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DIVISION II

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STATE OF WASHINGTON

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47924-9-II

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

SHAWNEE K. LAZZARI, Appellant

v.

FREDIA DELORES SZETO, Respondent

RESPONSE BRIEF

1501 Dock Street
Tacoma, Washington 98402
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I. INTRODUCTION

This Court should affirm the trial court's summary dismissal of Appellant Shawnee Lazzari's ("Lazzari") complaint because it is barred by collateral estoppel.

Lazzari and Respondent Fredia Szeto ("Szeto") own neighboring property in rural Pierce County. Horses are boarded on both parcels, and Szeto runs a licensed boarding facility on her property. A 2012 lawsuit between the parties resulted in a Settlement Agreement dated June 23, 2014, resolving Szeto's counterclaims, which included claims that Lazzari was harassing Szeto's boarding clients, resulting in lost business. Lazzari paid \$4,500.00 to Szeto to settle the claims.

Several months after the Settlement Agreement was signed, Lazzari began a series of verbal threats directed at Szeto including repeated use of racial slurs.¹ Those threats became more severe on December 3, 2014, causing Szeto to seek protection in the form of an anti-harassment order, which was issued over Lazzari's objection. Lazzari argued that the Settlement Agreement, executed prior to the allegations in the petition for anti-harassment barred the issuance of the Anti-Harassment Order because Szeto also made reference to harassing

¹ Lazzari is Caucasian; Szeto is African American.

behavior that occurred prior to the date the Settlement Agreement was signed.

The court rejected Lazzari's argument, and a final order was entered on the anti-harassment issue. Lazzari then brought the Superior Court lawsuit which she now appeals seeking to vacate the anti-harassment order, making the same arguments she made in opposition to the entry of the order.

Szeto brought a motion to dismiss, relying only on the pleadings and attachments thereto, which the court properly granted.

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

1. Whether the trial court properly considered Szeto's motion to dismiss under Civil Rule 12, when Szeto's answer attached pleadings filed by Lazzari in the prior action, which Lazzari referenced in her new complaint. Yes.
2. Whether the trial court properly determined the doctrine of collateral estoppel applied where Lazzari's new complaint sought to relitigate the specific issues Lazzari raised and addressed in an earlier proceeding which ended in a final, appealable judgment. Yes.
3. In the alternative, whether an anti-harassment order can issue based on harassment occurring after the date of a settlement agreement where the Settlement Agreement resolves only harassment occurring up to the date of the agreement. Yes.
4. Whether the trial court properly rejected Lazzari's claim for unjust enrichment, an off-contract remedy, where Lazzari's sole basis for bringing this claim relies on the express written settlement agreement. Yes.

5. In the alternative, whether the trial court could properly dismiss Lazzari's claim for unjust enrichment where the doctrine of collateral estoppel applies and the prior court necessarily determined Szeto did not breach any settlement agreement. Yes.

III. STATEMENT OF THE CASE

Lazzari and Szeto became neighbors in Roy, Washington in 2012.

CP 1. Almost immediately after Szeto purchased her property, Lazzari filed a lawsuit against Szeto, and began to harass Szeto across the fence between the properties. *See* CP at 2-4, 10-11.

Lazzari first sued Szeto in 2012 under Pierce County Cause No. 12-2-15888-1 ("2012 Lawsuit")². CP at 2, 33-35. Lazzari claimed the following causes of action: (1) quiet title; (2) trespass; (3) injunctive relief; and (4) continuing nuisance. CP at 2, 33-35.

In her answer, Szeto filed counterclaims against Lazzari. Szeto's counterclaims included: (1) abuse of process; (2) trespass; (3) nuisance; (4) tortious interference with a business expectancy; and (5) negligent infliction of emotional distress. CP at 2, 10, 39-40. In her prayer for relief, Szeto sought money damages for the emotional distress as well as compensatory damages as a result of her lost business sales due to Lazzari's conduct. CP at 11, 40.

² The 2012 lawsuit also included a small claims matter filed under Pierce County No. 2Z901707C. CP at 6. The small claims matter was consolidated with the 2012 lawsuit.

On June 23, 2014, the parties settled Szeto's counterclaims against Lazzari. CP at 2, 6, 43-47. The 4-page Settlement Agreement (hereinafter "Settlement Agreement") contains the following language:

C. Claims. 'Claims' shall encompass all claims, causes of action, or demands known or unknown, that were brought or could have been brought by Counter Claimant against this Counter Claim Defendant resulting from, or to result from, the incident(s) alleged by Counter Claimant in the Lawsuit up until the date of execution of this Agreement by virtue of any act, omission or occurrence including, without limitation, all claims for personal injury, death, negligence, property damage, loss of use, attorney fees and/or costs, counterclaims, and cross-claims arising out of the Occurrence. 'Claims' also includes in the general sense any other damages, demands, disputes, fines, expenses, liabilities, losses, obligations, or any other causes of action, known or unknown, asserted or not asserted, at law or equity, statutory or common law, state or federal, which arise out of, exist on account of, or in any way relate to the allegations in the Lawsuit.

