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64415-7

64415-7

NO. 64415-7

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NORTHWEST ANIMAL RIGHTS NETWORK, et al.,
Appellants,

v.

STATE OF WASHINGTON and KING COUNTY,
Respondents.

RESPONSE BRIEF

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FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 FEB 8 PM 1:31

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I. INTRODUCTION

Respondents State of Washington and King County request that the Court affirm the trial court's dismissal of this case. Appellants Northwest Animal Rights Network and Rachel Bjork (collectively NARN) claimed that various provisions of the Prevention of Cruelty to Animals Act, chapter 16.52 RCW (the Act) and county ordinances violate the state and federal constitutions "in several respects." CP at 6. NARN's complaint appears to be a facial challenge to the constitutionality of the Act and ordinances leaves Respondents without any indication of the reasons why the provisions are unconstitutional or circumstances that compelled NARN to bring the suit. NARN alleged two causes of action; first, a claim for a declaratory judgment and injunctive relief under chapter 7.24 RCW, the Uniform Declaratory Judgments Act, and second, a claim for the same relief as a "taxpayer derivative action." CP at 6, 8. In its Amended Complaint, NARN failed to allege how the challenged provisions of law and ordinance violate the state or federal constitutions, failed to allege any factual circumstances in which the challenged provisions were applied in an unconstitutional manner and failed to identify any injury suffered.

When it is impossible to tell from the face of the complaint what harm the litigant has suffered or what basis the litigant has for challenging

a statute, a court is justified in granting a motion to dismiss on the pleadings. NARN styled its claims as a facial challenge to the constitutionality of the challenged laws. However, the Amended Complaint raises only an abstract question and NARN has demonstrated neither a personal stake nor a substantial public interest justifying the Court's intervention. What appear actually to be NARN's political or policy issues that would be more properly addressed through the legislative process, where the merits of NARN's positions would be subject to public hearings and debate. Finally, the trial court properly refused to grant NARN's motion to amend the complaint for a yet second time, as the proposed amendments would not have cured the legal deficiencies of the Amended Complaint. For these reasons, this Court should affirm the trial court's dismissal.

II. STATEMENT OF THE ISSUES

1. Did the trial court correctly conclude that NARN failed to establish taxpayer derivative standing by failing to challenge an illegal act of a public official?
2. Did the trial court correctly conclude that NARN failed to establish standing under the Uniform Declaratory Judgments Act by failing to show either a right affected by or a special injury that was causally connected to the challenged provisions of law?
3. Did the trial court correctly conclude that NARN failed to allege a justiciable controversy?

4. Did the trial court properly grant Respondents' CR 12(c) motion and dismiss NARN's claims for lack of subject matter jurisdiction?
5. Did the trial court properly deny NARN's motion to amend the Amended Complaint a second time, because the proposed amendment would not have cured the legal deficiencies of the Amended Complaint?

III. STATEMENT OF THE CASE

A. Procedural History

In December of 2008, NARN petitioned the Attorney General to bring an action to "remedy the several patently unconstitutional exemptions" in the Act. CP at 33. The Attorney General's Office declined to institute an action. CP at 45. In February of 2009, NARN filed a lawsuit which consisted of two claims: an action for declaratory judgment and injunctive relief under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (UDJA), and a "taxpayer derivative action" requesting the same relief. CP at 6-8. Neither the petition to the Attorney General nor the Amended Complaint identified the factual basis for the two claims. NARN served the Respondents with the Amended Complaint¹ and Respondents timely filed Answers to the Amended Complaint. CP at 11-16 and CP at 18-22.

NARN then filed three motions seeking to strike the Respondents' affirmative defenses of lack of standing, lack of a justiciable controversy, lack of a ripe claim and lack of subject matter jurisdiction. CP at 23-76.

¹ The original complaint filed by NARN was never served upon Respondents. NARN amended the complaint as a matter of right under CR 15(a) and served the Amended Complaint upon the Respondents.

Respondents filed a cross-motion for judgment on the pleadings under CR 12(c). CP at 165-189. Before oral argument on the motions, NARN moved to amend the complaint for a second time. CP at 110-132. The trial court issued an Order on June 25, 2009, denying NARN's motions to strike the affirmative defenses, denying the motion to amend the complaint, and granting Respondents' motion for judgment on the pleadings. CP at 143-145. The trial court ruled that NARN failed to establish standing and failed to allege a justiciable controversy. After its motion for reconsideration was denied, NARN timely appealed.² CP at 158-164.

B. The Prevention Of Cruelty To Animals Act And King County Ordinances

NARN challenged the Prevention of Cruelty to Animals Act, chapter 16.52 RCW, which sets forth and criminalizes conduct constituting cruelty to animals. Like all Washington legislation, it reflects the policy choices made by the citizen members of the Washington State Legislature. Specifically, the Act lists the types of prohibited conduct toward animals that is criminalized and the remedies imposed to address and prevent future such conduct.

The Act also prohibits statutorily-defined neglect and abuse of animals and authorizes law enforcement and animal control officers to

² NARN does not assign error on the issue of ripeness, asserting that the trial court found its claims to be ripe. *See* Appellants Op. Brief at 2, fn 1. This assertion is contradictory to the record as the trial court denied NARN's motion to strike Respondents' affirmative defense of ripeness. CP at 143-144.

remove animals from such conditions. Further, the Act recognizes the right of a law enforcement officer or licensed veterinarian to destroy seriously injured animals that would otherwise continue to suffer, and the statute immunizes such officials from civil and criminal liability for actions taken in furtherance of these duties as long they exercise as reasonable prudence. *See* RCW 16.52.210.

The Act clarifies conduct that does not constitute animal cruelty and excludes such conduct from criminal penalties. For example, the Act provides that “[N]othing in this section may be considered to prohibit accepted animal husbandry practices or accepted veterinary medical practices by a licensed veterinarian or certified veterinary technician.” RCW 16.52.205(6). The Act’s application also is limited to avoid interference with “game laws” or the ability to “destroy any venomous reptile or any known as dangerous to life, limb or property.” RCW 16.52.180. Additionally, the Act is not intended to interfere with the right to kill animals for food or with the ability to use animals in any properly-conducted scientific experiments or investigations performed at the state’s universities or at a research facility regulated by the United States Department of Agriculture. *See* RCW 16.52.180.

