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DISCRETIONARY REVIEW OF TRIAL COURT DECISIONS UNDER THE WASHINGTON RULES OF APPELLATE PROCEDURE

Geoffrey Crooks*

I. INTRODUCTION

The Washington Rules of Appellate Procedure (RAP)¹ became effective July 1, 1976. These rules completely replaced all prior rules governing appellate procedure. Among the most important changes from prior practice was the creation of discretionary review as one of only two methods for seeking review of trial court decisions.² The former procedures for seeking review, particularly interlocutory review, “by extraordinary writs of review, certiorari, mandamus, prohibition, and other writs formerly considered necessary and proper to the complete exercise of appellate and revisory jurisdiction,” were superseded.³ The drafters’ comment explains that the intent behind this change was to simplify and clarify this part of appellate practice. As the comment notes, “[r]eview by way of extraordinary writ under the former rules has been the most confusing of all the appellate procedures, and precedent for almost any arguable position can be found.”⁴

This article has two purposes. The first is utilitarian—to provide a brief outline of the mechanics of discretionary review of trial court decisions. The second is somewhat more ambitious—to survey ten years’ experience under the “new” rules and to reflect on how discretionary review actually works.

II. THE MECHANICS OF DISCRETIONARY REVIEW

Discretionary review, as used to describe a method of seeking review of trial court decisions, simply means review by permission of the reviewing

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1. See WASH. R. APP. P. 18.21.

2. WASH. R. APP. P. 2.1(a). The other method is appeal, a review as a matter of right. See *id.*; *Munden v. Hazelrigg*, 105 Wn. 2d 39, 42, 711 P.2d 295 (1985).

3. WASH. R. APP. P. 2.1(b).

4. WASH. R. APP. P. 2.1 comment (b). See *infra* note 25 regarding the legal effect of the comments to the rules.

court.⁵ It contrasts with appeal, the only other method of seeking review. Appeal is review as a matter of right.⁶ Certain specified types of decisions are appealable; RAP 2.2 lists them.⁷ Generally, trial court orders are

5. WASH. R. APP. P. 2.1(a)(2). For purposes of RAP 2.1, review of trial court decisions can be either by the supreme court or the court of appeals. Supreme court review of court of appeals decisions is also discretionary review but of another species than review of trial court decisions. WASH. R. APP. P. 13.1(a). Discretionary review of court of appeals decisions breaks down further into review by petition for review or by motion for discretionary review. The rules and practice regarding the latter in some respects parallel the rules and practice for discretionary review of trial court decisions, but the topic is beyond the scope of this article.

6. WASH. R. APP. P. 2.1(a)(1).

7. This rule should be consulted before deciding whether to seek review by filing a notice of appeal or a notice for discretionary review. The basic list of appealable decisions is set forth in RAP 2.2(a) and (b):

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final Judgment*. The final judgment entered in any action or proceeding.

(2) *[Reserved.]*

(3) *Decision Determining Action*. Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

(4) *Order of Public Use and Necessity*. An order of public use and necessity in a condemnation case.

(5) *Juvenile Court Disposition*. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) *Deprivation of All Parental Rights*. A decision depriving a person of all parental rights with respect to a child.

(7) *Order of Incompetency*. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) *Order of Commitment*. A decision ordering commitment, entered after a sanity hearing.

(9) *Order on Motion for New Trial or Amendment of Judgment*. An order granting or denying a motion for new trial or amendment of judgment.

(10) *Order on Motion for Vacation of Judgment*. An order granting or denying a motion to vacate a judgment.

(11) *Order on Motion for Arrest of Judgment*. An order arresting or denying arrest of a judgment in a criminal case.

(12) *Order Denying Motion to Vacate Order of Arrest of a Person*. An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) *Final Order After Judgment*. Any final order made after judgment which affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty*. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) *Pretrial Order Suppressing Evidence*. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) *Arrest or Vacation of Judgment*. An order arresting or vacating a judgment.

(4) *New Trial*. An order granting a new trial.

(5) *Disposition in Juvenile Offense Proceeding*. A disposition in a juvenile offense proceeding

appealable when they have some ring of finality, marking a termination of all or some substantial and discrete portion of trial court proceedings.

