NO. 43790-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LEWIS COUNTY,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Lewis County filed suit in October 2011 to obtain a judicial declaration that, from the date of that declaration forward, Lewis County's exclusive financial responsibility for the acts and omissions of county employees working for or with the Lewis County Superior Court would shift entirely to the State. On the merits, Lewis County faced substantial legal obstacles as both the decisions of Washington's courts and state statutes have declared for decades that fiscal responsibility in this area is exclusively that of the County. Moreover, in response to the State's Motion to Dismiss below, Lewis County admitted that the county historically has taken responsibility for defense costs and payment of claims or judgments for the alleged misconduct of county superior court staff and programs and never before this case had asserted that the State was responsible for these costs. Thus, Lewis County's own factual allegations and Washington law were completely contrary to Lewis County's claim and requested declaratory relief.

The State dismissal motion was not about the merits, however, but for lack of subject matter jurisdiction under CR 12(b)(1).[1] The Court ruled that Lewis County's case, as pleaded, was not justiciable. Three grounds were provided: 1) Lewis County failed to allege facts

[1] Lewis County erroneously contends its case was dismissed under CR 12(b)(6), failure to state a claim. Lewis County Opening Brief at 1-2.

establishing a genuine and current case or controversy, instead relying solely on allegations of fully resolved, moot, past claims and lawsuits that the County already had assumed full responsibility for; 2) Lewis County had failed to join the superior court, its officers, staff or the county's juvenile court as defendants, even though its lawsuit focused on the "quasi-constitutional" status of these courts, their judges and staff; and 3) Lewis County's case did not qualify as one sufficiently affected by the public interest to exempt the case from being proven to be justiciable.

Lewis County's appeal relates to the first and third grounds for dismissal. The County has waived any appeal of dismissal on the basis of failure to join necessary parties. The trial court correctly ruled that the case, as pleaded, did not establish the requisites for a justiciable case nor qualify for a public interest exception to the requirement that the County prove justiciability. Even if the County could successfully establish justiciability, though, this Court should affirm dismissal on the alternative grounds that Lewis County's claim fails on the merits.

II. STANDARDS OF REVIEW

The State's motion was based upon lack of jurisdiction under CR 12(b)(1) and CR 12(c). CP 38. Such motions allow the courts to weigh and evaluate plaintiff's allegations without presuming their truth or resolving inferences in the County's favor. *Wright v. Colville Tribal Ent.*

Corp., 159 Wn.2d 108, 119-20, 147 P.3d 1275 (J. Madsen concurring) (2006); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Furthermore, while dismissal for lack of subject matter jurisdiction is reviewed de novo, *Wells Fargo Bank, N.A. v. Dept. of Revenue*, 166 Wn. App. 342, 350, 271 P.3d 268 (2012), an appellate court may affirm the summary dismissal below on any grounds contained within the trial court record. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); Deep *Water Brewing, LLC v. Fairway Resources, Ltd.*, 170 Wn. App. 1, 282 P.3d 146, 152 (2012). Finally, as the trial court's ruling that this case did not qualify for a public interest exception on the requirement of justiciability was in that court's discretion, reversal can occur only for manifest abuse of that discretion. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

III. ISSUES PERTINENT TO ALLEGED ERROR

Lewis County made one generalized Assignment of Error: the lower court erred in concluding that it lacked subject matter jurisdiction under RCW 7.24, Washington's Declaratory Judgment Act. Lewis County Opening Brief at 2. The State believes that the following distinct issues pertain to this appeal and that each constitutes an independent basis to affirm the dismissal:

1. Was dismissal correct because Lewis County failed to allege a present, existing dispute, case or controversy regarding whether the County should continue to comply with existing law and the County's historical practice of assuming exclusive responsibility for the misdeeds of county employees working for the superior court?

2. Was dismissal correct because Lewis County declined to name as parties the Lewis County Superior Court, its officers, staff or the Lewis County Juvenile Court, even though the alleged status of those institutions and individuals was the focus of the County's lawsuit? Has the County waived this issue on appeal due to its failure to assign error specifically on this basis or to brief it on appeal?

3. Was dismissal correct because, in the trial court's discretion, no issues of "great public importance" justified by-passing the requirement that Lewis County plead justiciable claims?

