NO. 45601-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Steven Kozol, a Washington State prisoner, appeals the dismissal of his Uniform Declaratory Judgment Act complaint. Mr. Kozol's complaint challenged a prison disciplinary infraction hearing and appeal that found him guilty of committing a serious prison infraction. Mr. Kozol requested a declaratory judgment finding the prison disciplinary hearing process and subsequent administrative appeal decision affirming the guilty finding violated WAC 137-28. He also requested a finding that Associate Superintendent Jackson committed a Class C felony under RCW 40.16.030 by filing an allegedly false disciplinary hearing appeal decision.

The trial court correctly dismissed Mr. Kozol's complaint because his claims were outside the scope of the Uniform Declaratory Judgment Act and did not present a justiciable controversy. The trial court also correctly determined Mr. Kozol's claims were not of great public importance favoring the issuance of a declaratory judgment in the absence of a justiciable controversy.

Additionally, the trial court correctly dismissed Mr. Kozol's request for injunctive relief because he failed to establish a clear legal right to injunctive relief due to the dismissal of Mr. Kozol's declaratory judgment claims. Lastly, the trial court did not abuse its discretion in denying Mr. Kozol's motion for leave to file a second amended complaint

after the trial court dismissed all claims but a speculative tort claim that was eventually determined to be nonexistent. Amendment was prejudicial to Defendants because of undue delay in filing the request to amend. Amendment also was futile because Mr. Kozol re-asserted his dismissed claims and added unfounded statutory and constitutional writs of certiorari. Thus, this Court should affirm the trial court's order denying leave to amend and dismissing all claims with prejudice.

II. COUNTERSTATEMENTS OF ISSUES

1. Are Mr. Kozol's claims barred by res judicata when he admits to filing claims that were litigated, or could have litigated, in his previous civil rights case filed in federal court?

2. Is a claim outside the scope of the Uniform Declaratory Judgment Act when it does not challenge the facial validity of a statute or regulation but instead challenges the application or administration of a statute or regulation?

3. Does a claim fail to raise a justiciable controversy when a declaratory judgment would have been advisory and would not have any direct coercive effect on any of the Defendants?

4. Is denial of a motion for leave to amend proper when the motion is filed at a late stage of the case, after dismissal of all claims but a

potential tort claim, and the only remaining proceeding is an order presentation hearing to determine if a tort claim was plead?

5. Should a request for injunctive relief be dismissed when there are not sufficient facts to establish a legal or equitable right, a well-grounded fear of immediate invasion of that right, and the acts complained of would not result in actual and substantial injury to that party because all underlying Uniform Declaratory Judgment Act claims were dismissed?

III. STATEMENT OF THE CASE

A. Facts Alleged In First Amended Complaint

Steven Kozol is an inmate in the Department of Corrections' custody and he is housed at Stafford Creek Corrections Center (SCCC). CP 30. On March 23, 2011, Mr. Kozol received a serious infraction alleging Mr. Kozol violated WAC 137-28-030(740)—Fraud, embezzlement, or obtaining goods, services, money, or anything of value under false pretense. CP 31.

Respondent Greg Jones was a disciplinary hearings officer at SCCC. CP 31. On April 6, 2011, a disciplinary hearing was held to decide if Mr. Kozol committed the serious infraction. CP 31. Mr. Kozol alleges he was not provided copies of most of the evidence used against him, and was not allowed to present documentary evidence in his

defense. CP 31. At the conclusion of the hearing, Mr. Jones found Mr. Kozol guilty of committing the serious infraction. CP 31.

Mr. Kozol appealed Mr. Jones' decision finding him guilty of a serious infraction. CP 31. Mr. Kozol argued his hearing was not conducted in accordance with WAC 137-28. CP 31. Associate Superintendent Eric Jackson reviewed Mr. Kozol's appeal. CP 31. Mr. Jackson issued a hearing appeal decision and upheld the finding of guilt. CP 32. Mr. Kozol alleged Mr. Jackson's hearing appeal decision falsely stated the hearing was conducted in accordance with due process and WAC 137-28. CP 32. He also alleged Mr. Jackson falsely stated that Mr. Kozol received at least twenty-four hours advance written notice and was provided an opportunity to call witnesses and present documentary evidence. CP 32.

B. Procedural History

Mr. Kozol filed a Complaint against the Department of Corrections under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24, asserting the guilty finding on a serious infraction violated his due process. CP 5. He also alleged the guilty finding violated WAC 137-28. CP 6. Mr. Kozol requested declaratory and injunctive relief. CP 6.

The Department answered the complaint, and filed a motion to dismiss arguing it could not be a defendant in a civil rights action. CP 7-9,

21-23. In response, Mr. Kozol moved to amend his complaint. CP 11-20. The Department did not object to the first amended complaint, but it obtained an order dismissing any 42 U.S.C. § 1983 claims brought against Department.[1] CP 25-28.