All other trial court actions—anything and everything not appealable—can be reviewed only by discretionary review. Indeed, RAP 2.3(a) provides that “a party may seek discretionary review of *any act* of the superior court not appealable as a matter of right.”⁸ The breadth of this language is purposeful. Recall that the extraordinary writs “formerly considered necessary and proper to the complete exercise of appellate and revisory jurisdiction” have been superseded.⁹ Discretionary review is available whenever an appeal is not, and is then the only method to seek relief from a higher court.

This means that in theory there is virtually no limit to the types of superior court events which could be targets of discretionary review. As a practical matter, of course, most requests for discretionary review of trial court actions seek interlocutory review of various sorts of pretrial orders.

The first step toward discretionary review is filing the Notice for Discretionary Review. With limited exceptions, this notice must be filed in the trial court within thirty days of the act of the trial court which the party filing the notice wants reviewed.¹⁰ The trial court clerk is responsible for filing the notice with the supreme court or the proper division of the court of appeals, depending on which reviewing court is designated in the notice. The clerk also serves the notice on all parties of record.¹¹

Then, within fifteen days of filing the notice, the party seeking review must file, this time in the appellate court, a motion for discretionary review.¹² RAP Title 17 sets forth the procedures for appellate court motions generally. The form and content of a motion for discretionary review are specifically prescribed by RAP 17.3(b).¹³ Since time constraints frequently

which is outside the standard range of disposition for the offense.

A third subsection, RAP 2.2(c), concerns superior court decisions on review of decisions of courts of limited jurisdiction. See *infra* note 21.

The final subsection, RAP 2.2(d), concerns judgments which are final as to fewer than all of the parties or claims or counts in the case. This subsection is discussed *infra* notes 49–51 and accompanying text.

8. WASH. R. APP. P. 2.3(a) (emphasis added).

9. WASH. R. APP. P. 2.1(b).

10. WASH. R. APP. P. 5.2(b). The rules provide a virtually foolproof form of notice: RAP Form 2.

11. WASH. R. APP. P. 5.4.

12. WASH. R. APP. P. 6.2(b).

13. RAP 17.3(b) provides:

Motion for Discretionary Review. A motion for discretionary review should contain under appropriate headings and in the order here indicated:

(1) *Cover*. A title page, which is the cover.

(2) *Identity of Petitioner*. A statement of the name and designation of the person filing the

will preclude the submission of a formally prepared record, an appendix to the motion is the authorized and accepted vehicle by which a party provides to the reviewing court the record necessary to consideration of the request for review. Of course, a formal record may be supplied to support a motion if time permits.¹⁴

Most motions for discretionary review are decided initially by a commissioner, although the commissioner may refer any motion for decision by the judges.¹⁵ Any motion decided by a commissioner's ruling will also be considered by the judges de novo if there is a motion to modify the ruling.¹⁶ A motion to be decided by the judges is typically considered without oral argument.¹⁷ A party may request oral argument if the motion is to be decided by a commissioner.¹⁸ The rules authorize argument by telephone conference call,¹⁹ which has become the common practice in the supreme court and division three of the court of appeals, and is used to a lesser extent in division two.²⁰

motion.

(3) *Decision Below.* A statement of the decision which petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision.

(4) *Issues Presented for Review.* A concise statement of the issues presented for review.

(5) *Statement of the Case.* A statement of the facts and procedure below relevant to the issues presented for review, with appropriate reference to the record.

(6) *Argument.* A direct and concise statement of the reasons why review should be granted, with supporting argument.

(7) *Conclusion.* A short conclusion stating the precise relief sought.

(8) *Appendix.* An appendix containing a conformed copy of the decision which the party wants reviewed and a conformed copy of any order granting or denying motions made with respect to that decision. In addition, the appendix may include copies of statutes and constitutional provisions relevant to the issues presented for review, a conformed copy of parts of the record relevant to the motion, and other material which would assist the court in determining whether the motion should be granted.

RAP Form 3 gives an even more complete and helpful description of the desirable parts of a motion for discretionary review.

14. A formal record also eventually must be prepared to perfect review, if review is granted, for consideration of the case on the merits.

