NO. 1040831

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

From Court of Appeals No. 870831– Div I

M.G., SAMANTHA GERLACH and SUZANNE GERLACH,

Petitioners,

v.

BAINBRIDGE ISLAND SCHOOL DISTRICT #303, a municipal corporation; WASHINGTON STATE HOSA, a non-profit corporation, NASZYA BRADSHAW an individual, ELEANOR WILSON an individual AND DOES 1-100.,

Respondents.

WASHINGTON STATE HOSA'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Washington State HOSA (hereinafter "HOSA") hereby opposes M.G. and Gerlach's Petition for Review and respectfully requests this Court deny review of the Court of Appeals decision in Appeal Number 87083-1-I. Petitioners continue to make the same meritless argument in this Petition for Review that they have made throughout this litigation. The trial court did not abuse its discretion in denying Appellants' Motion for Disqualification and Motion for Reconsideration where Judge Forbes represented the City of Bainbridge Island in a matter involving a permit that was sought by Petitioner Suzanne Gerlach and her husband, Petitioners' attorney, Marcus Gerlach. Such dispute between Petitioners and the City of Bainbridge Island occurred a decade ago when Judge Forbes represented the City in its position regarding a map. Judge Forbes was not required to recuse herself based on that prior event, nor any of the other baseless reasons Petitioners have argued throughout

this litigation. The trial court rulings, and Court of Appeals' affirmation, on this issue should not be reviewed or overturned.

The Petition for Review fails to state any rules on which review could be granted. The Petition is completely devoid of any citations to any Rules of Appellate Procedure and any analysis for why review is appropriate under any such rules. Pursuant to RAP 13.5, Petitioners needed to establish one of the three bases for review of an interlocutory decision of the Court of Appeals. First, Petitioners failed to identify any obvious error that would render further proceedings useless. See RAP 13.5(b)(1). Second, Petitioners failed to identify any probable error that substantially alters the status quo or limits the freedom of a party to act. See RAP 13.5(b)(2). Third, Petitioners failed to identify how the Court of the Appeals decision was so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court as to call for the exercise of revisory jurisdiction by the Supreme Court. See RAP 13.5(b)(3).

II. IDENTITY OF RESPONDENT

Respondent Washington State HOSA, Respondent and Defendant in the lower court briefings, requests this Court deny Petitioners' request for review.

III. STATEMENT OF FACTS RELEVANT TO ISSUE 1

Pursuant to Appeal Number 87083-1-I, Petitioners seek review of several determinations affirmed by the Court of Appeals. The only issue HOSA addresses in its Answer is Issue 1. Issue 1 centers on whether Judge Forbes was required to recuse herself from this presiding over this litigation.

Petitioners first moved to disqualify Judge Adams. (CP 709:8–12). Following Judge Adams' disqualification, Judge Forbes heard a motion in this litigation in February 2023. Judge Forbes made clear that she was the judge assigned to this litigation pursuant to the Court's standard judicial rotation procedure. (See CP 709:18–22). This litigation was preassigned to Judge Forbes under the ordinary course of judicial assignments. (CP 261:12–13; CP 752). The evidence is clear that

Judge Forbes did not choose to participate in this litigation in any way. (CP 261:14–17). At the time Petitioners first brought a motion in which Judge Forbes made the ruling they did not request Judge Forbes recuse herself. Petitioners did not raise any issues or concerns with the Court regarding Judge Forbes presiding over the litigation until after they were dissatisfied with her decision.

Since her initial ruling, Petitioners have made several attempts to disqualify Judge Forbes. On December 8, 2023, Petitioners filed Plaintiffs' Motion for Disqualification of Jennifer Forbes and Rescission of Orders (hereinafter "Petitioners' Motion for Disqualification"). (CP 655–679). Petitioners' Motion for Disqualification was based on the following allegations: (1) Judge Forbes represented the City of Bainbridge Island when Petitioner Suzanna Gerlach and Petitioners' attorney requested a permit (CP 656:1–6); (2) the City denied the permit (CP 656:12–13); (3) the City allegedly used an altered map and Judge Forbes represented the City's

position regarding said map (CP 656:25–28); (4) the City planner operated a window washing business (CP 656:11); and (5) Petitioners declined a solicitation to use the City planner's business (CP 656:12).

