

Appellate Court No. 48346-7-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2016 APR 13 AM 11:14
STATE OF WASHINGTON
BY AP
DEPUTY

LAWRENCE SHANDOLA, APPELLANT,

v.

PAULA HENRY, et al., RESPONDENTS.

Appeal from the Pierce County Superior Court Cause No. 13-2-06153-3
The Honorable Judge Garold Johnson

BRIEF OF APPELLANT

LAWRENCE SHANDOLA, Pro Se
SCCC, #830295, H5-B-127
191 Constantine Way
Aberdeen, WA 98520

ORIGINAL

P/M: 4/11/16

TABLE OF CONTENTS

I. Assignments of Error	
No. 1: The trial court erred when it denied Appellant's Motion to Vacate based upon a manifestly unreasonable decision, constituting an abuse of discretion ...	1
No. 2: The trial court erred when it denied Appellant's Motion to Vacate based upon an untenable reason, constituting an abuse of discretion ...	1
II. Issues Pertaining to Assignments of Error	
No. 1: Was the trial Court's decision manifestly unreasonable? ..	1
No. 2: Was the trial Court's decision based on untenable reasons? ...	1
No. 3: Should the Appellate Court avoid the law of the case doctrine in this appeal? ...	1
III. Statement of the Case ...	1
IV. Summary of Argument ...	3
V. Argument	
A. STANDARD OF REVIEW ...	3
B. 1) The Trial Court's Decision To Deny Appellate's Motion To Vacate The Order And Judgments Wholly Reliant Upon An Unconstitutional Statute Is Manifestly Unreasonable And Must Be Reversed ...	4
2) The Trial Court's Decision To Deny Appellant's Motion To Vacate The Order And Judgments Which Are Wholly Reliant Upon An Unconstitutional Statute Is Based Upon Untenable Reasons And Must Be ...	6
3) This Court Should Avoid The Law Of The Case Doctrine Based Upon The Intervening Change In Controlling Precedent ...	7
VI. Conclusion ...	10

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Washington State Cases:

* Akrie v. Grant, 2015 Wash. LEXIS 818 ...	8, 9
* Caouette v. Martinez, 71 Wn. App. 69, 856 P. 2d 725 (1993) ...	3
* Davis v. Cox, 183 Wn. 2d 269, 351 P. 862 (2015) ...	1, 5, 8, 9
* First Small Business Investment Co. of Cal. v. Inter Capitol Corp. of Or., 108 Wn. 2d 324, 738 P. 2d 263 (1987) ...	7, 9
* In re Marriage of Littlefield, 133 Wn. 2d 39, 940 P. 2d 1362 (1997) ...	3, 6
* In re PRP of Carle, 93 Wn. 2d 31, 604 P. 2d 1293 (1980) ...	4
* In re PRP of Johnson, 313 Wn. 2d 558, 933 P. 2d 1019 (1997) ...	4, 5
* In re PRP of Moore, 116 Wn. 2d 30, 803 P. 2d 300 (1991) ...	4
* In re PRP of Vandervlugt, 120 Wn. 2d 427, 842 P. 2d 950 (1992) ...	4
* Johnson v. Morris, 87 Wn. 2d 922, 557 P. 2d 1299 (1976) ...	4, 5
* Kennedy v. Sundown Speed Marine Inc., 97 Wn. 2d 544, 647 P. 2d 30, cert denied sub nom Volvo Penta of America v. Kennedy, 459 U.S. 1037 (1982) ...	3
* Moreman v. Butcher, 126 Wn. 2d 36, 891 P. 2d 725 (1995) ...	3
* Roberson v. Perez, 156 Wn. 2d 33, 123 P. 3d 844 (2005) ...	7, 8, 9
* State v. Smith, 111 Wn. 2d 1, 759 Wn. 2d 327 (1988) ...	4, 5, 6
* State v. Taylor, 83 Wn. 2d 594, 521 P. 2d 699 (1974) ...	9
* Tollefson v. Jantz, 2015 Wn. App. LEXIS 2842 ...	10

Federal Cases:

