

68040-4

NO. 68040-4-I

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

NICHOLAS G. JENKINS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The lawsuit giving rise to this appeal follows, and attempts to circumvent, the unanimous opinion of the Washington State Supreme Court in *Internet Community & Entertainment Corp., d/b/a/ Betcha.com v. Washington State Gambling Commission*, 169 Wn.2d 687, 238 P.3d 1163 (2010). In that matter, Appellant Jenkins sought a judicial declaration that the activities of his Internet bookmaking website - “Betcha.com” - did not violate Washington’s statutory prohibitions against illegal gambling activities. Following the adverse ruling in that case, Jenkins filed the instant declaratory action in an apparent attempt to evade the effect of the Supreme Court’s decision.

In his current action, Jenkins once again attacks the legal applicability and validity of the “bookmaking” definition set forth in the Washington Gambling Act (Act), and seeks, among other things, a judicial declaration that the charging of certain fees by a possible new website, that is (or might be) “functionally identical” to the now defunct Betcha.com, would not violate either the Act or the Supreme Court’s prior decision. In bringing this action, Jenkins asserts a desire to open a new “Betcha.com in Washington with some or most of the fees. . .” he had originally designed for his previously existing website and also to charge a new “subscription fee” for his Internet bookmaking services.

On October 28, 2011, the King County Superior Court properly denied Jenkins’ latest motion for summary judgment, granted summary judgment in favor of the State, and dismissed this cause of action. The

trial court correctly held that Jenkins' Complaint does not satisfy the requirement under the Uniform Declaratory Judgments Act (UDJA) that there be a justiciable controversy, and instead seeks to have the court issue an improper advisory opinion. By so ruling, the court declined Jenkins' request that the trial court independently examine his latest proposed business model and then advise him how he might somehow skirt the law and successfully evade the Supreme Court's prior decision. The trial court's ruling dismissing this matter was correct and should be affirmed.

II. RESTATEMENT OF THE ISSUE

Does Jenkins' complaint satisfy the requirements necessary to present a justiciable controversy under the Uniform Declaratory Judgments Act?

III. RESTATEMENT OF THE CASE

A. Factual History

Most of the facts relevant to this action were judicially determined by the Supreme Court in its unanimous opinion in *Internet Community & Entertainment Corp., d/b/a Betcha.com v. Washington State Gambling Commission, supra*.^{1,2} They are summarized as follows:

¹ Hereafter, references to facts contained in the Washington Supreme Court's opinion in *Internet Community & Entertainment Corp., d/b/a Betcha.com v. Washington State Gambling Commission*, 169 Wn.2d 687, 238 P.3d 1163 (2010), are identified by the abbreviation "SC" followed by the page.

² Additional facts concerning the operation of Betcha.com are contained in the Court of Appeals' decision, *Internet Community & Entertainment Corp., d/b/a Betcha.com v. Washington State Gambling Commission*, 148 Wn. App. 795, 201 P.3d 1045 (2009), that was reversed on legal grounds by the Washington Supreme Court. References to facts contained in the Court of Appeals' opinion are identified by the abbreviation "COA" followed by the page.

1. The Internet bookmaking website: www.Betcha.com.

In June 2007, Jenkins began operating his now defunct corporate *alter ego*, Internet Community & Entertainment Corp., d/b/a Betcha.com, an illegal Internet bookmaking website that conducted and facilitated online gambling. SC 689; COA 798; CP 4. Betcha.com was created, incorporated, and controlled by Jenkins, its chief executive officer. COA 798; CP 2-3. Jenkins based Betcha.com on his theory that brokering bets between on-line gamblers for a fee did not violate criminal prohibitions against Internet gambling activities if the gamblers entered into a wager with the understanding that they could refuse to pay, or “welch,”³ if they lost the bet. SC 690-91; COA 800.

To gamble on Betcha.com, an individual registered on the website, created a user name, and funded a wagering account with a credit card. SC 689-90; COA 800-01. Gamblers had to sufficiently fund their accounts to cover their bets if they lost. *Id.*

A gambler could choose to wager “person to person” or participate in a betting pool, and could choose to post his or her own bets or to accept wagers that were listed by other gamblers or created by the website’s staff. *Id.* The website allowed a gambler to choose the amount of the wager, the odds, the opening and closing dates of the bet, and the minimum “honor rating” that any gambler offering to accept the bet had to possess. *Id.*

³ To “welch” is defined as “1: to cheat by avoiding payment of bets.... 2: to avoid dishonorably the fulfillment of an obligation.” *Webster’s Third New International Dictionary* 2596 (2002). While this term may be objectionable to some, it is the term used by Betcha.com and by some of the courts in the prior litigation and, therefore, is used in this brief.

