No.

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# In The
# Supreme Court Of The United States

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HALLMARK CARE SERVICES, INC. ET AL.,
*Petitioners,*

v.

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF SPOKANE ET AL.,
*Respondents.*

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On Petition for a Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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## Question Presented

Spokane County initiated and prosecuted, without counsel, and directly through judicial members of its local superior court 124 joint actions against the Petitioners by mailing un-filed, ex parte letter orders; by entering ex parte orders without notice or hearing; by holding scores of expedited "drumhead" hearings by which the government summarily transferred clients to competing businesses; and, by entering money judgments against the Petitioners and in favor of Spokane County absent any due process, without notice, without hearing, and without any opportunity to defend against the government's actions.

The question presented to this Court is whether the doctrine of judicial immunity extends beyond protecting the individual judges, personally, for their actions, to shielding the government, on whose behalf they acted, from a citizen's claims seeking redress for the damages arising from the unconstitutional actions of the court?

## Parties to the Proceedings

Petitioners, Hallmark Care Services, Inc., a Washington Corporation, d.b.a. Castlemark Guardianship and Trusts d.b.a. Eagle Guardianship; Lori Petersen; and, Kerri Sandifer, were the Plaintiffs in the trial court, and the appellants in the Ninth Circuit Court of Appeals

Respondents, Spokane County; the Washington State Superior Court in and for the County of Spokane; Paul Bastine; and, Anastasia Fortson-Kemmerer were the defendants in the trial court, and the respondents in the Ninth Circuit Court of Appeals.

## Corporate Disclosure Statement

Hallmark Care Services, Inc. is a nongovernmental corporate party. Hallmark Care Services, Inc. is wholly-owned by PJLA, LLC, a Nevada limited liability company. None of the ownership is publicly held.

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## *Constitution, Statutes, and Rules*

## Petition for Writ of Certiorari

Petitioners, Hallmark Care Services, Inc., Lori Petersen and Kerri Sandifer respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## Citations of the Opinions and Orders Entered in the Case

The Ninth Circuit entered its opinion and ruling in *Hallmark Care Services, Inc. et al. v. Superior Court Of The State Of Washington For Spokane and Spokane County*, No. 19-35553 on June 17, 2020. The opinion was unpublished. A copy of the opinion is attached in the Appendix starting on page 2.

The district court entered its Order Denying Plaintiffs' Motion For Summary Judgment And Granting Defendants' Cross-Motion For Summary Judgment on July 27, 2017. *Hallmark Care Services, Inc. v. Superior Court of State of Washington For Spokane County*, No. 2:19-CV-0102-TOR. United States District Court, E.D. Washington. The opinion was unpublished. A copy of the opinion is included in Appendix starting on page 7.

## Statement of Jurisdiction

The Ninth Circuit entered its Opinion on June 17, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

On March 19, 2020, in light of the ongoing public health concerns related to COVID-19, this Court entered an order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment. The filing of this petition is timely.

## Constitutional Provisions

United States Constitution, Amendment 14

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Statement of the Case and Proceedings

### *A. Procedural Background*

This is a sister case to a prior action filed by the Petitioners in the United States District Court Eastern District of Washington, both of which were reviewed, without oral argument, at the same time by the Ninth Circuit Court of Appeals. A separate Petition for a Writ of Certiorari is being filed concurrently with this Court for the prior action.

This action arises out of the same set of original facts as the prior case, but, unlike the prior action, this one is based on continuing proceedings after remand from the Washington State Court of Appeals.

In October, 2018, the Washington State Court of Appeals, Div. III entered its ruling in the State appeal in which it reversed all money judgments entered against the Petitioners and remanded 124 actions back to the trial court for further proceedings consistent with the opinion which included the review of the guardian replacement procedure followed by the State trial court. After the mandate was entered, the Petitioners filed a new action in the Spokane County Superior Court for the purpose of consolidating the 124 separate actions into a single

case that would not interfere with the administration of the actual guardianships, but would allow for the claims on remand to be heard by the court, and new claims for damages to be added that the Petitioners never had the opportunity to add prior to the original actions being appealed.

Based on the constitutional claims in the action field by the Petitioners, Spokane County removed the entire action to the United States District Court for the Eastern District of Washington.

