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NO. 89819-7

SUPREME COURT OF THE STATE OF WASHINGTON

LEWIS COUNTY,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED2

III. STATEMENT OF THE CASE2

IV. LEGAL ARGUMENT4

A. Justiciability Determinations Are Reviewed For Abuse
Of Discretion.....4

B. Dismissal Was Within The Trial Court’s Discretion
Because Several Justiciability Elements Were Missing5

1. Amalgamating historical, moot claims does not
create a present, existing dispute under the UDJA
(element (1) under *Republican Party*).....6

2. The County’s interests were neither direct nor
substantial (element (3) under *Republican Party*).....10

C. The Trial Court Properly Exercised Discretion To Reject
The Public Interest Exception To Proving Justiciability11

V. CONCLUSION13

TABLE OF AUTHORITIES

Cases

<i>Associated Mortgage Investors v. G.P. Kent Constr. Co., Inc.</i> , 15 Wn. App. 223, 548 P.2d 558 (1976).....	5
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	10
<i>DiNino v. State ex rel. Gorton</i> , 102 Wn.2d 327, 684 P.2d 1297 (1984).....	12, 13
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973).....	6, 7, 8, 10
<i>Health & Hospital Corp. v. Marion County</i> , 470 N.E.2d 1348 (Ind. App. 1984).....	11
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.2d 115 (2006).....	5
<i>Nolette v. Christianson</i> , 115 Wn.2d 594, 800 P.2d 359 (1990).....	5, 10
<i>State ex rel. Distilled Spirits Institute, Inc. v. Kinnear</i> , 80 Wn.2d 175, 492 P.2d 1012 (1972).....	5
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	7, 10
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	12, 13
<i>Washington State Republican Party v. Washington State Public Disclosure Comm'n</i> , 141 Wn.2d 245, 4 P.3d. 808 (2000).....	5, 6, 8, 10

Statutes

RCW 2.28.100	2
--------------------	---

RCW 4.96.010	2
RCW 7.24	1
RCW 13.04.050	2

Rules

RAP 13.4(b)	1, 4, 14
RAP 13.4(b)(1)	4, 6
RAP 13.4(b)(4)	4, 13

Treatises

Karl B. Tegland, <i>Washington Practice, Specific Applications – Contract Rights, Insurance</i> § 42.29 n.1 (2011)	9
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I. INTRODUCTION

Lewis County sought a declaratory judgment to transfer to the State the County's exclusive financial responsibility for the acts and omissions of county employees working for or with the Lewis County Superior Court. The sole relief requested was a declaration under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24, that the State is solely and exclusively responsible for the acts and failures to act of the Lewis County Superior Court and the juvenile detention and probation services. But its suit lacked all the elements of a justiciable case under Washington law. The County alleged no pending or threatened claims or lawsuits, only past claims that were resolved with the County accepting full responsibility for approximately \$17,000 per year in payouts. The Superior Court ruled that the elements of a justiciable case were not satisfied, and the Court of Appeals affirmed.

The decisions below correctly applied the UDJA and the cases interpreting that statute, and the Court of Appeals correctly observed that the issue the County raises is speculative and hypothetical, not ripe for review, and not of sufficient importance to bypass the justiciability requirements of the UDJA. Further review is not warranted under the criteria in RAP 13.4(b).

II. ISSUES PRESENTED

The County misstates the legal issue presented in this case. The appellate standard of review for dismissals for lack of justiciability is abuse of discretion. Under that standard, two issues are presented:

1. Was the Court of Appeals correct in affirming the trial court's dismissal of this case when (a) the County alleged no current claim or litigation brought against it, but instead relied exclusively on moot, fully-resolved disputes; and (b) the County admitted that such claims had amounted to about \$17,000 per year for the decade leading up to the filing of its lawsuit?
2. Were the trial and appellate courts correct in concluding that Lewis County's suit did not meet the "disfavored and rarely invoked" public interest exception to the rule that the County must allege a justiciable claim?

III. STATEMENT OF THE CASE

Washington's judicial branch includes a system of state and county trial and appellate courts. CP 4. The Lewis County Superior Court is one of 39 county courts of general first-instance and limited appellate jurisdiction. CP 4. Lewis County employs the staff serving the superior court and county juvenile court in accordance with both the state constitution and state statutes. *E.g.* RCW 2.28.100 and 13.04.050. RCW 4.96.010 specifically states that counties are liable for the civil wrongs committed by these and other county employees.

