

No. 43983-2-II

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

JOYCE KELLEY, Individually, Respondent

v.

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

RESPONDENT'S RESPONSE TO APPELLANT'S OPENING BRIEF

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APPENDIX

- Exhibit A: Commissioner Schmidt’s order of November 15, 2012;
- Exhibit B: Plaintiff’s Amended Complaint;
- Exhibit C: Appellant Kelley’s declaration.

I. INTRODUCTION AND MOTION TO STRIKE

Under the terms of RAP 10.3(a)(4) a party is obligated to provide appropriate assignments of error. It has long been recognized that an assignment error to the “holding” of the Trial Court, without further specificity is too general for proper appellate consideration. See *Talps v. Arreola*, 83 Wn. 2d 655, 657, 521 P2d 206 (1974), citing to *Becwar v. Bear*, 41 Wn. 2d 37, 38, 246 P3d 1110 (1952). Nevertheless, Respondent recognizes that the Appellate Court nevertheless retains discretion to decide issues despite technical flaws in Appellant's briefing and non-compliance with the rules of appellate procedure. See *State v. Olson*, 126 Wn. 2d 315, 323, 893 P2d 629 (1995); RAP 1.2(a) and RAP 10.3(g). As both parties are very familiar with the issues presented below, and this matter has already been through discretionary view proceedings, arguably, despite such technical non-compliance this matter would fall within the exception set forth within RAP 10.3(g) which allows review with respect to issues which are “clearly disclosed in the associated issues pertaining thereto”. Nevertheless as Justice Talmadge suggested in his concurrence in the *Olson* case, such non-compliance is worthy of sanction pursuant to RAP 10.7.

While perhaps Respondent would not raise such an issue, in isolation, in combination with the County’s failure to “follow the rules” which are discussed in detail below, it is one of many problems that

cumulatively prejudicial. As reflected by this Court's file on November 15, 2012 Court Commissioner Eric B. Schmidt entered a detailed order granting in part and denying in parts Appellant's (defendants below), motion for discretionary review. Commissioner Schmidt's order of November 15, 2012 is attached hereto as Appendix No. 1. At Pages 6 through 9 of Commissioner Schmidt's ruling he spent considerable time and provided a detailed analysis of the collateral estoppel affirmative defense that had been raised by Pierce County below and which was rejected by the Trial Court. Quite clearly at Page 9 of the Commissioner's ruling with respect to the collateral estoppel defense the County's motion for discretionary review was denied "...their motion for discretionary review on this issue is denied." (Commissioner's ruling Page 9).

Commissioner Schmidt's actions were clearly consistent with the terms of RAP 2.3(e) which provided under the heading of "Acceptance of Review" that "the Appellate Court may specify the issue or issues as to which review is granted". As discussed in *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n.2, 234 P3d 264 (2010) under the terms of RAP 2.3(e) it is the Appellate Court who determines the scope of discretionary review and not the parties, citing to *Emily Wayne Homeowners Ass'n v. Colonial Dev., LLC.*, 139 Wn. App. 315, 318, 160 P3d 1073 (2007), aff'd in part, rev'd in part, *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn. 2d 178, 207 P3d 1251 (2009).

In this case, this Court granted discretionary review on a single narrow issue i.e. the County and Mr. Skagren's entitlement to "quasi-judicial immunity" and no more.

Had the County been dissatisfied with the Commissioner's ruling which rejected the collateral estoppel issue for discretionary review purposes, i.e. for the purposes of this particular appeal, it had the obligation to file a motion to modify. See RAP 17.7. It did not do so.

Despite the fact that the Commissioner's ruling, which is attached hereto as Appendix No. 1, is unequivocal on the question, the County has nevertheless dedicated a substantial portion of its opening brief to the collateral estoppel issue which was before the Trial Court but which is not part of this discretionary review. (See Pierce County's Opening Brief Page 14 through 17). In defiance of the Commissioner's ruling, the County nevertheless attempts to interject the collateral estoppel issue in its appeal.¹

Under the terms of RAP 18.9(a) a party who "fails to comply with these rules.." can be required to pay terms and/or compensatory damages to the opposing party who is harmed by such a failure to comply.²

¹ To the extent that the County is trying to suggest that the issue of "quasi-judicial immunity" turns on collateral estoppel, that is hardly the case and such suggestion is a not so veiled effort to justify the willful defiance of the Commissioner's ruling.

² Although arguably Respondent's counsel could have filed a separate motion to dismiss and await a ruling prior to filing Respondent's Opening Brief, that would only further engender delay in this case that has been already subject to delay and disruption by this interlocutory appeal. See *Pugel v. Monheimer*, 83 Wn. App. 688, 922 P2d 1377 (1996). (Party's failure to abide by the prior rulings of the Appellate Court by filing inappropriate briefs can be subject to sanctions even though "it might have been more efficient for Pugel to move to strike the respondent's brief, "and violation of the rules caused more work for Pugel...").

Not knowing how the court will rule with respect to Respondent's motion to strike, Respondent has little choice but to respond to the collateral estoppel argument set forth within Appellant's Opening Brief. Naturally this creates unnecessary work. It is unnecessary because such an issue is currently not before this Court in this limited discretionary review.³

As explored below it is respectfully suggested that this is a case where discretionary review was improvidently granted. Based on the record below, and on the face of the operative pleading in this case, Plaintiff's Amended Complaint, which is attached hereto as Appendix No. 2, the allegations within plaintiff's complaint indicate that Mr. Skagren was not engaging in a judicial and/or quasi-judicial function when he, according to the amended complaint engaged in action characterized as "stalk, prey, assault, batter and sexually harass Ms. Kelley". (CP. 8,9). While the County has raised a number of hypertechnical arguments, not a single one of them have a scintilla of merit.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Trial Court properly apply CR 12(b)(6) standards when it denied defendants Skagren's and Pierce County's motion to dismiss this action due to "quasi-judicial immunity" when a fair reading of the Amended Complaint, (and the facts as discussed below), clearly

³ The above discussion should be viewed as Respondent's request for attorney's fees pursuant to RAP 18.1 which requires a party to who is contending that they're entitled to an award of attorney's fees pursuant to either statute or rule, (or other grounds), to dedicate a section of their opening brief to the request for fees or expenses.

disclose factual issues as to whether or not Mr. Skagren was operating and performing a “quasi-judicial” function when he allegedly sexually harassed the Respondent and/or engaged in other torts?

2. Did the Trial Court appropriate apply standards applicable to the affirmative defense of quasi-judicial immunity, by recognizing that under CR 12(b)(6) standards Plaintiff’s Amended Complaint set forth allegations where Mr. Skagren was engaging in acts that did not fall within any “quasi-judicial” function?

3. Whether the Appellate Court will consider Appellant’s collateral estoppel affirmative defense when such a defense was considered and specifically rejected by the Appellate Court Commissioner when he determined what issues should be subject to discretionary review, a determination of which the Appellant never sought modification?

4. Whether or not Respondent will be awarded reasonable compensatory terms for having to respond to Appellant’s argument relating to collateral estoppels, when such an issue is not before this Court under the terms of the November 15, 2012 ruling granting discretionary review to the limited issue of “quasi-judicial immunity”?

III. COUNTERSTATEMENT OF THE FACTS

The operative pleading in this case is Plaintiff’s Amended Complaint. (CP1 - 7). Plaintiff’s Amended Complaint under the “Statement of Facts” provides:

- 4.1 Plaintiff was a graduate of the Pierce County Drug Core Program and was required to also submit through termination parental right hearings.
- 4.2 Defendant Pierce County assigned Guardian Ad Litem (GAL), employee Mark Skagren as plaintiff's GAL for the purpose of reporting to the court plaintiff's relationship with her son.
- 4.3 In 2010 and 2011, defendant Skagren used his authority, tasks and tools and premises of his job and assignment to **stalk, prey, assault, batter and sexually assault Ms. Kelley.**
 - 4.3.1 **Mr. Skagren made sexual comments to the plaintiff, made sexual advances, assaulted and battered her for sexual purposes.**
 - 4.3.2 **Mr. Skagren stalked and preyed upon the plaintiff for the purpose of attempting to have sex with her.**
 - 4.3.3 **Mr. Skagren had a history of engaging in such behavior and defendant Pierce County had overwhelming notice that Mr. Skagren had engaged in such conduct in the past for the purpose of obtaining sexual relationship with vulnerable women, like the plaintiff, he had control over.**
 - 4.3.4 **Mr. Skagren had the power to make positive or negative reports to the court that would ultimately decide whether vulnerable women would be allowed to keep their own children or not.** (Emphasis added).