15. WASH. R. APP. P. 17.2, 1.1(f).

16. WASH. R. APP. P. 17.7.

17. In the court of appeals "the judges" means a panel of three. In the supreme court the term ordinarily means a department, consisting of five justices. *See* WASH. R. APP. P. 17.7.

18. WASH. R. APP. P. 17.5(a).

19. WASH. R. APP. P. 17.5(e).

20. The differences in the various courts' use of telephone conference arguments mainly reflects the size of the geographical area from which cases come. Where counsel would have to travel long distances, saving that travel time can save a fair amount of clients' money. In this author's opinion, most motion arguments can be presented quite as effectively by telephone as in person, though on occasion the technology does not live up to the promises made by telephone advertisements.

III. STANDARDS FOR GRANTING DISCRETIONARY REVIEW

The standards which must be met in order for a trial court action to qualify for discretionary review are specific and stringent. They are set forth in RAP 2.3(b), which is titled “Considerations Governing Acceptance of Review.”²¹

Discretionary review will be accepted only:

- (1) If the superior court has committed an obvious error which would render further proceedings useless, or
- (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act, or
- (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

Each of these subsections in RAP 2.3(b) warrants close examination.

A. *Subsections 2.3(b)(1) and (2)*

Subsections 2.3(b)(1) and (2) are structured in a parallel fashion, in that each directs attention first to whether the trial court has committed error and then to the effect of that error. The subsections were initially intended to have a somewhat different focus, as is reflected in the explanation provided in the comment to the rule. Subsection (b)(1), with its “obvious error” requirement, was thought to state the “general test established by decisional law.”²² Subsection (b)(2) was intended to apply “primarily to orders pertaining to injunctions, attachments, receivers, and arbitration,

21. This subsection applies to discretionary review of decisions of the superior court acting as a trial court. When the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) were adopted (effective January 1, 1981), a new subsection was added to the discretionary review rule for those situations where the superior court acts in an appellate capacity, reviewing on the record a trial court decision made by a district or municipal court. That subsection, RAP 2.3(d), sets forth a different set of considerations to govern whether the supreme court or court of appeals will afford what would be a second level of review. This species of discretionary review is beyond the scope of this article.

There is no clear provision in the rules for either the supreme court or the court of appeals to review directly a decision of a court of limited jurisdiction, thus allowing a case to bypass the superior court. Such a procedure was envisioned in the RAP as they were originally proposed, however, and some commentators have suggested that this type of direct review could be afforded if a sufficiently compelling circumstance arose. WASH. STATE BAR ASS’N, WASHINGTON APPELLATE PRACTICE HANDBOOK § 9.5(d), at 9–17 (rev. 1984); see also O’Connor v. Matzdorff, 76 Wn. 2d 589, 458 P.2d 154 (1969); 2A ORLAND, RULES PRACTICE § 3091, at 486 (1978).

22. WASH. R. APP. P. 2.3 comment b.

which have formerly been appealable as a matter of right.”²³ For these latter sorts of situations, “when the status quo or the freedom of a party to act is substantially affected,” the drafters chose the less restrictive “probable error” test.²⁴

The practice has not reflected the drafters’ intended distinction between the two subsections based on the type of trial court order being challenged. Indeed, petitioners commonly argue, without regard to the type of trial court decision, that the standards of both subsections are met. This should not be particularly surprising. Nothing in subsection (b)(2) limits its applicability to cases involving injunctions and the like.²⁵ And its probable error standard is somehow more comfortable to deal with than the subsection (b)(1) obvious error standard. Probable error is simply easier to claim and find than obvious error. Also, from the appellate court commissioner’s point of view, to label a trial court’s good faith effort as obvious error seems needlessly harsh and insulting, and perhaps a bit arrogant. Finally, there is some incongruity in identifying error as obvious in an appellate court ruling that merely grants review and allows the issue to proceed to a full appellate hearing on the merits.