From 2000 to 2011, claims were made or complaints filed for money damages due to the alleged action or failure to act of the Lewis County Superior Court, its judges, commissioners and other county officers and employees (including the personnel of the county's juvenile detention facility and juvenile probation services). CP 6. Lewis County conceded that it historically had taken responsibility for the alleged wrongful conduct of these programs and personnel, that all such past claims and suits were fully resolved by the County without an assertion that the State should bear the risk of loss instead and that the claims paid averaged no more than \$17,000 per year. Pet. at 1-2; CP 63-64. There have been no such claims or lawsuits brought against Lewis County since the filing of its complaint in August 2011.

In its complaint the County sought a declaratory judgment to transfer to the State the sole and exclusive financial responsibility for acts and omissions of county employees working for or with the Lewis County Superior Court and juvenile detention and probation services. The trial court granted the State's Motion for Judgment on the Pleadings because the elements of a justiciable case were absent:

The case currently before this Court does not present 'an actual, present, and existing dispute'. Nor are there interests involved which are 'direct and substantial'. There is no tort claim pending and there has been no demand for payment made.

CP 98-100. The Court of Appeals affirmed:

[T]he County presents a question of an unpredictable contingency because the County's action did not include facts of any financial liability claim that it presently faced. The County does not cite any cases where aggregation of several past claims have been sufficient to create an 'actual present and existing dispute', or the mature seeds of one. And we do not agree that the trial court abused its discretion in refusing to find that the amount of money at issue here creates 'direct and substantial interests.'

Pet., Attach. A at 7 (citations omitted).

Lewis County now seeks this Court's review.

IV. LEGAL ARGUMENT

Lewis County's Petition must satisfy RAP 13.4(b)'s requirements before this Court will accept review. Although the Petition does not cite or discuss RAP 13.4(b), the State addresses RAP 13.4(b)(1) (conflict with a decision of this Court) and RAP 13.4(b)(4) (an issue of substantial public interest that should be determined by this Court) because they come closest to the legal contentions raised by the County. As discussed below, the Court of Appeals opinion is entirely consistent with this Court's decisions on justiciability under the UDJA and this appeal does not involve a matter of substantial public interest.

A. Justiciability Determinations Are Reviewed For Abuse Of Discretion

The trial court's decision to dismiss a case for lack of justiciability is reviewed under an abuse of discretion standard. *Nolette v. Christianson*,

115 Wn.2d 594, 599, 800 P.2d 359 (1990); *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972). A trial court abuses its discretion only when its decision rests on untenable grounds or reasons, if the trial court has relied on unsupported facts or applies the wrong legal standard or if the trial court has adopted a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.2d 115 (2006); *Associated Mortgage Investors v. G.P. Kent Constr. Co., Inc.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976).

Lewis County does not dispute the applicability of this standard of review to its appeal.

B. Dismissal Was Within The Trial Court’s Discretion Because Several Justiciability Elements Were Missing

A “justiciable controversy” must exist before a court’s jurisdiction may be invoked under the UDJA. *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 141 Wn.2d 245, 284, 4 P.3d. 808 (2000). For purposes of declaratory relief, a justiciable controversy is:

- (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

Id. Each of the four elements must be met for the controversy to be justiciable. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

Lewis County's claim met none of these elements and the Court of Appeals properly applied the test articulated in *Washington State Republican Party* in affirming the Superior Court's dismissal of the County's claim. There is no basis for further review under RAP 13.4(b)(1) where, as here, the lower courts simply applied controlling precedent to the facts alleged in the complaint and concluded the elements of justiciability are not satisfied.

1. Amalgamating historical, moot claims does not create a present, existing dispute under the UDJA (element (1) under *Republican Party*).

