The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity

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I. INTRODUCTION

It has now been more than thirty-five years since the Washington Rules of Appellate Procedure (RAP) became effective in 1976 and replaced all prior rules governing appellate procedure. One significant change that those rules made was to clearly describe and delineate a procedural mechanism for seeking interlocutory review of trial court decisions. Specifically, RAP 2.1(a) divided appeals into two categories: (1) review as a matter of right, called "appeal"; and (2) review of interlocutory orders by permission of the appellate court, called "discretionary review."[1] RAP 2.3(b), in turn, specifically states various "considerations" that govern acceptance of discretionary review of superior court decisions.[2] Relevant here, subsection (b)(1) permits discretionary review if "[t]he superior court has committed obvious error which would render further proceedings useless," and subsection (b)(2) permits such review if "[t]he 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."[3]

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

2. WASH. R. APP. P. 2.3(b). Discretionary review of decisions of the superior court sitting in an appellate capacity is governed by WASH. R. APP. P. 2.3(d). The application of that rule is beyond the scope of this Article.

3. WASH. R. APP. P. 2.3(b)(1), (b)(2). As can be seen, both subsections have two prongs: RAP 2.3(b)(1) has an "obvious error" prong and a "useless proceedings" prong, and RAP 2.3(b)(2) has a "probable error" prong and a "status quo or freedom to act" prong. *Id*.

The Task Force comment that accompanied RAP 2.1 explains that the changes to the process for seeking interlocutory review of trial court decisions were made because "[r]eview by way of extraordinary writ under the former rules has been the most confusing of all appellate procedures, and precedent for almost any arguable position can be found."[4] The question addressed in this Article is whether that confounding condition has changed for the better. Is the process for seeking discretionary review clearer today than it was before the RAP became effective? Or is there once again precedent for almost any arguable position? If the answer to the latter question is "yes," then Washington appellate courts have some work to do to clarify these rules and procedures.

The changes to RAP 2.3(b)(1) and (b)(2) should be beneficial. The mechanics of seeking discretionary review are now well defined and understandable: the rules clearly state how litigants are to seek discretionary review. Likewise, the considerations governing discretionary review are also clear. In an influential article on discretionary review, former Washington Supreme Court Clerk Geoffrey Crooks appropriately recognizes that RAP 2.3(b)(2) is applicable "only when a trial court's order has immediate effects outside the courtroom."[5] Crooks goes on to state that "[t]his 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."[6] That is, it applies to rulings that have the effect of doing something other than merely resolving an issue in the litigation.

Unfortunately, the *Washington Appellate Practice Deskbook* tells a different story. The *Deskbook* recognizes, at the outset, that the Task Force comment regarding RAP 2.3(b)(2) indicates that it "is primarily directed to orders pertaining to injunctions, attachments, receiverships, and arbitration."[7] But the *Deskbook* authors go on to state that this "limited view is misleading; this ground has been used to address a broad range of decisions that affect the course of litigation but may not affect the case on the merits."[8] Then, at the conclusion of this discrete discussion, the authors note Crooks's contrary view.[9] Making matters worse,

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4. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE 86 (7th ed. 2011). The Task Force comments are explanatory comments written by the drafters of the RAP prior to the adoption of the rules. *Id*.

5. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541, 1546 (1986).

6. *Id.*

7. 1 WASH. STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK 10-10 (2011).

8. *Id*.

9. *Id*.

not only are there differing interpretations of the considerations governing discretionary review, but the decision whether to grant or deny discretionary review has largely been made by court commissioners in unpublished orders, so there is little published case law or other guidance to resolve this debate.[10]

The ultimate effect on practitioners is both obvious and unavoidable. Many lawyers, rather than stake out a clear position regarding the applicability of the various considerations governing discretionary review, simply argue that any and every consideration that is even arguably applicable is satisfied by the trial court's determination. The appellate court commissioner can then simply choose from the available options and grant or deny discretionary review if the commissioner concludes that such review is warranted. This approach creates continued uncertainty and may cause litigants with meritorious petitions for review to not request such relief (given the cost of doing so and uncertain application of the applicable standards), while litigants with undeserving petitions for review (but greater resources) request such relief because there is no clear indication that such relief will be denied. Thus, there is a compelling need for clarity.

