No. 79350-1-I

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

OMAR ABDUL ALIM, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County
No. 18-2-18114-3 SEA

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

None of Defendants'[1] arguments in the Response Brief ("Resp. Br.") indicate that dismissal with prejudice of this lawsuit is either legally correct or just and fair. "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (internal quotation mark omitted). As explained in the Opening Brief ("Op. Br."), Plaintiffs allege a justiciable case in the proposed First Amended Complaint ("FAC"). Op. Br. 29–30; CP 203–11. Now, with Seattle Ordinance 12560 ("the Ordinance") enforceable against Plaintiffs and tens of thousands of other individuals in the City of Seattle, the justiciability of Plaintiffs' declaratory judgment claim is crystal clear.

Defendants' near silence regarding justiciability of the facts alleged in the FAC is deafening. Individual plaintiff Omar Alim alleges that he would need to purchase a gun safe in order to comply with the "locked container" storage requirement in the Ordinance. Mr. Alim alleges that when all authorized users are out of the house he has firearms that he does not store in a locked container. CP 208. Mr. Alim further alleges facts showing that he is not carrying or in control of firearms not secured in a locked container at times when he is at home, or when he is asleep. *Id.* Mr.

[1] Throughout briefing, the parties have referred to Appellants as "Plaintiffs" and Respondents as "Defendants."

Alim further alleges facts that show that a minor could possibly gain access to a firearm that is stored in a manner that violates the Ordinance. *Id.* Defendants barely address these allegations. Resp. Br. 42–43.

Similarly, Defendants scarcely address Plaintiffs' argument that the Ordinance is now enforceable and that Plaintiffs' storage practices have not changed. *Compare* Resp. Br. 19 *with* Op. Br. 19 n.4. Previously, Plaintiffs were not able to allege a current violation of the Ordinance during the enforcement period. If this Court orders remand, Plaintiffs will be able to make these factual allegations and render almost all of Defendants' justiciability arguments moot.

Defendants also minimize Plaintiffs' argument that the original complaint states a justiciable claim under the liberal pleading standards. Defendants, arguing that the standard of review for Rule 12(b)(1) should apply, attempt to portray that standard of review as meaningfully, dispositively narrower than the standard under Rule 12(b)(6). Defendants are incorrect: courts apply procedural protections to both Rule 12(b)(6) and facial Rule 12(b)(1) motions to dismiss, and in both cases courts must construe the complaint liberally and consider all reasonable inferences. Plaintiffs' allegations in the original complaint raise direct inferences that firearms will inevitably be stored unlocked and out of Plaintiffs' control when, for example, Plaintiffs are not at home. Op. Br. 16–17. The trial court

erred by failing to consider this obvious inference; especially since Defendants concede that storage when not at home is storage outside of Plaintiffs' control. *E.g.*, CP 23, 129; VRP 8:15–19. These inferences are anchored in the complaint and squarely within precedent.

Because Defendants cannot rebut the allegations in the FAC, or the current storage practices in violation of the Ordinance, or the direct inferences from the complaint, the Response Brief is littered with distortions. Defendants boldly speculate about Plaintiffs' state of mind.[2] Defendants conjure findings regarding delay, motive, and more.[3] The trial court made no such findings. CP 134–36, 240–41; VRP 30–31. There is no support in the record for a finding of undue delay or dilatory motive here, where the trial court denied leave to file a first amended complaint in a lawsuit pending for less than four months. And rather than confront the impropriety of the trial court's dismissal of Plaintiffs' case with prejudice, Defendants extensively analyze an imaginary CR 15 motion (Resp. Br. 30–33).

Defendants argue that a party that loses a contested motion to

[2] Without basis, Defendants presuppose that Plaintiffs undertook several "strategic decision[s]" (Resp. Br. 2, 38); that Plaintiffs decided to "gamble" (*id.* at 3); and that Plaintiffs "withheld" or "elected to withhold" information (*id.* at 4, 34).

