

FILED
Court of Appeals
Division III
State of Washington
2/12/2024 4:19 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
2/13/2024
BY ERIN L. LENNON
CLERK

Supreme Court No. 102791-5

COA No. 389910-III

SUPREME COURT
OF THE STATE OF WASHINGTON

COWLES COMPANY,
Appellant/Cross-Respondent,

v.

JEFFREY THURMAN,
Respondent/Cross Appellant/Cross-Appellant/ Petitioner for
Review.

PETITION FOR DISCRETIONARY REVIEW

MARY SCHULTZ
WSBA # 14198
Mary Schultz Law, P.S.
2111 E. Red Barn Lane
Spangle, WA 99031
(509) 245-3522, Ext. 1
Mary@Mschultz.com
Attorney for Petitioner

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I. IDENTITY OF THE PETITIONER.

The Petitioner is Jeff Thurman, the Respondent in this appeal and Cross Appellant in Division III.

II. CITATION TO COURT OF APPEALS DECISION.

This petition requests this Supreme Court's review of Division III's published opinion in *Thurman v. Cowles Co.*, 541 P.3d 403 (Wash. Ct. App. 2024). A copy of the decision is in Appendix A at 001.

III. ISSUES PRESENTED FOR REVIEW.

1. Whether RCW 4.105 et seq's Uniform Public Expression Protection Act is constitutional under the U.S. Const. amend. I, the Washington State Constitution's Article I §5, Article I §10, and its Article I, § 12.

2. Whether RCW 4.105 impermissibly applies retroactively to remove vested rights in violation of the Washington Const. art. I, § 3.

3. Whether RCW 4.105's numerous conflicts with court rules, as Division III acknowledges exist, invalidates the

Act, or whether the court may simply rewrite the Act's statutory provisions, as Division III did here.

IV. STATEMENT OF THE CASE.

Petitioner Jeff Thurman was a decorated sergeant with the Spokane County Sheriff's Office before June 13, 2019. On that date, Defendant Cowles Company (Cowles) published a highly defamatory and inflammatory false headline and other false statements calling, and portraying, Sgt. Thurman as, a racist. On September 3, 2019, now-former Sgt. Thurman sued the Spokane County Sheriff for defamation. *See Thurman v. Knezovich*, 25 Wn. App. 2d 126, 130, (2023). On June 14, 2021, Mr. Thurman filed a separate defamation complaint against Defendant Cowles. It had been revealed that Cowles's information originated exclusively from one questionable source—Spokane County's Sheriff, Ozzie Knezovich. No investigative journalism had been conducted before Cowles adopted and published the Sheriff's statements as Cowles's own, because of an agreement made in advance between Cowles's editor and the Sheriff. On December 23, 2022, a jury

awarded Mr. Thurman and his wife a combined total of \$19,480,000 in defamation and discrimination damages against the Spokane County Sheriff for the Sheriff's defamation. *See Thurman Response and Cross Appeal, p, 22.* On July 25, 2021, with Mr. Thurman's separate June 14, 2021 action against Cowles also underway, Washington's RCW Chapter 4.105, entitled the "Uniform Public Expression Protection Act," (the "Act") became effective. RCW 4.105.903.¹ It would be December 29,2021, 2022, five months after the Act's effective date, before Cowles invoked the Act, unilaterally issued its RCW 4.105.020 "notice" to Mr. Thurman,² and stopped Mr. Thurman's defamation case in its tracks, staying it for the duration of this appeal. RCW 4.105.030.³

The Spokane County Superior Court trial court held that RCW 4.105 et seq.'s Act is constitutionally valid. It denied

¹ Appendix at 020.

² Appendix at 013.

³ Appendix at 014.

application of the Act to Mr. Thurman's defamation claims against Cowles because he had filed those claims before the Act went into effect. Cowles appealed, and Mr. Thurman cross-appealed.

Division III upholds the trial court deeming RCW 4.105 et. seq. constitutionally valid, but reverses the trial court's ruling and holds that the Act applies to Mr. Thurman's defamation claims filed before the Act's effective date because of the wording of RCW 4.105.903's transitional provision. It holds that, since Mr. Thurman continued to "assert" his original defamation claims after July 25, 2021, the Act retroactively applies to his original complaint. Division III agrees that numerous provisions of the Act conflict with court rules, so it rewrites some of the Act's statutory provisions to align them with the court rules. It does so after holding that it has no ability to rewrite plain statutory language; its rewriting is selective. It upholds a mandatory fee provision "as written" that chills constitutional rights. Petitioner Thurman seeks review.

V. ARGUMENT AS TO WHY REVIEW SHOULD BE ACCEPTED.

The Court should accept review of Division III's ruling holding RCW 4.105's Uniform Public Expression Protection Act (Act) to be constitutional, because this is an issue of first impression. The ruling also involves significant questions of law under the Constitution of the United States and the Constitution of the State of Washington in that, while every person "may freely speak, write and publish on all subjects," citizens who abuse that right by defamation are "responsible for the abuse of that right" under Const. art. I, § 5,⁴ and the Act abrogates that constitutional responsibility, and denies its protections to citizens being defamed. Moreover, a significant question of law arises under the First Amendment of the United States Constitution,⁵ because this Act impermissibly interferes with defamation

⁴ Appendix at 028.

⁵ Appendix at 031.

victims' guaranteed right of access to the courts and right to petition the Government for redress of grievances. *Davis v. Cox*, 183 Wash. 2d 269, 289 (2015), ref. *Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 741 (1983). The ruling involves an issue of substantial public interest, because it upholds an Act which mandates the dismissal of defamation claims regardless of their merit, in violation of article I, § 5 and the First Amendment right of a victim to petition for relief from defamation. It chills constitutional rights under art. I, § 5, and the First Amendment by then mandating that the victim pay their defamer's fees, even when the victim's defamation claim has merit. Moreover, Division III has impermissibly applied the Act's transitional provision, RCW 4.105.903, retroactively, removing vested rights. Finally, the ruling conflicts with the principles established in *Putman v. Wenatchee Valley Med. Ctr.* 166 Wn.2d 974, 979 (2009), *Davis v. Cox*, 183 Wn.2d 269, 275, 351 P.3d 862 (2015), and *Lowy v. PeaceHealth*, 174 Wn.2d 769 (2012). Mr. Thurman asks this Court to accept review and

invalidate RCW 4.105 et seq. as unconstitutional, as applied to his defamation claims.

A. RCW 4.105 et seq.’s Uniform Public Expression Protection Act impermissibly abrogates defamation claims in the state of Washington.

Defamation is not protected speech. “[D]efamation is not the kind of public expression intended to be protected under the statute. (We agree).” *Thurman v. Cowles Co.*, 541 P.3d at 409. There is “no constitutional value in false statements of fact,” and false statements of fact do not advance any societal interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ref. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “There is no discernible compelling state interest in protecting false statements of fact directed at a private citizen.” *State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 135 Wn. 2d 618, 628 (1998). This state protects its citizens from defamation by enshrining accountability for that defamation in its Constitution at article 1 § 5. While a person “may freely speak, write and

publish on all subjects,” they are to be “responsible for the abuse of that right.” *Id.* Division III also agrees that “[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.” *Thurman v. Cowles Co.*, 541 P.3d at 411, citing *Bill Johnson's Rests., Inc. v. Nat'l Lab. Rels. Bd.*, 461 U.S. at 741. The legislature may not interfere with Washington citizens’ access to civil court rule processes to redress wrongs. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974; *Davis v. Cox*, 183 Wn.2d 269, 275 (2015).

Division III holds that “the UPEPA applies to all of Mr. Thurman's defamation claims.” *Thurman v Cowles*, 541 P.3d at 409. The Act abrogates accountability for defamation claims, however. The abrogation works through the statutes in sequence. A defamer collects their information for defamatory communication to the public, and under RCW 4.105.060(1),⁶ the court “shall dismiss the complaint with prejudice” now because

⁶ Appendix at 016.