* Ex Parte Siebold, 100 U.S. 371 (1880) ...	5, 6
* Marbury v. Madison, 1 Cranch 137 (1803) ...	4, 6
* Montgomery v. Louisiana, 193 L. Ed, 2d 599 (2016) ...	5, 6
* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) ...	4
* Volvo Penta of America v. Kennedy, 459 U.S. 1037 (1982) ...	3

Washington State Constitution:

* Article 1, §21 ...	2
----------------------	---

Washington State Statutes:

* RCW 4.24.510 ...	2
* RCW 4.24.525 ...	2, 5, 7, 8, 10

Washington RAP Rules:

* RAP 2.5 ...	7, 9
---------------	------

Washington State Civil Rules:

* CR 12 ...	1
* CR 60 ...	1, 3

Other Authorities:

* MOORE'S <u>FED. PRACTICE</u> , 2 ed. (1996) ...	8
---	---

I. ASSIGNMENTS OF ERROR

- No. 1: The trial court erred when it denied Appellant's Motion to Vacate based upon a manifestly unreasonable decision, constituting an abuse of discretion.
- No. 2: The trial court erred when it denied Appellant's Motion to Vacate based upon an untenable reason, constituting an abuse of discretion.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An unconstitutional law is void, and is as no law. Where the trial court's entry of judgment in the matter was based entirely upon an unconstitutional statute, was the court's denial of Appellant's Motion to Vacate said judgment a manifestly unreasonably decision?
[Assignment of Error No. 1]
2. A Motion to Vacate under CR 60(b) must be brought within one year. Where appellant timely brought his CR 60(b) Motion to Vacate based upon the Washington Supreme Court's decision invalidating the anti-SLAPP statute, was the trial court's denial of Appellant's Motion to Vacate based upon an incorrect standard? [Assignment of Error No. 2]
3. An Appellate Court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal. Where the trial court dismissed Appellant's action and imposed monetary judgments under RCW 4.24.525, and the Supreme Court subsequently invalidated that statute as unconstitutional, must the court avoid the law of case doctrine on this appeal?
[Assignment of Error Nos. 1 and 2]

III. STATEMENT OF THE CASE

On 6 February 2013 Lawrence Shandola (Appellant) filed an Action in the Pierce County Superior Court, Cause No. 13-2-06153-3. Clerk's Papers (CP) 4. Plaintiff alleged false light invasion of privacy and outrage, based upon letters written by the Defendants. CP 6-7.

On 26 March 2013 Defendants collectively filed a CR 12(b)(6) Motion to Dismiss, claiming absolute immunity under the Washington

anti-SLAPP (strategic lawsuits against public participation) statute, RCW 4.24.510, 4.24.525. CP 8-16. On hearing, Judge Garold Johnson granted Defendants' Motion. In so granting, Judge Johnson found: "This case is governed by RCW [4.]24.525." The Court entered Judgments against Appellant on May 3 and May 10, 2013.

Appellant appealed, and by way of a Motion on the Merits, Commissioner Bears affirmed. Accord State of Washington Court of Appeals, Division II, Case No. 44764-9-II. In so affirming, Commissioner Bears ruled that the trial court properly dismissed Appellant's action under the anti-SLAPP statute. Id. Commissioner Bears also ruled that the trial court's award of statutory damages and attorney fees imposed under the anti-SLAPP statute was appropriate. Id. Appellant unsuccessfully sought discretionary review, and the Mandate issued on September 15, 2014. CP 83-84.

On 28 May 2015, the Washington State Supreme Court issued its Opinion in Davis v. Cox, 183 Wn. 2d 269, 351 P. 3d 862 (2015). Cox, interpreted the Washington anti-SLAPP statute, RCW 4.24.525 and--ultimately--declared it unconstitutional. Id., at 275. The Cox Court invalidated said statute, holding that it violated the right of trial by jury under article I, §21 of the Washington Constitution. Id. On 30 July 2015 Appellant filed the Motion to Vacate Order and Judgments currently at issue. CP 1. A number of Oppositions and Joinders thereto were filed (CP 50-60, 65-77), as was a response. CP 41. Appellant filed a reply (CP 61), and the matter went to hearing on 6 November 2015. Verbatim Report of Proceedings (RP) 1. The trial court held that, because there were no prior cases dealing with the

unconstitutionality of the anti-SLAPP statute, the motion was denied.
RP 2-4; CP 78.