D. Release. Upon execution of this Agreement, payment to Counterclaimant Szeto of the Settlement Amount specified in Paragraph B(1) above, and dismissal of all claims, Counterclaimant Szeto expressly releases and shall be deemed to have forever discharged Counterclaim Defendant Lazzari, as defined in Section I above, and Counterclaim Defendant Lazzari's respective insurance carriers from any and all Claims, as defined above. It is hereby agreed that this Agreement is a compromise and a full settlement, accord and satisfaction of all counter claims.

CP at 6, 7.

In exchange for releasing her claims, Szeto received \$4,500.00 from Lazzari's homeowner's insurance. CP at 2. Accordingly, on June 27, 2014, the trial court dismissed Szeto's counterclaims after the parties stipulated to dismissal. CP at 43-47. Lazzari continued to prosecute her 2012 Lawsuit, which has now resolved. CP at 3, 6.

After entering into the Settlement Agreement, Lazzari began to harass Szeto, including using repeated racial slurs directed at Szeto. This harassment culminated in an incident on December 3, 2014, which caused Szeto to seek an anti-harassment order on December 4, 2014.

Szeto's petition sought relief from Lazzari's verbal threats and racial slurs.³ CP at 3, 11, 74. Szeto's petition relied on the December 3, 2014 event, as well as other instances, demonstrating a pattern of conduct. Some of the events to demonstrate the pattern occurred before the date the Settlement Agreement was signed. The most extreme events occurred on December 3, 2014, after the Settlement Agreement was signed.

A temporary Anti-Harassment Order was issued and hearing set for January 9, 2015. At the hearing, Lazzari argued that the anti-harassment order could not be entered because of the Settlement

³ For reference, the anti-harassment action was heard under Pierce County District Court Cause No. 4Z620384A. As discussed further below, Szeto attached the documents from this matter to her Answer to Lazzari's complaint underlying this appeal.

Agreement and dismissal of Szeto's counterclaims in the first action. CP at 4-5, 25-26, 43-48. The Court rejected that argument and issued the anti-harassment order, which was a final, appealable order. The district court restrained Lazzari from any further harassment. The court did not order or award any damages. CP at 4, 12, 72-73. Lazzari moved for reconsideration, which was denied. CP at 4, 12.

On May 27, 2015, Lazzari filed this underlying action. CP at 5. In her complaint, Lazzari alleged Szeto breached the Settlement Agreement, and in addition to a breach of contract claim, brought a claim for unjust enrichment. CP at 4-5. Lazzari alleged Szeto's reference to Lazzari's prior bad conduct (i.e., use of racial slurs) in her anti-harassment action breached the Settlement Agreement, despite the fact that the Court found that the petition for Anti-Harassment primarily relied on events occurring after the date of the Settlement Agreement. CP at 2-5.

In response, Szeto moved to dismiss Lazzari's action pursuant to Civil Rule 12(b). CP at 10-17. Szeto's Answer alleged collateral estoppel, based on the anti-harassment order action, precluded Lazzari's claim. CP at 20. Szeto further argued Lazzari failed to state a claim positing that the petition for anti-harassment was not a "claim" that was "released" by the Settlement Agreement. CP at 14-17, 20. Instead, Szeto argued any prior acts by Lazzari demonstrated the "course of conduct"

contemplated by Washington's anti-harassment statutes that culminated in the post-settlement December 3 incident. CP at 14-17, 20. The December 3 incident was the impetus for seeking the order of protection which occurred after the date of the June 2014 Settlement Agreement. CP at 14-17, 20.

Lazzari objected to Szeto's motion to dismiss. *See* CP at 74-82. Lazzari argued Szeto's motion was, in effect, a motion for summary judgment and not a motion to dismiss. CP at 75-76, 83-84. Szeto had attached and incorporated pleadings from the anti-harassment proceedings to her answer. Lazzari argued Szeto's decision to append pleadings to the answer necessitated the trial court convert Szeto's motion to dismiss into a motion for summary judgment. CP at 75-76. Szeto's answer appended: (1) Lazzari's declaration and attachments thereto⁴ from the district court matter; (2) Lazzari's supplemental declaration and attachments⁵ thereto; (3) Szeto's declaration in support of the anti-harassment petition, and

⁴ Lazzari's declaration in the district court matter attached (1) photographs; (2) Szeto's answer to the first trial court case; and (3) the stipulation and order of dismissal which dismissed Szeto's counterclaims. CP at 23-46.

⁵ Lazzari's supplemental declaration in the district court matter attached (1) photographs; (2) excerpts of Szeto's deposition taken on February 6, 2014; and (3) a letter from the Pierce County Health Department. CP at 47-53

attachments⁶ thereto; and (4) the anti-harassment order. *See* CP at 18-73. All of the documents Szeto attached to her answer were from the district court matter and were referred to, or implicated by, Lazzari's complaint. CP at 1-6, 18-73. Only Lazzari's counsel submitted a declaration (or any new information) under this cause number. CP at 83-84.