(a) the Act (chapter) applies because the defamation claim against the defamer is based on what the defamer asserts is their RCW 4.105.010 (2)(c)⁷ "exercise of the right of freedom of speech or of the press...on a matter of public concern." The victim cannot then establish the second conjunctive prong of RCW 4.105.060 (1)(b), that the chapter does *not* apply under RCW 4.105.010(3), because per the latter, while "this chapter does not apply to a cause of action asserted...(iii) Against a person primarily engaged in the business of selling ...goods or services (e.g., print media, online media, bloggers or podcasters, as examples), if the cause of action arises out of a communication related to the person's sale ...of (their) goods or services" under RCW 4.105.010(b), "This chapter *applies* to a cause of action asserted under (that same) subsection (a)(iii) "when the cause of action is:

(i) A legal action against a person arising from any act of that person, whether public or private, related to the

⁷ Appendix at 010.

gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, ... no matter the method or extent of distribution...”
RCW 4.105.010 (3)(b)(i).

A defamation claim asserts legal action against a defamer for these very things. Thus, the defaming, e.g., podcaster need only say that they were gathering, receiving, or posting information for communication to the public, and for the dissemination of dramatic or artistic (or journalistic) work. The defamation action against them must now be dismissed under RCW 4.105.060 (1)(a) and (b). Subsection (1)(c) of RCW 4.105.060’s mandatory dismissal statute is irrelevant, because the defamation claim is terminated at section (1)(b). The RCW 4.105.060 dismissal showings are conjunctive “and” showings, meaning that if section (1)(b) cannot be shown, as it cannot be when the defamer says they were intending to publish their defamation as artistic work, then section (1)(c) is not reached.

Because section (1)(b) cannot be met, the court “shall dismiss the complaint with prejudice.” RCW 4.105.060 (1). This Act thereby abrogates all accountability for defamation, because all a defamer need do is publish their defamation as communication to the public. Defamation is not excepted. The Act has no merit requirement. The Act thereby impermissibly abolishes the article 1 § 5 constitutional right of a defamation victim to make their defamer “responsible for the abuse of that right.”

The Act also impermissibly interferes with a victim’s First Amendment right to petition. The Act’s statutory processes violate Wash. Const. art. I, § 10,⁸ because the processes deny Mr. Thurman the administration of justice “without unnecessary delay.” The administration of justice under art. 1 § 5 guarantees a victim of defamation the right to hold their defamer accountable for abuse of speech rights. The Act abrogates this right as well. It allows the defamer to unilaterally stop a

⁸ Appendix at 023.

defamation claim process for *years*, regardless of the defamation claim's merit and the damage being caused. The defamer need only send a letter to their victim referencing RCW 4.105.020 (1). That letter "stays" the civil proceeding for *years*. The letter implements a stay of the defamation proceeding through appeal. Specifically, the letter issued unilaterally by the defamer mandates that the victim now "comply with the stay obligations listed in RCW 4.105.030." *Id.*, at .020. The stay provision of RCW 4.105.030 (1)(a) applies from the date of the defamer's letter to the conclusion of all appeals, regardless of what a trial court does with discovery or anything else. "All other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed." *Id.*, at .030. The Act's section .030 stay remains in effect "until entry of an order ruling on the motion under RCW 4.105.020." RCW 4.105.030 (2). The stay then continues

through “expiration of the time under RCW 4.105.080⁹ for the moving party to appeal the order.” *Id.*, at .030. When the appeal is filed, the stay now “remains in effect until the conclusion of the appeal.” RCW 4.105.030(3). Moreover, this appeal is a matter of *right*. RCW 4.105.080. No merit showing need be made as would be for, e.g., discretionary review. The stay will now remain in effect for years, as it has here, from the time Cowles sent its RCW 4.105.020 letter to Mr. Thurman on December 29, 2021 (CP570-71), until today, February 12, 2024. The Act’s statutory processes violate Wash. Const. art. I, § 10, because they deny Mr. Thurman, as a defamation victim, the administration of justice without unnecessary delay, as well as his art. 1 § 5 right to hold his defamer accountable for abuse of speech. The appellate court has no choice but to allow the appeal under RCW 4.105.080. Division III has rewritten this “appeal as of right” because “RCW 4.105.080 is inconsistent with RAP 2.2(d), and

⁹ Appendix at 018.

cannot be given effect. Stated differently, unless and until our Supreme Court adopts a rule allowing for direct appeal of orders denying motions under RCW 4.105.020, appellate courts should accept review of these matters only under discretionary review standards. *Thurman v. Cowles Co.*, 541 P.3d at 412. Elsewhere, however, Division III holds that " we must apply the statute as written—"we cannot rewrite plain statutory language under the guise of construction... [I]f the plain language is unambiguous, we apply that meaning." *Id.* at 409. The defendant's appeal stays the action, and must be entertained.

The stay provision of section .030, the dismissal section of section .060, and section .080's "appeal as a matter of right from an order denying, in whole or in part, a motion under RCW 4.105.020," renders the Act's limited "discovery" processes illusory, because discovery is meaningless. The defamation action will be dismissed under RCW 4.105.060(1), and any ruling denying that dismissal "in whole or in part," is appealable as a matter of right by the defaming defendant. The stay will

remain in effect until the conclusion of the appeal. RCW 4.105.080, and .030(3). Because the limited discovery provision becomes meaningless, it thereby conflicts with *Lowy v. PeaceHealth*, 174 Wn.2d 769 (2012), which ties the right to discovery “to the constitutional right of access to the courts.” In sum, Division III errs in holding this Act to be constitutionally valid where it abrogates Washington’s art. 1 § 5, as well as art. I, § 10’s right to the administration of justice “without unnecessary delay,” and the First Amendment right of access to the courts as an aspect of any meaningful right to petition the Government for redress of grievances, per *Davis v. Cox*, 183 Wn.2d at 289. As this Court writes in *Davis v Cox*, statutes that seek to protect one group of citizens (here, who are not even engaged in protected speech) by “cutting off another group’s constitutional rights of petition,” are invalid. 183 Wash. 2d at 295. This Supreme Court should accept review and deem this Act invalid.

B. RCW 4.105.020, .030, .060, .080, and .090 grant impermissible special privileges and immunities to those publicly defaming others.

For the same reasons stated above, RCW 4.105 et seq. accords a special privilege (and an immunity from suit) to a defamer who is not engaged in protected speech, by infringing upon the rights of a group of citizens who are exercising such rights, and bringing claims of merit. Wash. Const. art. I, § 12.¹⁰ Division III errs in applying a “rational basis” test to this argument, because, as Division III recognizes, strict scrutiny applies where “an allegedly discriminatory statutory classification affects a...fundamental right.” *Thurman v. Cowles Co.*, 541 P.3d at 412, ref. *State v. Schaaf*, 109 Wn.2d 1, 17 (1987). As discussed above, RCW 4.105 affects fundamental rights under the cited constitutiona provisions. Moreover, there

¹⁰ Appendix 030.

is neither a “rational basis” nor a compelling state interest in protecting defamation as this statute does. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d at 628.

This Supreme Court should accept review.

C. RCW 4.105.903 impermissibly punishes a defamation victim for exercising their art. 1 § 5 and First Amendment rights by mandating fees against the victim petitioner without any showing that the defamation claims are frivolous or “sham” litigation.