The Petitioners filed a motion for summary judgment to enter a finding of fact that the local Court had violated the Petitioner's constitutional right to due process in each of the 124 separate guardianship cases mirroring the finding and opinion entered, and that they were entitled to recover statutory fees and costs as the Petitioners as the prevailing party on appeal. This was based on the findings of fact made by the State court of appeals ruling.

The defendants, Spokane County et al., filed a summary judgment motion to dismiss the action citing several different theories. The district court denied the Petitioner's motions for summary judgment and granted the defendant's cross-motion

for summary judgment dismissing the entire action based on the absolute judicial immunity of the judicial members who initiated the original action.

## *B. Factual Background*[1]

The Petitioners to this writ are Lori Petersen d.b.a Empire Care Services, certified professional guardian ("CPG") #9713, Hallmark Care Services Inc. d.b.a Castlemark Guardianship and Trusts, CPG# 5128; and Hallmark Care Services Inc. d.b.a. Eagle Guardianship and Professional Services, CPG# 5132; and, Kerri Sandifer who was the an employee of Hallmark (together hereinafter referred to as "Hallmark").

This case arises out of an action commenced by Spokane County, through the judicial members of the Superior Court of the State of Washington for Spokane County[2], the local county trial court, in which it, sua sponte, initiated, and self-prosecuted, actions in 124 separate cases by which it transferred the Petitioners' clients to competing businesses

1 This *Factual Background* is materially identical to the *Factual Background* presented in the sister case under the same heading. Because this is a separate petition based on a different court of appeals number and case, this section, while redundant between the two petitions, is repeated in this action ensure that the Petition is complete.

2 Referred to hereafter as the "Spokane County Superior Court."

without affording them basic procedural due process guaranteed to them pursuant to the civil rules and statutes of the state of Washington, nor the right to a fair hearing and right to defend prior to the taking of property under the United States Constitution.

In the state of Washington, professional guardians are appointed by the court to represent incapacitated persons, who have the right to charge fees for carrying out their duties. WASH. REV. CODE. §11.88.008 (1997). These guardians, formally known as certified professional guardians, or CPGs, can be either individuals or entity agencies. WASH. STATE CT. GEN. R. 23. Professional guardians are certified under Washington State Court General Rule 23; are licensed by the state of Washington; are governed by the Washington State Certified Professional Guardian Board ( the "CPG Board") as established by the Washington State Supreme Court; and, are specifically subject to the Guardianship Program Rules promulgated by the CPG Board. WASH. REV. CODE. §2.72.030 (2009), WASH. STATE CT. GEN. R. 23, WASH. STATE CT. GUARDIANSHIP PROGRAM RULES. The Administrative Office of the Courts (AOC) is tasked with providing the administrative support to the CPG Board. GR 23(c)(8). But, it should be noted that the powers and duties of the AOC as authorized by the Washington legislature do not include

providing support for professional guardians in any way. *See* RCW 2.56.030.

In addition to the WASH. STATE CT. GUARDIANSHIP PROGRAM RULES , the Washington State statutes provide a parallel process and scheme for administering guardianships that applies to both non-professional guardians and certified professional guardians. Under the State's statute, a guardianship may be modified, and the guardian removed pursuant to RCW 11.88.090, which states, in part that the court may modify or terminate a guardianship, or replace a guardian for a "good reason." RCW 11.88.120.

## *The Star Chamber*

On March 13, 2015 the Washington State Supreme Court affirmed and adopted the CPG Board's recommendation that Ms. Petersen was to be suspended from acting as a professional guardian for one year. This was a final order in a disciplinary action that applied exclusively to Ms. Petersen, a certified professional guardian; it did not apply to Hallmark Care Services Inc. d.b.a. Eagle Guardianship and Professional Services nor Hallmark Care Services Inc. d.b.a Castlemark Guardianship and Trusts each of which operated as a unique Certified Professional Guardianship Agency

("CPGA"); it did not remove any clients that were assigned to her[3]; and, it presumably provided that she could return to her duties as a professional guardian at the expiration of the suspension, subject to monitoring for a 24 month period.

What would have otherwise been a mundane disciplinary order, instead became the trigger and catalyst for the members of the local court to initiate a personal attack against the Petitioners that far-exceeded the final order of the Supreme Court.