Each bet had a set time when the outcome of the wager would be determined. *Id.* Once that time passed, if a winning claim was made, the opposing gambler had to respond within 72 hours. *Id.* If the opposing bettor agreed with the loss or did not respond within 72 hours, Betcha.com transferred the winnings to the claimant's account. SC 689-90. If the losing gambler opted to "welch" on the bet, the bet was not paid by Betcha.com and the wager was terminated. *Id.* Under Betcha.com's "terms of service," individual users were responsible for collecting their own winning bets. COA 799.

Every gambler on Betcha.com was assigned an honor rating that served as a measure of the individual gambler's reliability and trustworthiness in paying wagers. SC 690; COA 800. As the gambler participated in wagers, Betcha.com changed the gambler's honor score based on a variety of factors, including user feedback, the amount of money wagered, the promptness with which the gambler settled a debt, and whether the gambler "welched" on a bet. *Id.*

2. Betcha.com's collection of fees.

Betcha.com's entire business model was based on charging gamblers several non-refundable fees for using its website. SC 689, 694; CP 3. At the outset, Betcha.com charged a flat listing fee for placing a bet on its website. *Id.* Next, whenever a bet was accepted, Betcha.com deducted a "matching fee" for bringing the parties together. SC 689, 694; COA 801; CP 3. The matching fee was a percentage of the wager and was

deducted from both bettors' accounts. SC 694; COA 801. Additionally, Betcha.com charged a "counteroffer" fee if a player wished to negotiate the odds of a particular bet. SC 689; CP 3. Finally, Betcha.com offered gamblers the ability to "upsell" their bet by posting the offer in a larger font size and more prominent location to increase its visibility. *Id.* Betcha.com collected these fees regardless of the outcome of any bet. SC 689, 694; COA 801.

3. Termination of Betcha.com's illegal gambling activities.

Shortly after Betcha.com began operating, Special Agents from the Washington State Gambling Commission (Commission) informed Jenkins that Betcha.com's activities were prohibited under the Act, RCW 9.46 *et seq.*, and requested that he cease operations. SC 690-91; COA 801-2. In July 2007, the Commission served Jenkins and Betcha.com with a formal cease and desist letter and, pursuant to a subsequently issued search warrant, seized computer equipment and records from Betch.com's offices. *Id.* Jenkins shut down Betcha.com soon thereafter. CP 6.

4. Betcha.com's first lawsuit.

On July 10, 2007, Jenkins and Betcha.com served the Commission with a lawsuit seeking a ruling under the Uniform Declaratory Judgments Act that Betcha.com's actions did not violate the Act's prohibitions against illegal gambling activities. SC 691; COA 802. The trial court granted summary judgment in favor of the State (SC 691) and, in a 2-1 decision, the Court of Appeals, Division II, reversed that ruling. *Internet*

Cnty. Corp. v. Gambling Comm'n, 148 Wn. App. 795, 201 P.3d 1045 (2009). The Washington Supreme Court granted the State's Petition for Review and, on September 2, 2010, issued a unanimous decision reversing the Court of Appeals and reinstating the trial court's grant of summary judgment in favor of the State. *Internet Cnty.*, 169 Wn.2d 687.

5. Jenkins' current lawsuit.

In August 2011, Jenkins filed a *pro se*⁴ complaint seeking a declaration under the UDJA that the Legislature violated the single-subject and subject-in-title rules when it enacted and amended Washington's bookmaking statute (RCW 9.46.0213⁵), that the bookmaking statute is unconstitutionally vague, and that operating a Betcha.com type of website at some future point in time, with a revised fee structure, would not amount to illegal gambling under the Act. CP 1-14.

In his complaint, Jenkins asserts that he would like to reopen Betcha.com or a "Betcha II"⁶ with "some or most of the fees (Listing-, Matching- and/or Counteroffer) he had originally designed for the site" and an additional "flat fee for the right to list offers for bets and accept those bets." CP 8. In regard to those fees, Jenkins specifically seeks

⁴ Though proceeding *pro se*, Mr. Jenkins is a former attorney who was once licensed to practice in California. See CP 3.