Similar difficulties are encountered in attempting to delineate between the portions of subsections (b)(1) and (b)(2) that speak to the effect of the claimed error. An error which renders further proceedings useless, for example, would seem likely also to either alter the status quo or limit the freedom of a party to act. It can be argued, however, that subsection (b)(2) should be applied only when a trial court’s order has immediate effects outside the courtroom. This interpretation of the “status quo” test and “freedom of a party to act” test would fit with the notion that subsection (b)(2) was intended to focus on injunctions and the like. A trial court action then arguably would not qualify for review under RAP 2.3(b)(2) if it merely altered the status of the litigation itself or limited the freedom of a party to act in the conduct of the lawsuit. An error affecting the internal workings of the lawsuit would be reviewable only if “obvious” and, as required by RAP 2.3(b)(1), only if it truly rendered further proceedings useless.

How much havoc must an order cause to “render further proceedings useless” as required for review under subsection (b)(1)? One recent case seems to suggest that the test is whether a decision on an interlocutory

23. *Id.*

24. *Id.*

25. The comments to the rules do not have the force of law, of course. In any event, they are not published in either of the rule books most lawyers use for ready reference. Probably the most widely available sources for the comments are WASH. STATE BAR ASS’N, WASHINGTON APPELLATE PRACTICE HANDBOOK (rev. 1984) and 2A ORLAND, RULES PRACTICE (1978).

Discretionary Review

review will “avoid a useless trial.”²⁶ Clearly something else is also required, however. Any time a trial court erroneously denies a well-founded summary judgment motion, pretrial review would prevent a useless trial. Yet the appellate courts rarely grant discretionary review of trial court orders denying motions for summary judgment. Several of the few reported cases where such review was afforded even take pains to advise that it will not be granted ordinarily.²⁷

In short, many pretrial errors can prejudice, and thus in a sense render useless, further trial court proceedings. Yet the appellate courts want nothing to do with the great majority of those cases until a final judgment is rendered. The appellate system operates with a plain and intentional bias against interlocutory review. The problem is thus to describe in some intelligible fashion when a case will overcome that bias.

Most lawyers’ instincts in approaching such a problem will lead them quickly to a search for cases. Unfortunately, few cases exist and those that do seldom contain much instructive discussion or analysis.

Several factors may account for the unhelpful state of the reported precedent. First, the decision regarding review is seldom reflected in the published decision on the merits. The grant of discretionary review is a preliminary decision that frequently is made initially by a commissioner. If review is granted, the case on its merits is heard later by judges, whose opinions, understandably, are then principally directed to deciding the issues on the merits. Those opinions seldom discuss in any detail the preliminary decision to grant review.²⁸ Even when an opinion mentions that the case is a discretionary review, it frequently does so only in passing as

26. *Hartley v. State*, 103 Wn. 2d 768, 773, 698 P.2d 77, 80 (1985).

27. *See, e.g., Sea-Pac Co. v. United Food & Commercial Workers Local 44*, 103 Wn. 2d 800, 699 P.2d 217 (1985); *Rye v. Seattle Times*, 37 Wn. App. 45, 678 P.2d 1282 (1984). Both *Sea-Pac* and *Rye* cite *Roth v. Bell*, 24 Wn. App. 92, 104, 600 P.2d 602, 609 (1979), which states that a trial court’s denial of summary judgment “is not a proper subject of a notice for discretionary review under RAP 2.3(b).” *Roth* clearly overstates the matter. Its seemingly absolute rule is belied even by the cases that cite it, *Sea-Pac* and *Rye*, as well as by *Hartley*, 103 Wn. 2d 768.

28. *Hartley v. State*, 103 Wn. 2d 768, 698 P.2d 77 (1985), is an exception. It can be argued, however, that the discussion of discretionary review in *Hartley* is dicta because of the procedural posture of the case. Discretionary review was initially granted by a court of appeals commissioner, and that court denied a motion to modify. At that point review was accepted, which should have ended any argument whether the case was properly before the appellate court. WASH. R. APP. P. 6.2(a). The respondents nonetheless pursued the issue when the review was subsequently transferred to the supreme court. By that point, however, the supreme court really had no choice other than to decide the case on its merits or dismiss review as having been improvidently granted. There is no direct provision for the latter course in the rules, and (although it might be within the court’s inherent power) apparently no precedent for it in this state.

part of the procedural history of the case.²⁹ The case law that does exist may also be misleading because it is an unrepresentative sample, containing only those cases in which review was granted. This is because rarely, if ever, will there be a published opinion denying review, even though many more motions for discretionary review are denied than are granted.

