No. 43790-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LEWIS COUNTY,

Appellant,

VS.

STATE OF WASHINGTON,

Respondent.

APPELLANT LEWIS COUNTY'S REPLY BRIEF

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ARGUMENT

The issue

The issue before the Court at this time is a limited one: Can the status of superior court judges and civil liability for their acts and for the acts of their subordinates be addressed through an action for a declaratory judgment?

As a preliminary matter, Appellant Lewis County (the "County") is obliged to note that Respondent State of Washington (the "State") errs when it addresses the ultimate matter at issue between the parties.

In its brief the State contends that our Supreme Court views superior court judges as serving "in a dual capacity and are thus State and County officers."[1] If that contention had any merit at the time it was written, then such merit certainly has been vanished since the publication of the Supreme Court's December 6, 2012 decision in the matter of Her Honor Judge Schaller's election to the State Superior Court Bench to serve in Thurston County.[2] In deciding that issue, the Washington Supreme Court first had to determine the nature of the court to which Judge Schaller had been

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[1] Respondent's Brief at 6.

[2] *Parker v. Wyman*, --- Wn.2d ---, --- P.3d ---, 2012 WL 6050564.

elected by voters of Thurston County: is the Superior Court of Washington for Thurston County a state court, or is it a county court?

Chief Justice Madsen, writing for a unanimous Court, noted as follows: [3]

> "Early in statehood this court was faced with the question of whether superior court judges are state officers or county officers for purposes of article VI, section 8 of the Washington Constitution, which specified that the first election of 'county and district officers' was to take place in 1890 and biennially thereafter, and that the first election of 'state officers' after the election for the adoption of the constitution was to take place in 1892 and every four years thereafter. We held that under this provision superior court judges are state officers. As the court there explained, 'That [superior court judges] are more accurately described as state officers than as county or district officers is evident, not only from the character and extent of their jurisdiction, and the locality in which they may be called upon to discharge their duties as such officers, but also from the fact that they are paid, at least in part, by the state, and vacancies occurring in the office are to be filled by the governor.' And in construing the constitutional provision giving this court original mandamus and quo warranto jurisdiction as to all 'state officers,' *see* article IV, section 4 of the Washington Constitution, we held that superior court judges are state officers.
>
> "It is true as we acknowledged that we have in some cases characterized superior court judges as being both state and

[3] *Parker*, 2012 WL 2012 WL 6050564 at *5 (citations omitted).

county officers. *But we have done so mainly in relation to salaries, responsibility for which is divided between the state and the counties. And we have never said that superior court judges are solely county officers for any purpose."*[4]

Perhaps the purpose for which the State's brief alluded to the ultimate matter in issue in this case (being liability for wrongful acts of court officers) is to suggest that it's a foregone conclusion that this issue will be decided by a finding of county not state responsibility. Perhaps the state intended to suggest that permitting this cause of action to proceed to a decision upon that substantive issue was a waste of judicial resources. If so, then it should appear that the Washington Supreme Court's decision, coming down as it did just after the filing of the state's brief in this appeal, most certainly suggests otherwise.

Necessary parties

Neither the Superior Court of Washington for Lewis County nor its judges are necessary parties to the present cause of action. CR 19 tells us who are the necessary parties to a cause of action.

The necessary parties are persons in whose absence "complete relief cannot be accorded among those already parties,"

[4] Emphasis added.

and some but not all persons who "claim an interest in the subject of the action". Thus, in a case brought to compel a superior court and its judges to act, each of the judges is a necessary party to that action.[5]

However, the present cause of action relates to civil liability for the acts of judges and their subordinates. It does not seek to compel any judicial officer or any employee of a judicial officer to do or not to do any act. Therefore the judges themselves are not necessary parties to this action.

"The relevant question for Rule 19(a) must be whether success in the litigation can afford the plaintiffs the relief *for which they have prayed.*"[6] The State does not tell us how the absence from the courtroom of any judge, any judicial assistant, or any juvenile justice worker prevents this Court from granting the declaration which the County seeks.

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[5] *Start* ex rel *Hill v. Superior Court of King County*, 4 Wash. 327, 327-28, 30 P. 82, 82 (1892).

[6] *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996), quoting from a concurrence addressing the meaning of FRCP 19 in the earlier decision of the Ninth Circuit in *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1501 (9th Cir.1991). (Emphasis supplied by the court in rendering the *Yellowstone* decision.)

Nor does the State does tell us how the Court's decision in this case stands to affect the interests of judges of the Superior Court of Washington for Lewis County. In fact, this Court's ultimate decision will not have the slightest effect on what these judges and their employees do or do not do, as it only relates to financial liability for their acts and omissions. With respect to the second prong of the test, no judge, nor any other superior court employee for that matter, has come forward to claim an interest in the subject of this action.

