NO. 89980-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

---

RITH KOK, individually and as Administrator of the Estate of SAMNANG KOK, deceased, et al.,

*Petitioner,*

v.

TACOMA SCHOOL DISTRICT NO. 10

*Respondent.*

---

# AMICI CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

---

James E. Lobsenz
Attorney for Amici Curiae

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

### WASHINGTON CASES



### FEDERAL CASES



### RULES & STATUTES

## A. ARGUMENT IN SUPPORT OF GRANTING REVIEW

### 1. The Decision Below Applies the Wrong Appellate Review Standard and Conflicts With This Court's Decision in *In re King*.

In the published opinion issued below, the Court of Appeals states, "We review a trial judge's decision whether to recuse herself to determine if the decision was manifestly unreasonable or based on untenable reasons or grounds." *Kok v. Tacoma School District No.10*, 317 P.3d 481, ¶ 25 (2014). This holding, that all recusal motions are reviewed under an abuse of discretion standard, directly contradicts and conflicts with this Court's decision in *In re King*, 168 Wn.2d 888, 232 P.3d 1095 (2010).

In *King* this Court reviewed a hearing officer's refusal to recuse himself in a disciplinary hearing. Paul King, the respondent attorney, asserted that there was a denial of the appearance of impartiality because the hearing officer had been his opposing counsel in a prior case. The hearing officer denied the motion for recusal. The Supreme Court specifically identified the applicable appellate standard of review as follows: "Questions as to whether undisputed facts violate due process or the appearance of fairness doctrine are legal and are reviewed *de novo*." *King*, 168 Wn.2d at 899.

*Kok* flatly contradicts and conflicts with *King*. *King* holds that

*de novo* review is the proper appellate review standard. Accordingly *everything* that the *Kok* opinion says is suspect because it is based upon the erroneous assumption that affirmation of the judgment is required absent an abuse of discretion.

In this case, as in *King*, the facts pertaining to the recusal motion were all undisputed. The School District never disputed any of these facts: (1) the trial judge's husband was employed by the law firm of Vandenberg Johnson; (2) that law firm regularly represented public school districts, (3) in 2007 her husband's law firm made over $10,000 representing public entities such as the Tacoma School District, (4) the judge's husband was a member of an organization called the Washington Council of School Attorneys,[1] and (4) on the association's membership roster her husband listed the Tacoma School District as one of his clients. CP 1960-2021, 2125-2250, 2162, 2188.

Since the Tacoma School District never disputed any of these facts, under this Court's holding in *King* the *de novo* appellate review standard should have been applied. Thus, the Court of Appeals erred when it applied the deferential abuse of discretion review standard.

An abuse of discretion standard is particularly ***in***appropriate for this type of trial court decision. When making a recusal decision, the

[1] In addition, at the end of the case, the same organization filed a motion to publish the Court of Appeals' decision, demonstrating that it perceived it to be in the interest of the

trial judge performs a self-evaluation. Not surprisingly, virtually every trial judge is naturally predisposed to find that she can provide both the substance and the appearance of fairness. The appearance of fairness doctrine requires an inquiry into whether "a reasonably prudent disinterested observer" person would have reason to doubt the judge's ability to be impartial. *State v. Gamble,* 168 Wn.2d 161, 187, 225 P.3d 973 (2010). *Accord In re Sanders,* 159 Wn.2d 517, 524-25, 145 P.3d 1208 (2006). In order to answer this question, the judge must *put aside everything she knows about herself.* She must give *no weight* to the fact that she knows she can be fair and impartial to the parties before her. She must ask *not* what she knows about her own ability to be fair; instead, she must ask what others *without* her self-knowledge might reasonably feel about her ability to be impartial. Moreover, she must put aside her natural feelings that most judges are in fact impartial, recognize that many reasonable people do *not* share this belief, and ask instead what they might reasonably think when assessing her direct or indirect connections to, and possible predispositions to favor, one of the parties before her.

