May 17, 2024

Submitted via the Rules Forum

Arizona Supreme Court
1501 West Washington
Phoenix, AZ 85007

Re: Comment on Petition R-23-0055 Rules of Procedure for Special Actions

Justices of the Court:

Thank you for this timely and necessary discussion about updating Arizona's Rules of Procedure for Special Actions ("RPSA").

As a public interest litigation organization, the Goldwater Institute's work regularly involves special action proceedings on a range of issues from government transparency to state and federal constitutional claims. Consequently, we engaged substantially with the RPSA Task Force and offered public comment.

Our comments covered the state of the current rules, challenges we have encountered in navigating them, and recommendations for amendments. These resulted in several alterations to the draft rules or comments, for which we thank the Task Force. We now comment on the rule petition and the version of the rules proposed in the petition's Appendix A.

The Task Force's proposed rules make important and significant improvements to the structure of the ruleset, clarify the distinction between original and appellate special actions, elaborate (mostly in a comment) about the nature of statutory special actions, and protect the ability to participate in special action proceedings as amicus curiae.

However, we have concerns about the discovery provision in draft rule 7(g), particularly in the context of statutory special actions. Additionally, we also believe that the RPSA should state the extent to which the Arizona Rules of Civil Procedure apply in original special actions when the RPSA are silent on a topic.

The proposed rules clarify different types of special action proceedings.

The current rules broadly apply to various types of special actions, despite important procedural differences. Understandably, the ruleset initially was meant to unify writ procedures, and it did so; but it became equally applicable both to special actions that functioned like interlocutory appeals as well as those that initiate entirely new, standalone legal actions, including those that are specifically authorized by statute.

An important component of the Task Force's recommendations is to define "original" and "appellate" special actions and specify procedures for each. We believe this is critical because, as proposed Rule 2 clarifies, "[w]ith few exceptions, jurisdiction is mandatory in original special actions," (particularly original statutory special actions), while conversely, "[w]ith few exceptions, jurisdiction is discretionary in appellate special actions." This clarification will help prevent the improper denial of jurisdiction in many original special actions, especially statutory special actions—those which by definition are *the* statutorily prescribed form of action for certain claims. For the same reasons, the proposed comment to Rule 2 is appropriate.

The Task Force also made a commendable distinction between statutory special actions and special actions falling solely within the scope of the common law writs. Statutory special actions are created by the legislature to provide expedited proceedings in certain settings. Typically, this means litigants have no other avenue to bring claims arising under such statutes as they might in the context of a "regular" special action. Courts have no discretion to deny jurisdiction in statutory special actions unless the underlying statute specifically grants it. Therefore Rules 2 and 3 and their comments clarify these important distinctions. Further efforts to clarify the procedural distinctions between statutory special actions and other special actions would be helpful.

The Task Force rightly retained language in proposed Rule 5(c) allowing for amicus participation in special actions in Superior Court.

During the revision process, the Task Force solicited comments from various committees of the State Bar. The Civil Practice and Procedure Committee Subcommittee on Rules of Procedure for Special Actions proposed eliminating the option to participate as amicus curiae in special actions in the Superior Court.[1] Fortunately, the Task Force rightly rejected this suggestion, preserving courts' discretion to allow nonparties to participate as amicus curiae in proposed Rule 5(c). We strongly support the retention of this language for several reasons.

First, there is no pressing need to ban amicus briefs in Superior Court special actions because they are exceedingly rare anyway.

Second, trial judges have—and should retain—discretion to decide whether to grant or deny an amicus leave to participate. If amicus participation is unwarranted in a particular matter, judges are free to deny it. Conversely, in instances where amicus participation would be helpful, judges should be free to allow it. As one Task Force member commented, "You can be a friend to any court."

Third, amicus briefs can be quite helpful to judges even under normal circumstances, but they may provide even more value in accelerated proceedings that often turn on questions of law and where there is generally not a lot of time for factfinding (indeed, as discussed below, the current draft rules seek to further curtail discovery). Amici, in an appropriate case, could provide valuable information to a trial judge regarding a host of factual and legal issues that might otherwise be impractical for the parties to do on a truncated timeline.