The remainder of this Article is organized as follows: In Part II.A, we survey Washington case law applying RAP 2.3(b)(1) and (b)(2) standards. In Part II.B, we apply basic principles of statutory interpretation to the RAP, as well as consider the legislative history of the rule to evaluate this precedent. Based on our analysis, we conclude that subsections (b)(1) and (b)(2) should properly apply to distinct situations and that review under subsection (b)(2) should be granted only in the context of a court order having immediate effects outside the judicial process, such as a preliminary injunction, an order requiring disclosure of privileged communications, or an order to divulge a trade secret or other confidential information. We also explain that an alternative reading—one that applies subsection (b)(2) to partial summary judgment or evidentiary rulings—would render subsection (b)(1) unnecessary. Further, we explain that our suggested approach would bring Washington jurisprudence in line with federal standards governing interlocutory review. Part III briefly concludes.

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10. For the past several years, panels of judges on Division One of the Washington Court of Appeals have been deciding some motions for discretionary review of superior court decisions and all petitions for discretionary review of decisions by courts of limited jurisdiction. These orders have uniformly been, and continue to be, unpublished.

II. ANALYSIS

A. Washington Courts' Inconsistent Application of RAP 2.3(b)(1) and (b)(2)

One of the earliest examples of a Washington court blurring the distinction between RAP 2.3(b)(1) and (b)(2) is found in *Glass v. Stahl Specialty Co.*[11] In *Glass*, the plaintiff brought a product liability claim against a manufacturer of industrial equipment that injured the plaintiff during the course of his employment.[12] The equipment manufacturer moved for leave to amend its answer to include a third-party claim for contribution against the plaintiff's employer on the basis that the employer, if negligent, could be held jointly and severally liable under the recently enacted Tort Reform Act.[13] The trial court granted the manufacturer's motion, and the employer moved for summary judgment, arguing that the employee had already received industrial insurance benefits.[14] The trial court denied the employer's motion and directed that this ruling be treated as a "final judgment" under Washington Superior Court Civil Rule (CR) 54(b).[15] In so doing, the trial court observed that the employer "would sustain a hardship in having to participate in the litigation of this case, pending a resolution of the novel legal question" of contribution.[16]

The Washington Supreme Court declined to review the trial court's order as a final judgment under CR 54(b), but it granted discretionary review, explaining, "[W]e have determined the trial court committed obvious or probable error."[17] This statement suggests that both subsection (b)(1) (obvious error) and (b)(2) (probable error) apply to a pretrial ruling that does not command some action or restrict conduct outside the subject judicial proceedings. Perhaps the court applied subsection (b)(2) because the Tort Reform Act was relatively new and the trial court's error was not "obvious." But the court made no effort to explain how the ruling satisfied the status quo or freedom to act prong of subsection

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11. Glass v. Stahl Specialty Co., 652 P.2d 948 (Wash. 1982).
12. *Id*. at 949.
13. *Id*. (citing WASH. REV. CODE. § 4.22.040 (1982)).
14. *Id*. at 949.
15. *Id*. at 949–50. WASH. SUPER. CT. CIV. R. 54(b) provides, in pertinent part:
When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, . . . the court may direct the entry of final judgment as to one or more but fewer than all of the claims . . . only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.
16. *Id*. at 950 (internal quotation marks and citation omitted).
17. *Id*.

(b)(2).[18] One possible explanation is that the trial court's decision altered the status quo and limited the employer's freedom to act by requiring the employer to participate in the litigation. But that is the outcome for any party that loses a dispositive motion, and it does not seem proper to apply the less rigorous "probable error" standard of subsection (b)(2) to all such rulings. Were it so, there would be no reason for the more stringent subsection (b)(1) standard.

The Court of Appeals perpetuated this confusion in *Walden v. City of Seattle*.[19] There, plaintiffs instituted a class action against the City of Seattle and certain officials and officers of the Seattle Police Department, asserting excessive and deadly force claims under 42 U.S.C. § 1983 as well as various state law tort claims.[20] After the trial court certified the class, the defendants moved for summary judgment on several issues, including that they were immune from the § 1983 claims under federal law.[21] The trial court denied this motion, and the defendants subsequently filed a notice of appeal from the § 1983 immunity ruling and a motion for discretionary review on the remaining summary judgment issues.[22] The Court of Appeals concluded that the Washington Rules of Appellate Procedure—not federal decisional law—governed the defendants' right to seek interlocutory review, and these rules should be "liberally applied" to "ensure full and adequate protection of federal immunity rights."[23] The court then ruled that "in these limited circumstances, we will grant discretionary review under RAP 2.3(b)(1) or (2) if obvious or probable error is shown *regardless* of whether the error renders 'further proceedings useless' or 'substantially alters the status quo or substantially limits the freedom of a party to act.'"[24]

The problem with the approach to RAP 2.3 in *Walden* is that it fails to explain how the useless proceedings prong of subsection (b)(1) and the status quo or freedom to act prong of subsection (b)(2) are satisfied.[25] Certainly, if the defendants were immune from suit further proceedings would be useless, just as proceedings are useless where there is a lack of jurisdiction or claims are time-barred. Yet this opinion suggests that demonstration of "probable error" under subsection (b)(2) is sufficient to

18. *Id*.

