No. 93321-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHIKO STEHRENBERGER,

Petitioner,

v.

JPMORGAN CHASE BANK, N.A.,

Respondent.

ANSWER OF JPMORGAN CHASE BANK, N.A., TO PETITION FOR REVIEW BY MICHIKO STEHRENBERGER

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Stehrenberger's latest appeal is part of an extended litigation campaign she started shortly after she first defaulted on a loan. Her argument now is that most of the judges in the State of Washington must be disqualified from her case because they maintain retirement accounts—managed by the Washington State Investment Board—that "include securities in JPMorgan Chase & Company, the parent corporation which wholly owns Respondent JPMorgan Chase Bank, N.A." (Stehrenberger's Mot. for Disqualification & Change of Venue at 2, Case No. 73493-8-I, Wn. App. Mar. 3, 2016.) Washington's Code of Judicial Conduct disposes of that argument. General interests in retirement accounts and individual holdings within mutual funds do not require disclosure or disqualification. CJC 2.11, comment 6. The Court should deny Michiko Stehrenberger's petition for review.

First, Stehrenberger's petition for review is late. Any petition for review had to be received by June 16, 2016, and the docket for the Court of Appeals shows the petition was received on June 20, 2016.

Second, the Honorable John P. Erlick of the Superior Court for King County, Washington, was neither required to recuse himself nor to make additional disclosures with respect to de minimis relationships with various financial institutions, some of whom are not even parties to this lawsuit.

Third, Stehrenberger hasn't identified any reason to set aside the Superior Court's rulings under CR 59, CR 60, or otherwise.

Fourth, the Superior Court properly barred Stehrenberger from continuing her vexatious campaign of litigation with further attacks on the judiciary.

Fifth, the Court should award Chase its fees and costs in connection with Stehrenberger's petition for review.

IDENTITY OF ANSWERING PARTY

Chase is the respondent and the plaintiff in this case.

STATEMENT OF THE CASE

In 2007, Stehrenberger obtained a $50,000 unsecured commercial line of credit from Washington Mutual Bank. Chase later acquired Stehrenberger's loan from the FDIC, as receiver for Washington Mutual Bank. (CP 392 ¶ 2; CP 548 ¶ 70; CP 1131; *see also* CP 911, 939; CP 487; CP 1125.)

In 2010, Stehrenberger stopped making payments on her loan, even though she admits owing money on the loan. (CP 321 ¶ 4, *see also* CP 1115 ¶ 7; CP 1159.) By February 4, 2011, Stehrenberger owed Chase approximately $47,600, including principal, overdue interest, and fees. (CP 302 ¶ 11.)

Due to Stehrenberger's default, Chase filed this breach-of-contract action. Stehrenberger litigated aggressively for years, filing many motions and declarations and serving hundreds of discovery requests on Chase. (CP 553-54; CP 1211.) Nevertheless, the Superior Court entered summary judgment for Chase (CP 1184-94) and denied Stehrenberger's motion to

amend the judgment (CP 1221; CP 1217-18). The Superior Court also awarded Chase its fees under Stehrenberger's promissory note and RCW 4.84.330. (CP 1222-23.)

The Court of Appeals affirmed the Superior Court because Chase is entitled to enforce Stehrenberger's promises under RCW 62A.3-309(a). The Court of Appeals explained that "in accordance with *Gerard*, the FDIC's transfer of all assets of the failed bank to Chase carried with it the authority to enforce Stehrenberger's note. This is because Chase purchased *all* of WaMu's assets as shown by the purchase and assumption agreement." *JPMorgan Chase Bank, N.A. v. Stehrenberger*, No. 70295-5-I, slip op. at 5 (Wn. Ct. App. April 28, 2014) (emphasis in original). The Court of Appeals also found the Superior Court did not abuse its discretion in awarding attorneys' fees, and granted Chase its fees and costs on appeal, subject to compliance with RAP 18.1. *Id.* at 11-12.