Judge K. O'Connor, Judge E. Kalama-Clark, Comm'r. R. Anderson[4], and A. Kemmerer, who held the title of "Coordinator"[5] of the Spokane County Guardianship Monitoring Program[6] in the superior court, were all members of the Spokane County Superior Court's Guardianship Monitoring Committee. As evidenced by the statements and declarations of these individuals, Judge K. O'Connor served as the Chair of the Superior Court

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3 The Washington State professional guardianship rules require a stand-by guardian who will take the place of a professional guardian when the assigned guardian is unable to act.

4 Comm'r. Anderson was also a member of the Washington State CPG Board.

5 A copy of the Declaration of A. Kemmerer is included in the Appendix at page 94.

6 No court rule, statute, administrative rule, or rule making defined the powers or authorities of this program.

Guardianship Monitoring Committee which in turn is charged with oversight of the Superior Court Monitoring Program. "The Guardianship Monitoring Committee is a program within the Superior Court Administrator's Office that facilitates the furtherance of the Court's responsibility to each incapacitated person who is under the protection of a guardianship."[7]

Four days after the Washington State Supreme Court affirmed one-year suspension of Ms. Petersen, Comm'r Anderson, a Spokane County Superior Court commissioner, member of the local Spokane County Guardian Committee, and member of the Washington State Certified Professional Guardian Board, sent an ex parte letter to Ms. Petersen, dated March 17, 2015, reminding Ms. Petersen that she was suspended, and demanding that she respond in writing within two days of her "specific plan as to each individual [that she] represent[ed]."[8] The letter included a list of guardianship cases not only for Ms. Petersen, but also for Hallmark Care Services, Inc. d.b.a Castlemark Guardianship and Eagle Guardianship and Professional Services. None of the guardianship

7 *See* Declaration of Judge Kathleen O'Connor, App. pg. 89.

8 A copy of this letter is in the Appendix at page 79.

s in the letter were assigned to nor before Comm'r Anderson.

Through counsel, Ms. Petersen replied to the ex parte letter stating that succession planning was already in place, and that the current standby guardian for Hallmark, and for all of the incapacitated persons ("IPs") assigned to Ms. Petersen, would "petition the Court [under WASH. REV. CODE. §11.88.120] to appoint Hallmark, an agency in good standing, as the successor guardian to during the term of Ms. Petersen's suspension. The response further pointed out that "out of the list of cases that [Comm'r Anderson] forwarded, only those under "Empire" or "Lori Petersen [were] actually affected by this suspension, and that "the remaining cases where "Eagle" or "Castlemark" were separate licensees, in good standing, who were not subject to the suspension.

In furtherance the Washington State Supreme Court's final order, and of her duty to remove herself as a guardian during the term of the suspension, Ms. Petersen resigned from her governor positions with Hallmark Care Services. Hallmark held a meeting of the Shareholders on April 1, 2015 at which it elected a replacement director and officer. In addition to ensuring a firewall between Ms. Petersen and

Hallmark during her one-year suspension, the certified guardianship agency added an additional professional guardian to be in compliance with Washington Court General Rule ("GR") 23.[9]

As of April 1, 2015, Hallmark had two CPGs of record, both in good standing, and the agency itself met all of the GR 23 compliance requirements, and was in good standing.

The Guardianship Monitoring Committee, chaired by Judge K. O'Connor, held cloistered, non-public meetings in which the members privately discussed Ms. Petersen's suspension and her reply to Comm'r. Anderson's ex parte letter. Presumably, based on these discussions[10], Judge O'Connor drafted and sent ex parte letter directives to all professional

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9 Washington Court General Rule 23(d)(2) requires that agencies meet three requirements in addition to individual CPGs: (i) All officers and directors of the corporation must meet the qualifications of RCW 11.88.020 for guardians; (ii) Each agency shall have at least two (2) individuals in the agency certified as professional guardians, whose residence or principal place of business is in Washington State and who are so designated in minutes or a resolution from the Board of Directors; and (iii) Each agency shall file and maintain in every guardianship court file a current designation of each certified professional guardian with final decision-making authority for the incapacitated person or their estate.

10 The dismissal of these actions denied Ms. Petersen the legal opportunity to make a discovery request for any minutes or records of the actual committee meetings.

guardians in Spokane County, and to all registered guardians ad litem in Spokane County, and to counsel for Ms. Petersen. Judge O'Connor then requested her colleague on the Guardianship Monitoring Committee, Judge Kalama-Clark, to issue orders in 124 separate causes of action to appoint guardians ad litem, and to appoint a special master[11] to oversee the "transition" of guardianships from Ms. Petersen and Hallmark to competing professional guardians, and an order requiring Ms. Petersen "to place $100,000 into the registry of the court or provide a $100,000 surety bond approved by the court to secure payment of ... the Special Master's fees."