NARN also challenged unspecified provisions of the King County Code. King County Code Chapter 11 (the Code) designates an animal care and control section to provide animal care services and to enforce animal control laws. King County Code (KCC) 11.02.010. Additionally, the Code provides for filing of criminal charges and imposition of civil

penalties against anyone who “allows an animal to be maintained in violation of this chapter,” KCC 11.04.190 and .200, and forbids certain people charged with or convicted of animal cruelty from owning, harboring, keeping or maintaining an animal. KCC 11.04.225. King County Code Chapter 21A.30 regulates livestock with a primary purpose “to support the raising and keeping of livestock in the county in a manner that minimizes the adverse impacts of livestock on the environment.” KCC 21A.30.030.

IV. SUMMARY OF ARGUMENT

NARN sought to invalidate on unidentified constitutional grounds the Legislature’s policy choices reflected in the Prevention of Cruelty to Animals Act. In its Amended Complaint, however, NARN failed to allege *any facts* connected to the provisions or enforcement of the Act. As such, its lawsuit fails.

NARN failed to specifically allege how and in what context the challenged provisions of the Act violate the state or federal constitution. Other than baldly asserting in Paragraph 8 of its Amended Complaint that the challenged provisions of the Act violate Article 1, Section X, and the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 12 and 23, of the Washington State Constitution, NARN failed to specify *how or why* this is so. The only guidance it

provided for the alleged violations is the bare statement that the challenged provisions of the Act violate the state and federal constitutions “in several respects, some if not all of which are referenced in Paragraph 8 above.” CP at 6-8. Paragraph 8, however, provides no further guidance so the allegations are unsupported.

In order to avoid dismissal, NARN’s request for a declaratory judgment and injunctive relief under the Uniform Declaratory Judgment Act (UDJA) and “taxpayer derivative action” must be evaluated separately and NARN must meet the independent and specific elements required for each claim. Contrary to its argument, NARN may not rely on the relaxed standing requirements applicable to a taxpayer derivative suit to meet the separate standing requirements of a UDJA claim.

NARN did not establish standing under the UDJA because it failed to show either a right affected or a special injury causally connected to the challenged provisions of the Act. NARN also failed to list any specific government action at issue other than vaguely to allege that Respondents “enforce, police, implement, and impose, or are charged with the ability to enforce, police, implement, and impose penalties based on violations of chapter 16.52 RCW.” CP at 2. It failed to allege with *any* particularity which “rights” or whose rights have been violated, or in what manner, or when or by whom. In addition, NARN failed to specify what *its* status is

or what legal relationship it has to the Act. Other than the payment of taxes, NARN alleged no injury to itself or to any others.

NARN additionally failed to establish standing to bring a taxpayer derivative suit, because it failed to challenge any illegal act of any public official or governmental body. NARN brought “this suit as a taxpayer derivative action” and alleged that (1) it is a taxpayer and paid the type of taxes that finance King County and the State of Washington, (2) it petitioned the Washington State Attorney General’s Office to take steps to remedy its claim that the challenged provisions of the Act were unconstitutional, and (3) the Attorney General’s Office declined its petition. CP at 2-3, 8. NARN is mistaken in asserting that this is all it needed to allege in order to have standing for a taxpayer derivative suit. Washington law requires that NARN challenge a *particular* allegedly illegal act of government if it wished to establish standing to bring a taxpayer derivative suit.

Further, neither claim raised in NARN’s suit presents the court with a justiciable controversy, because NARN alleged only a theoretical and abstract dispute, not an actual, present, or existing one. NARN argues, without authority or support, that because it is making a facial challenge to the constitutionality of certain sections of chapter 16.52 RCW, it need not establish standing or present a justiciable controversy.

In doing so, NARN undermines its position and concedes that it is not challenging a specific illegal government action and has not suffered an injury in fact. Failure to establish standing and lack of a justiciable controversy provide two independent grounds to affirm the trial court's dismissal of the complaint. Furthermore, NARN's proposed amendments to the Amended Complaint neither remedied nor even addressed these deficiencies. Therefore, the trial court properly dismissed the case.

V. ARGUMENT

A. Standard Of Review

This Court reviews a trial court's dismissal of a claim under CR 12(c) *de novo*. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery. *Burton*, 153 Wn.2d at 422. In making this determination, a trial court must presume that the plaintiff's allegations are true. *Id.* In addition, whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are also reviewed *de novo*. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

The decision to grant or deny leave to amend a complaint is within the discretion of the trial court. *Cambridge Townhomes, LLC v. Pacific*

Star Roofing, Inc., 166 Wn.2d 475, 483-84, 209 P.3d 863 (2009), (citing *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)). The appellant court should not disturb the trial court's ruling on such a motion unless it is manifestly unreasonable or was exercised on untenable grounds or for untenable reasons. *Cambridge Townhomes*, 166 Wn.2d at 484 (citation omitted). Importantly, "[d]enying a motion for leave to amend is not an abuse of discretion if the proposed amendment is futile." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008), (citing *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12, *review denied*, 120 Wn.2d 1014, 844 P.2d 435 (1992)).

B. The Trial Court Correctly Concluded That NARN Failed To Establish Taxpayer Derivative Standing Because It Failed To Challenge An Illegal Act Of Government

NARN correctly identified that there are two types of taxpayer suits but misstated the distinction between a "taxpayer suit" and a "taxpayer derivative suit." Appellants Op. Brief at 20. First, a taxpayer may bring a "taxpayer derivative suit" to challenge illegal or unauthorized acts of public officials or governmental bodies on behalf of himself or herself and as a representative of a class of similarly-situated taxpayers. *Washington Public Trust Advocates v. City of Spokane*, 117 Wn. App. 178, 181, 69 P.3d 351 (2003). This is the type of suit NARN alleged in the Amended Complaint. CP at 8.