HOSA formally opposed Petitioners' Motion for Disqualification. (CP 806–812). HOSA emphasized the following points in its opposition: (1) Judge Forbes appeared as the City attorney in the permit litigation more than ten years before the present matter (CP 808:6–7); (2) there is no evidence that Judge Forbes holds any personal animus against Petitioners (CP 808: 2–3); and (3) judges are not automatically disqualified where they engaged in litigation involving a party or party attorney (CP 813–15).

The trial court denied Petitioners' Motion for Disqualification. (CP 731–34). In denying the motion, Judge Forbes made the following findings:

1. "When working as contract legal counsel for the City of Bainbridge Island, I only worked on land use matters… Plaintiffs have presented no

evidence that I had any role in the supervision of any City of Bainbridge Island employee." (CP 732:6–8, 11–14).

2. "Plaintiffs refer to a declaration written in my capacity as land use legal counsel to the City of Bainbridge Island. This declaration was written in the normal course of my role as legal counsel. Beyond the existence of this declaration, I recall having no role or involvement in the federal matter referred to by Plaintiffs." (CP 732:15–18).

3. "I have no knowledge of a counterfeit map. I have no knowledge of a court finding the subject map to be counterfeit. Plaintiffs have presented no evidence that I knowingly presented false or counterfeit evidence." (CP 732:19–23).

4. "I cannot address the circumstances of any resolution of Plaintiffs' land use matter as asserted by Plaintiffs. From Plaintiffs' materials, it appears this matter was resolved long-after my involvement in the case was completed." (CP 732:24–733:2).

5. "Plaintiffs' argue in their reply brief that I 'mocked' Attorney Gerlach when I asked him if he was an attorney. This statement was made in the context of Plaintiffs' request that the court issue subpoenas, something that an attorney can typically do without the trial court's assistance. As discussed previously I did not mock Attorney Gerlach. The question was asked as prelude to my next question – 'So why do you need the

> court to issue a CR 45 subpoena?'"(CP 733:9–15).

Petitioners filed a Motion for Reconsideration on February 27, 2024, which included a request that the trial court reconsider its Order Denying Petitioners' Motion for Disqualification. (CP 738:17–741:28). As part of the Motion for Reconsideration, Petitioners offered new evidence by way of Judge Forbes serving as pro tem judge for Bainbridge Island Municipal Court, an involvement with Friends of SAIVS, and prior decisions. (See *Id.*; CP 756: 3–8). Per KCLCR 59(e), HOSA was not entitled to a response to Petitioners' Motion for Reconsideration. HOSA had already objected to Petitioners' original request for Judge Forbes to recuse herself and would have, if permitted by the trial court, opposed Petitioners' Motion for Reconsideration. Petitioners' Motion for Reconsideration was denied. (See CP 756:1–8).

Petitioners sought appeal of the order denying their motion for recusal and reconsideration thereof. HOSA opposed the

appeal, arguing that Petitioners failed to establish that the superior court abused its discretion and that the denials of their motions were manifestly unreasonable or based on untenable grounds. The Court of Appeals affirmed the lower court's denials of Petitioners' motions.

The Court of Appeals affirmed the trial court's decisions regarding recusal. In doing so, the Court of Appeals found that Petitioners waived their objections to Judge Forbes because they did not raise issues or concerns with the court prior to asking the court to grant Petitioners' motion for evidence in February 2023. Despite finding that there was a waiver, the Court of Appeals went through the recusal analysis and found that, "Even considering the fact that the trial judge presided over matters involving the City of Bainbridge Island after having represented the city in the land use matter about 10 years prior, plaintiffs do not show how this demonstrates prejudice on the part of the trial judge in this matter." (*Gerlach v. Bainbridge Island School Dist. #303, et al*., No. 87083-1-1 at p. 9 (Mar. 24, 2025) (un-

published)). The Court of Appeals went on to analyze whether Judge Forbes should have disqualified herself, holding that "[t]he facts presented by plaintiffs do not establish a circumstance where the trial judges' impartiality might reasonably be questioned." (*Id.*).