In the appended declarations, Lazzari clearly references the parties' Settlement Agreement stating, "Ms. Szeto should not be trying to revive or improperly refer to her counterclaims that were dismissed in my lawsuit." CP at 25. Further, Lazzari stated, "the allegations in Ms. Szeto counterclaims [sic] mirror those alleged by Ms. Szeto in this action." CP at 25. In her supplemental declaration, Lazzari informed the district court, "Szeto has refused to dismiss this action even though she is prohibited from relying upon the counterclaims that have been dismissed in my lawsuit." CP at 47.

The trial court below heard Szeto's motion to dismiss on July 17, 2015. *See* Verbatim Transcript of Proceedings, July 17, 2015 (hereinafter "RP"). The trial court considered argument from both parties regarding whether Szeto's motion was made pursuant to Civil Rule 12, or was a motion for summary judgment. RP at 2-9. The trial court, after reviewing

⁶ Szeto's declaration attached excerpts of Darlene Wilson's deposition taken on February 18, 2014, and pictures. CP at 60-70.

the parties' submissions, ruled Szeto's motion was a motion to dismiss and not a motion for summary judgment. RP at 8. The trial court also heard argument from Lazzari's counsel as to the merits of the motion. RP at 8-12. After argument, the trial court summarily dismissed Lazzari's claim reasoning collateral estoppel barred Lazzari's claims. RP at 8; CP at 89. Lazzari now appeals.

IV. ARGUMENT

A. Standard Of Review

The trial court granted Szeto's CR 12 motion to dismiss.⁷ In relevant part, CR 12(b) permits a defendant to move for dismissal where, as here, the plaintiff's complaint "fail[s] to state a claim upon which relief can be granted." CR 12(b)(6). An appellate court reviews a trial court's decision to dismiss pursuant to CR 12(b)(6) de novo. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 P.3d 487 (2015), review denied ____ P.3d ____.

⁷ At oral argument, the parties assumed Szeto brought her motion pursuant to CR 12(b). See RP at 7, 8. However, at oral argument counsel for Szeto also stated, "I think that this is a motion on the pleadings." RP at 8. A motion on the pleadings is governed by CR 12(c). Regardless, the analysis between a motion to dismiss pursuant to CR 12(b) and CR 12(c) are the same: "We treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim." *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 641, 289 P.3d 638 (2012).

Dismissal under CR 12(b)(6) is proper where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief. *Jackson*, 186 Wn. App. at 843. All facts alleged in the plaintiff's complaint are presumed as true. *Jackson*, 186 Wn. App. at 843. However, the appellate court need not adopt the complaint's legal conclusions. *Jackson*, 186 Wn. App. at 843.

An appellate court may affirm on any ground supported by the record. *Gronquist v. State*, 177 Wn. App. 389, 396 n. 8, 313 P.3d 416 (2013).

In this case, Szeto properly attached the district court record to her answer. The pleadings attached to Szeto's answer were directly or implicitly implicated and referenced by Lazzari's complaint. More importantly, Lazzari's declarations attached to the complaint, and the court record below, reflected Lazzari already raised the issue of whether Szeto could obtain relief for pre-Settlement conduct. Aside from collateral estoppel operating as a bar on Lazzari's underlying claim, Lazzari also fails to state a claim based on the language of the Settlement Agreement and Washington law.

B. Szeto Properly Attached the District Court Records to Her Motion to Dismiss and the Act of Attachment Does Not Convert Her Motion to Dismiss into Motion for Summary Judgment.

The attachment of the underlying district court pleadings did not convert Szeto's motion into a motion for summary judgment. Lazzari's Complaint referenced or implicated the district court matter. By attaching documents referenced by Lazzari's Complaint, the documents attached to Szeto's Answer became part of the pleading. Even if these prior-filed pleadings should not have been attached to the Answer, the trial court properly considered them.

Generally, when ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained within the complaint and cannot go beyond "the face of the pleadings." *Jackson*, 186 Wn. App. at 844. "But the trial court may take judicial notice of public documents if the authenticity of those documents cannot be reasonably disputed." *Jackson*, 186 Wn. App. at 844. "ER 201(b)(2) authorizes the court to take judicial notice of a fact that is not subject to reasonable dispute in that it is . . .capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Jackson*, 186 Wn. App. at 844 (quotations omitted); *see also Swak v. Dept. of Labor & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560 (1952) ("A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplemental to it."); *compare State v. Duran-Davila*, 77 Wn. App. 701, 705, 892 P.2d 1125 (1995)

(discussing “pre-ER 201 case law” prohibited trial court from taking judicial notice of records of proceedings between the same parties). In addition, a court may also consider, on a CR 12(b)(6) motion, specific documents referenced in the complaint, but which the plaintiff does not attach to the complaint. *Jackson*, 186 Wn. App. at 844.

