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COURT OF APPEALS
OF THE
STATE OF WASHINGTON

No. 29970-8-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

CHERRYANN COBALLE,

Appellant,

v.

SPOKANE COUNTY; SPOKANE COUNTY BOARD OF COUNTY
COMMISSIONERS; SPOKANE COUNTY HEARING EXAMINER;
SPOKANE COUNTY REGIONAL ANIMAL SERVICES,

Respondents.

**RESPONDENTS' SUPPLEMENTAL BRIEF RE: RIGHT OF
APPEAL AND DISCRETIONARY REVIEW QUESTIONS PUT
BY THE COURT**

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I. QUESTIONS PUT BY THE COURT

The Court's request for supplemental briefing put the following questions to the litigants.

1. Is there a statutory right to appeal the County Board of Commissioners' decision in this matter to superior court pursuant to RCW 36.32.330?
2. If there is such a right, was that the substance of the proceeding in superior court, or was the substance of the proceeding the resolution of petitions for statutory and/or constitutional writs of certiorari?

Depending on your response: On what basis was the writ procedure appropriate, if Ms. Coballes had a right of appeal to superior court?

3. Whatever your position on the nature of the superior court proceedings, is Ms. Coballes presently entitled to review as a matter of right under RAP 2.2 or is the court's acceptance of review discretionary under RAP 2.3?

II. SUMMARY OF RELEVANT FACTS

Petitioner, Ms. Coballes's Petition for Judicial Review by Statute [SCC 5.04.032], Constitutional Writ of Certiorari and/or Statutory Writ of Review [Ch. 7.16 RCW], filed with the superior court on November 17, 2011, contains three distinct claims upon which she asserts that relief may be granted by the superior court; Claim I – Statutory Appeal, Claim II & III – alternative Statutory or Constitutional Writ. CP 04. The Prayer in her Petition seeks relief “[f]or processing of her statutory right of appeal, provided she

reserves all right to constitutional review provided under the constitutional writ of certiorari and/or statutory writ of review, which she seeks jointly”. CP 04 – 05. Two weeks following the filing of her Petition for Judicial Review, Ms. Coballes next files an Ex Parte Motion for Writ of Review, Assignment of Judge, and Waiving Bond [sic] on November 30, 2011. CP 09 – 17.

In her Motion for Writ of Review Ms. Coballes acknowledges that she has “two avenues of judicial review of the hearing examiner/board of commissioner’s [sic] decision – (1) a statutory writ of review under RCW 7.16.040 and RCW 36.32.330 (statutory certiorari); and (2) discretionary review under the court’s inherent and constitutional power (constitutional writ of certiorari).” CP 10. In support of her request for a statutory writ of review Ms. Coballes argues that there is no adequate remedy at law under RCW 36.32.330 and thus a statutory writ of review pursuant to RCW 7.16.040 and/or a writ of certiorari instead should issue for the review by the superior court of the Board of County Commissioners’ decision. CP 11.

Neither Ms. Coballes’s briefing or her oral argument to the superior court makes mention of RCW 36.32.330 or the statutory

right of appeal, but rather follows her request for and issuance of the statutory writ of review and constitutional writ of certiorari.

III. RESPONSE TO QUESTIONS PUT BY THE COURT

A. IS THERE A STATUTORY RIGHT TO APPEAL THE COUNTY BOARD OF COMMISSIONERS' DECISION IN THIS MATTER TO SUPERIOR COURT PURSUANT TO RCW 36.32.330?

The answer to the Court's first question is clearly, yes, RCW 36.32.330 provides a statutory right of appeal of the board of county commissioners' decision to the superior court. When considering the propriety of a designation of dangerous dog pursuant to Spokane County Code 5.04.032, the Board of County Commissioners is acting within its ordinary and usual duties under RCW 36.32.120(7)¹.

