

**NO. 439832**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

JOYCE KELLEY, Individually, Respondent

v.

PIERCE COUNTY, a county corporation, MARK SKAGREN & "JANE  
DOE" SKAGREN, Petitioners

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**PIERCE COUNTY'S REPLY BRIEF**

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MARK LINDQUIST  
Prosecuting Attorney

By  
DANIEL R. HAMILTON  
Deputy Prosecuting Attorney  
Attorneys for Pierce County

955 Tacoma Avenue South  
Suite 301  
Tacoma, WA 98402  
PH: (253) 798-7746

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## I. RESPONSE TO PLAINTIFF'S "MOTION TO STRIKE"

Before it addresses what it calls defendant Pierce County's "hyper-technical arguments," RB 4, plaintiff Joyce Kelly's response brief – filed after the deadline and before the Court granted permission to do so – makes a "motion to strike" ironically asserting defendant Pierce County's opening brief has "many problems" under the appellate rules that in some unexplained way are "cumulatively prejudicial." *Id.* at 1-2. Plaintiff, however, is not only mistaken but fails to: 1) identify what she requests to be "stricken;" 2) state any argument or authority that would justify such relief; and 3) follow the appellate rules concerning motions in appellate briefs. *See* RAP 10.3(a)(6) (requiring "references to relevant parts of the record"); RAP 17.4(d) (allowing motion in a brief "only" if it "would preclude hearing the case on the merits"); *Point Allen Service Area v. Wash. State Dept. of Health*, 128 Wn.App. 290, 115 P.3d 373 (2005) (not considering "alleged errors unsupported by citation to the record or legal analysis"). *See also Engstrom v. Goodman*, 166 Wn.App. 905, 909 n. 2, 271 P.3d 959 (2012) ("motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider. No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an op-

portunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials – not a separate motion to strike").

In any case, plaintiff initially claims without explanation that under RAP 10.3(a)(4) the County's "assignment of error" somehow is "too general for proper appellate consideration." *Id.* However, an assignment of error simply must list the "specific trial court action" claimed to be erroneous, *see* 2 Wash. App. Prac. Deskbook, § 19.7(8) at 19-10 (3<sup>rd</sup> ed. 2011), and the County's assignment here expressly states the trial court erred in denying its "motions to dismiss and for reconsideration" – while the "Issues Pertaining to Assignment of Error" unambiguously identifies the specific facts showing error by failing to dismiss on "quasi-judicial immunity." *See* AB 1. Even plaintiff concedes there is no prejudice because "both parties are very familiar with the issues presented below" and "this matter has already been through discretionary review." RB 1.

Next, plaintiff asserts discretionary review was granted only on "immunity" and therefore "collateral estoppel" regarding that immunity issue is not before the Court. *Id.* at 2-3. Though the Commissioner certainly denied review on the County's argument that "the district court's denial of ... an order of protection on grounds of quasi-judicial immunity precludes her claim here," he also expressly granted review on "whether

quasi-judicial immunity applies to Skagren [sic]." CP 166, 172 (emphasis added). Accordingly, the County's brief does not argue the prior legal ruling that qualified immunity "precludes her claim here," but instead asserts the District Court's prior factual finding that Shagren was "acting as a GAL at the time of these events" is one of the reasons why "quasi-judicial immunity applies to" the GAL. *See also Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) ("[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim") (quoting *Restatement (Second) of Judgments* § 27 (1982)) (emphasis added); *Lemond v. State Dept. of Licensing*, 143 Wn.App. 797, 833, 180 P.3d 829 (2008) (same).

Plaintiff's request that this Court disregard a prior judicial factual finding that the GAL was performing a court ordered function at the time at issue not only violates public policy against an impermissible second "bite at the apple," *see discussion infra.* at 14-15, 20-21, but also violates the principle that the "discretionary review criteria in RAP 2.3(b) must be liberally applied" to immunity defenses because it is "an immunity from suit rather than a mere defense to liability" and is "effectively lost if the case is erroneously permitted to go to trial." *See Jones v. State, Dept. of*

*Health*, 170 Wn.2d 338, 242 P.3d 825 (2010); *Walden v. City of Seattle*, 77 Wn. App. 784, 787-88, 892 P.2d 745 (1995). *See also Deschamps v. Mason County Sheriff's Office*, 123 Wn.App. 551, 558, 96 P. 3d 413 (2004); *Marthaller v. King County Hosp.*, 94 Wn.App. 911, 973 P.2d 1098 (1999).