On April 7, 2015, A. Kemmerer, Coordinator of the Guardianship Monitoring Program[12], emailed the three letter orders and the Order Appointing Special Master to Hallmark's counsel.

First, was an un-filed ex parte letter order from J. O'Connor of the Spokane County Superior Court to all certified professional guardians in Spokane County, not including those that worked for Hallmark, informing them that "[i]n the upcoming weeks, Guardians ad Litem will be contacting you to

11 A close friend to Judge O'Connor.

12 No court rule, statute, administrative rule, or rule making defined the powers or authorities of this program.

take on several cases due to the recent suspension of CPG Lori Petersen, effective April 28, 2015."[13] These professional guardians were for-profit, individuals and agencies that competed with Ms. Petersen and Hallmark in the guardianship service industry.

Second, was an un-filed ex parte letter order from J. O'Connor of the Spokane County Superior Court to all registered guardians ad litem in Spokane County informing them that "the Court will assign Guardians ad Litem to each [of the 124 cases under Hallmark Care Services, Inc. or Lori Petersen] to investigate the appointment of a guardian, successor guardian and/or standby guardian." [14]

Third, was un-filed ex parte letter order addressed to Hallmark's counsel from J. O'Connor of the Spokane County Superior Court stating, in part, that "[t]he Court will not appoint as a successor guardian any certified professional guardian associated with Hallmark or with entities falling under the Hallmark umbrella. A special master shall be appointed to oversee the transition process and individual guardians ad litem will determine successor guardians for these incapacitated persons.

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13 A copy of this letter is included in the Appendix at page 71.

14 A copy of this letter is included in the Appendix at page 72.

The Court will require $100,000 surety bond to secure payment of fees."[15]

***None of these letters were entered into any record nor filed with the Clerk of the Spokane County Superior Court by J. O'Connor nor Comm'r. Anderson.***

The aforementioned letter orders and General Order Appointing Special Master were issued by the Spokane County Superior Court without prior notice to Hallmark, without any hearing, without an opportunity to present evidence or defend against the courts action, without any record of proceeding, and without citing any legal basis. At the time these letters were sent and the General Order Appointing Special Master was issued, none of the guardianship cases that the letters and order pertained to were assigned to an of the three judicial members who executed the orders.

Ms. Petersen and Hallmark promptly responded to the court's ex parte actions by filing a Motion for Reconsideration alleging several errors and issues including Lack of Jurisdiction for superior court to order or to expand on the disciplinary actions issued by the Certified Professional Guardian Board and affirmed by the Washington State Supreme

15 A copy of this letter is included in the Appendix at page 75.

Court; Lack of Legal Authority to order the bond/penalty and the appointment of the special master; and, Lack of Due Process wherein Hallmark Care Services, Inc. was not provided notice, nor given a right to appear or defend against the order. (emphasis added).

*The Drumhead*

On May 4, 2015, **before** the Motion for Reconsideration could be scheduled for hearing by the judge who executed the general order, the Spokane County Guardianship Monitoring Program, through the superior court's commissioners, commenced hearings in which the Petitioners were summarily removed as the guardians of record, and their clients were transferred to competing professional guardians absent any proof of wrongdoing, for all 124 IPs assigned to Lori Petersen and Hallmark.

***At each of these hearings, the court commissioner acted as prosecutor, fact witness, and judge.*** No opposing counsel was present to argue the governments, or trial court's position; no notice of allegations against Hallmark and Petersen was served on them prior to any hearing; no evidence was entered in support of any allegations against Hallmark and Petersen; and the commissioner,

acting as judge, prosecutor, and fact witness took no consideration of the continued due objections voiced by Hallmark and Petersen.

On May 8, 2015, the Spokane County Superior Court, itself, appeared, at the personal request of the judge who initiated the action[16], through a Notice of Limited Appearance by the Deputy Prosecutor of Spokane County to appear on behalf of the court at the hearing on the consolidated Motion for Reconsideration.