In *Jackson*, Division I affirmed the trial court’s consideration of documents attached to the defendant’s motion to dismiss. *Jackson*, 186 Wn. App. at 845. The defendant’s motion attached and asked the trial court take judicial notice of (1) an adjustable rate note; (2) prepayment addendum; (3) an allonge; (4) publicly recorded property records; and (5) a deed of trust. *Jackson*, 186 Wn. App. at 844-45. The Court of Appeals affirmed the trial court’s consideration, and implicit judicial notice, of the defendant’s documents. *Jackson*, 186 Wn. App. at 844-45. As to the note, addendum, and allonge, the *Jackson* Court determined the trial court could consider these documents because the plaintiff’s complaint “repeatedly referenced” them. *Jackson*, 186 Wn. App. at 844. The *Jackson* court then reasoned notice of the property records and deed were proper, because the plaintiff “cannot challenge the authenticity of these readily available public documents.” *Jackson*, 186 Wn. App. at 845.

Szeto properly attached the district court record to her Answer. As explained in *Jackson, supra*, a defendant like Szeto may attach certain

documents to responsive pleadings for consideration on a defendant's motion to dismiss. Mere attachment does not convert, as illustrated in *Jackson, supra*, a defendant's motion to dismiss into a motion for summary judgment.

Factually, *Jackson, supra*, parallels these facts and, therefore, controls. Lazzari's Complaint references the district court matter. In fact, like the repeated references to extraneous matters in *Jackson, supra*, Lazzari's entire complaint concerns statements and actions in district court. *See* CP at 1-5. Thus, as illustrated in *Jackson, supra*, the trial court here properly considered the documents attached to Szeto's Answer. Moreover, Szeto attached Lazzari's own declarations. *See* CP at 23-27, 47-48. Lazzari "cannot challenge the authenticity of [her] readily available" declaration filed with the district court. Further, presumably neither party disputes the contents of the declaration. Lazzari submitted her declarations initially to the district court under penalty of perjury, which Szeto appended to her answer. Any attempt to challenge the authenticity of her declarations now is tantamount to an admission of perjury by Lazzari.

Additionally, Szeto did not attach the district court record for any argumentative purpose. Szeto's answer did not inject any new information. The attached court records were not provided for the truth of

the matter asserted. Instead, the documents provided reflect, objectively, Lazzari already raised the issue of pre-Settlement Agreement conduct in district court.

Lazzari's declarations clearly reference Szeto's counterclaims. In fact, Lazzari's supplemental declaration expressly states Szeto "is prohibited from relying upon the counterclaims that have been dismissed in my lawsuit." CP at 47. Accordingly, the trial court did not err in considering Lazzari's sworn declaration for the premise that Lazzari already argued that Szeto could not refer to malfeasance prior to the Settlement Agreement in the district court matter.

Moreover, *P.E. Systems, supra*, affirms the above analysis contrary to Lazzari's contention. See Br. of App. at 10-11. There, the Supreme Court explained Washington's CR 10⁸ permits a party to attach documents to a pleading for consideration under a CR 12(b) motion. *P.E. Systems*, 176 Wn.2d at 204. Applying the aforementioned rule, the Supreme Court stated the contract underlying the parties' dispute in *P.E. Systems*, "the authenticity of which is not contested, may be attached to [the answer] and

⁸ CR 10(c) in relevant part states: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

may be considered in a CR 12(b) or CR 12(c) motion.”⁹ *P.E. Systems*, 176 Wn.2d at 205.

P.E. Systems, supra, is consistent with *Jackson, supra*. Both cases explain authentic, objective, documents referenced and underlying the complaint may be attached and considered under a CR 12 motion. Accordingly, Lazzari’s declaration falls within the scope and spirit of CR 12 and CR 10. Again, Lazzari cannot contest the authenticity of her own declarations or the authenticity of publically available records within the district court file. Moreover, Szeto attached the district court record for an objective and not argumentative, purpose – namely, to show what arguments the district court considered prior. Again, Lazzari cannot simultaneously sue Szeto for statements presented to the district court,

⁹ As Lazzari notes, the *P.E. Systems* Court stated: “exhibits that stretch the definition of a ‘written instrument,’ such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings.” *P.E. Systems*, 176 Wn.2d at 205. However, the *P.E. Systems* Court illuminated the admissibility of “extrinsic evidence” by examining the PowerPoint that purported to explain the also attached, properly considered, contract. *P.E. Systems*, 176 Wn.2d at 206. The Court explained because P.E. attached the PowerPoint “to clarify the terms of the [attached] contract” the PowerPoint could not be considered under a CR 12 motion. *P.E. Systems*, 176 Wn.2d at 206. Again, Lazzari’s declaration submitted to the district court does not fall within the bar. Szeto did not attach Lazzari’s declaration to explain or support her position as one normally submits an affidavit or declaration or the PowerPoint in *P.E. Systems, supra*. To the contrary, Szeto attached Lazzari’s declaration merely to reflect the parties already addressed Lazzari’s conduct despite the Settlement Agreement.

repeatedly reference the district court matter, and then prevent the trial court from taking notice of the contents of the district court file.

The trial court properly considered the documents attached to Szeto's Answer in ruling that the claims were barred by collateral estoppel.