Based on such alleged deplorable behaviors, Plaintiff in the Amended Complaint asserted a number of causes of actions including claims for sexual discrimination and harassment pursuant to RCW 49.60. et seq. Also tort claims for negligent hiring, training supervision and retentions were brought as well as a claim for outrage. (CP3 - 4)

Instead of filing an answer, Pierce County, on July 5, 2012 filed a Motion to Dismiss pursuant to CR 12(b)(6). (CP13-29). Within the

motion the County contended that plaintiff's claim were barred by the affirmative defense of "quasi-judicial immunity", and challenged whether or not plaintiff had a claim for public accommodations determination pursuant to RCW 49.60. et seq. Additionally, the County asserted that plaintiff's claims were barred under the doctrine of collateral estoppel, (issue preclusion) because plaintiff had previously sought an anti-harassment order against Mr. Skagren which was denied. Attached to the County's pleading, the County included Plaintiff's Petition for an Order of Protection and the Pierce County District Court order denying such a petition. (CP 24-29).

In response, Plaintiff filed a detailed response which included a declaration from Ms. Kelley providing additional details regarding Mr. Skagren's actions. Ms. Kelley's declaration is attached hereto as Appendix No. 3. (CP 70-72). Plaintiff asserted that under the terms of CR 12(b)(6), given the fact that the County had included materials outside of the pleadings, that the matter should be treated as a motion for summary judgment pursuant to Rule 56, and that pursuant to CR 56(f) the matter should be subject to continuance pending discovery.⁴

⁴ Apparently the County has the inequitable belief that it can submit basically whatever document it wants to as an attachment to a CR 12(b)(6) motion the plaintiff cannot convert the matter to a summary judgment by providing her own "matters outside the pleadings". Also, as will be touched upon below apparently the County also believes that it can take snippets of language from plaintiff's amended complaint out of context and contrary to the law is suggesting that plaintiff's amended complaint should be constrictly, as opposed to literally construed. It is respectfully suggested that the nonsensical positions taken by the County are further indicative that this is a meritless appeal.

In response the County filed a “motion to strike” Ms. Kelley’s declaration. (CP 94 - 107).⁵

On July 20, 2012 the Trial Court denied defendant’s motion. (CP 108 - 109). Undaunted, on July 30, 2012 the County moved for reconsideration making the exact same arguments that the Trial Court had already rejected. (CP 110 - 121). Again, Plaintiff filed a detailed response. (CP 122 - 134). In reply the County once again submitted materials from outside of the pleadings supportive of its position, i.e., a copy of the transcript of a rather truncated anti-harassment hearing Ms. Kelley was afforded within the Pierce County District Court. (CP 145 - 50). On August 24, 2012 the Trial Court denied the County’s motion to dismiss. (CP 151 - 152).

As reflected by this Court’s record thereafter the County sought discretionary review which was granted only as to the issue of “quasi-judicial immunity”.

IV. ARGUMENT

A. The Appellate Court Should Not Consider Matters Which Were Not First Raised In The Trial Court And Should Strike Argumentative Assertions Within The Appellant’s Statement Of Fact Which Have No Factual Basis.

RAP 10.3(a)(5) requires a brief to contain “a fair statement of facts and procedure relevant to the issues presented for a review, without argument”. It is noted that the Appellant’s “Statement of the Case” fails to conform to that standard. In particular, the Appellant at Page 1 of its

⁵ No order was ever entered by the trial court striking Ms. Kelley’s declaration.

Opening Brief asserts that “Pierce County District Court records further show that after the GAL had begun to make recommendation unfavorable to her, plaintiff on December 13, 2011, unsuccessfully pursued an anti-harassment order against him...”. There is absolutely no evidence before the Trial Court in this matter which any way suggested that plaintiff sought the anti-harassment order because Mr. Skagren had “begun to make recommendations unfavorable to her”. Arguments not supported by citation of the record are deemed waived and should not be considered by the Appellate Court. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P2d 549 (1992). Also the general rule is that Appellant Court’s will not consider issues raised for the first time on appeal. See *State v. Kirkman*, 159 Wn. 2d 918, 926, 155 P3d 125 (2007); RAP 2.5(a).⁶

⁶ It is noted that the County supplemented the record by including documents from the non-public custody case involving the plaintiff in which Mr. Skagren was appointed the GAL. Contrary to the County’s representations, there is no indication that the Trial Court actually reviewed these orders. There is no indication in the record the Trial Judge reviewed these orders. Documents from other proceeding were never part of the Trial Court record in this matter. Nor can they be the subject of “judicial notice”. Thus the inclusions of such information does not fall under RAP 9.10, because the documents were never part of the Trial Court record. In addition to the extent that the County would like to submit such information as “new evidence” such “additional evidence” does not meet the rigid criteria set forth within RAP 9.11(a). The general rule is that Appellant Court’s do not accept evidence on appeal that was not before the trial court. See *State v. Curtiss*, 161 Wn. App. 673, 703, 250 P3d 496 (2011). Moreover, the consideration of matters which was not before the trial court would serve to prejudice the opposing party because it denies them a full and complete opportunity to develop the record prior to the matter being considered by the Appellate Court. As it is, the additional evidence which the County desires to have the Appellate Court consider is not particularly supportive of its position because at the end of the day Mr. Skagren in fact was replaced as the GAL. A fact which lends validity to Plaintiff’s concerns, as opposed to detracting from them.

In any event, the above-referenced assertion, which is unsupported by the Trial Court record should be stricken by the Appellate Court and given no consideration.

Finally, it is noted that the County's approach to citation of precedent is also problematic. At Page 15 of Appellant's opening brief, at Footnote 2, it continues to cite to the cases of *State v. Noah*, 103 Wn. App. 29, 9 P3d 858 (2000), review denied by *Calof v. Casebeer*, 143 Wn. 2d 1014, 22 P3d 802 (2001), and *State v. Green*, 157 Wn. App. 833, 239 P3d 1130 (2010) in an attempt 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 10.14.01 et seq. has been denied. However, as explained by Commissioner Schmidt's ruling of November 15, 2012 neither of these cases stand for that proposition. (Ruling granted review Page 7; Appendix No. 1).

Commissioner Schmidt's ruling clearly indicates what is self-evidence, i.e., these cases address whether or not someone whose been criminally charged for violating a restraining order can collaterally attack such order in subsequent criminal proceedings relating to its violation. There is nothing about those two cases which any way suggests that the summary denial of a protection order, in summary anti-harassment proceedings can be afforded preclusive effect under Washington law. It is puzzling why the County persists in such efforts at misdirection.

It is respectfully suggested that the County's appellate brief in this matter is very reminiscent to the one discussed in *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P3d 189 (2009) which states in Footnote 6:

Appellant's brief often fails to justify a review under the rules of appellate procedure. See RAP 10.3(a), 18.1(b). The appellants frequently fail to assign error to the Trial Court's rulings, do not cite to authority for arguments, improperly make arguments in the statement of the case, do not properly request attorney's fees, and seem to ask as to the appeal non-reviewable issues simply because the Trial Court did not rule in their favor...

Although the *Durand* case suggests that despite such errors that the Court has inherent discretion to review the issues in this matter, if it so desires, it also suggests that the Court does not have to do so. As it is, it is again emphasized that at every level the County's appeal lacks substantive merit.

B. Standard Of Review and Standards Applicable To CR 12(b)(6) Motions.

Trial Court's decisions relating to CR 12(b)(6) motions are reviewed *de novo* and dismissal under this rule is only appropriate if "it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Reid v. Pierce County*, 136 Wn. 2d 195, 200 - 01, 961 P2d 333 (1998) citing to *Cutler v. Phillips Petroleum Co.*, 124 Wn. 2d 749 755, 881 P2d 216 (1994). Additionally the Appellate Court must accept as true the allegations in plaintiff's complaint and any reasonable inferences therefrom. *Id* citing to *Chambers-Castanes v. Kings County*, 100 Wn. 2d

275, 278, 669 P2d 451 (1983); *Corrigan v. Ball and Dodd Funeral Home, Inc.*, 89 Wn. 2d 959, 961, 577 P2d 580 (1978).⁷

Further, under 12(b)(6) standards, the court may use hypothetical facts, not part of the record, in arriving at its determination whether any set of facts could exist that would justify recovery. See, *Kenney v. Cook*, 130 Wn. App. 36, 123 P3d 508 (2005). CR 12(b)(6) motions should be granted “sparingly and with care”, and only in the unusual case in which a plaintiff includes allegations that show on the face of complaint that there is some insuperable bar to relief. *Id.* The dismissal of a claim on a motion to dismiss for failure to state a claim only should occur if the court concludes, beyond a reasonable doubt, that plaintiff cannot prove any set of facts which would justify recovery. As a result of these rules, the court must take all of the facts alleged in the complaint, as well as hypothetical facts, and view them in a light most favorable to the non-moving party.