[1] *See* pages 61 and 67 of the Task Force's January 5, 2024 Meeting Materials.

Fourth, if amicus briefs are banned, interested parties who otherwise would have appeared as amici may instead have a greater incentive to file intervention motions, which would complicate and elongate the proceedings. This is the opposite of what the special action rules are designed to do.

Fifth, amicus support may occasionally be warranted in certain original special actions—including statutory special actions—where there is a strong likelihood that the outcome will affect third parties. Public interest cases are a good example of this, including special actions involving public records, elections, or unique constitutional questions. Moreover, the Superior Court might in some instances be the only practical opportunity to file an amicus brief.

The current rules have granted superior court judges discretion to allow amicus participation for decades. There is no reason to limit their discretion in that area now, and the Task Force was correct to preserve the language in proposed Rule 5(c).

Proposed Rule 7(g) should not discourage discovery in original special actions.

Proposed Rule 7(g), in its current form, should not be adopted.

The heading for draft Rule 7(g) states "Discovery Generally Prohibited." The Rule goes on to state that "[d]iscovery is not routinely permitted in special actions." A prohibition on discovery in original special actions would impair the administration of justice in special action cases that require factual development.

The first sentence of Rule 7(g) should be deleted and its heading shortened to "Discovery."

Factual issues frequently arise in original special actions—and particularly in statutory special actions. Superior Court judges should retain the discretion to allow discovery where warranted without being discouraged from doing so. *Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 616 (App. 1996) ("A trial court has broad discretion in matters of discovery, and … this is no less true when discovery is requested in a special action proceeding in the superior court.").

Discovery is not as "rare" in statutory special actions as in other special actions because such actions typically provide plaintiffs their only avenue to bring such claims, even when there are key factual disputes. In the public records context, for example, under the "best interests of the state" exception to disclosure, the "impact of disclosure" is a triable issue of fact. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 347, 350 ¶¶ 8, 27 & n.4 (App. 2001). This means that discovery may be necessary any time a public body attempts to shield records under the "best interests of the state" exception. Such a broad statement in the rule discouraging discovery (and, potentially, removing other disclosure requirements) thus may prevent plaintiffs from capably prosecuting their cases against government entities in public records cases. Similarly, courts sitting as fact-finders will not have a well-developed record to make critical legal determinations.

We do not believe the government (or any litigant) should have such a presumption against discovery in original statutory special actions in Superior Court, even if it may be warranted in other special actions that present clean questions of law.

Additionally, discovery is "generally prohibited" in an appellate court setting, so any concerns that appellate courts will sit as fact-finders are resolved by draft Rule 6(e), which expressly states that appellate courts "do not conduct trials in original special actions."

The old State Bar Committee Note (e) to current Rule 4 contains more appropriate language:

> Discovery in special action proceedings may be necessary in particular circumstances, though it will certainly not be routinely required, and will never be used in an appellate court since no trials will occur there. The Rule gives necessary latitude to allow discovery in those rare instances when it is necessary.

In short, proposed Rule 7(g) goes too far in curtailing discovery that may be necessary and appropriate.

Relatedly, the Task Force's substitution of the word "material" for "triable" regarding the issues of fact that can be subject to special orders concerning discovery improperly impairs the fair administration of justice. Use of the word "material" risks importing summary judgment caselaw that may not be appropriate for special actions. This change also risks undermining caselaw that has discussed "triable issue[s] of fact" in the special action context. *See, e.g., Cranmer v. State*, 204 Ariz. 299, 302–03 ¶ 12 (App. 2003) (discussing current Rule 4(f) and clarifying that "a special action proceeding is not a trial de novo," at least for non-statutory special actions); *Keegan*, 201 Ariz. at 347, 350 ¶¶ 8, 27 & n.4 (App. 2001) (characterizing "the impact of disclosure" as a "disputed fact" in a public records statutory special action where expert witnesses were deposed); *King v. Neely*, 143 Ariz. 329, 330 (App. 1984) (citing predecessor to Rule 4(f) and finding that it did not allow a deposition under the circumstances).