This timely appeal followed.

IV. SUMMARY OF AGUMENT

Where the trial court enters an order and monetary judgments (statutory penalty, attorneys fess, and costs) based entirely on a statute that is shortly thereafter invalidated by the highest Court in that state, the trial court abuses its discretion when it refuses to vacate said order and monetary judgments.

V. ARGUMENT

A. STANDARD OF REVIEW

The Appellate Court's will review a trial court's decision to vacate an order and judgments under the provisions of CR 60(b) for an abuse of discretion. Caouette v. Martinez, 71 Wn. App. 69, 77, 856 P. 2d 725 (1993); Kennedy v. Sundown Speed Marine Inc., 97 Wn. 2d 544, 548, 647 P. 2d 30, cert. denied sub nom. Volvo Penta of America v. Kennedy, 459 U.S. 1037 (1982). A trial court abuses its discretion when it makes a decision that is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman v. Butcher, 126 Wn. 2d 36, 40, 891 P. 2d 725 (1995). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. In re Marriage of Littlefield, 133 Wn. 2d 39, 47,

940 P. 2d 1362 (1997).

B. 1) The Trial Court's Decision To Deny Appellant's Motion To Vacate The Order And Judgments Wholly Reliant Upon An Unconstitutional Statute Is Manifestly Unreasonable And Must Be Reversed.

"It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no 'retroactive' effect of a court's construction of a statute; rather, once the court has determined the meaning, that is what the statute has meant since its enactment." (quoting Johnson v. Morris, 87 Wn. 2d 922, 927-28, 557 P. 2d 1299 (1976)). In re PRP of Carle, 93 Wn. 2d 31, 37 604 P. 2d 1293 (1980). An intervening change in statutory interpretation "must be applied retroactively" because "once the court has determined the meaning of a statute, that is what the statute has meant since its enactment." PRP of Johnson, 131 Wn. 2d 558, 568, 933 P. 2d 1019 (1997)(citing PRP of Vandervlugt, 120 Wn. 2d 427, 436, 842 P. 2d 950 (1992); PRP of Moore, 116 Wn. 2d 30, 37, 803 P. 2d 300 (1991)).

A court cannot give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not itself a cognizable "wrong." Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 759-60 (1995)(Justice Scalia concurring, separate opinion). "An unconstitutional statute is void[.]" State v. Smith, 111 Wn. 2d 1, 17, 759 P. 2d 327 (1988). When a law is unconstitutional, a Court decides the case "disregarding the [unconstitutional] law," Marbury v. Madison, 1 Cranch 137, 178 (1803), because a law repugnant to the Constitution "is void, and is

as no law." Ex parte Siebold, 100 U.S. 371, 376-77 (1880). "A penalty imposed pursuant to an unconstitutional law is no less void because the ... [judgment] became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." Montgomery v. Louisiana, 193 L. Ed. 2d 599, 617 (2016).

Here, the trial court went to great lengths to clearly explain its intent to rely entirely upon the provisions of RCW 4.24.525 to dismiss the underlying civil action and to impose a statutory penalty against Appellant. RP8. When Appellant timely moved the court to vacate said Order and Judgments after the Washington State Supreme Court invalidated RCW 4.24.525 as being unconstitutional, the trial court refused to vacate said Order and Judgments. RP3. The trial court reasoned that because no previous case dealing with the anti-SLAPP statute suggested its constitutionality, the Order and Judgments would not be vacated. Id.