⁷ It is suggested that the rules applicable to CR 12(b)(6) motions must be construed in a manner consistent with our system of “notice pleading” which requires only a “short and plain statement of the claim” and a demand for relief in order to file a lawsuit. See *Waples v. Yi*, 169 Wn. 2d 152, 159 - 60, 234 P3d 187 (2010). As discussed in *Waples* under notice pleading standards, Plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims. A plaintiff may bring separate or alternative claims seeking compensation for the same damages or amounts provided the different evidence available to prove of each of the claims. *Jacobs Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P3d 1153 (2007). Given the liberal standards applicable to the notice pleading it is simply no longer necessary for a plaintiff to plead facts “constituting a cause of action”. *Hofto v. Bloumer*, 74 Wn. 2d 321, 444 P2d 657 (1968). It has long been recognized that a purpose of the complaint is to provide fair notice of what facts the causes of action are predicated on but there’s no requirement that the complaint state the legal effect or legal conclusions which can be inferred from such facts. See *Carroll v. Caine*, 27 Wn. 402, 67 P.993 (1902). It is suggested that the County’s claim to entitlement to dismissal based on “quasi-judicial immunity”, which is predicated by parsing a few words out of plaintiff’s complaint, out of context, is inconsistent with “notice of pleading” principles.

M.H. v. Corporation of Catholic Archdiocese of Seattle, 162 Wn. App. 183, 188, 252 P3d 914 (2001).

As discussed below, it is simply not the prerogative of a court to make a determination under CR 12(b)(6) standards in this case that Mr. Skagren is entitled to “quasi-judicial immunity” when the entitlement is such an immunity depends on the inherently factual issue as to whether or not he was engaging in a “judicial function”, or an administrative function, or some other function at the time of his actions alleged in the amended complaint. Because of the standards applicable to CR 12(b)(6) motions, the Court has no alternative but to assume the hypothetical set of facts where Mr. Skagren is not engaging in a judicial function at the time of his conduct as is specifically alleged in the amended complaint. Also under liberal pleading standards the court is obligated to read the amended complaint in its entirety and should reject the County’s effort to parse out a few words from the complaint as creating an “insuperable bar relief”.

Also, by way of procedural concerns, it is respectfully suggested that the Appellate Court should reject the County’s, rather self-serving efforts, to assert that it can include matters outside of the pleadings, in a CR 12(b)(6) motion, while the plaintiff cannot. Under the plain language of the rule, once materials from outside the pleadings are included, the motion should be converted to a motion for summary judgment pursuant to CR 56. See *Berst v. Snohomish County*, 114 Wn. App. 245, 251, 57 P3d 273 (2002). Under summary judgment standards, there is simply no

question that there are genuine issues of material fact as to whether or not Mr. Skagren was engaging in a “quasi-judicial” function in his interactions with the plaintiff and which form the core factual issues with respect to her claims.

A cursory review of Plaintiff’s Amended Complaint shows no reference to anti-harassment proceedings, nor are any pleadings from it, referenced in the Amended Complaint. See *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717 - 18, 189 P3d 168 (2008) (“documents 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”). Further, the suggestion in *Berge v. Gorton*, 88 Wn. 2d 756, 763, 567 P2d 187 (1977) that the Court can take judicial notice of matters of public record, appears to be inconsistent with the current and more recent precedent of our Supreme Court which provides that under the terms of ER 201 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. See *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn. 2d 89, 117 P3d 1117 (2005); *In Re the Adoption of B.T.*; 150 Wn. 2d 409, 78 P3d 634 (2003). Thus, the County’s argument that it can include materials from outside of the pleadings and nevertheless preserve their motion as a CR 12(b)(6) motion, without converting it into a Rule 56 motion runs afoul of ER 201 and the above cited precedent.

As it is, such concerns are ultimately academic, because Plaintiff's Amended Complaint is more than sufficient under CR 12(b)(6) standards to defeat the County's claim of entitlement to dismissal due to "quasi-judicial immunity," which under appropriate standards has an inherently factual component. "Quasi-judicial immunity" has no application to Mr. Skagren's actions which form the predicate for Plaintiff's discrimination/sexual harassment and other tort claims.

C. Defendant Skagren is Not and was Not Entitled to Quasi-Judicial Immunity Because He Was Not engaging In Any Kind of a Judicial or a Quasi-Judicial Function When he Engaged in the Actions Alleged Within Plaintiff's Amended Complaint and Further Elaborated Upon In Her Declaration.

Claims of absolute immunity, such as judicial immunity, constitute an affirmative defense upon which the proponent of such immunity has the burden of proof. See *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003). The courts have "generally" been quite sparing in the recognition of claims of absolute official immunity. See *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1230, (9th Cir. 1996), quoting, *Forrester v. White*, 484 U.S. 29, 108 S.Ct. 538, 98 L.Ed.2d 555 (1998).

In Washington, when it comes to judicial or quasi-judicial immunity the most recent case addressing such an issue appears to be *Lallas v. Skagit County*, 167 Wn.2d 861, 225 P.3d 910 (2009). As explained in *Lallas* at 865, the Washington State Supreme Court has adopted a "functional approach" in determining whether or not immunity applies. When utilizing a "functional approach" Courts look to the

function being performed instead of the person who performed it. *Id.*
Thus judicial immunity applies to judges only when they are acting in a
"judicial capacity and with color of jurisdiction." *Id.*

DeWolf and Allen distilled judicial and quasi-judicial immunity in
16 WAPRC § 14.13 (2012) in the following terms:

Judges are given absolute immunity for tort liability for acts performed within their judicial capacity. The reason for this absolute immunity is "not to protect judges as individuals, but to ensure that judges can administer justice without fear of personal consequences." The immunity enjoyed by courts even extend to willful misconduct in a judicial capacity. In addition, those who are functioning on the judge's behalf, such as a bailiff who gives a dictionary to the jury during their deliberation, are entitled to absolute judicial immunity. **However, not everything ordered by a judge is subject to immunity; if the judge requests that a task be performed, and the subordinate performs the task negligently, judicial immunity may not apply. For example, when a bailiff negligently fails to restrain a defendant after having been ordered to escort the defendant to jail, absolute immunity did not apply. Judicial immunity is also enjoyed by government agencies and executive branch officials while performing quasi-judicial functions. So called "quasi-judicial immunity" allows persons or entities who are performing functions so comparable to those performed by judges to enjoy absolute immunity. Absolute immunity is accorded only to those functions that are an integral part of a judicial proceeding. Functions integral to a judicial proceeding include judging, advocating, prosecuting, fact finding and testifying. A court clerk who merely**

carries out a judicial order is protected by quasi-judicial immunity, whereas a court clerk who negligently failed to record a court order subjected his employer to liability for ministerial nonfeasance."

For example, psychiatrists who render expert opinions regarding a mental patient's dangerousness as part of a judicial proceeding are immune from suit based on the furnishing of such opinions. On the other hand, a therapist who merely furnished therapy pursuant to a court order, but was not asked to report any findings to the court, was not entitled to absolute immunity. Absolute immunity results in the injured party being left without a remedy. Thus courts will closely examine whether or not the person claiming absolute immunity is entitled to it: 'In order for a governmental official to make this showing, he or she first must establish three things. First, the official must show that he or she performs a function which is analogous to that performed by a person's entitled to absolute immunity, such as judges or legislators. Second, the official must show how the policy reasons which justify absolute immunity for a judge or legislator also justify absolute immunity for that official. And third, the official must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule.' For example, caseworkers who are responsible for child custody placement decisions were entitled to qualified immunity from personal liability for negligent performance of their duties. However a therapist appointed by a court to provide therapy to suspected child abuse victims was not immune from suit by the children's father, since the therapist was not required to report back to the judge. (Footnotes omitted.) (Citations omitted.)

In this case, the defendants simply cannot meet the first prong discussed above. While there is no question that a GAL, like Mr. Skagren, would be entitled to quasi-judicial immunity when undertaking such actions as performing a court order parenting evaluation or testifying in court, that is not what is at issue in this case. See *Reddy v. Karr*, 102 Wn.App. 742, 9 P.3d 927 (2000). As explained in *Duvall v. County of Kitsap*, 26 F.2d 1124 (9th Cir. 2001), while certainly judicial immunity also extends to "certain others who perform functions closely associated with the judicial process" the real question is whether or not the act in question was "an integral part of the judicial process." Citing to *Greater Los Angeles Counsel on Deafness v. Zolin*, 812 F.2d 1103, 1108 (9th Cir. 1987). As further explored in the U.S. Supreme Court opinion in *Antoine v. Beyers and Anderson, Inc.*, 508 U.S. 429 (1993), to determine whether the doctrine of judicial immunity applies to an official other than the judge, the court must determine whether they perform a function which requires the exercise of discretionary judgment similar to that being performed by a judge. Stated another way, "quasi-judicial immunity", attaches to the person or entity who performs functions that are so comparable to those performed by judges that it is felt they should share the judges' absolute immunity while carrying out those functions." *Regan v. McLachlan*, 163 Wn.App. 171, 179, 257 P.3d 1122 (2011), citing to *West v. Osborne*, 108 Wn.App. 764, 772-73, 34 P.3d 816 (2011).

