

SUPREME COURT
OF THE STATE OF WASHINGTON

SUSAN CAMICIA,

Respondent,

v.

HOWARD S. WRIGHT
CONSTRUCTION COMPANY, a
Washington corporation; and CITY OF
MERCER ISLAND,

Defendants,

and

ANDREW G. COOLEY, and
KEATING BUCKLIN &
MCCORMACK, INC., P.S.,

Petitioners.

No. 94245-5

REPLY ON
MOTION FOR
VOLUNTARY
WITHDRAWAL
OF REVIEW

A. INTRODUCTION

In what can only be described as a strange step, respondent Camicia, who did not seek further relief by this Court in her answer to the petition for review by Andrew Cooley and his firm (“Cooley”), and is not aggrieved by the Court of Appeals opinion, opposes Cooley’s motion for voluntary withdrawal of review and asks this Court to grant review of the Court of Appeals’ unpublished opinion.

Reply on Motion for Voluntary
Withdrawal of Review - 1

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Camicia's response is long on rhetoric, and short on substance. Notwithstanding the general rule of practice under RAP 18.2 that withdrawal of review is liberally permitted by Washington appellate courts, Camicia would have this Court grant review of an opinion with which she agrees. Camicia's position represents a monumental waste of this Court's scarce judicial resources merely to satisfy the apparent zeal of Camicia's present counsel. The Court should *reject* such an empty exercise that Cooley hoped to spare the Court.

B. FACTUAL STATEMENTS

Camicia's reference to the record at 1-5 is hardly a fair recitation of the facts and omits *numerous* key points. For purposes of Cooley's motion to withdraw review under RAP 18.2, however, suffice it to say, first, that Camicia's one-sided treatment of the Court of Appeals decision here is not entirely accurate. The trial court's belated discovery ruling in this case was predicated upon two significant errors of law – state and federal health care privacy laws did not apply to municipal fire department personnel's medical treatment of patients, and the City took part in spoliation when it routinely destroyed tort claim records in accordance with State Archivist direction. The Court of Appeals agreed with Cooley and the City of Mercer Island on both key points. The court, however, believed that Cooley and the City

should have done more in response to Camicia's discovery requests and sustained the trial court's sanctions ruling. Cooley continues to disagree with that ruling, but does not want to further pursue review of it.

Second, Camicia is disingenuous in describing her answer to the petition for review (answer to motion at 4-5). While she concurred that review should be granted in theory, answer to PFR at 2-3, *throughout* her answer to the PFR, she *agreed* with the Court of Appeals ruling. Instead, her counsel purports to tell this Court what its opinion should say. Answer to PFR at 12-24. *Nowhere* in her answer did she seek additional relief. RAP 13.4(d). In fact, Camicia specifically asks this Court to *affirm* the Court of Appeals. Answer to PFR at 24.

Finally, Camicia decries the lack of any reason why Cooley is seeking to withdraw his petition. Answer to motion at 5. *Nothing* in RAP 18.2 requires it. In the experience of the undersigned, such requests to forego an appeal or to withdraw a petition are routine, and generally do not require explanation, except with regard to costs under RAP 18.2.¹

C. ARGUMENT

The Court should reject Camicia's position for three key reasons.

¹ Camicia asks for the opportunity to further belabor this matter, and to run up costs and waste the Court's time by filing a sur-reply. Answer to motion at 5 n.1. The Court should reject it.

First, RAP 18.2 contemplates that the withdrawal of review, though discretionary with this Court, is *freely allowed* in actual practice. Camicia cites only pre-RAP authority. But Camicia's counsel is experienced and should know that Washington appellate courts *routinely* permit withdrawal of review, particularly at the early stages of the process. This case is only tentatively set for consideration at this Court's May 30, 2017 departmental meetings.