If a decision not to recuse is reviewed under an abuse of discretion standard, in all but the most egregious circumstances trial judges will be effectively immune from appellate review of such

---

association's members – which included the trial judge's husband – to be able to cite to the decision as binding precedent.

decisions. "An appellate court finds abuse [of discretion] only 'when ***no reasonable judge*** would have reached the same conclusion.'" *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 104 (1989) (emphasis added). At the same time, the test for determining whether to recuse is "an objective test that assumes that ***a reasonable person*** knows and understands all the relevant facts." *Sherman v. State,* 128 Wn.2d 164, 905 P.2d 355 (1996) (emphasis added). The test is whether the judge's impartiality "might reasonably be questioned." *Code of Judicial Conduct* § 3(D)(1).

It is a truism that reasonable people may disagree. Appellate courts recognize this every day when they reverse summary judgments because they find that reasonable jurors could have found the facts in a way that precluded the summary judgment. *See, e.g., Schooley v. Deli Pinch's Market, Inc.,* 134 Wn.2d 468, 477, 951 P.d 749 (1998) ("we disagree and find that reasonable minds could conclude . . ."). Similarly, this Court regularly affirms a "reasonable" trial court ruling even when it finds that a "reasonable" trial judge could have reached the exact opposite conclusion. *See e.g., State v. Rhone,* 168 Wn.2d 645, 657, 229 P.3d 752 (2010) ("Rhone may be correct that had these arguments been presented to the trial court, it could have inferred a discriminatory motive from the totality of circumstances . . . Alternatively, it was just as reasonable for the trial court *not* to infer a

discriminatory motive.") *See also Lankford v. Idaho*, 500 U.S. 110, 124 (1991) ("this is a case where reasonable judges may differ . . .")

Under the abuse of discretion standard, a lower court's decision is affirmed if a reasonable judge *could* have reached the same conclusion, even though *another reasonable judge could* easily have reached the *opposite* conclusion. Therefore, despite the fact that a "reasonably prudent disinterested observer" could easily have concluded that the trial court judge might not be fair and impartial, if it is also true that a reasonable trial judge could have reached the opposite conclusion, then the decision not to recuse *will always be upheld if it is reviewed under the abuse of discretion standard.* Application of the abuse of discretion appellate review standard would necessarily eviscerate the existing rule of law which requires recusal whenever a reasonable person might question the judge's ability to be fair. If abuse of discretion is allowed to stand as the applicable appellate review standard, as the *Kok* Court has held, then the appearance of fairness doctrine will cease to be a meaningful concept in this State. This Court should grant review to address this critical question.

**2. The Decision Below Confuses Substantive Fairness, Which Is Achieved When A Correct Decision Is Made, With the Appearance Of Fairness, Which May Be Utterly Lacking Even Though The Decision Made Is Substantively Correct. The Decision Below Also Conflicts With The United States Supreme Court's Decision In *Monroeville*.**

In the Court below, Petitioner Kok pointed to *Tatham v. Rogers*,

170 Wn. App. 76, 283 P.3d 583 (2012) as support for her contention that the trial judge should have recused herself. In *Tatham,* Division III held that the trial judge erred when he refused to recuse himself. In *Kok*, Division II purported to distinguish the *Tatham* case.

Division II erroneously believed that it was significant that there was a difference between the appellate review standards that were applicable to the substantive legal questions which were the subject of the appeals in *Tatham* and in *Kok*. *Tatham* was a family law case, and the trial and the appeal focused on whether the trial judge erred when he divided the parties' property. The trial judge's property division was subject to appellate review under the abuse of discretion standard. In *Kok*, the summary judgment proceedings in the trial court and the appeal focused on the scope of a school's common law duty to protect students from violence perpetrated by other students. The trial court judge granted summary judgment to the school district and on appeal this ruling was subject to *de novo* appellate review. The *Kok* Court held that this difference between the appellate review standards applicable to the substantive decisions made by the two trial court judges made recusal necessary in *Tatham,* but unnecessary in *Kok*:

> [T]he nature of the proceedings was different in each case. In *Tatham*, a property division case, the trial judge had greater discretion in making his decision, and, on review, the appellate court would apply a deferential

> standard of review. By contrast, this case involved a summary judgment order, which appellate courts review *de novo*. Therefore, the increased risk of prejudice present in the *Tatham* case is not an issue here.

*Kok*, 317 P.3d at 488.