C. Collateral Estoppel Precludes Lazzari From Attempting To Litigate Whether Her Pre-Settlement Conduct Falls Within The Scope Of The Settlement Agreement.

The trial court below ruled collateral estoppel barred Lazzari's new complaint. Lazzari's complaint seeks to relitigate an issue she raised in the district court. Namely, Lazzari now seeks to relitigate whether Szeto could reference the pre-Settlement Agreement conduct in the subsequent anti-harassment petition. In doing so, Lazzari seeks reimbursement of the settlement proceeds after the court ordered her to refrain from harassing Szeto.

An appellate court reviews whether collateral estoppel applies under a de novo standard of review. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

Collateral estoppel bars relitigation of issues resolved in a prior proceeding. *Christensen*, 152 Wn.2d at 306. Collateral estoppel prevents a second litigation of issues between the parties even though a different claim or cause of action is asserted. *Christensen*, 152 Wn.2d at 306.

Collateral estoppel promotes judicial economy and prevents harassment of the parties. *Christensen*, 152 Wn.2d at 307. The party asserting the doctrine of collateral estoppel must establish:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307. Collateral estoppel may be applied to only those issues actually litigated and necessarily and finally determined in the earlier proceeding. *Christensen*, 152 Wn.2d at 307. The party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Christensen*, 152 Wn.2d at 307.

Here, all elements of collateral estoppel are met. As evidenced by the district court record, Lazzari already raised and argued whether pre-settlement conduct could give rise to the anti-harassment order, the Settlement Agreement notwithstanding. By concluding Szeto could raise pre-settlement conduct, the court necessarily addressed Lazzari's rephrased "breach of contract" claim.

1. *The district court already considered whether Szeto could reference Lazzari's pre-Settlement Agreement conduct to obtain an anti-harassment order.*

Collateral estoppel applies to issues litigated, and necessarily and finally determined in a prior proceeding. *Christensen*, 152 Wn.2d at 307.

In *State Farm Mutual Automobile Insurance Company v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2002), the Court of Appeals recognized litigation after a settlement agreement could preclude raising the same issue of liability at a later date. There, State Farm entered into a settlement agreement with an insured which purported to resolve all claims. *State Farm*, 114 Wn. App. at 302. The insured subsequently sued and recovered after the settlement. Afterwards, the insured sued again and State Farm then responded the settlement precluded recovery. *State Farm*, 114 Wn. App. at 302. The Court of Appeals rejected State Farm's contention that the settlement agreement was not central to the first action stating State Farm

...[did] not offer any suggestion as to how the court could have avoided considering the settlement agreement. [The insured's] complaint alleged that State Farm owed him money. No basis for this claim existed other than the settlement agreement. Adjudication of the issue was then manifestly essential to the first small claims judgment.

State Farm, 114 Wn. App. at 306.

Lazzari narrowly, and improperly, describes the relevant issue. In her brief, Lazzari asserts the relevant issue is whether Szeto breached the Settlement Agreement by reference to pre-settlement conduct in the

district court. Brief of Appellant, filed Nov. 6, 2015 (hereinafter “Br. of App.”) at 14. However, the district court necessarily addressed this recycled argument when the district court considered the actual issue, that is, whether Lazzari’s pre-Settlement Agreement conduct could be considered in the anti-harassment proceeding to establish “course of conduct,”¹⁰ Settlement and dismissal notwithstanding.

The district court already addressed Lazzari’s pre-settlement conduct and the effect upon an anti-harassment order. As in *State Farm, supra*, Lazzari offers no suggestion as to how the district court could have ignored addressing this issue.¹¹ The court issued the anti-harassment order and, therefore, necessarily determined the Settlement Agreement did not preclude the court from considering pre-settlement conduct. Logically, if the court concluded the Settlement Agreement did not prevent consideration of prior conduct, then the act of referencing prior conduct

¹⁰ See RCW 10.14.030, .020(1) (defining “course of conduct” for purposes of obtaining anti-harassment order in part as, “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose”).

¹¹ In fact, if Lazzari claims she failed to raise the settlement in the anti-harassment hearing, Lazzari could not then raise the issue on direct appeal. *Smith v. Shamon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). (“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.”). Therefore, Lazzari cannot assert the settlement in this subsequent and separate cause of action.

cannot give rise to a breach of the Settlement Agreement now. Now, Lazzari seeks another bite at the proverbial apple under the guise of breach of contract.

2. *The anti-harassment order issued by the district court is a valid, final judgment.*

The district court anti-harassment matter ended in a judgment. An anti-harassment order is a final judgment. *See* CR 54(a)(1).

(“A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies”); *see also In re Marriage of Suggs*, 152 Wn.2d 74, 79, 93 P.3d 161 (2004) (anti-harassment order is a final, appealable, order); *Trummel v. Mitchell*, 156 Wn.2d 653, 663, 131 P.3d 305 (2006) (anti-harassment order is final and appealable). “A judgment must be in writing and signed by the judge, CR 54(a)(1), but need not be in any particular form.” *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) (quotations omitted).

