No. 92497-0

SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM E. WALL, ESTATE OF JAMES H. JACK by and through its Personal Representatives, SHARON A. JACK and LINDA R. LEIBICH,

Appellants,

v.

THE STATE OF WASHINGTON acting by and through the WASHINGTON STATE LEGISLATURE and JAMES McINTYRE, Treasurer of the State of Washington; BRIAN SONTAG, Auditor of the State of Washington; and BRAD FLAHERTY, Director of the Dept. of Revenue, State of Washington,

Respondents.

PETITIONER'S REPLY TO STATE OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The State of Washington raises new issues in its Answer to Petition for Review. In order to avoid the merits of the constitutional challenges raised by Petitioner Estate, the State resurrects affirmative defenses denied by the trial court and the Court of Appeals.

Specifically, the State asks this Court to review its affirmative defenses of statute of limitations, mootness and standing, claiming these arguments were "raised" at each stage of the litigation "and their review would avoid the necessity of addressing the constitutional issues raised by the Estate." (Answer to Petition for Review at p. 2.)

The Court of Appeals did not address the State's affirmative defenses because the State did not cross-appeal the trial court's order denying in part the State's motion for summary judgment on these issues. (Slip Op. at p. 4, fn. 6.)

The preclusive affirmative defenses are inapplicable. The trial court correctly rejected these defenses declining to dismiss the case on the basis of statute of limitations, standing, mootness or separation of powers.

Review should be granted to address the merits of the Estate's constitutional challenges.

II. ARGUMENT IN REPLY

A. ***The State Failed to Timely Seek Cross Review of the Trial Court's Rejection of Affirmative Defenses.*** The State failed to file the necessary notice seeking cross review required by RAP 5.1(d) but persists in urging this Court to consider its affirmative defenses rejected by the trial court and the Court of Appeals.

The State seeks affirmative relief pursuant to RAP 2.4(a) in asking this Court to modify the decision of the trial court which rejected these affirmative defenses. The effort to bar Petitioner Estate's constitutional challenges through affirmative defenses was not properly before the Court of Appeals, nor is it properly before this Court. See *Robinson v. Kahn*, 89 Wn.App. 418, 948 P.3d 1347 (1998).

The trial court Order on Cross Motions for Summary Judgment (CP 150-154) states as follows:

> 1. This case is not barred by the statute of limitations. Either a 3-year statute of limitations or the "reasonable" limitation time frame of the Uniform Declaratory Judgments Act, RCW Ch. 7.24, applies, Defendants' Motion for Dismissal on this basis is denied.
>
> 2. Plaintiff Estate of James H. Jack has standing to bring this action. Plaintiff William E. Wall has no standing as a general taxpayer. Defendants' Motion for Dismissal on the

> basis of standing is therefore granted in part and dismissed in part.
>
> . . .
>
> 4. This case is not moot on the theory that the money has already been spent or that the General Fund spends substantial funds for education or any other basis alleged by defendants. Defendants' Motion for Dismissal for mootness is denied.
>
> 5. The order sought by plaintiffs requiring reimbursement to the Education Legacy Trust Account would not violate the separation of powers doctrine. Defendants' Motion for Dismissal on this basis is denied.

The State now repeats the same arguments in support of its affirmative defenses. The State claims no cross-appeal filing was necessary because it "won complete relief at the trial court" and "had nothing to appeal." (Answer to Petition for Review at p. 9.)

The State overlooks the trial court's specific rulings rejecting the affirmative defenses. The trial court denied the State's motion for summary judgment of dismissal on the basis of these affirmative defenses. The trial court then addressed the constitutional challenges raised by Petitioner Estate which rulings necessitated the appeal and the request for review by this court.

The State seeks to sidestep the requirement of cross-appeal by claiming that it had nothing to appeal and this court may affirm on any grounds supported by the briefs and the record citing *Huff v. Wyman,* 2015

Wash. LEXIS 1325 (Wash. Nov. 12, 2015). That case did not involve the failure of a party to timely seek review.

In *LaMon v. Butler*, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989), cited in *Huff,* this court ruled that an appellate court can sustain a trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. The distinction now before this court is that the trial court *did* consider the State's affirmative defenses, ruled against the State, and no appeal was taken from the trial court's denial of relief to the State.

For this reason the Court of Appeals properly denied consideration of issues not raised on appeal. In any event, the trial court correctly ruled that the Petitioner Estate's constitutional challenges were not barred by the statute of limitations, mootness and standing.

B. ***The Two-Year Statute of Limitations Period in RCW 4.16.130 is Inapplicable.*** This case is governed by the three-year statute of limitations found at RCW 4.16.080(2). This lawsuit was commenced within three years following the transfer of funds at issue. (Answer to Petition for Review at p. 9.) The State erroneously claims the case is governed by the two-year statute of limitations at RCW 4.16.130.

RCW 4.16.080(2) provides that "an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated . . ." shall be commenced within three years.