4. Was dismissal correct because, on the merits, Lewis County already bears, and should retain, financial responsibility for the civil wrongs of the juvenile court, its employees and juvenile justice programs?

IV. STATEMENT OF FACTS AND PROCEEDINGS BELOW

The following facts are taken from Lewis County's complaint and pleadings below. In addition, the State includes references to key court decisions and statutes that assign Lewis County the exclusive

responsibility for risks of loss attributable to the misconduct of judicial staff and programs.

Washington has a judicial branch which includes a system of State and County trial and appellate courts. CP 4. The Lewis County Superior Court is one of 39 county courts of general first-instance and limited appellate jurisdiction. CP 4. On occasion, claims are made or complaints are filed in which money damages and/or other relief is claimed, due to the alleged action or failure to act of the Lewis County Superior Court, its judges, its commissioners, and other county officers and employees (including the personnel of the county's juvenile detention and juvenile probation services). CP 6. Lewis County concedes that it and its 38 sister counties have historically taken responsibility for the alleged wrongful conduct of its judicial officers, staff and programs. Lewis County Opening Brief at 2. The County also concedes that all such past claims and suits were fully resolved and without an assertion that the State should bear the risk of loss instead. Lewis County Opening Brief at 2.3. Finally, there have been no such claims or lawsuits brought against Lewis County since the filing of its complaint in August 2011.

Lewis County employs the staff serving the superior court and county juvenile court in accordance with both the state constitution and state statutes. *E.g.* RCW 2.28.100 and 13.04.050. In fact, RCW 4.96.010

specifically states that counties are liable for the civil wrongs committed by these and other county employees. The Washington Constitution, moreover, provides that compensation for every county's superior court judges is split equally between the State and the county whose citizens elect the judge. Wash. Const. Art. IV. A portion of the salary of each of the judges of the court is a charge upon the County. CP 4.

Just as importantly, Washington's Supreme Court decreed as far back as 1914 that Article IV and state law confirm that superior court judges act in a dual capacity and are thus State and County officers. *In re Salary of Superior Court Judges,* 82 Wash. 623, 626-28, 144 P. 929 (1914).[2] The Court also ruled that each county's superior court constitutionally possesses "all of the jurisdiction that pertained to the county courts existing at the time of the adoption of the Constitution, and much of the jurisdiction then

[2] Lewis County's sole comment on the Supreme Court's decisions that confirm the County's responsibility for superior court facilities and employees is that an AGO opinion once described the decisions as involving "nothing more than the legitimacy of using county funds" to pay for judicial salaries. Lewis County Opening Brief at 4, citing 1979 AGO Op. No. 14 at 1. That opinion was requested to address the question of whether part or all of a judicial salary was subject to federal social security contribution requirements. The comment about the Supreme Court cases was simply a recognition that those cases were all challenges by county officials to using "county" resources for what counties alleged were State obligations. The Supreme Court held that the obligations were indeed County responsibilities, not State ones, and that county funds could and must be used to pay the expenses and one-half of the Judges salary. *In re Salary of Superior Court Judges*, 82 Wash. at 626-28. Thus, describing this venerable authority as about the "legitimacy" of using county funds for county obligations was accurate, though not fully descriptive of the Court's holdings. That observation does not detract from the controlling aspect that decision has for Lewis County's case: the superior courts and their judges are not exclusively a "State responsibility." Nor are county employees working for, or with, those courts.

pertaining to the courts of the justices of the peace. Nowhere in the Constitution are they denominated [as] state courts..." *Id.* The Court contrasted the Judge's compensation to all other expenses associated with the operations and staffing of the superior court: "their equipment such as the places of holding courts, the clerks, bailiffs, and other assistants are furnished wholly by the counties." *Id* at 628.

Similarly, the Court has held that the Legislature has plenary authority to assign to counties full financial responsibility for the facilities, staff and risk of loss for the operations and programs of the superior courts. *State ex rel Pierce County v. Clausen*, 95 Wash. 214, 231-32, 163 P. 744 (1917). Accordingly, the law provides and the County admits that it is obliged to provide all necessary accommodations and staff for the court and to fund the expenses necessary and incidental to its operations. CP 4. One obvious example of expenses necessary to the operations of the court and its juvenile justice program is liability for alleged employee misconduct. Indeed, why else would Lewis County obtain insurance for errors and omissions of court staff if it did not properly bear those risks?