In any case, the County has never conceded the Commissioner was correct as to the separate and independently dispositive collateral estoppel effect of the district court's legal holding of immunity and would welcome that different issue's consideration by this Court as an additional and separate ground for reversal previously raised by the County. *See* RAP 1.2 ("rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits"); *State v. Hathaway*, 161 Wn.App. 634, 651-52, 251 P.3d 253 (2011) (though issue was "not properly before this court in this appeal," because "review of this purely legal question at this time will facilitate justice and likely conserve future judicial resources, we consider the merits of Hathaway's argument"). Having incorporated her previous discretionary review briefing on collateral estoppel into her appellate brief, RB 24-29, plaintiff identifies no prejudice if the prior legal holding of immunity is considered along with the factual finding.

## II. ARGUMENT

### A. RECORD AND HYPOTHETICAL FACTS CAN BE CONSIDERED

Plaintiff begins her "argument" by claiming that orders in her underlying dependency action should not have been allowed in the appellate record because "Appellate Court's [sic] will not consider issues raised for the first time on appeal" and "there is no indication in the record the Trial Judge reviewed these orders." RB 9. In fact, the undisputed record unambiguously shows the County specifically and repeatedly relied on and cited those dependency orders to the trial court. *See* CP 14, 103. Indeed, plaintiff's own complaint expressly mentions her parental termination hearings. *See* CP 8. *See also Averill v. Farmers Ins. Co. of Washington*, 155 Wn.App. 106, 111, 229 P.3d 830 (2010) (in CR 12(b)(6) motion document was considered because it had been incorporated into complaint); *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 725-26, 189 P.3d 168 (2008) ("[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss" and are not "outside the pleadings and [are] properly considered"). In that plaintiff neither opposed the County's motion to include those orders in the appellate record nor moved to reconsider their inclusion, *see* 1/9/13 Cy RAP 9.10 Mot.; 1/25/13 Comm. Rul-

ing, her objection now is both baseless and untimely.

Plaintiff next argues this Court can no longer follow the longstanding holding in *Berge v. Gorton*, 88 Wn.2d 756, 576 P.2d 187 (1977), that under ER 201 a Court can take "judicial notice of matters of public record" in a CR 12(b)(6) motion. Instead, she argues the "current and more recent precedent" of *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98-99, 117 P. 3d 1117 (2005) and *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003), allegedly held "a court cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they may be between the same parties." RB 14. In fact, neither *Spokane* nor *B.T.* involve judicial notice by a trial court under ER 201 in a CR 12(b)(6) motion but address requests under RAP 9.11 for judicial notice for the first time on appeal.

The Supreme Court's express approval in *Berge* of judicial notice of records in another case for a CR 12(b)(6) motion is indistinguishable from the records here. Indeed, *Berge*, 88 Wn.2d at 763, specifically cites *Iacoponi v. New Amsterdam Casualty Co.*, 379 F. 2d 311, 312 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968), where "judicial notice of the state proceedings" was taken so as to recognize that a prior "Court considered these allegations and the evidence in support of them thoroughly and

found that there was ... no evidence" of a claim. (Emphasis added.) Far "more recent" decisions than *Spokane* and *B.T.* continue to affirm the taking of judicial notice on CR 12(b)(6) motions. See e.g. *Regan v. McLachlan*, 163 Wn.App. 171, 179, 257 P.3d 1122 (2011) (Div. II examined previous order to find quasi-judicial immunity); *Yurtis v. Phipps*, 143 Wn.App. 680, 689, 181 P. 3d 849 (2008) (granting "CR 12(b)(6) motion to dismiss on the grounds of res judicata and collateral estoppel" based on records in another case). See also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); ER 201(f) ("Judicial notice may be taken at any stage").

