Supreme Court Cause No. 102791-5

SUPREME COURT OF THE STATE OF WASHINGTON

COWLES COMPANY,
Respondent

vs.

JEFFREY THURMAN,
Petitioner

RESPONSE TO AMICUS BRIEF BY THE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Court Rules

II. INTRODUCTION

The Washington State Association for Justice Foundation supports the Petitioner's Motion for Discretionary Review for two reasons. First, to seek review of the "automatic stay" of discovery and whether it violates Wash. Const. art. I, 10. Second, to seek review of whether the automatic stay and automatic appeal conflicts with court rules. Its basis for both arguments fail. As to the first, Petitioner never sought leave to conduct discovery in the underlying matter. Therefore, the issue is not ripe for review. Second, the Rule of Appellate Procedure 2.2(a) has since been modified to specifically allow statutes to allow for automatic review of trial court decisions, making this issue moot. Even if this Court had not mooted the issue, the Court of Appeals decision below held that automatic review would not be appropriate unless RAP 2.2 is met and, therefore, the Court of Appeals *accepted* the position of the amicus and no additional review is necessary.

Supreme Court review is reserved for cases that seek to resolve conflicting opinions in the Court of Appeals or decisions involve significant public interest. Rule of Appellate Procedure 13.4(b) states:

> Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of these considerations are present here. The two issues raised by the Washington State Association for Justice Foundation are not ripe or moot and therefore do not rise to the level public interest outlined in RAP 13.4.

III. STATEMENT OF THE CASE[1]

Mr. Thurman has sued "Cowles Company" for reporting

[1] Cowles Company will reply on the statement of the case in its underlying brief and only recounts the necessary facts in this brief as related to the issues raised by amicus.

published by the Spokesman Review, one of the state's oldest newspapers. Mr. Thurman was a Spokane County Sheriff's Deputy who was terminated for alleged misconduct. The Spokesman Review published news articles describing that Mr. Thurman was fired and the reasons given by the Sheriff's Office for his termination. CP 1 – 14, 88 – 91. Respondent sued the wrong legal entity.[2]

Petitioner was allowed to amend his complaint, which was filed on December 3, 2021. The "Complaint For Damages – First Amended" ("Amended Complaint") included a newly asserted CPA claim and a greatly revised and expanded defamation claim. CP 394 – 415. Importantly, the Amended Complaint included allegations and bases for defamation that were not included in Respondent's initial Complaint.

On January 21, 2022, Cowles Company filed its motion under UPEPA. CP 484 – 508. In it, Cowles Company asked the superior court to dismiss all or part of Mr. Thurman's lawsuit

[2] Petitioner's failure to name the correct legal entity is fully documented in the Court of Appeals briefing below and will not be belabored here.

because: (1) all of Mr. Thurman's claims were based on protected public expression; and (2) Mr. Thurman could not establish a prima facie case for his claims. *Id*.

The superior court granted in part and denied in part Cowles Company's Special Motion. CP 922 - 927. The superior court addressed whether UPEPA applied to an Amended Complaint filed after UPEPA went into effect on July 25, 2021 and whether Cowles Company timely filed its Special Motion. First, the Court correctly found that UPEPA applied to the new CPA claim "brought in Plaintiff's Amended Complaint" in December 2021. *Id*. (findings 3-4).

However, the superior court also held that UPEPA did *not* apply to what it believed was a "single" defamation claim asserted in the original Complaint; even though the superior court concurrently found that Mr. Thurman had identified additional defamatory statements in his Amended Complaint. *Id*. (finding 6).

Turning to the merits, the superior court then dismissed

Mr. Thurman's CPA claim. Properly applying *Fid. Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005), the superior court found that "Plaintiff's CPA claim is based on acts which did not occur within trade or commerce." CP 925 (finding 9); RCW 19.86.020. Additionally, the superior court held that the First Amendment barred Mr. Thurman's CPA claim for the reasons articulated in *State v. TVI*, 18 Wn. App. 2d 805, 493 P.3d 763 (2021) and *Washington League for Increased Transparency & Ethics v. Fox News*, 19 Wn. App. 2d 1006, 2021 WL 3910574 (2021). CP 925 (finding 10). Notably, Mr. Thurman never sought to take discovery.

