

UPEPA: “One Weird Trick” For An Automatic, Interlocutory Appeal

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By Jonathan Collins

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Washington courts have long held that interlocutory review is disfavored because piecemeal appeals undermine the prompt, economical resolution of legal disputes.[1] For that reason, interlocutory trial court decisions rarely justify interrupting the proceedings for immediate appeal. RAP 2.2 reflects this policy by allowing litigants to appeal as a matter of right only after the trial court enters final judgment or a similar order.

The legislature created a peculiar exception to this rule when it enacted the Uniform Public Expression Protection Act (UPEPA), which grants an immediate right to appeal a trial court’s decision denying a special expedited motion to dismiss under the statute.[2] This unique right to appeal cuts against the longstanding principle that interlocutory review is disfavored and — as other states have discovered — can be abused by defendants to delay trial proceedings and drive up litigation costs.

In 2021, Washington became the first state to enact UPEPA — a model statute drafted by the Uniform Law Commission — in order “to combat an abusive type of litigation called a ‘SLAPP’ or ‘strategic lawsuit against public participation.’”[3]

UPEPA replaced an earlier anti-SLAPP statute the Supreme Court held unconstitutional in 2015.[4]

In a prototypical SLAPP case, the plaintiff — usually a large corporation or other well-funded entity — uses a lawsuit to target criticism from a particular defendant, like an activist group, a journalism outlet, or an ordinary citizen. In such cases, the plaintiff's goal is not to win, but to coerce the defendant into silence with burdensome litigation.

Like other anti-SLAPP laws, UPEPA "is designed to provide an expedited process for dismissing lawsuits that target activities protected by the First Amendment." [5] Once a party is served with a complaint or other pleading asserting "a cause of action" subject to UPEPA, they have sixty days to file "a special motion for expedited" dismissal.[6] At that point, the statute automatically stays all proceedings, and the trial court must rule on the UPEPA motion within sixty days, applying a three-step analysis:[7]

First, the court must decide whether UPEPA applies to the "cause of action" under the statute's definition, which broadly includes any "cause of action asserted in a civil action" that is "based on" the moving party's "[e]xercise of the right of freedom of speech . . . on a matter of public concern." [8]

Second, the court must decide whether the "cause of action" falls within any of the twelve statutory exceptions under which UPEPA does not apply — for example, common law fraud claims.[9]

Finally, if the cause of action falls within UPEPA's definition and not under any exception, the court must dismiss the cause of action if it fails to meet a minimum threshold of sufficiency akin to the standard on summary judgment.[10] In this way, "UPEPA is essentially an expedited summary judgment motion." [11]

Outside the UPEPA context, an order denying summary judgment is not appealable, and interlocutory review is exceptionally rare; the moving party must first convince a Court of Appeals Commissioner that the trial court committed an "obvious error" that renders "further proceedings useless." [12] In contrast, UPEPA provides the moving party an absolute right to immediately appeal any denial of

their UPEPA motion: “A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under” UPEPA.[13] The automatic stay remains in effect until the appeal is over.[14]

In other words, the proceedings must be put on hold to conduct an immediate appeal even when the trial court correctly denies a meritless or even frivolous UPEPA motion. And because the statute does not distinguish between the different reasons for a denial, a moving party arguably has the right to appeal a trial court’s decision under the statute’s first step that UPEPA simply does not apply at all.

This broad right to appeal opens the door to some negative consequences. For one thing, plaintiffs who assert meritorious claims falling within UPEPA’s scope — such as valid defamation claims — may be forced to endure a full appeal on the merits before reaching discovery, let alone trial.

The potential for abuse is equally troubling. Any defendant looking to stay trial proceedings by triggering an immediate, two-year appeal need only file a motion under UPEPA alleging the plaintiff’s claims are somehow “based on” protected First Amendment conduct.