[3] *See* Resp. Br. 10, 35, 37, 38.

dismiss should not be allowed to amend unless preemptively submitting amended pleadings before the trial court's ruling (Resp. Br. 3), but that is not the rule. The question of whether Plaintiffs might have amended the complaint a step earlier in the process is also not the dispositive issue. The issue before this Court is whether the trial court erred in granting Defendants' motion to dismiss, dismissing the case with prejudice, and abused its discretion when denying Plaintiffs' motion for reconsideration in light of the general rule not to dismiss a case if amendment might not be futile. *Culpepper v. Snohomish Cty. Dep't of Planning & Cmty. Dev., Cmty. Dev. Div.*, 59 Wn. App. 166, 176, 796 P.2d 1285, 1291 (1990). Since there are no findings or apparent reasons to deny Plaintiffs their right to test the merits of their declaratory judgment claim, leave to amend should have been "freely given" and this Court should remand for further proceedings.

II. REPLY ARGUMENT

A. Plaintiffs' First Amended Complaint Alleges a Justiciable Dispute

Plaintiffs have alleged a justiciable case. Specifically, Mr. Alim's allegations in the FAC establishes justiciability under any of the applicable standards.

The Ordinance states that firearms may be lawfully stored if "secured in a locked container, properly engaged so as to render such weapon inaccessible . . . ." CP 41–42. As Mr. Alim states in the Complaint

and FAC, he owns and stores firearms, and he does not own a gun safe or other locked container. CP 2, 204, 208–09. Mr. Alim alleges that in order to comply with the Ordinance and to store firearms in a locked container, he would be compelled to purchase a gun safe. CP 208–09.

The Ordinance also provides that firearms may be lawfully stored "if carried by or under the control of" a lawfully-authorized user. CP 41–42. Specifically, Mr. Alim provides the following factual allegations:

- Mr. Alim stores unlocked, accessible firearms in his home when no lawfully authorized user is present. CP 208.
- He stores unlocked, accessible firearms in his bedroom when he is home, so that they are not carried and often not under the control of any lawfully-authorized users when those users are elsewhere in the house (*e.g.* the kitchen, downstairs, the garage). *Id.*
- He stores an unlocked, accessible firearm on a different floor than the one on which he sleeps, and on the same floor as and in closer proximity to one of his minor children. *Id.*

The Ordinance does not define "control."[4] But under any sensible understanding of "carried by or under the control," Mr. Alim often and

[4] *See Com. v. Patterson*, 79 Mass. App. Ct. 316, 319–20, 946 N.E.2d 130 (2011) (examining location, proximity, and "ability to immediately reach" to determine that a firearm in an upstairs closet when defendant was downstairs was outside the defendant's control).

repeatedly does not carry or control his unlocked firearms, putting him in violation of the Ordinance. The factual allegations in the FAC also show that Mr. Alim states a justiciable claim regarding SMC 10.79.030. Mr. Alim's minor child has access to a firearm and could realistically obtain it. If these allegations do not invoke declaratory judgment jurisdiction, it is hard to imagine what could possibly satisfy Defendants' proposed standard.[5]

The City of Seattle is now allowed to enforce and impose penalties for violation of the Ordinance. CP 47. Mr. Alim has not changed his storage practices, and he is now in violation of the Ordinance. Op. Br. 19 & n.4. Questions and arguments about the individual plaintiffs' intent to violate the Ordinance are moot.

Defendants offer tepid arguments for why Mr. Alim's allegations do not allege a justiciable case. First, invoking the federal ripeness test (and not applying the *Diversified Industries* test) Defendants argue that Mr. Alim has not alleged a personal hardship. Resp. Br 42–43. Not only is this the wrong test, it is not true: Mr. Alim alleges that he would either need to purchase a gun safe in order to comply or he is subject to enforcement and

[5] As previously argued, the Court should also remand this case to allow the trial court to consider preemption of both SMC 10.79.020 and 10.79.030 due to the broad overriding public importance of the issue, especially in light of the statewide enactment of I-1639. *See* Op. Br. 18 & n.3.

fines of $500 or more. CP 208–09. In effect, Defendants are arguing to nullify the Uniform Declaratory Judgment Act ("UDJA") and prevent any and all pre-enforcement review of the Ordinance.