After receiving the notice of limited appearance on behalf of the superior court itself, counsel for Hallmark informed the commissioner overseeing the Spokane County Superior Court's the subsequent removal hearings, the next of which was on May 13, 2015, about the Notice of Appearance filed by counsel on the Court's own behalf. Counsel for Petersen/Hallmark further informed the bench that because the court's attorney was not present at the hearing, that it would be a violation of the rules of professional conduct[17] to communicate with a party, here the superior court, who was represented by counsel in a matter for which the appellants' attorney did not have permission from the court's

16 A copy of the Declaration of Judge Kathleen M. J. O'Connor' is provided in the Appendix at page 88.

17 WASH. R. PROF. CONDUCT §4.2

attorney to do so. The trial court stated that the representation by counsel did not apply to these proceedings and moved forward with the proceedings despite the objection and notice.

On May 15, 2015, after two weeks of hearings and orders already entered by the trial court in which Lori Petersen or Hallmark had their clients summarily removed from them, the Spokane County Superior Court scheduled and heard Hallmark's consolidated Motion for Reconsideration.

In that hearing several issues were brought before the trial court. The Spokane County Superior Court's authority to appoint a special master for this matter; the authority and powers of the local Guardianship Monitoring Program, and the source of the enabling rule or statute creating the "agency;" the unknown identity of the claimant in the action; the trial court's likely violation of Petersen's and Hallmark's Fourteenth Amendment rights; the lack of authority to require a bond; and, the lack of due process in general.

In the trial court's oral ruling on Hallmark's and Petersen's Motion for Reconsideration held on May 18, 2015, the trial court admitted that ***the superior court was, itself, the original claimant and client of counsel in this action.*** The trial

court also stated that the General Order Appointing Special Master "was presented to [her] ex parte without a court reporter present so no transcript was available. It was presented to [her] because it was not an order that would have been brought to the court commissioner, even though they handle most of our guardianship hearings, and because J. O'Connor was out on medical leave." The trial court refused to identify who, in fact, presented the order. With regard to the lawfulness of the order, the trial court stated that "the order only did two things - appointed special master and set bond." The trial court further went on to claim that the order "does not remove Hallmark from any case nor does it order the appointment of any guardian in any case."

This last claim was contrary to the actual language in the Order that clearly states the special master was appointed "to oversee the transition to and appointment of successor guardians for incapacitated persons serviced by the said Lori Petersen and the agencies of which she is a designated CPG or standby guardian."

The hearings instituted as a result of the Order Appointing Special Master did, in fact, result in two things: they forcibly removed Hallmark and Petersen as guardians from the cases rightfully

assigned to them, and assigned a new guardian - a competing for-profit individual or agency - to the incapacitated party. These "hearings" ended on June 4, 2015.

Again, without notice, without hearing, without presentment, and with no opportunity for Hallmark to object or defend, the trial court entered money judgments against Ms. Petersen and Hallmark dated between June 5 and June 8, 2015.

Hallmark and Petersen promptly appealed each of the 124 cases for both the improper removal of as guardians and the money judgments to the Washington State Court of Appeals Division III.

### *The State Court Appeal*

Over three years after the appeal was filed, the Washington State Court of Appeals, Div. III, entered its ruling in the 124 guardianships on October 18, 2018.[18]

In its ruling, the State court of appeals made the following findings of fact:

- That the Spokane County Superior Court and the Guardianship Monitoring Program, through its commissioners and staff, assessed

18 A transcript of this opinion and ruling is provided in the Appendix at page

costs against the Plaintiffs, based, in part, on the declaration of the guardian ad litem appointed by the court.

- That the costs were assessed without providing prior notice to the Petitioners; without providing the Petitioners with an opportunity to review the declaration of the guardian ad litem; and, without providing the Petitioners with an opportunity for a hearing, an opportunity to response, nor an opportunity to challenge facts outside the record upon which assessment was based.
- That the Spokane County Superior Court and the Guardianship Monitoring Program, through its commissioners entered a judgment in violation of CR 54(f) which explicitly provides a right to Notice of Presentation.
- That, in taking action in the proceedings against the Petitioners "some, and perhaps all, of the judicial officers involved were privy to information obtained ex parte from persons associated with the [Spokane County Guardianship Monitoring Program Program].
- That" some of the information obtained ex parte led to the conclusion by the judicial officers that no CPG or CPGA affiliated with

Ms. Petersen or Hallmark could be appointed to serve as guardian. The Supreme Court's order and its rules do not support that conclusion."