B. Subsection 2.3(b)(3)

Many of the problems and uncertainties in interpreting subsections (b)(1) and (b)(2) also apply when considering subsection (b)(3). That subsection provides for review if the superior court “has so far departed from the accepted and usual course of judicial proceedings” as to call for review. The comment to the rule explains unhelpfully that this subsection “governs the relatively unusual case calling for the exercise of revisory jurisdiction.”³⁰ Professor Orland notes (rather charitably) that the language of the subsection “somewhat doubles back on itself,” but he also opines that it “leaves the court free to review many of those situations previously reviewed in writ practice under the general rubric of acts without or in excess of jurisdiction.”³¹ At least one reported case supports this latter suggestion, reviewing a trial court jurisdictional error under RAP 2.3(b)(3).³²

On a less analytical level, the notion of a court departing from the “accepted and usual course of judicial proceedings” may foster images of wild-eyed judges running amok. This may explain why RAP 2.3(b)(3) is seldom argued or relied upon as a basis for granting review. Nevertheless, in the right circumstance the subsection can be used without implying senseless or inappropriate conduct by the trial judge. For example, a trial court order may represent a sensible and perhaps affirmable response to some unprecedented situation or issue. Such an order also, however, might be fairly characterized as a departure from the usual course of judicial proceedings that is significant enough to warrant interlocutory review.

29. A statement that the supreme court granted discretionary review can also refer to review of a court of appeals decision, of course. *See supra* note 5. It also may be a loose way to describe a preliminary decision to permit direct review under RAP 4.2. *See infra* note 37.

30. WASH. R. APP. P. 2.3 comment b. As originally proposed, subsection (b)(3) explicitly referred to the exercise of “supervisory jurisdiction” and the comment also said “supervisory” rather than “revisory.” The significance of this difference, if any, is unclear.

31. *See* 2A ORLAND, RULES PRACTICE § 3093, at 488–89 (1978).

32. *Wahler v. Department of Social & Health Servs.*, 20 Wn. App. 571, 575–76, 582 P.2d 534, 537–38 (1978).

C. *Illustrations from Existing Case Law*

Notwithstanding that reported cases contain very little close analysis of RAP 2.3(b), some of them illustrate factors which, when a substantial and debatable legal issue is also presented, may influence a court to grant review.

In one recent aggravated first degree murder case, *State v. Ortiz*,³³ the supreme court granted discretionary review of trial court orders that found the mentally retarded defendant competent to stand trial and that denied defense motions to suppress evidence. Ordinarily an appellate court would be unlikely to review either of these types of issues in an interlocutory posture. The history of this prosecution, however, was far from ordinary. The defendant had been first convicted in 1981. That conviction was reversed by the court of appeals in 1983. On retrial the defendant was convicted again, but the trial court declared a mistrial. The State then filed charges again, so the defendant was awaiting a third trial when the supreme court granted review. After reciting this history, the court's opinion, without discussing RAP 2.3(b), states simply that: "[w]e granted review in order to resolve these [competency and suppression] issues before defendant's third trial."³⁴

The grant of review in *Ortiz* probably reflects most strongly some notion of fairness—that a retarded and somewhat bewildered defendant should not be put to yet a third trial until doubts could be resolved about the standards by which to judge his competency. There was probably also a sense that if a third trial was to proceed every effort should be made to insure it would be the last. Finally, there may have been some sense, particularly given the nature and history of the prosecution, that considerations of judicial economy favored interlocutory review.

Parties seeking discretionary review in civil cases also frequently urge that judicial economy calls for review. The petitioners' common refrain is that two trials (invariably characterized as lengthy and expensive) will be required unless interlocutory review is afforded. These pleas can be successful in the right case. For example, the parties in *Marine Power & Equipment Co. v. Department of Transportation*³⁵ were predicting a year-long trial in the lawsuit over construction of the "Issaquah" class ferries. Before trial, an issue arose whether the preassigned trial judge erred in declining to honor an affidavit of prejudice. Rather than waiting for an

33. 104 Wn. 2d 479, 706 P.2d 1069 (1985).