Plaintiff also somehow asserts it is "inequitable" and "nonsensical" that on a CR 12(b)(6) motion a Court can take judicial notice of other court records but not her newly crafted declaration of newly minted allegations filed to oppose dismissal. See RB 7 n. 4. Though plaintiff cites nothing that allows opposing declarations to supplement an answer, see CR 12(b) (recognizing court may "exclude" other submissions that are "outside the pleadings"), her declaration's newest allegations at best are a

proposed set of hypothetical facts.<sup>1</sup> As such, they must be "consistent with the complaint," *Stangland v. Brock*, 109 Wn.2d 675, 676, 747 P.2d 464 (1987), and will be disregarded if they "do not reasonably follow from [her] description of what happened, or if these allegations are contradicted by the description itself". 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 597 (1969). Hence, though a "hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim," where "plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005) (affirming dismissal of claim) (emphasis added). As shown below, plaintiff's newest allegations are insufficient to preclude quasi-judicial immunity because her filings and judicial notice confirm its presence here as a matter of law.

Finally, plaintiff claims "the Court has no alternative but to assume the hypothetical set of facts where Mr. Skagren [sic] is not engaging in a judicial function at the time of his conduct." RB 13. However, the assumption requested by plaintiff is not a proposed factual hypothetical but a

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<sup>1</sup> Plaintiff notes "no order was ever entered by the trial court striking Ms. Kelley's declaration," AB 8 n. 5, but ignores no such order is necessary. *See Parks v. Fink*, \_ Wn.App. \_\_\_, 293 P.3d 1275, 1279 n. 7 (2013) (declarations "cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, ... a 'motion to strike' ... is actually an objection to the admissibility of evidence").

proposed legal conclusion, and on CR 12(b)(6) the "court is not required to accept the complaint's legal conclusions as true." *Rodriguez*, 144 Wn. App. at 717-1. *See also Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 120-21, 744 P. 2d 1032 (1987) (same). This is especially true where that legal conclusion is contrary to the complaint and Court record.<sup>2</sup>

**B. IMMUNITY CAN BE DECIDED UNDER CR 12(b)(6) STANDARD**

Plaintiff asserts "it simply is not the prerogative of a court to make a determination under CR 12(b)(6) standards" that GAL Shagren "is entitled to 'quasi-judicial immunity' when the entitlement is [sic] such an immunity depends on the inherently factual issue as to whether or not he was engaging in a 'judicial function' ... at the time of his actions alleged in the amended complaint." RB 13. First, whether alleged misconduct occurs while performing a "judicial function" can and repeatedly has been decided under CR 12(b)(6). *See e.g. Regan*, 163 Wn.App. at 177 (CR 12(b)(6) motion granted on grounds of quasi-judicial immunity's "insuperable bar" to suit); *Trohimovich v. Department of Labor and Industries*, 73 Wn.App.

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<sup>2</sup> Though plaintiff nowhere explains how it would preclude reversal or prejudice her, she also asserts the County's "statement of facts" mistakenly makes a single minor mention of a prior "unfavorable" GAL recommendation in the underlying dependency action that was not included in the trial court record. *Compare* AB 1 *with* Resp. Br. at 8-9. Because a further inspection of the record shows she is correct on this single factual issue, the County has moved to amend its brief to exclude the phrase: "after the GAL had begun to make recommendations unfavorable to her." *See* 4/8/13 Motion to Amend Brief.

314, 317-18, 869 P.2d 95 (1994) (CR 12(b)(6) dismissal on quasi-judicial immunity). Similarly, the preclusive effect of a prior judicial fact finding likewise has been decided under CR 12(b)(6). *See e.g. Yurtis*, 143 Wn. App. at 689-90 (affirming CR 12(b)(6) dismissal order because trial court properly had no basis to review alleged factual conclusion of prior court).