The distinction as to what it is or is not a judicial or a "quasi-judicial" function can be explained by examining a few cases. In *Lallas* the Supreme Court held that a county courthouse security guard who was injured by a convict who was fleeing custody could bring an action against the deputy sheriff from whom the convict had escaped and against the county. The court reasoned that the transporting of a prisoner is not something that a judge normally does as part of his official duties and as a result was not "judicial conduct". In *Lallas* the court distinguished the case of *Adkins v. Clark County*, 105 Wn.2d 675, 677-78, 717 P.2d 275 (1986) wherein quasi-judicial immunity was granted to a bailiff who provided jurors a dictionary. The court distinguished the *Adkins* case because the provision of a dictionary generally fell within the "judicial function" of making a determination as to what information could or could not go to a sitting jury. *Id.* at 866.

In marked contrast in *Reddy v. Karr* where quasi-judicial immunity was afforded, the gravamen in the plaintiff's claim that the parenting investigator was negligent when undertaking to perform a court order parenting evaluation. Clearly, the performance of such a court-ordered parenting evaluation was an act by an individual who was operating as "an arm of the court". Similarly in *West v. Osborn*, supra, the plaintiff sued a court-appointed guardian ad litem contending that the guardian ad litem engaged in misconduct and/or negligence in the performance of her court-appointed duties. Naturally, as she was operating again as "an arm of the

court" when engaging in the conduct for which she was sued, Ms. Osborne was entitled to quasi-judicial immunity. See also *Barr v. Day*, 124 Wn.2d 318, 331, 879 P.2d 91 (1994).

In this case, the County beyond pointing out the fact that Mr. Skargren held a position as a GAL, have provided absolutely no analysis as to what actual function he was performing when he was engaging in the acts which form the basis for Plaintiff's lawsuit. The obvious reason why the County has failed to even attempt to explain how Mr. Skargren's alleged conduct can be afforded "quasi-judicial immunity" is because there is simply no explanation nor analysis from which one could reach that conclusion.⁸ The County, and Mr. Skargren are challenged to try to explain to the court how the matters which are set forth within Ms. Kelley's declaration, which was before the Trial Court relate to a "judicial functions" and how such acts could possibly be describing behavior of someone who is acting as "an arm of the court";

2. Mark Skargren was my court-appointed guardian ad litem starting in 2011. My claims that Mr. Skargren and Pierce County relate to the sexual harassment that Mr. Skargren engaged in against me. For example, on one occasion, Mr. Skargren wanted to come and check on my son Lucas. I informed Mr. Skargren that Lucas was at day care but ten minutes later he showed up at my door. I informed Mr. Skargren again

⁸ Simply because what is at issue is "immunity" does not change the fact that all facts still must be viewed in favor of the plaintiff in this action who is the non-moving party. See *Care Partners, L.L.C. v. Lashway*, 545 F.3d 867, 875 n.4 (9th Cir. 2008) (court when performing an immunity analysis will adopt the plaintiff's version of the facts at the summary judgment stage unless the court finds that such facts are utterly discredited by the record), citing to *Scott v. Harris*, 550 US 372 (2007).

that Lucas was not there and Mr. Skargren stated that he was there to talk to me about getting my license back. Mr. Skargren knew that I did not have the funds to get my driver's license reinstated. Mr. Skargren stated to me "I know your job doesn't pay much and you have a lot of bills to take care of and you don't have a man to help you. I'm willing to give you the money for your license. You are a smart girl. I am sure you will find some way to pay me back." He then stated (how far would you go to get your license?" Mr. Skargren was looking at me in a sexual manner when he stated this. Mr. Skargren kept walking closer and closer to me as if he was trying to kiss me and I had to literally push him off of me and told him to "back up." When I declined this gesture, he became visibly upset.

3. I confided to my counselor Phoebe Mulligan what was going on with Mr. Skargren. During one of my counseling sessions, Mr. Skargren called me repeatedly on my cell phone. My counselor asked me to call him back and put it on the speaker. I did so and Mr. Skargren asked me why I had been dodging him. He stated he had gone to my job several times and I wasn't there. He asked me if I was mad at him and then said that he missed my beautiful face.

4. Mr. Skargren repeatedly showed up places where I was. I saw him on numerous occasions at the park near my house, at my job and at the coffee stand near her [my] house. At the time that he came to these places Mr. Skargren never checked up on Lucas or asked about him. Mr. Skargren came to my house 15 – 20 times and tried to ask me to go places with him. Mr. Skargren would often ask me if I needed a ride somewhere. If I did agree to a ride, Mr. Skargren would act as if we were on a date and would ask me personal questions and touch my hair or arms.

5. Mr. Skargren often sent me text messages from my phone [to my phone], asking me to go out on dates with him. These texts were often after midnight. Mr. Skargren would send me pictures of himself holding alcoholic beverages.

6. Mr. Skargren is taller than me and he would often hover over her [me] to look down my shirt trying to see my breasts. He also would approach me from behind and put his hands on my shoulder and hair. He often offered me money. Mr. Skargren often would tell me that I was beautiful and that I was sexy or a sexy thing. He would send text messages like "drinking a cold one, nice cold and wet," or "I like my beer like I like my women, cold and wet." He would often ask me if I wanted to have a beer with him. Mr. Skargren knew that I was a recovering addict.

7. Mr. Skargren often would touch me inappropriately, put his arm around me and touch my legs or knees or hair. For example, Mr. Skargren offered me a ride and when I got in his car he asked me to "hide a secret" and stated that "I shouldn't be in this car," then he grabbed my leg and said "just chill, you need to relax." He grabbed my knee on this date.

8. Mr. Skargren put his arms around me about two dozen times in all of my interaction with Mr. Skargren. Mr. Skargren would ask me personal questions about whether I had a boyfriend, what kind of things I liked to do to have fun. Mr. Skargren repeatedly told me that I had a beautiful face and a beautiful body. Mr. Skargren would also brush up against me from behind, rubbing his crotch on my backside. Mr. Skargren was very "touchy feely" with me, always trying to hug me or touching my body or my hair. Mr. Skargren

constantly pressured me to go out on dates
with him to go drinking (Appendix No. 3).

Just because Mr. Skargren holds a particular job does not give him a license to act as inappropriately as described above. For the County to suggest to the contrary is at best disingenuous and is clearly preposterous. The above does not describe "judicial functions," and such actions appear to have very little to do with Mr. Skargren's actions as a "GAL". The fact that he was a "GAL" is simply an aggravating factor that should be considered, particularly in light of the fact that plaintiff has brought an outrage claim. It has long been recognized that an abuse of a power relationship is an aggravating factor that courts should consider when evaluating whether or not the conduct involved is so atrocious as to constitute the tort of outrage.⁹ Mr. Skargren, if the above allegations are true, was not engaging in a "quasi-judicial" function. The fact that he was a "GAL" certainly is a relevant fact because it explains the reason why he had any contact with the plaintiff at all and is indicative of the kind of abuse of power relevant in establishing the existence of outrageous conduct. See *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 565 P.2d 1173 (1977). See also WPI 14.03.02 (comment, "The extreme and outrageous character of the conduct may arise from an abuse by the actor

⁹ It is noted that the above are Ms. Kelley's view of the events and as the defense has failed to answer and no discovery occurred prior to the defendants' CR 12(b)(6) motion we have yet to hear Mr. Skargren's side of the story. Although questions of immunity may involve questions of law, it is respectfully suggested that in reality whether or not immunity is available in this case involves a mixed question of law and fact. The questions of fact involved what function Mr. Skargren was performing at the time he was engaging in the above-referenced actions. Based on the facts currently within the record, there should be little doubt that Mr. Skargren was **not operating as a "GAL" or in a "quasi-judicial capacity when he engaged in the lurid conduct described above.**

of a position, or a relation with the other, which gives him actual or apparent authority over the other, or a power to affect his interests.", citing to Restatement (2nd) of Torts, § 46, comment e).

D. The Trial Court Correctly Ruled That The Denial Of An Anti-Harassment Order Which Resulted From A Summary Anti-Harassment Proceeding Should Not Be Accorded Preclusive Effect Under The Doctrines Of Collateral Estoppel.

As discussed above the Commission of this Court **did not accept a review of any issues relating to collateral estoppel.** Nevertheless, it appears that Respondent has little choice but to respond to the County's argument on this issue for the reasons discussed above.