To address these concerns, we recommend that Rule 7(g) read as follows:

> **(g) Discovery.** If a triable issue of fact is raised in an original special action in the Superior Court, the court may issue special orders concerning discovery.

Importantly, this language, like current Rule 4(f), requires the court to issue an order before discovery proceeds. It therefore retains in practice the substance of the phrase "[d]iscovery is not routinely permitted in special actions" without implying a presumption against discovery. Moreover, it specifies that discovery should only be allowed in *original* special actions *in the Superior Court*, which is more restrictive than the text of the current rule.

We also suggest that this sentence from the old State Bar Committee Note (or substantially similar language) be inserted at the beginning of the proposed comment to the rule:

> Discovery in special action proceedings may be necessary in particular circumstances, though it will certainly not be routinely required, and will never be used in an appellate court since no trials will occur there.

The RPSA should clarify that the Rules of Civil Procedure apply in original special actions in the Superior Court where they do not conflict with the special action rules.

The current rules also create confusion during litigation regarding the applicability of the Arizona Rules of Civil Procedure in original special actions in Superior Court.

These questions include the timeline for the filing of an answer or another appropriate response, what other responsive pleadings might be filed in lieu of an answer, and the availability of preliminary relief in special actions, none of which are addressed in the current rules. The current rules also do not address the extent to which Rule 16 of the Civil Procedure rules applies in special actions.

Proposed Rule 7(a)(2) solves the first problem by importing the timeline of Rule 12(a) of the Rules of Civil Procedure for the filing of an answer. The Task Force briefly discussed the phrase "other appropriate response" in that rule but did not clarify in rule or comment what types of pre-answer motions that might include. In fact, motions are not specifically addressed in the RPSA. Likewise, no rule directly discusses the availability of preliminary relief aside from stays in proposed Rule 8. Proposed Rule 7(f) will likely solve at least some of the questions surrounding Civil Procedure Rule 16.

Rather than continue to import the Rules of Civil Procedure piecemeal into the special action rules, we propose adding an express provision in the rules stating that the Arizona Rules of Civil Procedure apply where the special action rules are silent and a judge has not ordered otherwise.

Specifically, we suggest adding a rule to Part II that parallels draft Rule 10(a) in Part III regarding the use of ARCAP and SCRAP in appellate special actions. We propose that it read as follows: **"To the extent they are consistent with these Rules, the Rules of Civil Procedure apply to original special actions in the Superior Court."**

A specific reference to the Rules of Civil Procedure will fill in these and other potential gaps in the special action rules, which again, are designed to expedite proceedings, not necessarily supplant every procedural rule used in a typical case.

Conclusion

In sum, petition R-23-0055, abrogating the current RPSA and replacing them with the petition's proposed rules, should be granted, subject to the following revisions:

- Substitute proposed Rule 7(g) with the following:

> **(g) Discovery.** If a triable issue of fact is raised in an original special action in the Superior Court, the court may issue special orders concerning discovery.

And add as the first sentence of the comment to Rule 7(g):

> Discovery in special action proceedings may be necessary in particular circumstances, though it will certainly not be routinely required, and will never be used in an appellate court since no trials will occur there.

- Insert the following at or near the beginning of Part II, either as a separate rule or as a new subsection to rules 6 or 7:

> To the extent they are consistent with these Rules, the Rules of Civil Procedure apply to original special actions in the Superior Court.

Additionally, any further proposal to amend proposed Rule 5(c) to curtail amicus involvement in special actions in Superior Court should be rejected.

Thank you again for your consideration of these issues. We look forward to the new and improved RPSA.

Sincerely,

Parker Jackson (Bar No. 037844)
Staff Attorney
Scharf-Norton Center for
Constitutional Litigation at the
Goldwater Institute
Email: pjackson@goldwaterinstitute.org