Alternatively, an individual taxpayer may challenge the discretionary decision of a government authority when he or she has a unique right that is being violated in a manner special and different from the rights of other taxpayers. *See American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991); *Petition by City of Bellingham*, 52 Wn.2d 497, 499, 326 P.2d 741 (1958). This brief does not address this second type of taxpayer suit because NARN stated in its Amended Complaint that it is not bringing this type of taxpayer suit and, further, does not challenge any discretionary governmental decisions. CP at 28-29, Appellants Op. Brief at 8. However, if NARN asserts now that it intended its suit to challenge a discretionary governmental action, NARN still failed to allege that it has a unique right that is being violated. If NARN wished to add a cause of action to bring this type of a taxpayer suit in its motion to amend, it failed to identify this new cause of action in the proposed amendments and failed to allege a unique right that is being violated in a manner different from other taxpayers. As such, any potential claim of this type fails.

1. Taxpayers Must Challenge An Illegal Or Unauthorized Government Act In Order To Have Standing To Bring A Taxpayer Derivative Suit

NARN's taxpayer derivative suit failed because it did not challenge an illegal or unauthorized act of a public official or governmental body. Washington courts recognize taxpayer derivative suits as a mechanism to challenge the actions of a public official "for the

purpose of seeking relief from illegal or unauthorized action of public bodies or public officials.” 74 Am. Jur. 2d. *Taxpayers’ Actions* §§ 1, 5 (2001). “A taxpayer’s derivative lawsuit is an action brought by a taxpayer on behalf of himself or herself and as a representative of a class of similarly situated taxpayers to seek relief from illegal or unauthorized acts of public officials.” *Wash. Public Trust*, 117 Wn. App. at 181 (emphasis added). “This court recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer.” *State ex rel. Boyles v. Whatcom Cy. Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (emphasis added); *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 804, 10 P.3d 452 (2000).

When a taxpayer alleges an illegal or unauthorized act by a public official, Washington courts generally have not required a showing of a direct, special or pecuniary interest in the action. “The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state’s citizens contest the legality of official acts of their government.” *State ex rel. Boyles*, 103 Wn.2d at 614 (emphasis added). In every taxpayer derivative case cited in NARN’s briefing, the taxpayers alleged that a specific act or program of government was illegal. Such cases support Respondents’ position, because NARN failed to identify any specific act in its Amended Complaint. Appellants Op. Brief at 22-23.

A review of the case law confirms that all taxpayer derivative suits involve allegations that specific government acts were illegal. For

example, taxpayers challenged the City of Seattle's pre-employment urinalysis drug testing program in *Robinson*, 102 Wn. App. at 806; a PUD's appliance repair business in *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 508, 81 P.3d 876 (2003); Walla Walla's collection of gambling taxes in *American Legion Post No. 32*, 116 Wn.2d at 7; a proposed land transfer by the City of Bellingham in *Petition by City of Bellingham*, 52 Wn.2d at 499; a single work release program that required religious activities in *State ex rel. Boyles*, 103 Wn.2d at 614; a "Bible as Literature" class offered by the University of Washington in *Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of the Univ. of Wash.*, 72 Wn.2d 912, 436 P.2d 189 (1968); and, payment of funds under the provisions of various public works contracts providing for hardship payments in *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975). Finally, in *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994), the Washington Supreme Court declined to find taxpayer standing to challenge an initiative of the voters absent allegations of harm and ultimately dismissed the case for lack of justiciability.

2. NARN's Failed To Challenge An Illegal Or Unauthorized Act Of A Public Official

NARN incorrectly asserted that the only requirement for taxpayer standing is for (a) the taxpayer to ask the Attorney General to file suit and (b) the Attorney General decline to do so. Appellants Op. Brief at 4. This argument is in error. A taxpayer cannot establish standing by simply asserting that he or she disagrees with the governmental decision. *Petition*

by *City of Bellingham*, 52 Wn.2d at 499. As shown above, Washington courts have clearly held that a taxpayer derivative suit is reserved solely for challenges to public officials' illegal acts.

Interestingly, NARN's hypothetical scenarios involve an illegal contract for performance of a criminal act or a blatantly unconstitutional law violating minority civil rights. Appellants Op. Brief at 21. Those circumstances do describe actual illegal acts of a public official or circumstances where a person or class of persons have "rights, status or other legal relations [that] are affected by a statute" under RCW 7.24.020. While NARN's hypothetical scenarios present circumstances where the parties would have standing to bring suit, neither NARN's Amended Complaint nor the proposed amendments do so.

Simply put, NARN failed to challenge an illegal or unauthorized act, and hence it did not properly bring a taxpayer derivative suit. It is not sufficient for NARN merely to allege that the existence of a law is "tantamount to" or "proof enough of" government action. *See* Appellants Op. Brief at 20, 22. In fact, NARN unequivocally admitted that the only claim it raised was a facial challenge to the constitutionality of chapter 16.52 RCW. *See* Appellants Op. Brief at 8. The mere passage of a law itself cannot be the "illegal act" challenged in a taxpayer derivative suit.

Respondents do not assert that unconstitutional laws cannot or should not be challenged. Rather, a taxpayer derivative suit is not the proper mechanism for such a challenge. NARN challenged the *content*, not the results, of the Act and the county ordinances implementing the

Act. The proper mechanism to facially challenge the content of a statute is to request a declaratory judgment under the UDJA, not through a taxpayer derivative suit.

The fact that NARN's case is not a properly pled taxpayer derivative suit is all the more clear when this Court examines the relief sought by NARN. In a taxpayer derivative suit, the proper remedy is an order of the court demanding that the illegal action by the public official cease. *See* Appellants Op. Brief at 29. NARN did not request (nor would this Court grant) a writ demanding that the State Legislature cease passage of unconstitutional laws or an injunction ordering the Governor to cease signing unconstitutional bills into law. Significantly, NARN sought a declaratory judgment, a remedy available under the UDJA provided that NARN is able to establish standing under that statute.