⁵ RCW 9.46.0213 defines "bookmaking" as "accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or "vigorish" for the opportunity to place a bet." "Vigorish" is defined in the dictionary as "1: a charge taken (as by a bookie or gambling house) on bets; also: the degree of such a charge 2: interest paid to a money lender." *Webster's Third New Int'l Dictionary*, 2551 (2002). Bookmaking is illegal under the Act's provisions relating to "professional gambling." RCW 9.46.0269(1)(d), .220-.225.

⁶ In his Motion for Summary Judgment, Jenkins refers to his proposed future website as "Betcha II." CP 532.

separate judicial declarations relating to the legality of: 1) operating Betcha.com in the future on a flat subscription fee basis; 2) charging future users a nonrefundable fee for listing bets (“listing fees”); 3) charging users a nonrefundable fee when users accept bets (“matching fees”); and 4) charging future users a nonrefundable fee for “asking for betting odds that the bet poster is unwilling to accept” (“counteroffer fees”). CP 10-11, 13.

B. Procedural History

The State timely filed an Answer to Jenkins’ Complaint asserting, among several others, the defenses of ripeness, mootness and standing.^{7,8} CP 565-87. Thereafter, the parties exchanged cross-motions for Summary Judgment. CP 15-38, 531-54. On October 28, 2011, the trial court heard oral argument on the cross-motions and granted summary judgment in favor of the State, ruling that Jenkins had failed to raise a justiciable controversy under the UDJA. CP 561-64. In its Order, the trial court specifically stated that it did not reach the merits of any constitutional question presented in the Complaint and declined to enter an advisory

⁷ In its Answer, the State also asserted the affirmative defense of *res judicata*. CP 573. On summary judgment, the State briefed and argued that Jenkins’ claims are barred by *res judicata*; however, the trial court declined to reach that issue, concluding instead that Jenkins failed to raise a justiciable issue sufficient to invoke the court’s jurisdiction under the UDJA. *See* CP 31-36.

⁸ In his Complaint, Jenkins also challenges RCW 9.46.0213 for vagueness on behalf of other persons who would like to bet on the website. CR 12. The State argued below that Jenkins has no standing to bring a vagueness challenge on behalf of third parties — i.e. other possible future users of his proposed website. *See* CP 27. To have standing to maintain a vagueness challenge, a party generally is required to claim the statute is vague as to one’s own conduct. *State v. Sherman*, 98 Wn.2d 53, 56, 653 P.2d 612 (1982).

opinion on the questions relating to RCW 9.46.0213. CP 564. Jenkins timely appealed the trial court's decision.

IV. ARGUMENT

A. Standard of Review

A superior court's refusal to consider a declaratory action may be reviewed both for abuse of discretion and under a *de novo* standard of review. An appellate court "may be called upon to determine whether the trial court erroneously exercised its discretion either to consider or refuse to consider such an action." *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990). However, the superior court's legal conclusions regarding the dismissal of a UDJA claim are reviewed *de novo*. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001). When, as in this case, an appellant does not contest the superior court's factual findings, but seeks reversal of the court's legal conclusions, the appellate court's review of the superior court's denial of declaratory relief is *de novo*. *Id.* (citing *Nollette*, 115 Wn.2d at 600).

B. Jenkins' Complaint Fails to Present a Justiciable Controversy Under the UDJA

Under the UDJA, a court with jurisdiction has the power to "declare rights, status and other legal relations." RCW 7.24.010. Absent issues of major public importance, a "justiciable controversy" must exist before a court may invoke its jurisdiction under the UDJA. *Nollette*, 115 Wn.2d at 598-99. A justiciable controversy requires that four factors be met:

(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.

Wash. Educ. Ass'n v. Pub. Disclosure Comm'n, 150 Wn.2d 612, 622-23, 80 P.3d 608 (2003) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). All four factors “must coalesce to ensure that the court does not step into the prohibited area of advisory opinions.” *Id.* The traditional doctrines of standing, mootness, and ripeness are inherent in justiciability requirements for a declaratory action. *To-Ro Trade Shows*, 144 Wn.2d at 411.

1. Jenkins fails to state an actual, present and existing dispute.

Jenkins argues that this lawsuit involves an actual, present and existing dispute. Br. of Aplt. at 11. In support of his argument, he asserts that his stated desire to operate an Internet betting website (like Betcha.com) in the future is all that is required for a justiciable controversy. *Id.* This argument is without merit.

