No. 102298-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DAN YOUNG, an individual,

Petitioner.

v.

TODD S. RAYAN, et al.

Respondents.

RESPONDENTS' RESPONSE TO AMICUS MEMORANDUM OF NORTHWEST CONSUMER LAW CENTER

John C. Versnel, III, WSBA 17755
Andrew H. Gustafson, WSBA 51399
Attorneys for Respondents
LEE SMART, P.S., INC.
701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990
jcv@leesmart.com
ag@leesmart.com

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I. INTRODUCTION

Northwest Consumer Law Center ("NCLC") urges this Court to accept review by delving into the purported impact of Division One's ruling on alleged abuses prevalent in debt collection litigation. Yet the case at bar has nothing to do with debt collection practices. The instant litigation is a defamation action arising out of statements made by respondents during the course of a judicial proceeding concerning the manner in which petitioner, attorney Dan Young, obtained a will copy from a custodian of a privileged file. The court in that underlying judicial proceeding determined Mr. Young's conduct was unlawful even under Mr. Young's own version of events.

NCLC, like Mr. Young, fails to establish any tenable grounds for this Court to accept review.

First, NCLC claims, wrongly, that grounds for review exist under RAP 13.4(b)(4) by contending this case presents issues of substantial public interest that should be determined by this Court. NCLC premises its position on the grounds that

debt collection is a matter of public interest. But this case has nothing to do with debt collection practices. This petition does not concern a matter of substantial public interest, as it does not present a question that is public in nature, impact the conduct of governmental officers or pose a constitutional or statutory challenge. It is a dispute between private parties concerning the manner in which an attorney unlawfully obtained a copy of a will from a law firm.

NCLC then contends grounds for review exist because Division One declined to follow the public policy exception to the litigation privilege doctrine recognized in *Mason v. Mason*, 19 Wn. App.2d 803, 831, 497 P.3d 431 (2021). Yet the trial court in the instant action considered the exceptions to the litigation privilege discussed in *Mason* and its progeny then determined Mr. Young had no admissible evidence to support the application of any exceptions to the litigation privilege: "**the record is void of any admissible or non-speculative assertions**[.]" RP 37 (Emphasis added). Mr. Young's claims

are futile, because they fail as a matter of law regardless of whether *Mason* applies.

If this Court accepts review and determines Division One should have followed the exceptions to the privilege outlined in *Mason* and its progeny, then Mr. Young's claims still fail because he has no admissible evidence in support of these exceptions. Either way, Mr. Young loses. Thus, this Court should not accept review, because doing so would result in the issuance of an advisory opinion.

Accordingly, Mr. Young's Petition for Review should be denied.

II. IDENTITY OF RESPONDING PARTY

Defendants-Respondents are Todd Rayan, Samuel Wilkens, Penny Rohr, and the law firm Althauser Rayan Abbarno, LLP (collectively "Althauser").

III. CITATION TO COURT OF APPEALS DECISION

The published decision is *Young v. Rayan et al.*, No. 84426-1-I (Wash. Ct. App. July 24, 2023) ("*Young*").

IV. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny Plaintiff-Appellant Mr. Young's Petition for Review under RAP 13.4(b), where:

1. Both Mr. Young and NCLC fail to establish any basis for review under RAP 13.4;

2. This case presents no issue of substantial public interest that should be determined by this Court; and

3. Accepting review would result in the issuance of an advisory opinion.

V. STATEMENT OF THE CASE

Althauser adopts by reference their Statement of the Case in their Brief of Respondents to Division One of the Court of Appeals. Tellingly, NCIC does not even offer a Statement of the Case section in its Amicus Memorandum, as the instant action has nothing to do with debt collection practices. Thus,

the Court should disregard all uncited statements in NCIC's brief concerning the purported facts of this case. RAP 10.3(a)(5); RAP 13.4(c)(6); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992).

A. The superior court found Mr. Young offered no admissible evidence in support of any exception to the litigation privilege and granted Althauser's Motion for Summary Judgment.