Stehrenberger filed a petition for review with this Court. This Court denied that petition and awarded Chase its fees and costs in the amount of $7,287.22. Stehrenberger then filed a motion asking this Court to stay its order awarding Chase its fees and costs. The Court denied that motion, too.

Unsatisfied, Stehrenberger returned to the Superior Court and filed a motion to set aside the judgment under CR 59 and 60, alleging "new evidence" that the Washington judiciary is biased against her. Stehrenberger alleged Judge Erlick owned Washington Mutual stock. (*See*

CP 1354 at 2:17-18.) Notably, Washington Mutual is not and never has been a party to this case. Stehrenberger also alleged that Judge Erlick owned Chase securities through his retirement accounts and mutual funds. (CP 1354 at 2:18-19.) Finally, Stehrenberger alleged that Judge Erlick borrowed money from Chase in connection with various mortgages. (CP 1355 at 3:2-6.)

But that's not all. Stehrenberger made similar accusations against members of the Court of Appeals: the Honorable Ronald E. Cox, the Honorable Linda Lau, and the Honorable Ann Schindler. In this appeal, she repeated those accusations and insisted that the Court of Appeals should overturn the prior judgment because the investments raise a "public question as to the impartiality of these judges in these proceedings." (Appellant's Br. 11, Sept. 1, 2015.)

The Superior Court properly denied Stehrenberger's motions under CR 59 and 60 and barred Stehrenberger from continuing her vexatious litigation. The Court of Appeals affirmed the Superior Court, denied Stehrenberger's motion to disqualify most of the members of the Washington judiciary, and denied Stehrenberger's motion for reconsideration.

The Court of Appeals received Stehrenberger's petition for review on June 20, 2016, more than 30 days after the Court of Appeals denied Stehrenberger's motion for reconsideration on May 17, 2016.

ARGUMENT

Stehrenberger does not supply a good reason for this Court to accept review. RAP 13.4(b) identifies the four classes of cases in which this Court will accept review. Stehrenberger's petition does not fall within the first two classes because she does not identify a conflict between the decision of the Court of Appeals and any other court. That is because she can identify no court that has decided that a judge is disqualified by maintaining indirect, de minimis interests in retirement accounts. Likewise, there is no significant question of law under the constitutions of the State of Washington or the United States because the existence of a "question" implies a reasonable debate about the answer, and there is none here. Finally, the issue is not one of substantial public interest unless the Court is of the view that judges should not have retirement accounts.

A. The Court should deny Stehrenberger's petition for review because Stehrenberger filed and served the petition more than 30 days after the Court of Appeals denied her motion for reconsideration.

Stehrenberger's petition is late and should be denied for that reason alone. Stehrenberger had 30 days after the Court of Appeals denied her motion for reconsideration to file her petition for review. *See* RAP 13.4(a). A petition for review "is timely filed only if it is received by the appellate court within the time permitted for filing." *See* RAP 18.6(c). The Court will only extend the deadline for filing a petition for review "in extraordinary circumstances and to prevent a gross miscarriage of justice" because "the desirability of finality of decisions outweighs the privilege of

a litigant to obtain an extension of time under this section." *See* RAP 18.8(b).

Stehrenberger's petition for review is late because it was signed, dated, and served no earlier than June 16, 2016. The certificate of service attached to Stehrenberger's petition states that it was served "on this 27th day of May, 2016," but that must be a scrivener's error because the certificate itself and the petition were each dated June 16, 2016. Even if Stehrenberger did send the petition by mail on May 27, 2016, the Court of Appeals did not receive the petition until June 20, 2016, which is all that matters under Rule 18.6(c).

Stehrenberger has neither asked for nor is entitled to an extension of time under Rule 18.8. She acknowledges that the Court of Appeals denied her motion for reconsideration on May 17, 2016. (Stehrenberger's Pet. at 10.) Her failure to file a timely petition was not apparently caused by a misapprehension about that. Stehrenberger dated her petition June 16, 2016, suggesting that she knew that she had 30 days within which to file her petition. She offers no reason for failing to file her petition within the time allotted.