In order for a controversy to be justiciable, it must be actual, present and existing, as opposed to a possible, hypothetical or speculative disagreement. *Wash. Educ. Ass'n*, 150 Wn.2d at 622-23. Another way of stating the requirement is that “a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual

development, and the challenged action is final.” *Neighbors and Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 383, 940 P.2d 286 (1997), *rev. denied*, 135 Wn.2d 1009, 960 P.2d 937 (1998).

If the facts underlying a claim for declaratory relief are not sufficiently developed, then there is no justiciable controversy. In *Port of Seattle v. Utilities & Transp. Comm’n*, 92 Wn.2d 789, 805-06, 597 P.2d 383 (1979), the Supreme Court found the facts to be too speculative to support declaratory relief where the dispute assumed events that had not yet occurred. In that case, the Port of Seattle sought declaratory judgment that a present holder of a certificate for airporter service could not block the issuance of an additional certificate by simply showing a willingness to provide services. *Id.* The issue there presupposed that the Port would place contract rights up for bid and that the current provider would not prevail and then seek to block the issuance of another certificate. *Id.* Without these events first occurring, the Court was dealing with a hypothetical scenario and would have been issuing an advisory opinion. There, the Court declined to do so. *Id.*

Similarly, where a lessor sought resolution of its liability for injury sustained to its lessee’s social guest, as a result of a defect in the property, and where no claim for damages had been made, declaratory relief was unavailable. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973). The *Diversified Indus.* Court held that the cause was not ripe for declaratory relief until a claim by the social guest became more discernible than an “unpredictable contingency.” *Id.* at 815. The

Court noted that the prospect of a claim by the social guest was left to speculation and conjecture because the record did not indicate the nature of the injuries or that a claim was imminent or threatened. *Id.* at 814.

In the present action, Jenkins seeks declaratory relief relating to the legality of operating, at some unstated future time, an Internet betting website that is “functionally-identical” to Betcha.com. Br. of Aplt. at 15; CR 536 In support of his argument that the facts are sufficiently developed to present a justiciable controversy, Jenkins relies heavily on the facts surrounding his creation of the original Betcha.com and its ultimate closure in 2007. Br. of Aplt. at 14-15. In short, Jenkins contends that the factual record relating to Betcha.com developed in the first declaratory action is sufficient to support a judicial determination in this action. Br. of Aplt. at 13-15. However, Betcha.com no longer exists and cannot serve as a factual basis for some future business venture that may never exist and may or may not function as Betcha.com did.

The “betting portion” of Betcha.com, as formerly conceived, ceased operations in 2007. CP 6. Betcha.com does not presently exist in either its prior form or some future incarnation—it is merely a business concept. While Jenkins acknowledges that he could take steps short of launching the new or reconstituted website—such as forming a corporation, opening an office, and hiring employees—he has done nothing other than state a desire to re-launch the previous business.⁹ Br.

⁹ Jenkins argues that he should not have to “go through the motions” and subject himself to potential civil or criminal penalty to avail himself of the benefits of the UDJA.

of Aplt. at 16, 18. Nothing in the record indicates that the formation of the new business venture is imminent.

Jenkins suggests that possessing the software for Betcha.com is sufficient to remove the facts from the realm of speculation. However, the record is silent as to whether or how the software created for Betcha.com could or would work with modification. In fact, the record is devoid of any evidence about what modifications would or could be made in the software, as the fee structure for the future website is undecided. Although the Complaint purports to identify the fees Jenkins would charge for use of the future website, the fee structure is purely speculative at this point. Regarding the fees his future business venture would *actually* offer, Jenkins states, “[w]hich ones only a court can tell me.” Br. of Aplt. at 15.

Accordingly, there is no justiciable controversy in this matter because Jenkins presented the trial court with what are, at this point, simply a hypothetical set of facts. As in *Port of Seattle*, here the dispute is based on events that have not come to pass and may never do so. While Jenkins created and launched Betcha.com in the past, those past actions do not make the launch of a possibly somewhat similar new company anything more than an idea. As Mr. Jenkins says (Br. of Aplt. at 16), the State cannot read his mind. And neither can the court. No one can know whether Mr. Jenkins will actually attempt to launch his hypothetical

Br. of Aplt. at 18. However, the trial court’s order did not opine on what facts would need to be developed in order to give rise to an issue ripe for review. It simply indicated that some facts need to exist to make the case justiciable and take it outside the realm of being merely an advisory opinion.

business. When, whether, or if a future business model is ever finalized, and what that model might look like, remain unknowable for the court. Until Jenkins' business concept becomes something more concrete than a speculative idea, this cause is not ripe for declaratory relief and would result in an inappropriate advisory opinion regarding the legality of a potential future business venture. *See Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.

