always Appealing: When RAPs and Statutes Collide...

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What happens when a rule and a procedural statute conflict? Generally, when "a court rule and a statute appear to conflict on a procedural matter related to court administration, the rule controls."[1] This is in recognition of our State's constitution, which provides that the "administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court."[2] In other words, the Supreme Court, rather than the Legislature, establishes rules of procedure. "Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme."[3]

Division Three recently addressed a conflict between the Rules of Appellate Procedure (RAPs) and a statute in Thurman v. Cowles Co.[4] RCW 4.105.080 of the Uniform Public Expression Protection Act (UPEPA), which was enacted in 2021, provides that a "moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under RCW 4.105.020. The appeal must be filed not later than twenty-one days after entry of the order."[5]

The "UPEPA provides for early adjudication of baseless claims aimed at preventing an individual from exercising the constitutional right of free speech."[6] In furtherance of that policy, RCW 4.105.020 allows a party to a to file a "special motion for expedited relief" asking the court to dismiss a cause of action, or part of a cause of action, "to which this chapter applies," within 60 days of service of the complaint. If the trial court denies a moving party's request to dismiss all or part of a plaintiff's cause of action, RCW 4.105.080 grants the moving property the ability to appeal that order as a matter of right, if the notice of appeal is filed within 21 days of entry of the order.

RCW 4.105.080 conflicts with both RAP 5.2 and RAP 2.2. RAP 5.2 provides that a notice of appeal must be filed in the trial court within 30 days of entry of the order that the party wants reviewed.[7] And RAP 2.2 provides that when an order does not dispose of all claims it is "subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties."[8]

While Division Three did not address the conflict between RCW 4.105.080 and RAP 5.2, it did address the statute's conflict with RAP 2.2, holding that RCW 4.105.080 "cannot be given effect," as a result.[9] Citing RCW 2.04.200, Division Three held that "Court rules of practice and procedure adopted by the Supreme Court supersede conflicting laws,"[10] and that "unless and until our Supreme Court adopts a rule allowing for direct appeal of orders denying motions under RCW 4.105.020, appellate courts should accept review of these matters only under discretionary review standards."[11]

While it is true that the RAPs when adopted in 1976 were, for the most part, intended to supersede statutes covering appellate procedure, the very first rule, RAP 1.1, acknowledges that under certain circumstances, a statute can control over an inconsistent RAP, by providing that these "rules supersede all statutes and rules covering procedure in the Supreme Court and the Court of Appeals, unless one of these rules specifically indicates to the contrary."[12] Some rules are clear when a statute supersedes the RAPs, by including the statute within its provisions. However, some RAPs contain a provision signaling that a statute may supersede its provisions, but do not state which statutes apply. While RAP 18.22 lists those statutes that have been superseded by the RAPs, there is no similar list of statutes that supersede certain RAPs.

RAP 2.2(a), for instance, states a party may appeal from "only" those decisions listed within the rule, "[u]nless otherwise prohibited or provided by statute or court rule." But RAP 2.2 does not identify the statutes that may "prohibit" an appeal from a decision listed or "provide" for an appeal from a decision not listed.

RAP 5.2 also contains a statutory carve-out. RAP 5.2 provides that a notice of appeal must be filed within 30 days after entry of the decision that the party wants reviewed, but if "a statute provides that a notice of appeal . . . must be filed within a time period other than 30 days after entry of the decision, the notice required by

these rules must be filed within the time period established by the statute."[13] Like RAP 2.2, RAP 5.2 does not identify the statutes that may have a different time period for filing a notice of appeal.

When the RAPs were adopted, the Supreme Court contemplated that statutes might be subsequently enacted that will conflict with a RAP. If the statute stated it was superseding the RAP "by direct reference to the rule by number," the statute would apply "until such time as the rule may be amended or changed by the Supreme Court through its exercise of rulemaking power."[14] Otherwise, the RAPs would apply over an inconsistent statute "unless the rule specifically indicates that statutes control."[15]

The question is whether RCW 4.105.080, which was enacted after the RAPs were adopted, controls over the inconsistent provisions in RAP 2.2 and RAP 5.2. Division Three's holding that a moving party's right to appeal under RCW 4.105.080 "cannot be given effect"[16] is arguably incorrect. Even though RCW 4.105.080 does not make a "direct reference" to RAP 2.2 and RAP 5.2, both rules contain provisions that "indicate that statutes control." RAP 5.2, for instance, contains a provision titled "Time Requirements Set by Statute Govern."[17] Although less obvious than RAP 5.2, RAP 2.2 also has a statutory carve-out; the limitations under RAP 2.2 as to which decisions can be appealed as a matter of right apply "unless otherwise prohibited or provided by statute or court rule."[18] As RCW 4.105.080 specifically provides for an appeal as a matter of right from a decision that is not among those listed under RAP 2.2, the statute should control.