In addition to its other responsibilities, the Lewis County Superior Court exercises jurisdiction over juvenile matters. CP 5. Adjunctively to the exercise of juvenile jurisdiction, the County operates a juvenile detention facility and a juvenile probation service. CP 5. State law decrees that county

juvenile detention facilities and their operations are mandatory county functions. RCW 13.16.030. The County is obliged by statute to provide for the salary and financial benefits of employment of the matron (today styled the administrator) who, under the direction and control of the superior court's judges, oversees the day to day operation of the County's juvenile detention facilities and juvenile probation services, and the County also provides for the salary and financial benefits of employment of the staffs thereof. CP 5.

On October 20, 2011, Lewis County filed this declaratory judgment action. CP 3. The first cause of action in the Complaint was styled as a "Declaration of Rights, Status, and Legal Relation" and included a request for a declaration that the State and not plaintiff was solely and exclusively liable for the future acts and failures to act of the matron (administrator) and other officers and employees of the Lewis County Superior Court's juvenile detention and juvenile probation services. CP 6-7. More broadly, Lewis County wanted a declaration that the State is financially responsible for any future alleged wrongful conduct by its superior court judges, commissioners, programs and staff. CP 6-7.

The second cause of action in the Complaint was styled as a "Declaration of Rights, Status, and Legal Relation Under Constitution, Statutes, and Instruments". CP 7 . It also included a request for a declaration

that the defendant and not plaintiff was solely and exclusively liable for the future acts and failures to act of the matron (administrator) and other officers and employees of the Court's juvenile detention and juvenile probation services. CP 7. Again, Lewis County wanted a more broad judicial decree that, in the future, the State was solely responsible for any wrongful acts of judges, commissioners, and court staff. CP 7-8.

On April 23, 2012, Lewis County mailed a set of draft stipulations to the State pursuant to CR 2A. While the State did not stipulate to those facts, it had no objection to them being considered in deciding this jurisdictional issue.[3] These facts confirmed that Lewis County and its sister counties have been assuming sole and exclusive financial responsibility for decades for the risk of loss for the alleged negligence, federal and state law violations and other culpable acts of county officials and employees, including those of the County's superior court. CP 63-64. Lewis County's history of accepting sole and exclusive responsibility for those losses complied with the Supreme Court's holdings above and confirmed that Lewis County's position in its Complaint and requested declaratory relief was a 180° departure from settled law and the County's long, historical custom and practice.

[3] The State has never agreed to the use of the County Declarations that appear in this record at CP 15-37; 85-86. The agreement not to object pertained only to the four page draft stipulation. CP 63-66.

On at least ten occasions in the period 2000 through 2011 (inclusive) claims for money damages arose which related to alleged tortious acts committed by personnel of the Lewis County Superior Court in their respective official capacities. CP 63. Such personnel included the judges and commissioner of the court, the court administrator and her subordinates, the juvenile court administrator (who oversees the juvenile detention and juvenile parole facility), juvenile detention officers, and juvenile parole officers. CP 63. The County and its insurer paid $193,667.08 to settle these ten claims, and paid outside counsel to defend certain of these ten claims. In respect of those claims in which the County did not retain outside counsel, personnel of the Civil Division of the Lewis County Prosecuting Attorney's Office provided legal advice and litigation defense services. CP 63-64.

On at least 183 occasions in the period 2000 through 2011 (inclusive) claims for money damages have arisen which related to alleged tortious acts committed by personnel of the superior courts of various member counties of the Washington Counties Risk Pool. CP 64. Such personnel included the judges and commissioners of the courts, the court administrators and their subordinates, the juvenile court administrator (who oversees the juvenile detention and juvenile parole facilities), juvenile detention officers, and juvenile parole officers. CP 64. These counties and their insurer paid $2,302,531.67 to settle these 183 claims, and to pay outside counsel to

defend certain of these 183 claims. CP 64. In respect of those claims in which the counties did not retain outside counsel, personnel of the counties' prosecuting attorneys' offices provided legal advice and litigation defense services. CP 64.