Second, the complaint, the records to which it refers, the facts of which the court can take judicial notice, and even plaintiff's own hypothetical facts, all demonstrate no relevant "factual issue" exists here. Rather, plaintiff's sole argument is purely legal: *i.e.* that quasi-judicial immunity can be overcome simply by alleging sufficiently offensive misconduct. *See* RB 19-23. Here the conduct alleged in the complaint and hypothetical, the records referred to by the complaint, and the facts of which the court can take judicial notice, all demonstrate a judicial function was being performed at the time of the alleged misconduct and that dismissal under CR 12(b)(6) should have been granted.<sup>3</sup>

### **C. DENIAL OF QUASI-JUDICIAL IMMUNITY WAS ERROR**

Plaintiff's own extensive quotation of secondary authority distilling the law of judicial immunity admits: "The immunity enjoyed by courts

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<sup>3</sup> Plaintiff for some reason asserts "under summary judgment standards, there is simply no question that there are genuine issue of material fact." RB 13-14. However, because the complaint failed to state a claim, defendants appropriately first brought a CR 12(b)(6) motion. Hence, the only applicable standard on appeal is CR 12(b)(6) and not CR 56 where, as even plaintiff admits, the Court instead also would be provided "Mr. Skargren's [sic] side of the story," RB 23 n. 9, and plaintiff's attempt to explain her evolving claims.

even extend to willful misconduct in a judicial capacity" and "those who are functioning on the judge's behalf" also "are entitled to absolute judicial immunity" when performing "[f]unctions integral to a judicial proceeding" such as "fact finding ...." RB 16 (*quoting* DeWolf and Allen, 16 Wash. Prac. § 14.13 (2012)). Likewise, she concedes "there is no question that a GAL, like Mr. Skagren [sic], would be entitled to quasi-judicial immunity when undertaking such actions as performing a court order [sic] parenting evaluation ...." RB 18. *See also Barr v. Day*, 124 Wn.2d 318, 332, 879 P.2d 912 (1994) (GALs have quasi-judicial immunity because they are "surrogates of the court"); *West v. Osborne*, 108 Wn.App. 764, 772-74, 34 P.3d 816 (2001) (absolute immunity barred suit against GAL).

Plaintiff's argument instead, without basis in the pleadings or legal explanation, is that supposedly "what is at issue in this case" is not a protected "parenting evaluation ...." *Id.* at 18. This unsupported bare assertion is supported by neither the record nor the law.

**1. Complaint and Hypothetical Show Performance of Judicial Function**

Plaintiff surprisingly argues the County has "provided absolutely no analysis as to what actual function [the GAL] was performing when he was engaging in the acts which form the basis for plaintiff's lawsuit." RB 20. In fact, the County before the trial court and again on appeal has re-

peatedly provided analysis explaining that – at the times plaintiff alleges misconduct occurred – the GAL was in the process of performing the court ordered function of gathering information for a parenting evaluation. *See* CP 13-14, 19, 115-17, 137-40; AB 12-15. *See also Reddy v. Karr*, 102 Wn.App. 742, 750-51, 9 P.3d 927 (2001) (because "Judges cannot personally perform these independent investigations," while "performing court-ordered functions, [GALs] act as an arm of the court"); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir.1984) (GALs immune because their function of gathering and reporting information is an "integral part of the judicial process").

Plaintiff's own complaint expressly asserts GAL Shagren was assigned the court ordered function of gathering information and "reporting to the court the Plaintiff's relationship to her," as well as expressly alleges liability exists because the GAL supposedly then "used his authority, tasks, tools and premises of his job and assignment" to perform the acts which now form the basis for her lawsuit. CP 8 (emphasis added). Similarly, plaintiff's own declaration of hypotheticals claims the alleged misconduct occurred when the GAL "wanted to come and check on my son," CP 49 ¶ 2, when he called to ask "why I had been dodging him" and had not been at "my job," CP 50 ¶ 3, or when he checked up on her "at places where I was." CP 50 ¶ 4. *See also* RB 20-22. Indeed, when she deems it

advantageous on a different issue, plaintiff in her appellate briefing contradictorily argues her claim for outrage is enhanced because her claim is based on the GAL's supposed "abuse of power." RB 23-24. Plaintiff cannot ignore her own filings – or the County's argument based thereon – by pretending they do not exist and thereby claim nothing shows the GAL was performing judicial functions at the time she alleges he also acted improperly.

