fair and impartial. *Id.* at 723. "To permit such an attack to cause a new trial before a new judge would encourage unruly courtroom behavior and attacks on the trial judge and would greatly disrupt judicial administration." *Id.* No one claims that the DeCourseys ever assaulted the trial judge. On the contrary, they always conducted themselves in open court with respect and decorum.

In *Kauzlarich v. Yarborough*, 105 Wn. App. 632, 20 P.3d 946 (2001) the issue was whether a judge has the authority to raise an appearance of fairness problem *sua sponte*. In that case the Court of Appeals, in an unpublished opinion, "held that the failure of the trial court to inform Kauzlarich of the communication between two judges violated the appearance of fairness doctrine" and the case was remanded for further proceedings. *Id.* at 639. On remand the case was assigned to Pierce County Superior Court Judge Marywave Van Deren. She decided *sua sponte* to recuse herself. She reasoned that because "many [Pierce County] judges and court personnel were witnesses in [the] case," the

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trial is impossible before that judge."

appearance of fairness doctrine required her to recuse herself. *Id.* at 654. The case was then reassigned to Judge Haberly, a Visiting Judge from Kitsap County, who subsequently dismissed Kauzlarich's suit. *Id.* at 641. Kauzlarich argued that since neither party had asked Judge Van Deren to recuse herself, "the only reason left for recusal is actual bias under RCW 4.12.040." *Id.* at 654. The Court of Appeals disagreed, holding that she had the authority to raise an appearance of fairness problem *sua sponte.* There was a sound basis for a *sua sponte* recusal because the participation of any Pierce County judge "did raise a reasonable question" as to the appearance of fairness, and therefore Judge Van Deren did not err when she concluded that "the Canons of Judicial Conduct compelled her to recuse herself." *Id.* at 654.

This case does not involve a *sua sponte* recusal and therefore *Kauzlarich* is not on point. Kauzlarich was not complaining that the judge who ultimately decided his case – Judge Haberly – was either biased in fact or biased in appearance. As the appellate court noted, his "real complaint is Visiting Judge Haberly's unfavorable ruling." The DeCourseys *are* complaining about an appearance of fairness problem; they *did* make a motion for recusal; and this case does not present any question about a judge's discretion to recuse himself *sua sponte*.[2]

The Respondent misrepresents *Williams & Mauseth Ins. Brokers, Inc.*

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[2] *Kauzlarich* actually *supports* the DeCourseys' position because it refers to the Court's prior unpublished opinion where it held that the trial judge violated the appearance of fairness by failing to recuse himself under circumstances where objectively a person

v. Chapple, 11 Wn. App. 623, 524 P.2d 431 (1974). In a parenthetical aside, the Respondent describes the case as "reversing recusal decision premised upon judge's family member's connection to one of the parties." *Brief of Respondent* ("*BOR*"), at 27. From this description, one might get the idea that this Court ruled that the judge's family connection to one of the parties was legally insufficient to warrant a recusal. No such ruling was made. The decision was premised solely on the ground of waiver. The trial judge was acquainted with Richard Peters, the principal witness for the defendant, because Peters had caused the judge's children to suffer a tax loss of approximately $50,000. *Id.* at 624. After Peters had testified, the trial judge held a conference with counsel in chambers and told counsel that had he known at the outset that Peters was going to be a witness for the defendant he would have disqualified himself from hearing the case. *Id.* The defendant did *not* make any motion for recusal at that time. Instead, the defendant completed the presentation of its case and the trial judge then rendered an oral decision in favor of the plaintiffs. *Id.* at 625. Five days later the defendant filed a motion for new trial claiming that the trial judge should have recused himself. *Id.* The trial judge granted the motion but on appeal this Court reversed solely on the ground that the defendant had waived the issue by failing to promptly move for recusal once it became aware of the judge's connection to the witness.

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would have a reason to doubt the judge's ability to be impartial because the judge had engaged in ex parte communications with another judge.

Williams & Mauseth, 11 Wn. App. at 626.[3] The *Williams* opinion has no application here; the DeCourseys made their motion for recusal three days after discovering that the judge's wife was employed by Windermere. CP 2715.

