always Appealing: Washington's Supreme Court Again Emphasizes Our State's Policy of Deciding Cases on Their Merits

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Bar Bulletin Blog: General

The Supreme Court's recent decision in Kenmore MHP LLC v. City of Kenmore[1] addresses a number of topics of interest for appellate practitioners, most prominently its discussion of what constitutes substantial compliance with a service requirement, an issue that arises frequently in appeals. This article provides an overview of Kenmore and then discusses insights appellate practitioners can glean from the decision.

In Kenmore, Kenmore MHP LLC (MHP) electronically filed a petition for review with the Growth Management Hearings Board (Board) challenging a City of Kenmore (City) ordinance and attempted to serve the City the same day through a legal messenger, but the messenger was delayed by traffic and unable to serve the City until the next business day.[2] The City filed a motion to dismiss MHP's petition with the Board arguing MHP violated a Board regulation, WAC 242-03-230(2)(a), which states that petitions must be received by respondents "on or before the date filed with the board."[3] The Board, by a 2-1 vote, granted the City's motion, rejecting MHP's argument that it had substantially complied with WAC 242-03-230(2)(a) because the City was not prejudiced by service that, although a

day late under WAC 242-03-230(2)(a), was still within the 60-day statute of limitations for filing petitions under RCW 36.70A.290(2).[4] After MHP sought review of the Board's dismissal in superior court, the superior court reversed the Board and then was itself reversed by Division Two of the Court of Appeals.[5]

The Supreme Court reversed Division Two, holding that MHP "substantially complied with the requirements under the regulation because the City was in the same position it would have been had MHP complied with the order of service requirements."[6] The Supreme Court explained that while the Board was entitled to adopt its own procedural rules and its interpretation of substantial compliance was entitled to deference, its interpretation must still be "plausible and consistent with the legislative intent." [7] The Supreme Court then explained that the Board's decision was implausible because the test for substantial compliance the Board adopted in a previous case, Your Snoqualmie Valley v. City of Snoqualmie,[8] required the Board to consider prejudice to the opposing party, as did an earlier Supreme Court case cited by the Board in Your Snoqualmie Valley.[9] The Supreme Court also explained that the Board's decision was inconsistent with the Legislature's intent in adopting the Growth Management Act to foster a "robust community discussion in a development of comprehensive land use planning" and a "clear intent . . . that a timely petition for review should be heard on its merits."[10]

Kenmore provides valuable insight on what constitutes substantial compliance with procedural requirements, an issue which arises frequently when appealing agency decisions[11] and in cases involving a procedural rule or statute.[12] Kenmore underscores that courts evaluating substantial compliance should focus on whether the opposing party was prejudiced by the procedural deficiency. And while, strictly speaking, Kenmore is limited to interpreting and applying the test for substantial compliance from Your Snoqualmie Valley, its reasoning could easily apply to other cases involving service, as confirmed by the Supreme Court's general observation that "[c]ases considering substantial compliance with service requirements apply a prejudice analysis"[13] and its citation to RCW 1.12.010, which applies to the entire Revised Code of Washington, and states that it "'shall be liberally construed, and shall not be limited by any rule of strict construction.'"[14] The Supreme Court further stressed that "the prevailing policy in our state is 'that controversies be determined on the merits.'"[15]

Kenmore, however, also highlights a tension in Washington precedent regarding whether a party may substantially comply with service requirements. While Washington courts have accepted substantial compliance with service requirements in some contexts,[16] they have rejected it in others,[17] including in the context of the Administrative Procedure Act's (APA) requirements for filing and serving a petition for review in a superior court (as opposed to filing a petition for review with an agency, as in Kenmore).[18] Practitioners presented with a case involving compliance with a service requirement thus must take care to research and cite cases with analogous circumstances and be cognizant of conflicting case law on the issue.

Kenmore also demonstrates that while courts generally defer to an agency's interpretation of its own regulation, that deference is not boundless. The Supreme Court appeared particularly motivated by the fact that the petitioner had filed its petition for review within the 60-day statute of limitations in RCW 36.70A.290(2), the only statutory (as opposed to regulatory) requirement in the case. Indeed, the Supreme Court started Kenmore by quoting RCW 36.70A.290(2) and ended it by stating "MHP substantially complied with the statutory requirements under RCW 36.70A.290(2)."[19]

Similarly, Kenmore provides an example of how a party challenging an agency decision can show the decision was "arbitrary and capricious," a notoriously difficult standard to meet. The Supreme Court held "that the Board order of dismissal is unreasoning, and thus arbitrary and capricious, because it failed to correctly apply the test adopted in Your Snoqualmie Valley on which it purported to rely," citing back to its discussion of how the Board's own precedent confirmed that prejudice was a factor that must be considered in determining substantial compliance.[20] In other words, the Board's decision was arbitrary and capricious because it was contradicted by the very authority it purported to rely on.