**2. Prior Evidentiary Hearing Establishes Function as Matter of Law**

Even apart from the facts established by her filings, plaintiff is barred as a matter of law by her previous litigation from now denying Shagren was performing his function as a GAL at the times she alleges he acted improperly. Court records are undisputed that – after GAL Shagren was no longer on the parenting case and after plaintiff had been advised at her evidentiary hearing to provide "any additional information" about her allegations – the District Court made the factual finding: "The work of Mr. Skagren [sic] at the time as a guardian ad litem permits, in fact, requires a guardian to make certain observations and investigations, and it appears that's what was going on." CP 149-150. *See also* CP 29 (finding Shagren "was working as a GAL at times of these events").

Plaintiff argues she is not bound by this factual finding in her pre-

vious litigation because supposedly the "legislature has already determined" such proceedings "should not be afforded any kind of preclusive effect in subsequent litigation," and allegedly three of the four elements of collateral estoppel are absent. RB 24-29. The law and record show otherwise.

**a. RCW 10.14.140 Does Not Bar Preclusive Effect of Factual Finding**

Plaintiff claims RCW 10.14.140 precludes collateral estoppel of factual findings because it states: "Nothing in this chapter shall preclude a petitioners right to utilize other existing civil remedies." RB 24. The deference due to judicial orders, however, is not "in this chapter" under RCW 10.12, *et seq.*, and its quoted language has never been held to concern issue preclusion or to mean anything other than that the statute is not the exclusive civil remedy that can be used to prevent such harassment. Principles of statutory construction hold statutes "in derogation of the common law 'must be strictly construed and no intent to change that law will be found, unless it appears with clarity.'" *See Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008). Hence, this court in *Carver v. State*, 147 Wn. App. 567, 573, 197 P.3d 678 (2008), rejected a similar claim that "the existence of multiple remedies evidences legislative intent to preclude use of collateral estoppel" since the "Leg-

islature knows how to bar issue preclusion when it wants to do so."<sup>4</sup> Strictly construing RCW 10.14.140 as required demonstrates no legislative intent exists to change the issue preclusion rule for factual findings because that statute nowhere does so "with clarity."

**b. Issue Preclusion Bars Plaintiff Relitigating Shagren's Function**

Contrary to plaintiff's assertion that the County's appeal asserts "hyper-technical arguments," RB 4, the law of preclusion "is not a mere matter of practice or procedure inherited from a more technical time than ours" but "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts...." *Federated Depart. Stores v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). The policy protected by issue preclusion is not so easily avoided.

As to issue preclusion's first element of whether "the issue decided in the prior adjudication is identical with the one presented in the current action," *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983), plaintiff asserts the issues are not the same because this suit concerns tort claims and not an anti-harassment order. RB 25. However, issue preclu-

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<sup>4</sup> Plaintiff digresses to attack at length this Court's 15-year-old *Carver* decision as supposedly misinterpreting the different statute that was at issue in that case. RB 25-27. Because this aspect of *Carver* has nothing to do with the issues in this appeal, the County need not and does not respond to this irrelevant part of plaintiff's brief.

sion "instead of preventing a second assertion of the same claim or cause of action, ... prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted." *Rains*, 100 Wn.2d at 663 (*quoting Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)); *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn.App. 304, 330-331 (2010). The record is clear that – just as this relitigation concerns the question of the GAL's function at the time alleged – plaintiff's anti-harrassment petition expressly also decided the issue of whether Shagren "was working as a GAL at times of these events." CP 29. *See also* CP 150.

Plaintiff also cites *dicta* in which the Commissioner stated he "further" deemed it "unclear that the issues raised in each proceeding are identical." *See* CP 167; RB 28. The transcript of the District Court evidentiary hearing and its records, however, confirm that by the time of the District Court's factual finding the GAL no longer was involved in the dependency case, that plaintiff had been specifically requested to present all facts of alleged misconduct at that hearing, and that no subsequent misconduct by the GAL was thereafter alleged. *See* CP 149-150; Cy Supp. CP (Order Substituting GAL in P.C. Sup.Ct. Cause #09-7-01643-1). Though after the hearing plaintiff certainly retroactively enhanced her allegations of misconduct for this second litigation, *compare* CP 17, 149

with CP 2-3, 49-51, as shown below, the decisive "issue" in both cases was not the type of tortious conduct alleged but the function the GAL was performing at the time of the alleged conduct. Hence, court records not only confirm all alleged events about which plaintiff now complains had occurred by the time of the hearing, but – more importantly – that the decisive issue in both was whether Shagren "was working as a GAL at times of these events." CP 29 (emphasis added). *See also* CP 149-50.

