Recent Trends in Discretionary Review: I Reviewed Two Years of Commissioner Rulings so You Don't Have To

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Generally speaking, there are two ways a case ends up in the Court of Appeals. First, when a superior court enters a final judgment or something like it, that decision is appealable as a matter of right under RAP 2.2.1 Second, under RAP 2.3, the Court of Appeals may accept discretionary review of any other decision that is not appealable as a matter of right.2

But discretionary review of non-final superior court decisions—or "interlocutory review"—is disfavored because it leads to "[p]iecemeal appeals" that delay the "speedy and economical disposition of judicial business."3 Instead, discretionary review is intended for those rare superior court decisions that affect either the proceedings or the parties significantly enough to justify an immediate appeal rather than waiting until after trial. As a consequence, a party seeking appellate review of an interlocutory superior court decision must first file a motion for discretionary review explaining why that decision meets one of the four criteria listed under RAP 2.3(b).

The gatekeepers for discretionary review are the Court of Appeals Commissioners, who make the first—and usually the only—ruling on a petitioner's motion. In the past, it was difficult to gain insight into how the Commissioners applied the RAP 2.3(b) criteria in granting or denying discretionary review;

Commissioners' rulings were not easily accessible to the public, and Court of Appeals opinions only rarely explain why discretionary review is granted.

Recently, however, the Washington State Courts website added a public portal allowing access to documents in appellate cases, including Commissioner rulings. So, what can we learn from these Commissioner rulings, now that they are easily accessible? Two of my colleagues and I decided to find out.4 The three of us reviewed the last two years of Commissioner rulings granting or denying discretionary review under RAP 2.3(b) to identify any notable trends. This article highlights some examples, focusing on the most common grounds for discretionary review, RAP 2.3(b)(1) and (b)(2).

RAP 2.3(b)(1) and (b)(2). Section (b)(1) allows the Court to take review when a superior court commits "an obvious error" that would "render further proceedings useless," while section (b)(2) requires a "probable error" that "substantially alters the status quo" or "substantially limits the freedom of a party to act." Both provisions require establishing some degree of "error"—either obvious or probable—and some resulting "harm"—either rendering the proceedings useless or substantially altering the status quo. The provisions bear "an inverse relationship between the certainty of error and its impact on the trial" such that a "weaker argument for error" requires a "stronger showing of harm."5

Historically, Washington courts have not always applied these provisions consistently, particularly as to what showing of harm is required to establish that a superior court's "probable error" "substantially alter[ed] the status quo" under (b)(2).6 In 2022, the Supreme Court resolved this confusion in Dependency of N.G., holding that the "harm" element under RAP 2.3(b)(2) "necessarily requires an immediate effect outside the courtroom to substantially alter the status quo."7

Obvious error under RAP 2.3(b)(1). "Obvious error" requires a "high certainty of error,"8 which typically means the superior court failed to follow clear precedent, statutory language, or other controlling law. For example, a trial court committed "obvious error" by holding the 60-day time limit to appeal Okanogan County's comprehensive plan under the Growth Management Act, and the clock began to run when a newspaper published an article about the plan rather than the date the County adopted the plan, as precedent requires.9

Importantly, a trial court's fact-specific analysis will rarely amount to obvious error. In the same case, the County also argued the trial court committed obvious error by concluding the plaintiff had shown sufficient injury to confer standing. The Commissioner disagreed, explaining that the County relied on cases that were "so fact-specific that the court is unable to conclude that they show the trial court obviously erred" on the standing issue.10

In another case, an investor sued owners of a defunct marijuana business for violating Washington's securities act by failing to deliver a percentage of business profits. But the investor had already sued the same defendants under common law claims based on the same factual dispute, and the parties entered a stipulated order of dismissal with prejudice after reaching settlement. The Commissioner granted discretionary review, explaining the superior court likely committed "obvious error" by failing to dismiss the securities act claim on summary judgment as barred by res judicata, which prohibits filing separate lawsuits based on the same conduct.11

Probable error under RAP 2.3(b)(2). Probable error is harder to define and will look different depending on the circumstances of each case. Courts usually say an error is "probable" under section (b)(2) if it is "less certain" than the "obvious error" referenced in (b)(1).12 In my opinion, this means something like: when no authority directly contradicts the superior court decision—which would suggest an "obvious" error—the party seeking review must show the trial court diverged from an established or highly plausible interpretation of the law that is not foreclosed by precedent.

One example is Thurman v. Knezovich, where the plaintiff sued the Spokane County Sheriff for defamation based on his comments published in the Spokesman Review. During discovery, the Spokesman Review intervened to obtain a protective order and quash subpoenas seeking its records, asserting the journalist privilege under the "media shield" statute, RCW 5.68.010. The Commissioner concluded the trial court committed probable error in denying a protective order and granted discretionary review under RAP 2.3(b)(2), reasoning that the plain language in the media shield statute seemed to protect some subpoenaed information and there was a lack of case law interpreting the relevant provisions.13

Harm under (b)(1)—rendering further proceedings useless. Assuming the trial court committed "obvious error," demonstrating sufficient harm under RAP 2.3(b)(1) is typically straightforward. For example, if the trial court erroneously denied a motion to dismiss, then the remaining proceedings are useless because the case would be over but for the trial court's error.

As Division Three recently held in Sydow v. Douglass Properties LLC,14 however, a superior court decision must render all further proceedings useless—and "not simply much of the proceedings"—to warrant discretionary review under section (b)(1). Sydow involved a property dispute where the plaintiff sought a preliminary injunction preventing the defendant from developing the property during the proceedings.