Second, Defendants argue that Mr. Alim should not be allowed to supplement his allegations "at such a late stage" by providing the additional allegations in a proposed first amended complaint, before Defendants had answered and discovery had commenced. Resp. Br. 42. This argument is contrary to the record and contrary to law. *See infra* Sections B, C. This argument also has nothing to do with whether or not the FAC states a justiciable case, or whether permitting amendment would be futile.

Turning to the other plaintiffs, individual plaintiff Michael Thyng also alleges that he keeps unlocked firearms in his home for self-defense purposes. CP 205. Like Mr. Alim, Mr. Thyng will inevitably have unlocked firearms outside of his immediate reach in his home, putting him at risk of violating the Ordinance.

The organizational plaintiffs rely (in part) upon the factual allegations of their members as represented by the individual plaintiffs. *Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 791, 613 P.2d 769, 774 (1980). Mr. Thyng is a member of SAF and the NRA, and Mr. Alim is a member of the NRA. CP 205. And the organizational plaintiffs affirm that they oppose the broad bright-line requirement in the

Ordinance to use a locked container for firearms storage. CP 205, 209. Defendants mischaracterize the organizational plaintiffs' purpose by cherry-picking certain general statements. But the organizational plaintiffs have an interest in ensuring their members will be free to choose the safe storage model that is best suited to each individual member, rather than abiding by the overly strict and potentially ineffective method required by the Ordinance. CP 208–09; *see* CP 150 & n.3. Further, the organizational plaintiffs have an interest in ensuring that their members are free from confusing, overlapping, *ultra vires* regulation of firearms. *Id.*; *see* Atty Gen. Op. 1983 No. 14, at 1 (1983).

Regardless of whether the Court approaches the allegations in the FAC under a Rule 12(b)(1) or a Rule 12(b)(6) standard, the FAC meets the *Diversified Industries* test. Here, where Defendants make a facial challenge to the allegations and the facts are not disputed, justiciability is a question of law that this Court reviews de novo. *City of Longview v. Wallin*, 174 Wn. App. 763, 777, 301 P.3d 45, 53 (2013). Review of a motion for reconsideration or a motion to amend regarding a purely legal issue—such as futility or justiciability—is de novo. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812–13, 440 P.2d 834, 839 (1968); *see Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint

could not be saved by any amendment."). In any event, to the extent the trial court determined that the FAC does not state a justiciable case, such a ruling is untenable under the applicable legal standard. *See Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

Because the FAC states a justiciable case, the trial court's ruling on futility was incorrect and the trial court erred by dismissing the case with prejudice. *See infra* Section B. Even if the trial court's dismissal of the original complaint was correct, this Court should reverse the dismissal with prejudice and remand. Next, the justiciability of the FAC shows that the trial court abused its discretion by denying the motion for reconsideration. *See infra* Section C. And the justiciability of the FAC also shows that the original complaint (and the available direct inferences) was sufficient and should not have been dismissed. *See infra* Section D.

B. The Trial Court Erred When Dismissing the Case With Prejudice

The trial court erred by dismissing Plaintiffs' lawsuit with prejudice based on a finding of futility. The trial court dismissed the initial complaint at the hearing, despite Plaintiffs' request to be allowed to amend the complaint if the trial court found merit in Defendants' legal arguments. CP 108 (pointing out that permitting amendment will not prejudice Defendants at such an early stage in the case). "Such cases of clear futility at the outset of a case are rare, though, and this is not one of them." *Runnion ex rel.*

Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510, 519–20 (7th Cir. 2015).

In the absence of a finding of prejudice or the certainty of futility, a trial court should permit the plaintiff to propose an amended pleading. *Culpepper*, 59 Wn. App. at 176. This Rule 15 standard applies both to pre-judgment and to post-judgment motions to amend. *Id.*; *see Runnion*, 786 F.3d at 521–22 (citing post-judgment relief granted in *Foman*); *Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011).