Mr. Kozol's First Amended Complaint added Mr. Jones and Mr. Jackson as Defendants. CP 30-36. The First Amended Complaint asked the trial court to declare that Mr. Jones and Mr. Jackson violated WAC 137-28 and Mr. Jackson committed a felony under RCW 40.16.030. CP 34-35. Mr. Kozol also requested the Department be permanently enjoined from using the serious infraction in any manner detrimental or adverse to Mr. Kozol. CP 35. Lastly, Mr. Kozol requested $10,000 in damages against all Defendants. CP 36.

Defendants answered and filed a motion to dismiss under Civil Rule 12 arguing Mr. Kozol did not have a cause of action under the Uniform Declaratory Judgment Act (UDJA). *See* CP 37-56. Mr. Kozol filed a response opposing Defendants' motion to dismiss, and he filed a motion for sanctions. CP 58-60, 156-165. Then, Mr. Kozol had counsel appear on his behalf. CP 90.

[1] The Court's June 28, 2013 order of dismissal only related to the Department of Corrections and not Defendants Jackson or Jones later added as Defendants in Plaintiff's First Amended Complaint. *See* CP 27.

On October 4, 2013, the trial court orally dismissed all UDJA claims and claims for injunctive relief and damages. Report of Proceedings (RP) (October 4, 2013) at 16. The trial court determined its ruling may not have disposed of all claims in Mr. Kozol's First Amended Complaint because it believed there was a possible tort claim due to Mr. Kozol's request for damages. RP (October 4, 2013) at 16. A separate hearing was scheduled for the parties to present an order on the court's ruling of dismissal and argument, if necessary, on the possible remaining tort claim. RP (October 4, 2013) at 16-17.

Prior to the order presentation hearing, Defendants checked Department of Enterprise Services Risk Management Division's database for any potential tort claims or subsequent civil rights claims filed by Mr. Kozol. CP 120-121. The Defendants determined Mr. Kozol previously filed a case the U.S. District Court, Western District of Washington at Tacoma, Case Number C11-5209 BHS/KLS. CP 120-121. Mr. Kozol alleged a civil rights violation and state tort claims concerning allegations found in Mr. Kozol's tort claim. CP 120-121.[2] The federal court dismissed his civil rights and tort claims with prejudice in 2011. CP 121.

[2] *Kozol v. May*, C11-5209 BHS/KLS, 2011 WL 5006515 (W.D. Wash. Sept. 12, 2011) *report and recommendation adopted,* C11-5209BHS, 2011 WL 5006520 (W.D. Wash. Oct. 20, 2011).

Mr. Kozol did not file briefing on the potential tort claim. Instead, he filed a motion to for leave to file a second amended complaint. CP 99-103. The second amended complaint re-alleged all UDJA claims previously dismissed, dropped reference to monetary damages, and included new claims requesting a statutory and constitutional writ of certiorari. CP 105-109. Defendants contended the motion was both futile and untimely due to Mr. Kozol's delay in filing the motion shortly before an order presentation hearing. CP 110-117.

On November 1, 2013, a hearing was held on the order presentation and Mr. Kozol's motion to amend. RP (November 1, 2013) at 3. Mr. Kozol conceded he was not asserting a state tort claim, but wanted to seek a statutory and constitutional writ of certiorari. RP (November 1, 2013) at 4-5. The trial court considered Mr. Kozol's motion to amend, but determined the additions of two new writs of certiorari claims were outside the purpose of the order presentation hearing. RP (November 1, 2013) at 14-15. Then, the trial court signed an order denying Mr. Kozol's motion to amend and dismissed his first amended complaint. CP 148-149; RP (November 1, 2013) at 15-16.

Mr. Kozol's counsel withdrew from the case on November 8, 2013. CP 166-67. Afterwards, Mr. Kozol filed a timely notice of appeal on November 25, 2013. CP 152.

IV. STANDARD OF REVIEW

A trial court's dismissal of a claim under CR 12(c) is reviewed *de novo*. *Parmelee v. O'Neel,* 145 Wn. App. 223, 231–32, 186 P.3d 1094 (2008), *rev'd in part on other grounds,* 168 Wn.2d 515, 229 P.3d 723 (2010). Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). In making this determination, plaintiff's allegations are presumed to be true and may consider hypothetical facts that are not included in the record. *Id.* However, the Court does not need to accept the legal conclusions as true. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) *amended,* 109 Wn.2d 107, 750 P.2d 254 (1988). A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof. *Bock v. State*, 91 Wn.2d 94, 586 P.2d 1173 (1978).

V. ARGUMENT

A. Res Judicata Bars Mr. Kozol's Case

Mr. Kozol concedes res judicata prevented him from filing a civil rights or tort claim because a prior federal case he filed was dismissed with prejudice. Opening Brief, at 24, 27-28. Mr. Kozol's failed civil rights and tort litigation is not evidence for him to proceed on his UDJA

claim. Instead, it promotes the dismissal of his UDJA claim. Moreover, the trial court determined he did not have a claim under the UDJA and its discussion of other available remedies does save his case from being barred by res judicata.