There is no constitutional value in “frivolous claims that are brought for improper purpose.” *See Davis v. Cox*, 183 Wn.2d at 289. Statutes that financially intimidate plaintiffs into foregoing filing claims of merit, however, intimidate and thereby obstruct the First Amendment access right. It is only where a litigant “abuse(s) the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression,” that petitioning activity may be constitutionally punished. *Id.* Mr. Thuman’s defamation claims

are not frivolous, yet he will be mandated to pay his defamer's fees under RCW 4.105.090's attorney fee provision¹¹ because his defamation claims are necessarily dismissed under RCW 4.105.060, as briefed *supra*, regardless of their merit. Mandating fee assessments against an individual for exercising rights accorded by art. 1 § 5 and the First Amendment, without any showing of any "sham" claims, chills the exercise of those rights. Division III has failed to equally rewrite (*see infra*) or invalidate this statutory provision to prevent this constitutional conflict. This Supreme Court should accept review.

D. Division III impermissibly construes RCW 4.105.903's transitional provision to remove vested rights.

Division III construes the Act to apply "to causes of action pending on the Act's effective date." *Thurman v. Cowles Co.*, 541 P.3d at 407. The Act's transitional provision, RCW

¹¹ Appendix at 019.

4.105.903 states that, “[T]his chapter applies to a civil action filed or cause of action asserted in a civil action on or after July 25, 2021.” *Id.*, at 409. Division III holds that, although Mr. Thurman’s original defamation complaint was filed before July 25, 2021, his original causes of action “continued to be asserted” on or after July 25, 2021, and the Act now applies to (dismiss) Mr. Thurman’s original defamation claims. *Id.* This is impermissible retroactive application of an Act’s terms. The construction renders the statute in conflict with Washington’s Constitution, at art. I, § 3 by removing vested rights without due process of law.

An “accrued cause of action is a vested right when it ‘springs from contract or from the principles of the common law.’” 1000 *Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 587 (2006), as corrected (Nov. 15, 2006). Statutes affecting vested rights will be construed as operating prospectively only. *Id.* Mr. Thurman’s defamation claim springs from the common law. See *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579,

600 (1997). RCW 4.105.903's transitional provision may not be construed to affect Mr Thurman's accrued cause of action for defamation against Cowles, as it vested in 2019, when Cowles's conduct occurred. Moreover, either Division III's construction of the transitional provision or the provision itself produces absurd results. See *Samish Indian Nation v. Washington Department of Licensing*, 14 Wn. App.2d 437, 444 (2020); *In Matter of Dependency of D.L.B.*, 186 Wn.2d 103, 119, (2016); *State v. Ervin*, 169 Wn.2d 815, 823 (2010). Any act by Mr. Thurman to move his case forward after July 25, 2021, such as calling the court's judicial assistant for a hearing date on a motion moving his case forward, would be an "assertion" of his original cause of action, and apply the Act to dismiss his complaint filed before the Act became effective. The RCW 4.105.903 transitional provision would thereby also conflict with Civil Rule 15, which allows amendments of a complaint to relate back the original date of filing. *Stansfield v. Douglas Cnty.*, 146 Wn.2d 116, 122 (2002). Moreover, were the construction to hold,

then Cowles missed the Act's 60-day motion requirement, because it had been served with the original complaint on June 16, 2021. If Mr Thurman "continued to assert" his defamation claim after July 25, 2021, then Cowles had until approximately August 16, 2021 to file the RCW 4.105.020 special motion, and it did not do so. This is an inconsistent and "special privilege" construction given Cowles under construction of the transitional provision. This Supreme Court should accept review.

E. RCW 4.105's acknowledged conflict with numerous court rules, as Division III determined, invalidates the Act; the courts may not simply rewrite the Act, as Division III did.

Referencing the statutory language related to the Act's application to a "cause of action asserted after July 25, 2021," Division III holds that "we must apply the statute as written—'we cannot rewrite plain statutory language under the guise of construction.'" *Thurman v. Cowles Co.*, 541 P.3d at 409 (quote source omitted). Yet Division III rewrites various provisions of the Act because they conflict with Court rules. 541 P.3d at 412.

It notes RCW 2.04.200,¹² then notes the conflict between the Act and CR 26, as well as the conflict between RCW 4.105.080 and CR 54, and RAP 2.2. The Court cannot rewrite these statutes as it did. It fails to note other conflicts, such as RCW 4.105.030's stay conflicting with CR 7's allowable motion practice. The trial held that it could not even entertain Mr. Thurman's motion requesting a constitutional ruling, and circumvented RCW 4.105.030's stay under its "inherent authority." CP924, conclusions 2 and 3. Division III's construction of the transitional provision, RCW 4.105.903, also conflicts with CR 15's relation back entitlement. Division III's Commissioner then overrode RCW 4.105.080's appeal language, holding that RAP 2.4(a) controls to allow Mr. Thurman his cross-appeal. (Commissioner's Ruling, August 9, 2022). This Act is flawed throughout, and this Court may not rewrite it under the guise of construction. This Supreme Court should accept review.

¹² Appendix at 026.

Notably, for establishing these conflicts and necessary judicial rewriting of the Act's provisions, Mr. Thurman will be assessed Cowles's fees under RCW 4.105.060's mandatory fee provisions, because his defamation action will necessarily be dismissed upon remand, as explained *supra*.

VI. CONCLUSION.

Petitioner respectfully requests that this Supreme Court accept review of the constitutional invalidity issues raised, and particularly given Division III's rewriting of this legislative enactment to salvage it.

DATED this 12th day of February, 2024.

MARY SCHULTZ LAW, P.S.

/s/Mary Schultz
Mary Schultz, WSBA #14198
Attorney for Petitioner
Mary Schultz Law, P.S.
2111 E. Red Barn Lane, Spangle, WA 99031
Tel: (509) 245-3522, Ext. 1
E-mail: Mary@MSchultz.com

CERTIFICATE OF COMPLIANCE

Petitioner certifies that the foregoing Petition for Review complies with the formatting requirements of RAP 18.17(a)(1) and (2), was prepared in a proportionally spaced typeface using 14 pt. Times New Roman font, and contains a total of 3634 words in compliance with RAP 18.17(c)(10), which limits petitions for review to 5,000 words.

Respectfully submitted this 12th day of February, 2024.

MARY SCHULTZ LAW, P.S.

/s/Mary Schultz

Mary Schultz, WSBA # 14198

Attorney for Petitioner

Mary Schultz Law, P.S.

2111 E. Red Barn Lane

Spangle, Washington 99031

Tel: Office (509) 245-3522, Ext. 1

E-mail: Mary@MSchultz.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of February, 2024, the foregoing document was filed with the Court of Appeals, Division III electronic filing portal, which will automatically serve notice to all attorneys who have appeared in this action and registered with the electronic filing system. Petitioner is not aware of any unregistered participants.

DATED this 12th day of February, 2024.

MARY SCHULTZ LAW, P.S.

/s/Mary Schultz

Mary Schultz, WSBA # 14198

Attorney for Petitioner

Mary Schultz Law, P.S.

2111 E. Red Barn Lane

Spangle, WA 99031

Tel: (509) 245-3522, Ext. 1

Email: Mary@MSchultz.com

APPENDIX A

541 P.3d 403
Court of Appeals of Washington, Division 3.

Jeffrey THURMAN, Respondent,
v.
COWLES COMPANY, Appellant.

No. 38991-0-III
I
Filed January 11, 2024

Synopsis

Background: Former sheriff's sergeant filed a complaint against newspaper publisher, asserting a claim for defamation and a claim under the Consumer Protection Act (CPA). The Superior Court, Spokane County, Charnelle M. Bjelkengren, J., granted in part and denied in part publisher's motion for expedited relief and dismissal under the Uniform Public Expression Protection Act (UPEPA). Publisher appealed, and sergeant cross appealed.