As to the policy's second requirement, plaintiff argues "it is dubious that the denial of anti-harassment order pursuant to RCW 10.14, *et seq.*, is a 'final judgment on the merits'" because *McLean v. Smith*, 4 Wn.App. 394, 482 P.2d 798 (1971), supposedly held such orders "are more akin to a denial of injunctive relief." RB 25, 28. In fact, *McLean* did not concern anti-harassment orders but involved a non-appealable "temporary injunction" under CR 65(a) – and even then expressly noted a CR 65 order was "not ... the same thing" as a "restraining order." *See* 4 Wn.App. at 399 (*quoting Rogers v. Kendall*, 173 Wash. 390, 391, 23 P.2d 862 (1933)). In contrast, an anti-harassment protective order under RCW 10.12.180 is a "judicial order" which is not only appealable, *see Hough v. Stockbridge*, 150 Wn.2d 234, 76 P.3d 216 (2003) (affirming denial of extended anti-harassment protection order); *State v. Noah*, 103 Wn.App. 29, 9 P.3d 858 (2000) ("We affirm the antiharassment order"), but our courts

note "facts underlying the order" cannot be collaterally attacked in later criminal proceedings "because those facts have already been established in a prior judicial proceeding." *State v. Green*, 157 Wn.App. 833, 845-46, 239 P.3d 1130 (2010) ("anti-harassment order is issued only after a fact-finding hearing where a court finds unlawful harassment by a preponderance of the evidence") (*citing* RCW 10.14.080(3); *Noah id.* at 38).<sup>5</sup>

Finally, as to the third element of issue preclusion, plaintiff makes the conclusory assertion that "it would work a grave injustice to" apply collateral estoppel because she claims without any cited basis that evidentiary hearings on anti-harassment petitions are "summary proceedings" that supposedly have "minimal procedural safeguards or incentives for full litigation." RB 29. None of the cases she cites, however, concern or have any application to anti-harassment proceedings. *Compare id. with Hadley v. Maxwell*, 144 Wn.2d 306, 312-13, 207 P.3d 600 (2001) (no estoppel where driver paid fine rather than dispute minor infraction in traffic court because she had little incentive to contest the issue) and *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) (even "procedures employed" in an administrative proceeding "are sufficient to

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<sup>5</sup> Plaintiff accuses the County of citing *Green* and *Noah* "to mislead the court that these two cases are supportive of the proposition that collateral estoppel principles can bar a civil suit when an anti-harassment order pursuant to RCW 10.14, *et seq.*, has been denied." RB 10. Though those two referenced cases specifically address collateral attack and not collateral estoppel, they are relevant to refute plaintiff's baseless assertion that anti-harassment orders are not "worthy of preclusive effect." RB 25.

justify giving preclusive effect to the Commission's decision on the issue" so "preclusive effect to the factual finding" was recognized). Though plaintiff also argues without authority that the absence of discovery for anti-harassment proceedings makes issue preclusion unjust, RB 31, she ignores that *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn.App. 299, 306, 309, 57 P.3d 300 (2002), recognizes that a "speedy, cheap, and conclusive" procedure is not a reason to bar issue preclusion so that where "the prerequisites [of collateral estoppel] are met, ... the judgment of any court at any level may preclude further litigation."<sup>6</sup>

Nevertheless, the record shows the proceedings here were not "summary," that there were far more than "minimal procedural safeguards" and that plaintiff had important "incentives for full litigation." Specifically, though the presence of an attorney is not required for collateral estoppel, *State Farm Mut. Auto. Ins. Co.*, 114 Wn.App. at 309, even plaintiff admits "the terms of RCW 10.14.090 [allow] a party in such a proceeding [to] be represented by private counsel." RB 29. The record further shows as part of her proceeding plaintiff was provided an evidentiary hearing where testimony was taken under oath and cross examina-