The Legislature has already determined that summary anti-harassment proceedings brought pursuant to RCW 10.14 et. seq., should not be afforded any kind of preclusive effect in subsequent litigation. RCW 10.14.140 under the heading of "Other Remedies" provides: **"Nothing in this chapter shall preclude a petitioner's right to utilize other existing civil remedies."**

As recognized in the opinion in *Carver v. State*, 147 Wn.App. 567, 573, 197 P.3d 678 (2008) the legislature can choose in some circumstance to limit the applicability of preclusion principles to particular proceedings. In *Carver* the court looked to RCW 50.32.097 as an example of such a legislative determination. RCW 10.14.140 is also a similar legislative determination that anti-harassment proceedings done pursuant to that

statutory scheme should not have preclusive effect on any other civil remedies which may be available to the aggrieved party.

Such a legislative determination simply makes sense because anti-harassment proceedings are by their very nature a form of injunctive relief, and it has been previously recognized that a denial of injunctive relief is not deemed to be a determination "on the merits" worthy of preclusive effect. See *McLean v. Smith*, 4 Wn.App. 394, 482 P.2d 798 (1971). It would simply defy legislative mandate should the Court be inclined to afford the denial of an anti-harassment order (a form of injunctive relief) preclusive effect given the strong language set forth in RCW 10.14.140.

Curiously, in *Carver* this court concluded that the language of RCW 49.60. et. seq. did not preclude the application of preclusion principles to discrimination claims brought under it, when a party had previously sought relief in administrative proceedings. Such a holding appears to be in conflict with the language of RCW 49.60.020 and prior Supreme Court precedent which examined that provision, which are nowhere mentioned within the *Carver* opinion.

RCW 49.60.020 under the heading of "Construction of Chapter – Election of Other Remedies" provides in part:

The provision of this chapter shall be construed liberally for the accomplishments of the purposes thereof. Nothing contained in this chapter shall be deemed to be repeal any of the provisions of any other law of this state relating to discrimination because of ... sex ..., other than a law which purports to require or permit doing any act which is an

unfair practice under this chapter. **Nor shall anything herein contained to be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.** ... (emphasis added).

As is self-evident RCW 49.60.020 mandates "liberal construction." Consistent with such a mandate, early in the history of this statutory scheme the legislature in 1973 removed an "election of remedies" provision from its terms. See, *Reese v. Sears, Roebuck and Company*, 107 Wn.2d 563, 575, 731 P.2d 497 (1987) (, overruled on other grounds, *Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989). Consistent with such a legislative determination, in the *Reese* case the Supreme Court recognized that not only did the legislature intend actions under RCW 49.60. et. seq. to be independent from any collective and bargaining procedures, but also "by amending RCW 49.60 to remove the election of remedies bar, the legislature intended the statute to preserve all remedies an employee may have for an alleged violation of their civil rights." 107 Wn. 2d at 578. Under such circumstances the Supreme Court concluded that the aggrieved employee could choose to vindicate their civil rights immediately by filing a lawsuit under RCW 49.60 or may await and pursue a remedy under a collective bargaining agreement, and if their civil rights remain unenforced they can filed a civil discrimination suit under the terms of the chapter. As noted in *Bennett v. Hardy*, 113 Wn.2d 912, 927, 784 P.2d 1258 (1990) the language within RCW 49.60.020, which expressly states that nothing in this chapter shall

be "construed to deny the right of any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights", means this language indicates a legislative recognition that other means of redress than those in the state statute should be available, is significant and should not be ignored.

It is respectfully suggested that if RCW 49.60.020 permits the pursuit of alternative remedies such as collective bargaining to redress a violation of civil rights, the language also should afford a victim of discrimination the ability to seek an anti-harassment protection order or at least to institute such proceedings without jeopardizing their subsequent ability to bring a civil suit seeking monetary damages for actions violative of RCW 49.60. et. seq.

Further, even if we assume that the legislature has not already determined this issue in the above two referenced statutory provisions, it is noted that collateral estoppel is an affirmative defense and the party asserting it has the burden of proof. See *State Farm v. Avery*, 114 Wn.App. 299, 304, 57 P.3d 300 (2002); see also CR 8(c). The party asserting collateral estoppel bears the burden of persuading the court: (1) that the issue decided in the prior action was identical to the issue presented in the second action; (2) that the prior action ended in a final judgment on the merits; (3) that the party to be estopped was in privity with a party in the prior action; and (4) that application of the doctrine would not work an injustice.

In this case the County cannot even meet the first prong because the issues simply were not identical. What was at issue in the prior proceeding was whether or not the plaintiff was entitled to an anti-harassment order pursuant to the procedures set forth within RCW 10.14.020. The question in such a proceeding is whether or not the petitioning party can establish "unlawful harassment" as defined by RCW 10.14.020(2). That is an entirely different issue than the question of whether or not the plaintiff has been a victim of sexual harassment in public accommodations in violation of RCW 49.60.215, or whether Mr. Skargren engaged in other tortious conduct as well.

As recognized by the Court Commissioner, the Appellant has failed in meeting the burden of proof with respect to what issues were or were not actually before the District Court in the anti-harassment proceedings. It is likely that only a small portion of plaintiff allegations that were before the District Court when she unsuccessfully sought such a petition, and even if all potential issues were before the District Court in such a matter, the questions which are answered in such proceedings are "quite different" than those which would be addressed in this civil action. See *Broyles v. Thurston County*, 147 Wn.App. 409, 438, 195 P.3d 985 (2008) (refusing to apply collateral estoppel principles to a prior adjudication where the issues in the litigations were "quite different").

Additionally it is dubious that the denial of anti-harassment order pursuant to RCW 10.14 et. seq. is a "final judgment on the merits". T This

is because such proceedings are more akin to a denial of injunctive relief, which, as indicated above, have been found not to be determinations "on the merits" subject to preclusion principles. See *McLean v. Smith*, supra.

Finally, it would work a grave injustice to provide such summary proceedings collateral estoppel effect. Our Appellate Courts have been extremely hesitant to apply collateral estoppel principles to proceedings that are summary in nature or when there are minimal procedural safeguards or incentives for full litigation. See *Hadley v. Maxwell*, 141 Wn.2d 306, 207 P.3d 600 (2001). Proceedings under RCW 10.14 et. seq. are by their very nature, summary, and do include among other things the opportunity for discovery, the presentation of multiple witnesses, or many other of the procedural safeguards otherwise applicable to court proceedings. See *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508 – 09, 745 P.2d 858 (1987) (in determining whether collateral estoppel may be appropriate a court may look to the adequacy of the proceedings). Under the terms of RCW 10.14.090 a party in such a proceeding may be represented by private counsel, but beyond that, such proceedings have very little resemblance to a case prosecuted under the terms of our Civil Rules.

For these reasons, not only was the Court Commissioner correct in not finding that the collateral estoppel issue in this case was worthy of discretionary review under RAP 2.3 standards, but the Trial Court was also correct in rejecting such a defense.

CONCLUSION

For the reasons stated above the Appellate Court should affirm the Trial Court's determination that under CR 12(b)(6) principles, (or even under summary judgment standards for that matter), that based on the allegations in this case, Mr. Skargren is not entitled to "quasi-judicial immunity". If plaintiff allegations are deemed to be true, which they must be for the purposes of this appeal, Mr. Skargren clearly was not acting in a "quasi-judicial" capacity when engaging in the allegations which form the core factual basis for plaintiff's claims.

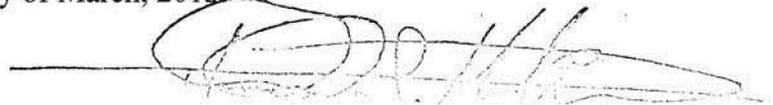
Similarly, to the extent the Court is inclined to consider the "collateral estoppel issue," (it clearly should not), such preclusion principles should not be applied to summary an anti-harassment proceedings. Not only are the issues not identical, but it is questionable whether a denial of anti-harassment order is truly a "determination on the merits". If the County is able to persuade the Court otherwise, nevertheless, collateral estoppel should not be afforded because it would work as grave injustice to do so. A person feeling threatened should be able to pursue an anti-harassment order without jeopardizing their ability to bring a subsequent civil lawsuit for damages against their wrongdoer. The application of preclusions in principles would discourage individuals from pursuing anti-harassment orders which may be justified for their own protection, out of fear that it could impact a subsequent lawsuit where they would be afforded the full opportunity to develop their case. The Court

can take note that anti-harassment orders are typically sought when allegedly wrongful events are transpiring, or nearly fresh, and there is believed to be an exigent need for the help of our court system. Under such circumstances there is rarely an opportunity to fully develop a "case", let alone any opportunity to engage in any kind of meaningful discovery in preparation for the expeditious and summary hearing on such matters.

Further, if the Court inclined to afford a preclusive effect to anti-harassment proceedings it would make such proceedings into essentially a trap for the unsophisticated and unwary who may have damage remedies available to them for the conduct upon which they are seeking protection. The notion of applying preclusion principles to anti-harassment proceedings would simply be just bad public policy.

Plaintiff should be awarded compensatory terms pursuant to RAP 18.9 for the above referenced rule violations of defense of the Orders of this Court.