Holdings: The Court of Appeals, Lawrence-Berrey, Acting C.J., held that:

UPEPA applied to sergeant's original and amended defamation claims;

60-day statute of limitations for publisher to file a special motion for expedited relief under UPEPA ran from the time sergeant filed his amended complaint;

sergeant's CPA claim was barred by the First Amendment;

UPEPA's discovery stay did not unconstitutionally interfere with sergeant's First Amendment right of access to the courts;

UPEPA did not violate sergeant's rights under federal equal protection clause or Washington's special privileges and immunities clause; and

publisher was entitled to costs, reasonable attorney fees, and reasonable litigation expenses for prevailing against sergeant's CPA cause of action.

Affirmed in part and reversed in part.

Staab, J., filed opinion dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Costs; Motion for Attorney's Fees.

*407 Appeal from Spokane Superior Court, Docket No: 21-2-01609-1, Honorable Charnelle M. Bjelkengren, Judge.

Attorneys and Law Firms

Casey Morgan Bruner, Riverside NW Law Group, PLLC, 905 W Riverside Ave., Ste. 208, Spokane, WA, 99201-1099, Appellant/Cross-Respondent.

Mary Elizabeth, Schultz Mary Schultz Law PS, 2111 E Red Barn Ln, Spangle, WA, 99031-5005, for Respondent/Cross-Appellant.

PUBLISHED OPINION

Lawrence-Berrey, A.C.J.

¶1 The Uniform Public Expression Protection Act (UPEPA or the Act), chapter 4.105 RCW, provides an expedited process for parties seeking dismissal of causes of action thought to target activity protected by the First Amendment to the United States Constitution. The process envisions a defendant, not later than 60 days after being served with a pleading asserting a covered cause of action, filing a special motion for expedited relief.

¶2 This opinion addresses (1) whether the UPEPA applies to causes of action pending on the Act's effective date, (2) whether service of an amended complaint restarts the 60-day period for filing the special motion, (3) inconsistency between rules adopted by our Supreme Court and some procedural rules in the UPEPA, and (4) constitutional as-applied challenges to the UPEPA. We conclude (1) the UPEPA applies to causes of action asserted on or after the Act's effective date, (2) service of an amended pleading restarts the 60-day period with respect to new claims, (3) to the extent the UPEPA's rules of court procedure are inconsistent with those adopted by our Supreme Court, the latter must be given precedent, and (4) the constitutional as-applied challenges fail. We affirm in part and reverse in part.

FACTS

¶3 On June 13, 2019, Cowles Publishing Company, d/b/a, the *Spokesman-Review*, published an article about Jeffrey Thurman. The article's headline read: “Spokane County sheriff's sergeant fired for racial slur, sexual harassment, talk of killing black people.” Clerk's Papers (CP) at 514. Under a picture of Mr. Thurman and his police dog, the caption read in part: “[Jeff Thurman] was fired on June 13, 2019, after an internal investigation found he allegedly spoke of killing black people and sexually harassed a female deputy on his helicopter crew. He denies the allegations and is suing Sheriff Ozzie Knezovich for defamation.” CP at 514. The body of the article included details of the alleged wrongdoing, as well as how the sheriff's department investigated the alleged wrongdoing. In large part, the information reported came from an interview with the sheriff and the sheriff's press conference.

*408 ¶4 On June 14, 2021, Mr. Thurman filed a complaint against Cowles Company, the parent company of Cowles Publishing Company, alleging defamation and invasion of privacy by false light. In the complaint, Thurman alleged that Cowles and the sheriff had

engaged in an agreement ... whereby Cowles would not investigate the facts underlying the Sheriff's upcoming defamatory announcement, and it would be given an “exclusive” on publication in exchange.

CP at 6. Thurman further alleged that the June 13, 2019 article, as well as articles published on June 18, 2019, July 2, 2019, June 21, 2020, and August 5, 2020, contained defamatory statements.

¶5 After obtaining leave of court, on December 3, 2021, Jeffrey Thurman filed an amended complaint.¹ The amended complaint alleged additional factual allegations to the defamation cause of action, did not allege the invasion of privacy cause of action, and alleged a Consumer Protection Act (CPA), chapter 19.86 RCW, cause of action.

¶6 On December 29, 2021, Cowles sent Mr. Thurman a letter notifying him of its intent to seek dismissal of the lawsuit. On January 21, 2022, Cowles filed a special motion for expedited relief, seeking to dismiss both the defamation and the CPA causes of action.

¶7 The trial court partially granted Cowles' motion. It concluded the UPEPA did not apply to Mr. Thurman's defamation cause of action because it was asserted before the effective date of the new law. The court did apply the UPEPA to the CPA cause of action and dismissed it as violative of Cowles' First Amendment rights. The court declined Cowles' request for reasonable attorney fees, reasoning that each party had partially prevailed in their motions.

¶8 Cowles timely appealed the partial denial of its motion for expedited relief.² Mr. Thurman cross appealed.

ANALYSIS

OVERVIEW OF THE EXPEDITED DISMISSAL PROCESS

¶9 The legislature passed the UPEPA to safeguard traditional First Amendment rights guaranteed to the public and the press. *See* RCW 4.105.901. The Act creates a special procedure to quickly resolve cases that target the “[e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern.” RCW 4.105.010(2)(c). It does this by allowing parties to bring a special motion for expedited relief “[n]ot later than sixty days after a party is served with a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which this chapter applies ... to dismiss the cause of action or part of the cause of action.” RCW 4.105.020(2).

¶10 Upon the filing of the motion, all other proceedings—including pending discovery and other motions—are stayed. RCW 4.105.030(1)(a). The record for the special motion is limited to “the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under superior court civil rule 56.” RCW 4.105.050.

¶11 The court must dismiss the cause of action or part of the cause of action if three conditions are met: (1) the moving party establishes under RCW 4.105.010(2) that the chapter applies, (2) the responding party fails to establish under RCW 4.105.010(3) that the chapter does not apply, and (3) the responding party fails to establish a prima facie case, or the

moving party establishes dismissal is warranted under the standards of CR 12(b)(6) or CR 56. RCW 4.105.060(1)(a)-(c).

*409 A. THE DEFAMATION AND CPA CLAIMS

1. The UPEPA applies to Mr. Thurman's defamation claims

¶12 The parties disagree whether the UPEPA applies to Mr. Thurman's original defamation and amended defamation claims. The answer to this question largely depends upon our interpretation of RCW 4.105.903.

¶13 We review questions of statutory interpretation de novo. *State v. Wertz*, 149 Wash.2d 342, 346, 68 P.3d 282 (2003). “On matters of statutory interpretation, our ‘fundamental objective is to ascertain and carry out the Legislature's intent.’” *Travelers Cas. & Sur. Co. v. Wash. Tr. Bank*, 186 Wash.2d 921, 930, 383 P.3d 512 (2016) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)). “When possible, the court derives legislative intent from the plain language enacted by the legislature, considering the text of the provision in question,” including the statute's context, related provisions, amendments, and the statutory scheme. *Lenander v. Dep't of Ret. Sys.*, 186 Wash.2d 393, 403, 377 P.3d 199 (2016). “Appellate courts do not supply omitted language even when the legislature's omission is clearly inadvertent, unless the omission renders the statute irrational.” *State v. Soto*, 177 Wash. App. 706, 716, 309 P.3d 596 (2013).

¶14 RCW 4.105.903 provides: “This chapter applies to a civil action filed or cause of action asserted in a civil action on or after July 25, 2021.” Absent clear legislative intent to the contrary, the word “or” in a statute is disjunctive. *Gray v. Suttell & Assocs.*, 181 Wash.2d 329, 339, 334 P.3d 14 (2014). Construing “or” disjunctively, RCW 4.105.903 makes the chapter applicable to (1) a “civil action filed ... on or after July 25, 2021,” or (2) a “cause of action asserted in a civil action on or after July 25, 2021.”

