

FILED
SUPREME COURT
STATE OF WASHINGTON
4/15/2024 8:58 AM
BY ERIN L. LENNON
CLERK

No. 102791-5

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

JEFFREY THURMAN,

Plaintiff/Petitioner,

vs.

COWLES COMPANY,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION AMENDED AMICUS CURIAE
MEMORANDUM IN SUPPORT OF REVIEW

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

On behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST OF MOVING PARTY

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the constitutionality of the Uniform Public Expression Protection Act, chapter 4.105 RCW (UPEPA).

II. INTRODUCTION

In 2010, the Legislature enacted the Washington Act Limiting Strategic Lawsuits Against Public Participation (the 2010 Act), whose stated purpose was to prevent “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Laws of 2010, ch. 118, § 1(1)(a), § 4. To effectuate this purpose, the Act altered several litigation procedures, allowing early dismissal of claims, modified proof standards,

automatic stay of discovery, expedited appeal and fees, costs and statutory damages. *See id.*, § 2.

In *Davis v. Cox*, 183 Wn.2d 269, 274-75, 351 P.3d 862 (2015), the 2010 Act was challenged on multiple constitutional grounds, including the right to trial by jury, separation of powers, right of access to courts, violation of the right to petition, and violation of due process. This Court held that the 2010 Act's standard for expedited adjudication in UPEPA (codified at RCW 4.24.525) violated the right to trial by jury under Wash. Const. art. I, § 21. *Id.* at 279. It did not reach the remaining challenges. *Id.*

In 2021, the Legislature repealed RCW 4.24.525 and enacted UPEPA. *See* Laws of 2021, chapter 259 (codified at chapter 4.105 RCW). While UPEPA replaced the 2010 Act's standard for expedited adjudication, many of the other provisions challenged in *Davis* were effectively reenacted in the new statutory scheme. This case gives the Court the opportunity to examine UPEPA's procedural impediments to litigating claims, including those that closely track the 2010 Act and whose

constitutionality was not examined in *Davis*. The Court should grant review.

III. STATEMENT OF THE CASE

This case arises from application of UPEPA to claims for defamation and violation of the Consumer Protection Act (CPA) brought by Jeffrey Thurman based upon publications by the Spokesman-Review, a Spokane newspaper.

Pursuant to RCW 4.105.020(1), the defendant advised Thurman of its intent to seek dismissal, and subsequently filed a special motion for expedited relief seeking to dismiss under RCW 4.105.020(2). The trial court partially granted the motion, finding that the Act did not apply to the defamation claim because it was asserted before the effective date of the Act, and dismissing the CPA claim pursuant to the Act as violative of the newspaper's First Amendment rights. The defendant appealed, and Thurman cross-appealed.

The Court of Appeals affirmed in part and reversed in part.¹ See *Thurman v. Cowles Company*, __ Wn. App. 2d __, 541 P.3d 403 (2024). The Court declined to reach Thurman’s argument that UPEPA’s stay of discovery violates his right to access the courts under Wash. const. art. I, § 10. The Court declined to reach that argument because while “[c]ivil litigants enjoy a right to discovery tied to the constitutional access to the courts,” RCW 4.105.030(4) permits a trial court to allow “limited discovery” if a party brings a motion and succeeds in showing discovery is necessary, and Thurman did not pursue such a motion. *Id.* at 411.

The Court noted the inconsistency between the broad rights of discovery accorded litigants under the Civil Rules and the presumptive denial of discovery imposed under UPEPA, but

¹ There are several procedural issues in this case ancillary to the constitutional issues, including the timing of application of UPEPA. This ACM focuses on whether UPEPA violates the Wash. Const. art. I, § 10 right to access to the courts and the separation of powers doctrine.

did not refuse to apply the Act's restrictive discovery rule. *See id.* at 412.