Res judicata, or claim preclusion, "bars the litigation of claims and issues that were litigated, or might have been litigated, in a prior action." *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). "Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington." *Ensley v. Pitcher*, 152 Wn. App. 891, 898-99, 222 P.3d 99 (2009) (quoting *Landry v. Luscher,* 95 Wn. App. 779, 780, 976 P.2d 1274 (1999)). "The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit." *Ensley*, 152 Wn. App. at 899. If res judicata applies, it bars all matters that were previously considered or could have been considered in the prior action. *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc.*, 118 Wn. App. 617, 628, 72 P.3d 788 (2003).

Here, Mr. Kozol's argument that his previous case dismissed with prejudice bars him from having an alternative remedy also bars him from asserting his UDJA claims. Mr. Kozol's concession that res judicata applies is evidence that his UDJA claims and his previously dismissed civil rights and tort claims are related and based off the same events. A

cause of action that was litigated, or could have been litigated, may not be re-litigated under the UDJA and the UDJA is not an avenue to evade the effect of res judicata. 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 42:25 (2nd ed. 2009). Therefore, Mr. Kozol's concession that res judicata is applicable is fatal to his case and a basis for dismissal of his appeal.

B. The Trial Court Properly Dismissed Mr. Kozol's Challenge To His Prison Serious Infraction and Disciplinary Hearing

Mr. Kozol's First Amended Complaint attempted to invalidate his prison disciplinary infraction, and obtain a declaratory judgment finding that the disciplinary hearing process violated WAC 137-28 and that Mr. Jackson committed a Class C felony. CP 18-19. Mr. Kozol argues the scope of his first amended complaint and its alleged facts establish a justiciable controversy under the UDJA. Opening Brief at 13-23. Additionally, he argues the trial court should have allowed him to amend his complaint and granted him injunctive relief. Opening Brief at 34-42.

The trial court properly dismissed the first amended complaint and denied the motion to amend. Mr. Kozol's attempt to litigate the application or administration of RCW 40.16 and WAC 137-28 fell outside the proper scope of the UDJA, and his first amended complaint was not legally sufficient to establish a justiciable controversy under the UDJA.

Additionally, Mr. Kozol's attempt to add statutory and constitutional writs of certiorari after all UDJA claims were dismissed but before the order was presented to the trial court was undue delay and futile. Lastly, Mr. Kozol's claim under the UDJA provides him no clear or equitable right to injunctive relief. Therefore, the trial court correctly dismissed Mr. Kozol's first amended complaint.

1. Appellant's First Amended Complaint Was Outside The Scope Of The UDJA Because It Sought The Determination Of The Proper Application Of The Statute and WACs, Instead Of The Proper Construction Of The Statute And WACs

Mr. Kozol's challenge to Defendant's alleged actions under RCW 40.16 and WAC 137-28 was outside the scope the UDJA because it sought the determination of the proper application of the statute and WACs, instead of the proper construction of the statute and WACs. The UDJA provides that: "a person 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 (emphasis added). Declaratory judgment actions 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 Res., 147 Wn. App. 365, 374-76, 198 P.3d 1033 (2008) (*citing City of Federal Way v. King County,* 62 Wn. App. 530, 535, 815 P.2d 790 (1991), *superseded by statute on other grounds*). Under the UDJA, the court "may determine only the facial validity of the statute itself, not the executive branch's administration of that statute." *Seattle-King County Council of Camp Fire v. State Dept. of Revenue*, 105 Wn.2d 55, 58, 711 P.2d 300 (1985). The court lacks authority to issue a declaratory judgment if the plaintiff is contesting the application of, or administration under, a statute instead of asserting a "question of construction or validity." *Bainbridge Citizens United*, 147 Wn. App. at 374-75.

Mr. Kozol argues that the court can issue a declaratory judgment that Defendant Jackson's actions violated RCW 40.16.030. Opening Brief at 18-23. But Mr. Kozol's First Amended Complaint asked the trial court to find that Mr. Jackson committed a felony violation of RCW 40.16.030. CP 33. This request seeks a ruling on the application of RCW 40.16.030 and not merely the construction or validity of the statute.

RCW 40.16.030 states:

> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a

> class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

When a statute provides a unique remedy, the unique remedy must be pursued under the statute and relief will not be granted under the UDJA. 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 42:9 (2nd ed. 2009). The plain language of RCW 40.16.030 shows it is a criminal statute with a penal and/or monetary remedy. A review of case law clearly shows RCW 40.16.030 is applied solely in the criminal context. *See State v. Lau*, 174 Wn. App. 857, 300 P.3d 838 (2013); *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007); *State v. Hampton*, 143 Wn.2d 789, 24 P.3d 1035 (2001); *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980); *State v. Sanders*, 86 Wn. App. 466, 937 P.2d 193 (1997). The courts have commonly held that "equity will not interfere with the criminal processes by entertaining actions for injunction or declaratory relief in advance of criminal prosecution." *Zemel v. Rusk*, 381 U.S. 1, 19, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

Additionally, Mr. Kozol has no standing to bring an action for a violation of RCW 40.16.030. Inherent in the four elements establishing a justiciable controversy are the "traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To–Ro Trade Shows v. Collins,* 144 Wn.2d 403, 411, 27

P.3d 1149 (2001). To determine if a party has standing under the UDJA, "a party must be within the 'zone of interests to be protected or regulated by the statute' in question and the party must have suffered an 'injury in fact.'" *City of Longview v. Wallin*, 174 Wn. App. 763, 778, 301 P.3d 45, 53 (2013) (citing *Am. Legion Post #149 v. Dep't of Health,* 164 Wn.2d 570, 593–94, 192 P.3d 306 (2008)).