¶15 With respect to the first disjunctive phrase, Mr. Thurman's civil action was not filed on or after July 25, 2021. But with respect to the second disjunctive phrase, Mr. Thurman's original and amended defamation causes of action were asserted on or after July 25, 2021. More plainly, although originally filed before July 25, the original causes of action continued to be asserted until amended, so they were asserted

on or after July 25, 2021. For this reason, the UPEPA applies to Mr. Thurman's original and amended defamation claims.

¶16 Our dissenting colleague reads the second clause to say a “cause of action asserted in a civil action *filed* on or after July 25, 2021.” We disagree that we can add the word “filed” to the second clause. Rather, we must apply the statute as written —“we cannot rewrite plain statutory language under the guise of construction.” *McCull v. Anderson*, 6 Wash. App. 2d 88, 91, 429 P.3d 1113 (2018). If the plain language is unambiguous, we apply that meaning. *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wash.2d 353, 364, 474 P.3d 547 (2020).

¶17 A literal reading is consistent with our legislature's directive on how courts must construe the UPEPA. RCW 4.105.901 requires the chapter to be “broadly construed and applied [so as] to protect the exercise of” the free speech, press, assembly, and association protections guaranteed by our federal and state constitutions. A literal reading of RCW 4.105.903 results in greater protections for people sued for exercising these important constitutional rights. We conclude that the UPEPA applies to all of Mr. Thurman's defamation claims.

¶18 Mr. Thurman argues defamation causes of action are not covered by RCW 4.105.901. We disagree. RCW 4.105.010(3)(b)(i) encompasses causes of action asserted against businesses, including the print media, “related to the gathering, receiving, posting, or processing of information for communication to the public.” Here, Mr. Thurman's defamation cause of action arises out of the *Spokesman-Review's* news story, which was information posted for communication to the public.

¶19 Mr. Thurman next argues that defamation is not the kind of public expression intended to be protected. We agree. Under the UPEPA, provable defamation claims survive the expedited dismissal process and are not dismissed unless and until a trier of fact finds that defamation has not ***410** been proved. However, claims against protected expression are covered by the UPEPA notwithstanding a plaintiff characterizing that expression as defamation.

2. Cowles timely filed its special motion with respect to both causes of action in the amended complaint

¶20 As noted above, RCW 4.105.020(2) allows a party, not later than 60 days after service of “a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which this chapter applies,” to file a special motion for expedited relief.³ “Other pleading” must mean an amended pleading because the list of pleadings preceding “other pleading” covers every type of original pleading. Here, Cowles filed its special motion for expedited relief not more than 60 days after being served with the amended complaint. Its motion therefore was timely.

¶21 Mr. Thurman argues that “retriggering” Cowles’ right to file a special motion produces absurd results. We disagree. As mentioned previously, the legislature has directed courts to construe the UPEPA broadly to protect certain federal and state constitutional rights. By renewing a party’s opportunity to file a special motion, these rights are better protected.

¶22 Mr. Thurman further argues the UPEPA should not be construed in a manner that precludes his vested CPA claim. We are not construing the Act in this manner. The UPEPA does not preclude bringing a CPA cause of action. Rather, it provides an expedited process for dismissing that and other causes of action if three conditions are met, including that the cause of action is subject to dismissal under the standards of CR 12(b)(6) or CR 56. RCW 4.105.060.

3. The trial court property dismissed Mr. Thurman’s CPA claim

¶23 Mr. Thurman argues the trial court erred by concluding his CPA claim was barred by the First Amendment. We disagree.

¶24 The First Amendment often bars a CPA claim when such a claim is brought against someone for exercising First Amendment activity. *See State v. TVI, Inc.*, 18 Wash. App. 2d 805, 493 P.3d 763 (2021), *aff’d on other grounds*, 1 Wash.3d 118, 524 P.3d 622 (2023); *Wash. League for Increased Transparency & Ethics v. Fox News*, No. 81512-1-I, 2021 WL 3910574 (Wash. Ct. App. Aug. 30, 2021) (unpublished), <https://www.courts.wa.gov/opinions/pdf/815121.pdf>. This is due to tension between the First Amendment requirement that a plaintiff prove actual malice to prevail on public concern defamation claims and the lack of any mens rea requirement for a Washington CPA claim.

¶25 Here, Mr. Thurman’s CPA claim rests on the *Spokesman-Review’s* public reporting of Mr. Thurman’s termination from the Spokane County Sheriff’s Department. The reporting was of public concern. Mr. Thurman’s assertion that the reporting was untrue and deceptive fails to satisfy the heightened mens rea standard that protects this type of First Amendment activity. The trial court did not err in dismissing this cause of action under a CR 12(b)(6) standard.

B. CONSTITUTIONAL AS-APPLIED CHALLENGES TO THE UPEPA

¶26 We review constitutional as-applied challenges de novo. *See City of Seattle v. Evans*, 184 Wash.2d 856, 861, 366 P.3d 906 (2015). “An as-applied challenge to the constitutional validity of a statute is characterized by a party’s allegation that application of the statute in the specific context of the party’s actions or intended actions is unconstitutional.” *City of Redmond v. Moore*, 151 Wash.2d 664, 668-69, 91 P.3d 875 (2004). Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context, but the statute is not wholly invalidated. *Id.* at 669, 91 P.3d 875. We address *411 Mr. Thurman’s various challenges separately below.

1. Right of access to the courts

¶27 “[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.” *Bill Johnson’s Rests., Inc. v. Nat’l Lab. Rels. Bd.*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). While Washington courts also recognize the right, the specific provisions grounding the right are hazy in our State’s jurisprudence. *See Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 781, 819 P.2d 370 (1991) (“Our cases on the right of access are somewhat perplexing.”).

¶28 Whatever the right’s underpinnings, however, access to the courts is not unlimited. “The right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers of the court.” *Id.* at 782, 819 P.2d 370. Importantly, “the right of trial by jury ... does not encompass *frivolous* claims that are brought for an improper purpose.” *Davis v. Cox*, 183 Wash.2d 269, 289, 351 P.3d 862 (2015). Thus, “it is well established that ‘[w]hen there is no genuine issue of material fact, ... summary judgment proceedings do not infringe upon a litigant’s constitutional right to a jury trial.’ ” *Id.* (alterations in original) (quoting

LaMon v. Butler, 112 Wash.2d 193, 200 n.5, 770 P.2d 1027 (1989)).

¶29 Civil litigants enjoy a right to discovery tied to the constitutional right of access to the courts. *Lowy v. PeaceHealth*, 174 Wash.2d 769, 776, 280 P.3d 1078 (2012). Open discovery, in theory, promotes early resolution of claims:

Effective pretrial disclosure, so that each side knows what the other side knows, has narrowed and clarified the disputed issues and made early resolution possible. As importantly, early open discovery exposed meritless and unsupported claims so they could be dismissed. It is uncontroverted that early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims.

Id. at 777, 280 P.3d 1078.

¶30 Mr. Thurman argues, in the context of his lawsuit, the UPEPA's discovery stay under RCW 4.105.030 unconstitutionally interfered with his access to courts. We reject Mr. Thurman's as-applied challenge.

¶31 RCW 4.105.030(4) permits a court to allow limited discovery if a party shows discovery is necessary to prove the chapter does not apply. Here, Mr. Thurman did not attempt to convince the court that he needed additional discovery. This might be because he obtained substantial pertinent discovery in his litigation against Sheriff Knezovich.⁴ Had the trial court denied Mr. Thurman discovery despite a sufficient showing of need for that discovery, then we could address Mr. Thurman's as-applied challenge. But because Mr. Thurman has not established he was precluded from obtaining needed discovery, we reject his challenge.

2. *Court rules of practice and procedure supersede a procedural statute*⁵

¶32 Court rules of practice and procedure adopted by the Supreme Court supersede conflicting laws. RCW 2.04.200.

Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme. *Petrarca v. Halligan*, 83 Wn.2d 773, 522 P.2d 827 (1974). Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible. *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

State v. Ryan, 103 Wash.2d 165, 178, 691 P.2d 197 (1984).