Dated this 7th day of March, 2013



Thaddeus P. Martin, WSBA #28175
Attorney for Respondent

I certify that I sent for service a copy of this document on all parties or their counsel of record on the date below as follows:

Daniel Hamilton
Pierce County Prosecutor's Office
Civil Division
955 Tacoma Avenue S, Ste 301
Tacoma, WA 98402

I certify under penalty of the laws of the State of Washington, that the foregoing is true and correct.

Dated this 7th day of March, 2013, at Lakewood, Washington.


Kara Denny, Legal Assistant

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COURT OF APPEALS
DIVISION II
2013 MAR -7 AM 11:33
STATE OF WASHINGTON
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Appendix A

November 15 2012 3:45 PM

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NO: 12-2-09618-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOYCE KELLEY, individually,

Respondent,

v.

PIERCE COUNTY, a county
corporation and MARK SKAGREN
and "JANE DOE" SKAGREN, and the
Marital Community Composed
thereof,

Petitioners.

Cons. Nos. 43983-2-II
43986-7-II

RULING GRANTING REVIEW

Pierce County and Mark Skagren seek discretionary review of the trial court's denial of the County's motion to dismiss under CR 12(b)(6) and the denial of its subsequent motion for reconsideration. Concluding that the trial court appropriately certified one issue to this court under RAP 2.3(b)(4), this court grants discretionary review as to the issue of whether Skagren is protected by quasi-judicial immunity.

Skagren was appointed by the Pierce County Juvenile Court as guardian ad litem (GAL) for Joyce Kelley's son for dependency proceedings in that court. On December 13, 2011, Kelley sought an order of protection in district court for

herself and her son preventing Skagren from contacting them. She alleged that Skagren was contacting her late at night "under the influence," sending her pictures of himself holding bottles of alcohol, coming to her workplace, and not checking on her son despite claims that he was. Mot. for Disc. Rev., App. at 21. The Pierce County District Court denied her petition, stating in its order: "No actionable activity, [Skagren] was working as a GAL at times of these events." Mot. for Disc. Rev., App. at 23. Kelley apparently did not appeal this ruling. The juvenile court removed Skagren as the GAL for Kelley's son.

On June 5, 2012, Kelley filed an amended complaint against the County and Skagren, alleging several causes of action under Washington Law Against Discrimination (WLAD) as well as negligent hiring and supervision by the County. The complaint's allegations included that Skagren made sexual comments to and sexual advances upon Kelley, and that he "assaulted and battered her for sexual purposes, and that he "stalked and preyed on" her "the purpose of attempting to have sex with her." Mot. for Disc. Rev. at 3 (Amended Complaint for Damages).

The County moved to dismiss under CR 12(b)(6), arguing that (1) Kelley's claims were barred because Skagren and the County are protected by quasi-judicial immunity, (2) Kelley was precluded from arguing otherwise because the district court dismissed her anti-harassment petition based on quasi-judicial immunity, (3) Kelley had failed to allege an actionable claim under WLAD, and (4) the County is not vicariously liable for Skagren's actions.

Kelley responded, contending that she had a viable public accommodation claim under WLAD in that she was discriminated against in a way that impeded

her use of a place of public accommodation, the courtroom. She also argued that the County and Skagren were not protected by quasi-judicial immunity because Skagren's alleged conduct took place outside of his role as a GAL.

The trial court denied the County's motion to dismiss and subsequent motion to reconsider, but certified that the matter involves "controlling questions of law as to which there is a substantial ground for a difference of opinion and that immediate review of those orders may materially advance the ultimate termination of the litigation." Mot. for Disc. Rev., App. at 82 (Order Denying Pierce County's CR 12(b)(6) Motion to Dismiss). It did not specify which issues in the County's motion fell within its certification.

The County and Skagren seek discretionary review. This court may grant discretionary review when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). The County and Skagren seek discretionary review pursuant to RAP 2.3(b)(1)-(2) and (4).

A party is entitled to dismissal of any claim that fails to state a claim upon which relief may be granted. CR 12(b)(6). Courts should grant motions to dismiss for failure to state a claim sparingly and with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Dismissal for failure to state a claim is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan*, 160 Wn.2d at 164 (citing *Bravo v. Dolsen Companies.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). A trial court's ruling on a CR 12(b)(6) motion is a question of law reviewed de novo. *San Juan*, 160 Wn.2d at 164 (citing *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000)).

QUASI-JUDICIAL IMMUNITY

First, Skagren and the County argue that, as Skagren was acting as an "arm of the court" in his GAL capacity, quasi-judicial immunity protects him and the County from Kelley's suit. Kelley responds that quasi-judicial immunity does not protect Skagren and the County because Skagren's actions took place outside his role as a GAL.

Judicial immunity protects individuals acting in a judicial capacity from suits in tort, "even if accused of acting maliciously and corruptly." *Adkins v. Clark County*, 105 Wn.2d 675, 677, 717 P.2d 275 (1986) (citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). In deciding whether

judicial immunity applies, this court looks at the "function being performed instead of the person who performed it." *Lallas v. Skagit County*, 167 Wn.2d 861, 865, 225 P.3d 910 (2009). Immunity protects a judicial officer where the acts complained of "are intimately associated with the judicial process." *Adkins*, 105 Wn.2d 678 (citing *Mauro v. Kittitas County*, 26 Wn. App. 538, 613 P.2d 195 (1980) (holding that bailiff was liable for giving jurors a dictionary during deliberations)).

In *West v. Osborne*, 108 Wn. App. 764, 774, 34 P.3d 816, *review denied*, 145 Wn.2d 1012 (2001), the court held that quasi-judicial immunity protected a GAL who was being sued by the mother of the child for whom she was serving as GAL. In that case, the GAL "interviewed witnesses, consulted therapists, reviewed public records, supervised visitations, testified at hearings, and filed reports." *West*, 108 Wn. App. at 767. The mother sued the GAL, claiming that she had failed to perform her duties and had "negligently 'placed'" the child with his father. *West*, 108 Wn. App. at 767. The trial court granted the GAL quasi-judicial immunity and dismissed the mother's claims on summary judgment. This court held that quasi-judicial immunity protected the GAL from suit because the GAL was "acting as an arm of the court at all times." *West*, 108 Wn. App. at 774.

The issue of whether Skagren is immune from suit because he was serving as a GAL, *Lallas*, 167 Wn.2d at 865, or whether he is not immune from suit because, as Kelley contends, he was not "acting as an arm of the court" when he committed the act that she alleges, *West*, 108 Wn. App. at 774, is one where "there is substantial ground for a difference of opinion and that immediate

review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(b)(4). Therefore, discretionary review of this issue is appropriate under RAP 2.3(b)(4). This is particularly so where quasi-judicial immunity is involved, because such immunity is immunity from suit, not just immunity from damages. *West*, 108 Wn. App. at 772-73. The County and Skagren’s motion for discretionary review of this issue is granted.

COLLATERAL ESTOPPEL

Second, the County and Skagren contend that the trial court erred in denying its motion to dismiss on the basis of collateral estoppel, arguing that the district court’s denial of Kelley’s petition for an order of protection on grounds of quasi-judicial immunity precludes her claim here. Kelley responds that because proceedings under Chapter 10.14 RCW for an order of protection are summary in nature, a judgment rendered in such a proceeding cannot be afforded preclusive effect in subsequent civil action for damages.

Application of the doctrine of collateral estoppel requires:

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

Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (quoting *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987))).

The parties point to no authority, and this court finds none, addressing whether the denial of an order of protection can be given preclusive effect in a later civil suit for damages. The cases the County and Skagren rely on, *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000), *review denied by Calof v. Casebeer*, 143 Wn.2d 1014, 22 P.3d 802 (2001), and *State v. Green*, 157 Wn. App. 833, 239 P.3d 1130 (2010), involve collateral attacks on restraining orders in criminal convictions for violations of the order. The courts in those cases recognized that “[v]iolation of the judicial order gives rise to criminal punishment without evidence regarding the facts underlying the order, because those facts have already been established in a prior judicial proceeding.” *Green*, 157 Wn. App. at 846 (citing *Noah*, 103 Wn. App. at 38). Kelley is not contesting the validity of the denial of her petition for an order of protection; rather, she is claiming that the nature of the proceedings differ too much to afford preclusive effect to the court’s order denying her earlier petition. Therefore *Noah* and *Green* do not support dismissal on collateral estoppel grounds in this case.