When faced with the question of diversion of funds by government belonging to a "special fund," courts routinely apply a three year statute of limitations as the limit on when these claims may be brought by a plaintiff. *Quaker City National Bank of Philadelphia v. Tacoma*, 27 Wash. 259, 67 Pac. 710 (1902) cited by *Amende v. Bremerton*, 36 Wn.2d 333, 340, 217 P.2d 1049, 1052 (1950). See also *Trimen Dev. Co. v. King County*, 124 Wash.2d 261, 276, 877 P.2d 187 (1994) (claim for reimbursement of illegal tax).

When there "is uncertainty as to which statute of limitations governs, the longer statute will be applied." *Stenberg v. Pacific Power and Light*, 104 Wn.2d 710, 715, 709 P.2d 793 (1985), citing *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 51, 455 P.2d 359 (1969).

RCW 4.16.080(2) applies to any injury to the person or rights of another "not enumerated in other limitation sections." See *Bader v. State*, 43 Wn.App. 223, 227, 716 P.2d 925 (1986).

Petitioner Estate seeks declaratory relief alleging a diversion of funds from the Education Legacy Trust account contrary to the Washington State Constitution. The Washington Uniform Declaratory Judgments Act (UDJA), RCW Ch. 7.24, does not have an explicit statute of limitations, but lawsuits under the UDJA must be brought within a reasonable time. When discussing a constitutional violation, challenges to unconstitutional legislation have never been subject to a limitations period under the UDJA. *Auto. United Trades Org. v. State,* 175 Wn. 2d 537, 542, 286 P. 3d 377(2012) relying on *DeYoung v. Providence Med. Ctr.,* 136 Wn.2d 136, 960 P.2d 919 (1998) (holding the statute of repose in medical malpractice claims to be unconstitutional 20 years after the legislation was enacted); *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 117, 118 P.3d 322 (2005) (holding racially restrictive covenants unenforceable and in violation of the United States Constitution even though suit was brought over 60 years after the covenants attached to the property.

In the present action, appellants allege an unconstitutional misappropriation of funds and seek return of those funds to the Education Legacy Trust Account. The action must be brought within a reasonable time.

At a minimum, the three-year statute of limitations of RCW4.16.080(2) must apply.

Acknowledging that the UDJA only requires that an action be brought within a reasonable time, the State asserts that a two-year limitation period is reasonable, citing *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn.App. 154, 159, 293 P.3d 407 (2013). But equally reasonable is a 3-year statute of limitations. In *Schreiner*, the court barred a declaratory judgment action challenging a written lease brought more than six years after alleged breach. The court acknowledged that the UDJA is to be liberally construed and administered, but concluded the claim was analogous to a general contract claim which should have been brought within six years.

Both RCW 4.16.080(2) and the UDJA support Petitioner Estate's position that this action was timely commenced.

C. This Lawsuit is not Moot and Meaningful Relief is Requested. A case is moot if "the issues it presents are purely academic." *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983), *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). However, a case is not moot if a court can still provide "effective relief." *Turner*, 98 Wn.2d at 733.

The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief. The available remedy need not be fully satisfactory to avoid mootness. *City of Sequim v. Malkasian,* 157 Wn. 2d 251, 259, 138 P. 3d 943 (2006).

The State asserts that Petitioner Estate's claims are moot because it is "too late to provide any relief" and the money that the Legislature wrongfully transferred from the Education Legacy Trust Account to the General fund in violation of the Constitution "was spent long ago." (Answer to Petition for Review at p. 11.)

This unserious argument would absolve government from any claim for misuse of funds by simply alleging the money had been spent. The issue before this court is whether or not the admitted diversion of funds from the Education Legacy Trust Account to the State General Fund violated Article VII, Section 5 and Article II, Section 19 of the Washington Constitution. The Constitutional issues are hardly moot and the relief requested is restoration of funds from the General Fund to the Education Legacy Trust Account.

This requested remedy is not "illusory" as contended by the State. An order from this court directing return of the wrongfully diverted funds is not an "advisory opinion" as suggested by the State. (Answer to Petition for Review at p. 12.)

Orwick v. Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984) is cited by the State for the proposition that a case is moot if a court can no longer provide effective relief. Effective relief is certainly possible in the present action. This court in *Orwick* at p. 253 noted that an exception is made even for moot cases involving "matters of continuing and substantial public interest." Citing *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

D. Appellant Taxpayers have Standing to Bring a Constitutional Challenge to the Diversion of Funds. This is a declaratory judgment proceeding in which acts of the Legislature are challenged as being unconstitutional. The UDJA specifies who may institute such proceedings. RCW 7.24.020 provides in part:

> A person interested . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance. . . may have determined any question of construction or validity arising under the . . . statute, ordinance, . . . and obtain a declaration of rights, status or other legal relations thereunder.

Taxpayers are freely granted standing to bring an action challenging government misconduct. See *Miller v. Pasco*, 50 Wn.2d 229, 310 P.2d 863 (1957); *State, ex rel Lamon v. Langlie*, 45 Wn.2d 82, 273 P.2d 464 (1954).

Giving taxpayers standing recognizes the interest of providing a judicial forum where this State's citizens can challenge the legality of official acts of government. Prohibiting this right is tantamount to saying there can be no effective check on what the Legislature can do. The Constitution is not a self-executing remedy to the prospects going beyond its proper limits. The prohibitions of the Constitution must be invoked by litigation.