19. Walden v. City of Seattle, 892 P.2d 745 (Wash. Ct. App. 1995) (per curiam).

20. *Id*. at 746.

21. *Id*.

22. *Id*.

23. *Id*. at 748–49.

24. *Id*. (quoting WASH. R. APP. P. 2.3(b)(1), (2)) (emphasis in original).

25. The additional issues raised when courts redraft a court rule by decisional fiat are beyond the scope of this Article.

trigger discretionary review when a trial court ruling either requires a party to participate in litigation, or affects how a party participates in litigation. But again, if that is the case, why does the "obvious error" standard in subsection (b)(1) exist?

Another example of the application of subsections (b)(1) and (b)(2) in tandem is found in *Bartusch v. Oregon State Board of Higher Education*.[26] There, the Court of Appeals granted review, under both subsection (b)(1) and (b)(2), of a trial court order denying a motion to dismiss for lack of jurisdiction.[27] The Court of Appeals concluded that the trial court lacked personal jurisdiction over the defendant and directed dismissal of the case on remand.[28] Acceptance of review under subsection (b)(1) made perfect sense here because the jurisdictional facts were undisputed and clearly did not support application of Washington's long-arm statute. In the absence of jurisdiction, further proceedings would have been useless.

It is entirely unclear why the court also granted review under subsection (b)(2). Although meeting the "obvious error" standard of subsection (b)(1) would seem to satisfy the "probable error" standard of subsection (b)(2), it is not clear how the trial court's order altered the status quo or substantially limited the freedom of a party to act. The only way to read the court's ruling is that an order allowing litigation to proceed "substantially alters the status quo" or "substantially limits the freedom of a party to act" because the party must continue to participate in the litigation. But that is obviously true of the denial of any dispositive motion where an arguable case for probable error can be made. Here again, this application of subsection (b)(2) obviates any need to seek review based on the more stringent "obvious error" and "useless proceeding" standard of subsection (b)(1).

McKee v. Martin[29] also illustrates the courts' tendency to apply subsection (b)(2) to pretrial rulings without explaining how the status quo or freedom to act prong is met. In *McKee*, a court commissioner accepted discretionary review, under subsection (b)(2), of a partial summary judgment ruling.[30] The case involved an auto accident where the defendant was collaterally estopped from "arguing or presenting evidence" that he did not violate the rules of the road because a municipal court found in a separate proceeding that he had committed a traffic in-

26. Bartusch v. Oregon State Bd. of Higher Educ., 126 P.3d 840, 843 (Wash. Ct. App. 2006).
27. *Id*. at 842–43.
28. *Id*. at 846.
29. McKee v. Martin, No. 31696–0–II, 2005 WL 3389650 (Wash. Ct. App. Dec. 13, 2005).
30. *Id*. at *2.

fraction in violation of state law.[31] In reversing the trial court's ruling, the Court of Appeals explained that application of the collateral estoppel doctrine would work an injustice because the small amount of the fine at stake in the traffic infraction proceeding did not provide the defendant sufficient motivation to litigate the issue before the municipal court, and also that the issues presented in the two proceedings were identical.[32] Notwithstanding the Court of Appeals' decision on the merits, it is unclear why subsection (b)(2) was the vehicle for granting discretionary review, unless limitations on a litigant's ability to present certain evidence or arguments at trial are considered a substantial alteration of the status quo or a substantial limitation on a party's freedom to act. But if that were true, every evidentiary ruling would be subject to discretionary review so long as the probable error standard is met.