Such a decision and reasoning are flawed. An unconstitutional law is void, and is as no law. Siebold, supra at 376; Smith, supra at 17. A statutory penalty imposed pursuant to an unconstitutional law--like here--is void, despite the fact that the judgment became final before the law was declared unconstitutional. Montgomery, supra at 617. Because the Supreme Court of Washington interpreted the anti-SLAPP statute in Cox, and declared such statute to be unconstitutional, "that is what the statute has meant since its enactment." Johnson, supra at 568; Johnson v. Morris, supra at 927-28. Thus, the Cox Court's interpretation means that RCW 4.24.525

has been unconstitutional since its enactment; consequently, RCW 4.24.525 has never been valid, and all trial court action based thereupon is void. Montgomery, supra at 617. The only choice for the court in this instance was to vacate the unconstitutional-law-based Order and Judgments. Because the trial court's decision was outside the range of acceptable choices, it abused its discretion in denying Appellant's Motion to Vacate and must be reversed.

2) The Trial Court's Decision To Deny Appellant's Motion To Vacate The Order And Judgments Which Are Wholly Reliant Upon An Unconstitutional Statute Is Based Upon Untenable Reasons And Must Be Reversed.

A trial court's decision that is based on an incorrect standard is an abuse of discretion. Littlefield, supra at 47.

Here, the court reasoned that, because there were no prior anti-SLAPP cases dealing with constitutionality, it was denying Appellant's motion. RP3. By so denying, it essentially amounts to the court's enforcement of an unconstitutional law.

Appellant has diligently researched the law and can find no authority to support the court's standard used here. As aforementioned, an unconstitutional law is void, and is as no law. Siebold, supra at 376; Smith, supra at 17. What's more, there is no grandfather clause for the court's to enforce an unconstitutional statute. Montgomery, supra at 617. When a law is unconstitutional, a court decides the case disregarding the unconstitutional law. Marbury, supra at 178. This is the correct standard to apply in the immediate case; this standard the court did not use.

Because the trial court is effectively enforcing an unconstitutional law, and because it used the wrong standard in

denying Appellant's motion, it abused its discretion and must be reversed.

3) This Court Should Avoid The Law Of The Case Doctrine Based Upon The Intervening Change In Controlling Precedent.

Appellant urges, and specifically requests, the Court to review the propriety of its earlier decision in this same case (Washington Court of Appeals Division II, Case No. 44764-9-II) and decide the case on the basis of the Appellate Court's current opinion of the anti-SLAPP statute, RCW 4.25.525. Such a request is authorized under RAP 2.5(c)(2).

Under RAP 2.5(c)(2), the plain language of the rule affords Appellate Courts the discretion in its application. RAP 2.5(c)(2) codifies at least two historically recognized exceptions to the law of the case doctrine which operate independently.

First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. See e.g. First Small Business Investment Co. of Cal. v. Intercapitol Corp. of Or., 108 Wn. 2d 324, 333, 738 P. 2d 263 (1987). "This common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error." Roberson v. Perez, 156 Wn. 2d 33, 42, 123 P. 3d 844 (2005).

Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial Court action and appeal. See RAP 2.5(c)(2)(authorizing Appellate Courts to review prior decisions on the basis of the law

"at the time of the later review."). This exception to the law of the case doctrine also comports with federal law. 1B JAMES WM. MOORE, MOORE'S FED. PRACTICE P.O. 404 1, at 11-6-11-7(2d ed. 1996)("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, despite the interim, must be followed on the second appeal, despite the doctrine of the law of the case")(footnote omitted). Perez, supra at 42. "An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal." Id, at 43.

Here, both exceptions to the law of the case doctrine are applicable. Under the first exception, the Court's decision under Case No. 44764-9-II is clearly erroneous. There, Commissioner Bears granted the Court's motion on the merits to affirm the dismissal of Appellant's case under the anti-SLAPP statute, and further held that the trial court did not err by awarding the Defendants statutory damages and attorney fees under RCW 4.24.525. However, the State Supreme Court has subsequently declared the anti-SLAPP statute unconstitutional. Cox, supra at 275. As succinctly provided in Akrie v. Grant, 2015 Wash. LEXIS 818, the State Supreme Court stated:

"[B]asic fairness demands that we not sustain a penalty pursuant to a statute we have held unconstitutional." Accordingly, Commissioner Bears's Order affirming the dismissal of Appellant's case and the imposition of statutory penalties and attorneys fees--all under the unconstitutional anti-SLAPP statute--is clearly erroneous. Perez, supra at 42, accord Cox, supra at 275.

