always Appealing: Washington Supreme Court Again Divides on Balancing Finality and Error Correction

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Bar Bulletin Blog: General

By Ian C. Cairns

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Last year I wrote in this space regarding two decisions from the Washington Supreme Court in which all of the justices agreed there was an error, but they disagreed about what, if anything, they could or should do about it.[1] The Supreme Court issued another such decision two months ago in Luv v. W. Coast Servicing, Inc.[2] This article starts with a discussion of the complicated procedural history of Luv, then discusses the three opinions in the case, and then offers my own thoughts on the case.

Luv arose out of efforts by West Coast Servicing, Inc., to foreclose on a deed of trust securing a note executed by Prince Eric Luv. The dispute made its way to court, and the trial court ruled that the statute of limitations barred West Coast's efforts to enforce the deed of trust and entered a judgment quieting title to Luv. This is the ruling that all nine justices agreed was erroneous.

West Coast appealed, and Division One affirmed in an unpublished opinion ("Luv I").[3] West Coast moved for reconsideration, which the Court of Appeals denied. West Coast then filed a petition for review with the Supreme Court, which the Supreme Court denied.[4] Less than two weeks later, Division One released its opinion in Copper Creek (Marysville) Homeowners Ass'n v. Kurtz, which involved the same statute of limitations issue and reached an outcome "contrary" to Luv I.[5]

Citing Copper Creek, West Coast filed a "renewed" motion for reconsideration in Division One, which was again denied. West Coast also filed a "renewed" petition for review in the Supreme Court, which the Supreme Court denied. The decision in Luv I became final when the Court of Appeals issued its mandate on February 17, 2022.

Having struck out in the appellate courts, West Coast filed a motion in the trial court seeking to vacate the judgment under CR 60(b)(11), which allows a trial court to vacate a judgment for "[a]ny … reason justifying relief." The trial court denied the motion, rejecting West Coast's argument that Copper Creek represented an "intervening change in law," reasoning that Luv I had erroneously interpreted existing Washington law, and thus Copper Creek did not change the law, but correctly applied existing Washington law.[6]

West Coast again appealed and the Court of Appeals again affirmed ("Luv II").[7] The Court of Appeals did not deny it had erred in Luv I but agreed with the trial court that Copper Creek did not change the law, explaining "[t]he decisions in this case did not become wrong as a result of the decision in Copper Creek."[8] And with only an error of law, not a change in the law, West Coast could not prevail because "[i]t is well settled that errors of law do not constitute extraordinary circumstances correctable through CR 60(b)(11)."[9]

West Coast again petitioned the Supreme Court for review. The Supreme Court, which had granted review of Copper Creek, stayed West Coast's petition pending its review of Copper Creek. After affirming Copper Creek, the Supreme Court remanded Luv II for reconsideration in light of Copper Creek.[10] The Court of Appeals again ruled Copper Creek did not constitute a change in the law and West Coast again petitioned for review.[11]

The Supreme Court granted review and issued three opinions, each of which is discussed below. Ultimately, a majority of the Court (the four justices in the lead opinion plus Justice Barbara Madsen) remanded to the trial court with instructions to vacate the judgment and conduct additional proceedings.

The lead opinion, written by Justice Charles Johnson and joined by Justices Mary Yu, Helen Whitener, and Sheryl Gordon McCloud, reasoned that "[a]n error of law, such as an invalid judgment, is a justifiable basis ... for a trial court to grant relief under CR 60(b)(11) when accompanied by extraordinary circumstances extraneous to the proceeding."[12] Applying this rule, the lead opinion reasoned that "conflicting appellate court decisions combined with the prompt timing of a CR 60(b)(11) motion constitute extraordinary circumstances."[13] The lead opinion acknowledged that CR 60(b)(11) "is not meant to be broadly interpreted, enabling parties to relitigate matters" but nonetheless felt that relief was appropriate because "West Coast followed proper procedure throughout this case by appealing the trial court decisions in Luv I, allowing the lower courts every opportunity to review and remedy the legal errors."[14]

Justice Madsen wrote a concurring opinion that was not joined by any other justices. Rather than rely on CR 60, Justice Madsen would have remanded the case to the Court of Appeals under RAP 2.5(c)(2) "to revisit its earlier appellate decision in Luv and reconsider the statute of limitations analysis in light of Copper Creek."[15] Although she believed the lead opinion erroneously "misappl[ied] and expand[ed] the grounds for obtaining CR 60(b) relief," Justice Madsen opted to join its result and remand the case to the trial court with instructions to vacate the judgment.[16]

Justice Salvador Mungia wrote a dissenting opinion, joined by Justices Steven González, Debra Stephens, and Raquel Montoya-Lewis, and would have affirmed the Court of Appeals. Justice Mungia reasoned that "[f]or over 100 years, we have held that parties could not collaterally challenge a judgment when the basis was an allegation that the trial court committed a legal error."[17] Justice Mungia was also critical of the lead opinion for directing the trial court to vacate the judgment because "CR 60(b)(11) gives the trial court the sole discretion to set aside a

judgment."[18] Justice Mungia also raised policy concerns, in particular that expanding the grounds for CR 60 relief would stretch limited judicial resources and make litigation more expensive.[19]

Luv demonstrates that the justices continue to disagree on when finality should prevail over error correction. When I previously wrote about this disagreement, I avoided offering any criticism of the Court's decisions. This time, I humbly offer two criticisms of the lead opinion.