2. IGNORING *SHERMAN* AND *SANDERS*, RESPONDENT ERRONEOUSLY ASSERTS THAT THE DECOURSEYS MUST PROVE ACTUAL PREJUDICE IN ORDER TO PREVAIL ON A CLAIM THAT THERE WAS A VIOLATION OF THE APPEARANCE OF FAIRNESS.

Citing to *In re the Welfare of RSG,* 174 Wn. App. 410, ¶ 38, 299 P.3d 26 (2013), Respondent erroneously asserts that a party making a recusal motion "must demonstrate actual prejudice." *BOR* at 27. But *RSG* is inapplicable for several reasons. First, *RSG* is not an *appearance* of partiality case. The *only* claim raised in *RSG* was that the trial court judge was "actually prejudiced." *RSG*, 174 Wn. App. at ¶ 37 ("Aker also argues that we should disqualify the trial judge because he has demonstrated ***actual prejudice*** against her, her interests, and her attorney.") (emphasis added). If one's claim is "actual" prejudice, then not surprisingly one has to prove "actual" prejudice.

Second, Appellant Aker *never* made any motion for recusal in the trial

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[3] "[A] litigant who for the first time during trial learns of grounds for disqualification must promptly make his objection known, as by moving for a mistrial. [Citation]. He may not, after learning of grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified. [Citations]. . . . He is not permitted to wait until he sees which way the decision is going to go before deciding whether to stay with or try to eliminate the judge who is hearing the matter. Nor is he permitted to wait until the judge has heard evidence on the merits, which will have to be resubmitted if another judge is substituted." *Accord Buckley v. Snapper Power Equipment,* 61 Wn. App. 932, 939, 813 P.2d 125 (1991).

court. If a timely motion for disqualification is filed under RCW 4.12.050, then prejudice is established simply by the filing of the motion. *Id.* at ¶ 38. But as the *RSG* Court noted, "If a motion is not timely made, the movant must show actual prejudice. [Citation]." Aker *never* made a motion for disqualification in the trial court, and therefore on appeal "Aker acknowledge[d] that she is required to show actual prejudice." *Id.*

Third, since she never made a recusal motion, Aker had no claim that the judge had improperly denied such a motion. Instead, she asked this Court to disqualify the judge from any further *future* participation in the case. Aker's actual prejudice claim was based solely on the fact that the trial judge had made several mistakes of law; this Court held that did not show actual prejudice and thus refused to preclude the judge from further participation in the case upon remand. *Id.* at ¶ 45.[4]

Unlike *RSG,* the present case (1) does *not* involve a claim of actual prejudice; (2) the appellants *did* make a timely motion for recusal in the trial court; (3) and the recusal motion is *not* based on the substance of any of the judge's rulings, but rather on the judge's failure to disclose his wife's relationship to Windermere and their joint marital interest in making sure that Windermere's business reputation was not harmed.

In *Sherman v. State,* 128 Wn.2d 164, 205, 905 P.2d 355 (1995), the

[4] "While the trial court may have erred in refusing to allow Aker's attorney to question [a particular witness], that error does not demonstrate actual prejudice, particularly where the court has not had the opportunity to reconsider its ruling. We deny Aker's motion to disqualify the trial judge from further proceedings in this case."

Court *explicitly rejected* the contention that an actual prejudice standard applied to a claim of violation of the appearance of fairness: "Dr. Sherman argues that recusal was unwarranted because Appellant suffered no prejudice . . . However, in deciding recusal matters, ***actual prejudice is not the standard.***" (Emphasis added). This holding was reaffirmed in *In re Sanders*, 159 Wn.2d 517, 524, 145 P.23d 1208 (2006). The Respondent simply ignores these cases, citing instead to irrelevant cases such as *RSG.*[5]

3. AS *TATHAM* DEMONSTRATES, THE JUDGE MUST DISCLOSE POTENTIALLY DISQUALIFYING FACTS ON THE RECORD, EVEN IF HE DOES NOT THINK THEY ARE DISQUALIFYING.