No individual is currently suing or even making a demand upon Lewis County for the tortious conduct of its judicial branch or juvenile justice employees; the County's declaratory judgment action therefore was no more than a "possible, dormant, hypothetical, speculative, and/or moot disagreement." See *Washington State Republican Party*, 141 Wn.2d at 284. Indeed, the only claims and lawsuits Lewis County cited were either unspecified past matters from other counties or moot claims for which the County had accepted responsibility or otherwise resolved with county funds or funds of its insurer. CP 63-66. In each case Lewis County had

conceded that the County, not the State, was financially responsible for defending and/or paying the claimants or litigants who had asserted these claims. *Id.* Through its allegations in this case, the County attempted to manufacture a genuine, current dispute out of resolved, moot claims for which it had accepted sole responsibility.¹ Moot claims and issues were the predicate for the County's suit and they cannot state a justiciable claim as a matter of law. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 417, 27 P.3d 1149 (2001) (an actionable, immediate dispute cannot be based on a moot claim); *Jones v. Washington*, No. CV-12-0188-EFS, 2012 WL 3260411 at *5 (E.D. Wash. 2012) (complaint dismissed because only past injuries argued as basis for prospective relief).

This Court's decision in *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973), is dispositive. There, lessees invited social guests, a small child and her parents, onto their property. While on the property, the child was injured by an object that was improperly secured to a fence. *Id.* at 812. The landlord and the lessee made payments

¹ Lewis County's Complaint (and related pleadings) confirmed that the County has complied for years with state law by accepting complete and exclusive responsibility for claims asserted against the Superior Court, its staff and the County's Juvenile Probation and Detention Department. CP 3-8 and 63-66. In resolving these now moot claims the County never asserted that the State should bear responsibility instead of the County. Over the eleven years prior to filing this suit, Lewis County payouts for all such claims averaged about \$17,000 per year. CP 63-66. Only 183 such claims were brought against all 39 of Washington's counties over the same eleven-year period, averaging about \$12,500 per claim. These figures are derived from the claims information on pages 1 and 2 of the Petition. *See also* CP 63-66.

to the child's parents for medical expenses until the child's family moved to a different state.² *Id.* No further claim or demand was made. Because of the child's age, however, the statute of limitations was tolled for an extended period of time. The landlord brought suit for declaratory judgment against the lessee for an adjudication of potential future financial responsibility as between the landlord and the lessee in connection with the accident. *Id.* at 812-13. The Court held that no justiciable controversy was presented because no current claim for damages for the child's injury had been made or was threatened and because the circumstances and extent of the injury were not specifically alleged so as to allow determination of the risk involved. *Id.* at 814.

Here, as in *Diversified*, we have two parties in a theoretical dispute³ about potential liability for a potential future claim. Lewis County identifies no actual or threatened claim or claimant. County employees and programs are generally described as potential targets for

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

³ Element two of the test for UDJA justiciability is that the parties have opposing interests. *Washington State Republican Party*, 141 Wn.2d at 284. The facts pleaded by Lewis County show that, as of 2011, the County had never contested its liability, thereby agreeing with the State that the County bears this risk of loss. CP 63-64. Can the County simply change its mind and decide that, from now on, it will disregard state law and county practice, in order to create "opposing interests" with the State sufficient to create a justiciable case?

unasserted future claims, but their culpability is apparently assumed based on undescribed circumstances and unidentified theories of liability. The requested relief would purport to be legally conclusive on all future claimants and plaintiffs, as well as enforceable against unjoined courts and staff, whoever they may be, and whatever their circumstances.

Lewis County argues that its contracts with an insurance pool preclude the County from litigating this case with actual claimants and a genuine, current fact pattern applicable to an identifiable defendant. Pet. at 2. However, the sole basis for this contention was a declaration that the County “may lose” coverage if the County proceeds to trial when the insurer elects to settle. CP 86. The declarant does not state that the County is contractually “precluded” from disclaiming its liability or asserting a claim against the State in the face of a demand or lawsuit. Nor can the County’s private insurance contracts relieve it of its responsibility to state a justiciable claim. For example, a separate action for a declaration of non-liability could be initiated. See Karl B. Tegland, *Washington Practice, Specific Applications – Contract Rights, Insurance* § 42.29 n.1 (2011). Lewis County has justiciable alternatives to the dismissed case below: it just prefers not to pursue them.

2. The County's interests were neither direct nor substantial (element (3) under *Republican Party*).

In addition to the lack of a current, existing dispute, Lewis County's case also lacked proof of a direct and substantial interest to vindicate. The County's evidence confirmed the alleged losses were not substantial: about \$17,000 a year for Lewis County and about \$12,500 per claim for all Washington counties. CP 63-66. The County disputes the significance of its own evidence by claiming that the Court of Appeals' discussion of that evidence creates a "fifth element" for justiciability – that a substantial amount of money be involved – that is contrary to the decisions of this Court and those of other states that have adopted the UDJA. Neither contention is correct.