First, the lead opinion does not take any accountability for the Court's role in creating the circumstances it relied on to grant relief. The lead opinion reasons the "compelling circumstances" that warranted relief included the "several decisions denying relief based on legal error," without acknowledging that its ruling denying review of Luv I was among those decisions.[20] At the same time, the lead opinion faults "the lower courts" because they had "every opportunity to review and remedy the legal errors."[21]

Of course, as Justice Mungia notes, the Supreme Court "is not an error-correction court" but instead "accept[s] petitions for review that satisfy the criteria set out in RAP 13.4(b)."[22] It is thus appropriate, although admittedly unfortunate, when the Supreme Court denies review of an erroneous Court of Appeals decision because it does not satisfy the criteria of RAP 13.4(b), as the Court apparently did in Luv I. But, having ruled that the circumstances were so "compelling" and "extraordinary" that the judgment must be vacated in Luv II, one would expect some sort of acknowledgment from the Court that when presented with the same judgment and same arguments in Luv I, the Court did not believe the circumstances were sufficiently compelling to require vacating the judgment. The lead opinion itself notes that West Coast "advanced legal arguments consistent with Copper Creek I and II throughout this case's procedural history."[23]

The second reason I take issue with the lead opinion is that it lauds West Coast's "prompt efforts to follow proper procedure," when, in fact, some of those efforts were not proper.[24] While it is hard to fault West Coast's tactics given it ultimately prevailed, neither its "renewed" motion for reconsideration in the Court of Appeals nor its "renewed" petition for review were "proper procedure." RAP 12.4(h) prohibits a party from filing more than one motion for reconsideration, RAP 12.5(b)(3) provides that the Court of Appeals "will issue the mandate" after a

petition for review has been denied, and RAP 12.4(a) prohibits a party from filing "a motion for reconsideration of a Supreme Court order denying a petition for review." The Supreme Court itself noted in its letter to West Coast explaining why it refused to take any action on its "renewed" petition for review that "[t]he Rules of Appellate Procedure do not provide for the filing of a 'renewed' petition for review."[25] The Court of Appeals likewise rejected Luv's "renewed" motion for reconsideration as "not allowed under the Rules."[26]

These may seem like minor infractions, but I believe they dovetail with Justice Mungia's concern that Luv will increase the costs of litigation. In addition to encouraging parties to file CR 60 motions seeking to correct legal error, parties are now incentivized to demonstrate their "prompt efforts to follow proper procedure," which apparently include filings that are prohibited by the Rules of Appellate Procedure. This is particularly troubling given that it is usually wealthier parties that are best able to abuse the opportunity to submit additional filings.

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1 See Ian Cairns, "Washington Supreme Court Divides on Balancing Finality and Error Correction," KCBA Bar Bulletin (Oct. 2024), available at https://washingtonappeals.com/_ARTICLES/2410-Washington_Supreme_Court_Divides-Ian_Cairns.pdf.

2 577 P.3d 398 (2025).

3 No. 81991-7-I, 18 Wn. App. 2d 1049, 2021 WL 3288360 (2021).

4 198 Wn.2d 1035 (2022).

5 21 Wn. App. 2d 605, 624 n.6, 508 P.3d 179 (2022). The Court of Appeals filed its initial opinion in Copper Creek on Jan. 18, 2022, but later withdrew it and filed a substitute opinion that reconsidered an attorney fee issue.

6 577 P.3d at 400.

7 No. 83959-4-I, 24 Wn. App. 2d 1038, 2022 WL 17246712 (2022).

8 2022 WL 17246712, at *5.

9 2022 WL 17246712, at *3.

10 1 Wn.3d 1033 (2023).

11 No. 83959-4-I, 30 Wn. App. 2d 1032, 2024 WL 1367162 (2024).

12 577 P.3d at 401.

13 577 P.3d at 402.

14 577 P.3d at 401.

15 577 P.3d at 406.

16 577 P.3d at 404, 406. While the issue is beyond the scope of this article, given Justice Madsen's rejection of the lead opinion's interpretation of CR 60, it is debatable whether that interpretation is precedential. See generally Rachael Clark, Comment, "Piecing Together Precedent: Fragmented Decisions from the Washington Supreme Court," 94 Wash. L. Rev. 1989 (2019).

17 577 P.3d at 406.

18 Id.

19 577 P.3d at 415.

20 577 P.3d at 403.

21 577 P.3d at 401.

22 577 P.3d at 406.

23 577 P.3d at 403.

24 Id.; see also 577 P.3d at 401, 403 (praising West Coast for its "proper and prompt actions" and "follow[ing] proper procedure throughout this case").

25 This letter, dated Feb. 3, 2022, is available through the Appellate Document Portal on the Washington State Courts' website (https://www.courts.wa.gov).

26 This letter, dated Feb. 2, 2022, is likewise available through the Appellate Document Portal.