To be properly considered an instrument under RCW 40.16.030, this analysis, a document must fall within the literal scope of a statute or valid regulation and be of "'a character that the mischief the statute seeks to prevent would ensue if the document were filed.'" *Price,* 94 Wn.2d at 819 (quoting *People v. Bel Air Equip. Corp.,* 39 N.Y.2d 48, 54–55, 382 N.Y.S.2d 728, 346 N.E.2d 529 1976)). The instrument at issue is a form template and allegedly false statements were marked boxes related to Mr. Kozol's disciplinary due process. CP 68-69. Mr. Kozol's First Amended Complaint does not establish the disciplinary hearing appeal decision form as required by statute or rule or that this form was the type contemplated under the statute. *See Hampton*, 143 Wn.2d at 797 ("no regulation *requires, permits,* or even *authorizes* the filing of a form, [therefore] it cannot be said that the final inspection form was either explicitly or implicitly permitted or required by law.") (Emphasis in original).

Therefore, Mr. Kozol's claim is not within the zone of interests of RCW 40.16.030.

Mr. Kozol cites to *Industrial Indem. Co. of the Northwest., Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990) and *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984) as authorities for allowing his UDJA case against Mr. Jackson. Opening Brief at 23. Neither case is controlling. *Kallevig* is not controlling because it addressed an insurance company's claim that it did not need to pay a claim arising from a restaurant fire. *Kallevig*, 114 Wn.2d at 910-13. An insurance company's duty under an insurance contract is a separate issue from Mr. Kozol's claim against Mr. Jackson arising from RCW 40.16.030. *See* RCW 7.24.020 and .030 specifically separate contract disputes from rights arising under a statute. *See* 15 Karl B. Tegland, *Washington Practice: Civil Procedure* §§ 42:29-31 (2nd ed. 2009). Furthermore, it did not address a person's actions under a criminal statute. *See Kallevig*, 114 Wn.2d 907. Mr. Kozol's case was unrelated to an insurance contract and specifically asked the court to find Mr. Jackson committed a felony. Therefore, *Kallevig* is inapplicable.

Miotke answered the question "whether any cause of action against governmental units for injuries allegedly caused by their actions taken in violation of various environmental laws." 101 Wn.2d at 309. *Miotke* did

not determine if a criminal violation occurred. *See id.* Instead, it determined if the government could be held civilly liable for discharging raw sewage into a river causing damage to the plaintiff. *Id.* at 329-37. RCW 40.16.030's sole purpose is criminal and it provides no civil remedy. Futhermore, Mr. Kozol's claim did not seek damages for violations of various environmental laws. Therefore, *Miotke* is inapplicable.

However, *Brown v. Vail*, 169 Wn.2d 318, 334-35, 237 P.3d 263 (2010) is advisory. In *Brown*, the Washington Supreme Court recognized the enforcement of the statute rests in the executive agencies and a declaratory judgment would not settle the lawsuit. *Id.* Thus, the Court found no justiciable controversy for plaintiff's claim that the Department was violating the Controlled Substances Act since a court opinion would not end the controversy. *Id.*

Mr. Kozol also argues that he can seek a declaratory judgment to determine if Defendants' actions were in violation of WAC 137-28. Opening Brief at 18-23. Mr. Kozol's First Amended Complaint alleged Mr. Jones and Mr. Jackson failed to follow their obligations under WAC 137-28-290 and WAC 137-28-300. CP 32-34. Thus, Mr. Kozol sought a ruling on the proper administration of WAC 137-28-290 and WAC 137-28-300 rather than a ruling on the proper construction of these WACs.

A ruling on the proper administration of a WAC is not the proper subject matter for a declaratory judgment. *See Bainbridge Citizens United*, 147 Wn. App. at 374. Instead, declaratory judgment actions are meant "to determine the facial validity of an enactment, as distinguished from its application or administration." *City of Federal Way,* 62 Wn. App. at 535 (citing *Seattle–King County Council of Camp Fire v. Dep't of Revenue,* 105 Wn.2d 55, 57–58, 711 P.2d 300 (1985)). Mr. Kozol did not raise a challenge to WAC 137-28's validity or construction therefore "a declaratory judgment is not an available remedy under the power specifically enumerated in RCW 7.24.020." *Bainbridge Citizens United*, 147 Wn. App. at 375. Lastly, Mr. Kozol fails to provide any authority that the UDJA is the appropriate avenue to challenge the Department's actions during a prison disciplinary hearing. Thus, Mr. Kozol's challenge of the administration of WAC 137-28 during his disciplinary hearing and subsequent appeal is outside of the scope of the UDJA.