The trial court cannot nullify the liberal right to amend under Rule 15 simply by prematurely dismissing with prejudice. Federal courts strongly criticize such hasty dismissals with prejudice of an original complaint.[6] Ordinarily, "a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed." *Runnion*, 786 F.3d at 519. Consequently, federal appellate courts "rigorously" review a trial court's denial of any opportunity to amend. *Id.*

Professors Wright and Miller explain that the policy preference in the civil rules for deciding cases on the merits rather than on technicalities

[6] As Defendants acknowledge, Washington courts often look to federal authority for guidance in interpreting Rule 12(b). *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119 n.5, 147 P.3d 1275 (2006) (Madsen, J., concurring) (collecting cases).

> requires that plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading. Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim. The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim.

Id. (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)).

Defendants argue that a contrary rule should apply. Citing only Rule 15 and *Hook v. Lincoln County Noxious Weed Control Board*,[7] Defendants argue that a party must proffer a proposed amended pleading or its proposed allegations before the court dismisses, or else dismissal with prejudice is appropriate. Resp. Br. 31, 40. With no other authority to cite, Defendants justify this rule on "judicial efficiency." This legal standard for pleadings and amendment is upside down: in the absence of a finding of prejudice, bad faith, undue delay, or futility, dismissal with prejudice and without leave to amend is an abuse of discretion. *Herron v. Tribune Pub. Co., Inc.*,

[7] Defendants' reliance on *Hook* is ironic. Defendants invoke *Hook* for the proposition that a failure to submit proposed amended pleadings is fatal to a motion to amend, ignoring the fact that Plaintiffs' submission of a proposed amended pleadings along with Plaintiffs' motion for reconsideration follows the procedure required by the court in *Hooks* at the same procedural posture. 166 Wn. App. 145, 159–60, 269 P.3d 1056, 1063–64 (2012) (affirming trial court because the plaintiff failed to provide an amended complaint along with the motion for reconsideration).

108 Wn.2d 162, 166, 736 P.2d 249, 253 (1987) ("In all cases, the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." (quotation marks omitted)); *Culpepper*, 59 Wn. App. at 176.

The trial court did not make any findings regarding prejudice, bad faith, or undue delay—and the record does not remotely support any such finding. *See infra* Section C. The trial court appears to have dismissed the case with prejudice based solely on futility, stating that "I have not heard, nor could I envision a pleading that would cure this, and so it's with prejudice." VRP 31:2–3. After the trial court ruled, Plaintiffs promptly requested leave to amend the original complaint. *Runnion*, 786 F.3d at 520 (observing that it is "especially advisable" to permit amendment "when such permission is sought after the dismissal of the first complaint."). As discussed *supra* in Section A, the trial court's futility ruling is incorrect and the trial court should not have dismissed the case with prejudice.

Defendants' focus on proffer is a red herring. It is also simply incorrect. Courts may not dismiss complaints with prejudice because of the absence of a proffer unless the complaint is futile as a matter of law. *See Contreras v. Toyota Motor Sales U.S.A. Inc.*, 484 Fed. App'x 116, 118 (9th Cir. 2012) (holding that the district court should have allowed plaintiffs the opportunity to submit an amended complaint, even though plaintiffs did not

proffer any facts on economic harm, because it "might not be futile"). This could have been a different case if the trial court had requested a proffer, or asked any questions relevant to the dispositive issues to determine futility, but those facts are not in the record here.

Nor were Plaintiffs required to submit a proposed amended complaint along with their opposition to the motion to dismiss, as Defendants argue. Resp. Br. 30–33. Such a rule would be wildly impractical. Litigants should not be required to make proffers on each possible dispositive issue before the court rules. Neither Washington courts nor courts in other jurisdictions require pre-dismissal proffers. [8] This is especially true here, where the parties clashed on which legal tests to apply. CP 26–27 (Defendants citing federal law on standing and ripeness and arguing "concrete intent" is the touchstone); CP 100–03 (Plaintiffs citing *Diversified Industries* and focusing on the dilemma between compliance