Though the County pleaded facts about past, fully resolved claims, demands and lawsuits, it pleaded no current, pending claims, demands or lawsuits concerning the officials, staff or programs of the Lewis County Superior Court. Nor has the County alleged that any such demands, claims or lawsuits have emerged since it filed this suit in October 2011. As such, based on the County's evidence described above, Lewis County's cost to bear this risk of loss from 2000 to the present has averaged less than $15,000.00 per year.[4]

V. LEGAL ARGUMENT

RCW chapter 7.24, the Uniform Declaratory Judgments Act (UDJA), governs declaratory judgments in Washington State. The UDJA was the sole basis for Lewis County's cause of action. Lewis County seeks to invoke this Act by styling its suit as one to resolve the legal relations between itself and the Lewis County Superior Court, which the County (erroneously) claims is an entity of the State government only. CP 4. For this proposition, Lewis County provided no authority. Instead, the County

[4] Based on Lewis County's total paid since 2000 ($193,667.08) divided by 13 years (2000-2012).

admitted it is required by statute to fund the expenses necessary and incidental to county judicial branch employees and to its operation of the superior court and to provide for the salary and financial benefits of employees of the County's juvenile detention and juvenile probation services and facilities. CP 4-5. Lewis County also admitted that it has always paid the defense costs, settlements and judgments associated with claims asserted against superior court and juvenile court operations and staff. CP 63-66.

Next, while the actions of and legal responsibility for anyone generally alleged to be employed or affiliated with Lewis County Superior Court are the focus of this case, Lewis County has not joined the Court, its judges, any county judicial employees, staff or affiliates as parties to this case. No actual or potential claimants or litigants suing the county are named or even discussed in the Complaint. The proposed declaratory relief would bind a world of anonymous plaintiffs and would determine the legal status and obligations of non-party superior courts, their officials and employees.

Even if this Court accepted Lewis County's characterization of the status of parties and non-parties alike and of the government entity that should answer for the County's alleged future misdeeds, the UDJA is not the proper vehicle to overturn 123 years of conceded county liability for claims against Lewis County Superior Court employees. Such a dramatic change in

law is properly addressed in the Legislature, where it has been in the past, not in a courtroom. If this Court determines this case is justiciable, it should order a remand to enter judgment on the merits in the State's favor as Lewis County has provided no facts or case law to justify relieving the County of its financial responsibility for court and juvenile justice costs.

A. The Court Lacked Jurisdiction Under The Requirements Of The Uniform Declaratory Judgments Act

The UDJA provides,

> "A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

RCW 7.24.020. Declaratory judgment actions under RCW 7.24.020 are proper "to determine the facial validity of an enactment, as distinguished from its application or administration." *Bainbridge Citizens United v. Washington State Dept. of Natural Resource*, 147 Wn. App. 365, 374, 198 P.3d 1033 (2008) (citing *City of Federal Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790 (1991)).

While the Complaint stated its Second Cause of Action was for a "Declaration of rights, status or legal relation under constitution, statutes, and instruments", it did not specify any statutory, constitutional, or contractual

provision, which was being challenged or which the County claims needs interpretation or construction. CP 7. Because the County did not raise a question of "construction or validity", a declaratory judgment was not an available remedy under the specific language of RCW 7.24.020. *Bainbridge,* 147 Wn. App. at 375.

RCW 7.24.020 is not, however, an exhaustive list of the factors that govern declaratory actions. *Id.* at 374, RCW 7.24.050. Rather, the UDJA grants trial courts the authority to "declare rights, status and other legal relations" if "a judgment or decree will terminate the controversy or remove an uncertainty." RCW 7.24.010, and .050. The County's First Cause of Action, for a "declaration of rights, status, and legal relation", was an attempt to invoke this general power. CP 6-7. However, even this cause of action cannot provide relief to the County because the facts as pleaded did not provide the basis of a justiciable controversy. A "justiciable controversy" must exist before a court's jurisdiction may be invoked under the UDJA. *Washington State Republican Party v. Washington State Public Disclosure Com*'n, 141 Wn.2d 245, 284, 4 P.3d. 808 (2000). For purposes of declaratory relief, a justiciable controversy is

> "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather

than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Id.

