always Appealing: Court of Appeals to Superior Court: “Make a Decision!”

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Bar Bulletin Blog: General

By Howard Goodfriend

“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.

For the past 25 years, superior courts have had the authority to certify an issue for interlocutory appellate review. Historically, a party could obtain review by convincing the appellate court (usually, its commissioner acting as gatekeeper) in a motion for discretionary review that the superior court’s decision meets one of three established criteria — (1) obvious error rendering further proceedings useless,[1] (2) probable error that substantially limits the freedom of a party to act,[2] or (3) that “the superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.”[3]

Added to the Rules of Appellate Procedure in 1998, RAP 2.3(b)(4) provides an additional ground for obtaining appellate review before entry of a final judgment. Under this provision the superior court may certify, or the parties themselves may stipulate, that the superior court has entered an order that “involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.”

While acceptance of review under RAP 2.3(b)(4) is still at the appellate court's discretion, the rule is unique among the criteria for interlocutory appellate review in that it allows the parties themselves or the superior court judge to certify that the appellate court should intervene, before the conclusion of the case, to decide an issue that will control the outcome of the case ("a controlling question of law"), to which there is no clear answer ("there is a substantial ground for a difference of opinion"), and to which an answer from the appellate court may "materially advance the ultimate termination" of the case.[4]

Like the other three criteria in RAP 2.3, certification under subsection (b)(4), gives the appellate court authority to review an interlocutory order of the superior court. But obtaining discretionary review is still difficult, as demonstrated by a recent unpublished case, Wade v. Rypien,[5] in which Division Three of the Court of Appeals refused to answer a question certified by the trial court, after the appellate court commissioner had granted review based upon the parties' stipulation and the superior court's order certifying a question of law. The problem identified by Division Three: there was no "order" to review, as the superior court certified an issue before actually deciding it.

The Wade case was a tort action brought by the plaintiff against her former partner, alleging damages for assault, battery, false imprisonment and intentional infliction of emotional distress, from acts of domestic violence dating back well over a decade. The issue, certified by the superior court on the parties' stipulation, was whether Washington would recognize "a new unified tort of domestic violence that would allow Wade to seek damages for actions occurring beyond the relevant statute of limitations for each individual act."[6]

With neither an answer to the complaint, nor any dispositive motion practice, the parties stipulated that the issue met the criteria of RAP 2.3(b)(4), and jointly asked the trial court to certify the issue for immediate appellate review by the Court of Appeals. The trial court granted the motion, and the Court of Appeals commissioner agreed that the certified issue satisfied the requirements of RAP 2.3(b)(4), as a "controlling issue of law," that was unclear based on the absence of Washington precedent, and because "immediate review would materially advance the termination of the litigation."[7] The merits panel of Division Three,

however, dismissed review as “improvidently granted because the superior court has not decided the issue presented.”[8]

Division Three held that the parties, the trial court, and the commissioner ignored the threshold requirement that RAP 2.3 allows for discretionary review of an “act” or an “order” of the superior court. The trial court never entered an order deciding whether the theory of a continuing tort of domestic violence would authorize a damages claim for individual acts occurring after the expiration of the statute of limitations:

Specifically, the rule provides: “Decision of Superior Court. Unless otherwise prohibited by statute or court rule, a party may seek discretionary review of any act of the superior court not appealable as a matter of right.” RAP 2.3(a).”

Further:

Under RAP 2.3(b)(4), “a superior court may certify, or the parties may stipulate, “that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.”[9]

Writing separately, Judge Lawrence-Berrey acknowledged that “the parties, understandably, will be disappointed . . . and may view our approach as pedantic,” but emphasized that “the Court of Appeals is an error correcting court. Here we have no error to correct.”[10]

The court’s reluctance to address an issue in the absence of a superior court order that decides the issue in the first instance is not surprising. With rare exception, Washington courts do not issue advisory opinions, and rely on the parties’ adversity to turn an abstract legal issue into a concrete dispute with actual facts.[11] Even when considering issues of Washington law certified by the federal court, which have also been criticized as allowing the issuance of an advisory opinion,[12] the Washington Supreme Court has an actual record of the district court’s proceedings, including motions, declarations and other documentary evidence to put the certified issue into its proper context.[13]