The district court issued the anti-harassment order after notice and a hearing. CP at 3-4, 72-73. The district court considered the merits of the parties’ claims and subsequently issued an anti-harassment order. *See* CP at 3-4, 72-73. Accordingly, the anti-harassment matter, in which Lazzari raised her objection to Szeto’s reference to pre-settlement conduct,

ended in a judgment. Though Lazzari moved for reconsideration, she never appealed. Lazzari cannot now collaterally attack the judgment.

3. *Szeto and Lazzari were the parties in the district court and trial court matters.*

The parties to the district court and trial court matters are identical. *See* CP at 1, 72-73. Szeto and Lazzari were party to both the anti-harassment action as well as thus underlying “breach of contract” action.

4. *Lazzari raised and argued the issue of whether her pre-Settlement Agreement conduct could support an anti-harassment claim; she is not prejudiced now.*

“The injustice component is generally concerned with procedural, not substantive irregularity.” *Christensen*, 152 Wn.2d at 309. Procedural unfairness contemplates whether the party whom collateral estoppel is asserted against had a full and fair opportunity to litigate the estopped issue. *Christensen*, 152 Wn.2d at 317. The injustice element also contemplates public policy considerations. *Christensen*, 152 Wn.2d at 310.

Lazzari argued to the district court below that Szeto could not “revive...her counterclaims that were dismissed.” CP at 25; *see also* CP at 47. The district court contemplated whether Szeto’s allegations, as stated by Lazzari, “mirror[ed] those alleged” in Szeto’s trial court counterclaim which were subject of the Settlement. CP at 6, 25. The

district court granted the anti-harassment order after a full hearing and, as evidenced by the appended court file, an opportunity to litigate. CP at 3-4, 72-73. In granting Szeto's requested relief, the district court necessarily concluded the Settlement Agreement did not bar the anti-harassment order. Moreover, Lazzari moved to reconsider the district court ruling, which the district court denied. CP at 4, 12. Lazzari failed to appeal, instead choosing relitigate this matter collaterally, by way of separate complaint rather than the direct appeal.

Additionally, Lazzari did not suffer injustice by failure to convert Szeto's CR 12 motion into a CR 56 motion for summary judgment. As explained above, Szeto submitted records from the district court case, which Lazzari based her breach of contract claim upon. CP at 2-5; *see also* 22-73. Contrary to Lazzari's references on appeal, Szeto did not submit any new declarations, affidavits, or other sworn statements for consideration.¹² Lazzari cannot now argue she suffered injustice because Szeto informed the trial court of the contents of the district court file.

¹² Lazzari claims the abbreviated CR 12(b) schedule prevented Lazzari from "procur[ing] additional affidavits and evidence." Br. of App. at 18. However, Lazzari had ample opportunity, and knew how to attach documents pursuant to CR 10, she attached the parties' settlement agreement. CP at 6-9. Moreover, Lazzari's short-sighted statement fails to grasp Szeto's "affidavits and evidence" were pleadings from the district court matter that were previously filed by Lazzari.

D. The Definition of “Claim” in the Settlement Does Not Encompass a Civil Action for Harassment Based on Post-Settlement Conduct, as Harassment Requires Proof of a “Course Of Conduct” of Harassment.

The definition of “claim” in the Settlement Agreement contemplates claims that were ripe as of the date of execution. By contrast, a petition for anti-harassment requires proof of “course of conduct” which necessarily contemplates ongoing conduct. Szeto sought the anti-harassment order on December 4, 2014, after the altercation with Lazzari on December 3, 2014. Accordingly, Szeto’s claim to obtain an anti-harassment order was not ripe because the “course of conduct” culminated on December 3.

Settlement agreements are governed by general principles of contract law. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). The primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. app. 706, 712, 334 P.3d 116 (2014). A court focuses on the reasonable meaning of the contract language to determine the parties’ intent. *Viking Bank*, 183 Wn. App. at 712-13. A court gives words their “ordinary, usual, and popular meaning unless the entirety of the agreement demonstrates a contrary intent.” *Viking Bank*, 183 Wn. App. at 713. If a contract term is subject to two or

more reasonable interpretations, after analyzing the language and extrinsic evidence,¹³ if appropriate, the term is ambiguous. *Viking Bank*, 183 Wn. App. at 713. Ambiguities are construed against the drafter; or, if the parties drafted the contract together, a court will adopt the “interpretation that is the most reasonable and just.” *Viking Bank*, 183 Wn. App. at 713.

The Settlement Agreement provides the following definition:

C. Claims. “Claims” shall encompass all claims, causes of action, or demands known or unknown, that were brought or could have been brought by Counter Claimant against this Counter Claim Defendant resulting from, or to result from, the incident(s) alleged by Counter Claimant in the Lawsuit up until the date of execution of this Agreement by virtue of any act, omission or occurrence including, without limitation, all claims for personal injury, death, negligence, property damage, loss of use, attorney fees and/or costs, counterclaims, and cross-claims arising out of the Occurrence. “Claims” also includes in the general sense any other damages, demands, disputes, fines, expenses, liabilities, losses, obligations, or any other causes of action, known or unknown, asserted or not asserted, at law or equity, statutory or common law, state or federal, which arise out of, exist on account of, or in any way relate to the allegations in the Lawsuit.