This Court has acknowledged that the value of taxpayer suits generally outweighs any infringement on governmental processes. See *Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985).

The *Boyles* court stated at p. 614:

> This court recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer. See e.g., *Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967), *cert. Denied*, 393 U.S. 960 (1968); *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965). Generally, we have required that a taxpayer first request action by the Attorney General and refusal of that request before action is begun by the taxpayer. See *Tacoma v. O'Brien, supra;*

> *Citizens Coun. Against Crime v. Bjork*, 84 Wn.2d 891, 893, 529 P.2d 1072) (1975). We have recognized however, that even that requirement may be waived when 'such a request would have been useless.' *Farris v. Munro,* 99 Wn.2d 326, 329-30, 662 P.2d 821 (1983).

It is undisputed that Petitioner Estate did in fact request action from the Attorney General and was refused. (Complaint, §§ 5.1-5.3; CP 17-18.)

The State alleges Petitioner Estate does not claim any direct damage or injury in fact resulting from the challenged transfer. Yet taxpayer standing alone gives Petitioner Estate sufficient interest in the subject matter to sue.[1] In *Kightlinger, et al. v. Public Utility Dist. No. 1 of Clark County*, 119 Wn.App. 501, 81 P.2d 876 (2003), taxpayers sought declaratory relief to enjoin the PUD from engaging in the business of repairing electrical appliances. The court rejected the very argument made by respondent in the present action. The PUD, citing *American Legion Post No. 32 v. City of*

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[1] The trial court in the present action hesitatingly ruled that appellant Wall, as a general taxpayer, did not have standing. The court stated that Mr. Wall's standing as a general taxpayer separated him from the standing enjoyed by other taxpayers who have put forward evidence that they have paid the estate tax. The court stated, "I'm not entirely sure that drawing the line along those lines is consistent, necessarily, with *Boyles*, but I find that the heightened connection . . . nexus. . . between those who have paid the Estate Tax is a line I'm going to draw on standing. So, I will find that standing is appropriate for the estate . . . " (RP 31.) Pursuant to the authorities cited herein, Mr. Wall certainly has taxpayer standing. He is not required to demonstrate a unique injury. Every taxpayer has an interest in policing unconstitutional conduct of the State Legislature.

Walla Walla, 116 Wn.2d 1, 802 P.2d 784 (1991) urged that taxpayer status was insufficient to confer standing without showing the violation of a unique right or interest. The *Kightlinger* court disagreed at p. 506, stating:

> A taxpayer must show special injury where he or she challenges an agency's *lawful discretionary* act. *American Legion*, 116 Wn.2d at 7-8. Where a municipal corporation acts illegally, 'it is a fair presumption that every taxpayer will be injured in some degree by such illegal act.' *Barnett v. Lincoln*, 162 Wash. 613, 623, 299 Pac. 392 (1931). Here the Taxpayers do not challenge a lawful discretionary act. Rather, they argue that the PUD lacks lawful authority to operate an appliance repair business. Thus, the Taxpayers are not required to demonstrate a unique injury. *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985).

The State cites this court's recent opinion in *Huff v. Wyman,* 2015 Wash. LEXIS 1325 (Wash. Nov. 12, 2015) for the proposition that this court may affirm on any grounds supported by the briefs and the record. Curiously, the State ignores that portion of the *Huff* opinion discussing taxpayer standing applicable to the present action:

> Here, appellants allege taxpayer status, challenge the constitutionality of a government act, and had their request that the attorney general take action denied. CP at 21-24. The appellants do not challenge a discretionary decision. Rather, they challenge the exercise of constitutional authority that they contend is beyond what the constitution allows–namely, placing an initiative on the ballot that exceeds the scope of the people's article II power and violates article XXIII of the state constitution. Granting standing on this

> narrow issue will not lead to harassment of public officials; it is consistent with the recognized role that taxpayer suits play in determining whether a government official acts lawfully. We conclude, therefore, that appellants have taxpayer standing to maintain their claim. *Huff*, Slip Op. at p. 6.

III. CONCLUSION

This case addresses significant constitutional issues involving the legislature's power to change the object of the estate tax from its stated purpose, educational funding, through budget and appropriations legislation. The ruling of the trial court and the novel interpretation of constitutional law pronounced by the Court of Appeals compel review by this court. The State's effort to avoid review of the constitutional issues raised by petitioner estate through meritless affirmative defenses should be rejected. Petitioner estate respectfully requests review of these important constitutional issues.

Respectfully submitted this 16th day of December, 2015.

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Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I sent by U.S. Mail, first class, postage prepaid and also electronic mail, a true copy of this document to:

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Dated this 16th day of December, 2015.

/s/ Mary Berghammer
Mary Berghammer

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Re: *Wall, et al. v. State of Washington, Cause No. 02497-0.*

Clerk: Attached for filing in your court please find Petitioner's Reply to State of Washington's Answer to Petition for Review in Cause No. 92497-0.

Thank you.

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