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<sup>6</sup> Under plaintiff's position all dismissals for judicial immunity or under CR 12(b)(6) prior to discovery can be relitigated. Instead, as a matter of law, immunity of officials should "be resolved prior to discovery." *Becker v. Washington State University*, 165 Wn.App. 235, 254, 266 P.3d 893 (2011) (emphasis added). See also *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) ("immunity is entitled to dismissal before the commencement of discovery") (emphasis added).

tion occurred. *See e.g.* CP 149. Though plaintiff thereafter had the opportunity to appeal, *see Hough, supra; Noah, supra.*, she chose not to do so but brought the instant suit instead. Such procedures are more than "sufficient to justify giving preclusive effect" to the District Court's factual conclusion that Shagren was functioning as a GAL at the time of his alleged misconduct. *See e.g. Shoemaker*, 109 Wn.2d 510 (preclusion where "[a]dequate notice was given all parties," "[e]ach side called witnesses, introduced documentary evidence and cross-examined the other's witnesses, thereby satisfying the requirement of a fair opportunity to present and rebut evidence," "opening and closing statements and hearing memoranda permitted a formulation of the legal issues raised by the facts and an application of the law to those facts," "[t]here was a final adjudication on the record in the form of findings of fact and conclusions of law," and "[o]ther procedural safeguards were provided in the taking of testimony on oath and the right of Shoemaker to move for reconsideration and to appeal the Commission's decision to superior court, even though he chose not to pursue the latter remedy in favor of suing in federal district court on a federal claim").

Further, in her prior litigation against the GAL, plaintiff was a highly incentivized litigant whom the record shows affirmatively hauled him into court for the supposed purpose of protecting her "so he cannot

retaliate and harm me and my child or effect [sic] my case." CP 27. Finality of litigation between active participants is so important that even when "faced with a choice between achieving finality and correcting an erroneous result, we generally opt for finality." 114 Wn.App. at 306 (*cit- ing In re Marriage of Brown*, 98 Wn.2d 46, 49, 653 P.2d 602 (1982) ("in the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity"); *Bull v. Fenich*, 34 Wn.App. 435, 438, 661 P.2d 1012 (1983) (same). Finality is even more vital here where its absence threatens yet another vital public policy: *i.e.* the ability of judicial immunity to protect the administration of justice by judges and their surrogates. *See e.g. Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) ("[t]he purpose of this immunity is not to protect judges as individuals, but to ensure that [judicial officials] can administer justice without fear of personal consequences"); *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966) ("If the [official] must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any ... case, his freedom and independence in proceeding ... will be at an end").

Hence all elements of issue preclusion are present and as a matter of law plaintiff is bound by the finding Shagren "was working as a GAL

at times of these events." CP 29 (emphasis added). *See also* CP 150 ("The work of Mr. Skagren [sic] at the time as a guardian ad litem permits, in fact, requires a guardian to make certain observations and investigations, and it appears that's what was going on." CP 149-150 (emphasis added).

### **3. Quasi-Judicial Immunity Depends on Function Not Tort Alleged**

Whether based on her own filings in this case and court records or on the adverse judicial finding of fact in her previous litigation, or both, it has been shown that the "actual function [Shagren] was performing when he was engaging in the acts which form the basis for plaintiff's lawsuit" was as a court-appointed GAL investigating a parent in a termination of parental rights proceeding. Here plaintiff asserts any judicial immunity can be overcome simply by her alleging sufficiently "atrocious" and "deplorable behavior" and arguing such conduct could not "possibly be describing behavior of someone who is acting as 'an arm of the court.'" RB 6, 20, 23. Thus, without offering any legal analysis, plaintiff *ipse dixit* concludes: "Mr. Skagren [sic], if the above allegations are true, was not engaging in a 'quasi-judicial' function." *Id.* at 23. This analysis-free conclusion ignores that plaintiff's own brief: 1) concedes quasi-judicial immunity protects even "willful misconduct" and turns instead on the function being per-

formed at the time of the alleged tort; 2) admits the law expressly holds GALs perform protected judicial functions when investigating parenting matters; and 3) ignores her allegations concern alleged misconduct while GAL Shagren was conducting a parenting evaluation for the Court.