California courts grappling with a similar statute have acknowledged “the ironic unintended consequence that anti-SLAPP procedures, enacted to curb abusive litigation,” may ultimately incentivize the opposite.[15] California courts specifically identified the broad right to appeal as the primary reason defendants began “using meritless anti-SLAPP motions as a litigation weapon.”[16] By “entitling the unsuccessful movant to immediately appeal” any denial, the statute guarantees that “however unsound an anti-SLAPP motion may be, it will typically stop the entire lawsuit in its tracks until an appellate court completes its review.”[17]

The Washington legislature heard a similar warning from future Court of Appeals Judge Ian Birk, who — over a year before his judicial appointment — testified before the Senate Law and Justice Committee during a public hearing on UPEPA: “[T]his bill gives any defendant in any civil case the unilateral power to stop it in its tracks [and] force an immediate appeal which means a delay of about two years.”[18] Birk further noted that, under UPEPA’s “imbalanced fee provision,” a defendant “never faces a risk of paying [attorney’s] fees except in cases of

frivolousness, which courts are extremely reluctant to find.”[19] It will be particularly challenging to find a UPEPA motion is frivolous given the statute “must be broadly construed and applied to protect” free expression.[20]

Birk predicted that the bill, as written, would “invite . . . all the same abuses that led” the Supreme Court to invalidate the prior Anti-SLAPP statute in 2015.[21]

The legislature clearly took these concerns seriously, amending the original bill to exclude numerous causes of action from UPEPA’s scope.[22] For example, UPEPA expressly excludes causes of action “relating to real property,” “[s]eeking recovery for bodily injury,” and those “[b]ased on a common law fraud claim,” in addition to all claims brought under Title 26 (domestic relations), Title 49 (labor and employment), and the Consumer Protection Act, ch. 19.86 RCW.[23] There are also more general exceptions, such as any cause of action “[a]gainst a person named in a civil suit brought by a victim of a crime against a perpetrator[.]”[24]

So far, these exceptions seem successful in deterring the kind of abuse inundating California courts. Since 2021, Washington courts have cited UPEPA in only 8 appellate decisions — averaging less than two per year. That is far fewer than the “explosion” of appeals under the less restrictive California statute, which often produces up to 200 appellate decisions per year.[25]

Still, there’s no guarantee UPEPA’s appellate burden will remain so manageable. If anything, appellate citations show an upward trend as the number of UPEPA appeals has increased every year since its enactment.

At a minimum, the legislature might consider amending UPEPA to provide that a moving party cannot appeal as a matter of right if the trial court determines the cause of action falls under one of UPEPA’s exceptions.[26] For example, there simply is no reason to interrupt trial proceedings for an immediate appeal to decide whether a trial court correctly denied a UPEPA motion seeking to dismiss an employment discrimination claim — a cause of action “[b]rought under Title 49 RCW” and thus expressly excluded from UPEPA. To the extent there is any ambiguity in applying these exceptions, the regular procedure for discretionary review is more than adequate for such decisions.

It's also worth mentioning that the Supreme Court need not be a passive observer when it comes to the legislature's experiments in appellate procedure. Under longstanding separation of powers principles, "the power of [the] court to establish procedural rules for the courts of this state is supreme." [27] Accordingly, procedural statutes that conflict with court rules have no effect. [28]

In *Thurman v. Cowles Company*, Division Three recognized that the statutory right of appeal in UPEPA conflicts with RAP 2.2, concluding that appellate courts should apply "discretionary review standards" to orders denying UPEPA motions "unless and until our Supreme Court adopts a rule allowing for direct appeal" as the statute envisions. [29] The court also noted that UPEPA's restriction on discovery is inconsistent with CR 26. [30]

Like Division Three, courts in other UPEPA states are beginning to recognize the inherent "friction" between the statute's provisions and ordinary procedural court rules. [31] As one Pennsylvania court put it: "On its face, the UPEPA gives the very strong impression that this Act is the General Assembly's latest attempt at rewriting the Pennsylvania Rules of Court." [32]