The DeCourseys did not discover that the trial judge had a connection to, and an economic interest in the financial well-being of Windermere, until August of 2012 when they filed their motion for recusal. CP 2707. Respondent argues they should have found this out earlier and that "any 'fault' as to the 'late discovery' [of the connection to Windermere] is their own." *BOR* at 35, n. 5. Respondent argues that the DeCourseys "were required to use due diligence" to discover the judge's connection to Windermere through his wife, and they failed to do so. *Id.*

This argument ignores the disclosure rule in CJC 2.11, the comment to that rule, and the case law. *Buechler v. Wenatchee Valley College*, 174

[5] Respondent also purports to rely on *In re Swenson*, 158 Wn. App. 812, 244 P.3d 959 (2010). But *Swenson* is a personal restraint petition case. An "actual substantial

Wn. App. 141, 298 P.3d 110 (2013) is instructive. There the trial judge *complied* with the rule by disclosing the pertinent facts to the parties. She also offered to recuse herself if either party requested that she do so. *Id.* at 148.[6] Similarly, in *Smith v. Behr Process Corp.,* 113 Wn. App. 306, 339, 54 P.3d 665 (2002), the trial judge noted it was her "ethical duty" to disclose that shortly before trial she had inadvertently had Easter dinner at the home of one of the class representatives.

In *Behr* and *Buechler* the judges disclosed the facts that might cause someone to doubt their ability to be impartial. In this case the judge never disclosed his marital tie to Windermere. Respondent ignores the trial judge's violation of CJC 2.11, and suggests that the DeCourseys were obligated to do an independent background investigation to find out whether the judge had an interest that he should have disclosed.[7]

This same argument was rejected in *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012). There the trial judge had actually made an effort to attempt to comply with the disclosure rule. He had posted a small plaque on the wall of his courtroom, listing 15 lawyers with whom he had

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prejudice" standard *does* apply to PRPs. *Id.* At ¶ 15, citing *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). This case is not a PRP so *Swenson* has no application here.

[6] "Superior Court Judge Lesley Allan, to whom the case had been assigned, wrote the parties' lawyers, advising them that between 1990 and 1998 she had served as an assistant attorney general, assigned to represent WVC. She also disclosed that she believed she knew [a witness] as the owner of a quilt store the judge had frequented before the store closed."

[7] Respondent concedes that there was no waiver, and yet argues that the DeCourseys were negligent because they failed to investigate the employment of the judge's wife. But negligence does not constitute waiver. Moreover, it is not negligent to assume that the judge is complying with the Canon of Judicial Conduct that requires disclosure.

business or professional relationships of some unspecified kind. *Id.* at 85-86. But Appellant Rogers never saw the plaque, and the trial judge made no disclosures to Rogers on the record as required by the rule. *Id.* Citing to CJC 2.11 cmt. 5, the Court of Appeals held, "The courtroom plaque does not satisfy the ethical requirement for disclosure 'on the record,'" and noted that "even if well-intentioned" it did not disclose the necessary particulars of the relationships. *Id.* at 97, n.6.

Respondent Tatham argued that Appellant Rogers had gambled that he would win with the assigned judge, and then when he lost, attempted to get a "do-over" by belatedly bringing up disqualifying facts about the judge that he should have known about. Thus, Tatham argued that Rogers had waived the issue. But the appellate court rejected that contention, noting that there was no evidence that Rogers *knew* the facts about the judge's relationships with Tatham's lawyer. Noting that the burden of establishing waiver is on the party asserting waiver, the Court held that Tatham had failed to prove a waiver. *Id.* at 96-98.

In the present case, there was no attempt at all to comply with CJC 2.11. And yet the Respondent argues that the DeCourseys should still lose because compliance with CJC 2.11(C) was not necessary. The Respondent asserts that since the trial judge did not believe that his wife's employment by Windermere was a disqualifying fact, there was no need to disclose that fact: "Of course, if Judge Eadie thought a disqualifying

conflict of interest was present, he would have disclosed it." *BOR* at 35 n. 5. But *Tatham* rejected this argument too, noting that CJC 2.11 provides:

> "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, *even if the judge believes there is no basis for disqualification.*" CJC 2.11 cmt. 5 (emphasis added). This comment did not exist at the time of trial.

