

Honorable Robert J. Bryan

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIAN P. CARR,

Plaintiff,

v.

SAM REED, in his official capacity as Secretary of State of the State of Washington, and ROB McKENNA, in his official capacity as Attorney General of the State of Washington and representing in their official capacity as representatives of the State of Washington and, separately, as private individuals the Honorable ROBERT L. HARRIS, JOHN F. NICHOLS, BARBARA D. JOHNSON, KENNETH EIESLAND, RICH MELNICK, JOHN HAGENSEN, KELLI E. OSLER, JOEL PENOYAR, (J.) C.C. BRIDGEWATER, J. ROBIN HUNT, GERRY L. ALEXANDER, BARBARA MADSEN, MARY E. FAIRHURST, SUSAN OWENS and JAMES M. JOHNSON as well as other currently unnamed parties as determined by the Court,

Defendants.

No. C07-5260 RJB

CLARK COUNTY DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS  
PLAINTIFF'S AMENDED COMPLAINT

HEARING DATE:  
September \_\_\_\_, 2007

I. MOTION

COME NOW Defendants The Honorable ROBERT L. HARRIS, The Honorable JOHN F. NICHOLS, The Honorable BARBARA D. JOHNSON, The Honorable KENNETH

1 EIESLAND, The Honorable RICH MELNICK, The Honorable JOHN HAGENSEN, and The  
2 Honorable KELLI E. OSLER (the “Clark County Defendants”), and move the court to grant  
3 Defendants’ Motion for Summary Judgment because Defendants’ motion, memorandum and  
4 supporting documentation establish that there are no genuine disputes as to any material fact and  
5 Defendants are entitled to judgment as a matter of law.

6  
7 This motion is based on the records and files herein, and the Points and Authorities  
8 submitted herewith.

9  
10 II. FACTS

11 Defendants Kenneth Eiesland and Richard Melnick are District Court Judges for Clark  
12 County, who were appointed as Superior Court Commissioners. Co-Defendant Counsel Clark’s  
13 Declaration, Ex. A, ¶ 21. On October 15, 2004, Judge Eiesland entertained a petition for  
14 Domestic Violence Order for Protection signed by Karyn (Plaintiff’s ex-wife). Id., Ex C, p.12.  
15 This first petition was assigned cause number 04-2-08824-4. Id., Ex C, p.12. Judge Eiesland  
16 granted a Temporary Order for Protection, ordering Carr to have no contact with Karyn. Id., Ex  
17 C, p.12. At the time of this initial order, a hearing for a longer term Order for Protection was set  
18 for October 27, 2004. On October 27, 2004, Judge Melnick considered and entered a Domestic  
19 Violence Order for Protection, valid for a period of one year from that date. Id., Ex C, p.13.  
20

21 Judge John Nichols is a Washington State Superior Court Judge in Clark County. Id., Ex  
22 A, ¶ 20. On November 12, 2004, Carr filed a petition for a Temporary Domestic Violence Court  
23 Order for Protection. Id., Ex C, p.14. This second petition was assigned cause number 04-2-  
24 08908-9. Id., Ex C, p.14. Judge John Nichols entertained and denied the petition for Protection.  
25 Veljacic’s Declaration, Ex 1, Ex 2. On January 5, 2005, Judge John Nichols filed an “amended  
26 denial” of Carr’s petition explaining more thoroughly the reason for the denial. Id., Ex 3, 4. A  
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1 hearing date for a longer term Domestic Violence Court Order for Protection had been set for  
2 January 19, 2005. Id., Ex 4. Carr failed to appear at that hearing and Judge Eiesland, acting as a  
3 Superior Court Commissioner, noted the failure to appear and did not order a protection order in  
4 favor of Carr. Id., Ex 5.

5  
6 Meanwhile, on November 23, 2004, Carr had filed a motion for revision regarding the  
7 decision of Judge Melnick to grant the first order for protection under 04-2-08824-4. Clark's  
8 Declaration, Ex. C, p. 14. Also included in this motion was a request for revision of Judge  
9 Nichols' denial of the second petition for order for protection under 04-2-08908-9. Id. Ex. C, p.  
10 15.

11  
12 Judge Barbara Johnson is a Washington State Superior Court Judge in Clark County. Id.,  
13 Ex A, ¶ 20). On December 10, 2004, Judge Johnson entertained Carr's motion for revision and  
14 denied it. Id. Ex. C, p. 15. On January 18, 2005, Carr filed a notice of appeal with the  
15 Washington State Court of Appeals, Division II, thereby appealing Judge Johnson's decision. Id.  
16 Ex. C, p. 15.