Another example of the application of subsection (b)(2) to a summary judgment ruling can be found in *GMAC v. Everett Chevrolet, Inc.*[33] In *GMAC*, the Court of Appeals granted discretionary review of a trial court's order denying a motion for summary judgment on the defendant car dealer's bad faith counterclaim against its lender.[34] The Court of Appeals concluded that the car dealer could not establish a bad faith claim based on the underlying contract documents it cited in support of its claim, and, further, that the trial court improperly based its decision on a contract provision neither pleaded nor argued by the car dealer.[35] The court then summarily concluded that RAP 2.3(b)(2)'s freedom to act prong was satisfied because "[t]he denial of summary judgment under these circumstances has substantially limited GMAC's ability to establish by summary judgment a proper adjudication of this counterclaim of bad faith."[36] But that reasoning is entirely circular: a trial court's denial of a summary judgment motion necessarily prevents the moving party from establishing that summary judgment should be granted. If that were the standard, then subsection (b)(2)'s freedom to act prong would be meaningless and there would be no reason to rely upon subsection (b)(1).

Minehart v. Morning Star Boys Ranch, Inc.[37] further illustrates the blurred distinction between subsections (b)(1) and (b)(2). There, the Court of Appeals recognized that there is a difference between the two

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31. *Id*.

32. *Id.* at *2–3.

33. GMAC v. Everett Chevrolet, Inc., No. 68374–8–I, 2012 WL 3939863 (Wash. Ct. App. Aug. 16, 2012).

34. *Id*. at *1.

35. *Id*. at *4–6.

36. *Id*. at *6.

37. Minehart v. Morning Star Boys Ranch, Inc., 232 P.3d 591 (Wash. Ct. App. 2010).

standards, commenting that "there is an inverse relationship between the certainty of error and its impact on the trial. Where there is a weaker argument for error, there must be a stronger showing of harm."[38] Yet in its analysis of several evidentiary rulings, the court did little to clarify the difference. For instance, in rejecting a request for review of one set of evidentiary rulings, the court stated that there were "tenable grounds" for the rulings and therefore no showing of either "obvious or probable error."[39]

The Court of Appeal's decision in *State v. Dickjose*[40] exemplifies a similar application of subsection (b)(2). In *Dickjose*, a commissioner granted discretionary review of a trial court order denying a motion to suppress evidence obtained pursuant to an invalid search warrant.[41] The Court of Appeals agreed with the defendant that the search warrant was invalid and reversed the trial court order denying the motion to suppress.[42] It is unclear why subsection (b)(2) provided a proper basis for accepting discretionary review before final judgment. The trial court order did not "substantially alter the status quo" or "substantially limit the freedom of a party to act," unless those criteria are understood to apply to rulings affecting a party's position in litigation—or in this case, a criminal prosecution. It seems that subsection (b)(1) was the proper avenue to seek discretionary review, assuming that admission of the unlawfully obtained evidence would have constituted reversible error. Denial of the motion to suppress that evidence, therefore, would have "render[ed] further proceedings useless."

The above discussion is not meant to suggest—nor is it true—that Washington appellate courts have persistently misapplied subsections (b)(1) and (b)(2). To the contrary, there are a few noteworthy cases that properly apply these provisions. In *Macias v. Mine Safety Appliances Co.*,[43] for example, the issue on appeal was whether a plaintiff, who developed mesothelioma after decades of cleaning respirators used in the handling of asbestos-laden materials, could assert a failure to warn product liability claim against the respirator manufacturers even though the respirators he cleaned were not made with asbestos.[44] Despite two recent rulings of the Washington Supreme Court limiting the duty to warn to persons in the chain of distribution of a potentially harmful product, the

38. *Id*. at 594.
39. *Id*. at 595.
40. State v. Dickjose, No. 39160–1–II, 2011 WL 1005552 (Wash. Ct. App. Feb. 23, 2011).
41. *Id*. at *4.
42. *Id.* at *1.
43. Macias v. Mine Safety Appliances Co., 244 P.3d 978 (Wash. Ct. App. 2010).
44. *Id*. at 979–80.

trial court denied the respirator manufacturers' motion for summary judgment.[45] A commissioner for the Court of Appeals subsequently granted discretionary review on the ground that the trial court had committed obvious error.[46] Applying controlling precedent, the Court of Appeals reversed and ordered that summary judgment be entered on remand.[47]

Discretionary review under subsection (b)(1) of the order denying summary judgment was warranted in *Macias* because the trial court failed to follow controlling precedent (committing "obvious error"), and the respirator manufacturers were entitled to judgment as a matter of law, regardless of further developments in the litigation—rendering further proceedings useless. Other examples of the proper application of subsection (b)(1) to rulings regarding summary judgment abound.[48] Additionally, Washington courts have appropriately applied subsection (b)(1) to rulings denying motions for voluntary dismissal,[49] as well as rulings on

45. *Id*. at 980.