Tatham, 170 Wn. App. at 95 n. 5.[8]

4. THE DECOURSEYS WERE NOT REQUIRED TO WAIT AND TO RAISE THEIR APPEARANCE OF FAIRNESS CLAIM IN A CR 60(b) MOTION. IF THEY HAD DONE THAT THEY WOULD HAVE WAIVED THE CLAIM.

On the one hand, Respondent argues that the DeCourseys should have brought their motion for recusal *earlier.* Claiming that "they were required to use due diligence" Respondent argues they should have investigated the background of the judge and his wife at the outset of the case, and made their motion for recusal then. *BOR* at 35 n. 5. On the other hand, Respondent says that the DeCourseys brought their motion too early, and asserts that they should have brought it five months *later*, after judgment had been entered against them, pursuant to CR 60(b): "[C]laims such as those made by the DeCourseys are properly raised in a CR 60(b) motion. *Tatham,* 170 Wn. App. at 76. The DeCourseys failed to use that procedure or satisfy that burden." *BOR*, at 29.

But *Tatham* merely held that a party who does not discover the

[8] Unlike the trial in *Tatham,* Comment 5 to CJC 2.11 *did* exist at the time of the trial of this case. It took effect on January 1, 2011. *Rules of Court,* 169 Wn.2d 1149.

basis for recusal until after entry of judgment *may* properly bring an appearance of fairness claim in a CR 60(b) motion: "CR 60(b)(11), rather than CR 60(b)(5), is the proper basis for seeking relief from a judgment for a violation of the appearance of fairness that comes to light after judgment is entered." 170 Wn. App. at 100. *Tatham* did not require a party who discovers the basis for recusal before judgment to wait until after judgment to bring a 60(b) motion. On the contrary, *Tatham* makes it clear that if a litigant does that, he waives the claim because "[a] party may not speculate upon what rulings the court will make on propositions involved in the case and, if the rulings do not happen to be in the party's favor, then for the first time raise them on appeal." *Tatham*, at ¶ 35.

In this case, once the DeCourseys learned that the judge's wife was employed by Windermere, they acted immediately. They filed their recusal motion on August 9, 2012, two and a half months *before* Respondent filed its motion for summary judgment (on October 19, 2012), and three and a half months *before* the trial judge granted partial summary judgment to the Respondent (on November 16, 2012). Thus, the DeCourseys did not hold back on their recusal motion in hopes that the trial judge would make rulings favorable to them.

5. A PARTY CAN RAISE A DUE PROCESS CLAIM FOR THE FIRST TIME ON APPEAL.

When the DeCourseys, *pro se* litigants, filed their motion for recusal, they specifically raised an appearance of fairness claim. Respondent

claims that because they did not call their argument a due process claim, they cannot raise a due process claim on appeal.

This argument flies in the face of both the text of RAP 2.5 and the case law.[9] In fact, in *Buechler v. Wenatchee Valley College,* 174 Wn. App. at ¶ 43, the Appellant was permitted to raise a claim of violation of the appearance of fairness doctrine *for the first time on appeal*, even though that claim is of *non*constitutional magnitude. *A fortiori* a party can raise the constitutional error of denial of a judge with the appearance of impartiality for the first time on appeal.

6. THE TRIAL JUDGE CONCEDED THAT IT WAS OBJECTIVELY REASONABLE FOR THE DECOURSEYS TO DOUBT HIS ABILITY TO BE IMPARTIAL.

As in *Tatham,* the central issue on appeal in this case is whether the trial judge's impartiality might reasonably be questioned.

> The issue for a judge in considering whether the appearance of fairness doctrine may be or has been violated is not whether he or she personally and in good faith views a family relationship, for example, or a financial interest, or a fiduciary relationship, to be of little significance. It is whether, in light of the relationship, a reasonably prudent and disinterested person would conclude that all parties can or did obtain a fair, impartial, and neutral hearing.