IV. ARGUMENT

A. Standard for Discretionary Review of an Interlocutory Decision.

The decision of whether or not to recuse a judge is an interlocutory one. When seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals, the Petitioner must meet the bases for review stated in RAP 13.5(b)(1)–(3). RAP 13.5 which provide as follows:

Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

> (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
>
> (2) If the Court of Appeals has committed probable error and the decision of the Court of

> Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5(b) sets out "specific and stringent" criteria for permitting review. See *In re Dependency of N.G.*, 199 Wn.2d 588, 595, 510 P.3d 335, 338 (2022).

First, establishing obvious error requires Petitioners to show a high certainty of error. *In re Dependency of N.G.*, 199 Wn.2d at 595. Although "obvious error" is not defined, it has been established that where the lower court fails to follow controlling precedent, the obvious error standard may apply. See *Macias v. Mine Safety Appliances Co.*, 158 Wn. App. 931, 244 P.3d 978 (2010), *rev'd on other grounds by Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012). This basis is satisfied where the case would have been dismissed, or the

moving party's involvement would have ended, but for the trial court's error. See *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 818 P.2d 1262 (1991); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Petitioners cannot be basing their appeal on this basis for review because the recusal of Judge Forbes would not have rendered further proceedings in this litigation useless. It would only have required a new judge to be assigned. Further, as explained in the next section, the Court of Appeals' affirmation of the trial court decisions was proper.

Second, to meet the "substantially alters the status quo" test, Petitioners must offer evidence that the appealed decision has an immediate effect outside the courtroom. *In re Dependency of N.G.*, 199 Wn.2d at 590, 598. Essentially, where there is a weaker argument for error, Petitioners must make a stronger showing of harm in order to meet the requirements for review. *Id.* at 595 (citing *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462–63, 232 P.3d 591 (2010)). The probable error standard used in RAP 13.5(b)(2) is less stringent than the obvious

error used in (b)(1), but requires a more significant harm than (b)(1). *Id.* The court has interpreted RAP 13.5(b)(2) to mean that "where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(3)." *State v. Howland*, 180 Wn. App. 186, 207, 321 P.3d 303 (2014) (RAP 2.3(b)(3) and RAP 13.5(b)(2) use the same language). This basis for appellate review is primarily applied to orders regarding injunctions, attachments, receivers, and arbitration, matters that were previously appealable as a matter of right under the old legal system. *In re Dependency of N.G.*, 199 Wn.2d at 597 (citation omitted).

The Petition for Review contains no evidence or argument to support the meaning of RAP 13.5(b)(2). The denial of Petitioners' request for Judge Forbes to recuse herself has no impact outside the courtroom. Further, the decision by the Court of Appeals does not constitute "probable error."

Third, RAP 13.5(b)(3) is used to address a procedural irregularity where the court has acted contrary to case law, statute, or rule. See *In re Marr. of Folise*, 113 Wn. App. 609, 613, 54 P.3d 222 (2002); see also *State v. Smith*, 90 Wn. App. 856, 862, 954 P.2d 362 (1998). Petitioners have offered no evidence of a procedural irregularity nor do the records support that such irregularity occurred.

None of the bases for review have been met. Despite not including any arguments regarding the standard for granting review, it is clear that the decision from the Court of Appeals was proper and does not meet the requirements for review under any of the Rules of Appellate Procedure.

B. <u>The Decision from the Court of Appeals Was Correct and Therefore Does Not Meet Any of the Bases for Permitting Review by this Court</u>.

To prevail on a motion for disqualification, Petitioners must demonstrate that the judge has actual or potential bias. *State v. Chamberline*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). Prejudice is not presumed and must be supported by a showing by the

moving party. *State v. Dominguez*, 81 Wn. App. 325, 328–29, 914 P.2d 141 (1996). It is assumed that a judge will perform her actions without bias or prejudice. *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). When determining whether recusal is required, the Code of Judicial Conduct provides guidelines. "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." *State v. Gamble*, 168 Wn. 2d 161, 188, 225 P.3d 973 (2010) (citing CJC Canon 3(D)(1).