46. *Id*.

47. *Id*. at 987.

48. *See, e.g.*, Douchette v. Bethel Sch. Dist. No. 403, 818 P.2d 1362, 1363 (Wash. 1991); Hartley v. State, 698 P.2d 77, 81 (Wash. 1985) (specifically explaining that "[a] useless lawsuit would be prevented by a decision in favor of dismissing the State and County as defendants"); Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 699 P.2d 217, 218 (Wash. 1985); Shannon v. State, 40 P.3d 1200, 1202 (Wash. Ct. App. 2002) (explaining in appeal from denial of summary judgment even though statutory pleading requirements were not met: "We ordinarily will not review a denial of a motion for summary judgment. But an appellate court will accept discretionary review if the trial court 'committed an obvious error which would render further proceedings useless.'"); Dussault v. Seattle Pub. Sch., 850 P.2d 581, 583 n.1 (Wash. Ct. App. 1993) (explaining that while denial of a summary judgment motion is not an appealable order, discretionary review may be granted under subsection (b)(1) to avoid a useless trial); McDonald v. Moore, 790 P.2d 213, 216 (Wash. Ct. App. 1990) (reversing summary judgment ruling in will contest presenting issue of first impression in Washington); Rye v. Seattle Times Co., 678 P.2d 1282, 1289 (Wash. Ct. App. 1984) (reversing denial of summary judgment in defamation action against newspaper and reporter for lack of affirmative evidence of malice).

49. *See* Baker v. Kotlik, No. 51128–9–I, 2003 WL 731834, at *1–2 (Wash. Ct. App. Mar. 3, 2003) (reversing order granting motion to dismiss because plaintiff sought voluntary dismissal under WASH. SUPER. CT. CIV. R. 41 before hearing on motion to dismiss); King Cnty. Council v. King Cnty. Pers. Bd., 716 P.2d 322, 322–23 (Wash. Ct. App. 1986) (same).

motions to dismiss for failure to state a claim,[50] lack of jurisdiction,[51] and expiration of the applicable limitation period.[52]

As a corollary to this application of subsection (b)(1), some Washington court rulings, consistent with Crooks's view, have indicated that subsection (b)(2) applies to orders having immediate impacts outside of the subject court proceedings. The recent decision in *Filo Foods LLC v. City of SeaTac*[53] illustrates this application of subsection (b)(2). In *Filo Foods*, supporters of an initiative to raise the minimum wage for certain workers within the city of SeaTac sought discretionary review of a trial court ruling that "removed [the initiative] . . . from the ballot, depriving the voters of SeaTac the opportunity to vote for or against it."[54] This ruling, the court explained, altered the status quo because the initiative would have been on the ballot otherwise.[55] The court properly granted discretionary review under subsection (b)(2), and its ruling makes sense when one considers the limited opportunity for an election. Other types of rulings properly reviewed under this rule include preliminary injunctions,[56] rulings regarding arbitration,[57] rulings regarding custody orders,[58] and rulings requiring interpleader.[59] At least one court has appropriately suggested that subsection (b)(2) is limited to these types of rulings.[60]

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50. *See, e.g.*, Long v. Dugan, 788 P.2d 1, 1–2 (Wash. Ct. App. 1990) (dismissal for failure to state a claim because wrongful death statute does not create a right of action for nondependent surviving siblings).

51. *See, e.g.*, Vannausdle v. Pierce Cnty. Dep't of Assigned Counsel, No. 36440–9–II, 2009 WL 1060399, at *2 (Wash. Ct. App. Apr. 21, 2009) (finding lack of personal jurisdiction because plaintiff failed to effect service).

52. *See, e.g.*, Barfield v. Estate of Barfield, No. 51884–4–1, 2003 WL 21055110, at *1 (Wash. Ct. App. May 12, 2003) (reversing denial of summary judgment where it was undisputed that suit was filed after expiration of limitation period).

53. Filo Foods LLC v. City of SeaTac, 319 P.3d 817 (2014).

54. *Id*. at 819.

55. *Id*.

56. *See, e.g.*, Speelman v. Bellingham/Whatcom Cnty. Hous. Auths., 273 P.3d 1035, 1039 (Wash. Ct. App. 2012) (review of emergency preliminary injunction); Ameriquest Mortgage v. State Att'y Gen., 199 P.3d 468, 472–73 (Wash. Ct. App. 2009) (review of denial of motion for preliminary injunction).