The Court also acknowledged the inconsistencies between a defendant's right of immediate appeal from an order denying a motion for expedited relief under UPEPA and CR 54(b) and RAP 2.2(d), which provide that an order not disposing of all claims is generally not appealable except under the standards for discretionary review. *See id.* While holding that "appellate courts should accept review of these matters only under discretionary review standards," the Court did not reject the appeal on this basis, but rather proceeded to consider the appeal without applying the discretionary review standards. *Id.*

Thurman petitioned for discretionary review by this Court.

IV. ISSUES PRESENTED

1. Is review warranted to address whether UPEPA's automatic stay of discovery violates the right of access to courts guaranteed by Wash. Const. art. I, 10?
2. Is review warranted to address whether UPEPA's procedures for automatic stay of discovery and automatic appeal conflict with court rules, thereby violating the separation of powers doctrine?

V. ARGUMENT IN SUPPORT OF REVIEW

RAP 13.5(b) provides in relevant part:

Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:... (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals... substantially limits the freedom of a party to act...

The Court of Appeals affirmed the dismissal of Thurman's CPA claim, reversed the trial court's ruling that UPEPA did not apply to his defamation cause of action, and remanded for consideration Cowles' special motion for expedited relief to dismiss the defamation claim. *See Thurman*, 541 P.3d at 409-10, 413. The Court of Appeals also ruled that Thurman is not entitled to conduct discovery in the defamation action. *See id.* at 411. Given the refusal to allow discovery in the remanded claim, discretionary review is appropriate because the Court of Appeals committed probable error and its decision substantially limits Thurman's right to discovery necessary to exercise his constitutional right to access to courts. *See* discussion below in § IV.A.

A, This Court Should Accept Review To Address Whether The Presumptive Denial Of Discovery In RCW 4.105.030 Denies Plaintiffs Discovery Guaranteed By Wash. Const. Art. I, § 10.

The right of access to the courts is closely tied to the command in Wash. Const. art. I, section 10 “[t]hat justice in all cases shall be administered openly.” *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). Under both the federal and state constitutions, access to courts constitutes “[t]he very essence of civil liberty” and “the bedrock foundation upon which rest all the people’s rights and obligations.” *Martin v. Dep’t of Corrections*, 199 Wn.2d 557, 564, 510 P.3d 321 (2022) (citations omitted).

The right to discovery is necessary for plaintiffs to exercise their right of access to courts. *See Martin*, 199 Wn.2d at 564 (“the right to discovery – as authorized in the civil rules – [is] part of the right to access the courts”); *Stratford v. Umpqua Bank*, 2 Wn.3d 112, 119, 534 P.3d 1195 (2023) (similar) (citations omitted); *Putman v. Wenatchee Med. Ctr.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (similar).

The nature and scope of litigants' right to discovery is embodied in Washington's civil rules:

The court rules recognize and implement the right of access. The discovery rules, specifically 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). This broad right of discovery is necessary to ensure access to the party seeking the discovery.

Lowy, 174 Wn.2d at 776 (citation omitted).

The civil rules' procedures governing discovery provide litigants *presumptive* access to discovery, and rules placing conditions on that presumptive access have been rejected. *See Stratford*, 2 Wn.3d at 119 (refusing to adopt the Apex Doctrine, which would require plaintiffs to demonstrate need to depose high level corporate executives, because it improperly shifts the burden of proof in violation of our discovery rules and improperly undermines the right of access to courts); *Putman*, 166 Wn.2d at 979 (finding "certificate of merit" requiring submission of evidence to obtain needed discovery violated access to courts because "[o]btaining the evidence necessary to

obtain a certificate of merit may not be possible prior to discovery”).