NARN conceded that their failure to allege an illegal government act is fatal to its case: "if the taxpayer cannot demonstrate illegal governmental activity, then he has no standing to challenge those acts absent direct, special, or pecuniary injury in the first place." *See* Appellants Op. Brief at 37. The Amended Complaint is devoid of any challenge to illegal government action. The taxpayer derivative claim fails and the lower court's decision should be affirmed.

C. The Trial Court Correctly Concluded That NARN Also Did Not Establish Standing Under The Uniform Declaratory Judgments Act

NARN also requested a judgment under the UDJA declaring that the challenged provisions of the Act were unconstitutional. CP at 8. As in its taxpayer derivative claim, NARN did not establish the requisite elements to show that it has standing to make that challenge. The UDJA provides that:

“[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020.

The purpose of a judgment under the UDJA is to settle rights, status, and other legal relations and afford relief from uncertainty and insecurity with respect to them. RCW 7.24.120. Courts have jurisdiction under UDJA to construe or assess the validity of statutes only when parties establish standing and the existence of a justiciable controversy. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

1. The UDJA Requires That Plaintiffs Establish Standing To Challenge The Constitutionality Of A Statute

Washington courts apply the doctrine of standing “to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution.” *To-Ro Trade Shows*, 144 Wn.2d at 411; *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986); appeal dismissed, 479 U.S. 1073 (1987).

Under the UDJA, one may not challenge the constitutionality of a statute unless it appears that he or she will be directly damaged in person or in property by its enforcement. *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (citation omitted). Said another way, a plaintiff must demonstrate that the statute has operated to that party's prejudice. *High Tide Seafoods*, 106 Wn.2d at 701-02. The factual allegations of a pleading “must be enough to raise a right to relief above the speculative level” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). To be considered plausible, a claim must be more than merely conceivable. *Id.* Facts establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court to grant it. *Mitchell v. Doe*, 41 Wn. App. 846, 848, 706 P.2d 1100 (1985). These threshold requirements under the UDJA ensure that the court will not be rendering advisory opinions or pronouncements on abstract or speculative questions. *Walker*, 124 Wn.2d at 418. “The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity.” *Id.* at 419.

NARN argued, without any supporting authority, that a taxpayer may bring suit under the UDJA without meeting the standing requirements articulated either in the case law or RCW 7.24.020. Standing to bring a taxpayer derivative suit does not substitute for standing to bring an action under the UDJA. When plaintiffs challenge the constitutionality of government action but are not the object of the government action challenged, standing is not precluded, but ordinarily it

is substantially more difficult to establish. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). As the Washington Supreme Court said in citing to *Lujan*:

In order to challenge the constitutionality of government action, the defendant must establish standing as follows: First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.

State v. Cook, 125 Wn. App. 709, 720-21, 106 P.3d 251 (2005), (citing *Lujan*, 504 U.S. at 560).

Rather than “abrogate” case law, as argued by NARN, *see* Appellants Op. Brief at 29, Respondents urge this court to follow its own precedent and require NARN to establish that it has standing under the UDJA. NARN only cited to a single 1958 case that no other court has followed, *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 329 P.2d 841 (1958), in support of its erroneous contention that standing is not required to bring a UDJA action. However, that court allowed taxpayer standing recognizing that the taxpayer was challenging a specific act as illegal (the

payment of a mandate by the State Treasurer) whereas NARN challenged no specific illegal act at all.³ *Id.* at 858.

2. NARN Did Not Allege Or Suffer An Injury In Fact

NARN also must allege an injury in fact to establish standing, *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-77, 101 P.3d 67 (2004). In its Amended Complaint, however, NARN failed to specifically allege any injury. Further, any claim of injury which can be gleaned from NARN's briefing is purely hypothetical and speculative. *See, e.g.*, Appellants Op. Brief at 18-19. NARN cannot bootstrap factual or legal allegations in its appellate briefing to remedy the omissions and flaws in its Amended Complaint. The Amended Complaint itself must plead facts sufficient to establish standing, and it does not.

Instead, the Amended Complaint merely lists multiple sections of chapter 16.52 RCW with which NARN disagrees, summarily stating that they are unconstitutional but listing no facts supporting such conclusion. CP at 3-6. NARN also did not allege that it suffered a concrete and particularized injury. It has not alleged any legally-cognizable interest in

³ Other cases from the same period support the requirement to establish standing to bring a declaratory judgment action. *See Miller v. City of Pasco*, 50 Wn.2d 229, 231-232, 310 P.2d 863 (1957) (taxpayer found to have independently met the requirements of RCW 7.24.020 and taxpayer claim also allowed to proceed to challenge the legality of a specific sale of real estate by the City of Pasco); *Heisey v. Port of Tacoma*, 4 Wn.2d 76, 85-86, 102 P.2d 258 (1940) (merely being a taxpayer not sufficient to support declaratory judgment action absent an injury to taxpayer or a real controversy).

the animals purportedly affected by the challenged laws, nor has it alleged any interest of or injury to itself or its members related to those laws. This is because NARN has not suffered any particularized injury. To the extent that NARN argued that its injury is to the rights of its members as citizens, such an injury is not particularized because NARN cannot show that its members rights would be any more affected than those of any other citizen. The Washington Constitution does not guarantee an individual right to protect all animals from the legal actions of the animal's owners.

NARN nevertheless argued that Northwest Animal Rights Network, a corporation, has standing to assert such a right relying on a California case, *Farm Sanctuary, Inc. v. Department of Food and Agriculture*, 63 Cal. App. 4th 495, 502, 74 Cal. Rptr. 2d 75, (Cal. App. 2nd Dist. 1998). *Farm Sanctuary* does not support NARN's position because it involves standing to challenge a California regulation. Standing to challenge a regulation promulgated by a state agency is not at issue in this case and, further, is governed by statute.

3. NARN Also Has Not Alleged Any Injury That Is Causally Connected To The Act Or A County Ordinance

Any particularized injury that NARN may have asserted would not have had the requisite causal connection to the Act or a county ordinance.