On August 23, 2022, Judge Phelps granted Althauser's Motion for Summary Judgment and dismissed Mr. Young's complaint with prejudice. CP 427-428. The trial court framed the inquiry of determining whether the statements at issue were protected under the litigation privilege as follows:

> The first issue in this case is whether or not the declarations given by Ms. Rohr and Mr. Wilkens fall under the civil litigation privilege. And to answer that question really has very little to do with whether or not they are truthful or not, but much to do with the test that's been put forth for the Court, which is whether or not they have to do with the underlying – the under – the underlying case and **if any of the exceptions apply.**

RP 35 (Emphasis added).

The court reasoned that the statements at issue are protected under the litigation privilege, because the statements at issue were made in the course of a judicial proceeding and plainly bear some relation to the Underlying Action. RP 36. The court noted Mr. Young conceded as much in his deposition. *Id.* Judge Phelps rejected Mr. Young's argument that the "larger actionable conspiracy" exception to the litigation privilege applies, finding "the record is void of any admissible or non-speculative assertions" establishing the existence of a conspiracy. RP 37.

VI. ARGUMENT

A. Review is not warranted under any of the grounds in RAP 13.4.

Pursuant to RAP 13.4, this Court will grant a petition for review only:

> (1) if the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with the decision of another division 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.
>
> RAP 13.4(b).

NCLC suggests – wrongly – that grounds for review exist under RAP 13.4(b)(2) and (4). NCLC does not offer any argument in support of any other basis for this court to accept review. NCLC therefore concedes that review is not warranted under either RAP 13.4(1) or RAP 13.4(3). However, this Petition should be denied because it fails to satisfy any basis for Supreme Court review.

B. This case presents no issues of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

NCLC fails to offer any applicable authority establishing this case presents an issue of substantial public interest that should be determined by this Court. This Court has addressed what constitutes an issue of public interest:

> The criteria to be considered in determining whether sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance

> to public officers; (3) the likelihood that the question will reoccur.

Dep't of Ecology v. Adsit, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Case laws shows that a question that meets these criteria will almost always implicate constitutional principles or the validity of statutes or other legislative enactments. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Gen. Tel. Co. of the Northwest, Inc. v. City of Bothell*, 105 Wn.2d 597, 716 P.2d 879 (1986); *Adsit*, 103 Wn.2d at 705; *State ex rel. Chapman v. Superior Court*, 15 Wn.2d 637, 642-43, 131 P.2d 958 (1942); *State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wn. 179, 73 P.2d 759 (1937).

Inexplicably, NCLC suggests this Court should accept review because debt collection is a matter of public interest. NCLC Memo at 4. Yet the instant action has absolutely nothing to do with debt collection practices. This case does not present a question that is public in nature, impact the conduct of governmental officers, or pose a constitutional or statutory

challenge. It is a dispute between private parties concerning statements made about the manner in which an attorney unlawfully obtained a copy of a will from a law firm.

Because this action does not involve any issues of substantial public interest that should be determined by this Court, this Court should deny review.

C. This Court should not accept review, because doing so would result in the issuance of an advisory opinion.

NCLC then contends this Court should accept review principally because Division One declined to follow the public policy exception to the litigation doctrine recognized in *Mason v. Mason*, 19 Wn. App.2d 803, 831, 497 P.3d 431 (2021). The public policy exception outlined in *Mason* is as follows:

> In *Mason*, we noted that litigation privilege does not apply when the facts are such that application of the privilege would defeat the public policy considerations justifying the privilege. This exception applies in a narrow set of circumstances where any attorney "misappropriates a judicial proceeding to achieve an improper and extrinsic end," immunity "neither preserves 'integrity of the judicial process,' nor 'further[s] the administration of justice.'"

Scott v. Am. Express Nat.Bank, 22 Wn. App. 2d 258, 267-68, 514 P.3d 695 (2022) (citations omitted).

Because Division One elected not to follow *Mason* and its progeny, NCLC claims this Court should accept review to address this division split. Further, NCLC argues that Division Two's approach to the litigation privilege (and its exceptions) "is the correct one." NCLC Memo at 11.