[8] *See, e.g., United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Company*, 839 F.3d 242, 251-52 (3d Cir. 2016) (absent other circumstances, party who waits to see if court will find complaint insufficient and then immediately seeks leave to amend has not engaged in undue delay warranting denial of leave to amend); *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("[T]he court treated Plaintiff's decision to stand by the complaint . . . as a forfeiture of the protections afforded by Rule 15. This was, in our view, premature and inconsistent with the course of litigation prescribed by the Federal Rules."); *Runnion*, 786 F.3d at 523 ("[A] plaintiff who receives a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may also choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal leave standard for amendment with leave of court under Rule 15(a)(2).").

and enforcement). And while Defendants claim that the liberal policy of amendment is unworkable because parties will be allowed more than one attempt to plead, courts are well-equipped to effectively supervise litigants under Rule 15.

C. The Trial Court Erred by Denying the Motion for Reconsideration

For the above reasons, the trial court also abused its discretion when denying the motion for reconsideration. Plaintiffs moved for reconsideration and provided a proposed amended complaint. *Cf. Hook*, 166 Wn. App. at 159–60 (requiring a proposed amended complaint along with a motion for reconsideration). Plaintiffs' motion for reconsideration demonstrates, among other things, that dismissal with prejudice was incorrect because amendment was not futile.

Defendants complain that Plaintiffs' motion for reconsideration is procedurally incorrect because it raises "new arguments and new facts." Resp. Br. 37; *but see* CP 217 (arguing that Plaintiffs' "motion raises no new facts and no new law."). Defendants also claim that Plaintiffs failed to identify any error of law. Resp. Br. 4; *but see* CP 143, 146–47 (identifying trial court's erroneous legal rulings). Defendants' argument, if correct, would essentially bar post-judgment motions to amend pleadings and would nullify cases like *Hook* and *Katyle*. But each of the cases that Defendants rely upon are distinguishable and not applicable.

Defendants rely upon *Rose* to argue that Plaintiffs must provide justification or prove excusable neglect in order to amend the complaint post-judgment. Resp. Br. 38. But *Rose* involved a motion for reconsideration under CR 60(b)(1) (excusable neglect) and CR 59(a)(3) (accident or surprise), which is why the plaintiff had to prove excusable neglect. *Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 119, 15 P.3d 1062, 1063–64 (2001). The motion for reconsideration here is based upon an entirely different provision. CP 143 (citing CR 59(a)(8)). And in *Wilcox*, the appellant had argued theories of mutual mistake during summary judgment, and then switched to argue new facts and new legal theories of misrepresentation and contract by adhesion in the motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729, 732 (2005). This case is entirely different because Plaintiffs presented no new legal theories. Here, Plaintiffs brought a declaratory judgment claim based on factual allegations, and filed a subsequent motion for reconsideration to provide additional facts to demonstrate that the same

declaratory judgment claim was not futile.[9]

Last, Defendants repeatedly suggest that the trial court correctly entered final judgment and denied the motion for reconsideration based on undue delay and dilatory motive. Resp. Br. 10 ("[T]he Superior Court properly denied Plaintiff's motion for reconsideration, because they provided no excuse for their delay in supplying a proposed amended complaint."). But the trial court made no such finding at the hearing or when denying the motion for reconsideration. CP 240–41. Unless the trial court relied upon its prior finding of futility, the denial of the motion for reconsideration without findings or a basis is an abuse of discretion on its face. *Culpepper*, 59 Wn. App. at 176 ("[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion . . . ." (quoting *Foman*)).

[9] Defendants also cite *U.S. Bank Nat'l Ass'n as Tr. for Lehman XS Tr. Mortgage Pass-Through Certificates v. Stanton*, 77638-0-I, 2019 WL 1245654 (Wash. Ct. App. Mar. 18, 2019) (unpublished) without identifying it as unpublished and having no precedential value, in violation of General Rule 14.1(a). *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731, 733 (2017). This is not Defendants' first breach of GR 14.1. *See* CP 234 n.2. Plaintiffs move to strike these portions of the Response Brief. In any event, *U.S. Bank* is also completely distinguishable because the motion to amend in that case came a year after the complaint's filing and on the eve of trial.