Further, it is unclear that the issues raised in each proceeding are identical. The district court’s order stated that Kelley was not entitled to an order of protection because Skagren was “working as a GAL at the time of these events.” Mot. for Disc. Rev., App. at 23. The allegations Kelley made in her petition for an order of protection were as follows:

i was in a counseling session with phobe mulligan(who has also given a stament) he kept calling and texting me. i put him on speaker phone so phobe can hear what he was saying. he asked me where i was because he has ben stopping by my job and i havent ben there. he also stated that he missed me and asked if i

was upset? he asked me because the nite efor he was texting me under the influence. he sent pictures of to me with him in them holding bottles of achol. this was about 1130 or 12 at nite. i went out side and he was parked out front. i couldent let this go on any longer. i had to speak up.

he has came up to my jobs multible times. he has told the courts he has checked on my son. he has never done so. he has done this to other women besides me. im scared he is going to have a day where he is drinking and take futher action. he is a man that prays on vanurbul woman that he has power over. im scard to be in my home at nite with me and my son that he mite retalate. he has already sat outside my house i dont know what he will do? he has ben in my house when he was their i felt very intimidated. i have seen him since the police has ben contacted. i fear for what he can do to me and my son.

so he can not retaliate and harm me and my child. or effect my case.

i dont want him to come back and retaliate and hurt me or my child, because i voiced the truth about what he hs ben do to woman. when he is suppose to be their to protect our children.

Mot. for Disc. Rev., App. at 21 (spelling errors in original).

The allegations in Kelley's complaint extend beyond the facts alleged in the petition. They include claims that Skagren made "sexual comments" to Kelley and "assaulted and battered her for sexual purposes." Resp. to Mot. for Disc. Rev. at 5 (quoting Amended Complaint).

As to the denial of the motion to dismiss on grounds of collateral estoppel, there does not appear to be "substantial ground for a difference of opinion" or that "immediate review of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). Therefore, discretionary review of this issue under RAP 2.3(b)(4) is not appropriate. Unlike the immunity issue, collateral estoppel would confer only a defense against the claim of damages, not immunity from suit. And given the lack of authority to the contrary, the

County and Skagren fail to show that the trial court committed obvious or probable error, so discretionary review under RAP 2.3(b)(1) or (2) is not appropriate. Their motion for discretionary review of this issue is denied.

VICARIOUS LIABILITY

Third, the County and Skagren argue that Kelley's claim that Skagren was acting "in a function that was entirely non-judicial in nature and for his personal gratification" and her allegation that the County is vicariously liable for Skagren's conduct are mutually exclusive. Mot. for Disc. Rev. at 16. Therefore, the County and Skagren contend, the trial court erred in refusing to dismiss Kelley's claims against the County.

An employer is not vicariously liable for the actions of employees which occur outside the scope of their employment. See *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), review denied, 123 Wn.2d 1027 (1994). Whether an employee is acting in the scope of his employment is determined by examining

whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment; or by specific direction of his employer; or, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest.*

Thompson, 71 Wn. App. at 552 (quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 710 P.2d 814 (1986) (quoting *Elder v. Cisco Constr. Co.*, 52 Wn.2d 241, 245, 324 P.2d 1082 (1958) (quoting *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958)))) (emphasis in all cases).

The question of whether an employee is acting within the scope of his employment is ordinarily a question for the jury. *Gilliam v. DSHS*, 89 Wn. App. 569, 585, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998). Given that, and the authority that provides that CR 12(b)(6) motions should be granted sparingly, there does not appear to be “there is substantial ground for a difference of opinion” regarding the vicarious liability claim or that “immediate review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(b)(4). Therefore, discretionary review of this issue under RAP 2.3(b)(4) is not appropriate. Again, unlike the immunity issue, the limits on vicarious liability would confer only a defense upon the County against the claim of damages, not immunity from suit. And for the same reasons, the County and Skagren fail to show that the trial court committed obvious or probable error in denying the motion to dismiss on vicarious liability grounds, so discretionary review under RAP 2.3(b)(1) or (2) is not appropriate. Their motion for discretionary review of this issue is denied.

PUBLIC ACCOMMODATION CLAIM

Finally, the County contends that Kelley failed to allege an actionable claim under RCW 49.60.030(1)(b), which recognizes a right to be free from discrimination in the “full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement,” because she failed to allege that the claimed conduct interfered with her use of any “place.” Mot. for Disc. Rev. at 18 (emphasis theirs) (quoting *MacLean v. First Northwest Indus. of Am. Inc.*, 96 Wn.2d 338, 343, 635 P.2d 683

(1981)). Kelley responds that the law on what constitutes a "public accommodation" is evolving and therefore dismissal at this stage would be inappropriate. Resp. to Mot. for Disc. Rev. at 34. She contends that "public accommodation" encompasses the provision of governmental services, such as the appointment of a GAL. Resp. to Mot. for Disc. Rev. at 34.

A plaintiff asserting a claim under discrimination in a place of public accommodation must show that the "defendant's establishment is a place of public accommodation." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) (citing *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 638, 911 P.2d 1319 (1996)). In *Fell*, our Supreme Court addressed the question whether a service was a "place of public accommodation" for purposes of WLAD. *Fell*, 128 Wn.2d at 638-39. The court stated: "What must be very clear, however, is that the statutory mandate to provide access to places of public accommodation is not a mandate to provide services." *Fell*, 128 Wn.2d at 639.

Given that CR 12(b)(6) motions should be granted sparingly, there does not appear to be "substantial ground for a difference of opinion" regarding the public accommodation claim or that "immediate review of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). Therefore, discretionary review of this issue under RAP 2.3(b)(4) is not appropriate. And given the paucity of case law in this area, the County and Skagren fail to show that the trial court committed obvious or probable error in denying the motion to dismiss for failure to state a public accommodation claim,

so discretionary review under RAP 2.3(b)(1) or (2) is not appropriate. Their motion for discretionary review of this issue is denied.

CONCLUSION

The County and Skagren have demonstrated that discretionary review of the immunity issue is appropriate under RAP 2.3(b)(4). They have not demonstrated that discretionary review of the other issues is appropriate. Accordingly, it is hereby

ORDERED that the County's and Skagren's motion for discretionary review is granted but is limited to the issue of whether quasi-judicial immunity applies to Skagren. RAP 2.3(e). The Clerk will issue a perfection schedule. Proceedings in the trial court are stayed pending a decision by this court.

DATED this 15th day of November, 2012.



Eric B. Schmidt
Court Commissioner

cc: Daniel Ray Hamilton
Christopher W. Keay
Thaddeus P. Martin, IV
Hon. Garold E. Johnson



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS: 9-12, 1-4**

September 27, 2012

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CASE #: 43983-2-II USE THIS NUMBER ON ALL FILINGS

(43986-7-II Consolidated)

Joyce Kelley, Respondent v. Pierce County, Mark Skagren & "Jane Doe" Skagren,
Petitioners

Re: Pierce County, No. 12-2-09618-5

Case Manager: Christina

Dear Counsel:

We received two Notices of Discretionary review filed September 21, 2012. In accordance with RAP 3.3(a), effective September 1, 1994, the cases should be consolidated.

The time periods for complying with the Rules of Appellate Procedure are as follows:

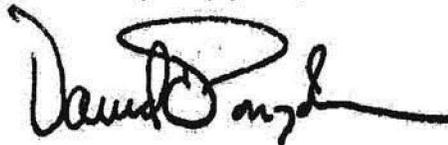
1. Motions for Discretionary Review must be filed with the clerk of this court by October 8, 2012. *See* RAP 6.2(b). The motion should not exceed 20 pages, not including supporting papers. RAP 17.4(g)(1). The appendix to the motion for discretionary review must include "a copy of parts of the record relevant to the motion." RAP 17.3(b)(8).
2. According to this court's General Order 05-1, effective May 9, 2005, a commissioner of this court will consider the merits of the motions for discretionary review with oral argument.
3. A **response** to the motion must be filed within **15 days** after the last motion is filed. **Filing a response is mandatory.** The response should not exceed 20 pages, not including supporting papers. RAP 17.4(g)(1).
4. Replies, if filed, are due within 7 days after the response is filed and should not exceed 10 pages, not including supporting papers.
5. This court will hear argument in due course. As noted below, attendance is mandatory.
6. **These filing deadlines supersede those set out in RAP 6.2(b) and 17.4(e).**

PLEASE NOTE:

Motions for discretionary review and a response are required. This court will dismiss the case or sanction counsel for failing to timely file these pleadings. *See* RAP 18.9. Requests for extensions of time must be made by motion and affidavit showing good cause. Counsel are cautioned to review the RAPs for other applicable rules. A commissioner will consider the motion in the next term after it is filed.

Attendance at oral argument is mandatory unless counsel notifies the court and other party/parties at least 24 hours in advance of the scheduled argument date of counsel's intention to waive his or her presence. **The court will impose a \$150.00 sanction for failure to appear without providing the required notification.**

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Ponzoha". The signature is stylized with a large, circular flourish at the top and a long, horizontal stroke extending to the right.

David C. Ponzoha,
Court Clerk

DCP:cm

cc: Pierce County Clerk

Appendix B

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

JOYCE KELLEY, Individually;

Plaintiff,

v.