Here, Lewis County's claim did not meet any of these elements. No individual is currently suing or even making a demand upon Lewis County for the tortious conduct of its judicial branch or juvenile justice employees and, therefore, the County's declaratory judgment action was merely a "possible, dormant, hypothetical, speculative, and/or moot disagreement." *Id.* Indeed, the only claims and lawsuits Lewis County cited in its proposed facts were either unspecified past matters from other counties or moot claims that Lewis County has admitted the County accepted responsibility for and/or were resolved with county funds or funds of its insurer. CP 63-64. In either case Lewis County conceded that it was the County, not the State, that assumed the financial responsibility for defending and/or paying the claimants or litigants who asserted their clams against the county.

Thus, Lewis County's allegations confirmed it was trying to manufacture a genuine, current dispute out of its own contrary history of treating such claims as the sole responsibility of Lewis County. In essence, "moot" claims and issues were the sole alleged predicate for a current, existing controversy. That is not a justiciable claim as a matter of law. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 417, 27 P.3d 1149 (2001) (An

actionable, immediate dispute cannot be based on a moot claim); *Jones v. Washington*, No. CV–12–0188–EFS, 2012 WL 3260411 at *5 (E.D. Wash. 2012) (Complaint dismissed because only past injuries argued as basis for prospective relief.)

The case of *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973) is dispositive. There, lessees invited social guests, a small child and her parents, onto their property. While on the property, the child was injured by an object that was improperly secured to a fence. *Id.* at 812. The insurers of lessor and the lessees made payments to the child's parents for medical expenses until the child's family moved to a different state.[5] *Id.* No further written claim, or demand, for or on behalf of the minor was made; however, due to the age of the child, the statute of limitations would be tolled for an extended period of time. *Id.* For this reason, the lessor brought suit for declaratory judgment against the lessee for an adjudication of potential future financial responsibility as between lessor and lessee in connection with the accident. *Id.* at 813. The Washington Supreme Court held that no justiciable controversy was presented because no current claim for

[5] Lewis County erroneously tries to distinguish this case as one in which no claim for payment had ever been made. Lewis County Opening Brief at 13. To the contrary, like Lewis County, the plaintiff tried to convince the court that past payments were sufficient to establish a current case or controversy, even without a current demand, and the court rejected that contention. *Diversified Industries*, 82 Wn.2d at 814.

damages for the guest's injury had been made or was threatened and because the circumstances and extent of the injury were not specifically alleged so as to allow determination of the risk involved. *Id.* at 814. The Court further ruled that the case was not justiciable because the law could change before a claim was ever filed. *Id.* at 815.

Here, as in *Diversified*, we have two parties in a theoretical dispute[6] about potential liability for a potential future claim. Lewis County identifies no actual or threatened claim or claimant. A number of potential county employees and their county employers are identified in the complaint as potential targets for such unasserted future claims, but their culpability is apparently assumed based on undescribed circumstances and unidentified theories of liability. The requested relief would purport to be legally conclusive on all future claimants and plaintiffs, as well as enforceable against unjoined courts and staff, whoever they may be, whatever their circumstances.

Additionally, the *Diversified* Court's admonition that it would be improper to decide the case on the merits when the law could easily

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[6] Element two of the *Wash. Republican Party,* 141 Wn.2d at 284, test for UDJA justiciability is that the parties have opposing interests. The facts pleaded by Lewis County show that, at of 2011, based on its own custom and practice, the County did not contest its liability, thereby agreeing with the State. Can the County simply change its mind and decide, from now on, it will disregard state law and county practice, in order to create "opposing interests" sufficient to create a justiciable case?

Similarly, the third element – that the interests at issue be "substantial" – is hardly met when the County's own testimony shows past claims averaged less than $15,000 per year. (See p. 11).

change before a claim was filed was equally compelling here because the Legislature has plenary authority over counties and legally can assign to counties the full financial burden of fulfilling governmental functions that serve both state and county interest. *State ex. Rel. Pierce County v. Clausen,* 95 Wash. 214, 231-32, 163 P. 744, (1917). As the Legislature has already so legislated (RCW 4.96.010) and can legislate again regarding the counties' financial responsibilities for their employees' misdeeds, the Complaint did not raise claims that would be finally resolved by judicial declaration. This conclusion is not absurd as the County argues in its Brief at 14; it is settled law.