- That while the Petitioner "must scrupulously abide by an order suspending her, and the suspension alone will likely have significant financial ramifications. But nothing in GR 23 suggests that in addition to suffering the suspension, a CPG should lose her entire investment in a CPGA or that the CPG's coworkers should all be thrown out of work.
- And, that "[e]vidence presented in future proceedings may or may not support the guardian replacement procedure followed by the court and an assessment of fees against Hallmark or Ms. Petersen."

### *Removal to Federal Court On Remand Subsequent to State Appellate Ruling*

After the ruling and mandate was entered by the Washington State Court of Appeals, Div. III., Ms. Petersen and Hallmark filed an action in the Spokane County Superior Court consolidating the claims in each of the 124 separate cases, and alleging breach of due process under the Washington State

Constitution and the Fourteenth Amendment; Abuse of Process; Malicious Prosecution; Tortious Interference with Business Expectancy; for the court to Vacate Judgments Consistent with the Reversal and Remand by the Court of Appeals; and for reimbursement of the fees and costs incurred in the course of defending the action.

Spokane County had the matter removed to federal district court based on the Fourteenth Amendment claim. And, the district court promptly dismissed the action alleging that all claims were barred by judicial immunity.

Hallmark filed a timely appeal of the district court's ruling to the United States Court of Appeals for the Ninth Circuit. On June 17, 2020 the Ninth Circuit, without oral argument, entered its opinion affirming the lower court.

Hallmark now asks this Court for a writ of certiorari to clarify and review the legal basis for dismissal proffered by the United States District Court and the Ninth Circuit.

## Argument For Writ of Certiorari

### *Does the doctrine of judicial immunity extend beyond protecting the individual judges, personally, for their actions, to shielding the government, on whose behalf they acted, from a citizen's claims seeking redress for the damages arising from the unconstitutional actions of the court?*

Under Washington Statute, ***all*** "local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation." WASH. REV. CODE § 4.96.010(1) (2011). No exception exists for courts, nor for administrative agencies of the courts. *See Id.*

Judicial immunity, and its counterpart quasi-judicial immunity, protect the ***individual*** judges from civil suit for acts performed in their official capacities. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). A judge loses his or her immunity

where he or she acts in the "clear absence of all jurisdiction," or performs an act that is not "judicial" in nature. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Stump v. Sparkman*, 435 U.S. 349, 360 (1978).

This Court has wisely recognized that caution should accompany any application of absolute immunity. *Forrester v. White*, 484 U.S. 219, 223-24 (1988). Absolute immunity, is "strong medicine" that can only be justified when the likelihood that of collateral liability for a judge performing his or her duties is high. *Id*. at 230.

To be clear, the defendants in this action are the County of Spokane Washington, and its superior court - not the individual judges. Even though they were not named as defendants nor parties to the action, it is a worthy endeavor to discuss whether or not immunity should apply to some of the individual actors in this matter - actors whose immunity the local district court and Ninth Circuit Court of Appeals has extended to the Spokane County and the government of despite a State statute to the contrary. *See* WASH. REV. CODE § 4.96.010(1)

A judge's immunity is lost in two broad circumstances: a judge is not immune from liability for non-judicial actions; and, a judge is not immune

for actions not taken in the judge's judicial capacity. *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

In *Sparkman*, the this Court looked at two factors to determine whether an act by a judge is "judicial": the act itself, and the expectations of the parties. *Stump v. Sparkman*, 435 U.S. at 362. With respect to the nature of act, this Court looked at "whether it is a function normally preformed by a judge, and, with respect to the expectation of the parties, "whether they dealt with the judge in his judicial capacity." *Id*.

In this case, Judge O'Connor, who drafted and issued the letter orders commencing the state action, admits in her own declaration that "[i]n [her] capacity as chair of the Guardianship Monitoring Program Committee [she] was aware that ... Lori Petersen's license to practice as a certified professional guardian was suspended by the Washington State Supreme Court effective April 27, 2015 for a period of one year." App. pg. 89. She further admitted that "[i]n light of Ms. Petersen's suspension, immediate action was necessary to replace her as the primary or standby guardian." And, while Judge Ellen Kalama-Clark refused to identify "who" brought the order for her to sign, Judge O'Connor admits that "[a]t [her] request, the

Honorable Ellen Clark of the superior court issued an Order Appointing Special Master...." *Id.* at 89-90. And, Judge O'Connor declared that she personally requested the assistance of the Spokane County Prosecuting Attorney, with whom she would be designated as the contact to advise and consult on the legal issues of the matter. *Id.* at 90.