The causation element of standing requires a showing that NARN's injury can be fairly traced back to the challenged action. *High Tide Seafoods*, 106 Wn.2d at 702. Because NARN has neither specifically alleged any illegal government action nor shown that it was actually harmed by the existence or enforcement of the challenged laws, NARN failed to establish the requisite causal connection between any injury and the Act.

4. NARN Cannot Show That Its Alleged Injury Would Be Redressed By A Favorable Decision Of This Court

NARN must show that its alleged injury likely would be redressed by a favorable decision of the court. *State v. Cook*, 125 Wn. App. at 720-21. Even if it had alleged a particularized injury as a result of the Act, NARN's harm therefore would not be redressed by a favorable decision of this Court. NARN has not alleged any conduct that would be stopped by striking down the challenged provisions of the Act. NARN cited no factual situation where law enforcement failed to prosecute someone's criminal actions. At best, NARN speculated that situations somehow, somewhere must exist where a prosecution under the Act should have occurred but did not. *See Appellants Op. Brief* at 12.

As stated above, NARN did not articulate an injury sufficient to establish standing and cannot credibly assert that a favorable decision of the court will redress any grievance. NARN has no legal right to demand that any particular person be charged or prosecuted for his or her actions related to the treatment of any animal NARN members do not own, and

NARN has not alleged that such persons even exist. Consequently, no right is taken away from NARN when law enforcement agencies exercise their enforcement or prosecutorial discretion under the Act regarding the treatment of an animal. NARN made no allegations related to animals *its members* own and it has no constitutionally protectable interest in the treatment of animals its members do not own.

NARN claimed that it need not meet the redressibility requirement of RCW 7.24.110 to name all interested parties. This confirms that NARN's case is not truly a taxpayer derivative suit aimed at addressing particular illegal acts by public officials. *See* Appellants Op. Brief at 30. RCW 7.24.110 states that "no declaration shall prejudice the rights of persons not parties to the proceeding." If NARN truly were challenging acts of public officials or other persons such as university faculty, fish and wildlife officers, veterinarians, hunters, fishermen, ranchers, farmers, or fair and rodeo participants, NARN would be required to name those officials in order to redress its injury. Because NARN has not pled a challenge to the actions of particular individuals, it must meet the standing requirements applicable for a facial challenge under the UDJA.

D. The Trial Court Correctly Held That NARN Failed To Allege A Justiciable Controversy

It is "virtually a universal rule that, before the jurisdiction of a court may be invoked under the [UDJA], there must be a justiciable controversy." *To-Ro Trade Shows*, 144 Wn.2d at 411; *Washington Beauty*

College, Inc. v. Huse, 195 Wash. 160, 80 P.2d 403 (1938). The rule of justiciability requires that NARN must have a direct, present, substantial, and legally protected interest in the relief sought. *Washington Beauty College*, 195 Wash. at 165. The elements for a justiciable controversy are:

- (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.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973); *see also Washington Beauty College*, 195 Wash. at 164-65.

The four justiciability factors must “coalesce” to ensure that the court will be rendering a final judgment, on an actual dispute, between opposing parties with a genuine stake in the dispute’s resolution. *Diversified*, 82 Wn.2d at 815. If a controversy lacks any of these four elements, it becomes an exercise in academics and is not properly before the courts for a resolution. *Northwest Greyhound Kennel Ass’n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973).

1. NARN Failed To Allege An Actual, Present, And Existing Dispute

NARN vacillated between describing its action as a purely facial challenge to the constitutionality of the Act and depicting the case as a challenge to discrete and specific acts of government. NARN repeatedly

failed in its Amended Complaint, the proposed amendments to the Amended Complaint, and even in the appellate briefing to set forth any facts or circumstances to establish an actual, present, and existing dispute, or even the mature seeds of one, related to the existence or application of the challenged provisions of the Act. NARN's failure to establish this first element of justiciability is fatal.

In an attempt to raise a claim that it has alleged a justiciable controversy, NARN cited *New Jersey SPCA v. New Jersey Department of Agriculture*, 196 N.J. 366, 955 A.2d 886 (2008), a case neither relevant nor persuasive. In that case, the New Jersey Supreme Court upheld most of the agency's rules related to animal cruelty but found that the New Jersey Department of Agriculture failed to follow the direct mandate of the Legislature when promulgating certain regulations.⁴ Importantly, the court declined to rule on what the regulations *ought* to be so as not to interfere with the function of the legislature. *New Jersey SPCA*, 196 N.J. at 371-372. In contrast, NARN has not asserted that any agency failed to

⁴ As with the earlier cited California case, *Farm Sanctuary, Inc.*, 63 Cal.App.4th 495, this New Jersey case is a challenge to an administrative agency's regulations. Standing to challenge a state agency's regulation is controlled by state statute hence these cases do not support NARN's argument for standing under the UDJA. Nor does this case help NARN on the merits of its "non-delegation" claim because chapter 16.52 RCW creates criminal penalties. Factual issues such as whether an agricultural practice is "accepted" are not "delegated" under the Act but rather are decided by a jury after presentation of evidence by the prosecution and defense.

follow a legislative mandate. Therefore, this case does not support its argument that it has raised an actual dispute.

2. NARN Failed To Allege Either Genuine And Opposing Interests Or Interests That Are Direct And Substantial

NARN failed to meet the second and third elements of justiciability. To be entitled to relief under the UDJA, the interests involved in an action must be direct and substantial, rather than potential, theoretical, abstract or academic. *Diversified*, 82 Wn.2d at 815. Further, NARN also must allege that the parties' interests are genuine and opposing. Neither allegation has been made. NARN appeared to challenge a number of county and municipal ordinances from throughout the state but only named the State and one county as defendants, parties who cannot defend all the various ordinances. CP at 5-6. Additionally, nothing in NARN's Amended Complaint indicated how it was directly affected by the continued existence of the challenged provisions of the Act, or if so, how. NARN's interests are merely "potential, theoretical, abstract or academic." *Id.* NARN's failure to identify any actual, concrete harm or injury caused them by the challenged provisions of the Act means that this action fails to present a justiciable issue and hence precludes declaratory action by the court. *Walker*, 124 Wn.2d at 412.

