

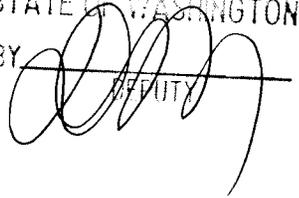
No. 40152-5-II

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DIVISION II  
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DIVISION II OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
BY   
DEPUTY

DAVID H. REGAN,

Appellant,

vs.

MELISSA McLACHLAN; METRO CITY  
BAIL BONDS; PIERCE COUNTY, WA.,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 09-2-01653-1

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it adopted the facts as set forth in State v. Cruz, 146 Wn.App. 1006 (2008).

2. The trial court erred when it dismissed Mr. Regan's claim under CR 12(b)(6) because the Pierce County Clerk's Office is not entitled to quasi-judicial immunity for ministerial tasks.

3. The trial court erred when it dismissed Mr. Regan's claim under CR 12 (b) (6) because the legal issues in Mr. Regan's case were different than those in State v. Cruz and, thus, the doctrine of collateral estoppel is inapplicable.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it adopted the facts set forth in State v. Cruz, 146 Wn.App. 1006 (2008)? (Assignments of Error 1).

2. Whether the Pierce County Clerk's Office - when involved in ministerial tasks - is entitled to quasi-judicial immunity such that Mr. Regan's claim could properly be dismissed under CR 12(b)(6)? (Assignments of Error 2).

3. Whether the legal issues in Mr. Regan's case were separate from those presented in State v. Cruz such that the doctrine of collateral estoppel was inapplicable and Mr. Regan's case was improperly dismissed under CR 12(b)(6)?

(Assignments of Error 3).

### III. STATEMENT OF THE CASE

#### A. Procedural History

According to the Clerk's Papers, David H. Regan, Pro Se Plaintiff herein, filed a complaint for damages on July 6, 2009, against Defendants Melissa McLachlan and Rexall Hawkins, husband and wife, and their marital community; Metro City Bail Bonds; Pierce County, Washington and Clark County, Washington. CP 5. On September 14, 2009, Defendant Rexall Hawkins filed his answer as did Defendant Melissa McLachlan. CP 18,28. On September 29, 2009, Defendant Clark County filed its answer. CP 39. On October 22, 2009, Plaintiff Regan filed a motion for default judgment against Metro City Bail Bonds, Melissa McLachlan and Rexall Hawkins. CP 134.

On November 6, 2009, Defendant Pierce County filed a CR 12(b)(6) motion to dismiss and noted a

hearing to be held on December 4, 2009. CP 189. On November 24, 2009, Plaintiff Regan noted a hearing for "Summary Judgment/Dismissal" - scheduled to occur on December 4, 2009 - requiring the presence of Rexall Hawkins, Melissa McLachlan/Metro City Bail Bonds and the representative for Pierce County, Daniel Hamilton. CP 308. On November 30, 2009, Pierce County filed a reply brief in support of its motion to dismiss under 12(b)(6). CP 310. Additionally, this brief moved to strike Plaintiff's response brief - that included a motion for summary judgment - as untimely under the Court Rules. Id. Defendant Hawkins and Defendant McLachlan also objected to the motion for summary judgment - arguing that it did not comply with the Court Rules. CP 321, 322.

At the hearing on December 4, the trial court struck several exhibits from Plaintiff Regan's brief in opposition to Pierce County's motion to dismiss (CP 356), struck Plaintiff's motion for summary judgment and granted Pierce County's motion for dismissal under CR 12(b)(6). CP 323-24. In the order of findings pursuant to CR 54, the Court stated the following:

1. As its factual findings, this court adopts and incorporates, as if fully set forth herein, those facts stated in the unpublished opinion of the Court of Appeals in State v. Cruz, 146 Wn.App. 1006 (2008)<sup>1</sup>.
2. Defendant Pierce County and its Officers enjoyed quasi-judicial immunity as the actions alleged by Plaintiff were performed pursuant to lawfully executed court orders.
3. The doctrine of collateral estoppel bars Plaintiff from asserting claims against Defendant Pierce County and its officers for returning the \$50,000 bond at issue in the Cruz case to Metro City Bail Bonds, pursuant to court order.
4. It would be unjust to delay entry of judgment as to Defendant Pierce County under CR 54(b) because (a) this court entered a final order on December 4, 2009 dismissing all Plaintiff's causes of action against Defendant Pierce County (b) the dismissal of Pierce County will not adversely affect the remaining defendants, and (c) continuance of this action against the remaining defendants will not adversely affect Pierce County.