The Court extends some leeway to pro se litigants like Stehrenberger, but even that is sparingly granted in cases where a litigant missed a deadline on appeal. *See, e.g.*, *In re Carlstad*, 150 Wn.2d 583, 590-91 (2009) (dismissing untimely personal-restraint petition filed by pro se prisoner). And Stehrenberger is no ordinary pro se litigant. This is her

second visit to this Court in connection with this controversy, which itself follows a long, expensive campaign of litigation with no end in sight.

B. Judge Erlick was not required to recuse himself from this case.

Judge Erlick did not need to recuse himself from this case based on de minimis connections with Washington Mutual and Chase. Nor was Judge Erlick required to make any disclosures with respect to those purported interests.

Judges are presumed to perform their functions "without bias or prejudice." *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841 (2000). The burden is on Stehrenberger to show bias or prejudice. *Id.* "Recusal lies within the sound discretion of the trial court." *In re Marriage of Farr*, 87 Wn. App. 177, 188-89 (1997).

Judges are not required to disqualify themselves if they have insignificant economic interests in the parties to the proceeding. *See* CJC 2.11(A)(3); *see also Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 25-26 (2013). Notably, the phrase "economic interest" means "ownership of more than a de minimis legal or equitable interest," and it does not include "an interest in the individual holdings within a mutual or common investment fund." CJC 2.11, cmt. 6.

The federal courts have also explained—in commenting on the companion federal rules—that a judge's impartiality cannot reasonably be questioned just because a judge has a mortgage or a line of credit with one of the parties to the proceeding. *See Townsend v. BAC Home Loans Serv.,*

L.P., 461 F. App'x 367 (5th Cir. 2011); *In re U.S.*, 158 F.3d 26, 31-33 (1st Cir. 1998); *In re Zow*, 2013 WL 445385, at *1 (Bankr. S.D. Ga. Jan. 24, 2013) (noting also that "recusal statutes are 'not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice. . . . Nor are they intended to be used as a delay tactic or to prevent the timely consideration of cases and controversies.'").

Judge Erlick's de minimis connections with Washington Mutual and Chase did not even merit disclosure, much less recusal. Washington Mutual is not and never has been a party to this case. The outcome of this case could have no conceivable effect on the value of interests in Washington Mutual. Washington Mutual Bank was liquidated in an FDIC receivership, and the bank's parent company was liquidated in bankruptcy.

Just because Chase acquired certain assets of Washington Mutual Bank does not mean that Judge Erlick acquired any interest in Chase. As the Court of Appeals explained, "WaMu failed, and the Federal Deposit Insurance Corporation placed the bank in receivership." *Stehrenberger*, No. 70295-5-I, slip op. at 1 (Wn. Ct. App. April 28, 2014). Whatever interests Judge Erlick may have had in Washington Mutual stock are presumably worthless. And as the Superior Court noted, Stehrenberger introduced no evidence "that Washington Mutual securities held by Judge Erlick were ever converted to any equity interest in Chase securities." (CP 1365-67.)

Nor did Judge Erlick's connections with Chase require disclosure or recusal. The Code of Judicial Conduct states that general interests in retirement accounts and individual holdings within mutual funds do not require disclosure. CJC 2.11, cmt. 6. If the rule were otherwise, there probably would not be a single judge in the State of Washington that could hear Stehrenberger's case, insofar as each would have a similar interest in the judicial-retirement system. Judge Erlick's mortgage loans also did not give rise to any appearance of unfairness or impropriety. Those loans did not give Judge Erlick an "economic interest" in Chase within the meaning of CJC 2.11. *Id.* In any event, routine mortgage transactions do not give Judge Erlick any reason to be more favorably disposed to Chase.

The facts here are far different from the facts in the cases cited by Stehrenberger. For example, in *Tatham v. Rogers*, the trial court should have disclosed that the judge and one of the party's attorneys had been partners in a law firm, that the attorney served as the judge's campaign manager, and that the judge and the attorney had continuing personal business with each other. 170 Wn. App. 76, 85 (2012). That is much different from the de minimis connections identified in Stehrenberger's motion.