RCW 4.105.030(1)(a) provides for a stay of all court proceedings, including discovery, upon the defendant giving notice of intent to file or filing a special motion under .020 of UPEPA. The motion is granted and the case is dismissed unless the plaintiff either establishes “a prima facie case as to each essential element of the cause of action” or fails to demonstrate a genuine issue of material fact in response to a summary judgment motion. RCW 4.105.060(1)(c)(i)-(ii).² UPEPA effectively flips the applicable discovery presumption: While under this Court’s constitutional jurisprudence, discovery is presumptively available and any avoidance of discovery must be

² UPEPA also allows for dismissal if the defendant demonstrates that the plaintiff has failed to state a claim upon which relief can be granted. *See* RCW 4.105.060(1)(c)(ii)(A). That standard incorporates the standard for dismissal under CR 12(b)(6), which involves cases subject to dismissal based on the pleadings alone, and discovery is generally not available. This memorandum does not argue that the denial of discovery under RCW 4.105.060(1)(c)(ii)(A) violates the right of access to courts under art. I, § 10.

justified, UPEPA provides that discovery is presumptively unavailable and any entitlement to discovery must be justified.

Thurman argued that the automatic stay of discovery in RCW 4.105.030(1)(a) violated his right of access to courts because it denied him the discovery to which he would otherwise be entitled under Washington's civil rules. The appellate court appeared to recognize that UPEPA may contravene plaintiffs' constitutional right of access to courts. *See Thurman*, at 411. However, it declined to reach the merits of Thurman's argument because he did not request discovery under RCW 4.105.030(4). *See Thurman*, at 411.

It is not the mere denial of discovery that creates the constitutional infirmity, but UPEPA's denial of the procedural protections that govern availability of discovery. The broad right of discovery necessary to access the courts is "the right to discovery – as authorized in the civil rules." *Martin*, 199 Wn.2d at 564. That right is subject only to the narrow restrictions set forth in CR 26, which permit a party resisting discovery to show

good cause for an order limiting discovery. “The burden of persuasion rests with the party... seeking the protective order.” *Stratford*, 2 Wn.3d at 120. This Court has rejected a rule which “shifts the burden to the party seeking discovery rather than the party resisting it as required by general discovery principles and our Civil Rules.” *Id.* at 121. The procedure in RCW 4.105.030(4) requires the party seeking discovery to first show cause why discovery is necessary. This “flips the burden” and “conflicts with our otherwise broad allowance for discovery.” *Id.* at 124. Review is warranted to address whether UPEPA’s presumptive denial of discovery contravenes access to courts under art. I, § 10.

B. This Court Should Grant Review To Address Whether UPEPA Violates The Separation of Powers Doctrine.

The division of the government into three coequal branches of government in the state constitution “gives rise to a vital separation of powers doctrine.” *Putman*, 166 Wn.2d at 980 (citation omitted). The doctrine “ensures that the fundamental functions of each branch remain inviolate.” *Id.* (citation omitted).

The power to promulgate rules for practice in court is a fundamental function within the inherent power of the judicial branch. *See Putman*, 166 Wn.2d at 980. If a statute involving fundamentally procedural matters conflicts with a court rule and cannot be harmonized, the court rule will prevail. *See id.* at 980-81.³

Discovery Stay

The automatic discovery stay in RCW 4.105.030(1)(a) conflicts with the broad right of discovery in CR 26-37. The

³ The Court of Appeals did not address this conflict issue as a matter of constitutional law, but rather statutory law, citing RCW 2.04.200. *See Thurman*, 541 P.3d at 411 & n.5. Recent decisions of this Court have examined the viability of procedural statutes that conflict with court rules as a constitutional issue under the separation of powers doctrine. *See, e.g., Putman*, 166 Wn.2d 985; *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). Thurman's Petition relies upon both RCW 2.04.200 and this Court's separation of powers decisional law to challenge UPEPA. *See Pet.* at 8, 22. RCW 2.04.200 is simply the Legislature's acknowledgment that the Court has the ultimate authority to set rules governing court procedures. *See Banowsky v. Backstrom*, 193 Wn.2d 724, 740-42, 445 P.3d 543 (2019). Whether the issues here are examined under RCW 2.04.200 or the separation of powers doctrine, the result is that those provisions in UPEPA that conflict with court rules must yield.

purpose of the discovery rules is “to allow production of all relevant facts.” *Stratford*, 2 Wn.3d at 119 (citation omitted). A statutory procedural rule that requires a party to submit evidence supporting its claims prior to obtaining discovery conflicts with the right of discovery in the civil rules. UPEPA stays all proceedings allowed in the Civil Rules to discover relevant facts, yet still requires a plaintiff to produce facts to establish entitlement to discovery.