Tatham, 170 Wn. App. at 104.

In this case, the trial court judge admitted, on the record, that

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[9] The rule states that "a party may raise for the first time in the appellate court . . . manifest error affecting a constitutional right." "It is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time." *Conner v. Universal Utilities*, 105 Wn.2d 168, 171, 712 P.2d 849 (1986). "[T]his is particularly true of error affecting fundamental aspects of due process . . . ." *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994).

although he believed he could be fair and impartial, he acknowledged the reasonableness of the DeCourseys' doubts. Although the trial judge denied the DeCourseys' motion for recusal on September 5, 2012, several months later he seriously considered recusing himself from the task of determining the reasonableness of the amount of attorneys' fees charged by Lane Powell for prosecuting the case against Windermere.

> I'm not defensive for Windermere. I have no financial stake in Windermere, my wife doesn't. She earns commissions from her sales of houses she's involved with and pays a portion of that to Windermere; the Windermere franchise that she works from which was not the Windermere franchise involved here.
>
> But in any event, I don't think I have a conflict on that ***but I respect your concern.*** And so I think that ***if it comes down to my evaluating the litigation that involved Windermere directly*** and might involve then some evaluation of Windermere's conduct, ***then I think I would at that point recuse myself and leave that issue to another judge,*** but I don't know if we have to be there. . . .

RP 11/16/12, at 58-59 (emphasis added). See also RP 11/16/12, at 70.[10]

The judge said, "I respect your concern." If the DeCourseys' doubts about his ability to be impartial were objectively unreasonable, he would have no reason to say this. There is no reason to "respect" an objectively unreasonable concern. Moreover, if their doubts were irrational he would not have tried to persuade them not to worry because his wife didn't work in the same office as the Windermere agent that the DeCourseys sued. At the hearing on Lane Powell's motion for summary judgment, the judge interrupted Lane Powell's attorney to tell him not to

mention the prior Windermere lawsuit, saying: "I don't want to interrupt too much, but ***I think that the issues of the Windermere lawsuit are sensitive in this case***, and I don't want any suggestion in this record that anything I am doing here is affected at all by the facts of the Windermere lawsuit." (RP 11/16/12, at 13 (emphasis added). But the mere fact that the judge recognized that his connection to Windermere was a "sensitive issue" is telling. Whether counsel spoke the name "Windermere" or not, the fact that Windermere employed the judge's wife creates an objectively reasonable basis to doubt the judge's ability to be neutral.

7. THE JUDGE COMMITTED AN ERROR OF LAW BY FOCUSING ON WINDERMERE'S NON-PARTY STATUS.

The trial judge justified his denial of the recusal motion on the ground that in the suit before him the DeCourseys did not sue Windermere. CP 2925. "Windermere is not now, and never has been a party to this case." CP 2925. Respondent repeats this argument on appeal, asserting incorrectly that "none" of the DeCourseys' cases "involve bias allegations premised on the trier's alleged connections to a non-party." *BOR*, at 43. But that is not true. Three cases cited by Appellants *do* involve judicial connections to non-parties; the Respondent simply ignores them.

In both *Swift v. Island County*, 87 Wn.2d 348, 552 P.2d 175 (1976) and *Hayden v. Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981)

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[10] "If I do have to go through a reasonableness determination on these hours, then it will be my – ***I'm thinking very seriously about assigning that to a different judge***." (Emphasis added). He did not, however, assign that task to another judge.

the disqualified commissioners had connections to banks that stood to benefit indirectly from a decision to approve a zoning decision. In both cases the banks were *not* parties to action, nevertheless the appellate courts ruled that there was a violation of the appearance of fairness doctrine.