Second, Camicia is not *aggrieved* by the Court of Appeals decision; she *agrees* with it. She has *no standing* to pursue review. RAP 3.1. Because Camicia has not claimed an entitlement to additional relief, the Court of Appeals' decision does not *adversely* affect Camicia's property or pecuniary rights, a personal right, or impose any burden or obligation upon her. *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949). Notwithstanding Camicia's overzealous reiteration of her answer to the Cooley petition for review, answer to motion at 7-12, *nothing* there detracts from the fact that she never sought *additional relief* in her answer to the petition for review. She does not qualify in any sense as a "cross-petitioner" as to the Court of Appeals opinion. Hers is but an exercise to further jab a thumb in the eye of the City's defense counsel.

That is decidedly *not* a basis for denying withdrawal of review.² Simply put, Camicia is not aggrieved by a decision in her favor. *Paich v. N. Pac. Ry. Co.*, 88 Wash. 163, 165, 152 Pac. 719 (1915).

Finally, Camicia asks the Court to award her fees incurred in answering the petition and this motion as a condition for withdrawal of review. Her request is baseless. First and foremost, Camicia was not entitled to a fee award under the trial court's ruling and under the Court of Appeals' decision. RAP 18.1(a). If review had been granted, she would not have been entitled to such an award. She did not claim in the Court of Appeals or in her answer to the PFR that the Court of Appeals erred in denying her such an award.³

In this Court's discretion, costs under RAP 18.2 may be recovered by a party opposing the motion to withdraw review *only* if this Court so directs. Ordinarily, costs are recoverable where that party has a right to fees

² As she is not an aggrieved party, Camicia's request in her answer to the motion at 12 to circumvent the normal Court process for addressing motions for voluntary withdrawal of review to ensnare the justices in her rant should be rejected. RAP 17.2(b) does not apply, as it is entirely discretionary, and such discretion should not be exercised here.

³ Moreover, Camicia's answer to the motion for voluntary withdrawal of review, as noted herein, is entirely unnecessary, and any fees she has incurred in filing such an unnecessary pleading are not recoverable.

on appeal (Camicia does not) or where the party has incurred substantial actual costs (Camicia has not).⁴

Simply put, Camicia has incurred no costs in connection with review in this Court to which she is entitled. RAP 18.2.

Finally, Camicia claims that Cooley has engaged in conduct meriting sanctions under RAP 18.9(a). That overzealous argument is baseless. Nothing about Cooley's position on Camicia's motion to publish or the petition for review is contradictory. Indeed, if Camicia is correct, her own positions are equally at odds – she argued to the Court of Appeals in her motion to publish that its opinion represented a further change in the law with significant repercussions for defense counsel. (“The Court's decision extends the affirmative duty of counsel to search all records in response to legitimate discovery requests, and make sure their municipal clients also thoroughly search all their records in every department to comply with discovery requests.” – motion to publish at 6). But ultimately before this Court, the Court of Appeals decision, must be reviewed, nevertheless. Counsel seemingly chooses to put Camicia's victory at the

⁴ Camicia has not incurred any costs in the sense of perfecting the record or the like in this Court.

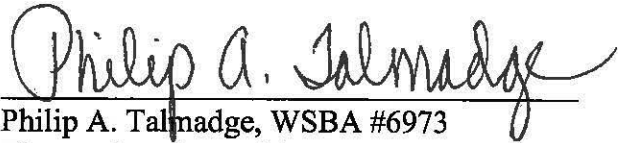
Court of Appeals at risk, presumptuously *assuming* that this Court will agree to grant review and affirm the Court of Appeals.

D. CONCLUSION

For the reasons set forth herein, this Court should grant Cooley's RAP 18.2 motion without an award of costs.

DATED this ~~27~~²⁴ day of April, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served and filed a true and accurate copy of the *Reply on Motion for Voluntary Withdrawal of Review* in Supreme Court Cause No. 94245-5 to the following:

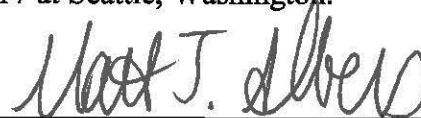
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 24, 2017 at Seattle, Washington.



Matt J. Albers, Paralegal
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