2. A judicial determination of the issues presented would not be final and conclusive.

In supporting his argument that the trial court should not have dismissed his claims, Jenkins also contends that a judicial determination will be final and conclusive. Br. of Aplt. at 16. However, without a developed and existing factual basis underlying a decision in this case, there would be no certainty to the court's determination. Jenkins has asked the court to render an opinion on a moving target by basing the relief sought on speculative facts subject to change. Even if an otherwise justiciable controversy existed on which declaratory relief could be granted (regarding Jenkins' stated general business concepts), a decision regarding the legality, or illegality, of the currently proposed possible fees would not ensure that Jenkins would not come back before the court seeking a declaration on the legality of other fee structures in future attempts to circumvent RCW 9.46.0213 and the Supreme Court's prior adverse decision.

C. This Case Does Not Present Any Issues of Major Public Importance

Jenkins argues for the first time on appeal that this case presents issues of major public importance sufficient to overcome the justiciability requirement of the UDJA.¹⁰ Br. of Aplt. at 19-20. Contrary to Jenkins' assertion, the issues presented in this litigation are entirely private in nature and are not of major public importance.

A court may exercise its discretion in favor of reaching an issue that is otherwise not justiciable where the issue before the court is one of great public interest, where the issue has been adequately briefed and argued, and where an opinion of the court would be beneficial to the public and to other branches of government. *Snohomish County v. Anderson*, 124 Wn.2d 834, 840–41, 881 P.2d 240 (1994); *State ex rel. Distilled Spirits Inst. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972). In determining whether an issue is of major public importance, courts look to the public interest of the subject matter “and the extent to which public interest would be enhanced by reviewing the case.” *Id.* at 841.

In support of his assertion that the instant lawsuit presents issues of major public importance, Jenkins contends that this action presents substantially the same questions of statutory interpretation as his first declaratory action, which the State admitted were of significant public

¹⁰ In the briefing he submitted to the superior court, Jenkins focused primarily on the impact resolution of the issues would have on his ability to operate an Internet betting web site in the future and the guidance it would offer to future customers of the proposed web site. CR 57-58, 536, 550.

interest. Br. of Aplt. at 19. While Jenkins is correct that important questions of statutory interpretation existed prior to the Supreme Court's ruling in *Internet Community & Entertainment Corp.* those questions have now been resolved. In fact, this lawsuit seems to be primarily focused on Jenkins' dissatisfaction with that earlier decision. The questions and issues he advances here bear only on his ability to reopen a website that is "functionally identical" to Betcha.com, which has been held to be an illegal bookmaking operation.

The present lawsuit advances no issues of broad overriding public import; rather, it seeks resolution of issues that are private in nature. Nothing in the record indicates that the public or other branches of government would benefit from a decision in this case. Therefore, in the absence of a justiciable controversy, the trial court correctly held that it should not invoke its jurisdiction under the UDJA or otherwise consider the merits of Jenkins' asserted claims.

D. Jenkins' Argument Regarding "Extra-Legal Sentiments" is Without Merit

Jenkins' final argument on appeal is that he is "vulnerable" to what he calls "extra-legal sentiments." Br. of Aplt. at 21-25. According to Jenkins, his vulnerability to these sentiments should not preclude remand for litigation on the merits. *Id.* However, to the extent that any of the assertions he makes in attempting to explain this amorphous and

unsupported argument are even legal in nature, they do not bear any relation to the issue of justiciability.¹¹

V. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court affirm the trial court's ruling granting summary judgment in favor of the State and dismissing this cause of action.

RESPECTFULLY SUBMITTED this 14th day of March, 2012.

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¹¹ To the extent Jenkins argues about the interpretation of the provisions of RCW 9.46, the Supreme Court's holding in *Internet Community & Entertainment Corp.*, or the earlier dissent at the Court of Appeals, such matters are not at issue in this appeal.