Mr. Kozol also argues *Bainbridge Citizens United* is not applicable to his case. Opening Brief at 21-22. Mr. Kozol asserts he did not seek to compel Defendants to enforce a statute or WAC against a third party. Opening Brief at 22. Instead, he wanted WAC 137-28 enforced against Defendants and RCW 40.16 against Mr. Jackson. Opening Brief at 22.

Mr. Kozol's argument is evidence that the reasoning in *Bainbridge Citizens United* applies and the purpose of his case was outside the scope of RCW 7.24.020. The plain language of RCW 7.24.020 only allows a person to raise a question of "construction or validity arising under the instrument, statute, ordinance, contract or franchise." *Bainbridge Citizens United* confirmed the plain meaning by finding there is no cause of action under the UDJA where the sole question before the Court is "whether the [agency] properly applied or administered [a specific WAC]." *Id.* at 374-75. The Court's legal reasoning is directly applicable to this case and consistent with the UDJA's statutory language even though the facts in *Bainbridge Citizens United* are not analogous to Mr. Kozol's First Amended Complaint.

2. Appellant's First Amended Complaint Failed To State A Justiciable Controversy Because Mr. Kozol Did Not Have Standing And Any Ruling Would Be Advisory Only

Mr. Kozol argues the scope of his First Amended Complaint and its alleged facts establish a justiciable controversy under the UDJA. Opening Brief at 13-16. However, Mr. Kozol's desire to obtain a declaratory judgment finding the disciplinary hearing process violated WAC 137-28 and Mr. Jackson committed a Class C felony fails as a matter of law.

Before a court assumes jurisdiction and determines a question under the UDJA, a plaintiff must show there is a justiciable controversy present. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *Burman v. State*, 50 Wn. App. 433, 439, 749 P.2d 708 (1988). A justiciable controversy is present if there 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.

To-Ro Trade Shows, 144 Wn.2d at 411. The court steps into the prohibited area of issuing an advisory opinion if a justiciable controversy element is not met. *Id.*, 144 Wn.2d at 416.

Here, a decision on Mr. Kozol's First Amended Complaint would have been advisory only. A justiciable controversy does not exist if a declaratory judgment will not produce a final and conclusive determination that would terminate the uncertainty or controversy giving rise to the proceeding. *Brown v. Vail*, 169 Wn.2d 318, 335, 237 P.3d 263 (2010). The UDJA "is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal relations." *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 759-60, 259 P.3d 280

(2011) (citing *DiNino v. State,* 102 Wn.2d 327, 330, 684 P.2d 1297 (1984)).

Mr. Kozol argues a declaratory judgment would have a direct and coercive effect on Defendants because declaratory judgments have the full force and effect of a final judgment. Opening Brief, at 33-34. This argument mistakes a UDJA claim leading to final judgment with the final judgment producing a final and conclusive resolution to Mr. Kozol's claims. The Court will not usually entertain a declaratory judgment action when "enforcement of the alleged violations remains in the discretion of the agency, and no party is bound to act in accord with such judgment." *Brown*, 169 Wn.2d at 334.

A UDJA action cannot go to the proper administration of a WAC or statute. Thus, a court cannot say whether or not the Department violated its WAC or statute or take the next step at expunging the serious infraction from Mr. Kozol's prison record. This is evidenced by RAP 16 and its granting of jurisdiction to the Court of Appeals and Supreme Court for challenging disciplinary infractions.

Furthermore, Mr. Kozol concedes he is now barred by res judicata from bringing a civil rights and tort claim because of his previous case filed in federal court. Opening Brief, at 23-24, 27-28. He also argues he is unable to bring a personal restraint petition. Opening Brief, at 25-27.

Therefore, a declaratory judgment would not assist him in bringing a civil rights or tort suit in state or federal court challenging the disciplinary hearing or loss of his guitar. A declaratory judgment would not establish the validity of a personal restraint petition.

Additionally, a declaratory judgment finding Mr. Jackson violated RCW 40.16.030 has no coercive effect on Mr. Jones or Mr. Jackson. Additionally, neither the Department nor a prosecutor's office is required to take action and the enforcement of the alleged violation remains in the discretion of the agency or a county prosecutor's office.[3] Consequently, Mr. Kozol did not have a UDJA claim under RCW 40.16.030.

3. Mr. Kozol's Case Is Not Of Great Public Importance And *Kitsap County v. Smith* Is Not Controlling

Mr. Kozol relies upon *Kitsap County v. Smith*, 143 Wn. App. 893, 902, 180 P.3d 834 (2008) for his ability to bring a UDJA action against Mr. Jackson for alleged violations of RCW 40.16.030. Opening Brief at 21-23, 31-33. However, Mr. Kozol's reliance on *Kitsap County* is misplaced and his argument for a declaratory judgment under RCW

[3] Mr. Kozol cites to *Eller v. Ladenburg*, No. 19028-1-II, 1996 WL 520606 (Wash. Ct. App. Sept. 13, 1996), an unpublished decision, for the proposition that the trial court would convene a grand jury against Mr. Jackson if Mr. Kozol succeeded in establishing a felony violation. Opening Brief at 22, n.1. However, this case focused on a mandamus action brought by an attorney challenging the prosecutorial discretion to not prosecute a perjury claim against an adverse witness in the attorney's civil case. The attorney was ultimately sanctioned under CR 11 for his frivolous claim and the Court's footnote dicta concerning RCW 10.27.030 does not establish a final and conclusive resolution to Mr. Kozol's claims.