3. Any Decision On The Merits Of NARN's Amended Complaint Would Not Be Final And Conclusive And Hence Would Be An Advisory Opinion

The last element of a justiciable controversy is that a judicial determination on the issue must be final and conclusive. *Diversified*, 82 Wn.2d at 815. NARN did not identify any injury that would be remedied or any illegal act that would be stopped by a favorable decision of a court. Instead, NARN's claims are hypothetical and speculative, and a judicial decision on the merits could not be final and conclusive.

Where the four justiciability factors are not met and the court nevertheless rules on the case, "the court steps into the prohibited area of advisory opinions." *Diversified*, 82 Wn.2d at 815. The courts exercise their discretion and deliver advisory opinions only on rare occasions where the interest of the public in the resolution of an issue is overwhelming and where the issue has been briefed and argued. *To-Ro Trade Shows*, 144 Wn.2d at 416. Neither such fact is proved, or even alleged, by NARN. This Court should decline to issue an advisory opinion in this case, and affirm the refusal of the trial court to do so.

4. NARN Does Not Present An Issue Of Public Importance And Are Asking The Court To Invade The Prerogatives Of The Legislature

As stated above, the interest of the public in the issues raised by NARN is not so "overwhelming" thereby requiring the Court to rewrite the Act because the Legislature failed to write it correctly in the first place.

The question for this Court is not whether the *issue* of animal welfare is important. The question is whether the *claims* in the Amended Complaint are so compelling that the Court should order the case to be heard regardless of whether NARN has standing. Since NARN failed to identify any ongoing practices, illegal acts, or substantial dispute in its complaint, this case does not rise to the level of overwhelming public importance.

Instead, NARN is asking this Court to make the policy choice regarding what practices *should* constitute animal cruelty. For example, if a court ruled in favor of NARN, it could decide to criminalize accepted veterinary practices performed by a licensed veterinarian or accepted animal husbandry practices including killing an animal for food. Hunting and fishing could be criminal acts. Conducting university research involving animals could subject faculty and students to prosecution. The decision to criminalize any such conduct is one that should be made in the legislative arena, not a judicial one. Should the Legislature see fit to do so at some point in the future, the courts would be charged with hearing cases in which disobedience to such laws has been alleged.

Washington courts have decided several cases where this separation of roles was discussed. In *Northwest Greyhound Kennel Ass'n*, the plaintiff requested a declaratory judgment that the Horse Racing Act was unconstitutional. *Northwest Greyhound Kennel Ass'n*, 8 Wn. App at 319. The Court of Appeals correctly declined to decide the primarily political question of what types of gambling should be permitted in the state, an area of legislative discretion. *Id.* Rather than raising

constitutional issues, the Court found that the complaint raised a non-judicial question of legislative policy. *Id.* at 321.

Recently, the Washington Supreme Court also refused to rule on what it deemed to be a political question in *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). Political questions are “political and governmental and embraced within the scope of the powers conferred [upon the legislative branch of government], and therefore not within the reach of judicial power.” *Id.* at 316-317 (citation omitted). In this case, NARN has asked this Court to do exactly what the Supreme Court counseled against in *Brown*: to invade the prerogatives of the Legislature by criminalizing conduct the Legislature has specifically chosen not to criminalize. NARN seeks to expand the scope of the law regarding animal cruelty. That was, and is, a policy judgment squarely within the sphere of the Legislature.

NARN cited *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983), for the proposition that a taxpayer derivative suit can be brought in absence of a challenged illegal or unauthorized act. In that case, the Washington Supreme Court declined to find taxpayer standing but decided, despite that flaw, to hear a facial challenge to the constitutionality of the newly-passed State Lottery Act because of the public importance of the issue. *Id.* at 330. *Farris* presented questions of the constitutionality of the initial implementation of a controversial law, along with a challenge to the constitutionality of state expenditures on a particular program. *Id.* None of those factors is present in NARN’s case which purports to

challenge provisions of a law long in effect, cites to no particular government act or program, and establishes no need for the Court to intervene to provide guidance to public officials. This Court should refuse NARN's invitation to invade the province of the legislative branch.

E. The Trial Court Properly Granted Respondents' CR 12(c) Motion And Dismissed NARN's Claims For Lack Of Subject Matter Jurisdiction

NARN asserted that the trial court erred in determining that it lacked subject matter jurisdiction over claims where NARN lack standing to bring the claim or the claim is not justiciable. The trial court's rulings on standing and justiciability provide two independent grounds for upholding the dismissal below. Contrary to NARN's representations, Respondents are not arguing that superior courts lack jurisdiction to hear challenges to a statute's constitutionality. *See* Appellants Op. Brief at 25. Rather, if the Court agrees that NARN failed to demonstrate the prerequisites of standing or justiciability of any claim, this Court should affirm the grant of Respondents' motion for judgment on the pleadings under CR 12(c) to dismiss the claims for lack of jurisdiction.

A party seeking to challenge the constitutionality of a statute must demonstrate that the statute has operated to that party's prejudice. Absent a personal stake in the challenge, a party lacks standing to bring the suit. Absent a party with standing, courts lack jurisdiction to consider the challenge.

Postema v. Snohomish County, 83 Wn. App. 574, 579, 922 P.2d 176 (1996), (citing *High Tide Seafoods*, 106 Wn.2d at 701-702).

Dismissal under CR 12 is appropriate where it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton*, 153 Wn.2d at 422; *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987). The function of a motion for judgment on the pleadings is to determine whether or not a genuine issue of fact exists, not to decide the ultimate issues of fact. *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 367 P.2d 985 (1962). A party who moves for judgment on the pleadings admits, for the purposes of the motion, the truth of every fact well pleaded. “However, a motion for judgment on the pleadings . . . does not admit mere conclusions nor the pleader’s interpretation of statutes involved nor his construction of the subject matter.” *Pearson v. Vandermay*, 67 Wn.2d 222, 407 P.2d 143 (1965) (citation omitted).