Finally, Lewis County argues that its contracts with an insurance pool preclude the County from litigating this case with actual claimants and a genuine, current fact pattern applicable to an identifiable defendant. Lewis County Opening Brief at 3. However, the declaration testimony cited for this proposition only states that the County "may lose" coverage if the County proceeds to trial when the insurer elects to settle. CP 86. The testimony simply does not support the County's position that it is contractually "precluded" from litigating this case in an actual, current, fact-based context. Nor can its private insurance contracts relieve it of its responsibility to state a justiciable claim. Indeed, a separate action for a declaration of non-liability could be initiated. *See Karl B. Tegland,*

Washington Practice, Specific Applications – Contract Rights, Insurance § 42.29 n.1 (2011), or a third-party claim (if an actual claim is asserted against the County) could be asserted against the State under RCW 4.22.040 and .050. In either scenario Lewis County would be litigating based on specific facts that are not part of a moot claim, with real parties plaintiff and defendant. Lewis County has justiciable alternatives to the dismissed case below: it just prefers not to pursue them.

Contrary to Lewis County's position, a justiciable case or controversy cannot subsist of a pure issue of law that is utterly devoid of facts, fails to join claimants and their intended targets, and that would produce a declaratory judgment that would change fundamentally State-County powers and obligations that have been determined for decades.

B. To Be Justiciable Or Produce A Binding Result, All Necessary Parties Must Be Before The Court

A case is not justiciable when a plaintiff fails to name all parties whose interests or status may be affected by a declaratory judgment. *Northwest Animal Rights Network v.* State, 158 Wn. App. 237, 242, 242 P.3d 891 (2010). The question of whether all necessary parties must be joined in order to have a case or controversy was decided in *Bainbridge Citizens United*, 147 Wn. App. at 371. A trial court lacks jurisdiction in a uniform declaratory judgment act case unless plaintiff joins "all persons ...

who have or claim any interest which would be affected by the declaration." *Id.* at 372. A party is necessary if (1) the trial court cannot make a complete determination of the controversy without that party's presence, (2) the party's ability to protect its interest in the subject matter of the litigation would be impeded by a judgment in the case, and (3) judgment in the case necessarily would affect the party's interest. *Id.* All three factors justified dismissal below because Lewis County declined to name actual or potential claimants or the county juvenile court and county staff identified as the targets of such claims.

In *Bainbridge Citizens United,* the plaintiffs sought a declaration that the Department of Transportation should be compelled to enforce WAC provisions against alleged trespassers in Eagle Harbor, but the plaintiff did not join the alleged trespassers as parties. *Id.* at 372. The plaintiffs argued that the trespassers were not necessary parties because plaintiffs did not request that any action be taken directly against the trespassers, and thus the effects that a judicial determination might have on the trespassers was speculative and secondary to the issue at hand. *Id.* The Court rejected this argument noting that the remedy sought by the plaintiffs was to force the Department to evict the trespassers. *Id.* at 373. Accordingly, the trespassers were necessary parties. *Id. See also, Glandon*

v. Searle, 68 Wn.2d 199, 202, 412 P.2d 116 (1966) (Potential future claimants, if not joined, will not be bound by declaratory judgment).

Here, Lewis County has not joined the plaintiffs in any future claim or lawsuit against county judicial branch employees. Nor can it do so because they do not exist. Furthermore, future plaintiffs might have claims now against the county that would fail if they were required to pursue them exclusively against the state or they may have theories of county liability that have not been considered before but would be absolutely foreclosed by the decree requested in this case. The rights of these future plaintiffs to manage their own litigation and to obtain justice would be prejudiced, as would the rights of non-parties like the superior court, the juvenile court, their judges and staff because they are not parties to this case. Simply put, if Lewis County wants a court to rule, based on the state constitution or otherwise, regarding the "legal status" of these entities and their personnel, due process requires their joinder. If the County similarly wants the Court to foreclose suits by those injured by county employees or institutions, due process mandates their joinder.