40.16.030 is unsupported by this case. In *Kitsap County*, the County sued Smith for his recording of private conversations with County employees contrary to Washington State's Privacy Act—RCW 9.73. *Kitsap County,* 143 Wn. App. at 898-99. In addition, the County sought relief under RCW 40.14 and RCW 40.16 for the return of records Smith wrongfully removed from the County's custody and control as they were public records within the meaning of RCW 40.14. *Id.* at 899, 910-913.

The trial court dismissed the County's UDJA claims determining there was no justiciable controversy. *Id.* at 900. On appeal, this Court determined the County could seek a declaratory judgment because the issues confronted by the County were of "great public importance" reasoning the County needed to be able to advise its employees on the legal limits of recording work-related conversations and establish appropriate policies addressing this issue. *Id.* at 908-09. The Court reached this decision based on case precedent stating "issues of 'broad overriding import' may persuade a court to exercise its discretion in favor of reaching an issue which is otherwise not justiciable." *Id.* at 908 (citing *Snohomish County v. Anderson,* 124 Wn.2d 834, 840–41, 881 P.2d 240 (1994)).

Thus, unlike the facts in this case, the decision to allow the Declaratory Judgment Act was based on an exception to the justiciable

controversy requirement under RCW 7.24 where the Court found a declaratory judgment was of great public importance. *Kitsap County,* 143 Wn. App. at 909. Mr. Kozol does not argue his case is of great public importance.[4] *See* Opening Brief, at 32-33. Additionally, Mr. Kozol was not in the same position as Kitsap County. Kitsap County had a need to determine the validity of Smith's actions so it could advise its employees on the legality of recording conversations with other public employees along with its need to establish policies ensuring a person's privacy was protected. Furthermore, it had the ability to prosecute Smith, if necessary.

Mr. Kozol's First Amended Complaint is not of great public importance because the resolution of his case is not of wide-spread importance. Any decision regarding his prison disciplinary hearing would have been narrowly tailored the facts of his case and not applicable to others. In essence, it is a standard personal restraint petition disguised as a claim under the UDJA. Therefore, *Kitsap County* is not controlling and the trial court correctly determined no justiciable controversy existed and Mr. Kozol's claims were not of great public importance favoring the issuance of a declaratory judgment in the absence of a justiciable controversy.

[4] Mr. Kozol's counsel argued before the trial court that Mr. Kozol's claims were of great public importance and did not argue there was a justiciable controversy. RP (October 4, 2013) at 5-8.

C. Mr. Kozol's Motion For Leave To Amend Was Untimely, Futile, And Prejudicial To The Department

Mr. Kozol argues that the trial court abused its discretion in denying him leave to file a second amended complaint. Opening Brief at 34-40. However, Mr. Kozol's second amendment prejudiced the Defendants because it was untimely and futile. Thus, the trial court did not abuse its discretion in denying his motion to amend.

Granting or refusing permission to amend pleadings rests with the sound discretion of the trial court. *Criscola v. Guglielmelli*, 50 Wn.2d 29, 308 P.2d 239 (1957). The trial court's denial of leave to file a second amended complaint is reviewed for an abuse of discretion. *Watson v. Emard*, 165 Wn. App. 691, 697-98, 267 P.3d 1048 (2011). An abuse of discretion occurs if the decision to deny was based on tenable grounds or tenable reasons. *Id.* at 698. "The touchstone for denying amendment of a complaint is the prejudice such amendment will cause the nonmoving party." *Id.* at 699. "In determining prejudice, a court considers the possible undue delay, unfair surprise, and the futility of amendment." *Id.*

1. Mr. Kozol's Request For Leave To Amend Was Untimely And Prejudicial To Defendants

Mr. Kozol's proposed second amended complaint was untimely. Mr. Kozol's proposed second amended complaint raised claims previously dismissed and sought to assert new claims for a writ of certiorari based on

the same set of facts identified in his current First Amended Complaint. CP 105-109.

Mr. Kozol's concession that his first amended complaint did not contain a tort claim made the purpose of setting an order presentation hearing moot. The trial court would have dismissed Mr. Kozol's case previously if he had informed the trial court that he was not alleging a tort claim. *See* RP (October 4, 2013) at 16-17. Instead, the sole purpose of the hearing was to enter an order of dismissal and to determine whether there was a remaining tort claim. *See* RP (October 4, 2013) at 16-17. It was undue delay for Mr. Kozol to file a motion to amend keeping his dismissed claims and adding new claims not related to the trial court's purpose in setting an order presentation hearing.