Moreover, though it cited no precedent for its refusal to consider a certified issue in the abstract, the Court of Appeals was not writing on a clean slate. In Dickens v. Alliance Analytical Laboratories, LLC,[14] Division Three refused to consider four

issues involving the breadth of the wrongful withholding of wages statute, RCW 49.52.050, including "what does a plaintiff have to prove in order to hold a defendant personally liable as an agent of an employer" under the statute.[15]

In that case, the trial court, after denying cross motions for summary judgment, certified several issues involving how much authority an "agent" must have from an employer in order to be personally liable for an employee's wages. The commissioner granted "limited review," and Division Three took an even narrower view of the grant of discretionary review, affirming the denial of summary judgment and remanding because "[u]nresolved material facts remain to be developed."[16] The court refused to go any further "[b]ecause we do not give advisory opinions."[17]

Division Two also dismissed discretionary review as improvidently granted under RAP 2.3(b)(4) in an unpublished decision, Varney v. City of Tacoma,[18] a case involving a firefighter suing the City of Tacoma for abuse of process and discrimination after the firefighter and the City had engaged in extensive litigation concerning his claim for worker's compensation. The trial court ordered the City to produce unredacted copies of documents from its files from the workers' compensation litigation that the City claimed were privileged, then certified several issues involving the scope of the attorney-client privilege and its fraud exception. The Court of Appeals refused to answer several of the certified questions on the ground that they "ask hypothetical questions that are not tethered to the facts of this case, and they are not rooted in specifically referenced parts of the trial court's order of which the parties seek review."[19]

There are several lessons from these cases: First, the appellate court grants discretionary review under RAP 2.3(b)(4) of an order, not an issue. No matter how interesting the legal issues may appear, the appellate court will not pass judgment until the trial court has made a ruling based on a contested motion.

Second, though legal issues may abound in a case, the appellate court will be loath to consider a certified legal question where the trial court has denied summary judgment based on disputed issues of fact. It is hard to convince a court that there is a controlling issue of law, the resolution of which will materially advance the litigation's termination, if its answer turns on disputed fact issues that may be resolved in subsequent litigation.

Third, remember that interlocutory review is discretionary, not a matter of right, even when a trial court certifies an issue for the Court of Appeals to review. Avoid the temptation to expand or expound on the nuances of a legal issue when seeking certification. Frame the issue as cleanly and concisely as possible to emphasize that the superior court needs guidance on an issue that is both unresolved and controlling.

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1 RAP 2.3(b)(1).

2 RAP 2.3(b)(2).

3 RAP 2.3(b)(3).

4 For a more thorough discussion, see my previous article on interlocutory review in the Bar News: Certification of Interlocutory Rulings for Immediate Appeal, King County Bar Association - Bar Bulletin (April 2021), available at: https://www.washingtonappeals.com/_ARTICLES/2104-Certification_of_Interlocutory_Rulings_for_Immediate_Appeal-Howard_Goodfriend.pdf

5 No. 39172-8-III, 2024 WL 488409 (Feb. 8, 2024).

6 Wade, 2024 WL 48809 at *1.

7 2024 WL 488409 at *1.

8 2024 WL 488409 at *1.

9 2024 WL 488409 at *1 (emphasis in original).

10 2024 WL 488409 at *2 & n.1 (Lawrence-Berrey, J., concurring).

11 See, e.g., Walker v. Munro, 124 Wn.2d 402, 879 P.2d 920 (1994) (refusing to issue writ of mandamus in challenge to initiative prior to its effective date); Brown v. Vail, 169 Wn.2d 318, 237 P.3d 263 (2010) (refusing to issue declaratory

judgment that use of drug in state sanctioned executions would violate federal controlled substance laws, “where the decision to enforce provisions of a controlled substances act is left to the discretion of agencies overseeing the statute.”).

12 See In re Elliott, 74 Wn.2d 600, 637, 446 P.2d 347 (1968) (Hale, J., dissenting).

13 RAP 16.16(d); RCW 2.60.030(2). See In re Elliott, 74 Wn.2d 600, 610, 446 P.2d 347 (1968).

14 127 Wn. App. 433, 111 P.3d 889 (2005).

15 127 Wn. App. at 436.

16 127 Wn. App. at 443.

17 127 Wn. App. at 443.

18 No. 56174-3-II, 2023 WL 1990553 (Feb. 14, 2023), rev. denied, 1 Wn.3d 1026 (2023).

19 2023 WL 1990553 at *3.