

NO. 401525

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

DAVID H. REGAN, Appellant

v.

MELISSA McLACHLAN, et al., Respondents

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**BRIEF OF RESPONDENT PIERCE COUNTY**

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
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## **I. ISSUES ON APPEAL**

1. Is it within the trial court's discretion to take judicial notice of a matter of public record pursuant to ER 201 and established case law? (Assignment of error 1.)

2. Is the court's clerk protected by quasi-judicial immunity when processing a written order of the court? (Assignment of error 2.)

3. Does collateral estoppel bar plaintiff's action because the issues of whether the remittance order complied with RCW 10.19.140 and properly listed plaintiffs' predecessor as the issuer were decided in *State v. Cruz*? (Assignment of error 3.)

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Plaintiff, David H. Regan, filed a complaint for damages against Pierce County and others on July 6, 2009. CP 5. On November 6, 2009, Pierce County filed a CR 12(b)(6) motion to dismiss and noted it to be heard on December 4, 2009. CP 189, 308. At that hearing, Thurston County Superior Court Judge Anne Hirsch dismissed the case against defendant Pierce County with prejudice. CP 323-24. Mr. Regan now appeals the dismissal. AB 1.

**B. STATEMENT OF FACTS**

On May 1, 2003, the Director of the Washington State Department of Licensing (hereinafter "DOL") affirmed a previous ruling revoking for a period of five years the license of Metro City Bail Bonds, as well as plaintiff's license as a bail bond agent. CP 190, 211. It did so based on the Director's finding that "Respondents have violated RCW 18.185.110 (10) for aiding and abetting the unlicensed practice of a bail bond agent." CP 208. Sometime prior to 2005 -- and while the order revoking the license of Metro City Bail Bonds and Regan was still in effect -- plaintiff sold his business to Defendant Melissa McLachlan, a woman whom he had terminated in 2001 because of monies that went missing from Regan's Tacoma office. CP 7 at ¶ 3.2. On December 30, 2005, Ms. McLachlan filed a petition to justify Metro City Bail Bonds with the Pierce County Superior Court. CP 213-214. She listed herself as the sole owner. CP 209; CP 7 at ¶ 3.2. This petition was pending until July 23, 2007, when the court ordered it dismissed for want of prosecution. CP 243.

Nevertheless, Metro City Bail Bonds posted bail for defendant Javier Quiroz Cruz in a criminal case pending before the Pierce County Superior Court on May 10, 2006. CP 246-47. Judge Felnagle approved the bond, *id.*, pursuant to statute. *See* RCW 10.19.040 ("Any officer authorized to execute a warrant in a criminal action, may take the

recognizance and justify and approve the bail . . . "). The surety for the bond was Fairmont Insurance. CP 247. When Quiroz Cruz failed to appear for the pre-trial conference, Deputy Prosecutor Mark Von Wahlde filed a motion for forfeiture on the bond. CP 250-51. The court granted the motion. CP 257-259. Metro City Bail Bonds later returned Quiroz Cruz to custody. CP 297; *State v. Cruz*, 146 Wn. App. 1006, 2008 WL 2811270 (2008) at 2.<sup>1</sup> The court then ordered the Clerk to issue Metro City Bail Bonds a check in the amount of \$49,250 pursuant to RCW 10.19.140. CP 262-63.

After this order, Metro City Bail Bonds' surety -- Fairmont Insurance -- filed a motion in the criminal case against Quiroz Cruz for return of funds. CP 266-67. Fairmont asserted that it was entitled to these funds because the check was issued by United States Fire Insurance Company and because the check had a "clear notation on the face of the check, if funds were to be recouped, then said funds were to be returned to United States Fire Insurance Company." CP 272. Fairmont asked the court to order that Ms. McLachlan or Pierce County pay it the \$49,250 that was returned to Metro City Bail Bonds. CP 266-67. Presumably,

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<sup>1</sup> No. 36568-5-II (2008) (Unpublished Opinion). The court may take judicial notice of an unpublished opinion where it establishes the facts or the law of the case before it. *Cf. Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (2002) (taking judicial notice of an unpublished opinion dealing with the same parties and issues).