17  
18 Judge Robert L. Harris is a Washington State Superior Court Judge in Clark County, and  
19 is the presiding judge for the county. Id., Ex A, ¶ 20. Judge Harris as presiding judge appointed  
20 District Court Judges Eiesland and Melnick as Superior Court Commissioners. Id., Ex. A, ¶ 20,  
21 21. Judge Harris also appointed Judge Hagensen and Commissioner Osler as Family Law Court  
22 Commissioners. (Id., Ex A ¶ 21).

23  
24 Judge John Hagensen is a District Court Judge for Clark County, who also acts as a  
25 Superior Court Family Law Court Commissioner. (Id., Ex A ¶ 21). Judge Hagensen did not  
26 preside over either of the above cases that are the subject matter of Plaintiff's lawsuit. Likewise,  
27 Kelli Osler is a District Court Commissioner, who was appointed a Family Law Court  
28

1 Commissioner. Id., Ex A ¶ 21. Commissioner Osler did not preside over either of the above  
2 cases that are the subject matter of Plaintiff's lawsuit.

3 A review of the Amended Complaint (Id., Ex. A) shows that Counts I (Commissioners  
4 Exceed Three in Number), II (Interference with Right to Appeal), III (Requirements of Statutes  
5 Ignored), IV (Family Court Commissioners issue Restraining Orders), and VI (Sexual Bias in  
6 RCW 26.50 Process) relate to the above defendants. A review of Plaintiff's initial disclosures  
7 confirms that the above petitions for Orders for Protection (cause numbers 04-2-08824-4 and 04-  
8 2-08908-9) are the focus of his case.

9  
10 III. POINTS AND AUTHORITIES

11  
12 Clark County Defendants hereby adopt the arguments presented by co-defendants in  
13 Assistant Attorney General Clark's Motion to Dismiss filed August 30, 2007. The Clark County  
14 defendants hereby present additional argument on Absolute Judicial Immunity and Plaintiff's  
15 lack of Standing as alternative bases for dismissal of Plaintiff's case.

16  
17 **A. Standard for Motion for Summary Judgment**

18 Summary judgment should be granted where there is no genuine issue of material fact  
19 and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). "The  
20 plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for  
21 discovery and upon motion, against a party who fails to make a showing sufficient to establish  
22 the existence of an element essential to that party's case, and on which that party will bear the  
23 burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.  
24 2d 265 (1986).

### 1. Absolute Judicial Immunity

Our jurisprudence has long recognized that "a general principle of the highest importance to the proper administration of justice (is) that a judicial officer (should) be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L. Ed. 646 (1872). The breadth of judicial immunity is circumscribed by two longstanding rules: (a) the immunity covers only those acts which are "judicial" in nature. Stump v. Sparkman, 435 U.S. 349, 360-364, 98 S. Ct. 1099, 1106-1108, 55 L. Ed. 2d 331 (1978); and (b) "[A] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he acted in the 'clear absence of all jurisdiction.'" Id. At 356-57, 98 S. Ct. at 1104-05. See Gregory v. Thompson, 500 F.2d 59, 62 (9<sup>th</sup> Cir. 1974).

#### *(a) Judicial Act*

As the United States Supreme Court stated in Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed 2d 331 (1978), the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. Sparkman 435 U.S. at 361.

The 9<sup>th</sup> Circuit has "identified the following factors as relevant to the determination of whether a particular act is judicial in nature: (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." Duvall v. County of Kitsap, 260 F.3d 1124, 1133 (9<sup>th</sup> Cir. 2001), citing Meek v. County of Riverside, 183 F.3d 962, 967 (9<sup>th</sup> Cir.

1 1999). “Disagreement with the action taken by the judge, however, does not justify depriving  
2 that judge of his immunity. Despite the unfairness to litigants that sometimes results, the  
3 doctrine of judicial immunity is thought to be in the best interests of the proper administration of  
4 justice...[, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to  
5 act upon his own convictions, without apprehension of personal consequences to himself.”

6 Sparkman 435 U.S. at 361, quoting Bradley v. Fisher, 13 Wall., at 347.

7  
8 The acts that Plaintiff complains of stem from judicial decisions to appoint  
9 commissioners (Harris), grant a temporary Order for Protection (Eiesland), grant a permanent  
10 Order for Protection (Melnick), deny a temporary Order for Protection (Nichols), deny revision  
11 of previous rulings (B. Johnson), and issue protection orders on cases unrelated to Plaintiff’s  
12 (Hagensen, Osler). The appointment of commissioners, consideration of Orders for Protection  
13 and consideration of Motions for Revision are all protected judicial acts.

