

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue, creating a modern, professional aesthetic.

**Civil Appeals - An Emphasis on
Preserving Error, Stays and
Supersedeas, and Ethical
Considerations on Appeal**

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Preliminary Matters

- ▶ This presentation focuses on Washington Law
- ▶ This is geared toward trial attorneys handling civil matters
- ▶ Topics:
 - ▶ Preserving Error
 - ▶ Stays and Supersedeas
 - ▶ Ethics





Preserving Error

Or how I learned to stop
worrying and love RAP
2.5(a).

Examples – Was the Issue Preserved?

- ▶ “Kathleen argues we should not consider Maurice's argument that she failed to exercise due diligence because Maurice failed to raise it until his motion for reconsideration.” Maurice filed a declaration in response to Kathleen’s motion to vacate, stating that Kathleen failed to show ‘any requests for financial information, account information, assets or otherwise were withheld’ from her. CP at 186.
 - ▶ Yes! Citing Maurice’s declaration, Division Two said that “[i]mplying that Kathleen should have requested more information about the assets is analogous to arguing that Kathleen failed to exercise due diligence. Therefore, we consider this argument on the merits.” *In re Marriage of Bresnahan*, 21 Wn. App. 2d 385, 403 (2022)
- ▶ Plaintiff objected during closing when defense counsel misstated the standard of care in medical malpractice, claiming society had zero role to play in establishing the standard of care for doctors. Plaintiff noted the objection and referred to a discussion the lawyers had in chambers about this topic. **Did plaintiff preserve an argument on appeal that defendant made an improper argument?**
 - ▶ No! Not without a request for a curative instruction “redirect[ing] the jury to the accurate statement of the law.” *Adair v. Weinberg*, 79 Wn. App. 197, 204, 901 P.2d 340 (1995). Also, the appellate court had no way to know what happened during the discussion in chambers so it could not adequately review the alleged error.
 - ▶ **Make sure the record is sufficient to review the error!**

Examples – Was the Issue Preserved?

- ▶ Plaintiffs sued Seattle as taxpayers challenging its contractual payments to Woodland Park Zoo, based on allegations that Zoo was engaging in acts of animal cruelty. They alleged that the City owned the land and funded the Zoo's operations. **Did the plaintiffs preserve an argument on appeal from CR 12(c) dismissal that the Zoo was a *de facto* City agency?**
 - ▶ No! The plaintiff's complaint merely contained allegations against "the Zoo," not the City. They could not amend the complaint through argument to infer some agent/principal relationship for the first time on appeal (and even if it could the facts did not support it). *Sebek v. City of Seattle*, 172 Wn. App. 273, 290 P.3d 159 (2012).
 - ▶ **Consider all vulnerabilities in the case, including with pleadings that may need amending before an appeal!**
- ▶ The Department of Revenue assessed use tax on a company's sale of explosive detection machines to the TSA that were deployed Sea-Tac and Spokane airports. The company paid the assessment and sought a \$5.3 million refund, claiming it was not a "consumer" subject to the use tax because it was a manufacturer and not an installer of the detection machines. Division I wrote in an appeal from summary judgment that the company "installed" the machines, even though this was a disputed question of fact. The company did not move for reconsideration or raise this factual mistake in a petition for review to the Supreme Court. **Did the company preserve the error or was it now law of the case that it "installed" the machines?**
 - ▶ Yes! The company did preserve the error to argue later. Courts must not perpetuate their own errors under the law of the case doctrine if it would result in manifest injustice. The test is "whether the prior decision was clearly erroneous and, if so, whether the erroneous decision works a manifest injustice to one party." *Morpho Detection, Inc. v. Dep't of Revenue*, 8 Wn. App. 2d 672, 683, 440 P.3d 1009 (2019). There is no requirement to preserve this argument through a motion for reconsideration.
 - ▶ **Remember the purpose of the CRs and RAPs to find the truth on the merits!**

Examples – Was the Issue Preserved?

- ▶ “Appellant further argues DSHS owed a duty under Restatement (Second) §§ 323 and 324 by voluntarily undertaking services to Kent that were necessary for his protection. Appellant argues that this duty arises from DSHS offering Kent participation in the RCL program and conducting assessments to determine Kent's eligibility in that program. These sections of Restatement (Second) were not raised below, and DSHS argues that we should therefore not consider them.”
 - ▶ ***Close enough!*** “Because these sections of Restatement (Second) involve an exception to the public duty doctrine, and because the record has been developed to consider this issue, we reach this issue.” *Turner v. Wash. State Dep't of Soc. & Health Servs.*, 493 P.3d 117, 129 & n.15(Wash. 2021).

Examples – Was the Issue Preserved?