Kenmore laudably holds that cases should be resolved on their merits and not on procedural technicalities which do not cause prejudice. Let's hope practitioners can use that holding to ensure more cases are heard on their merits.

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1 No. 100934-8, 2023 WL 3238559 (Wash. May 4, 2023).

2 2023 WL 3238559, at *1.

3 2023 WL 3238559, at *2.

4 2023 WL 3238559, at *2.

5 2023 WL 3238559, at *2.

6 2023 WL 3238559, at *6.

7 2023 WL 3238559, at *3.

8 No. 11-3-0012 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Mar. 8, 2012 (Ord. on Mots.)) As discussed in Kenmore, the test for substantial compliance adopted in Your Snoqualmie Valley was itself derived from a Ninth Circuit decision, Borzeka v. Heckler, 739 F.2d 444 (9th Cir. 1984).

9 2023 WL 3238559, at *3-6.

10 2023 WL 3238559, at *6.

11 See, e.g., Continental Sports Corp. v. Department of Labor and Industries, 128 Wn.2d 594, 910 P.2d 1284 (1996); Ruland v. State, Dep't of Soc. & Health Servs., 144 Wm. App. 263, 182 P.3d 470 (2008); Skinner v. Civ. Serv. Comm'n of City of Medina, 168 Wn.2d 845, 232 P.3d 558 (2010).

12 See, e.g., Wilson v. Olivetti N. Am., Inc., 85 Wn. App. 804, 934 P.2d 1231, rev. denied, 133 Wn.2d 1017 (1997); Williamson, Inc. v. Calibre Homes, Inc., 147 Wn.2d 394, 54 P.3d 1186 (2002); Reiner v. Pittsburg Des Moines Corp., 101 Wn.2d 475, 480, 680 P.2d 55 (1984).

13 2023 WL 3238559, at *6.

14 2023 WL 3238559, at *6.

15 2023 WL 3238559, at *7 (quoting Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); emphasis added).

16 See, e.g., Black v. Dep't of Lab. & Indus. of the State of Wash., 131 Wn.2d 547, 933 P.2d 1025 (1997) (appellant substantially complied with RCW

51.52.110's requirement to serve notice of appeal on department director by serving assistant attorney general assigned to case); Reiner, 101 Wn.2d at 480 (plaintiff substantially complied with requirements for service on a foreign corporation in RCW 4.28.080(10) by handing the summons and complaint to the wife of a corporate employee after confirming employee lived there); Skinner, 168 Wn.2d at 855-56 (appellant substantially complied with RCW 41.12.090's requirement to serve city's civil service commission by serving city clerk); Hall v. Seattle Sch. Dist. 1, 66 Wn. App. 308, 312-14, 831 P.2d 1128 (1992) (teacher substantially complied with RCW 28A.58.460's requirement to serve notice of appeal on chair of the school board by serving chair's secretary).

17 See, e.g., Est. of Jepsen, 184 Wn.2d 376, 380 n.4, 358 P.3d 403 (2015) (rejecting argument that email to the personal representative's attorney substantially complied with RCW 11.24.010's requirement to personally serve will contest on personal representative); Nitardy v. Snohomish County, 105 Wn.2d 133, 712 P.2d 296 (1986) (requiring strict compliance with the service provisions of RCW 4.28.080(1) for suits against counties).

18 See, e.g., Clark Cnty. v. Growth Mgmt. Hearings Bd., 10 Wn. App. 2d 84, 448 P.3d 81 (2019). Clark County was cited in Kenmore without any discussion of the apparent tension between allowing substantial compliance with the service requirements for a petition for review to an agency, but not to a superior court. See 2023 WL 3238559, at *2. While beyond the scope of this article, I believe cases requiring strict compliance with the APA's service requirements conflict with its purpose, which the Supreme Court has stated is to "eliminate many of the formalities associated with the initiation of an action in superior court and instead allow pro se litigants to seek judicial review without the need to hire an attorney or process server." Banowsky v. Guy Backstrom, DC, 193 Wn.2d 724, 739, 445 P.3d 543 (2019) (quoting Diehl v. W. Washington Growth Mgmt. Hearings Bd., 153 Wn.2d 207, 215, 103 P.3d 193 (2004)) (alterations omitted).

19 2023 WL 3238559, at *1, 7.

20 2023 WL 3238559, at *7.