14  
15 With regard to defendant Harris, the power of appointment stems from the inherent right  
16 of the court to provide for the efficient administration of justice. In re Juvenile Director, 87  
17 Wn.2d 232, 552 P.2d 163 (1976). Because the appointment of commissioners is a judicial act,  
18 the alleged error in Harris’ appointments did not render him liable in damages for the  
19 consequences of his actions. Appointing commissioners is a normal judicial act, the oath of  
20 which is administered only by a judge. Such appointments occur in the judge’s chambers and  
21 arise out of a judge’s acting in his/her official capacity.

22  
23 Carr dealt with Judges Nichols, B. Johnson, Eiesland, and Melnick in their official  
24 capacities in a courtroom, while all were acting as either Superior Court Commissioners or  
25 Superior Court Judges. Each of these judges considered the petitions, which were controversies  
26 between two parties. Presiding over such a controversy is a normal judicial function. The  
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1 consideration of the petitions occurred in the courtrooms or chambers of each judge. The  
2 controversy complained of by the Plaintiff centers around the cases that were pending before  
3 each of these judges. The events in the complaint arose directly and immediately out of a  
4 confrontation with the judges acting in their official capacities. It is this same type of decision  
5 (Orders for Protection) by judges Hagensen and Osler that the Plaintiff complains of, therefore  
6 the same arguments apply to these two defendants.  
7

8 *(b) Jurisdiction of Superior Court*

9 Only when a judge has acted in the "clear absence of all jurisdiction" will s/he be subject  
10 to liability. Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed 331 (1978). A clear  
11 absence of all jurisdiction means a clear lack of all subject matter jurisdiction. Bradley v. Fisher,  
12 80 U.S. (13 Wall.) at 351-352. See also Rankin v. Howard, 633 F.2d 844, 848-49 (9<sup>th</sup> Cir. 1980)  
13 ("a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial  
14 immunity"), cert. denied, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed. 2d 326 (1981). Acting in the  
15 clear absence of jurisdiction is different from acting in excess of jurisdiction. O'Neil v. City of  
16 Lake Oswego, 642 F.2d 367 (9<sup>th</sup> Cir. 1981).  
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19 The U. S. Supreme Court has illustrated the distinction between an act in the clear  
20 absence of jurisdiction and an act in excess of jurisdiction by stating:  
21

22 if a probate judge, with jurisdiction over only wills and estates, should try a criminal  
23 case, he would be acting in the clear absence of jurisdiction and would not be  
24 immune from liability for his action; on the other hand, if a judge of a criminal court  
25 should convict a defendant of a nonexistent crime, he would merely be acting in  
26 excess of his jurisdiction and would be immune.

27 Stump v. Sparkman, 435 U.S. at 357, n.7.

28 O'Neil, supra, further illustrates this point. In O'Neil, the plaintiff was convicted of  
29 contempt by a judge pro tempore. Under applicable state law, the judge was not permitted to  
find a defendant guilty of contempt committed outside the court's immediate view in the absence

1 of an affidavit outlining the facts of the contempt. The contempt in O'Neil was in fact outside  
2 the judge's immediate view and there existed no affidavit outlining the facts of the contempt.  
3 The judge convicted and O'Neil sued. The 9<sup>th</sup> Circuit ruled that rather than acting in the clear  
4 absence of all jurisdiction, the judge acted in excess of his jurisdiction. The 9<sup>th</sup> Circuit used the  
5 parlance of Sparkman to explain:

6  
7 (the judge's) action in convicting O'Neil of contempt, an offense within his court's  
8 jurisdiction, although without the requisite papers to confer jurisdiction over this  
9 particular commission of the offense, is more analogous to a criminal court  
10 convicting for a nonexistent offense than to a probate court hearing a criminal case.  
11 It is the sort of "grave procedural error" that does not pierce the cloak of immunity.

12 O'Neil, 642 F.2d at 369, citing to Sparkman, supra, at 359.

13 Judges Harris, Nichols, and B. Johnson are all Superior Court Judges, while Eiesland and  
14 Melnick were appointed Superior Court Commissioners, with Hagensen and Osler appointed as  
15 Family Law Court Commissioners for Superior Court. The Superior Court of Washington has  
16 original subject matter jurisdiction over domestic relations proceedings.

17 Revised Code of Washington 2.08.010 states:

18 The superior court shall have original jurisdiction in all cases in equity, and in all  
19 cases at law which involve the title or possession of real property, or the legality of  
20 any tax, impost, assessment, toll or municipal fine, and in all other cases in which the  
21 demand or the value of the property in controversy amounts to three hundred dollars,  
22 and in all criminal cases amounting to felony, and in all cases of misdemeanor not  
23 otherwise provided for by law; of actions of forcible entry and detainer; of  
24 proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of  
25 probate, **of divorce and for annulment of marriage**, and for such special cases and  
26 proceedings as are not otherwise provided for; and shall also have original  
27 jurisdiction in all cases and of all proceedings in which jurisdiction shall not have  
28 been by law vested exclusively in some other court, and shall have the power of  
29 naturalization and to issue papers therefor. Said courts and their judges shall have  
power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and  
writs of habeas corpus on petition by or on behalf of any person in actual custody in  
their respective counties. Injunctions and writs of prohibition and of habeas corpus  
may be issued on legal holidays and nonjudicial days.