But this flawed reasoning mistakenly confuses and equates the "prejudice" of having the case decided incorrectly with the "prejudice" of having the case decided by a judge who does not have the appearance of impartiality. The fact that a judge decided a case correctly says *nothing* about whether that judge acted with the appearance of impartiality. The fact that the appellate review of the summary judgment was conducted using the *de novo* standard *did* serve to enhance the probability that the grant of summary judgment was substantively correct. But it did *nothing* to either increase or decrease the probability that the trial court judge acted with the *appearance* of impartiality when she made her decision.

"The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." *Gamble,* 168 Wn.2d at 187. Affirmance following *de novo* review by appellate judges can provide confidence that the trial court reached the correct decision. But *de novo* appellate review can never provide public confidence that the trial court judge was neutral and impartial.

This is easily illustrated. Even if ten out of ten appellate court judges applying *de novo* review agree that a trial court judge was correct to grant summary judgment to a defendant, if the defendant was the trial judge's mother all ten appellate judges are also virtually certain to agree that the trial judge should have recused himself because he could not possibly act with the appearance of impartiality. An appellate court affirmation of the substantive correctness of the trial judge's ruling in this situation would do nothing to cure the fact that the right to a judge with the appearance of fairness was blatantly denied. The law is settled that a litigant is entitled to *both.*

The *Kok* opinion is fatally flawed because it holds that if a litigant eventually gets a decision that is substantively correct, then it does not matter that the litigant was denied his right to an initial decision maker who possessed the appearance of impartiality. The Supreme Court's decision in *Ward v. Monroeville*, 409 U.S. 57 (1972) rejected the same type of contention. In that case the municipal court judge was also the mayor of the local village. He had a financial incentive to find criminal defendants guilty and to impose fines because those fines supplied the revenue that was used to run the town. The village argued that this financial interest did not matter because by exercising his right to appeal decisions of the municipal court, a defendant obtained a trial *de novo* before a new and different judge

who did not have that financial incentive to convict him. The village claimed that the initial denial of the right to a judge with the appearance of fairness, which was perpetrated at the defendant's first trial, was "cured" by the fact that the defendant could obtain that right later by exercising his right to appeal.

The Supreme Court flatly disagreed. The Court held that the appeal procedure could *not* "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. [The defendant] is entitled to a neutral and detached judge in the first instance." *Monroeville*, 409 U.S. at 61-62.

The *Kok* Court's decision employs the same kind of reasoning which the *Monroeville* court rejected. It does not matter that a litigant who loses a summary judgment motion eventually obtains review by a panel of impartial appellate judges who are free to decide *de novo* whether the motion was improperly granted. The fact is that *Kok* was entitled to a Superior Court judge with the appearance of fairness. She did not receive that, and no subsequent appellate procedure can cure that defect by providing her later with "the neutral and detached judge" that she was entitled to "in the first instance." *Id.*

**B. CONCLUSION**

Amici curiae urge this Court to grant review in the *Kok* case, to address and resolve the issues regarding (1) the proper appellate review

standard; (2) the reasonableness of a doubt regarding a judge's ability to be impartial when the judge's spouse, or the employer of the judge's spouse, stands to gain or lose something depending on the outcome of the case; and (3) whether an appearance of fairness violation by a trial court judge is "cured" if later a panel of impartial appellate court judges concludes that the trial court's decision in the case was substantively correct.

DATED this 17th day of April, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz, WSBA No. 8787
Attorneys for Amici Curiae

## CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, 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 addresses are both 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.

3. On April 17, 2014, I served, a copy of:

**AMICI CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW**; on the following counsels of record:

***Attorney for Plaintiffs/Appellants***
Paul A. Lindenmuth (*paul@benbarcus.com* )
Law Offices of Ben F. Barcus & Associates
4303 Ruston Way
Tacoma, WA 98402
***(Via U.S. Mail and E-Mail)***

***Attorney for Respondent***
Michael A. Patterson (*map@pattersonbuchanan.com)*
Charles P.E. Leitch (*cpl@pattersonbuchanan.com)*
Daniel P. Crowner (*dpc@pattersonbuchanan.com)*
Patterson Buchanan Fobes & Leitch, Inc., P.S.
2112 Third Avenue, Suite 500
Seattle, WA 98121
***(Via U.S. Mail and E-Mail)***

DATED April 17, 2014 at Seattle, Washington.

Lily T. Laemmle
Legal Assistant to James E. Lobsenz