In their opening brief the DeCourseys discussed *Liljeberg v. Health Services Corporation,* 486 U.S. 847 (1988) at some length, and quoted the passage where the trial court justified his refusal to disqualify himself on the grounds that "Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy." *Id.* at 867 n.15. This rationale is *identical* to the rationale given by the trial judge in this case. CP 2925. The U.S. Supreme Court rejected this rationale in *Liljeberg*, just as the appellate courts in *Swift* and *Hayden* rejected it. Respondent simply ignores these cases and makes no attempt to distinguish them.[11] By ruling that the interests of a non-party are irrelevant, the trial court directly contradicted the rule of *Swift*, *Hayden* and *Liljeberg,* and thus the trial court failed to apply the correct law.[12]

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[11] In a footnote Respondent asserts that *Liljeberg* was not decided on due process grounds and thus does not support the DeCourseys' due process claim. BOR, at 47 n.9. *Liljeberg* was decided on the ground that 28 U.S.C. § 455(a) was violated. That statute codifies the appearance of fairness doctrine and uses the exact same test that Washington uses (disqualification required "in any proceeding in which [the judge's] impartiality might reasonably be questioned."). Respondent fails to offer any reason why *Liljeberg* is not directly on point insofar as the claim of violation of the appearance of fairness doctrine. The *Tatham* Court relied on *Liljeberg* as support for its conclusion that there was a violation of the appearance of fairness doctrine. *Tatham*, 170 Wn. App. at 100-101.

[12] The failure to apply the right rule of law constitutes an abuse of discretion. *Fisons v. Washington State Physicians,* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a trial court "necessarily abuse[d] its discretion if it based its ruling on an erroneous view of the

8. THE JUDGE AND HIS WIFE HAVE MORE THAN A "DE MINIMIS" INTEREST IN WINDERMERE'S WELL-BEING.

The judge conceded that she worked at a Windermere office, and that she earned commissions from the sale of houses listed by Windermere and paid a portion of those commissions to Windermere. On appeal Respondent argues that "Mrs. Eadie's interest in Windermere – a company for which she works as an independent contractor – is not more than a "de minimis one . . . ." *BOR* at 38-39.[13] The Code of Judicial Conduct defines "de minimis" as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." *See CJC, Terminology.* In this case the judge's financial declarations identify Windermere as his wife's "Employer or Source of Compensation" and state that she earned between four and twenty thousand dollars from Windermere in 2011; between forty and one hundred thousand dollars from Windermere in each of the three years 2010, 2009, 2008 and 2007; more than $75,000 in 2006; and between $30,000 and $75,000 in 2004. CP 2724-2740. Plus, the Eadie couple had more than $40,000 in a "Windermere Retirement Plan and Spousal." CP 2737. That is simply not a "de minimis" interest.

Mitchell v. Teck Cominco Alaska Inc., 193 P.3d 751 (Alaska 2008) demonstrates that under some circumstances, even a tiny amount of

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law."). Accordingly, even if the applicable appellate standard of review in this case were abuse of discretion (which it isn't), there *was* an abuse of discretion.

[13] It is not clear what the judge meant when he said his wife was an "independent agent" of Windermere. He never said she was an "independent contractor" and Respondent cites nothing in the record to support that characterization of her relationship with Windermere. She was identified on Windermere's website as a Windermere agent and her email address given there was ceadie@windermere.com. CP 2723.

income can be sufficient to disqualify the trial judge, especially when the judge fails to disclose his wife's interest at the outset of the case. In *Mitchell* a fired employee brought a race discrimination suit against his employer, Teck Cominco Alaska. Teck operated a mine on land owned by the NANA Corporation. NANA was not a party to the discrimination suit. Nevertheless, the economic fortunes of NANA were indirectly affected by Teck's fortunes due to an agreement between the two companies to share net profits. *Id.* at 763 n. 40. If Teck lost the case, or even if it won but incurred significant litigation costs, that would indirectly affect NANA's economic fortunes under their profit sharing agreement. *Id.*

The trial judge's wife owned stock in NANA, and had in the past received stock dividends varying between $200 and $300 a year. The trial judge denied the plaintiff's motion that he disqualify himself reasoning that this was a "de minimis" amount. The Alaska Supreme Court agreed that it was, but considered the possibility that the judge's wife stood to earn a higher amount of dividends in the future. *Id.* at 764. Noting that mine royalties to NANA for the coming year were projected to be four times the amount they had been for the previous year,[14] the Court "remand[ed] for renewed consideration of the plaintiff's request that [the trial judge] disqualify himself . . . ." motion for disqualification. *Id.* "On remand [the judge] should consider and indicate whether his wife's