Additionally, Mr. Kozol's dilatory practice prejudiced the Defendants. The Defendants had been defending against Mr. Kozol's case for nearly nine months prior to the trial court's oral ruling dismissing all claims. *See* CP 4-6. Nine months was sufficient time for Mr. Kozol to add statutory and constitutional writ of certiorari claims since he concedes there were no new factual allegations. Opening Brief, at 37. Defendants should be able to reasonably rely upon the trial court's narrow ruling only allowing argument for a tort claim already potentially plead in Mr. Kozol's First Amended Complaint. *See Martin v. Bateman*, 111 Wash.

634, 637, 191 P. 759, 760 (1920) (It is not error to refuse to allow an amendment that would amount to abandonment of stated cause and commencement of entirely new action); *Harris v. Cowles*, 38 Wash. 331, 337, 80 P. 537 (1905) (It is discretionary to deny an additional amendment after previously allowing amendments and having dismissed claims plead in those previous amendments.). Otherwise, Mr. Kozol is rewarded for not being forthright about his tort claim and Defendants are prejudiced in not receiving a dismissal of their claims when the basis for continuing the case was nonexistent. Furthermore, an amendment would have prejudiced Defendants by requiring them to re-litigate claims previously determined to be legally inadequate. *See State ex rel. King Cnty. v. Superior Court for King Cnty.*, 33 Wn.2d 76, 80, 204 P.2d 514 (1949) (Trial court's refusal to consider amended petition was affirmed because the amended petition simply repeated previously dismissed claims and any further consideration would have resulted in unnecessary delay.). Therefore, the trial court did not abuse its discretion because amendment would have been due to undue delay and prejudicial to the Defendants.

2. Mr. Kozol's Request For Leave To Amend Was Futile

Mr. Kozol's motion to file a second amended complaint was prejudicial to the Defendants because amendment was futile. Mr. Kozol attempted to amend his complaint to re-assert his UDJA claims and claims

for injunctive relief. *See* CP 107-109. The Court determined these claims had no merit and dismissed them with prejudice. Therefore, re-asserting these claims was futile.

Additionally, Mr. Kozol's assertion of new writ of certiorari claims was futile because he did not have the ability to request a writ of certiorari under RCW 7.16 or article IV, section 6 of the Washington Constitution. "Courts traditionally respond to the unique problems of penal environments by invoking a policy of judicial restraint." *Foss v. Dep't of Corr.*, 82 Wn. App. 355, 358, 918 P.2d 521 (1996). "This policy is designed to give prison administrators wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* (citing *Bell v. Wolfish,* 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L.Ed.2d 447 (1979)). However, superior courts can issue statutory or constitutional writs of certiorari. Ch. 7.16 RCW; Const. art. IV, § 6. *Saldin Sec., Inc. v. Snohomish Cnty.*, 134 Wn.2d 288, 292, 306-07, 949 P.2d 370 (1998).

"Both the statutory and constitutional writs share a common purpose: to enable limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is unavailable." *Coballes v. Spokane Cnty.*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012) (citing *Saldin Sec.,*

Inc., 134 Wn.2d at 306-07). Both writs are understood to be extraordinary remedies that should be "granted sparingly." *Coballes*, 167 Wn. App. at 866 (citing *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010)).

"A constitutional writ of certiorari is not a matter of right, but discretionary with the court." *Torrance v. King Cnty.*, 136 Wn.2d 783, 787, 966 P.2d 891 (1998). "The law is well established that discretion can be exercised when no other adequate remedy at law is available and when the decision below is arbitrary, capricious, or contrary to law." *Id.*, at 787-88 (citing *Saldin Sec., Inc.*, 134 Wn.2d at 292-93).

Arbitrary and capricious action is "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011) (citing *Foster v. King Cnty.*, 83 Wn. App. 339, 347, 921 P.2d 552 (1996)). "Agency action is arbitrary and capricious if there is no support in the record for the action. An agency action is not arbitrary and capricious when there is room for two opinions, despite a belief on the part of the reviewing court that the agency reached an erroneous conclusion." *Fed. Way Sch. Dist. No. 210*, 172 Wn.2d at 769 n.14 (quoting Tim J. Filer, *The Scope of Judicial Review of Agency Actions in Washington Revisited—Doctrine, Analysis, and Proposed*

Revisions, 60 Wash. L. Rev. 653, 660 (1985) (footnote omitted)). By analogy, the appellate courts review a prison disciplinary proceeding brought in a personal restraint petition as arbitrary and capricious if the prisoner was not afforded the applicable minimum due process protections and the decision was not supported by at least some evidence. *In re Krier*, 108 Wn. App. 31, 38, 29 P.3d 720 (2001); *In re Personal Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999).

A constitutional writ of certiorari allows a court of review to "determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Saldin Sec., Inc.*, 134 Wn.2d at 292. "This constitutional, or common law, writ of certiorari is only available as an avenue for review when both direct appeal and statutory writ of review are unavailable." *Coballes*, 167 Wn. App. at 866 (citing *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 533, 79 P.3d 1154 (2003)). "The superior court is without inherent supervisory jurisdiction to consider the merits of a writ of petition when the petitioner fails to show the violation of a fundamental right." *Foss*, 82 Wn. App. at 363.