This Court should not accept review, because doing so would result in an advisory opinion. "Issuing an advisory opinion is allowable "only 'on those rare occasions where the interest of the public in the resolution of an issue is overwhelming.'" *Bloome v. Haverly*, 154 Wn. App. 129, 141, 225 P.3d 330 (2010) (citation omitted). No such circumstances remotely exist here.

Here, while Division One declined to follow Mason's recognition of a public policy exception to the litigation privilege doctrine, the trial court considered the exceptions to the litigation privilege discussed in *Mason* and *Scott* then determined Mr. Young had no admissible evidence to support

the application of these exceptions. RP 35-37. Specifically, the trial court found "**the record is void of any admissible or non-speculative assertions**" establishing the existence of a conspiracy. RP 37 (Emphasis added). Indeed, Mr. Young does not have a shred of admissible evidence whatsoever suggesting Althauser "intentionally employed legal process for an inappropriate and extrinsic end."

Because the trial court determined Mr. Young lacked admissible evidence to support the application of any exceptions to the litigation privilege, accepting review would lead to the issuance of an advisory opinion. If this Court accepts review and affirms Division One's ruling, Mr. Young's claims remain dismissed. If this Court accepts review and determines Division One should have followed the exceptions to the privilege outlined in *Mason* and its progeny, then Mr. Young's claims still fail because he has no admissible evidence in support of these exceptions. Either way, Mr. Young loses.

Thus, this Court should decline to accept review to avoid the issuance of an advisory opinion. Mr. Young's Petition for Review must be denied.

VII. CONCLUSION

NCLC and Mr. Young have unequivocally failed to present grounds under RAP 13.4(b) on which this Court should grant review. Accordingly, Althauser respectfully requests that Mr. Young's Petition for Review be denied.

Respectfully submitted this 15th day of November, 2023.

I certify that this memorandum contains 1,866 words, in compliance with RAP 18.7.

LEE SMART, P.S., INC.

By: s/ Andrew H. Gustafson
Andrew H. Gustafson
WSBA No. 51399
Attorney for Respondents

701 Pike Street, Suite 1800
Seattle, WA 98101
Phone: (206) 624-7990
Fax: (206) 624-5944
Email: ag@leesmart.com

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on November 15, 2023, I caused service of the foregoing pleading on each and every attorney of record herein VIA COA E-Filing Portal:

Ms. Camille Minogue, WSBA No. 56405
Mr. Dan R. Young
Law Offices of Dan R. Young
1000 Second Avenue, Suite 3200
Seattle, WA 98104
camille@truthandjustice.legal
dan@truthandjustice.legal

SaraEllen Hutchison, WSBA No. 36137
Law Office of Saraellen Hutchison, PLLC
2367 Tacoma Ave. S.
Tacoma, WA 98402
Telephone: 206-529-5195
saraellen@saraellenhutchison.com

Robert Mitchell, WSBA No. 37444
Robert Mitchell Attorney at Law PLLC
1020 N. Washington
Spokane, WA 99201
Telephone: 509-327-2224
bobmitchellaw@yahoo.com

Elizabeth A. Adams, WSBA No. 49175
Terrell Marshall Law Group PLLC
936 N. 34th Street, Suite 300
Seattle, WA 98103
Telephone: 206-816-6603
eadams@terrellmarshall.com

Samuel R. Leonard, WSBA No. 46498
Northwest Consumer Law Center
936 N. 34th Street, Suite #300
Seattle, WA 98103
Telephone: 206-805-0989
sam@seattledebtdefense.com

DATED this 15th day of November, 2023, at Seattle, Washington.

s/ Jessica Leonard
Jessica Leonard, Legal Assistant

LEE SMART P.S., INC.

November 15, 2023 - 2:36 PM

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- ltl@leesmart.com
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- sr@leesmart.com

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Sender Name: Taniya Chai - Email: ttc@leesmart.com
Filing on Behalf of: Andrew Harry Gustafson - Email: ag@leesmart.com (Alternate Email: jcl@leesmart.com)

Address:
701 Pike Street, Ste. 1800
Seattle, WA, 98029
Phone: (206) 627-7990

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