[14] "[T]he future stream of NANA shareholder dividends, as well as the value of NANA stock . . . may increase substantially as a direct result of NANA's investment in the Mine."

ownership of NANA stock has a financial or other impact on the [judge's] household, *de minimis* or not, that would reasonably call into question his ability to serve as the trial judge in this case." *Id.* at 764-75. Citing to the section of the Alaska Code of Judicial Conduct which is analogous to Washington's CJC 2.11(A), and to an Alaska statute, the Court noted that the trial judge had failed to comply with their disclosure provisions:

> [The statute] likewise provides that a judge shall disclose reasons for disqualification at the commencement of the action. ***This strongly suggests that Judge Erlich should have disclosed his wife's NANA stock at the inception of the case,*** and his consideration of disqualification on remand should ***consider whether his prior non-disclosure has a bearing on whether his impartiality might reasonably be questioned.***

Id. at 765 n.54 (emphasis added). In the present case, the wife's income stream from commissions on Windermere sales is roughly 100 times the amount of dividends that the spouse in *Mitchell* had been receiving. But the trial judge failed to disclose these facts at the outset of the case.

9. WHEN THE CURRENT EMPLOYER OF THE JUDGE'S SPOUSE STANDS TO BENEFIT FROM A DECISION IN FAVOR OF ONE OF THE PARTIES, THE JUDGE SHOULD DISQUALIFY HIMSELF.

There are relatively few cases where a disqualification motion is premised on the fact that one of the judge's family members stands to benefit indirectly from a decision in favor of one of the parties. The DeCourseys previously discussed *Potaschnick v. Port City Construction*, 609 F.2d 1101 (5th Cir. 1980), where a decision in favor of one party would indirectly benefit the judge's father by enhancing the business

reputation of the law firm that employed him.[15]

The DeCourseys have discovered another case that involved the *past* employment of the judge's *wife*. In *United Farm Workers v. Superior Court*, 170 Cal.App.3d 97, 216 Cal.Rptr. 4 (1985), the trial judge presided over the trial of a suit by an employer against a union. Thirty-two days after the trial had started, the trial judge disclosed that during a strike his wife had worked for two or three days as a replacement worker for the employer. *Id.* at 101. He did not disclose this at the start of the trial because his wife's temporary employment had occurred six years previously, and he had only just recalled it after several weeks of trial. *Id.* at 102. The union brought a motion for disqualification which the judge denied. The California Court of Appeals called the disqualification issue "a close question," but affirmed the trial judge noting that since the employment relationship had ended six years ago, there was no basis for arguing that the judge's wife had any *current* financial interest in the company that would require the judge to disqualify himself: "Here the [union] cannot rely on ***any continuing relationship*** between [plaintiff] and [his wife] giving rise to ***any current personal or financial interest*** which would disqualify [the judge]." *Id.* at 105 (emphasis added).

The same cannot be said in this case. The judge's wife had an ongoing employment relationship with Windermere, and her commission income

[15] Respondent has made no effort to distinguish the case, stating only that it was not decided on due process grounds. But it *was* decided, on appearance of fairness grounds, that the trial judge erred as a matter of law when he failed to recuse himself.

gave her an ongoing financial interest in Windermere's favorable public image. Thus, the judge's marital community had a personal pecuniary interest in preventing the DeCourseys from continuing to wage their anti-Windermere publicity campaign.[16] Due process requires "that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes." *Gibson v. Berryhill,* 411 U.S. 564, 579 (1973). The trial judge knew of these financial interests which he and his wife shared, but he neither disclosed them nor disqualified himself when they were discovered. This violated both the appearance of fairness and due process.