RCW 7.16 also allows a superior court to grant a writ of review. "A court will issue a statutory writ of review under chapter 7.16 RCW if the petitioner can show that (1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally,

and (4) there is no other avenue of review or adequate remedy at law." *Jones v. Pers. Res. Bd.*, 134 Wn. App. 560, 567, 140 P.3d 636 (2006); RCW 7.16.040. "The absence of a right of appeal or plain, speedy, and adequate remedy at law is recognized as an essential element of the superior court's jurisdiction to grant a statutory writ of review." *Coballes*, 167 Wn. App. at 866 (citing *Holifield,* 170 Wn.2d at 240).

The courts have used a four-factor test to determine whether an action is judicial. *Jones*, 134 Wn. App. at 570 (citing *Raynes v. City of Leavenworth,* 118 Wn.2d 237, 244, 821 P.2d 1204 (1992)). "The factors are: (1) whether a court could have been charged with making the agency's decision; (2) whether the action is a type that courts have historically performed; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of the courts as opposed to that of legislators or administrators." *Id.* (citing *Raynes,* 118 Wn.2d at 244–45).

The Supreme Court defined "acted illegally" under RCW 7.16 as "when that tribunal, board, or officer (1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the

accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court." *Holifield,* 170 Wn.2d at 244-45.

Here, Mr. Kozol's proposed second amendment asserted both a statutory and constitutional writ of review. CP 109. Mr. Kozol challenged the process given to him during the serious infraction hearing and not the Department's authority to reach the end result. CP 107-108. He asserted the Department acted arbitrarily and capriciously when it found him guilty of committing a serious infraction under WAC 137-25-030. CP 109.

However, Mr. Kozol's second amendment did not indicate that the disciplinary decision was without regard to the facts and circumstances surrounding the action essential for an arbitrary and capricious action. *See Fed. Way Sch. Dist. No. 210*, 172 Wn.2d at 769. Moreover, he did not contest the Department's ability to find him guilty of a serious infraction and he did contest the Department's imposition of sanctions for a serious infraction. *See* CP 106-109. Therefore, Mr. Kozol failed to allege facts establishing an arbitrary and capricious action causing his asserted constitutional writ of review to be futile.

Lastly, Mr. Kozol's second amendment did not allege facts establishing a cause of action under RCW 7.16. Mr. Kozol did not allege

facts that set forth an "illegal act" as defined in *Holifield*. Additionally, the second amendment did not show the Department's disciplinary decision and procedure met the four-factor test stated in *Raynes*. Moreover, a statutory writ of review of a disciplinary proceeding is problematic because the review of evidence under RCW 7.16 is under a "substantial evidence" standard that is more stringent than the "some evidence" standard used by the appellate courts reviewing a personal restraint petition. Thus, the trial court's review under RCW 7.16 would have created an absurd result where an infraction that did not cause an inmate to loose good conduct time would have a more stringent review than an inmate under restraint appealing a decision where he or she lost good conduct time.

Therefore, the addition of a statutory and constitutional writ of certiorari would have been prejudicial because amendment would have been futile. Consequently, the trial court did not abuse its discretion denying Mr. Kozol's second amendment.

D. Injunctive Relief

Mr. Kozol argues the trial court erred in determining he failed to allege a sufficient basis to request injunctive relief. Opening Brief, at 40-42. Mr. Kozol's First Amended Complaint requested a permanent injunction preventing the Department from using his serious infraction "in

any manner detrimental or adverse to Mr. Kozol." CP 35. However, this request for injunctive relief is not proper under the UDJA because it is overly broad and inconsistent with the Department's duty to preserve internal order and discipline. *See Foss*, 82 Wn. App. at 358.

An injunction is an extraordinary equitable remedy designed to prevent serious harm; its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury. *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000). Additionally, injunctive relief will not be granted where there is plain, complete, speedy, and adequate remedy at law. *Tyler Pipe Industries, Inc. v. Dept. of Revenue,* 96 Wn.2d 785, 638 P.2d 1213 (1982). Therefore, a party seeking injunctive relief must establish: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to that party. *Dependency of Q.L.M. v. Department of Social and Health Services*, 105 Wn. App. 532, 20 P.3d 465 (2001).

Here, Mr. Kozol's First Amended Complaint failed to allege facts establishing any elements for injunctive relief. *See* CP 30-36. Mr. Kozol only asserts a conclusory claim that he will suffer immediate damage if his request for declaratory relief is not granted. CP 34. This vague and conclusory statement does not establish a clear right to request an

injunction or that the Department's actions would result in actual and substantial injury to him. Furthermore, it does not establish a well-grounded fear for an immediate invasion resulting in actual or substantial injury. Therefore, the trial court properly dismissed Mr. Kozol's claim for injunctive relief because it was not available to him based on his alleged facts and dismissal of his UDJA claims.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the trial court's order be affirmed.

Respectfully submitted this 18th day of August, 2014.

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CERTIFICATE OF SERVICE

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EXECUTED this 18th day of August, 2014 at Olympia, WA.

s/ Katrina Toal
KATRINA TOAL
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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