CP 337-38.

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<sup>1</sup> While this is an unpublished opinion, because the Court may take judicial notice of an opinion dealing with the same parties and issues, it is properly cited within this brief. See Bingham v. Lechner, 111 Wn.App. 118, 45 P.3d 562 (2002).

Additionally, at the December 4th hearing, the trial court denied Plaintiff Regan's motion for default judgment against the defendants, including Metro City Bonds, LLC - who had never answered the complaint. CP 326.

On January 6, 2010 a stipulation and order of dismissal was filed - dismissing Defendant Clark County, WA from the lawsuit. CP 328.

Mr. Regan now challenges findings 1-3 noted above, as well as the denial of his motion for default judgment against Metro City Bail Bonds. This appeal was timely filed.

B. Facts

Melissa McLachlan was formerly a member of Metro City Bail Bonds, LLC, and was conducting business on behalf of Fairmont Specialty Insurance Company (Fairmont). However, while operating Metro City, McLachlan was failing to pay Fairmont Insurance the required surety premium proceeds. See Complaint for Damages, CP 5-17. Both Fairmont and United States Fire Insurance Company are owned by Fairfax Financial Holdings. Cruz, 146 Wn.App at 2.

On May 10, 2006, Metro City issued a \$50,000.00 bail bond to secure the appearance of Javier Quiroz Cruz, a defendant in a criminal matter, in Pierce County Superior Court. CP 09. On July 24, 2006, Mr. Cruz's bail was forfeited by the trial court. See Exhibit "A", CP 246-48. The surety for the bond was Fairmont Insurance. Id. When Mr. Cruz failed to appear for a pre-trial conference, a Pierce County Deputy Prosecuting Attorney, von Wahlde, filed a motion or forfeiture on the bond, which was granted. See Exhibit "B", CP 250-55, and "C", CP 257-260. Mr. Cruz was later returned to custody and the Court ordered the bond returned to Metro City Bail Bonds. See Exhibit "D", CP 262-64.

Following this order, the surety for Metro City Bail Bonds, Fairmont Insurance, filed a motion in the criminal case against Cruz for return of funds. See Exhibit "E", CP 266-68. Fairmont asserted it was entitled to these funds because the check was issued by United States Fire Insurance Company and had a "clear notation on the face of the check [stating that], if funds were to be recouped, then said funds were to be returned

to United States Fire Insurance Company." See Exhibit "F", CP 270-74, and Exhibit "I". CP 282. Additionally, prior to issuance of the above order returning funds to Metro City, on August 3, 2006, Prosecutor von Wahlde had received a letter from Fairmont requesting that the bond be returned to United States Fire Insurance Company. See Exhibit "G", CP 276. Apparently based on the above assertions, on May 23, 2007, the Court ordered Metro City or Melissa McLachlan to re-deposit \$49,250.00<sup>2</sup> with the Clerk of the Court. See Exhibit "H", CP 291-94. Ms. McLachlan appealed the Court's order. Cruz, 148 Wn.App at 1.

In the appeal, Pierce County appeared as a co-respondent with McLachlan. Id. The County defended the original order returning funds to Metro City/McLachlan and asserted that the trial court lacked jurisdiction to order Metro City/McLachlan to return the bond because "McLachlan [was] a non party and cannot and should not be bound by the order of the Superior Court acting in its criminal capacity." Id.

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<sup>2</sup> This was the full amount of the bond (\$50,000.00) minus a standard court fee.

In its opinion, the Court of Appeals found that the original remittance order complied with state law and that the money was properly returned to Metro City/McLachlan. Id. However, the Court stated that "[w]hether Fairmont and Fire Insurance Co. otherwise have a claim against the clerk, Metro City, or McLachlan is not before us."