It is difficult to imagine that, with respect to the expectation of the Petitioners, this judge was being dealt with in her "judicial capacity" where none of the matters were assigned to to her; where none of the matters were before that judge; where that judge was personal acting on information she received in an administrative committee; where that judge issued letter "orders" without entering them into the record; where that judge cajoled another judge on the court to enter a ruling without notice or hearing to the parties; where that judge personally requested the assistance of counsel only after learning that her "orders" were being contested' and, where that judge personally entered here own declaration in an appellate proceeding that was reviewing her actions.

The district Court relied on this Court's rulings in *Antoine v. Byers & Anderson, Inc.*[19], *Mireles v. Waco, Burns v. Reed*[20], and *Stump v.*

19 508 U.S. 429 (1993)

20 500 U.S. 478 (1991)

*Sparkman* to support it decision to dismiss the action and deny Ms. Petersen and Hallmark any recourse against their aggressors.

There is one glaring difference between the present case and each of the cases relied upon by the district court. In each of those cases, the action was brought by a legitimate third party. In the present case, in absolute contract any of the cases relied upon by the district court and court of appeals, it was the court itself, and members of the local court, who initiated and prosecuted this underlying action against the Petitioners.

In *Mireles*, where the judge ordered counsel to be forcibly brought from the hallway before him, while the judge's actions were petty and reprehensible at best, there is no question that the public defender had current and active cases before that judge. *Mireles v. Waco*, 502 U.S. at 10.

Even in *Sparkman*, where a judge granted the thoughtless and patently inhumane "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement", it was child's mother, through her counsel, who brought the action - not the court itself. *Stump v. Sparkman,* 435 U.S. at 351. While the facts in the matter are horrific, and the ruling judge was

found to have immunity, the action was free to proceed against the other parties.

This Court has previously discussed the Star Chamber, describing it as a "curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and Judicial character, and characteristically departed from common law traditions." *Faretta v. California*, 422 U.S. 806, 821 (1975).

When a Michigan circuit judge summarily sent the petitioner to jail for contempt of court, this Court had to determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257, 258 (1948). In *Oliver*, this Court strongly stated that summary trials, even for alleged misconduct called contempt of court, are not regarded as an exception to the universal rule against secret trials.

Unlike the present case, even in "Oliver" the defendant was at least present at a hearing.

To be blunt, this is not how our system is supposed to work. This Court has made it clear that it agrees.

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this

> practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups, each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. *Id* at 268.

While common law and this Court's precedent may protect the individual judges from their wanton actions, it should not protect the government nor deny the Petitioners any right to redress for the harms done to them.

*When a court, and its members, engage in patently administrative actions of professional services oversight, does judicial immunity apply, or does this violate the separation of powers doctrine?*

Like the Star Chamber was described above, the Spokane County Guardianship Monitoring

Program is a curious institution of mixed executive and judicial character that characteristically departs departed from common law traditions.

In this case, members of the Spokane County Superior Court judiciary also acted as members of the Guardianship Monitoring Committee, described by Judge O'Connor ass a program within the Superior Court Administrator's Office that facilitates the furtherance of the Court's responsibility to each incapacitated person who is under the protection of a guardianship.

The Washington guardianship scheme operates parallel administration of guardianships, both through the Certified Professional Guardianship Board which promulgates its own rules, and the state statutes. Both are operated under the Courts of Washington - the former under the Washington State Supreme Court, and the latter in the county superior courts.

Ultimately, both the CPG Board and the local Guardianship Monitoring Program operating under the Superior Court Administrator's Office are engaged in the administration of guardianships. While these activities are assigned the courts by statute, it most certainly does not make all of the actions by these entities "judicial."

There is no question that a determination of whether or not an individual is incapacitated is a judicial function. But, most of the functions that the Guardianship Monitoring Program and its oversight committee engage in are patently "administrative". This includes auditing of guardianships, and day-to-day oversight of the appointed guardians. The fact that these activities take place in a court should not, by proximity alone, create the assumption that all of the actions are judicial.

This Court distinguishes between judicial and administrative or ministerial proceedings. D*istrict of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). The nature of a proceeding "depends not upon the character of the body, but upon the character of the proceedings." *Id.* at 477.