Fairmont made this request on behalf of United States Fire Insurance Company because it was the surety for Metro and because "Fairmont Specialty Insurance Co. and United States Fire Insurance Company are both ultimately owned by Fairfax Financial Holdings." CP 271. The court thereafter entered an order requiring that "Metro City Bail Bonds and or Melissa J. McLachlan . . . deposit with the Clerk of the Court [\$49,250] within ten days of this order" and that it be held in an interest bearing account until the court determined the ownership of the funds at a "date to be set." CP 290. McLachlan appealed. CP 296; *Cruz*, 146 Wn. App. at 1006.

In the appeal, Pierce County appeared as co-respondent with McLachlan. CP 300; *Cruz*, 146 Wn. App. 1006, p.5. Though Fairmont was not seeking damages from Pierce County, the County nevertheless defended the original order returning the funds to McLachlan and argued that the trial court lacked jurisdiction to order McLachlan to return the bond because "McLachlan is a non party and cannot and should not be bound by the order of the Superior Court acting in its criminal capacity." *Id.* In an unpublished opinion, the Court of Appeals held "the record shows that until January 16, 2007, Fairmont and Fire Insurance Co. made no attempt to revoke Metro City's authority to conduct business on their behalf in the State of Washington." CP 302. The Court then held that the

trial court's order should be vacated because "it is undisputed that the remittance order complied with RCW 10.19.140 and properly listed Metro City as the issuer of the bail bond." *Id.* The clerk of the Court of Appeals then filed a mandate in the *Cruz* case certifying "that the opinion of the Court of Appeals . . . became the decision terminating review of this court." CP 305.

Despite the fact that his assignor, Fairmont, was not able to recoup the bond money in the *Cruz* case,<sup>2</sup> plaintiff brought the instant suit against Pierce County alleging it was negligent both for justifying Metro City Bail Bonds in 2005 and for allowing the bail bond to be remitted to Metro City Bail Bonds in the *Cruz* case in 2006. CP 5-17 at ¶¶ 3.3, 3.13-3.14, 4.1-4.2.

### III. ARGUMENT

A trial court has authority to dismiss a complaint for "failure to state a claim upon which relief can be granted," CR 12(b)(6), so that "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Hence, a CR 12(b)(6) motion should be

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<sup>2</sup> Plaintiff Regan admits he "is an agent for Fairmont Specialty Insurance Company." CP 5 ¶ 1.1. He further admits he has received assignment of rights from Fairmont, a party to the previous action. CP 6 ¶ 1.2.

granted where "plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 791, 234 P.3d 332 (2010); *See also West v. Stahley*, 155 Wn. App. 691, 696, 229 P.3d 943 (2010). Typical examples are motions based on res judicata or immunity. *See, e.g., Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008) (affirming grant of "CR 12(b)(6) motion to dismiss on the grounds of res judicata and collateral estoppel"); *Schneider v. Amazon.com, Inc.*, 108 Wn. App. 454, 458, 31 P.3d 37 (2001) (affirming dismissal "under CR 12(b)(6) on grounds [defendant] was immune from liability"); *Trohimovich v. Department of Labor and Industries*, 73 Wn. App. 314, 317-18, 869 P.2d 95 (1994) (affirming CR 12(b)(6) motion to dismiss based on quasi judicial immunity). In making this analysis, "the court is not required to accept the complaint's legal conclusions as true," *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008); *See also Haberman v. WPPS*, 109 Wn.2d 107, 120, 750 P.2d 254 (1987) (under CR 12(b)(6) a "court need not accept legal conclusions as correct") and the Court "may take judicial notice of matters of public record." *Berge*, 88 Wn.2d at 756. Whether a particular dismissal under CR 12(b)(6) is appropriate is reviewed de novo. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

As demonstrated below, the trial court here properly dismissed the complaint against Pierce County as barred by collateral estoppel based on judicial notice of relevant facts, its determination that no facts exist that would justify recovery, and that the Pierce County Clerk enjoys quasi-judicial immunity in processing the orders of the Superior Court.

**A. TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE OF THE RELEVANT PUBLIC RECORD**

Trial court decisions on whether to take judicial notice are reviewed for abuse of discretion. *See Arnold v. Dept. of Retirement Systems*, 74 Wn. App. 654, 662, 875 P.2d 665 (1994) (reviewing trial court decision declining to take judicial notice for abuse of discretion), *rev'd on other grounds*, 128 Wn.2d 765, 912 P.2d 463 (1996). Here, the trial court had authority to take judicial notice of *State v. Cruz*, 146 Wn.App. 1006, and consider those relevant facts to decide the motion to dismiss for failure to state a claim.