Ms. Coballes accurately quotes RCW 36.32.330 in her Motion for Writ of Review². Any decision or order of the board of county

¹ The legislative authorities of the several counties shall: ...
(7) Make and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law, ... (RCW 36.32.120(7))

² Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners. The notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the county auditor. The appellant shall, within ten days after service of the notice of appeal give a bond to the county with one or more sureties, to be approved by the county auditor, conditioned for the payment of all costs which shall be adjudged against him or her on such appeal in the superior court. The practice regulating appeals from and writs

commissioners is appealable to the superior court by any person. RCW 36.32.330. The “appealability” of the Board’s decision regarding Mr. Coballes’s dog’s status as a dangerous dog is clearly stated in Spokane County Code 5.04.032(5) which states: “An appeal of an order affirming the hearing officer(s) recommendation may be made in the manner provided under the general laws of the state”. The statement in the Spokane County Code specifically acknowledges and concedes the jurisdiction of the superior court to hear an appeal of the Board’s decision pursuant to RCW 36.32.330.

Ms. Coballes’s assertion in her Motion for Writ of Review that RCW 36.32.330 does not apply because “[n]o direct appeal applies via the RALJ given that the Examiner and Board are not courts of limited jurisdiction” is inapposite. The statement in RCW 36.32.330 that the practice regulating appeals from and writs of certiorari to justice’s courts shall, insofar as applicable, govern in matters of appeal from a decision or order of the board of county commissioners, is a reference to the rules regarding appellate practice and right of appeal or discretionary review. That statement does not prevent an appeal to the superior court in this matter.

of certiorari to justice’s courts shall, insofar as applicable, govern in matters of appeal from a decision or order of the board of county commissioners. (RCW 36.32.330)

B. IF THERE IS SUCH A RIGHT, WAS THAT THE SUBSTANCE OF THE PROCEEDING IN SUPERIOR COURT, OR WAS THE SUBSTANCE OF THE PROCEEDING THE RESOLUTION OF PETITIONS FOR STATUTORY AND/OR CONSTITUTIONAL WRITS OF CERTIORARI?

Having initiated the review of the Board of County Commissioners' decision in the superior court under RCW 36.32.330 Ms. Coballes invoked the superior court's appellate jurisdiction. In the alternative she also sought review of the Board's decision pursuant to a statutory writ of review and/or writ of certiorari. CP 04. Claim I of her Petition for Judicial Review was made under her statutory right of appeal. RCW 36.32.330. Additionally her prayer asks the court to review the Board's decision pursuant to her "statutory right of appeal". CP 04.

Approximately two weeks after filing her petition in the superior court Ms. Coballes abandoned Claim I of the Petition for Judicial Review and instead asked the superior court to proceed in this action solely as a statutory writ of review pursuant to RCW 7.16.040 and/or a constitutional writ of certiorari. CP 10 – 11. Although her claim under RCW 36.32.330 had properly invoked the jurisdiction of the superior court, Ms. Coballes abandoned that claim, and at Ms. Coballes's behest

the superior court proceeded solely on her request for a statutory writ of review and constitutional writ of certiorari. CP 516.

C. ON WHAT BASIS WAS THE WRIT PROCEDURE APPROPRIATE, IF MS. COBALLES HAD A RIGHT OF APPEAL TO SUPERIOR COURT?

Because Ms. Coballes had properly invoked the superior court's appellate jurisdiction pursuant to RCW 36.32.330, a statutory writ of review and/or a constitutional writ of certiorari were not available to Ms. Coballes as a means of judicial review in the superior court. RCW 7.16.040; *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 246, 240 P.3d 1162 (2010)³; *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292 – 293, 949 P.2d 370 (1998).

D. IS MS. COBALLES PRESENTLY ENTITLED TO REVIEW AS A MATER OF RIGHT UNDER RAP 2.2 OR IS THE COURT'S ACCEPTANCE OF REVIEW DISCRETIONARY UNDER RAP 2.3?