PIERCE COUNTY, a county corporation and
MARK SHAGREN and "JANE DOE"
SHAGREN, and the Marital Community
Composed thereof; ,

Defendants.

NO. 12-2-09618-5

AMENDED COMPLAINT FOR
DAMAGES

Plaintiff, Joyce Kelley, by and through her counsel of record Thaddeus P. Martin of Law Office of Thaddeus P. Martin as and for her causes of action against defendant, alleges as follows:

I. PARTIES

1.1. Plaintiff Joyce Kelley is and at all times relevant has been a resident of Washington State in Pierce County.

1.2. Defendant Pierce County is a county corporation organized under the laws of the State of Washington.

AMENDED COMPLAINT - 1

1
2 **5.3 Hostile Environment (Sexual) (Public Accommodation) (RCW 49.60, et seq.):**

3 Plaintiff incorporates all preceding paragraphs as though fully set forth herein as a proximate
4 cause of Plaintiff's injuries. Although Plaintiff states an individual cause of action, Plaintiff
5 notes that each cause of action is interrelated to all of the facts set forth in this complaint.
6

7
8 **5.4 Disparate Treatment (Sexual) (RCW 49.60, et seq.):** Plaintiff incorporates all
9 preceding paragraphs as though set forth fully herein as a proximate cause of Plaintiff's
10 injuries. Although Plaintiff states an individual cause of action, Plaintiff notes that each cause
11 of action is interrelated to all of the facts set forth in this complaint.
12

13
14 **5.5 Assault and battery (Sexual) (RCW 49.60, et seq.):** Plaintiff incorporates all
15 preceding paragraphs as though set forth fully herein as a proximate cause of Plaintiff's
16 injuries. Although Plaintiff states an individual cause of action, Plaintiff notes that each cause
17 of action is interrelated to all of the facts set forth in this complaint.
18

19
20 **5.6 Unlawful Retaliation (Sexual) (RCW 49.60, et seq.):** Plaintiff incorporates all
21 preceding paragraphs as though set forth fully herein as a proximate cause of Plaintiff's
22 injures. Although Plaintiff states an individual cause of action, Plaintiff notes that each cause
23 of action is interrelated to all of the facts set forth in this complaint.
24

1 **5.7 Negligent Hiring, Training, Supervision, and Retention:** Plaintiff incorporates all
2 preceding paragraphs as though set forth fully herein as a proximate cause of Plaintiff's
3 injuries. Although Plaintiff states an individual cause of action, Plaintiff notes that each cause
4 of action is interrelated to all of the facts set forth in this complaint.
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7 **5.8 Intentional Infliction of Emotion Distress (Outrage):** Plaintiff incorporates all
8 preceding paragraphs as though set forth fully herein as a proximate cause of Plaintiff's
9 injuries. Although Plaintiff states an individual cause of action, Plaintiff notes that each cause
10 of action is interrelated to all of the facts set forth in this complaint.
11

12 **5.9 Families with Children Discrimination:** Plaintiff incorporates all preceding
13 paragraphs as though set forth fully herein as a proximate cause of Plaintiff's injuries.
14 Although Plaintiff states an individual cause of action, Plaintiff notes that each cause of action
15 is interrelated to all of the facts set forth in this complaint.
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21 V. DAMAGES

22 As a direct and proximate result of the acts and omissions of the Defendants, and each
23 of them, the Plaintiff suffered severe and permanent emotional distress, mental anguish,
24 mental and emotional shock, all of which have continued into the present and will continue
25 into the future.
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AMENDED COMPLAINT - 5

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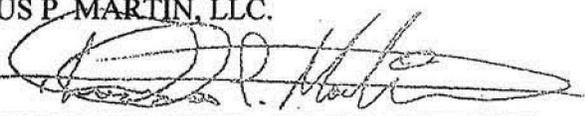
VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them,
as follows:

- (1) For such special damages as shall be established at time of trial;
- (2) For such general damages as shall be established at time of trial;
- (3) For such punitive damages allowable by law; and
- (4) For such attorneys' fees, interest, costs, and such other and further relief as shall be allowed by law or deemed just and equitable

Dated this 5th day of JUNE 2012.

THADDEUS P. MARTIN, LLC.

By 

Thaddeus P. Martin, WSBA No. 28175
Attorney for Plaintiff

Appendix C

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

JOYCE KELLEY, Individually;

Plaintiff,

v.

PIERCE COUNTY, a county corporation and
MARK SHAGREN and "JANE DOE"
SHAGREN, and the Marital Community
Composed thereof, ,

Defendants.

NO. 12-2-09618-5

DECLARATION OF JOYCE KELLEY

I, JOYCE KELLEY, declare as follows:

1. I am a party to this action. I am over the age of 18 and competent to testify the following based on my personal knowledge.

2. Mark Shagren was my Court appointed guardian ad litem starting in 2011. My claims against Mr. Shagren and Pierce County relate to the sexual harassment that Mr. Shagren engaged in against me. For example, on one occasion, Mr. Shagren wanted to come and check on my son Lucas. I informed Mr. Shagren that Lucas was at daycare but ten minutes later Mr. Shagren showed up at my door. I informed Mr. Shagren again that Lucas was not there and Mr. Shagren stated that he was there to talk to me about getting my license back.

KELLEY DECLARATION - 1

1 Mr. Shagren knew that I did not have the funds to get my driver's license reinstated. Mr.
2 Shagren stated to me "I know your job doesn't pay very much and you have a lot of bills to
3 take care of and you don't have a man to help you. I'm willing to give you the money for
4 your license. You are a smart girl. I am sure you will find some way to pay me back." He
5 then stated "how far would you go to get your license?" Mr. Shagren was looking at me in a
6 sexual manner when he stated this. Mr. Shagren kept walking closer and closer to me as if he
7 were trying to kiss me and I had to literally push him off of me and told him to "back up."
8 When I declined this gesture, he became visibly upset.

9 3. I confided to my counselor Phoebe Mulligan what was going on with Mr. Shagren.
10 During one of my counseling sessions, Mr. Shagren called me repeatedly on my cell phone.
11 My counselor asked me to call him back and put it on speaker. I did so and Mr. Shagren
12 asked me why I had been dodging him. He said he had gone to my job several times and I
13 wasn't there. He asked if I was mad at him and then said he missed my beautiful face.

14 4. Mr. Shagren repeatedly showed up at places where I was. I saw him on numerous
15 occasions at the park near my house, at my job and at the coffee stand near her house. At the
16 times that he came to these places Mr. Shagren never checked up on Lucas or asked about
17 him. Mr. Shagren came to my house 15-20 times and tried to ask me to go places with him.
18 Mr. Shagren would often ask me if I needed a ride somewhere. If I did agree to a ride, Mr.
19 Shagren would act as if we were on a date and would ask personal questions and touch my
20 hair or my arms.

21 5. Mr. Shagren often sent me text messages from my phone asking me to go out on dates
22 with him. These text messages were often after midnight. Mr. Shagren would send pictures
23 of himself holding alcoholic beverages.

24 6. Mr. Shagren is taller than me and he would often hover over her to look down my shirt
25 trying to see my breasts. He also would approach me from behind and put his hands on my
26

KELLEY DECLARATION - 2

1 shoulder and hair. He often offered me money. Mr. Shagren often would tell me that I was
2 beautiful and that I was sexy or a sexy thing. He would send text messages like "Drinking a
3 cold one, nice cold and wet," or "I like my beer like I like my women, old and wet." He
4 would often ask me if I wanted to have a beer with him. Mr. Shagren knew that I was a
5 recovering addict.

6 7. Mr. Shagren often would touch me inappropriately, put his arms around me or touch
7 my legs or knees or hair. For example, Mr. Shagren offered me a ride and when I got into his
8 car he asked me to "hide a secret" and stated that I "shouldn't be in his car," then he grabbed
9 my leg and said "just chill, you need to relax." He grabbed my knee three times on this date.

10 8. Mr. Shagren put his arms around me about two dozen times in all of my interactions
11 with Mr. Shagren. Mr. Shagren would asked personal questions about whether I had a
12 boyfriend, what kinds of things I like doing to have fun. Mr. Shagren repeatedly told me that
13 I had a beautiful face and a beautiful body. Mr. Shagren would also brush up against me from
14 behind, rubbing his crotch on my backside. Mr. Shagren was very "touchy feely" with me,
15 always trying to hug me or touching my body or my hair. Mr. Shagren constantly pressured
16 me to go out on dates with him to go drinking.

17
18 I hereby declare under the penalty of perjury under the laws of the State of Washington
19 that the foregoing is true and correct to the best of my knowledge.

20
21 EXECUTED THIS 10th day of July, 2012 at Lakewood, Washington.

22
23 By Joyce E. Kelley
24 Joyde Kelley
25
26

KELLEY DECLARATION - 3