IV. ARGUMENT

I. **The trial court erred when it granted defendant Pierce County's 12(b)(6) motion to dismiss.**

CR 12(b)(6) grants the trial court the authority to dismiss a case where the plaintiff has failed to state a claim upon which relief can be granted. Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. See Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) ("On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim."); see also

Christensen v. Swedish Hosp., 59 Wn.2d 545, 548, 368 P.2d 897 (1962) (citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2L.Ed.2d 80 (1957)). A case dismissed pursuant to CR 12(b)(6) is reviewed *de novo*. King v. Snohomish County, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002).

Here, this Court should reverse the trial court's dismissal of Mr. Regan's claim because (1) the legal issues set-forth in State v. Cruz, while similar, were not the same as in Mr. Regan's case and thus, it was improper for the trial Court to adopt the facts from that case, (2) Mr. Regan targeted the Pierce County Clerk's office in his lawsuit, and because the clerk's office does not enjoy quasi-judicial immunity when performing ministerial tasks, it was improper for the Court to dismiss his claim under 12(b)(6), and (3) the doctrine of collateral estoppel does not apply in this case because there are different legal issues than those set-forth in the Cruz case, and, thus, the trial court erred when it dismissed this case.

- A. It was improper for the trial court to adopt the facts from the Cruz case because the legal issues were different.

In Cruz, the Court was addressing whether a criminal docket was the appropriate venue for addressing the legality of a remittance order. While the Court never reached that issue, because the legal issues were different, and because the parties submitted factual assertions specific to those unique legal issues, it was improper for the trial court in this case to rely on the facts from Cruz.

Specifically, as noted above, the Court in Cruz acknowledged that its decision did not foreclose claims against "the clerk, Metro City, or McLachlan..." Cruz 146 Wn.App at 11. Because Mr. Regan's case is specifically directed at those three defendants, it was improper for the trial court to conclude that the only facts to consider were those alleged in the Cruz case.

- B. Because the Pierce County Clerk's office does not enjoy quasi-judicial immunity, it was improper for the trial court to dismiss Mr. Regan's claim.

The trial court concluded that, because the Pierce County Clerk's office acted pursuant to a valid court order, it is immune from lawsuits under the doctrine of quasi-judicial immunity.

However, because the clerk's actions were ministerial, quasi-judicial immunity does not apply.

In Washington, Judges are absolutely immune from civil damage lawsuits for acts performed within their judicial capacity. Taggart v. State, 118 Wn.2d 195, 203, 822 P.2d 243 (1992). This is so to ensure that judges can administer justice without fear of personal consequences. Id. at 203; Adkins v. Clark County, 105 Wn.2d 675, 677, 717 P.2d 275 (1986). Quasi-judicial immunity "'attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions.'" West v. Osborne, 108 Wn.App. 764, 772-73, 34 P.3d 816 (2001) (*quoting Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 122 L.Ed. 2d 353, 113 S.Ct. 1044 (1993)), *rev. denied*, 145 Wn.2d 1012, 37 P.3d 292 (2000). A purely ministerial act by a clerk of the court is not a judicial act. Mauro v. Kittitas County, 26 Wn.App. 538, 540, 613 P.2d 195 (1980).

However, when performing court-ordered functions, a person acts as an "arm of the court," and is protected by quasi-judicial immunity. Reddy v. Karr, 102 Wn.App. 742, 749, 9 P.3d 927 (2000); Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991).

A "ministerial" act is one that "involves obedience to instructions or laws instead of discretion, judgment, or skill - the court clerk's ministerial duties include recording judgments on the docket." Black's Law Dictionary 1011 (7th ed. 1999). The duties of a superior court clerk are defined by statute and include, "keep[ing] the records, files and other books and papers appertaining to the court." RCW 2.32.050(3). "Generally speaking, a clerk of court is an officer of a court of justice, who attends to the clerical portion of its business, and who has custody of its records and files ... Such an office is essentially ministerial in its nature, and the clerk is neither the court nor a judicial officer." Swanson v. Olympic Peninsula Motor Coach Co., 190 Wash. 35, 38, 66 P.2d 842 (1937); see 15A Am. Jur. 2d, Clerks of Court § 21. The clerk's

duties are described on the Pierce County website  
as:

[M]ostly administrative in nature, being quasi-judicial in some cases. The Clerk is responsible for maintaining the records of all cases filed in the Superior Court dating back to the 1890's. The Clerk has several quasi-judicial duties, which include issuance of various writs, orders, subpoenas and warrants."