As a matter of law, in deciding a motion to dismiss, the court "may take judicial notice of matters of public record." *Berge*, 88 Wn.2d at 763. *See also Rogstad v. Rogstad*, 74 Wn.2d 736, 743, 446 P.2d 340 (1968) ("[c]ourts have very broad authority to avoid unnecessary proof of established facts"); *Rodriguez*, 144 Wn.App. at 726 ("Documents whose contents are alleged in a complaint but are not physically attached to the

pleadings may also be considered in a ruling on a . . . motion to dismiss"); *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"); *Ileto v. Glock, Inc.*, 94 F. Supp. 2d 1040, 1045 (C.D. Cal., 2002), *rev'd in part on other grounds*, 349 F.3d 1191 (2003) (complaint dismissed because "Court may disregard allegations . . . if they are contradicted by facts established by reference to any documents . . . upon which it necessarily relies; the Court also need not accept as true allegations that contradict facts judicially noticed by the Court"); ER 201(f) ("Judicial notice may be taken at any stage of the proceeding").

Washington Appellate Court decisions are matters of public record of which courts can take judicial notice. *See State v. Powell*, 150 Wn. App. 139, 158, 206 P.3d 703 (2009) (ordering unpublished portion of the appellate court decision be filed for public record pursuant to RCW 2.06.040); *Iacononi v. New Amsterdam Casualty Co.*, 379 F.2d 311, 312 (3rd Cir. 1967) (in deciding a motion to dismiss the court can take judicial notice of other court proceedings). Here, *State v. Cruz* was decided by Division Two of the Court of Appeals in 2008 and filed for public record. *Cruz*, 146 Wn. App. 1006 p.4. In so doing, the Court of Appeals in *Cruz* set out the same facts with regard to the very bail bond money and

remittance order that are directly applicable here. *See id* at p.1-3.

Therefore, the trial court could properly take judicial notice of these facts when deciding the 12(b)(6) motion to dismiss.

Though plaintiff does not dispute the authority of the court to take judicial notice of relevant facts, he argues "it was improper for the trial court to conclude that the only facts to consider were those alleged in the *Cruz* case." AB 11. While it is correct that the court did take judicial notice of the facts of the *Cruz* case, any assertion the trial court concluded those were the only facts to consider has no support in the record. Though a court "need not accept as true allegations that contradict facts judicially noticed by the Court," *Ileto*, 194 F. Supp. 2d at 1045; *see also Steckman*, 143 F.3d at 1295-96 ("we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"), plaintiff provides no basis for his claim that the trial court somehow failed to "accept[] as true for purposes of the motion" the appropriate "factual allegations of the complaint." *Berge*, 88 Wn.2d at 759. Taking judicial notice of public documents simply does not *ipso facto* exclude consideration of non-contradictory facts alleged in the complaint from being considered by the court. *See, e.g., Rodriguez*, 144 Wn. App. at 726 ("[d]ocuments whose contents are alleged in a complaint

but are not physically attached to the pleading may also be considered in a ruling on a . . . motion to dismiss").

Further, here the current case arises from the same nucleus of facts and involves the same parties as the *Cruz* decision.<sup>3</sup> Though plaintiff objects that the same questions of law are not presented here, he cites not a single authority or rationale for why underlying facts found as relevant to a party's previous court decision are not just as applicable to the same parties in a related court decision. AB 10. He fails to do so because the law is to the contrary. *See, e.g., Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 330-331, 237 P.3d 316 (2010) ("Collateral estoppel is not res judicata "in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted") (*quoting Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983) and *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)). Likewise, plaintiff does not explain how the facts stated in *Cruz* are false or incomplete, and thus, does not provide any reason for rejecting the

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<sup>3</sup> In his complaint, plaintiff admits he is an agent of Fairmont, CP 5 at ¶ 1.1, which is the company that brought the motion for return of funds in the *Cruz* case. 146 Wn. App. 1006 at p. 1 ("Fairmont and Fire Insurance Co. asked the trial court to order 'Pierce County and/or Melissa J. McLachlan d/b/a Metro City . . . to pay \$49,250.00 to [Fire Insurance Co.]").

statement of facts found and relied upon by this Court in *Cruz*. Indeed, plaintiff undermines his argument by himself citing to *Cruz* to establish facts on appeal that he deems helpful to him.<sup>4</sup>

Given the applicability of the *Cruz* facts to the current case, as demonstrated by even plaintiff's opening brief, it was not an abuse of discretion to take judicial notice of those facts.