Had Ms. Coballes not abandoned her pursuit of her statutory appeal under RCW 36.32.330 the process for conducting the appeal of the Board's decision would have governed by the rules applicable to appeals from courts of limited jurisdiction, Washington Court Rules, 2011, Rules for Appeal of Decisions, Courts of Limited Jurisdiction

³ "Unless both elements are present, the superior court has no jurisdiction for review." (Quoting *Commanda v. Cary*, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001))

(RALJ). RCW 36.32.330. Pursuant to RALJ 9.1(h), the decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3. Thus, having invoked the jurisdiction of the superior court under RCW 36.32.330 the decision of the superior court pursuant to RCW 36.32.330 would have been subject to review by the court of appeals as a discretionary review pursuant to RAP 2.3.

However the superior court did not conduct its review under RCW 36.32.330, but at the insistence of Ms. Coballes the superior court's review was conducted under RCW 7.16.040 pursuant to a statutory writ of review and/or a constitutional writ of certiorari. CP 516. The superior court's decision in this matter is a final judgment in that it concluded the matter before the court and the decision was not entered upon a review of a decision of a court of limited jurisdiction, therefore if the statutory writ of review or constitutional writ of certiorari had been available to Ms. Coballes review of the superior court's decision that decision would have been appealable to this court as a matter of right pursuant to RAP 2.2.

IV. CONCLUSION

The confusion that this case engenders regarding the nature of the case and the theory under which review by the superior court was sought springs from the woefully few references in Ms. Coballes's pleadings

and briefing regarding the authority under which judicial review was authorized. Though scant Ms. Coballes does clearly state her claims upon which she requests relief from the court and equally as clearly she abandons her claim for an appeal of right pursuant to RCW 36.32.330 after she first invokes the court's jurisdiction for such an appeal of right.

Ms. Coballes first invoked the appellate jurisdiction of the superior court and in the alternative sought a statutory writ of review pursuant to RCW 7.16.040 and/or a constitutional writ of certiorari. Having properly invoked the superior court's appellate jurisdiction under RCW 36.32.330 there was no proper basis for the superior court to issue a statutory writ of review or a constitutional writ of certiorari. RCW 7.16.040; *City of Seattle v. Holifield*, supra; *Saldin Securities, Inc. v. Snohomish County*, supra.

Even though Ms. Coballes abandoned her claim for statutory appeal pursuant to RCW 36.32.330 doing so did not vest the superior court with any more authority than it originally had to issue either a statutory writ of review or a constitutional writ of certiorari. RCW 7.16.040; *City of Seattle v. Holifield*, supra; *Saldin Securities, Inc. v. Snohomish County*, supra. By explicitly abandoning her claim for a statutory appeal under RCW 36.32.330, and by failing to brief or argue that claim to the superior court Ms. Coballes gave up that claim. *Holder*

v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). The statute of limitations for Ms. Coballes to again bring her claim for judicial review as a statutory appeal of right is long past. RCW 36.32.330. Ms. Coballes having had and exercised her statutory right to appeal the court would not have jurisdiction to issue a statutory writ of review or a constitutional writ of certiorari. RCW 7.16.040; *City of Seattle v. Holifield*, supra; *Saldin Securities, Inc. v. Snohomish County*, supra.

Based upon the facts before the Court and the law applicable to Ms. Coballes's statutory right of appeal, statutory writ of review and constitutional writ of certiorari Spokane County respectfully requests that the Court refuse discretionary review of Ms. Coballes's explicitly abandoned statutory appeal, and further determine that the superior court lacked jurisdiction to issue a statutory writ of review or a constitutional writ of certiorari. Regardless of the superior court's reasoning the court's ruling is the correct result.

Respectfully submitted this 18th day of January, 2012.

STEVEN J. TUCKER
Spokane County Prosecutor



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PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 18th day of January, 2012, I caused to be served a true and correct copy of the RESPONDENTS' SUPPLEMENTAL BRIEF RE: RIGHT OF APPEAL AND DISCRETIONARY REVIEW QUESTIONS PUT BY THE COURT by the method indicated below, and addressed to the following:

Adam S. Karp
114 W. Magnolia St., Ste 425
Bellingham, WA 98225

<input type="checkbox"/>	Personal Service
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile

DATED this 18th day of January, 2012 in Spokane, Washington.


LORI ZAAGMAN-BACON