57. *See, e.g.*, Adler v. Manor, 103 P.3d 773, 778–79 (Wash. 2005) (involving review of an order compelling arbitration pursuant to unconscionable agreement).

58. *See, e.g.*, Dep't of Soc. & Health Servs. v. Paulos, 270 P.3d 607, 613–14 (Wash. Ct. App. 2012) (involving review order removing child from placement with grandparents).

59. Danjel Enters., LLC v. Valdez, No. 63267–1–I, 2010 WL 3214556, at *2 (Wash. Ct. App. Aug. 16, 2010) (involving review of an order requiring an escrow agent to deposit funds into court registry).

60. Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1261 (Wash. Ct. App. 2010) (observing that "[o]rders pertaining to arbitration are among the types of orders that fall within the scope of this rule" (citing Crooks, *supra* note 4, at 1545–46)).

Unfortunately, these *correctly* decided cases[61] are eclipsed by dozens of opinions that either blur or ignore the distinction between subsections (b)(1) and (b)(2).[62] As the above discussion illustrates, there are numerous instances in which commissioners grant motions for discretionary review of partial summary judgment orders or evidentiary rulings under subsection (b)(2). Such rulings reflect a view that subsection (b)(2) has essentially swallowed subsection (b)(1). In other matters, courts have declined to specify the particular subsection under which they grant or deny review.[63] As a result, courts, commissioners, and practitioners alike are left to confront a substantial increase in the volume of motions for discretionary review resulting from the imprecise application of subsections (b)(1) and (b)(2). The lack of rigor and attendant confusion in applying subsections (b)(1) and (b)(2) have not gone unnoticed, as courts have frequently lamented that discretionary review has been improvidently granted.[64] Yet even in these instances, courts have not sought to clarify when discretionary review is appropriate under the different standards.

Considering the body of case law applying RAP 2.3(b)(1) and (b)(2), one thing is clear: the law is a mess. As noted above, subsection (b)(2) appears to focus on injunctions and the like. But despite the plain language of the rule and available commentary, Washington courts have applied the "probable error" and "substantially alters the status quo or substantially limits the freedom to act" standards of subsection (b)(2) to a wide range of issues in a seemingly inconsistent manner. As a result, litigants frequently seek discretionary review under subsection (b)(2) of run-of-the-mill pre-trial orders, which is directly contrary to the principle of the final judgment rule disfavoring piecemeal review.[65] To forestall

61. *See supra* text accompanying notes 43–60.

62. *See supra* text accompanying notes 11–42.

63. *See* Sunbreaker Condo. Ass'n v. Travelers Ins. Co., 901 P.2d 1079, 1085–86 (Wash. Ct. App. 1995) (denying discretionary review of denial of summary judgment without specifying particular subsection of RAP 2.3(b)); Roth v. Bell, 600 P.2d 602, 609 (Wash. Ct. App. 1979) (denying discretionary review under RAP 2.3(b) but declining to analyze any particular subsection).

64. *See, e.g.*, Eastman v. Puget Sound Builders NW., Inc., No. 42013–9–II, 2012 WL 5349186, at *3 (Wash. Ct. App. Sept. 11, 2012); Kantola v. Juvinall, No. 37537–1–II, 2009 WL 1212270, at *5 (Wash. Ct. App. May 5, 2009); Brunridge v. Fluor Hanford, Inc., No. 22058–3–III, 2004 WL 898279, at *1 (Wash. Ct. App. Apr. 27, 2004); Taplett v. Major Mktg. Servs., Inc., No. 20112–1–III, 2002 WL 398492, at *1 (Wash. Ct. App. Mar. 14, 2002).

65. *See* Loeffelholz v. C.L.E.A.N., 82 P.3d 1199, 1214 (Wash. Ct. App. 2004) ("[A] court generally must resolve all claims for and against all parties before it enters a final and enforceable judgment on any part of the case. The goals are to avoid confusion and piecemeal appeals.") (internal footnotes omitted); Minehart v. Morning Star Boys Ranch, Inc., 232 P.3d 591, 593 (Wash. Ct. App. 2010) ("Interlocutory review is disfavored. Piecemeal appeals of interlocutory orders must be

that trend and bring greater clarity to the standards for when discretionary review is appropriate, Washington appellate courts should elucidate the distinction between subsections (b)(1) and (b)(2) and then adhere to that distinction. A proposed framework for doing so is described below.