¶33 Washington's civil rules generally permit open discovery but allow for court-imposed limitations in some instances. *412 “[T]he discovery rules contemplate differing interests among the parties and resolve these conflicts by balancing the rights and interests of the parties.” *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wash.2d 974, 986, 216 P.3d 374 (2009) (Madsen, J., concurring). Thus, “CR 26 and its companion rules, CR 27-37, grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c).” *Puget Sound Blood Ctr.*, 117 Wash.2d at 782, 819 P.2d 370.

¶34 Mr. Thurman argues the narrow discovery envisioned in the UPEPA is inconsistent with the broad discovery permitted by CR 26, and the civil rules must be given precedence. This is a valid argument.

¶35 In a clash between civil discovery rules and legislative discovery rules, the former wins. Trial courts, when asked to lift a stay under RCW 4.105.030(4), must adhere to the dictates of CR 26(c), which permits trial courts to restrict discovery when “justice [is] require[d] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” In making its determination of what justice requires, the trial court should take judicial notice that the legislature, by enacting the UPEPA, has set forth the public policy of the State of Washington. Ultimately though, the scope of permissible discovery and reasonable limitations are reserved to the courts as a judicial function.

¶36 Mr. Thurman also argues that a defendant's right of immediate appeal from a denial of a special motion for expedited relief is inconsistent with CR 54(b). We agree with Mr. Thurman's conclusion, but for a separate reason.

¶37 Under RCW 4.105.080, a defendant “may appeal as a matter of right from an order denying, in whole or in part, a motion under RCW 4.105.020.” Under CR 54(b), an order not disposing of all claims generally is as an interlocutory order, and any remaining claims continue to trial. The inconsistency between the statute and the rule is made more apparent by RAP 2.2(d).

¶38 Under RAP 2.2(d), which largely mirrors CR 54(b), an order not disposing of all claims generally is not appealable except under the standards for discretionary review. In this respect, RCW 4.105.080 is inconsistent with RAP 2.2(d) and cannot be given effect. Stated differently, unless and until our Supreme Court adopts a rule allowing for direct appeal of orders denying motions under RCW 4.105.020, appellate courts should accept review of these matters only under discretionary review standards.

3. Special privileges and immunities/equal protection

¶39 Washington's special privileges and immunities clause states, “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” WASH. CONST. art. I, § 12. Washington's privileges and immunities clause serves a similar purpose to the federal equal protection clause. *Housing Auth. of King County v. Saylor*, 87 Wash.2d 732, 738-39, 557 P.2d 321 (1976).

¶40 Mr. Thurman argues the UPEPA violates both clauses because it distinguishes between the different litigants in a defamation action. He argues the UPEPA unfairly favors a defendant-defamer because it permits the defamer to invoke the UPEPA when confronted with a defamation claim without conferring an equivalent benefit on the plaintiff.

¶41 The test applied to an equal protection challenge depends on the nature of a court's scrutiny. Strict scrutiny is reserved for situations when “an allegedly discriminatory statutory classification affects a suspect class or a fundamental right.” *State v. Schaaf*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987). Suspect classifications include those based on race, alienage

or national origin. *Id.* at 18, 743 P.2d 240. Mr. Thurman does not argue that the UPEPA involves a suspect classification for purposes of equal protection analysis.

¶42 Because Mr. Thurman does not assert that the UPEPA discriminates against a suspect class, the rational basis test applies, permitting a legislative classification *413 unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *State v. Coria*, 120 Wash.2d 156, 171, 839 P.2d 890 (1992). Under rational basis scrutiny, a three-part test determines:

- (1) whether the legislation applies alike to all members of the designated class,
- (2) whether there are reasonable grounds to distinguish between those within and those without the class, and
- (3) whether the classification has a rational relationship to the purpose of the legislation.

Philippides v. Bernard, 151 Wash.2d 376, 391, 88 P.3d 939 (2004).

¶43 A “class,” for purposes of the first part of the test, is defined as “those asserting or defending against the same cause of action ... in the civil law arena.” *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 274, 658 S.E.2d 603 (2008). In this respect, the UPEPA treats the class of defamation plaintiffs the same and the class of defamation defendants the same.

¶44 Second, the legislature has reasonable grounds for treating defamation plaintiffs and defendants differently when the former brings a cause of action against the latter for exercising First Amendment activities on a matter of public concern. This concern is well stated in the following passage, which explains the purpose of the UPEPA:

In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish

and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions “Strategic Lawsuits Against Public Participation,” or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

UNIF. PUB. EXPRESSION PROT. ACT prefatory note intro., 13 pt. 2 U.L.A. 30, 31-32 (2022).

¶45 Third, the classification has a rational relationship to the purpose of the legislation. The purpose of the legislation can be achieved only by distinguishing between a plaintiff who brings a defamation cause of action against an entity exercising its First Amendment activities and a defendant sued for exercising such activities.

C. COSTS, ATTORNEY FEES, AND EXPENSES AT TRIAL AND ON APPEAL

¶46 RCW 4.105.090 makes recovery of costs, reasonable attorney fees, and reasonable litigation expenses mandatory for a party prevailing on a special motion for expedited relief. Cowles has prevailed on dismissing Mr. Thurman's CPA cause of action. But Cowles has not, at this point, prevailed in dismissing Mr. Thurman's defamation cause of action. We remand to the superior court for consideration of Cowles' special motion with respect to the defamation cause of action.

¶47 We direct the trial court to award Cowles its costs, reasonable attorney fees, and reasonable litigation expenses at trial and on appeal for prevailing against Mr. Thurman's CPA cause of action. We also direct the trial court to award Cowles similar relief if it prevails in its special motion against Mr. Thurman's defamation cause of action.

¶48 Affirmed in part, reversed in part.

I CONCUR:

Pennell, J.

Dissenting: Tracy Staab

Staab, J.

*414 ¶49 I respectfully dissent with part of the majority's conclusion. While I agree that the Uniform Public Expression Protection Act (UPEPA or Act), ch. 4.105 RCW, applies to Thurman's Consumer Protection Act (CPA), ch. 19.86 RCW, claims that were asserted after the effective date of UPEPA, I disagree with the majority that UPEPA applies to Thurman's defamation claim that was asserted before the Act's effective date.

¶50 As the majority opinion notes, our primary goal in a statutory interpretation case is to determine the legislative intent. *Travelers Cas. & Sur. v. Wash. Tr. Bank*, 186 Wash.2d 921, 930, 383 P.3d 512 (2016). To determine legislative intent, we first consider the plain meaning of the words used within the statute. *Seattle Hous. Auth. v. City of Seattle*, 3 Wash. App. 2d 532, 538, 416 P.3d 1280 (2018). “When determining a statute's plain meaning we consider ‘the ordinary meaning of words, the basic rules of grammar, and the statutory context to conclude what the legislature has provided for in the statute and related statutes.’ ” *Id.* (quoting *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wash.2d 834, 839, 215 P.3d 166 (2009)). Under this rule for statutory construction, we apply dictionary definitions to undefined terms. *Id.*

¶51 For purposes of this appeal, UPEPA uses the verb “assert” in two places. Once to determine the application of UPEPA pursuant to the chapter's effective date. And again to indicate the triggering event that allows a responding party to file a motion for expedited dismissal.

¶52 Turning first to the application of UPEPA's effective date, RCW 4.105.903 provides that UPEPA applies to either “a civil action filed or cause of action asserted in a civil action on or after July 25, 2021.” As the moving party, Cowles has the burden to show that UPEPA applies to the claims raised by Thurman. RCW 4.105.060(1)(a). Thurman's civil action was filed before the effective date, so under the first alternative, UPEPA would not apply.