CP at 6.

¹³ To assist in interpreting a contract, a court may employ extrinsic evidence to ascertain the parties intent. *Viking Bank*, 183 Wn. App. at 713. However, a court may only consider extrinsic evidence to determine the meaning of specific words and terms used and not to show an intent independent of the instrument or to vary, contradict, or modify the written word. *Viking Bank*, 183 Wn. App. at 713.

The legislature defined “unlawful harassment” for purposes of an anti-harassment order as:

. . . knowing and willful *course of conduct* directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner. . . .

RCW 10.14.020(2) (emphasis added). “Course of conduct” in turn considers more than one event, “a pattern of conduct composed of a series of acts over a period of time, *however short*, evidencing a continuity of purpose.” RCW 10.12.020(1) (emphasis added); *see also State v. Haines*, 151 Wn. App. 428, 437, 213 P.3d 602 (2009) (RCW 10.14.020 does not require each individual event amount to harassment but instead contemplates a series of harassing acts).

In *State v. Kintz*, the Supreme Court affirmed the *Haines* Court’s interpretation of both Washington’s criminal¹⁴ and civil anti-harassment statutes. *State v. Kintz*, 169 Wn.2d 537, 554-55, 238 P.3d 470 (2010). Quoting from *Haines*, *supra*, the Supreme Court adopted the court of appeal’s reasoning:

To the contrary, both the plain text and structure of the statutory sections at issue indicate that what must be

¹⁴ Washington’s criminal stalking statute, RCW 9A.46.110(6)(c) defines “harasses” for criminal purposes by cross reference to the definition of unlawful harassment in RCW 10.14.020.

‘Repeated’ is a ‘course of conduct’ that ‘seriously alarms, annoys, harasses, or is detrimental’ to the victim. There is no basis whatsoever to suppose that each of the separate acts that comprise that course of conduct must be vexatious when taken in isolation. It is the combination of separate acts—none of which is necessarily criminal in its own right—that must be ‘seriously alarm[ing], annoy[ing], harass[ing], or detrimental’ to the victim in order for the perpetrator to have committed the criminal offense of stalking.

Kintz, 169 Wn.2d at 554 (quoting *Haines*, 151 Wn. App. at 435 (quoting RCW 10.14.020(2))) (alterations in original).

The Settlement Agreement does not contemplate “course of conduct” as defined by RCW 10.14.020. Instead, the term “claim” contemplates actions “that were brought or could have been brought” as of the date of the Settlement’s execution. CP at 6. Though Szeto raised allegations that may have risen to “course of conduct” in her counterclaims, the allegations from the December 3, 2014 altercation was the impetus for filing the petition for an anti-harassment order. The December 3 event had not yet occurred at the time of settlement. As indicated by *Haines* and *Kintz*, *supra*, a single bad act is part of “a combination of separate acts” that amounts to unlawful harassment. Moreover, RCW 10.12.020(1) defines course of conduct as harassment “*however short.*” The statute does not bookend, or put a time limit on, when course of conduct begins or ends. The plain language of the statute

allows Szeto to, as she did, allege the December 3 incident was part of the same “course of conduct.” Thus, the separate acts both before and after the Settlement constitute, and are essential for Szeto’s unlawful harassment claim underlying the anti-harassment order.¹⁵ Effectively, Lazzari’s argument, that Szeto (or a court) cannot consider acts prior to the Settlement, results in Lazzari receiving a “free pass” to harass.¹⁶ This result is absurd.

Regardless, as evidenced by this underlying complaint and the anti-harassment petition, since the Settlement, particularly on December 3, Lazzari unlawfully harassed Szeto. Accordingly, because the harassing “course of conduct” came to fruition on December 3, Szeto’s claim arose on December 3. Thus, the Settlement does not contemplate Lazzari’s

¹⁵ Taking Lazzari’s facts as true, her statement that the district court’s order “had been based on more than the December 3, 2014 allegation” is irrelevant. CP at 4. Again, course of conduct contemplates a series of events, “however short” or conversely, however long, that amount to a “course of conduct.” See RCW 10.12.020(1).

¹⁶ Washington Courts do not enforce illegal contracts or contracts that contravene public policy in order to protect the public. *Danzig v. Danzig*, 79 Wn. App. 612, 622, 904 P.2d 312 (1995). Thus, to the extent Lazzari argues Szeto must not report harassment, which also implicates criminal statutes, or pay a penalty, the Settlement is invalid and unenforceable.

harassing “course of conduct” for purposes of obtaining a subsequent anti-harassment order.¹⁷

Moreover, the Settlement Agreement seeks to ascertain the parties’ mutual intent.¹⁸ Lazzari offers no evidence that Szeto sought to release Lazzari of: (1) an unripe claim, or (2) permit Lazzari to harass Szeto without recourse. Presumably, the parties sought to resolve their then-existing dispute with the Settlement Agreement – not permit harassment with impunity. *See* CP at 6.