Despite Defendants' mischaracterizations of the record,[10] there is no support for a finding of delay or bad faith where the trial court denied leave to amend the original complaint in an under-four-months-old lawsuit. Likewise, the record is simply devoid of a scintilla of prejudice to Defendants. This Court should reverse the denial of the motion for reconsideration and remand to permit Plaintiffs to file an amended complaint.

D. The Original Complaint Alleges a Justiciable Dispute

The Court does not need to reach the issue of the dismissal of the original complaint if it reverses and remands based on the erroneous dismissal with prejudice or denial of the motion for reconsideration. Regardless of how the Court resolves this appeal, Plaintiffs intend to submit amended pleadings if this Court orders remand.

The parties disagree on whether the motion to dismiss the original complaint should be analyzed under Rule 12(b)(1) or Rule 12(b)(6). Plaintiffs have maintained from the start that the UDJA should be analyzed under Rule 12(b)(6). CP 94–95, 143–46; 236 n.5. Although on appeal

[10] For example, Defendants misleadingly suggest that the parties discussed Plaintiffs' "failure to attempt to allege facts sufficient to confer standing" during a meeting between counsel. Resp. Br. 7. No such discussion took place. As counsel for Defendants stated in his declaration, when conferring about briefing and case scheduling counsel merely asked if Plaintiffs intended to file a responsive amended complaint or to file an opposition to the motion to dismiss. CP 230.

Defendants portray significant differences between the two rules, Defendants have previously equivocated as to what standard applies. CP 127; VRP 16:3–4. The trial court apparently ruled that the standard did not matter in this case, and that the complaint failed under either test. VRP 186:13–14 ("[W]hether under 12(b)(1), which I think is the appropriate avenue, or 12(b)(6).").

Because Washington law permits the courts to invoke the UDJA for matters of public importance, *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004), it follows that our courts of general jurisdiction have the general authority to render declaratory judgments, although such authority is prudentially limited to justiciable cases. The UDJA justiciability cases are therefore more akin to determining whether the parties state a cognizable claim under Rule 12(b)(6) than whether the courts have been granted authority by the Washington State Constitution to decide the case under Rule 12(b)(1), or the corresponding federal case law under Article III of the United States Constitution. Moreover, Washington courts have repeatedly applied Rule 12(b)(6) to questions of whether parties satisfy the *Diversified Industries* test under the UDJA. *E.g.*, *Ames v. Pierce Cty.*, 194 Wn. App. 93, 105–06, 114, 374 P.3d 228 (2016); *id.* at 123–25 (applying Rule 12(b)(6) standards and arguing that plaintiff stated a declaratory judgment claim) (Bjoren, J.,

dissenting).[11]

As a practical matter, a complaint should be dismissed under Rule 12(b)(6) "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" and Rule 12(b)(6) motions should be granted "sparingly and with care." *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988) (quoting *Wright & Miller* and other federal secondary sources). Washington courts have applied this guidance and held that Rule 12(b)(6) motions "should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to a valid claim, even if the facts are alleged informally for the first time on appeal." *Fondren v. Klickitat Cty.*, 79 Wn. App. 850, 854, 905 P.2d 928, 930 (1995) (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)).

Under the pleading protections afforded to litigants under Rule 12(b)(6), the trial court erred by granting the motion to dismiss. The facts alleged, and the direct inferences available from the facts alleged, demonstrate that Plaintiffs engage in conduct that is prohibited by the

[11] A number of unpublished decisions also apply the Rule 12(b)(6) standard. *E.g., Harbor Plumbing v. Washington State Dep't of Labor & Indus.*, 51767-1-II, 2018 WL 3640906, at *2–3 (Wash. Ct. App. July 31, 2018) (unpublished). This case has no precedential value, is not binding on any court, and Plaintiffs cite it only for such persuasive value as the Court deems appropriate. *See* GR 14.1.