- ▶ "Kaplan argues that the trial court erred in denying his pretrial motion for summary judgment that the “under the care of a licensed physician” clause in each of his disability insurance policies is ambiguous as a matter of law because it is susceptible to at least two reasonable interpretations, and must, therefore, be construed in his favor to mean that he needed to be under the care of a physician at the time he made a claim for benefits, and not during the preceding five years for which he seeks disability benefits.”
- ▶ **Yes!** *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 800, 803, 65 P.3d 16, 21 (2003)

Examples – Was the Issue Preserved?

- ▶ “Here, the Port's motion for summary judgment requested that the trial court dismiss all of the NEM Plaintiffs' claims. However, the motion discussed only ASNAA's federal preemption over claims for damage caused by noise conditions. The Port's motion did not address the plaintiffs' claims for damages caused by fumes or toxic discharge. In fact, the motion did not even make a passing mention of fumes or toxic discharge. And the plaintiffs' responsive memorandum discusses these conditions only to emphasize that those claims were not a subject of the present summary judgment motion.”
- ▶ **NO!** “Contrary to the Port's assertions, a general request to dismiss all claims, standing alone, is inadequate to raise those claims and issues not discussed more fully within the motion for summary judgment. Similarly, the Port argues that it adequately raised the issue whether ASNAA precludes the NEM Plaintiffs' claims for vibration damages by briefly stating that the “causes of action ... each depend on [an] alleged increase in operations and the alleged ‘heightened noise pollution’ and vibrations (*i.e.*, low frequency noise) caused by those operations.”⁴⁶ But this passing reference does not “clearly state” that this is an issue “upon which summary judgment is sought.”⁴⁷ The Port's motion did not put the NEM Plaintiffs on notice that they needed to address whether the ASNAA applies to damages from vibrations,⁴⁸ and they had no opportunity to make an adequate response.” *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40-41, 340 P.3d 873, 882 (2014).

Examples – Was the Issue Preserved?

- ▶ “Kitzmiller argues that the trial court erred by dismissing her entire complaint because Schroeder moved for summary judgment only on his failure to warn. In addition to the duty to warn about the open hatch and movement of the boat, addressed above, Kitzmiller's complaint alleges that Schroeder was negligent in “consuming alcohol” throughout the day on the boat; failing to keep a proper lookout; tying the boat to other sailboats in the bay; failing to provide “adequately trained and competent officers and/or crew;” and “failing to timely and properly remove” her from the boat.””
- ▶ **Yes!** “Kitzmiller fails to provide any factual or legal bases to support these theories. Kitzmiller said she did not know if Schroeder was drunk. Kitzmiller said Schroeder seemed to know what he was doing in operating the boat and she did not feel unsafe in the way he operated the boat. Kitzmiller repeatedly stated that she did not know what caused the alleged sudden movement of the boat before her fall and that she did not think Schroeder caused the movement. Because Kitzmiller does not know what caused the alleged sudden boat movement, she cannot demonstrate how the “raft up” or alleged lack of a lookout caused her fall. Kitzmiller states that Schroeder's sailboat was designed to be manned and operated by one person, which contradicts her theory that Schroeder was negligent by failing to have officers or crew. She offers no reason that Schroeder should have removed her from his boat.” *Kitzmiller v. Schroeder*, 17 Wn. App. 2d 1037, 2021 WL 1734766, at *7 (2021) (unpublished)

Stays and Supersedeas

- ▶ RAP 8.1 – procedures for stays of money judgments, decisions affecting property and other civil matters
- ▶ RAP 8.3 – appellate court can issue orders to ensure effective and equitable review



Money and Practical Matters

- Alternatives to bonds are often preferred
- CR 62 governs automatic stay of judgments
- RAP 8.1(h)



Let's get Ethical, Ethical!

Duty of Competency, Prompt Communication, Ethical Withdrawal, and
Candid Advice

Get to the Rules

▶ RPC 1.1 Competence

- ▶ A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

▶ RPC 1.3 Diligence

- ▶ A lawyer shall act with reasonable diligence and promptness in representing a client

▶ RPC 1.4 Communication -

- ▶ (a) A lawyer shall:
 - ▶ (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules;
 - ▶ (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - ▶ (3) keep the client reasonably informed about the status of the matter;
 - ▶ (4) promptly comply with reasonable requests for information; and
 - ▶ (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- ▶ (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

▶ RPC 3.1 Meritorious Claims and Contentions

- ▶ A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

▶ RPC 3.3 Candor Toward the Tribunal

- ▶ (a) A lawyer shall not knowingly:
 - ▶ (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - ▶ (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
 - ▶ (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party;
- ▶ or (4) offer evidence that the lawyer knows to be false.

▶ RPC 2.1 Advisor

- ▶ In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

▶ RPC 1.7 – Conflict of Interest

- ▶ (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - ▶ (1) the representation of one client will be directly adverse to another client; or
 - ▶ (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- ▶ (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - ▶ (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - ▶ (2) the representation is not prohibited by law;
 - ▶ (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - ▶ (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Any Questions?

