Motions for Reconsideration in the Washington Court of Appeals

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Bar Bulletin Blog: General

"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.

Clients that lose on appeal naturally wonder if there is a way to ask the appellate court to change its mind. Enter RAP 12.4, which allows parties to file motions for reconsideration based on "points of law or fact . . . the court has overlooked or misapprehended."1 This article reviews recent cases from the Washington Court of Appeals in which an opinion was changed in response to a motion for reconsideration and attempts to draw lessons from them.

In 2023 and the first four months of 2024, the Court of Appeals granted just 19 motions for reconsideration of the more than 1,000 opinions it issued.2 The Court of Appeals also issued a substitute opinion in 15 cases in which it denied a motion for reconsideration. Of these 34 opinions, 24 were unpublished.3 The changes made to an opinion in these cases can be broken down into six categories.4

The first — and largest — category is 19 cases in which the Court of Appeals did not change the result but clarified or supplemented the reasoning in its opinion, either by granting a motion for reconsideration and amending its opinion (nine cases) or denying the motion while issuing a substitute opinion (ten

cases).5 These clarifications sometimes included specific rebuttals to the arguments made in the motion for reconsideration.6

The second category includes six cases in which the Court of Appeals changed the result of its opinion based on an intervening change in relevant authority.7

The third category was three cases in which the Court of Appeals clarified the relief granted on appeal (i.e., affirmance, reversal, or modification of the trial court decision) or the instructions to the trial court on remand.8

The fourth category of cases includes five cases where the Court of Appeals granted reconsideration to correct discrete misstatements of the facts or law, or fixed minor typographical errors.9 The Court of Appeals sometimes did the same thing when issuing a substitute opinion.10

The fifth category consists of one opinion in which the Court of Appeals addressed an issue it had overlooked.11

The sixth category involves one case in which the Court of Appeals changed its holding on a substantive issue without an intervening change in the relevant authority.12

To the experienced appellate practitioner, these results are not surprising. The conventional wisdom is that "[m]otions for reconsideration are rarely granted" and that even when granted "the most likely result is a modification of the opinion that does not change the result but that instead corrects factual errors in the opinion or clarifies the court's legal reasoning."13 Yet, I believe there are still useful lessons that can be drawn from a review of these cases. And if nothing else, it's helpful to confirm that conventional wisdom is grounded in reality.

One lesson is that practitioners should carefully review substitute opinions issued alongside an order denying reconsideration and confirm the changes made to the original opinion.14 That is true for at least two reasons. First, even when denying reconsideration, the Court of Appeals may alter the result of its opinion.15 Second, even if it does not change the result, the Court of Appeals may significantly amend its reasoning.16 Depending on the changes, the merits of a petition for review to the Washington Supreme Court could be impacted, especially if, for example, the substitute opinion acknowledged it conflicted with another Court of Appeals opinion.17

A second lesson is that the more limited and specific the relief sought, the more likely the Court of Appeals will grant it. For example, in Young v. Rayan, 27 Wn. App. 2d 500, 533 P.3d 123, rev. denied 539 P.3d 4 (2023), the Court of Appeals granted a motion for reconsideration asking the court "to correct select misstatements of facts in paragraph 10 of its Decision" and stressed the "relief sought is very narrow."

A third lesson is that the Court of Appeals is willing to amend its opinions to avoid confusion on remand. Accordingly, explaining how an opinion is likely to confuse the trial court on remand may increase the likelihood of reconsideration.

A fourth lesson is that practitioners should remain apprised of changes to relevant authority that might be grounds for reconsideration. In particular, statutory amendments or Washington Supreme Court cases — which the Court of Appeals cannot shrug off as nonbinding authority — are strong grounds for reconsideration.18

Finally, while this article has focused on methods for increasing the likelihood the Court of Appeals grants reconsideration, even when denied motions for reconsideration have value if they prompt the Court of Appeals to clarify its reasoning. To state the obvious, better reasoned opinions are better. To state the less obvious, opinions that more thoroughly address the losing party's arguments uphold the legitimacy of our courts by ensuring that losing parties feel they have been heard and had their fair day in court.19 So while practitioners should remain mindful that motions for reconsideration rarely change the result of an appeal, they also shouldn't be afraid to challenge the Court of Appeals when it overlooks or misapprehends the facts or law. □

Ian Cairns is a principal in Smith Goodfriend and former Chair of the King County Bar Association's Appellate Section. He can be reached at ian@washingtonappeals.com.

1 RAP 12.4(c). Only a decision terminating review, see RAP 12.3(a), is subject to reconsideration. RAP 12.4(a). The rule does not authorize reconsideration of an interlocutory decision or of a ruling by a commissioner or clerk, although a party may file a motion to modify a commissioner's ruling under RAP 17.7.