In conclusion, the term “claim” does contemplate a release from unaccrued “course of conduct” as contemplated by RCW 10.14.020.

E. The Trial Court Did Not Err by Dismissing Lazzari’s Unjust Enrichment Claim.

Lazzari argues, without authority, that the trial court improperly dismissed Lazzari’s unjust enrichment claim. The trial court properly rejected Lazzari’s claim. As explained above, the trial court necessarily determined pre-settlement conduct could be considered at the district

¹⁷ In light of the requirement that an anti-harassment order requires more than one act of harassment, the fact that the district court did not rely solely on the December 3 incident is inconsequential. To the contrary, such analysis confirms that, as of the date of execution of the Settlement Agreement, Szeto’s claim for harassment was not yet ripe.

¹⁸ This analysis also comports with common sense and is “most reasonable and just” to the extent the word “claim” is ambiguous. *Viking Bank*, 183 Wn. App. at 713. Interpreting the term “claim” to permit Lazzari to harass Szeto with impunity is neither reasonable nor just.

court, despite the Settlement Agreement. Therefore, Lazzari cannot present a basis for unjust enrichment.

As a matter of law, Lazzari cannot argue both breach of contract and unjust enrichment. Unjust enrichment is a cause of action based on the legal fiction of an implied contract. *Pierce Cnty. v. State*, 144 Wn. App. 783, 828-29, 185 P.3d 594 (2008). A party to an express contract cannot bring an action on an implied contract relating to the same subject matter in contravention of the express contract. *Pierce Cnty.*, 144 Wn. App. at 829; *see also Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.”) (Emphasis added).

Accordingly, Lazzari may only assert her breach of contract claim, if, as she contends, the contract addresses the use of pre-Settlement Agreement conduct. The trial court did not err in dismissing Lazzari’s implied contract, unjust enrichment claim, in light of Lazzari’s strenuous contention that the express, written, Settlement Agreement controlled.

Regardless, the district court determined Szeto did not breach the Settlement Agreement. The trial court did not need to specifically address this issue: (1) because Lazzari argued an express contract applied, and (2) because the trial court dismissed Lazzari’s claim based upon collateral

estoppel. In order to show a prima facie case of unjust enrichment, the plaintiff must show:

. . . a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Young, 164 Wn.2d at 484 (emphasis added). Enrichment alone does not trigger an unjust enrichment claim. *Dragt v. Dragt/De Tray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007). Instead, “the enrichment must be unjust under the circumstances and as between the two parties to the transaction.” *Dragt*, 139 Wn. App. at 576.

As explained above, the district court considered, and rejected Lazzari’s contention that Szeto could not present pre-Settlement Agreement conduct to establish “course of conduct.” Stated differently, the court already concluded Szeto did not breach the Settlement Agreement. Because Szeto did not breach any agreement, retention of the funds Lazzari’s insurer paid cannot be “unjust under the circumstances.” Moreover, Lazzari fails to explain how Szeto’s act of defending herself from Lazzari’s potentially criminal conduct¹⁹ can in any way be construed as “unjust.” Szeto sought the anti-harassment order to protect herself from

unlawful harassment. Accordingly, because a court already determined Szeto was not barred from citing pre-Settlement Agreement conduct, and sought respite from Lazzari's harassing conduct, Szeto's retention of the settlement funds here is not unjust.

F. Szeto Should Be Awarded Fees on Appeal.

The Settlement Agreement between the parties provides that in the event a party initiates litigation to enforce the agreement, the prevailing party is entitled to an award of attorney's fees and costs. CP 8. Based on this provision, the trial court awarded Szeto attorney's fees for successfully defending in the action. Pursuant to RAP 18.1, Szeto requests an award of fees on appeal.

V. CONCLUSION

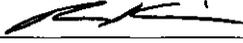
The trial court properly dismissed Lazzari's attempt to relitigate settled matters. Lazzari already raised the issue of whether pre-settlement conduct could give rise to an anti-harassment order. Lazzari cannot now bring a separate claim and seek the same relief, which a prior court denied. In the alternative, Lazzari fails to state a claim as the conduct giving rise to the disputed anti-harassment order did not occur until after the parties executed the Settlement Agreement.

¹⁹ See RCW 9A.46.110(1) (setting forth elements for "the crime of stalking").

Finally, because Lazzari asserts a breach of contract claim based on an express contract, she cannot now maintain a cause of action for unjust enrichment.

RESPECTFULLY SUBMITTED this 14th day of December, 2015.

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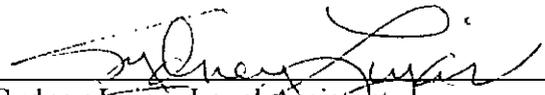
CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, I served a true and correct copy of the foregoing document upon counsel of record, via the method noted below, properly addressed as follows:

BY AP
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