The language, "unless otherwise prohibited or provided by statute or court rule," was added to RAP 2.2 in 1985. Two years after this amendment, the Supreme Court deferred to the Legislature's enactment of RCW 9.94A.210(2) allowing the State to appeal, as a matter of right, from a sentence outside the sentencing range for the offense, even though RAP 2.2 did not include this decision among those decisions that the State could appeal from in a criminal case.[19] In doing so, the Court did not rely on the amendment to RAP 2.2. Instead, the Court held that "the rules supersede only those statutes pertaining to court procedures."[20] The Court described RCW 9.94A.210(2) as addressing the jurisdiction of the appellate court, rather than procedure. The Court thus held that while it had power to enact rules describing the manner in which exceptional sentences may be appealed, "it

is for the Legislature to determine whether such appeals should be heard at all."[21] The Supreme Court later amended RAP 2.2 to include a provision allowing the State to appeal a sentence outside the sentence range to conform with both its holding and the statute.[22] It is likely that the Supreme Court would take the same position on RCW 4.105.080 and defer to the Legislature's determination that the orders denying expedited relief under the UPEPA are appealable as a matter of right.[23]

So far, there have been only two published decisions addressing RCW 4.105.080.[24] I foresee other issues, related to appellate procedure, arising from this statute that will need to be addressed in future decisions. For instance, RCW 4.105.080 only grants the right to appeal to a "moving party." Therefore, a plaintiff whose cause of action is partially dismissed under RCW 4.105.020 cannot appeal the order as a matter of right, even though the defendant could. If the defendant files a notice of appeal, can the plaintiff seek review by a notice of cross-appeal, or will they separately need to seek discretionary review under RAP 2.3?[25] If the defendant does not appeal, and the plaintiff files a notice of discretionary review under RAP 2.3, must they file their notice within 21 days, as required for a notice of appeal under the statute, or can they file it within 30 days as provided by RAP 5.2(b)? Can a defendant who files a notice of appeal under RCW 4.105.080 also seek review of orders that are not appealable as a matter of right if they prejudicially affect the appealed order,[26] or will it be similar to review of interlocutory orders, limited to the issues for which discretionary review is granted,[27] which in this instance would be review of a denial of expedited dismissal under the UPEPA?[28] These are all questions that we will need to wait for answers, and may become the subject of a later article.

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1 State v. Flaherty, 177 Wn.2d 90, 93, 296 P.3d 904 (2013); see also RCW 2.04.200 ("When and as the rules of courts herein authorized shall be

promulgated all laws in conflict therewith shall be and become of no further force or effect").

2 Wash. Const. art. IV, § 30(5); see also RCW 2.06.030 ("The administration and procedures of the court shall be as provided by rules of the supreme court").

3 State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

4 _ Wn. App. 2d __, 541 P.3d 403 (Jan. 11, 2024).

5 The UPEPA was enacted in 2021 as a successor to the Washington Act Limiting Strategic Lawsuits against Public Participation (anti-SLAPP), former RCW 4.24.525. Under the anti-SLAPP law, a party was entitled to an "expedited appeal" as a matter of right from an order denying a motion to strike a claim, similar to RCW 4.105.080. RCW 4.24.525(5)(d). However, unlike RCW 4.105.080, the anti-SLAPP law did not reduce the period for filing a notice of appeal under RAP 5.2.

6 Jha v. Khan, 24 Wn. App. 2d 377, 387, 520 P.3d 470 (2022), rev. denied, 530 P.3d 182 (2023).

7 RAP 5.2(a).

8 RAP 2.2(d).

9 Division Three also held that RCW 4.105.080 conflicted with CR 54(b), which provides that an order not disposing of all claims generally is an interlocutory order, and any remaining claims continue to trial. Thurman, 541 P.3d at 412.

10 Thurman, 541 P.3d at 411.

11 Thurman, 541 P.3d at 412.

12 RAP 1.1(g) (emphasis added).

13 RAP 5.2(d).

14 RAP 1.1(h).

15 RAP 1.1(h) (emphasis added).

16 Thurman, 541 P.3d at 412.

17 RAP 5.2(d).

18 RAP 2.2(a).

19 State v. Pascal, 108 Wn.2d 125, 131, 736 P.2d 1065 (1987).

20 Pascal, 108 Wn.2d at 131 (emphasis in original) (citing RAP 1.1(g)).

21 Pascal, 108 Wn.2d at 130-31.

22 RAP 2.2. Decisions Of The Superior Court That May Be Appealed, 2A Wash. Prac., Rules Practice RAP 2.2, Drafters' Comment, 1990 Amendments (9th ed.).

23 The Supreme Court may get the opportunity to weigh in on this issue since the respondent in Thurman petitioned for review. That petition will be considered on June 4, 2024.

24 Thurman, 541 P.3d 403; Jha, 24 Wn. App. 2d 377.

25 The plaintiff in Thurman was said to have "cross appealed," but the opinion does not address that fact beyond that.

26 RAP 2.4(b).

27 RAP 2.3(e).

28 Division One briefly touched on this issue in two of its cases. In its published decision, Jha, the Court reviewed orders, which were not individually appealable as a matter of right under RCW 4.105.080, under RAP 2.4(a) because they were designated in the notice of appeal. 24 Wn. App. 2d at 404, n. 14. In its unpublished decision, Dimension Townhouses, LLC v. Leganieds, LLC, the Court refused to review the trial court's refusal to dismiss a claim based on defendant's argument that they were immune, because that argument was "not subject to immediate appeal like the denial of a UPEPA motion under RCW 4.105.080." Cause no. 84969-7-I, at * 6, n. 3 (Jan. 22, 2024).