For now, however, our Supreme Court has deferred to the legislature's unique procedural choices under UPEPA, including the statutory right to appeal. In 2023, the Court amended RAP 2.2 to permit an appeal as a matter of right when "provided" by statute. [33] The proposed amendment was specifically intended to "avoid any conflict" with UPEPA. [34] The Court also reversed Division Three's decision in *Thurman*, holding UPEPA did not apply to claims filed before the statute became effective. By resolving the case on statutory grounds, the Court "decline[d] to reach" the separation of powers question. [35]

But Washington courts should not shy away from revisiting the issue under the right circumstances. As UPEPA litigation develops, future cases may reveal that judicial intervention is necessary to modify how courts implement its unique procedures.

As it stands, respondents facing meritless UPEPA appeals have few options other than riding it out. Motions to dismiss an appeal as frivolous under RAP 18.9 are almost never granted. Another option might be reviving motions on the merits under RAP 18.14, which allows the courts to expeditiously affirm in appeals that

are "clearly without merit." [36] While all three appellate divisions have entered general orders abandoning motions on the merits, [37] UPEPA's broad statutory right to appeal might justify reinstating the procedure.

Jonathan Collins joined Smith Goodfriend in 2019 and is now a shareholder. He previously clerked for Judge Linda Lau in Division One and Chief Justice Mary Fairhurst of the Washington State Supreme Court. Jon can be reached at jon@washingtonappeals.com.

[1] Maybury v. City of Seattle, 53 Wn.2d 716, 721 (1959).

[2] RCW 4.105.070.

[3] Jha v. Khan, 24 Wn. App. 2d 377, 386 (quoted source omitted).

[4] Davis v. Cox, 183 Wn.2d 269 (2015).

[5] M.G. v. Bainbridge Island Sch. Dist., 34 Wn. App. 2d 51, 70 (2025).

[6] RCW 4.105.020(2).

[7] RCW 4.105.030(1)(a), (2), .060(1), .070.

[8] RCW 4.105.060(1); RCW 4.105.010(2)(c).

[9] RCW 4.105.010(3).

[10] RCW 4.105.060(1)(c).

[11] Jha, 24 Wn. App. 2d at 399 (quoted source omitted).

[12] DGHI, Enterprises v. Pac. Cities, Inc., 137 Wn.2d 1999, 949 (1999).

[13] RCW 4.105.070.

[14] RCW 4.105.030(3).

[15] Grewal v. Jammu, 191 Cal.App.4th 977, 1001 (2011).

[16] Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 54 Cal.App.5th 738, 760 (2020).

[17] Oakland, *supra*, at 763.

[18] TVW, Senate Law & Justice Committee, 1:04:56 to 1:07:24 (Jan. 14, 2021), available at: .

[19] *Id.*; See RCW 4.105.090.

[20] RCW 4.105.901.

[21] *Supra*, n.18.

[22] Compare S.B. 5009, 67th Leg., Reg. Sess. (Wash. 2021), with Substitute S.B. 5009, 67th Leg., Reg. Sess. (Wash. 2021).

[23] RCW 4.105.010(3)(a).

[24] RCW 4.105.010(3)(a)(iv).

[25] Grewal, *supra* n.15, at 998.

[26] RCW 4.105.010(3)(a).

[27] *Petrarca v. Halligan*, 83 Wn.2d 773, 776 (1974).

[28] *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 985 (2009).

[29] *Thurman v. Cowles Co.*, 29 Wn. App. 2d 230, 246 (2024).

[30] *Id.* at 246.

[31] *Hernandez v. Zook*, 351 A.3d 796, 800 (2026).

[32] *Id.*

[33] Order No. 25700-A-1510 (June 8, 2023).

[34] Washington Courts, Proposed Rules Archives, available at: .

[35] *Thurman v. Cowles Co.*, 4 Wn.3d 291, 306 (2025).

[36] RAP 18.14(e)(1).

[37] See RAP 18.14(k).