Petitioners disagree that they carry the burden on their own motion for disqualification. The case law is clear: the party questioning a judge's biases has the burden of producing sufficient evidence to demonstrate bias. *Tatham v. Rogers*, 170 Wn. App. at 96 (citation omitted). The party challenging the judge's fairness must present more than mere speculation. *Id.* (citation omitted). The challenging party can meet its burden by presenting evidence that the judge has a personal or pecuniary interest in the case. *Id.* (citation omitted). Petitioners were

required to meet this burden at the trial court level. At the Court of Appeals, Petitioners were required to establish that the trial court's decision was manifestly unreasonable or based on untenable reasons or grounds. *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 23–24, 317 P.3d 481, 487 (2013). Petitioners failed to meet such standards at both the trial court and Court of Appeals.

Petitioners did not meet their burden to disqualify Judge Forbes. The facts regarding Judge Forbes' prior interactions with Petitioners, interactions which occurred approximately 10 years ago, do not demonstrate prejudice on the part of Judge Forbes against Petitioners. Judge Forbes has no memory of any interaction with Petitioners or Attorney Gerlach personally. (CP 251:21–23). Judge Forbes could only recall a vague memory of the permitting case. The present litigation is completely unrelated to the buoy permit case from a decade ago. The mere fact that Judge Forbes represented the City of Bainbridge Island's position regarding the denial of a permit does not

constitute an action requiring recusal from the unrelated present litigation. Judge Forbes defense of the City was not personal; instead, it was in the performance of the normal course of her job duties. (See CP 732:15–19). Judge Forbes handled hundreds of cases over her more than 16 years of practice. (CP 261:20–21).

Petitioners allege that Judge Forbes mocked Attorney Gerlach when the Court asked about the status of his license and why he was not signing a subpoena himself. Such a question from Judge Forbes does not constitute evidence of bias. Attorney Gerlach requested the trial court assist in obtaining records from social media companies. The Court asked Attorney Gerlach why he needed assistance with these subpoenas if he is a licensed attorney. As a licensed attorney, Attorney Gerlach could have sought the requested records without court intervention, so the question from Judge Forbes was entirely appropriate. Further, given that Attorney Marcus Gerlach shares the same surname as the Petitioners, it is fair for the judge to ensure that the person before her is in fact a licensed attorney and not one of the

Petitioners themselves. Such interaction does not support a claim of actual bias or prejudice.

Petitioners continue to make a vague reference to Friend of SAIV. Petitioners did not explain in their Motion for Disqualification how any connection with SAIV constitutes an actual bias or prejudice. SAIV was brought up for the first time in Petitioners' Motion for Reconsideration. On appeal, both at the Court of Appeals and now at the Supreme Court, the Petitioners have failed to present any reasonable argument regarding how SAIV relates to and constitutes evidence of bias.

Not only do the facts not support Petitioners' Motion for Disqualification, they also do not mandate Judge Forbes to have recused herself subject to any of rules set out in the Code of Judicial Conduct. CJC 2.11(A)(1) sets out the rule for recusal due to personal bias or prejudice regarding a party or party's attorney. Based on the facts as set forth in this Response, HOSA's Opening Brief in the Court of Appeals, and the trial court records, there is

no evidence to support that Judge Forbes must have recused herself.

Petitioners cannot seek to recuse Judge Forbes simply because they do not like her rulings. Petitioners have argued that Judge Forbes' rulings against them are evidence of bias. (See CP 693:18–28). There is no evidence that Judge Forbes dismissed HOSA from this case because of any bias or prejudice she had toward Petitioners. Instead, HOSA was dismissed because Petitioners' Amended Complaint failed to put forward facts that would support any claims against it. Similarly, Judge Forbes having issued sanctions against Petitioners for inappropriate behavior and filings, is not evidence of bias. Petitioners were sanctioned as a result of their failure to comply with prior court instructions.

V. CONCLUSION

For the foregoing reasons, HOSA requests this Court deny Petitioners' request for review.

DATED this 21st day of May, 2025.

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I certify that this brief contains 3,071 words, in compliance with RAP 18.17(c)(10).

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2025, I electronically filed the foregoing with the Clerk of the Court using the E-Filing system which will send notification of such filing to the registered email address(es) for the following parties:

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