2 The Court of Appeals issued 1,180 decisions terminating review in 2023. See Caseloads of the Courts of Washington, https://www.courts.wa.gov/caseload/.

3 I retrieved these opinions by searching Westlaw for "reconsideration granted," "as amended on reconsideration," and "withdrawing" or "superseding on reconsideration." I have not included citations to each opinion but have cited examples below.

4 Because some opinions fall into more than one category, the number of opinions in the categories below is greater than 34.

5 While the Court of Appeals sometimes specifies the changes made in an order granting reconsideration, it often does not and none of the orders I reviewed issuing substitute opinions specified the changes made. In researching this article, I used Microsoft Word to compare the original and substitute opinions and highlight the changes made between opinions. In addition, with a few exceptions, I was able to review the motions for reconsideration and any answers filed by downloading them from the appellate court public document portal available on the Washington State Courts website, https://www.courts.wa.gov/.

*6 See, e.g., King Cnty. v. Friends of Sammamish Valley, 26 Wn. App. 2d 906, 934 n.7, 939 n.8, 945 n.10, 530 P.3d 1023 (2023); State v. Sanchez Lujano, 26 Wn. App. 2d 1017, 2023 WL 2880126, at *5 (2023).*

*7 See, e.g., Matter of Smith, 25 Wn. App. 2d 1037, 2023 WL 1954514, at *2 (2023) (reconsidering opinion on personal restraint petition based on a recent order from the Washington Supreme Court on another personal restraint petition); State v. Peterson, 27 Wn. App. 2d 1055 (2023), 2023 WL 5202424, at *2 (reconsidering portion of opinion addressing victim penalty assessment "based on recent statutory amendments").*

8 See, e.g., Chiu v. Hoskins, 27 Wn. App. 2d 887, 904-05, 534 P.3d 412 (2023) (adding paragraph to the opinion's conclusion specifying that the trial court's attorney fee award was vacated and that "[w]hether to award on remand attorney fees under the lease necessarily turns on issues that this Court did not address"), rev. denied 542 P.3d 569 (2024).

9 See, e.g., Young v. Rayan, 27 Wn. App. 2d 500, 533 P.3d 123, rev. denied 539 P.3d 4 (2023) (correcting misstatements of fact); DeYoung v. City of Mount Vernon, 28 Wn. App. 2d 355, 536 P.3d 690 (2023) (amending portion of opinion addressing standard of review); Kumar v. Appleton, No. 84899-2-1, 2024 WL 418885 (Feb. 5, 2024) (amending opinion to add the word "not" erroneously omitted from a sentence).

10 State v. Wade, 28 Wn. App. 2d 100, 534 P.3d 1221 (2023) (court deleted footnote 16 from its original opinion that stated the appellant had not attempted to raise an argument when appellant sought to raise that argument in a supplemental brief), rev. denied 542 P.3d 570 (2024).

11 Kaur v. Am. Enterprises Corp, 25 Wn. App. 2d 1035, 2023 WL 1776589 (2023) (addressing overlooked request for attorney fees).

12 Traulsen v. Cont'l Divide Ins. Co., 26 Wn. App. 2d 1012, 2023 WL 2859337 (court reconsidered portion of its original opinion denying attorney fees), rev. denied 534 P.3d 800 (2023).

13 Washington State Bar Association, Washington Appellate Practice Deskbook § 16.4(3) (4th ed. 2016).

14 It would be helpful if the Court provided at least the parties with a "redline" of the substitute opinion when changes are made. Otherwise, practitioners can employ the method set out in footnote five of this article.

*15 See, e.g., State v. Rodriguez, No. 37522-6-III, 2024 WL 859323, at *1 (Feb. 29, 2024) (amending original opinion to require the vacation of a victim penalty assessment and reconsideration of restitution interest on remand).*

16 See, e.g., State v. Johnson, 540 P.3d 831 (2024) (expanding analysis on whether trial court erred in giving lesser included offense instructions and ER 404(b) issue), rev. denied 2024 WL 2045629 (2024).

17 See RAP 13.4(b)(2) (authorizing review "[i]f the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals").

18 For a discussion of "horizontal" stare decisis and the extent to which Court of Appeals panels can treat opinions from other divisions (or even their own) as nonbinding authority, see the column written by my colleague in this space last

month. Jonathan Collins, Always Appealing: Whose Division Is It Anyway?, King County Bar Bulletin (May 2024), https://www.washingtonappeals.com/_ARTICLES/2405-Whose_Division_Is_It_Anyway-Jonathan-Collins.pdf.

19 See Stefanie A. Lindquist, Wendy L. Martinek, Virginia A. Hettinger, Splitting the Difference: Modeling Appellate Court Decisions with Mixed Outcomes, 41 Law & Soc'y Rev. 429, 435 (2007) ("Convincing the losing party that the court decision was fairly rendered is particularly critical to legitimacy and compliance.") (emphasis in original).