Finally, Lewis County has waived any appeal of this dispositive issue by failing to assign error to the issue or to brief it as an error committed by the trial court. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692-93, 15 P.3d 115 (2000); *Christensen v. Munsen*,

123 Wn.2d 237, 867 P.2d 626 (1994). Whether based on waiver or as a distinct element of justiciability that the County has failed to prove, this Court can affirm dismissal on this basis alone.

C. While Washington Courts Occasionally Invoke Their Discretion To Apply A More Liberal Approach To Justiciability For Issues Of Great Public Importance, The Trial Court Appropriately Did Not Do So In This Case

While this case clearly fails to meet the strict elements of justiciability in Washington, the County claims its action, filed solely on its own behalf, constitutes an "issue of great public importance" because county liability for claims against judicial branch employees is of general concern to each of Washington's 39 counties and their citizens. CP 6. Washington courts have occasionally invoked their jurisdiction in declaratory judgment actions over matters of great public importance, even in cases that are wanting for some of the elements of a justiciable controversy. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 557, 496 P.2d 512 (1972). However, they have only done so when the matter in question is of such great and overriding public moment as to constitute the legal equivalent of all of the elements of a justiciable controversy. *Id.*. Whether or not to invoke this more liberal approach to justiciability is a matter of discretion for the court. State ex rel. *Distilled Spirits Institute, Inc. v. Kinnear,* 80 Wn.2d 175, 178, 492 P.2d 1012 (1972).

Significantly, the Washington Supreme Court has held that the "great public importance" basis for jurisdiction to render declaratory judgments is disfavored and should only be invoked in rare circumstances. *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). The court also stated that any suggestion that courts routinely by pass justiciability for cases of major public import was "an overstatement." *Id.* at 415. The trial court below accordingly declined to exercise jurisdiction on this exceptional basis. CP 100.

In *Walker*, a citizen's action group sued, requesting a writ of mandamus, declaratory judgment, and an injunction, based on a claim that provisions of an initiative limiting expenditures, taxation, and fees were unconstitutional. *Id.* at 405. The court stated that its examination of numerous "major public import" cases showed that even if the court does not always adhere to all four requirements of the justiciability test, it will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged. *Id.* at 415.

Similarly, in a case dealing with the constitutionality of the Natural Death Act, the Supreme Court refused to render a declaratory judgment even when "obviously important constitutional rights were involved." *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984). In *DiNino,* a woman who was not terminally ill wanted a

declaration of the validity of her directive to her physician regarding life-sustaining procedures, which differed from the model directive in the act as far as pregnancy and abortion provisions. *DiNino*, 102 Wn.2d at 332. Despite the importance of the issues involved, the court held that the case was not justiciable, as it presented a "hypothetical, speculative controversy". *Id.* The court went on to hold that without a factual controversy before it, "an advisory opinion would not be beneficial to the public or to other branches of government." *Id.* The same reasoning applies with equal force here because Lewis County has failed to show or even allege that any claim or action against its judicial branch employees is pending or even contemplated. Consistent with Supreme Court precedent, the trial court declined to invoke its discretion to exercise jurisdiction in this case. To overturn that decision, Lewis County has to establish manifest abuse of discretion and it has failed to do so.

D. This Court Should Remand with Instructions To Dismiss On The Merits As An Alternative to Affirming Dismissal For Lack of Subject Matter Jurisdiction

The dismissal of Lewis County's case was a jurisdictional ruling, not one on the merits. However, if this Court disagrees with the dismissal for lack of jurisdiction, the Court should simply remand the case with instructions to dismiss on the merits. *See Richardson v. Danson*, 44

Wn.2d 760, 764, 270 P.2d 802 (1954).[7] The allegations in the complaint and the several declarations Lewis County submitted below are factually and legally insufficient to warrant the expansive declaratory judgment prayed for. At most the declarants described the nature, frequency and amounts of historical claims, established that the county's executive branch does not directly control the employment of county judicial staff and that other counties' experiences are similar.