**B. TRIAL COURT CORRECTLY RULED THE PIERCE COUNTY SUPERIOR COURT CLERK WAS PROTECTED BY QUASI-JUDICIAL IMMUNITY**

The trial court correctly ruled that "Pierce County and its Officers enjoyed quasi-judicial immunity, as the actions alleged by Plaintiff were performed pursuant to lawfully executed court orders." CP 338. Judicial immunity protects judicial officers from civil damages for acts performed in their judicial capacity. *Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992). "Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992). Like judicial immunity, quasi-judicial immunity is an absolute bar to claims against the officer enjoying

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<sup>4</sup> Appellant's Brief states that "[b]oth Fairmont and United States Fire Insurance Company are owned by Fairfax Financial Holding. *Cruz*, 146 Wn.App at 2 [sic]." AB 6.

the immunity. *Id* at 101. Just as a judge is absolutely immune for his or her orders in a case, so too are that Court's clerks who are delegated the responsibility for implementing that order.

Specifically, the Pierce County Clerk enjoys quasi-judicial immunity when processing a lawfully entered court order. Though plaintiff cites the Clerk's website for a description of its duties, AB 13, he fails to note that the same resource also states: "The Clerk has several quasi-judicial duties, which include issuance of various writs, orders, subpoenas and warrants in support of the Court's decisions, as well as administration of the Mandatory Arbitration System." Pierce County Clerk of the Superior Court, available at:

<http://www.co.pierce.wa.us/pc/abtus/ourorg/clerk/home.htm> (last modified April 14, 2010). A person acts as an "arm of the court" when performing court-ordered functions and therefore, enjoys quasi-judicial immunity. *Reddy v. Karr*, 102 Wn. App. 742, 749, 9 P.3d 927 (2000); *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991).

The court had sole responsibility for fashioning the remittance terms in the order of the court, and therefore the clerk enjoys quasi-judicial immunity in processing that order according to its express terms. In *Reddy*, the family court investigator enjoyed quasi-judicial immunity because "[t]he court was solely responsible for fashioning the orders."

102 Wn. App. at 750. Similarly here, the superior court – not the clerk – was responsible for creating the final order of the court remitting the bail bond money in this case. The judge ordered that the bail money be remitted to Metro City. CP 262-63 ("The balance shall be remitted by the clerk to METRO CITY BAIL BONDS"). It is undisputed that the clerk processed the order of the court and remitted the money to Metro City as directed. AB 7. Further, this Court has already recognized that the order remitting the money to Metro City was lawful. *Cruz*, 146 Wn. App. 1006 at p.4. Therefore, the clerk enjoys quasi-judicial immunity while acting as an arm of the court to process the lawful remittance order.

The clerk's actions in this case are not properly characterized as ministerial non-feasance because non-feasance concerns situations where a clerk *fails* to process an order of the court. *See, e.g., Mauro v. County of Kittitas*, 26 Wn. App. 538, 541, 613 P.2d 195 (1980) (holding judicial immunity does not protect a clerk where the order was executed but never processed). The order of the court here required the clerk to remit the funds to Metro City, not United States Fire Insurance Company. CP 262-63. It is undisputed that the clerk complied with the terms of the order and remitted the funds to Metro City. AB 7. As a matter of law, the clerk therefore did not fail to process the order or commit "ministerial non-feasance."

As long as the clerk draws the money from the proper account, quasi-judicial immunity protects the clerk in processing the order of the court. The general duties of the Superior Court Clerk are set out by statute. RCW 2.32.050. Specifically, "[i]n the performance of his duties" the clerk must "conform to the direction of the court." RCW 2.32.050(9). Here, the clerk is being sued for conforming to the direction of the court. Further, the Pierce County Clerk is required to manage and record bail bonds and forfeitures, not to disregard unambiguous court orders and take notice of remittance instructions on the face of a check and exercise independent judgment as to whether the lawfully entered order of the court complies with those instructions. *See* RCW 2.32.050.

In light of the clerk's statutory obligation to keep the records of the court and not the records of the agency relationship between citizens, the clerk must only receive bail money, place it in the correct account, and remove money from the correct account as directed by the court. *See id.* Thus, there is no ministerial duty "to document the clear instructions on the face of the check," as alleged by plaintiff. AB 14. Regan simply cannot validly argue that after the order was issued the clerk should have second-guessed the court and substituted its judgment to challenge the judge with the face of the check that originally included specific instructions -- rather than process the lawfully issued order as instructed.