B. Reassessing the Requirements for Discretionary Review Under RAP 2.3(b)(1) and (b)(2)

RAP 2.3 subsections (b)(1) and (b)(2) need not cause confusion among practitioners because there is a logical way to apply them. Courts can and should avoid relying on catchall analyses that a party has demonstrated either obvious or probable error. Instead, RAP 2.3(b)(2) should be limited to trial court orders granting or denying injunctive relief and other orders that impact parties' rights outside litigation proceedings—as opposed to a party's position within a case—such as an order compelling or refusing to compel arbitration, an order requiring a party to return property to another party or preserve property pending the outcome of litigation, a custody order, or an order requiring the disclosure of privileged information or trade secrets. RAP 2.3(b)(1), in turn, should apply to orders that affect the litigation, such as an order dismissing a claim or defense or an order denying a motion to transfer venue. This framework is sensible for numerous reasons, each briefly set forth below.

First, the proposed framework is consistent with the plain language of RAP 2.3(b)(1) and (b)(2). RAP 2.3(b)(1) is expressly limited to purported errors that "would render further proceedings useless," whereas RAP 2.3(b)(2) is limited to a ruling that "alters the status quo or substantially limits the freedom of a party to act." The text of subsection (b)(1) provides that discretionary review is proper when the error committed is so blatant and severe that there is no point to continuing the particular litigation, either because further proceedings would require reversal and repetition on remand, or because the litigation should be dismissed altogether.

On its face, subsection (b)(2) applies to orders that immediately change the rights of a party or modify some existing condition. A preliminary injunction order, an order transferring custody from one individual to another, an order requiring disclosure of privileged information, or an order compelling parties to submit to arbitration rather than exercise their rights to access a court of law accomplishes each of those things. In contrast, CR 12 rulings, discovery orders, summary judgment rulings, and

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avoided in the interests of speedy and economical disposition of judicial business.") (internal quotation marks and citation omitted).

most evidentiary rulings do not alter the substantive rights of any party with similar effect. Such rulings might be incorrect and warrant reconsideration by the trial court or reversal on appeal, but the terms of subsection (b)(2), on their face, do not apply to such rulings.

Second, the proposed framework would preserve the independent significance of subsection (b)(1). Subsection (b)(2) should not be interpreted to apply to partially dispositive and evidentiary rulings, in part because of the interpretive principle that courts are to give effect to language in a rule by considering different provisions in relation to one another and harmonizing them.[66] Subsections (b)(1) and (b)(2) employ different standards that must apply to different situations. If pretrial orders were considered to alter the status quo or substantially limit the freedom of a party to act, subsection (b)(1), with its more stringent "obvious error" standard and requirement that further proceedings be "rendered useless," would be rendered nugatory.

Third, the proposed framework is consistent with the Task Force comments regarding RAP 2.3(b)(1) and (b)(2). As to subsection (b)(1), the Task Force observed that the obvious error or useless proceedings standard "states the general test established by decisional law" developed around applications for extraordinary writs.[67] Subsection (b)(2), the Task Force explained, "applies primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, *which have formerly been appealable as a matter of right.*"[68] Indeed, Rule 14 of the former Washington Supreme Court Rules on Appeal provided that rulings granting injunctions and similar equitable rulings could be appealed as a matter of right. The legislative history, therefore, confirms that subsections (b)(1) and (b)(2) pertain to different types of orders.

Fourth, the proposed framework is consistent with well-reasoned case law, including *Macias*.[69] Those cases confirm that pretrial orders affecting the course of the litigation with no immediate effects on parties' rights outside the litigation properly qualify for discretionary review only when the subject ruling is obviously incorrect and reversal would obviate the need for further proceedings.[70] In contrast, non-appealable orders or rulings having immediate effect on people's rights outside the litigation are reviewable under the less stringent probable error stand-

66. *See* State v. Brown, 312 P.3d 1017, 1020 (Wash. Ct. App. 2013) (meaning of a court rule "is discerned by reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the intent behind it") (internal quotation marks omitted).

67. TEGLAND, *supra* note 4, at 201.

68. *Id*. (emphasis added).

69. *See generally* Macias v. Mine Safety Appliances Co., 244 P.3d 978 (Wash. Ct. App. 2010).