¶53 Alternatively, UPEPA applies when a “cause of action is asserted in a civil action on or after” the effective date. RCW

4.105.903 (emphasis added). The verb “assert” is otherwise undefined but generally means “to state or affirm positively, assuredly, plainly, or strongly.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (1993). UPEPA acknowledges that the only way to assert a cause of action is through pleadings. RCW 4.105.020(2). A “pleading” is defined in CR 7(a) as “a complaint and an answer,” along with “a reply to a counterclaim” or “an answer to a cross claim, ... a third party complaint ... and a third party answer.” Thus, under the second alternative, UPEPA applies to a cause of action asserted after the effective date in a pleading other than one that causes a civil action to be filed, such as a counterclaim or cross claim. The alternative prong does not apply here because Thurman asserted his cause of action for defamation when he stated the claim in his original complaint. This was a singular event.

¶54 Contrary to the majority's characterization of my position, this plain language interpretation does implicitly insert language into the statute. Instead, this interpretation acknowledges the difference between a “civil action filed” and a “cause of action asserted.” RCW 4.105.903. A “civil action” is a broad term referring to all lawsuits. *See* CR 2; *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wash.2d 126, 130, 426 P.2d 828 (1967). A “cause of action” is synonymous with a claim. *See* BLACK'S LAW DICTIONARY at 275 (11th ed. 2019). In this case, Thurman filed his civil action when he filed his complaint, which included several causes of action including defamation. Thurman's amended complaint did not start a civil action because the action was already pending. However, the amended complaint asserted new causes of action including a claim for violating the CPA. Since the new causes of action in the amended complaint were asserted after the effective date of UPEPA, the Act applies to the newly asserted causes of action.

¶55 Despite this plain meaning, the majority opinion reasons that once Thurman asserted *415 his claim in his complaint, he apparently continued to reassert it every day thereafter because the lawsuit remained pending. Although claiming that this reasoning is supported by a literal reading of the statute, the majority opinion does not cite any authority or rely on the ordinary definition of words used in the statute. Notably, the statute does not read that UPEPA applies to causes of action *pending* on or after July 25, 2021. Instead, the Act uses the more specific verb “asserted.”

¶56 Cowles contends that the amended complaint, filed after July 25, 2021, reasserted the defamation cause of action, bringing it within UPEPA's protection. I disagree with this logic as well. As the trial court noted, there is a general rule for claims reasserted in an amended pleading:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

CR 15(c) (emphasis added). Cowles fails to demonstrate why this rule does not apply and why Thurman's reasserted claim for defamation would not relate back to the same claim asserted in the original complaint.

¶57 Besides the failure to apply the ordinary meaning to the verb “assert,” the majority's reasoning also creates a conflict within UPEPA. As noted above, the verb “assert” is also used in UPEPA to indicate the triggering event that starts the deadline for filing an expedited motion to dismiss. RCW 4.105.020(2). UPEPA provides that such a motion may be filed within 60 days of service of the pleading “that asserts a cause of action to which this chapter applies.” *Id.*

¶58 Because the Act's effective date under RCW 4.105.020(2) and the triggering event under RCW 4.105.903 relate to the same subject matter, we should construe the statutes consistently. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wash.2d 619, 626, 278 P.3d 173 (2012). Moreover, “ ‘when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout.’ ” *State v. Roggenkamp*, 153 Wash.2d 614, 634, 106 P.3d 196 (2005) (Saunders, J., dissenting) (internal quotation marks omitted) (quoting *Welch v. Southland Corp.*, 134 Wash.2d 629, 636, 952 P.2d 162 (1998)).

¶59 I agree with the majority opinion that an amended complaint is considered a pleading. I also agree that Thurman's amended complaint, which asserted for the first time a cause of action for violating the CPA, triggered the 60-day time limit for filing a motion to dismiss this cause of action. But if asserting a cause of action in a pleading is interpreted consistently as an ongoing event as the

majority opinion suggests, then the 60-day trigger for filing an expedited motion starts when a responding party is served with a pleading that asserts a cause of action, and then restarts every day that the cause of action is pending.

¶60 Contrary to the majority's reasoning, I would hold that asserting a cause of action in a pleading under UPEPA is a static, one-time event. Under this plain reading of the statute, UPEPA was not effective and does not apply to Thurman's defamation claim, which was asserted in his

original complaint. On the other hand, Thurman's CPA claim was asserted for the first time in his amended complaint, which was filed after UPEPA's effective date. Thus, Cowles had 60 days from the date of service of the amended complaint to file a motion to dismiss the CPA claim under UPEPA.

All Citations

541 P.3d 403

Footnotes

- 1 The court's November 19, 2021 order granting motion to amend required Mr. Thurman to serve the amended complaint on Cowles. There is no declaration of service in the record attesting that this was done. For purposes of this appeal, we presume that Mr. Thurman complied with the court's order and effected service on or about December 3, 2021, the date Mr. Thurman filed his amended complaint.
- 2 RCW 4.105.080 grants a moving party who is denied expedited relief, in whole or in part, the right of direct appeal.
- 3 Our dissenting colleague's other criticism is, to be consistent, we would have to conclude that "the 60-day trigger for filing an expedited motion starts when a responding party is served with a pleading that asserts a cause of action, and then restarts every day that the cause of action is pending." Dissent at 5. We disagree. The 60-day period is triggered upon service of the pleading, which occurs only once.
- 4 Paragraph 2.4 of Mr. Thurman's complaint states: "This complaint arises from evidence unearthed during the discovery process in the ... defamation action of [Thurman v. Knezovich]." CP at 5.
- 5 Mr. Thurman intertwined this nonconstitutional argument with a constitutional argument similar to the one we rejected above. In this section, we address his nonconstitutional argument.

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.010

4.105.010. Application of chapter

Effective: July 25, 2021

Currentness

(1) In this section:

(a) “Goods or services” does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(b) “Governmental unit” means a public corporation or government or governmental subdivision, agency, or instrumentality.

(c) “Person” means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(2) Except as otherwise provided in subsection (3) of this section, this chapter applies to a cause of action asserted in a civil action against a person based on the person's:

(a) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(b) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding;

(c) Exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern.

(3)(a) Except when (b) of this subsection applies, this chapter does not apply to a cause of action asserted:

(i) Against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

(ii) By a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety;

(iii) Against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services;

(iv) Against a person named in a civil suit brought by a victim of a crime against a perpetrator;

(v) Against a person named in a civil suit brought to establish or declare real property possessory rights, use of real property, recovery of real property, quiet title to real property, or related claims relating to real property;

(vi) Seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action, unless the claims involve damage to reputation;

(vii) Brought under the insurance code or arising out of an insurance contract;

(viii) Based on a common law fraud claim;

(ix) Brought under Title 26 RCW, or counterclaims based on a criminal no-contact order pursuant to chapter 10.99 RCW, for or based on an antiharassment order under *chapter 10.14 RCW or RCW 9A.46.050, for or based on a sexual assault protection order under *chapter 7.90 RCW, or for or based on a vulnerable adult protection order under chapter 74.34 RCW;

(x) Brought under Title 49 RCW; negligent supervision, retention, or infliction of emotional distress unless the claims involve damage to reputation; wrongful discharge in violation of public policy; whistleblowing, including chapters 42.40 and 42.41 RCW; or enforcement of employee rights under civil service, collective bargaining, or handbooks and policies;

(xi) Brought under the consumer protection act, chapter 19.86 RCW; or

(xii) Any claim brought under federal law.

(b) This chapter applies to a cause of action asserted under (a)(iii), (viii), or (xi) of this subsection when the cause of action is:

(i) A legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audiovisual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; or

(ii) A legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

Credits

[2021 c 259 § 2, eff. July 25, 2021.]

OFFICIAL NOTES

***Reviser's note:** Chapters 7.90 and 10.14 RCW were repealed by 2021 c 215 § 170, effective July 1, 2022. For later enactment, see chapter 7.105 RCW.