As a matter of law, plaintiff is mistaken that a judicial officer's immunity depends on the degree of offensiveness she alleges rather than on whether the official is performing a function at the request of the Court at the time of the alleged tort – regardless of the tort she claims. She cannot so easily overcome well settled and reasoned law that "the advancement of broader public policies sometimes requires that concededly tortious conduct, no matter how reprehensible, go unremedied, at least by means of a civil action for damages." *Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir.), *cert. denied*, 479 U.S. 1127 (1984) (emphasis added). *See also Lallas v. Skagit County*, 167 Wn.2d 861, 865, 225 P.3d 910 (2009) ("Absolute immunity prevents recovery even for malicious or corrupt actions"); *Mireles v. WACO*, 502 U.S. 9, 10 (1991) ("judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial"). Nevertheless, in her superficial reference to *West v. Osborn*, RB 19-20, plaintiff simply ignores that there – even though the parent alleged the GAL had "repeatedly, intentionally and willfully perjured

herself" and "used her ... influence on the Pierce County Sheriff's Dept. to intimidate, threaten, and influence her charge" as well as "threaten[] the mother" – this Court still found quasi-judicial immunity existed because she "was acting as an arm of the court at all times" in that matter. Plaintiff makes no attempt to explain how her claim is distinguishable from *West* where GAL immunity was upheld despite the allegation of "atrocious" and "deplorable behavior."

Plaintiff also fails to acknowledge – much less address – the public policy basis that requires such immunity especially for GALs in parenting matters such as hers. Specifically, plaintiff nowhere confronts that:

A guardian ad litem must ... be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. Consequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in judicial proceedings.

*Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994) (quoting *Kurzawa*, 732 F.2d at 1458)). Plaintiff offers no basis for overlooking these concerns or the fact that public policy requires such immunity because a "guardian must be free, in furtherance of the goal for which the appointment was made, to engage in a vigorous and autonomous representation of the child" and "is necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian's actions." See *Tindell v.*

*Rogosheske*, 428 N.W.2d 386 (Minn. 1988). Hence, it remains uncontested that a GAL's ability and willingness to make a vital report "to the court [on] Plaintiff's relationship with her son" – as her own complaint affirmatively states was the GAL's assignment here, *see* CP 8 – would be hampered and his or her role as a vigorous advocate for the child inhibited if "the specter of litigation" could so easily be raised to intimidate the GAL simply by filing a complaint alleging sexual harassment during a GAL's court ordered investigation.

Though a parent being evaluated can have a GAL who allegedly acts to sexually harass another disciplined by the court, fired by the County, or criminally prosecuted by the State, she cannot sue his County employer or undermine the public's overarching and well established need for quasi-judicial immunity.

### III. CONCLUSION

For the reasons explained above and in its opening brief, Pierce County again respectfully requests this Court reverse the trial court and order that plaintiff's claim against it be dismissed.

DATED this 8th day of April, 2013.

MARK LINDQUIST, Prosecuting Attorney  
s/ DANIEL R. HAMILTON  
DANIEL R. HAMILTON / WSB #14658  
Deputy Prosecuting Attorney  
Attorneys for Pierce County

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing PIERCE COUNTY'S REPLY BRIEF was delivered this 8th day of April, 2013, by electronic mail and to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following:

Thaddeus P. Martin  
Law Offices of Thaddeus P. Martin & Associates  
4928 – 109th Street Sw  
Lakewood, WA 98499  
Email: [tmartin@thadlaw.com](mailto:tmartin@thadlaw.com)

Christopher Keay  
Johnson, Graffe, Keay, Moniz & Wick, LLP  
Attorneys at Law  
2115 North 30th Street, Suite 101  
Tacoma, WA 98403  
Email: [ckeay@jgkmw.com](mailto:ckeay@jgkmw.com)

s/ CHRISTINA SMITH  
CHRISTINA SMITH  
Legal Assistant  
Pierce County Prosecutor's Office  
Civil Division, Suite 301  
955 Tacoma Avenue South  
Tacoma, WA 98402-2160  
Ph: 253-798-7732 / Fax: 253-798-6713

# PIERCE COUNTY PROSECUTOR

**April 08, 2013 - 3:46 PM**

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pcpatvecf@co.pierce.wa.us

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tmartin@thadlaw.com

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