RCW 2.08.010 (emphasis added).

1 Being a court of general jurisdiction, authority of superior court is presumed until  
2 contrary affirmatively appears. Munch v. McLaren, 9 Wn. 676, 38 P. 205 (1894). Further, RCW  
3 26.50.020(5) states “[t]he courts defined in RCW 26.50.010(3)<sup>1</sup> have jurisdiction over  
4 proceedings under this chapter.” RCW 26.50.010(4) states "court" includes the superior... courts  
5 of the state of Washington. RCW 26.50 is entitled “Domestic Relations” and the Orders for  
6 Protection referenced in Plaintiff’s Amended Complaint originate from RCW 26.50.070 and  
7 RCW 26.50.060.  
8

9 Clearly, Superior Courts in the state of Washington are courts of original jurisdiction.  
10 They specifically have jurisdiction over domestic relations matters and proceedings under  
11 chapter 26.50, which includes Domestic Violence Orders for Protection stemming from divorce  
12 proceedings. Therefore, original subject matter jurisdiction existed in the matters complained of  
13 by plaintiff, while all Clark County defendants acted as Superior Court Judges or  
14 Commissioners.  
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16 It is apparent that Plaintiff’s theory is that due to an alleged procedural defect in  
17 appointment of Superior Court Commissioners in Clark County, jurisdiction is somehow  
18 nullified and therefore the cloak of immunity should be pierced. However, consistent with  
19 O’Neil, the jurisdiction of the Washington State Superior Court (to which Plaintiff availed  
20 himself via his own Petition for Order for Protection) over domestic relations matters remains  
21 intact regardless of the alleged procedural deficiencies argued by Plaintiff.  
22

## 23 2. Plaintiff Lacks Standing

24 As an alternative basis for dismissal with regard to Defendants Hagensen and Osler,  
25 Plaintiff alleges that Judge Hagensen and Commissioner Osler have issued Domestic Violence  
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29 <sup>1</sup> RCW 26.50.010(3) was renumbered as RCW 26.50.010(4) by 1992 c 111 § 7.

1 Orders for Protection that extend up to one full year. Plaintiff alleges that Judge Hagensen and  
2 Commissioner Osler lack authority to issue such Orders for Protection. Significantly, Plaintiff  
3 lacks standing to sue Judge Hagensen and Commissioner Osler.

4 In order to establish standing, a plaintiff must show (1) it has suffered an "injury in fact"  
5 that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;  
6 (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as  
7 opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends  
8 of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 180-181, 120 S. Ct. 693, 145 L.  
9 Ed. 2d 610 (2000). Both aggrievement and standing require "that petitioners establish, at a  
10 minimum, 'injury in fact' to a protected interest." Shell Oil Co. v. FERC, 310 U.S. App. D.C.  
11 312 (D.C. Cir. 1995). In the cases listed by Plaintiff as instances where Hagensen and Osler  
12 allegedly entered Orders for Protection, the Orders do not involve Plaintiff as either a petitioner  
13 or respondent. He has not shown in his complaint that he has a protected interest that is traceable  
14 to the decisions of Hagensen and Osler. Nor has Plaintiff shown any injury in fact resulting from  
15 the decisions of Hagensen and Osler and as a result, he lacks standing. Therefore his case should  
16 be dismissed on this alternative basis.

#### 20 IV. CONCLUSION

21 The Court should grant the defendants' motion for summary judgment based on the  
22 reasons set forth in the co-defendants' motion. Further, the court that decided the controversy  
23 that the Plaintiff complains of had subject matter jurisdiction as a court of original jurisdiction.  
24 The judges themselves, therefore, since engaging in judicial acts, enjoy absolute judicial  
25 immunity. Finally, Plaintiff lacks standing to sue defendants Hagensen and Osler. For the  
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1 foregoing reasons, the Plaintiff's Amended Complaint should be dismissed in its entirety as a  
2 matter of law.

3 DATED this 31<sup>st</sup> day of August, 2007.

4 s/Bernard F. Veljacic, WSBA #28702  
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CERTIFICATE OF SERVICE

I, Mindy Lamberton, hereby certify that on August 31, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system who will send electronic copies to all parties of record.

s/Mindy Lamberton  
Clark County Prosecuting Attorney  
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