The trial court denied the injunction and, in seeking discretionary review, the plaintiff argued the trial court rendered the proceedings useless because the defendant's ongoing development would functionally moot his ownership claim. The Court disagreed, explaining the plaintiff could still obtain quiet title to the land and damages for trespass, and thus the trial court's denial of the injunction—even if "obvious" error—did not render all further proceedings useless.

Harm under RAP 2.3(b)(2)—substantially altering the status quo. If the trial court commits only "probable" error, the Court of Appeals cannot accept discretionary review unless the moving party can show some "immediate effects outside the courtroom."15 Typically, this means injunctive relief or an analogous interference with a party's property interests outside the proceedings. Examples of this kind of harm include: an order preventing a party from renting out rooms in her home,16 an order preventing a homeowners' association from collecting dues and by extension paying for basic services,17 and orders requiring immediate payment while the proceedings remain pending.18

Commissioners have also found that discovery orders requiring disclosure of potentially privileged information have an immediate effect outside the courtroom warranting review under section (b)(2)—like Thurman, for example, where the trial court's decision denying a protective order to the Spokesman Review would disclose information protected by journalist privilege. But the same reasoning applies to orders disclosing information protected by attorney-client privilege19 or confidential medical information.20

In some rare cases, Commissioners have granted discretionary review under section (b)(2) where an appeal after final judgment would be too late. In *Ota v. Wakazuru*, the trial court disqualified the plaintiffs' attorneys as a sanction for alleged witness tampering, and review was granted "because the orders at issue deny the [plaintiffs] of their counsel of choice and an appeal as of right after judgment would be too late to provide relief."21

Commissioners have used the same reasoning in some limited contexts, like trial court decisions relating to venue.22 Indeed, an aggrieved party is unlikely to reverse a trial court's venue decision on appeal after final judgment, given the abuse of discretion standard and the obligation to show prejudice.23

Still, it is not entirely clear that RAP 2.3(b)(2) allows discretionary review in cases where the potential harm stems from the fact that a direct appeal after final judgment may be too late. In Raab v. Nu Skin Enterprises Inc., the Commissioner noted that "it is questionable whether this is the type of immediate effect outside of the courtroom contemplated by N.G. and Howland" while nevertheless granting review, reasoning that "it is not unusual for an appellate court to grant interlocutory review for purposes of resolving" a "debatable venue issue" "early in the litigation."24 While this result arguably blends the section (b)(1) and (b)(2) standards articulated in N.G., it may simply mean venue decisions are the rare example where Commissioners are more likely to grant review of errors that are not quite obvious but still have a dramatic effect on the proceedings.

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1 RAP 2.2.

2 RAP 2.3.

3 Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).

4 Most of the credit for the work that went into this project belongs to Ian Cairns and Nicholas Bartels.

5 Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, ¶6, 232 P.3d 591 (2010).

6 See generally Judge Stephen J. Dwyer, Leonard J. Feldman, & Hunter Ferguson, The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity, 38 Seattle U. L. Rev. 91 (2014)

7 Dependency of N.G., 199 Wn.2d 588, 596, ¶14, 510 P.3d 335 (2022) (emphasis added). The Court adopted its analysis from Division One's decision in State v. Howland, 180 Wn. App. 196, 321 P.3d 303 (2014).

8 N.G., 199 Wn.2d at 595, ¶13.

9 See Commissioner's Ruling, Okanogan Cnty. v. Methow Valley Citizen's Council, No. 39059-4-III (Dec. 12, 2022)

10 Okanogan Cnty., supra n.9, at 8-9.

11 Commissioner's Ruling, Bagot v. SMRB, LLC, et. al., No. 8444-7-I (Feb. 14, 2023).

12 N.G., 199 Wn.2d at 595, ¶13.

13 Commissioner's Ruling, Thurman v. Knezovich, No. 38444-6-III (Nov. 8, 2021).

14 Sydow v. Douglass Props. LLC, No. 38888-3-III, 2023 WL 3317370 (May 9, 2023) (unpublished).

15 N.G., 199 Wn.2d at 596-97.

16 Commissioner's Ruling, Haworth, et. al., v. Alison, No. 56381-9-II (March 24, 2022)

17 Commissioner's Ruling, Riggs v. Westcliffe Richland Homeowners Ass'n, No. 38837-9-III (July 26, 2022)

18 Commissioner's Ruling, Aird v. Wash. Dep't of Transp., No. 85611-1-I (Dec. 6, 2023); Commissioner's Ruling, Weisman v. Wash. Dep't of Emp. Sec., No. 83893-8-I (Aug. 19, 2022)

19 Commissioner's Ruling, Varney v. City of Tacoma, Nos. 56174-3-II & 56187-5-II (Dec. 16, 2021).

20 Commissioner's Ruling, State v. Johnson & Johnson, et. al., No. 84140-8-I (Sept. 30, 2022)

21 Commissioner's Ruling, Ota v. Wakazuru, No. 82840-1-I (Nov. 4, 2021)

22 Commissioner's Ruling, Raab v. Nu Skin Enterprises Inc., No. 38842-5-III (Aug. 4, 2022); see also Matter of Jeremey Denniston Settlement Preservation Trust, No. 38466-7-III, 2023 WL 2531288 (March 16, 2023) (unpublished)

23 See Unger v. Cauchon, 118 Wn. App. 165, 170-71, 73 P.3d 1005 (2003).

24 Raab, supra n.22, at 13.