On June 22, 2022, Appellant filed its Notice of Appeal pursuant to RCW 4.105.080. Relevant to this briefing, Mr. Thurman argued below that the discovery stay violates Washington's constitution but the Court of Appeals found:

> 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. 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. 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.

Thurman v. Cowles Co., 541 P.3d 403, 409 (Wash. Ct. App. 2024).

The Court of Appeals also issued two findings regarding the procedure of UPEPA. The Court of Appeals held that the discovery standard set forth in UPEPA was overruled by CR 26, which would control any scope of discovery allowed in an underlying case, and that the "right to appeal" contained in the statute, should be evaluated by the standards found in RAP 2.2. However, no discovery was sought in this case and the case was already on appeal. Therefore, these rules are ultimately of no consequence.

IV. ARGUMENT

A. THE ISSUE REGARDING THE DISCOVERY STAY ARE NOT RIPE BEFORE THE COURT

The Supreme Court of Washington "will generally decline to decide issues that were not raised below." *Int'l Ass'n of Fire Fighters, Loc. 46 v. City of Everett*, 146 Wash. 2d 29, 37, 42 P.3d 1265, 1268 (2002) (citing *State v. Clark*, 124 Wash.2d 90, 104–05, 875 P.2d 613 (1994)); RAP 2.5(a); *see also Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984) ("We will not, however, review an issue not raised below unless necessary to prevent manifest injustice.").

"The reasons for this rule are well settled: (1) to ensure that an appellant has an opportunity to elect to stand on his theory or apply to the court to amend his theory and present some other one; and (2) to encourage parties to raise issues before [the lower courts], thereby ensuring the benefit of developed arguments on both sides and lower court opinions squarely addressing the questions." *Int'l Ass'n of Fire Fighters, Loc. 46*, 146 Wash. 2d at 29.

Here, Mr. Thurman never argued that the automatic stay violated Washington's constitution nor did he ask the lower court to permit discovery pursuant to RCW 4.105.030(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.").

As the Division III accurately explained:

> We reject Mr. Thurman's as-applied challenge. 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. . . . [B]ecause Mr. Thurman has not established he was precluded from obtaining needed discovery, we reject his challenge.

Thurman v. Cowles Co., 541 P.3d 403, 409 (Wash. Ct. App. 2024).

Below, at the trial court level, Mr. Thurman only argued

that discovery should be permitted because of an alleged waiver. As a result, this issue was not appropriately raised and because Mr. Thurman was never denied discovery (he did not ask for it) this case is not the appropriate case for a facial constitutional challenge, since it was not discussed below.

B. THE ISSUE REGARDING THE AUTOMATIC APPEAL IS MOOT

Amicus's second argument is that the automatic right to appeal contradicts the Rules of Appellate Procedure and violates the "separation of powers." However, this Court has since mooted that issue. On June 8, 2023, this Court entered its Order "IN THE MATTER OF THE PROPOSED AMENDMENT TO RAP 2.2—DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED." The Order modifies RAP 2.2 as follows: "(a) Generally. Unless otherwise prohibited or provided by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions." *Id.* As a result, this Court has specifically given the legislature the

authority "provide" for immediate rights of appeal in court cases.

Curiously, the Court of Appeals below *sided* with Amicus's position that the immediate right to appeal contradicted court rules. It explained:

> 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).
>
> 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.

Thurman v. Cowles Co., 541 P.3d 403, 412 (Wash. Ct. App. 2024) (emphasis added). Therefore, even if the issue had not been mooted by this Court's recent Order, there is no purpose

or reason to accept review to determine whether or not the automatic right to appeal violated Court Rules, because the Court of Appeals already said that it did.

C. STANDARD OF REVIEW

The procedural posture of Petitioner's present motion, which the amicus supports, is whether review is warranted under Rule of Appellate Procedure 13.4(b), which states:

> Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, none of these factors and met. The two issues that amicus wants addressed, are not ripe or are moot. Review by the Supreme Court is not appropriate.

IV. CONCLUSION

For the reasons set forth above, the Court should deny

discretionary review.

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V. CERTIFICATION

Pursuant to RAP 18.17(b), Cowles Company certifies that this objection complies with the formatting requirements of RAP 18.17(a) and has 1976 words pursuant to RAP 18.17(c)(9).

Dated this 13th day of May, 2024.

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PROOF OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 8th day of May 2024, the foregoing was filed with the Supreme Court, and delivered to the following persons in manner indicated:

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