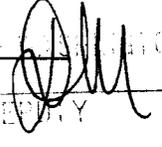


COURT OF APPEALS  
DIVISION II

No. 40152-5-II

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STATE OF WASHINGTON  
BY  DEPUTY

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

DAVID H. REGAN,  
Appellant,  
vs.

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

APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR THURSTON COUNTY

Cause No. 09-2-01653-1

REPLY BRIEF

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*P.M. 11-29-2010*

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STATEMENT OF THE CASE

Mr. Regan adopts the facts as set forth in petitioner's opening brief.

ARGUMENT

I. IT WAS IMPROPER FOR THE COURT TO ADOPT THE FACTS SET FORTH IN STATE V. CRUZ AND DISMISS MR. REGAN'S CLAIM UNDER CR 12(b)(6).

As stated, where a plaintiff is able to establish facts supporting the allegations in the complaint, dismissal under CR 12(b)(6) is improper. Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). "[O]n a 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." Id.

In this case, when the trial court adopted the facts as set forth in Cruz, it ignored facts suggesting that Pierce County was negligent in returning the bail bond funds to Metro city. Respondent contends that the trial court only took "judicial notice" of the facts and that "any assertion the trial court concluded those were the

only facts to consider has no support in the record." Brief of Respondent Pierce County at 9. However, this is incorrect. As outlined in Petitioner's opening brief, the trial court's order stated:

As its factual findings, this court adopts and incorporates, as if fully set forth herein, those facts stated in the unpublished opinion of the Court of Appeals in State v. Cruz, 146 Wn.App. 1006 (2008).

CP 337.

By "fully adopting" the facts from a case dealing only with the issue of whether a criminal docket was the appropriate venue for addressing the legality of a remittance order - and then dismissing the case under CR 12(b)(6) - the trial court never gave Mr. Regan a chance to prove that Pierce County was negligent. A jury never heard whether the Pierce County Clerk's Office knew of the inscription on the \$50,000 check or had any other knowledge that the funds were to be returned to the surety rather than Metro city. A jury never heard whether the Pierce County Clerk's Office had a policy for returning bond money to the surety rather than the bond company directly. That the Court in Cruz specifically acknowledged

its decision did not foreclose claims against "the clerk, Metro City, or McLachlan" proves that this case and Cruz are completely separate - and that it was error for the trial court to "fully adopt" the facts from Cruz. Because the issue of whether the clerk's office was negligent in dispersing the funds to Metro City is an issue of fact - to be determined by a jury - dismissal under 12(b)(6) was improper.

II. BECAUSE THE CLERK'S  
MINISTERIAL DUTIES BEGAN AFTER  
THE JUDGE SIGNED THE ORDER,  
THE CLERK IS NOT PROTECTED BY  
QUASI-JUDICIAL IMMUNITY.

Additionally, the trial court erred in dismissing Mr. Regan's claim under the doctrine of quasi-judicial immunity. While respondent contends that the clerk was "acting as an arm of the court" when processing the remittance order, the Washington Supreme Court has specifically rejected this line of reasoning. In Mauro v. County of Kittitas, 26 Wn.App. 538, 541, 613 P.2d 195 (1980), the Court of Appeals stated that judicial immunity ended the moment the judge executed an order withdrawing an arrest warrant. Id. at 540. Recently, in Lallas v. Skagit County, 167 Wn.2d

861, 912, 225 P.3d 910 (2009), the Supreme Court analyzed Mauro and affirmed the notion that once a judge executes an order, the immunity ends. The Court stated:

In contrast, the Court of Appeals in Mauro found Kittitas County not immune from a civil suit for damages when its employee failed to process a judicial order withdrawing an arrest warrant. In Mauro, which we cited with approval in Adkins, Mauro was cited for speeding. He failed to appear on his trial date, and a warrant was issued for his arrest. He paid the fine for his citation, and the court commissioner executed an order that the warrant be withdrawn. The order was never processed. Although it is not clear why the order was never processed, the order had to be hand delivered to the sheriff's office. Therefore, the fault had to lie with the clerk of either the court or the sheriff's department. Mauro was arrested pursuant to the warrant and later brought suit seeking damages. *The court concluded that the judicial function had been completed when the commissioner executed the order. Delivering the order and withdrawing the warrant were ministerial. Because the functions were ministerial and not judicial, the failure to do them was not intimately associated with the judicial process and, therefore, not entitled to immunity.*

Lallas, 167 Wn.2d at 912 (internal citations omitted).

Here, the moment the judge signed the order, the ministerial duties of the Piece County Clerk

began. Because ministerial duties are not protected under the doctrine of quasi-judicial immunity, it was improper for this case to be dismissed under 12(b)(6).

III. BECAUSE THIS CASE INVOLVES A SEPARATE LEGAL ISSUE THAN THAT DECIDED IN CRUZ, 12(B)(6) DISMISSAL UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL WAS IMPROPER.

The Court in Cruz was only addressing whether a non-party was bound by Superior Court orders created while the court was acting within its criminal capacity. The Court concluded that - based on the facts before it - the remittance money was properly returned to Metro City. Nonetheless, because it was not addressing the issue of whether the clerk or Ms. McLachlan had acted improperly, the Court did not foreclose the possibility that Mr. Regan could bring forth a negligence claim against one of those parties. While Mr. Regan - under the doctrine of judicial immunity - cannot challenge the Court's conclusion in Cruz, he should still be free to explore any negligence on the part of the clerk. As shown above, in execution of its ministerial duties, the clerk is not immune from liability. Because the

remittance of the funds was a ministerial duty,  
and because the Cruz case involved wholly separate  
legal issues, collateral estoppel does not apply  
and this case was improperly dismissed under CR  
12(b)(6).

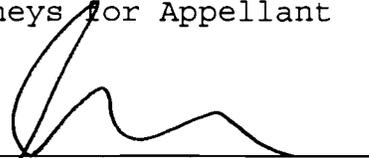
CONCLUSION

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

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of  
November, 2010.

HESTER LAW GROUP, INC. P.S.  
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By:

  
Brett A. Purtzer  
WSB #17283

COURT OF APPEALS  
DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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 reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 29<sup>th</sup> day  
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\_\_\_\_\_  
Kathy Herbstler