34. *Ortiz*, 104 Wn. 2d at 482, 706 P.2d at 1071.

35. 102 Wn. 2d 457, 687 P.2d 202 (1984).

appealable final judgment and thus risking a wasted year of trial, discretionary review was granted to decide the issue before trial.³⁶

Such a compelling appeal to judicial economy is, of course, quite rare. Most parties who come to the appellate courts wringing their hands about the prospect of two "long and expensive" trials are dealing with trials projected to take weeks rather than months or years. Most petitioners also tend to ignore the possibility that interlocutory review may simply substitute two long and expensive appeals for two long and expensive trials. This prospect is always in the minds of appellate court judges and commissioners, who also know from experience that a case not decided today may never have to be decided. Although a party may believe and sincerely argue that an eventual appeal is inevitable, it frequently is not so. Pretrial issues often are rendered moot by the result of trial. Other times the whole lawsuit settles. Most cases in which pretrial discretionary review has been sought but denied probably do not, in fact, return later on appeal.

Another factor that may influence particularly the supreme court to grant discretionary review³⁷ is a need for definitive interpretation of newly enacted legislation, for the benefit of litigants and lower courts throughout the state. This rationale is discussed in *Hartley v. State*, where the court indicated that it was "interpreting a new statute with wide implications for governmental liability."³⁸ *Hartley* cites, as another example of a grant of review to resolve questions about a new statute, *Glass v. Stahl Specialty Co.*³⁹ *Glass* involved the 1981 Tort Reform Act,⁴⁰ as did yet another relatively recent discretionary review, *Glover v. Tacoma General Hospital*.⁴¹

36. *Marine Power*, 102 Wn. 2d 457.

37. RAP 2.3 governs discretionary review of a trial court decision by either the supreme court or the court of appeals. Review by the supreme court (whether by appeal or discretionary review) is called direct review, which has its own separate and additional standards set forth in RAP 4.2(a).

To seek direct discretionary review a party should specify in the notice for discretionary review that review is sought in the supreme court. With the motion for discretionary review, then, the petitioner should also file a statement of grounds for direct review. The statement must indicate "(1) the grounds upon which the party contends direct review should be granted, and (2) whether the case is one which the supreme court would probably review if decided by the court of appeals in the first instance." WASH. R. APP. P. 4.2(b); see also WASH. R. APP. P. form 4. In practice, the first of these requirements is more important than the second. Rarely can one justifiably predict that a future court of appeals decision would probably be reviewed by the supreme court.

As with the discretionary review standards of RAP 2.3, there is little reported precedent discussing the standards governing whether a case qualifies for direct review under RAP 4.2.

38. 103 Wn. 2d 768, 773, 698 P.2d 77 (1985). The quoted characterization, however, may be rather stretching the importance of the Habitual Traffic Offenders Act, WASH. REV. CODE ch. 46.65 (1985), which was the "new statute" at issue in *Hartley*.

39. 97 Wn. 2d 880, 652 P.2d 948 (1982).

40. WASH. REV. CODE § 4.22 (1985).

41. 98 Wn. 2d 708, 658 P.2d 1230 (1983). Contrary to the urgings of counsel in some other cases, *Glass* and *Glover* ought not be read to demonstrate any particular eagerness on the part of the supreme

Discretionary Review

Another potentially critical consideration may be the adequacy of an appeal to remedy the effects of the claimed pretrial error. If a trial court enforces an order requiring pretrial disclosure of information despite a claim that it is privileged, for example, any error cannot be remedied by an appeal from a final judgment.⁴² Only interlocutory review can provide effective relief. This type of inquiry into the adequacy of an appeal to remedy an error is somewhat similar to an inquiry required under the writ practice which discretionary review supersedes. This is because the appellate availability of extraordinary writs was generally limited to circumstances where the “remedy at law” would have been inadequate.⁴³

A final consideration is speed. A case stands a better chance of receiving discretionary review if it is sufficiently important to hear promptly⁴⁴ or sufficiently straightforward to be disposed of summarily.⁴⁵ Conversely, because the normal review process will impose additional delays, it usually makes little sense to grant an interlocutory review that will put a case on hold, before trial, for several years. Thus, particularly in an appellate court with a backlog of unheard cases, a party seeking discretionary review probably also should be prepared both to justify accelerated review and to perfect review promptly.

court to afford interlocutory review whenever a case presents Tort Reform Act issues.