West's RCWA 4.105.010, WA ST 4.105.010

Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature. Some statute sections may be more current, see credits for details

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.020

4.105.020. Special motion for expedited relief

Effective: July 25, 2021

Currentness

(1) Prior to filing a special motion for expedited relief under subsection (2) of this section, the moving party shall provide written notice to the responding party of its intent to file the motion at least 14 days prior to filing the motion. During that time, the responding party may withdraw or amend the pleading in accordance with applicable court rules, but shall otherwise comply with the stay obligations listed in RCW 4.105.030. If the moving party fails to provide the notice required under this subsection, such failure shall not affect the moving party's right to relief under this chapter, but the moving party shall not be entitled to recover reasonable attorneys' fees under RCW 4.105.090.

(2) Not later than sixty days after a party is served with a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which this chapter applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to dismiss the cause of action or part of the cause of action.

Credits

[2021 c 259 § 3, eff. July 25, 2021.]

West's RCWA 4.105.020, WA ST 4.105.020

Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature. Some statute sections may be more current, see credits for details

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.030

4.105.030. Stay

Effective: July 25, 2021

Currentness

(1) Except as otherwise provided in subsections (4) through (7) of this section, on the earlier of the giving of notice of intent to file a motion under RCW 4.105.020(1) or the filing of a motion under RCW 4.105.020(2):

(a) All other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed; and

(b) On motion by the moving party, the court may stay a hearing or motion involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under RCW 4.105.020.

(2) A stay under subsection (1) of this section remains in effect until entry of an order ruling on the motion under RCW 4.105.020 and expiration of the time under RCW 4.105.080 for the moving party to appeal the order.

(3) Except as otherwise provided in subsections (5), (6), and (7) of this section, if a party appeals from an order ruling on a motion under RCW 4.105.020, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(4) During a stay under subsection (1) of this section, the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under RCW 4.105.060(1) and the information is not reasonably available unless discovery is allowed.

(5) A motion under RCW 4.105.090 for costs, attorneys' fees, and expenses is not subject to a stay under this section.

(6) A stay under this section does not affect a party's ability voluntarily to dismiss a cause of action or part of a cause of action or move to sever a cause of action.

(7) During a stay under this section, the court for good cause may hear and rule on:

(a) A motion unrelated to the motion under RCW 4.105.020; and

(b) A motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

Credits

[2021 c 259 § 4, eff. July 25, 2021.]

West's RCWA 4.105.030, WA ST 4.105.030

Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature. Some statute sections may be more current, see credits for details

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.060

4.105.060. Dismissal of cause of action in whole or part

Effective: July 25, 2021

Currentness

(1) In ruling on a motion under RCW 4.105.020, the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

(a) The moving party establishes under RCW 4.105.010(2) that this chapter applies;

(b) The responding party fails to establish under RCW 4.105.010(3) that this chapter does not apply; and

(c) Either:

(i) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or

(ii) The moving party establishes that:

(A) The responding party failed to state a cause of action upon which relief can be granted; or

(B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

(2) A voluntary dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under RCW 4.105.020 does not affect a moving party's right to obtain a ruling on the motion and seek costs, attorneys' fees, and expenses under RCW 4.105.090.

(3) A voluntary dismissal with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under RCW 4.105.020 establishes for the purpose of RCW 4.105.090 that the moving party prevailed on the motion.

Credits

[2021 c 259 § 7, eff. July 25, 2021.]

West's RCWA 4.105.060, WA ST 4.105.060

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.080

4.105.080. Appeal

Effective: July 25, 2021

Currentness

A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under RCW 4.105.020. The appeal must be filed not later than twenty-one days after entry of the order.

Credits

[2021 c 259 § 9, eff. July 25, 2021.]

West's RCWA 4.105.080, WA ST 4.105.080

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.090

4.105.090. Costs, attorneys' fees, and expenses

Effective: July 25, 2021

Currentness

On a motion under RCW 4.105.020, the court shall award court costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion:

(1) To the moving party if the moving party prevails on the motion; or

(2) To the responding party if the responding party prevails on the motion and the court finds that the motion was not substantially justified or filed solely with intent to delay the proceeding.

Credits

[2021 c 259 § 10, eff. July 25, 2021.]

West's RCWA 4.105.090, WA ST 4.105.090

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.903

4.105.903. Application--Transitional provision

Effective: July 25, 2021

Currentness

This chapter applies to a civil action filed or cause of action asserted in a civil action on or after July 25, 2021.

Credits

[2021 c 259 § 13, eff. July 25, 2021.]

West's RCWA 4.105.903, WA ST 4.105.903

Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature. Some statute sections may be more current, see credits for details

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 3

§ 3. Personal Rights

Currentness

No person shall be deprived of life, liberty, or property, without due process of law.

Credits

Adopted 1889.

West's RCWA Const. Art. 1, § 3, WA CONST Art. 1, § 3

Current through Nov. 7, 2023, General Election.

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 5

§ 5. Freedom of Speech

Currentness

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Credits

Adopted 1889.

West's RCWA Const. Art. 1, § 5, WA CONST Art. 1, § 5

Current through Nov. 7, 2023, General Election.

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 10

§ 10. Administration of Justice

Currentness

Justice in all cases shall be administered openly, and without unnecessary delay.

Credits

Adopted 1889.

West's RCWA Const. Art. 1, § 10, WA CONST Art. 1, § 10

Current through Nov. 7, 2023, General Election.

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 12

§ 12. Special Privileges and Immunities Prohibited

Currentness

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Credits

Adopted 1889.

West's RCWA Const. Art. 1, § 12, WA CONST Art. 1, § 12

Current through Nov. 7, 2023, General Election.

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West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.04. Supreme Court (Refs & Annos)

West's RCWA 2.04.200

2.04.200. Effect of rules upon statutes

Currentness

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

Credits

[1925 ex.s. c 118 § 2; RRS § 13-2.]

West's RCWA 2.04.200, WA ST 2.04.200

Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature. Some statute sections may be more current, see credits for details

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West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.04. Supreme Court (Refs & Annos)

West's RCWA 2.04.200

2.04.200. Effect of rules upon statutes

[Currentness](#)

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

Credits

[1925 ex.s. c 118 § 2; RRS § 13-2.]

[Notes of Decisions \(15\)](#)

West's RCWA 2.04.200, WA ST 2.04.200

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 3

§ 3. Personal Rights

[Currentness](#)

No person shall be deprived of life, liberty, or property, without due process of law.

Credits

Adopted 1889.

[Notes of Decisions \(2249\)](#)

West's RCWA Const. Art. 1, § 3, WA CONST Art. 1, § 3

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 5

§ 5. Freedom of Speech

[Currentness](#)

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Credits

Adopted 1889.

[Notes of Decisions \(513\)](#)

West's RCWA Const. Art. 1, § 5, WA CONST Art. 1, § 5

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 10

§ 10. Administration of Justice

[Currentness](#)

Justice in all cases shall be administered openly, and without unnecessary delay.

Credits

Adopted 1889.

[Notes of Decisions \(563\)](#)

West's RCWA Const. Art. 1, § 10, WA CONST Art. 1, § 10

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 12

§ 12. Special Privileges and Immunities Prohibited

[Currentness](#)

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Credits

Adopted 1889.

[Notes of Decisions \(1218\)](#)

West's RCWA Const. Art. 1, § 12, WA CONST Art. 1, § 12

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United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom
of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I

Current through P.L. 118-30. Some statute sections may be more current, see credits for details.

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MARY SCHULTZ LAW PS

February 12, 2024 - 4:19 PM

Transmittal Information

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Appellate Court Case Number: 38991-0
Appellate Court Case Title: Jeffrey Thurman v. Cowles Company
Superior Court Case Number: 21-2-01609-1

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