The stay of all discovery mandated by UPEPA cannot be reconciled, much less harmonized, with the limited nature of the exceptions to broad discovery in CR 26(c). The provision in RCW 4.105.030(4) allowing a plaintiff foreclosed from discovery to bring a motion and seek to establish a need to discovery does not harmonize UPEPA with the Court Rules regulating discovery. Section .030(4) impermissibly shifts the burden to the party seeking discovery rather than the party resisting it as required by the Civil Rules. *See Stratford*, 2 Wn.3d at 121 (rejecting a doctrine shielding certain persons from discovery absent a showing of need).

The discovery stay in RCW 4.105.030(4) conflicts with and cannot be harmonized with the Civil Rules governing discovery, and should be declared unconstitutional under the separation of powers doctrine.

Moving Party's Right to Appeal the Denial of a UPEPA Motion for Expedited Relief

In *Thurman*, Cowles moved for expedited relief pursuant to RCW 4.105.020. The trial court granted the motion as to the CPA claim and dismissed it, but denied the motion as to the defamation claim. *See Thurman*, 541 P.3d at 408. Cowles appealed the partial denial of its motion for expedited relief pursuant to RCW 4.105.080. *See id.*

RCW 4.105.080 allows an appeal as a matter of right from an order denying, in whole or in part, an RCW 4.105.020 motion for expedited relief. CR 54(b) and RAP 2.2(d) generally provide that an order not disposing of all claims is not appealable except under the standards of discretionary review. *See Thurman*, 541 P.3d at 412. The Court of Appeals acknowledged this .080 appeal

as a matter of right is inconsistent with CR 54(b) and RAP 2.2(d) and cannot be given effect. *See id.*

The Court should grant review to address whether the statutory grant of appeal violates the separation of powers doctrine.

VI. CONCLUSION

This Court should grant Review.

This document contains 2,212 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of April 2024.

/s Daniel E. Huntington
DANIEL E. HUNTINGTON
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

/s Valerie McOmie
VALERIE D. MCOMIE
WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
(360) 852-3332
valeriemcomie@gmail.com

On behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2024, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Attorney for Plaintiff:

Mary Schultz
Mary Schultz Law, P.S.
2111 E. Red Barn Lane
Spangle, WA 99031
Telephone: (509) 245-3522, ext. 1
email: Mary@Mschultz.com

Attorney for Defendant:

Casey M. Bruner
RIVERSIDE LAW GROUP, PLLC
905 W. Riverside Ave., Suite 404
Spokane, WA 99201
Telephone: (509) 952-8182
email: cmb@riverside-law.com

/s Daniel E. Huntington
DANIEL E. HUNTINGTON
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

April 15, 2024 - 8:58 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 102,791-5
Appellate Court Case Title: Jeffrey Thurman v. Cowles Company
Superior Court Case Number: 21-2-01609-1

The following documents have been uploaded:

- 1027915_Letters_Memos_20240415085200SC013351_5661.pdf
This File Contains:
Letters/Memos - Other
The Original File Name was Thurman Final Amended ACM .pdf
- 1027915_Motion_20240415085200SC013351_8768.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Thurman Motion to File An Amended ACM.pdf

A copy of the uploaded files will be sent to:

- Mary@mschultz.com
- Shanna@Mschultz.com
- cmb@riverside-law.com
- danhuntington@richter-wimberley.com

Comments:

Please see attached the Amended Amicus Curiae Memorandum and Motion for Leave to File Amended Amicus Curiae Memorandum of Washington Association for Justice Foundation.

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com

Address:
4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

Note: The Filing Id is 20240415085200SC013351