Glover is also interesting and somewhat unusual for another reason: the trial judge there explicitly invited discretionary review. The trial judge has no authority in this matter, of course, just as the parties cannot stipulate to discretionary review. A provision in the RAP as originally proposed, inviting the trial judge’s opinion whether review should be accepted, was not adopted. Nonetheless, the trial court’s views can help convince an appellate court that interlocutory review is indeed appropriate in a given case.

42. See *Rhinehart v. Seattle Times*, 98 Wn. 2d 226, 654 P.2d 673 (1982).

43. See generally Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ*, 36 WASH. L. REV. 1 (1961). One pre-RAP case, in language that may still have some currency, stated a test with a somewhat different emphasis: “[T]he proper basis for determining whether or not the remedy by appeal is adequate . . . should be judged by whether or not this court would on appeal, after trial, be obliged to reverse the judgment . . . were the case to proceed as the record shows it must now proceed.” *State v. Harris*, 2 Wn. App. 272, 281, 469 P.2d 937, 943 (1970).

44. For example, in *Marine Power & Equip. Co. v. Department of Transp.*, 102 Wn. 2d 457, 687 P.2d 202 (1984) (discussed *supra* text accompanying notes 35–36), the notice for discretionary review was filed April 5, 1984, review was granted April 12, 1984, and the case was heard and decided by order on May 21, 1984.

45. See, e.g., *King County Council v. King County Personnel Bd.*, 43 Wn. App. 317, 716 P.2d 322 (1986), where the court of appeals in a brief per curiam opinion granted a motion for discretionary review, reversed a trial court order, and remanded with directions that the action be dismissed.

IV. SOME POSSIBLE PITFALLS

A. *Using the Incorrect Method of Seeking Review*

The rules provide that a notice for discretionary review of an appealable decision will be given effect as a notice of appeal, and vice versa,⁴⁶ thus affording litigants some protection against mistakes in choosing the method by which to seek review. An example is provided by *Glass v. Stahl Specialty Co.*⁴⁷ In *Glass*, the party seeking review filed a notice of appeal and the case was perfected as if it was an appeal. Counsel for both parties were then presumably surprised to learn, at oral argument or when the opinion was filed, that the court had found the trial court's order nonappealable and had instead treated the matter as a discretionary review.⁴⁸

Usually the clerk of the appellate court to which the review is directed will spot any potential problem of appealability when a notice of appeal is received. The clerk will then set the matter on a motion calendar for a commissioner to consider the appealability issue. This alerts the parties that there may be some problem. It also ought to suggest to a party who has filed a notice of appeal that a provisional motion for discretionary review would be well advised.

Perhaps the most frequent cause of difficulties in determining appealability is a trial court order that, under Washington Superior Court Civil Rule 54(b),⁴⁹ is a final judgment but does not dispose of the entire lawsuit. Such a final judgment as to fewer than all claims or counts or parties is recognized as appealable by RAP 2.2(d). The appellate courts retain authority to determine, however, whether certain strictly enforced prerequisites are met:

(1) There must be more than one claim for relief or more than one party against whom relief is sought; (2) there must be an express determination in the judgment that there is no just reason for delay; and (3) there must be an express direction for the entry of the judgment. It is the function of [the appellate] court to determine whether these tests have been met. The trial court cannot in "its discretion" treat as "final" that which is not "final."⁵⁰

46. WASH. R. APP. P. 5.1(c).

47. 97 Wn. 2d 880, 652 P.2d 948 (1982).

48. *Glass*, 97 Wn. 2d at 882-83, 652 P.2d at 950. Another example of the phenomenon is *Wahler v. Department of Social & Health Servs.*, 20 Wn. App. 571, 582 P.2d 534 (1978).