Reduced to its essence, Lewis County's case asks the court to ignore Supreme Court precedent, to disregard or declare unconstitutional laws enacted by the Legislature and to overlook the County's admitted and completely contrary custom and practice for decades. Washington's Constitution makes superior court judges officers of both the State and the County. *In re Salary of Superior Court Judges,* 82 at 231-32. The County, by state law, is already responsible, financially and to the exclusion of the State, for providing facilities and personnel. *Id.* The State Legislature has constitutional authority to legislate that the County bear the entire costs of the criminal justice system operating within the

[7] The *Richardson* court did so because the record below was developed enough to make a decision as a matter of law. Here, Lewis County produced through a number of declarations, with attachments, to establish the nature, number and dollar amounts of court-related claims it has paid over the last several years. The County does not dispute the holdings of the cases and the effects of the statutes cited by the State. The County also failed to cite authority for granting the relief requested on the merits. No further record is needed.

County. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 544, 909 P.2d 1303 (1996), *State v. Agren*, 32 Wn. App. 827, 828, 650 P.2d 238 (1982). The Legislature possesses plenary authority to assign the County total fiscal responsibility for the staff and programs of the superior courts. *Clausen,* 95 Wash. at 231-32.[8] The Legislature has done so in RCW 4.96.010. The declaratory judgment Lewis County seeks would be contrary to the settled case law and statutes of the State, in effect overruling Supreme Court decisions and declaring unconstitutional duly enacted state laws.

Judgment against Lewis County on the merits is also supported by the County's own conduct in acknowledging exclusive county responsibility for such claims over the last several decades. In *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 371, 940 P.2d 286 (1997), a citizens group sought a declaratory judgment that Seattle had exceeded its authority some 70 years prior by constructing a drive that permitted vehicular and not pedestrian-only access to a park. The court denied the relief because the plaintiffs were belatedly trying to overturn a legislative decision that could have, and should have, been challenged long ago. That holding has equal application to bar Lewis County from a

[8] Declaratory judgment actions are particularly inappropriate in areas where the Legislature possesses almost complete discretion to act. *See, Northwest Greyhound Kennel Ass'n, Inc. v. State,* 8 Wn. App. 314, 318-19, 506 P.2d 878 (1973).

court-ordered, 180° change in State-County responsibilities. Doctrines of laches, estoppel and waiver were iron-clad defenses on the merits as well as factors influencing the court's decision to dismiss for lack of jurisdiction.

Finally, the County suggests that the county executive's alleged lack of control over the hiring, discipline and day-to-day activities of county judicial employees, means that the State should be liable for judicial employee (and juvenile justice employees) misconduct, even though these are Lewis County employees. Lewis County Opening Brief at 3; CP 35-37. However, the fact that the Lewis County Commissioners cannot hire, fire or control elected judges or the employees of the County's judicial branch is no more significant than the fact that the County Judiciary does not dictate employment terms and conditions for those working for the County's co-equal Executive and Legislative branches. Would this Court entertain a claim that the State is not responsible for the actions of employees of the State Supreme Court because the Governor or Legislature do not control, hire or fire these employees? This compartmentalized view of determining a county's liability for the actions of county employees on a division-by-division or a departmental basis has been rejected by the Washington courts in *Broyles v. Thurston County*, 147 Wn. App. 409, 427-28, 195 P.3d 985 (2008) and

in *Lewis County v. Public Employment Relations Commission,* 31 Wn. App. 853, 864-65, 644 P.2d 1231 (1982) and it should be rejected in this appeal.

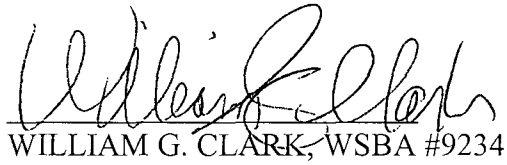
Lewis County's case was not sustainable as a matter of fact or law. If not inclined to affirm dismissal on jurisdictional grounds, the Court should instead direct dismissal on the merits. Either way the lower court's dismissal must be affirmed.

VI. CONCLUSION

Lewis County's case satisfied none of the pre-requisites for a justiciable case or controversy under the Declaratory Judgments Act. The trial court also correctly declined to invoke a public import exception to those requirements. Alternatively, Lewis County's claim failed on its merits. This Court should so affirm.

RESPECTFULLY SUBMITTED this 19th day of November, 2012.

ROBERT M. MCKENNA
Attorney General



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PROOF OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT on appellant's counsel of record on the date below via United States Mail, as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of November, 2012, at Seattle, WA.

Nicole Symes
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