10. EITHER THE RESPONDENT REPUDIATED THE CONTRACT, OR THERE WAS NO CONTRACT.

On December 5, 2008, Respondent told the DeCourseys, "We will forbear on demanding payment on the balance owed [to the law firm] until payment on the judgment or settlement with Windermere." CP 1949. Three and a half weeks later Respondent told the DeCourseys that it "agreed to forbear for a reasonable time on collecting the balance" owed to it by the DeCourseys. CP 633. Respondent asserts that between December 5 and 30, the parties "discussed" the possibility that it would forbear until the judgment was paid by Windermere, but that they ultimately "**rejected it** in favor of the language requiring Lane Powell to forbear for a reasonable time." *BOR* at 49 (emphasis in original).

Nothing in the record supports this "rejection" contention.

[16] "An interest that is alleged to create bias or unfairness need not be direct or obvious."

Respondent *fails to cite anything* in the record and there is nothing in the record to support it.[17] What we have are two letters, *both* written by Lane Powell. The first letter *specifies* a time period of forbearance. The second letter does not; it simply refers to "a reasonable time." Lane Powell illogically asserts that the ambiguous language in the second letter was meant to "reject" the earlier language. But it is more logical to assume that the language of the second letter was intended to continue to convey the earlier promise that the Respondent would forbear until Windermere paid up. Contradicting itself, Lane Powell elsewhere admits that "Windermere's payment would trigger [DeCourseys'] obligation to pay," not some undefined passage of time. *BOR*, at 8.

Moreover, the Respondent's interpretation of the second letter is at odds with the rule that ambiguity in a contract is construed *against* the party that drafted it; that is particularly true when the contract is an agreement between an attorney/drafter and his client. *In re Van Camp*, 171 Wn.2d 781, ¶ 47, 257 P.3d 599 (2011). Thus, any ambiguity inherent in the word "reasonable" must be construed in favor of the DeCourseys.

Finally, given the subjective nature of the phrase, for "a reasonable time," if the second letter is construed as the Respondent suggests, then there was no agreement at all on an essential term of the agreement, and

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Chicago RR v. Human Rights Comm'n, 87 Wn.2d 802, 807-08, 557 P.2d 307 (1977).

[17] Instead of citing to the record, the Respondent cites to an earlier section of its own brief. *BOR* at 49. Nor does that section of the brief contain any citation *to the record*

thus there was no agreement at all. A contract that fails to provide essential terms is no contract at all, and thus there is nothing to breach. *See, e.g., Bogle & Gates v. Holly Mountain*, 108 Wn. App. 557, 561-62, 32 P.3d 1002 (2001) (dismissing law firm's suit for breach of contract for failure to pay because law firm failed to prove there was a contract between the law firm and client). If there was nothing to breach, then it was error to enter judgment for Respondent on a breach of contract claim.

Either the ambiguity is resolved in favor of the DeCourseys, in which case the Respondent breached the agreement first, relieving the DeCourseys of any obligation to adhere to it; or there never was any contract at all. Either way it was error to enter judgment for Respondent on a breach of contract claim.

B. CONCLUSION

Appellants ask this Court to vacate the judgment and to remand with directions that a new judge be assigned to hear this case. In the alternative, appellants ask this Court to vacate and remand for entry of partial summary judgment in their favor on LP's breach of contract claim, leaving Respondent free to pursue its quantum *meruit claim.*

DATED this 19th day of November, 2013.

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that supports this contention. To be sure, the Respondent asserts: "That language was rejected," *BOR* at 7, but it cites *nothing* to support that assertion.

NO. 69837-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LANE POWELL, PC, an Oregon professional corporation,

Respondent,

vs.

MARK DeCOURSEY and CAROL DeCOURSEY, individually and the marital community composed thereof,

Appellants.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury of the laws of the state of Washington, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On November 21, 2013, I caused to be served via LEGAL MESSENGER one copy of ***REPLY BRIEF OF APPELLANTS*** on:

ROBERT M. SULKIN
MALAIKA M. EATON
McNaul Ebel Nawrot & Helgren PLLC
600 University Street Suite 2700
Seattle WA 98101

Lily T. Laemmle
Legal Assistant