49. The rule is entitled "Judgment Upon Multiple Claims or Involving Multiple Parties." It provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, that there is no just reason for delay and upon an express direction for the entry of judgment." WASH. R. CIV. P. 54(b)

50. *Doerflinger v. New York Life Ins. Co.*, 88 Wn. 2d 878, 881, 567 P.2d 230, 232 (1977) (citation omitted).

Discretionary Review

These requirements are in part merely ministerial. Disputes may arise, however, over what is a “claim for relief.” Also, the “no just reason for delay” finding must have a basis in fact; there must be “some danger of hardship or injustice through delay which would be alleviated by immediate appeal.”⁵¹

If a party seeking review has any doubt whether a particular trial court order is appealable, the party may move in the appellate court for a ruling that the trial court’s order is appealable or alternatively for discretionary review. Obtaining such a ruling at an early stage may allow a party to avoid the potential waste of time and resources in perfecting a review which later turns out to be not properly before the court.

B. *Subsequent Proceedings*

The discretionary review rule explicitly provides that “the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.”⁵² Closely related to this principle is the notion that ordinarily a party has no obligation to seek discretionary review in order to preserve an issue for a later appeal.⁵³ An exception may exist: one case suggests that a party aggrieved by a trial court order concerning venue should not “wait until the trial [is] concluded and then ask an appellate court to set aside an unfavorable judgment on the basis that the venue was laid in the wrong county.”⁵⁴ This should not be read as a total bar to raising venue issues on appeal if discretionary review was not sought, however. Rather, the appellant will be required “to show that he was prejudiced by the denial of a change of venue; otherwise a new trial will not be granted.”⁵⁵ This does not seem to be an unreasonable requirement.

V. CONCLUSION

It seems fair to conclude that the rules for discretionary review of trial court decisions have fulfilled one of the drafters’ principal goals. The

51. *Id.* at 882, 567 P.2d at 232 (quoting *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939, 942 (2d Cir. 1968)); *see also* *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 657 P.2d 804 (1983); *Snyder v. State*, 19 Wn. App. 631, 577 P.2d 160 (1978).

52. WASH. R. APP. P. 2.3(c).

53. *State v. Washington State Credit Ass’n*, 33 Wn. App. 617, 622, 657 P.2d 327, 330–31 (1983).

54. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn. 2d 571, 578, 573 P.2d 1316, 1319–20 (1978). The relevant trial court proceedings in *Lincoln* occurred before the 1976 adoption of the RAP. Any interlocutory review would thus have been by certiorari, but the rationale would seem to apply equally to discretionary review. *See also* *Hauge v. Corvin*, 23 Wn. App. 913, 599 P.2d 23 (1979).

55. *Lincoln*, 89 Wn. 2d at 578, 573 P.2d at 1320.

procedure for seeking review of non-appealable decisions is simple and straightforward, especially by comparison with the practice under prior rules. Serious traps for the unwary are few, if any. In most cases a reasonably careful reading of the rules themselves will provide intelligible, correct, and sufficient information on what pleadings to file, when, and with whom.

The discretionary review rules may not live up to their apparent promise, however, in identifying and defining the standards under which interlocutory review of a trial court decision will be granted. The three criteria of RAP 2.3(b) are by their terms broad and general, probably both by design and by necessity. Distinctions that the drafters seem to have intended between the three criteria have become blurred in practice. Nor has any body of case law developed that provides any close interpretation of the language of the rules. Reported decisions discussing discretionary review are and likely will continue to be sparse and, at least in their explicit analysis, unhelpful.

The reported cases can be used, however, to supplement the broadly stated criteria of RAP 2.3(b) by identifying particular factors that may influence an appellate court toward granting discretionary review. Judicial economy is an important concern. If an interlocutory decision might head off uncommonly complex trial court proceedings, for example, discretionary review may be granted. Similarly, review may be more likely if an interlocutory decision can solve a problem that threatens to recur frequently, as when a new statute affects a broad class of cases. Sometimes only interlocutory review can afford a remedy; because of the interests involved, a decision on a later appeal could not adequately protect the party asserting error. Finally, no appellate court wants to foster unnecessary pretrial delays. Discretionary review may be more readily available, therefore, in cases which will lend themselves to a prompt appellate determination.