Additionally, such a clearly erroneous decision works a manifest injustice to one party: Appellant. Intercapitol, supra at 333. That is to say, Appellant is currently under judgment of \$75,000 in statutory penalties and attorneys fees imposed under the unconstitutional anti-SLAPP statute. CP 7-23. A manifest injustice is defined as "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn. 2d 594, 596, 521 P. 2d 699 (1974). The record is very clear in that the trial court relied entirely upon the anti-SLAPP statute to dismiss the case, impose a statutory penalty, and attach attorneys's fees against Appellant. Because Commissioner Bearse's Order affirming is clearly erroneous, and because said erroneous decision works a manifest injustice to Appellant, common sense application assures that the Appellate Court need not perpetuate this error under the law of the case doctrine. Perez, supra at 42.

Under the second exception, Cox was decided a few months after the Mandate issued in Case No. 44764-9-II. See Mandate, Case No. 44764-9-II, issued 15 September 2014; compare to CP 25-39, filed 28 May 2015. Because RAP 2.5(c)(2) authorizes appellate Court's to review prior decisions on the basis of the law "at the time of the later review," and the law now applicable is that the anti-SLAPP statute has been declared unconstitutional, the Court should avoid the law of the case doctrine in this matter. See Grant, supra (Washington Supreme Court holding that--based on its decision in Cox, supra at 274--statutory damages, attorneys fees, and costs could not be awarded to any of the Defendants under the anti-SLAPP statute

because it has been declared unconstitutional); see also Tollefson v. Jantz, 2015 Wn. App LEXIS 2842 (Division I)(Court held that because the trial court's dismissal was based on the anti-SLAPP statute, which the State Supreme Court later invalidated, vacation of the dismissal, award of damages and attorney fees based on RCW 4.24.525 is appropriate).

VI. CONCLUSION

Based upon the foregoing, the trial court abused its discretion when it denied Appellant's Motion to Vacate the dismissal order, statutory penalties and attorneys fees which were all based entirely on the unconstitutional anti-SLAPP statute. In addition, this Court should avoid the law of the case doctrine, review the prior decision in Case No. 44764-9-II and decide the matter on the basis of the law at the time of this later review, as said decision is clearly erroneous being based upon an unconstitutional statute. This Court should reverse the trial Court's Order denying Appellant's Motion to Vacate, and remand the matter back before a different judge for further proceedings. This Court should also award Appellant attorney fees and costs associated with this appeal. Appellant respectfully requests so.

Respectfully submitted this 09 day of April 2016.


LAWRENCE SHANDOLA, Pro Se.

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, LAWRENCE SHANDOLA, declare and say:

That on the 09 day of APRIL, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 48346-7-II:

* BRIEF OF APPELLANT

* DECLARATION OF SERVICE BY MAIL GR

FILED
 COURT OF APPEALS
 DIVISION II
 2016 APR 13 AM 11:14
 STATE OF WASHINGTON
 DEPUTY

addressed to the following:

* WASHINGTON STATE
COURT OF APPEALS, DIV II
950 BROADWAY, STE 300
TACOMA, WA., 98402-4454

* FORSBERG & WILLIAMS, P.S.
ATTN. PAUL SMITH
901 FIFTH AVE, STE. 1400
SEATTLE, WA., 98164

* RANDALL HARRISON, ATT'Y
705 S. 9th ST. STE. 201
TACOMA, WA., 98405

* BETH JENSEN, ATT'Y
505 BROADWAY #801
TACOMA, WA., 98402

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

DATED THIS 09 day of APRIL, 2016 in the City of Aberdeen, County of Grays Harbor, State of Washington.

Lawrence Shandola
 Signature

LAWRENCE SHANDOLA
 Print Name

DOC 830295 UNIT H5 B127
 STAFFORD CREEK CORRECTIONS CENTER
 191 CONSTANTINE WAY
 ABERDEEN WA 98520

ORIGINAL