Ordinance and allege a justiciable dispute. Op. Br. 15–24. For example, while Defendants argue that the original complaint does not explicitly allege whether Mr. Alim leaves firearms unsecured when he leaves the house, Resp. Br. 20, Mr. Alim has alleged that he does not own a gun safe to secure his firearms under the Ordinance, leading to the natural inference that he does not and cannot comply with the Ordinance when he keeps firearms at home and inevitably leaves the house.

Additionally, Plaintiffs asserted additional facts giving rise to a facially valid claim. Although Plaintiffs could do this for the first time on appeal, *Fondren*, 79 Wn. App. at 854, these facts are already in the record within the proposed FAC. The FAC contains additional facts that are consistent with the complaint and reinforce the inferences that the trial court should have considered when ruling on the original complaint. Defendants do not even address the impact of the additional facts alleged in the FAC, and instead contend that Plaintiffs' application of the Rule 12(b)(6) standard is "unmoored" and "contorted." Resp. Br. 20. But Plaintiffs' argument is anchored in the complaint, where Mr. Alim alleges that he would need to purchase a gun safe to comply (CP 2), that he stores (rather than carries) firearms unlocked and in violation of the ordinance (CP 2, 6), and where there is no allegation that he always remains in his home or carries his firearms at all times. Whether Mr. Alim stores his firearms in plain view or

under a pillow (Resp. Br. 20) is irrelevant. And Plaintiffs do not contort *Haberman* and *Bravo*, but instead apply those precedents with reference to actual facts alleged in the FAC. The allegations here are well within Washington Supreme Court precedent, and reversal and remand here would break no new ground nor create a "parade of horribles" as insinuated by Defendants.

To avoid this result, Defendants argue that the standards under Rule 12(b)(1) apply, and that those standards do not permit this Court to apply the Rule 12(b)(6) procedural protections. But even Defendants' case states that the standard does not differ in any significant respect. Justice Madsen, concurring in *Wright v. Colville Tribal Enterprise Corp.*, explains that "[a] plaintiff confronting a facial challenge enjoys many of the procedural protections afforded under CR 12(b)(6)." 159 Wn.2d 108, 119, 147 P.3d 1275, 1282 (2006). When no factual allegations are disputed, and matter outside the pleadings is not considered, the standard for Rule 12(b)(1) is essentially the same as for Rule 12(b)(6). *Id.*; *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (cited by *Wright*); *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981); *see Aversa v. United States*, 99 F.3d 1200, 1209–10 (1st Cir. 1996) ("In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true

and indulging all reasonable inferences in favor of the plaintiff.").

Defendants have cited no case law that supports the argument that the trial court could not draw reasonable inferences from the allegations in the complaint, or that *Haberman* and *Bravo* do not apply to Rule 12(b)(1) facial challenges. Therefore, even assuming Defendants are correct that Rule 12(b)(1) applies, the trial court still erred by dismissing the complaint and denying the motion for reconsideration.

Finally, Defendants' insistence that Rule 12(b)(1) applies provides this Court with an additional reason to reverse and remand. Justice Madsen, in the same concurrence, states the principle that dismissals based on jurisdiction should not be with prejudice and should not preclude a subsequent lawsuit when concerns over ripeness or standing have been resolved. *See also* Op. Br. 30–31. "Unlike a CR 12(b)(6) dismissal, a CR 12(b)(1) dismissal has no preclusive effect, is immediately appealable, and may be based on evidence outside of the pleadings." *Wright,* 159 Wn.2d at 119 (citing *Moore's Federal Practice*). Defendants cannot have their cake (no Rule 12(b)(6) procedural protections for Plaintiffs) and eat it too (preclusive dismissal of Plaintiffs' case).

III. CONCLUSION

Plaintiffs respectfully request that this Court vacate the trial court's dismissal with prejudice, and remand this declaratory judgment action for

further proceedings.

DATED this 25th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Appellants herein.

2. On this date, I caused a true and correct copy of the foregoing document to be served on the following parties:

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

DATED: July 25, 2019, at Seattle, Washington.

s/ Monica Dawson
Monica Dawson

CORR CRONIN LLP

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