NARN relied solely and ineffectively on assertions in its appellate brief that harm “arguably” results and it may not request that this Court take inappropriate judicial notice of facts not pled. Appellants Op. Brief at 37, 39. In fact, NARN failed to plead *any* facts, let alone facts sufficient to support its claims for relief.

“[D]ismissal is granted . . . ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *Id.*, (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 344 (2d ed. 1990)). This case presented such an insuperable bar to relief because NARN’s lack of standing and its failure to plead a justiciable

controversy deprived the court of subject matter jurisdiction. The trial court's dismissal should be affirmed.

F. The Trial Court Did Not Abuse Its Discretion When It Properly Denied NARN's Motion To Amend Because The Proposed Amendments Would Not Have Cured The Legal Deficiencies Of The Amended Complaint

Requests to amend complaints are entrusted to the discretion of the trial court. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077 (1998). CR 15 permits the amendment of a complaint only by leave of court when a responsive pleading already has been filed, unless the adverse party has consented to the amendment. *MacLean v. First Northwest Industries of America, Inc.*, 96 Wn.2d 338, 345, 635 P.2d 683 (1981). Leave to amend a complaint shall be freely given "when justice so requires." CR 15(a). The Court is not required to grant a motion to amend the complaint when such amendment would prejudice to the non-moving party. *MacLean*, 96 Wn.2d at 345. "The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party," and a trial court's denial of such a motion will not be disturbed on appeal unless the reviewing court finds a manifest abuse of discretion. *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, et al*, 100 Wn.2d 343, 350-351, 670 P.2d 240 (1983).

Courts have recognized the prejudice to non-moving parties inherent in allowing amendment where the moving party's complaint still

would be legally deficient. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). The general principle that amendment is freely allowed does not hold when the suggested amendments lack merit or would be futile to correct the complaint's omissions. *E.g.*, *Doyle v. Planned Parenthood*, 31 Wn. App. 126, 131, 639 P.2d 240 (1982); *Mullen v. North Pacific Bank*, 25 Wn. App. 864, 879, 610 P.2d 949, *review denied*, 94 Wn.2d 1009 (1980).

Here, NARN's proposed amendments fail to state *facts* sufficient to constitute a cause of action, as did its Amended Complaint, and hence its motion to amend yet again was properly denied. A motion to amend was correctly denied in *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 96 P.3d 413 (2004), where the Court held that "the amended complaint is in essence a restatement of the same issues that are raised in the original complaint." *Deschamps*, 123 Wn. App. at 563.

Similarly, in *Orwick*, the court's denial of leave to amend was deemed not to be an abuse of discretion because even if the proposed amendment had been allowed, the defendants still would have been entitled to summary judgment. *Orwick*, 65 Wn. App. at 89. The facts and circumstances alleged, *as a matter of law*, did not state a cause of action for the plaintiff's proposed claim. *Id.* If a theory of liability lacks legal support, the court does not abuse its discretion when it denies leave to amend. *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889-90, 155 P.3d 952 (2007).

NARN moved to amend its Amended Complaint in an attempt to avoid a potential adverse ruling on the pending motions. However, the trial court found that the proposed amendments would not have cured the legal deficiencies in the Amended Complaint. In such circumstances, the trial court has discretion to deny a futile motion to amend. This Court should find that the trial court did not abuse its discretion because granting a futile motion to amend a complaint is prejudicial to the party opposing amendment. NARN's motion to amend its Amended Complaint was properly denied because the amendments as proposed by NARN would be futile and not cure the legal deficiencies of the complaint. Granting such a motion would prejudice Respondents. This Court should find that the trial court did not abuse its discretion and should hold that NARN's request to again amend its Amended Complaint was properly denied.

1. NARN's Proposed Amendments Did Not Identify Any Illegal Government Activity It Purported To Challenge

Taxpayer derivative suits require a challenge of an actual illegal or unauthorized act of a public body or official. Speculative and conclusory statements, interpretations of statutes, and constructions of the subject matter are not facts. *See e.g. Pearson*, 67 Wn.2d 222. NARN moved to amend its Amended Complaint to include a list of generic tasks of government. CP at 127-129. The list included the Legislature's passage of laws, the Governor signing bills into law, and "selective (non)enforcement" of laws by the Attorney General, State Patrol, King County Sheriff, King County Prosecuting Attorney, and all Washington

District and Superior Court Judges. CP at 127-129. Despite that list, NARN failed to identify *any* specific illegal or unauthorized act of a governmental body or public official and, in fact, some of the identified “acts” are discretionary or immune from suit.

Contrary to NARN’s characterization, it is not an “illegal action” for the Legislature to pass a law, even in those situations where a court may ultimately declare the law to be unconstitutional. Moreover, it is not an “illegal action” for the Governor to sign a law that is duly enacted by the Legislature, even if a court ultimately overturns it on constitutional grounds. NARN recognized this fact by quoting the United States Supreme Court in *U.S. v. Munoz-Flores*: “Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional.” *U.S. v. Munoz-Flores*, 495 U.S. 385, 391, 110 S. Ct. 1964, 109 L. Ed.2d 384 (1990); *see* Appellants Op. Brief at 26. Statutes are presumed to be constitutional, and the burden falls upon NARN to prove otherwise. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).

Further, the legislative acts of the passage of both the Act and King County’s adoption of ordinances related to the Act are protected by legislative immunity from suit. *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998). Similarly, the Superior and District Courts enjoy judicial immunity for their judicial functions. *See Dennis v. Sparks*, 449 U.S. 24, 27, 101 S. Ct. 183, 66 L. Ed. 2d 185

(1980); *Adkins v. Clark Cy.*, 105 Wn.2d 675, 677, 717 P.2d 275 (1986).

Likewise, prosecutors have absolute immunity for actions taken in initiating and pursuing a criminal prosecution. *Hannum v. Dep't of Licensing*, 88 Wn. App. 881, 886-887, 947 P.2d 760 (1997).