70. *See supra* text accompanying notes 43–52.

ard.[71] The reasoning in cases like *Macias* conforms precisely to the framework proposed here, but the teaching of those decisions is eclipsed by the many other cases that ignore or blur the proper distinction between subsections (b)(1) and (b)(2).[72]

Fifth, the proposed framework makes logical sense. A ruling that grants injunctive relief has a very concrete and significant effect on a party's freedom to act. It therefore makes sense that review in that instance would be governed by a lesser standard: "probable error" rather than "obvious error." As noted, the Court of Appeals observed in *Minehart* that standards for granting discretionary review under subsections (b)(1) and (b)(2) create an inverse relationship between the effect of an order and the certainty of error.[73] Moreover, it makes practical sense that a party adversely affected by such a ruling should be able to obtain review under the less stringent standard before a final judgment because of the potential costs and damages imposed by lengthy litigation.

Likewise, this framework ensures that parties erroneously deprived of clear legal rights in litigation may obtain meaningful relief under subsection (b)(1). The requirement that an "obvious error . . . would render further proceedings useless" sensibly refers to rulings that misapply clearly established law to undisputed facts or that misunderstand facts in a manner rising to the level of reversible error. A classic example is a trial court ruling that erroneously denies a motion to dismiss based on expiration of an applicable limitation period. Regardless of any further developments in the litigation, the moving party is entitled to dismissal, and therefore, all further proceedings are useless. The same can be said for a party that is entitled to (but is denied) summary judgment on some or all issues, or where summary judgment is improperly granted. Waiting for a final judgment would be incredibly wasteful and ultimately pointless. Further, the damage caused by an obviously erroneous ruling is less likely to be solved by a successful appeal. But given the policy against piecemeal appellate review, it makes sense to require demonstration of obvious error to obtain review of such rulings. Subsection (b)(1) provides an avenue of relief for aggrieved parties and a mechanism for appellate courts to exercise supervisory jurisdiction in appropriate circumstances without wasting appellate resources, creating delays through piecemeal appeals, or undermining the independence of trial courts.

Sixth, this framework will bring the coherence to this aspect of appellate practice that the RAP sought to achieve because it clearly deline-

71. *See supra* text accompanying notes 53–60.

72. *See supra* text accompanying notes 11–42.

73. *See* Minehart v. Morning Star Boys Ranch, Inc., 232 P.3d 591, 594 (Wash. Ct. App. 2010).

ates the circumstances when discretionary review is appropriate. As it stands now, subsections (b)(1) and (b)(2) are frequently viewed as applying to the same types of non-final orders. That can clearly be seen in the secondary authorities that are cited and discussed in Part I above and in the many cases that are cited and discussed in Part II.A. The result is an appellate court system burdened by the very types of imprecise and persistent requests for interlocutory review that the rules of appellate procedure and the final judgment rule are intended to limit.

Finally, the proposed framework tracks federal law, which might provide guidance to both jurists and practitioners alike. Federal law expressly provides a right of appeal from orders concerning preliminary injunctions.[74] Although subsection (b)(2) does not allow appeals from such orders as a matter of right, its less stringent "probable error" standard corresponds to the recognition in federal law (and in the former Rules on Appeal) that parties should be able to obtain review of certain orders with relative ease. Just as a party may obtain interlocutory review in federal court by applying for a writ of mandamus upon a showing of a "clear and indisputable right,"[75] a party may seek review under subsection (b)(1) upon a showing of an obvious error.[76]

III. CONCLUSION

Washington courts have strayed from the initial intent of RAP 2.3: to establish clear, distinct standards governing motions for discretionary review. Over the past three decades, courts, perhaps unwittingly, have collapsed the terms of subsections (b)(1) and (b)(2) into a murky analytical framework. This trend is inconsistent with the language of the rules

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74. *See* 28 U.S.C. § 1292(a) (2014), which provides, in pertinent part:

> Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; [and]
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property[.]

75. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380–81, 394 (2004).

76. Application for extraordinary writs in the federal context is also analogous to the standard of WASH. R. APP. P. 2.3(b)(3), which permits discretionary review when a "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." Application of this standard is not a focus of this Article.

and has created confused lines of case law, leaving practitioners no choice but to argue that review is warranted under either standard. Appellate courts should take this problem seriously and endeavor to clarify the appropriate standards. Limiting subsection (b)(2) to orders concerning injunctions and the like—not ordinary pretrial rulings—would demonstrate fealty to the terms of the rules and ensure avenues for interlocutory review where appropriate, consistent with the final judgment rule.