In the underlying proceedings, even the state trial court admitted that members of the Spokane County Superior Court bench and the local Guardianship Monitoring Program undertook the significant administrative task of identifying and appointing replacement guardians. Petitioners argued that the state trial court cannot state that their acts were "administrative" in order to be relieved of providing due process, while at the same

time seeking the protections of judicial immunity for those same acts.

The concept of separation of powers is exemplified by our Constitution. *Miller v. French*, 530 U.S. 327, 341 (2000). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). While these boundaries are not 'hermetically sealed, this "Court has traditionally acted to ensure that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by other branches, and that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch." *McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) quoting *Mistretta v. United State*s, 488 U.S. 361, 383 (1989). (citation, internal quotation marks and alteration omitted).

When the Judicial Branch takes over the administrative tasks of monitoring care of incapacitated persons - tasks that other agencies, like Washington's Department of Social and Health

Services, are much better equipped to handle and who engage in parallel services, it unnecessarily undermines the institutional integrity of the Judicial Branch. Here it created the circumstance where judicial staff of the Spokane County Superior Court abused their position and power to attack persons (both flesh and blood and entities) while circumventing the procedural and constitutional safeguards that would normally have protected the Petitioners had the actions been taken by an administrative agency.

Unfortunately, this argument has yet to be addressed by any court, as has the question of whether or not it is a breach of the separation of powers doctrine for the court to engage in both judicial and executive administrative activities that would be better, and more appropriately suited to an administrative agency.

## Conclusion and Plea for Relief

Admittedly, the facts in this case should seem unbelievable, verging on the impossible, to most legal practitioners: that a judges, using the power of the trial court, would engage in what appears to be a willful disregard of a party's rights under the United States Constitution and the Washington State court's civil rules; that the appellate court would acknowledge the failure of the court to provide due process, and remand the action back to the trial court for further review of the underlying actions; and that, upon removal of the remanded issues to the federal court, the district court and Ninth Circuit Court of Appeals would find that these actions were somehow consistent with American Jurisprudence.

The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." Amdt. 14, §1. The amendment does not make an exception when the State actor is a member of the court.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth

Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A state court may not avoid its constitutional obligations, and it is the province of the Supreme Court to inquire whether the action of the state court rests upon a fair or substantial basis. *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930).

The federal guarantee of due process extends to State action through its judicial, as well as through its legislative, executive, or administrative, branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). While it is the province of state courts for the state courts to determine the substantive law of the State, they must, in so doing, accord the parties due process of law provided by the United States Constitution. *Id.* Whether acting through its judiciary or otherwise, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Id.*

This Supreme Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant

property interest." *Id.* quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Furthermore, due process requires a "neutral and detached judge in the first instance," *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 618 (1993). "[J]ustice," indeed, must satisfy the appearance of justice. *Id.*

The courts are supposed to be the branch of government whose procedures are, by far, the most protective of individual rights. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010).* A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison* 349 U.S. 133, 136 (1955). Our system of law has always endeavored to prevent even the probability of unfairness. *Id.* "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.* at 137. Not only is a biased decision-maker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *Id.*

The foundation of American judicial system and of our laws transcends the walls of the courtroom

and judge's chambers. It is not the wood paneling, the hard benches, nor the somber, traditional courtroom decor that causes citizens to respect and adhere to the law. Nor is it the long, flowing black robes,; the loud, banging gavels; nor the thousands of linear feet of opinions, rulings, treatises, and case law that effectuate the will of a court. Instead, it is the generalized trust and confidence that the People have in the process and that they will have some protections when, and if, they have to engage in that process. While we, as a People, may be critical of decisions, We the People do believe in our judicial system - that there will be some consistency in how it applies the law, and that We will have some rights in the process.

The current action, and the actions of the local judiciary severely undermine this trust. How is a judge immune from liability for star chamber actions that are not on the record? How does that immunity extend to the government when the State statute explicitly declares that all "local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct?" And, is it a violation of the separation of powers for the government to conduct administrative acts through

the local courts in order to claim immunity from wrongdoing.

The lower courts have determined that these acts conform with American jurisprudence. Petitioners respectfully ask this Court to review and reverse the decisions of the lower courts, and to allow the Petitioners to continue their quest to seek redress for the actions and damages caused by the Respondents.

Respectfully submitted by John Pierce, Attorney for Petitioners.

s/John Pierce/
JOHN PIERCE
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