Plaintiff offers no justification for this allegedly 'ministerial duty' to refuse to conform to the order of the court as directed by statute, but instead to oversee the court and protest its lawful orders. It is the duty of the judge, not the clerk, to decide who is entitled to receive remitted bail money according to applicable statutes, and that is exactly what took place in the instant case. CP 262-63.

Consequently, the Superior Court correctly ruled that the clerk enjoyed quasi-judicial immunity.

**C. PLAINTIFF'S CLAIMS WERE BARRED BY COLLATERAL ESTOPPEL**

The trial court also correctly concluded that the doctrine of collateral estoppel bars plaintiff from bringing the current claim against Pierce County. As previously noted: "The doctrine of collateral estoppel . . . 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 665 (quoting *Seattle First Nat'l Bank*, 91 Wn.2d at 226). While Mr. Regan brings the current claim under a civil cause number, the dispositive issues presented with respect to Defendant Pierce County are the same.

Collateral estoppel is applicable where: (1) the issue decided in the prior adjudication is identical with the one presented in the current action, (2) there was a final judgment on the merits, (3) the party against

whom the plea is asserted was a party or a party in privity with a party to the prior adjudication, and (4) the application of collateral estoppel will not work an injustice on the party against whom the doctrine is applied. *Rains*, 100 Wn.2d at 665. On appeal, appellant argues only that collateral estoppel does not apply because the current case involves different legal issues than those in *Cruz*. AB 15-18. However, plaintiff agrees the *Cruz* decision resolved the issue of whether the money was properly remitted to Metro City. Specifically, plaintiff states: "The Court in the Cruz case **did ultimately conclude that the money was properly returned to Metro City.**" AB 17 (emphasis added). *Cruz* also resolved the issue of whether Metro City had authority to act on Fairmont's behalf. *Cruz*, 146 Wn. App. 1006 at p.4. In *Cruz*, the Court of Appeals found:

Here, it is undisputed that the remittance order complied with RCW 10.19.140 and properly listed Metro City as the issuer of the bail bond. And the record shows that until January 16, 2007, Fairmont and Fire Insurance Co. made no attempt to revoke Metro City's authority to conduct business on their behalf in the State of Washington.

*Id.* The findings that the remittance order complied with the statute and was properly remitted to Metro City preclude a negligence claim against Pierce County. Further, as discussed above, there is no "wrongdoing" to support any cause of action because Pierce County and its officers enjoyed

quasi-judicial immunity in processing the lawful court order issued in this case.

Though Appellant claims, "the Court in that case [*Cruz*] explicitly stated that Fairmont and Fire Insurance might still 'have a claim against the clerk, Metro City, or McLachlan,'" AB 17, the accurate quotation from *Cruz* about the limits on the issues before the court was: "[w]hether Fairmont and Fire Insurance Co. otherwise have a claim against the clerk, Metro City, or McLachlan is not before us." *Cruz*, 146 Wn. App. 1006, p.4 (emphasis added). This court's simple recognition of the limitation of the legal issues before it did not preclude the trial court from recognizing that plaintiff was precluded from again litigating the same issue. The trial court here simply recognized the undisputed finding in *Cruz* that the remittance order complied with the statute and the undisputed fact that the clerk processed the order necessarily means Pierce County officers enjoy quasi-judicial immunity. Plaintiff's current lawsuit is barred by collateral estoppel because any negligence claim against the Clerk of the Superior Court would have to re-litigate the issue already decided; i.e., that the order of the court complied with the applicable statute.

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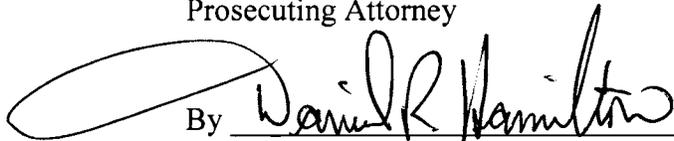
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**IV. CONCLUSION**

For the reasons stated above, respondent Pierce County respectfully requests this Court affirm the sound judgment of the trial court.

DATED: October 27, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing BRIEF OF RESPONDENT PIERCE COUNTY was delivered this 27th day of October, 2010, by United States Mail or ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

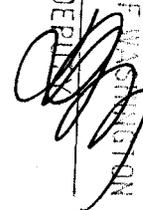
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