First, this Court has repeatedly held that direct and substantial interests must be at issue before a case is deemed justiciable. *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005); *To-Ro Trade Shows*, *supra*, 144 Wn.2d at 417; *Washington State Republican Party*, *supra*, 141 Wn.2d at 284; *Nollette*, *supra*, 115 Wn.2d at 599; *Diversified Indus.*, *supra*, 82 Wn.2d at 815. The Court of Appeals' attention to the relatively small amounts of historical losses as proof that substantial interests were not at issue was consistent with this Court's decisions and did not create a new test for justiciability. The Court of Appeals simply followed this

Court's decisions in its analysis of whether the County's allegations satisfied the third element of *Republican Party's* test for justiciability.

Contrary to the Petition, the Court of Appeals' decision did take into account the decisions from other jurisdictions that were cited by the County. Pet., Attach. A at 6-7. Only one case appeared analogous, an Indiana decision where the court cited to the fact that over one million dollars a year in claims was a factor in finding that case justiciable. *Health & Hospital Corp. v. Marion County*, 470 N.E.2d 1348, 1353 (Ind. App. 1984). As noted by our Court of Appeals, the alleged losses in this case were "nowhere near" the losses in the Indiana decision, rendering that case unpersuasive and irrelevant. Pet., Attach. A at 7. None of the out-of-state cases cited by the County stood for the proposition that aggregating past, moot, fully-resolved claims totaling no more than \$17,000 a year constitutes a justiciable case under the UDJA.

C. The Trial Court Properly Exercised Discretion To Reject The Public Interest Exception To Proving Justiciability

While this case clearly fails to meet the strict elements of justiciability in Washington, the County claims its action, filed solely on its own behalf, constitutes an "issue of great public importance" because county liability for claims against judicial branch employees is of general concern to all of Washington's 39 counties and their citizens. Pet. at 3.

This Court has held that the “great public importance” basis for jurisdiction to render declaratory judgments is disfavored and should only be invoked in rare circumstances. *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). In *Walker*, a citizen’s action group sued, requesting a writ of mandamus, declaratory judgment, and an injunction, based on a claim that provisions of an initiative limiting expenditures, taxation, and fees were unconstitutional. *Id.* at 405. The court reiterated after examination of numerous “major public import” cases that courts must not render judgment on a hypothetical or speculative controversy, where specific concrete harm has not been alleged. *Id.* at 415. This Court declined to find that the public interest in elections and the initiative process created a justiciable controversy.

Similarly, in a case dealing with the constitutionality of the Natural Death Act, this Court refused to render a declaratory judgment even when “obviously important constitutional rights were involved.” *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984). In *DiNino*, a woman who was not terminally ill wanted a declaration of the validity of her directive to her physician regarding life-sustaining procedures, which differed from the model directive in the pregnancy and abortion provisions of the Act. *DiNino*, 102 Wn.2d at 332. Despite the importance of the issues involved, the court held that the case was not

justiciable; without a factual controversy before it, “an advisory opinion would not be beneficial to the public or to other branches of government.”

Id. The same reasoning applies here because Lewis County has failed to show or even allege that any claim or action against its judicial branch employees is pending or even contemplated.

If the rights of the electorate in *Walker* and the “obviously important constitutional rights” discussed in *DiNino* were insufficient to warrant exercising jurisdiction, then the historical, minor monetary losses alleged by the County do not substantially affect the public interest so as to justify entertaining its suit. The trial court’s dismissal was an appropriate exercise of that court’s discretion that should not be disturbed on appeal. For that reason, review under RAP 13.4(b)(4) is not warranted.

V. CONCLUSION

The trial court acted within its discretion to dismiss this case for lack of justiciability, under both the traditional analysis repeatedly endorsed by this Court and under the public interest exception sought by the County. The Court of Appeals’ decision to affirm the trial court’s decision is entirely consistent with this Court’s decisions regarding

justiciability under the UDJA. There are no grounds for review of this case under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 17th day of March, 2014.

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A handwritten signature in cursive script, appearing to read "William G. Clark", written over a horizontal line.

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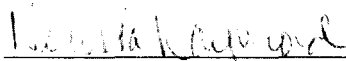
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DATED this 17th day of March, 2014, at Seattle, WA.



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Thank you,

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