Pierce County Clerk of the Superior Court,  
available at:

<http://www.co.pierce.wa.us/pc/abtus/ourorg/clerk/home.htm> (last modified April 14, 2010).

In Mauro, 26 Wn.App. at 541, the Kittitas County clerk failed to record a court order withdrawing a defendant's arrest warrant, and the County argued that the clerk's actions were shielded by judicial immunity. Id. at 539. However, the Court found that the clerk's act was ministerial and that the county would be liable for the "ministerial nonfeasance" of its employee. Id. at 541.

Here, the original \$50,000.00 check had a clear notation on its face stating that "if funds were recouped ... they were to be returned to United States Fire Insurance Company." See Exhibit

"I", CP 282. Like the defendant in Mauro, the Pierce County clerk committed ministerial nonfeasance when it failed to document the clear instructions on the face of the check. Pierce County cannot claim it was an "arm of the court" because, had the clerk properly noted this instruction upon processing the check - in a manner consistent with its ministerial duties - it would have been unable to process the court order and would have informed the court of the issue.

Hypothetically, if a court ordered a clerk to make a payment from an account the court believed had money in it, but upon inspection by the clerk was found to not contain any money, the clerk would inform the court of the lack of funds and the court would re-consider its previous order. If the clerk - in an attempt to comply with the order - removed money from another account, the person whose money disappeared would certainly have a claim against the clerk. Here, because the clerk committed the ministerial nonfeasance when it failed to notice or to comply with clear instructions on the face of a check, it was

improper for the trial court to dismiss Mr. Regan's case under 12(b)(6).

C. Collateral estoppel does not apply in this case because Mr. Regan's case involves different issues than those addressed in Cruz.

Resurrection of the same claim in a subsequent action is barred by the doctrine of *res judicata*. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995). Under this doctrine, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" In re Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006) (quoting Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995)). When a subsequent action is based on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel. Hilltop Terrace Homeowner's

Ass'n, 126 Wn.2d at 31. Collateral estoppel, or issue preclusion, requires:

- (1) Identical issues;
- (2) a final judgment on the merits;
- (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and
- (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (quoting Malland v. Dep't of Ret. Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985)). In addition, "the issue to be precluded must have been actually litigated and necessarily determined in the prior action." Shoemaker, 109 Wn.2d at 508.

Here, because there were not identical issues in the Cruz case, collateral estoppel was incorrectly applied and the 12(b)(6) dismissal was improper.

While the Court in the Cruz case did ultimately conclude that the money was properly returned to Metro City, the Court was never asked to consider whether the clerk committed negligence. In fact, the Court in that case

explicitly stated that Fairmont and Fire insurance might still "have a claim against the clerk, Metro City, or McLachlan." Cruz 146 Wn.2d at 11. This fact alone defeats collateral estoppel - especially in light of the holding in Mauro where the Court determined that a court clerk can commit ministerial malfeasance. Here, because that issue was never addressed, Mr. Regan's complaint properly included claims for which relief could be granted and it was improper for the trial court to dismiss under 12(b)(6).

V. CONCLUSION

Based upon the arguments contained herein, Mr. Regan respectfully requests that this court reverse the trial court's dismissal pursuant to CR 12(b)(6).

VI. APPENDIX

Exhibit "A" - Metro City Bail Bond

Exhibit "B" - Motion for Forfeiture of Bail

Exhibit "C" - Order Forfeiting Bail

Exhibit "D" - Order Returning Bond

Exhibit "E" - Motion for Order Requiring  
Payment of Funds

Exhibit "F" - Declaration of Michael Zeimer

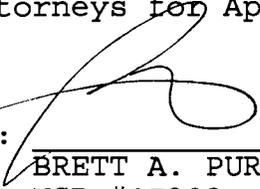
Exhibit "G" - Letter dated August 3, 2006

Exhibit "H" - Order

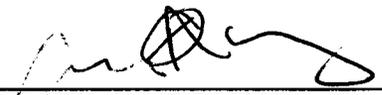
Exhibit "I" - Check

RESPECTFULLY SUBMITTED this 27th day of  
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CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Kathy Herbstler

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