"[P]ersons are not necessary parties even if they are involved in the subject matter of litigation if no recovery is sought against them and judgment would not prejudice their interests ...."[7] Even if persons such as His Honor Judge Brosey, His Honor Judge Hunt, and His Honor Judge Lawler should be said, for one reason or another, to be necessary parties, then the appropriate remedy is not judgment on the pleadings, as the State claims. Rather, it

[7] *Serres v. Washington Dept. of Ret. Sys.*, 163 Wn.App. 569, 588, 261 P.3d 173, 183 (2011) review denied, 173 Wn.2d 1014, 272 P.3d 246 (2012).

should be a remand of this case to the court below for an order to cure the defect through joinder of such persons.[8]

Justiciable controversy

The issue at the heart of the present appeal is whether the present cause of action presents an actual, justiciable controversy. As noted in the County's Opening Brief, Washington law sets out a four-part test to determine the existence of a justiciable controversy. While the state asserts that a justiciable controversy is lacking, it does not identify which of the four elements in that test the county has failed to demonstrate to exist. The county respectfully suggests to this court that it has amply demonstrated at pages 6 and 7 of its Opening Brief how each such element clearly is present, upon the facts before the court.

Hypothetical controversies do not belong in Washington's courtrooms. The parties are agreed that the *Diversified Industries Dev. Corp. v. Ripley*[9] is good law in this state.

As explained at pages 13 and 14 of the County's Opening Brief, *Diversified* stands for the proposition that a putative

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[8] *Hannegan v. Roth,* 12 Wash. 695, 44 P. 256 (1896); *Mudarri v. State,* 147 Wn.App. 590, 604, 196 P.3d 153, 163 (2008).

[9] 82 Wn.2d 811, 514 P.3d 137 (1973).

defendant with respect to "an unpredictable contingency," which may or may not arise in future, out of one known event, cannot preclude future litigation in relation to that singular event by bringing a declaratory judgment action against some putative plaintiff of its choosing. As the county already has explained, *Diversified* is inapplicable to the facts of this case.

Rather, as the county has demonstrated at pages 8 through 10 of its Opening Brief, this action is in the main stream of Sister State appellate decisions, in which declaratory judgment actions are recognized as being perhaps the *most* appropriate way for litigants in general, and for units of local government in particular, to ascertain those of their rights which come to be determined through the resolution of constitutional and like issues. Should this court deny the present appeal, then such a decision would see Washington alone diverge from the clear, consistent, and nation-wide jurisprudence which has developed as to the applicability and scope of the Uniform Declaratory Judgment Act.

A commentator in parsing the *Diversified* decision has observed (in the context of a declaratory judgment action) that, "A justiciable controversy is one in which the judicial determination will

have the force and effect of a final judgment in law or be of great and overriding public interest."[10] There can be little doubt that such is the case in the matter now before the court.

Finally, the state's Brief contends that this court should decline to offer judgment upon the merits of the county's claim which underlie this litigation, because, the state reminds us, the Legislature can always reverse such a decision of this court or of the court below.[11] Were that the law, then the courts of this State would be far less overtaxed than in fact they are. Precious few matters come before the courts whose results cannot be reversed (prospectively, at least) by a well-phrased statute.

Moreover, it is far from certain that when the county ultimately is granted the relief which it seeks, and future claims arising out of the acts and omissions of judges and their subordinates come to be presented to the state rather than to county government, that there will be a political will to impose liability upon the treasuries of the several counties for decisions and

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[10] Tegland, 15 WASH. PRAC., CIVIL PROCEDURE § 42:4 (2d ed.), n. 1, citing and discussing *Burman v. State*, 50 Wn.App. 433, 439, 749 P.2d 708, 712 (1988).

[11] Respondent's Brief at page 18.

for personnel who lie beyond the control of the 39 counties' elected officials.

CONCLUSION

This case presents an actual controversy. The county's claim for declaratory relief is fully justiciable, under settled Washington case law. Both Washington and sister state case law should lead this court to allow this appeal; and, in so doing, to permit this matter of community concern to find resolution.

Specifically, the Court should reverse the decision of the court below. The cause of action should be remanded to the Superior Court of Washington for Thurston County for further proceedings.

Respectfully submitted on this 11th day of December 2012.

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CERTIFICATION

I hereby certify that on 12/11/12 I deposited in the mails of the United States of America and/or placed with Legal Messengers, a copy of the document to which this certificate is attached, for delivery to all counsel of record.

Lewis County Prosecuting Attorney's Office

LEWIS COUNTY PROSECUTOR

December 17, 2012 - 11:47 AM

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