C. The Superior Court properly declined to vacate or revise its prior orders under CR 59 and CR 60.

Stehrenberger did not provide any valid basis for setting aside the Superior Court's prior orders under CR 59 or CR 60. CR 59 requires a motion for a new trial to be brought within 10 days after entry of

judgment. *See* CR 59(b). The Superior Court had no discretion to enlarge that time even if it had been inclined to do so. *See Metz v. Sarandos*, 91 Wn. App. 357, 359-60 (1998). Although CR 60 allows more time to set aside orders, relief under CR 60(b)(11) should be sparingly granted, and only under extraordinary circumstances. *See Flannagan v. Flannagan*, 42 Wn. App. 214, 221 (1985).

Stehrenberger could not obtain relief under CR 59 because her motion was filed more than 10 days after judgment was entered. Stehrenberger was also not entitled to relief under CR 60(b) because she did not provide evidence of the extraordinary circumstances necessary to justify relief. Stehrenberger described a series of de minimis connections between Judge Erlick and various financial institutions, some of whom are not even parties to this case. They certainly did not justify setting aside the Superior Court's prior orders under CR 60(b)(11).

Stehrenberger also failed to comply with CR 60(e), which requires a CR 60 motion to be served "in the same manner as in the case of summons in a civil action . . . ." As reflected in her certificate of service, Stehrenberger e-mailed a copy to Chase's attorneys. There is no evidence that they agreed to accept service of process under CR 4—by e-mail or otherwise—on behalf of Chase.

D. The Superior Court properly barred Stehrenberger from further frivolous filings.

The Superior Court recognized that Stehrenberger is a vexatious litigant. This is her second petition to this Court. The Superior Court

recognized that an award of fees was not a sufficient deterrent insofar as the Superior Court, the Court of Appeals, and this Court all awarded fees against Stehrenberger before. The Superior Court acted properly and with restraint by barring Stehrenberger from further frivolous filings.

E. The Court should award Chase its fees and costs.

The Court should award Chase its fees in connection with Stehrenberger's petition for review under RAP 18.1(j). That rule permits an award "to the party who prevailed in the Court of Appeals . . . for the prevailing party's preparation and filing of the timely answer to the petition for review." Chase is also entitled to fees under RCW 4.84.330 because it is the prevailing party and because, as Stehrenberger acknowledged (*see* Appellant's Br. at 31-32), the note contains a fee provision under which she agreed to pay Chase's fees incurred in collecting on the note. CP 306, 307 (bank and its assigns may seek fees incurred in collecting on note); CP 392 (Chase acquired WaMu's loans from FDIC by operation of law under FIRREA). "A provision in a contract providing for the payment of attorneys' fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well." *Boyd v. Davis*, 127 Wn.2d 256, 264 (1995) (affirming award of fees on appeal under RCW 4.84.330).

* * *

For the foregoing reasons, the Court should deny Stehrenberger's petition for review and award Chase its reasonable attorneys' fees and costs incurred in connection with the petition for review.

RESPECTFULLY SUBMITTED this 12th day of July, 2016.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.

By _____
Fred Burnside, WSBA No. 32491
Hugh McCullough, WSBA No. 41453

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 12, 2016, I caused the foregoing "Answer of JPMorgan Chase Bank, N.A., to Petition for Review by Michiko Stehrenberger" to be delivered to the following as indicated:

Ms. Michiko Stehrenberger	☐ Messenger
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Post Falls, Idaho 83854-7553	☒ Federal Express
document.request@gmail.com	☐ Fax
	☒ E-mail

Certified in Seattle, Washington on July 12, 2016.

Elaine Huckabee

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Cc: document.request@gmail.com; McCullough, Hugh; Burnside, Fred
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Attached please find Answer of JPMorgan Chase Bank, N.A., to Petition for Review by Michiko Stehrenberger to be filed in the above matter.

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