2. NARN's Proposed Amendments Did Not Identify Any Specific Or Particularized Injury Suffered By NARN

As argued above, the proposed amendments do not establish the necessary "injury in fact" providing standing in a UDJA action. Any injury described in NARN's proposed amendments was speculative at best. The proposed amendments only allege that NARN may "come into contact directly or indirectly" with "criminal activity" in "several fora" but do not describe how, where, or when this conduct occurred or even possibly could occur. CP at 123. Moreover, the proposed amendments do not state what person, practice, or program has harmed NARN.

NARN also requested leave to amend in order to assert "aesthetic, emotional, and/or financial injury," but do not propose any facts that support the injury or facts that show that its injury is different from any other member of the public. CP at 123. Essentially NARN only argues that it is a Washington taxpayer who had political or philosophical disagreements with some of the state's laws. NARN is no different from any other person who may disagree with their government from time to

time but who equally has no standing to bring a taxpayer derivative suit based merely on such disagreement. None of the government actions cited in NARN's proposed amendments constitute an illegal or unauthorized act. Thus, the motion to amend the Amended Complaint was properly denied.

G. NARN Established No Legal Basis For Its Request For Attorney Fees

NARN established no basis for an award of attorney fees. Washington follows the "American rule" concerning attorney fees; such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996).

1. The "Private Attorney General" Theory Does Not Provide NARN A Basis To Request Attorney Fees

In its Opening Brief, NARN did not cite any statutory provision authorizing attorney fees and only asserted that it may recover attorney fees as "private attorneys general." Appellants Op. Brief at 49. This doctrine has been rejected in Washington state. *See Blue Sky Advocates v. State*, 107 Wn.2d 112, 121-122, 727 P.2d 644 (1986); *see also Wright v. Jeckle*, 121 Wn. App. 624, 632-633, 90 P.3d 65 (2004). In *Blue Sky Advocates*, the Washington Supreme Court stated "[w]e reject the private attorney general doctrine" and quoted the United States Supreme Court:

[C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party ... or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

Blue Sky Advocates v. State, 107 Wn.2d at 121-122, (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)).

2. The "Common Fund" Exception Does Not Provide NARN A Basis To Request Attorney Fees

On February 2, 2010, NARN served a "Notice of Clarification/Motion to Amend" conceding that the "private attorney general" theory had been rejected in Washington and requested attorney fees be awarded under the "common fund" exception for "protection of constitutional principles." See Appellants Notice Of Clarification/Motion To Amend at 1-2. The common fund exception is an equitable exception to the American rule and allows for recovery of attorney fees in two situations; first, where the litigant confers a benefit to an ascertainable class and a common fund is benefitted or preserved and, second, where the litigant confers benefit to a class in a suit challenging the unconstitutional expenditure of public funds. *Rustlewood Ass'n v. Mason County*, 96 Wn. App. 788, 801, 981 P.2d 7 (1999).

NARN may not be awarded attorney fees because it has not conferred a benefit to others through creating or preserving a common

fund in litigation. Even where a litigant prevails and confers a substantial benefit to a class, attorney fees are not awarded unless the party protected, preserved, or created a common fund. *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 542 and 545, 585 P.2d 71 (1978). “As courts have repeatedly clarified, the common fund/substantial benefit doctrine is applicable only when the litigant preserves assets or creates a common fund, in addition to conferring a substantial benefit upon others.” *City of Sequim v. Malkasian*, 157 Wn.2d 251, 271, 138 P.3d 943 (2006).

In this case, no common fund is at issue and this is bar to NARN’s request for attorney fees. Simple monetary benefit to a class of persons is not a basis for awarding attorney fees. For example, the Washington Supreme Court ruled that the common fund exception did not extend to a case where a party prevailed in a zoning decision thus allowing a class of property owners to remain free of city property taxes. *See Interlake Sporting Ass’n, Inc. v. Washington State Boundary Review Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006). In *Seattle School Dist. No. 1*, the court noted that preservation of the value of stocks and bonds or preservation of funds through a court ordered accounting may substitute for a monetary fund but “there must be an immediate Common fund from which attorneys’ fees may be drawn.” *Seattle School Dist. No. 1*, 90 Wn.2d at 544-45.

Further, NARN may not request attorney fees in this case as the litigation has not benefitted a class through challenge to the unconstitutional expenditure of public funds. The four requirements of

this variation of the common fund exception are: “(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge.” *City of Seattle v. McCready*, 131 Wn.2d 266, 276, 931 P.2d 156 (1997), citing *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

In this case, NARN did not challenge any expenditure of public funds. NARN alleged only a facial challenge to the constitutionality of the Act under the UDJA, a situation where the common fund exception does not apply. *City of Seattle v. McCready*, 131 Wn.2d at 276, citing *Seattle School Dist. No. 1*, 90 Wn.2d at 544-45. Further, in no case has a Washington court held merely challenging the expenditure of tax funds in general is sufficient to create a common fund. Further, it should be noted that any theory supporting recovery of attorney fees requires that NARN prevail. Therefore NARN’s request for attorney fees should be denied.

VI. CONCLUSION

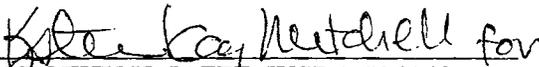
The Respondents, State of Washington and King County, urge this Court affirm the trial court’s Order, finding that NARN failed to establish standing for its claim under the UDJA and taxpayer derivative action, that NARN failed to allege a justiciable controversy, and that each of these findings establishes independent grounds to deprive the court of subject

matter jurisdiction. Further, this Court should find that the trial court properly denied NARN's futile motion to amend its Amended Complaint as the proposed amendments would not have cured the legal deficiencies of the Amended Complaint. For these reasons, the trial court's dismissal of the action should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of February 2010.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the *Response Brief* on all parties or their counsel of record on the date below as follows:

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- Hand delivered by _____

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

DATED this 8th day of February 2010, at Olympia, Washington.


SHIRLEY BURRELL