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STATE OF WASHINGTON
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No. 97604-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEIU 775,

Petitioner,

v.

FREEDOM FOUNDATION,

Respondent.

FREEDOM FOUNDATION'S REPLY IN SUPPORT OF MOTION TO MODIFY COMMISSIONER'S RULING STAYING MOTION FOR DISCRETIONARY REVIEW AND SUPERIOR COURT PROCEEDINGS

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I. ARGUMENT.

A. The Court's Inherent Authority is Limited by the Rules Concerning When Discretionary Review is Available.

SEIU 775 first argues that the Commissioner need not have cited any Rule of Appellate Procedure in support of the relief it granted, because the Court has inherent authority to award such relief. *See* Answer, at p. 8. Generally speaking, of course it is correct that courts (including both appellate courts and trial courts) have the authority to control their dockets, and to issue stays where necessary to do so. It is equally indisputable, however, that the inherent authority of a court is limited to the extent set forth in the Rules governing that court. *See, e.g., Wallace v. Evans*, 131 Wn.2d 572, 575-76, 934 P.2d 662 (1997) (CR 41(b)(1) limits trial court's inherent authority to dismiss actions for want of prosecution).

Applying the principle here, RAP 2.3 and 15.3 speak directly to when an ongoing trial court case may be accepted on the appellate courts' docket, including this Court's docket, and already represent an effort to manage the influx of interlocutory appeals. *See In re Estate of Carlson*, 2019 WL 5112491, at *4 (Oct. 14, 2019) (not reported) (*citing Minehart v. Morning Star Boys Ranch*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010)). To that end, Rule 13.5 explicitly states that discretionary review of an interlocutory decision will be accepted by the Supreme Court "only" if the subsequent criteria for discretionary review are satisfied. RAP 13.5(b).

The Rule further makes clear that this determination should only be made at the time the motion for discretionary review is heard, as "[d]enial

of discretionary review of a decision does not affect the right of a party to obtain later review of the Court of Appeals decision or the issues pertaining to that decision," *i.e.*, does not affect the right to take a plenary appeal once the case is concluded. RAP 13.5(d); *see also Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 820, 21 P.3d 1157 (2001). The Rule does not so much as contemplate the situation where a motion for discretionary review is simply put on hold until it is determined, with total certainty, whether there has been an error below – for the simple reason that application in that situation defeats the entire purpose of the discretionary review procedure. Because those Rules address the same subject matter as the Court's "inherent authority" to control its docket with respect to interlocutory appeals, they serve to limit that authority.

Reliance on a string of inapposite cases does not simply reflect imprecision on the Union's part.[1] Indeed, it has consistently conflated the various standards for discretionary review and direct review, seeking to distract from the lack of any basis for discretionary review of the trial court's interlocutory decision and to obtain the delay it seeks by any means necessary. *See* Answer, at pp. 5-6 (suggesting that Foundation's arguments

[1] SEIU 775 argues that "[s]taying discretionary-review motions pending the disposition of controlling appeals is so routine that the Court often offers no analysis to justify its decision." Answer, at p. 10. There is certainly a lack of any guiding analysis in most of the cases cited by the Union, but more importantly, none of those cases involved a request for discretionary review of an *interlocutory* decision. *See id.*, at p. 9. Instead, the requests in those cases were made pursuant to RAP 13.4, which provides for discretionary review of decisions *terminating* review. That standard is entirely different than the requisite standards under RAP 13.5, and does not require any showing on the likelihood of error. The standard is different because discretionary review of final trial court decisions does not present any risk of undue interference with the trial court's continuing to process the underlying action. The case before this Court, however, does.

in support of direct review of a final judgment should similarly support discretionary review of a dismissal order);[2] pp. 16-18.[3]

But RAP 2.3 and RAP 15.3 insist upon a showing of "obvious error" or "probable error" to skip over the trial process, even where a conflict could be shown as to a fundamentally important question. **Accordingly, those Rules reflect a judgment that avoiding a saturation of the appellate courts' dockets with myriad interlocutory appeals, and allowing the trial process to play out, is more important**. Neither the Commissioner nor this Court may ignore those Rules and allow a motion for discretionary

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[2] The fact of a "conflict" in the decisions of the lower courts or the "public importance" of a question obviously support direct review, and may also support discretionary review where proceedings below have concluded and one party attempts an appeal to this Court's discretionary jurisdiction. *See* RAP 13.4. But "conflict" or "public import" are mentioned nowhere among the criteria for discretionary review of interlocutory decisions.

[3] For instance, the case that the Union relies most heavily upon involved a question of direct review, and is therefore *per se* irrelevant to whether the standards for discretionary review have been properly applied. *Cent. Puget Sound Reg. Transit Auth. v. WR-SRI 120th North, LLC*, 191 Wn.2d 223, 232, 422 P.3d 891 (2018). It is therefore false that "SEIU 775 argued that discretionary review with an attendant stay of trial proceedings was appropriate both under [*Sound Transit*] and under the more general criteria of RAP 13.5." *See* Answer, at p. 7. The Union candidly requested, and was granted, delay for delay's sake. But even on its own terms, *Sound Transit* is not helpful to the Union. In that case, all of the four (4) cases already pending on appeal and consolidated came out in favor of Sound Transit. *See Sound Transit*, 191 Wn.2d at 232. Then a fifth case resolved the same issue, also in Sound Transit's favor. Whether the fifth case resulted in a final judgment like the other four (4) is somewhat unclear from the opinion, although SEIU 775's representation that the fifth case was still pending when the court accepted review (Answer, at p. 17) seems to be a misunderstanding of the court's reference to accepting review of the four (4) previous cases, *not* when it accepted review of the fifth. *Sound Transit*, 191 Wn.2d at 232 ("At the time we accepted review, a fifth case based on the same issues was pending before the trial court."). On that earlier occasion, the fifth case was still pending, but by the time of the opinion, it must have proceeded to some resolution that permitted a direct appeal on the part of Seattle. *See id*. ("Seattle filed a notice of direct appeal to this court in that case."). In any event, the critical point is that in *Sound Transit*, all of the five (5) matters involved substantially the same ruling in favor of the same party, so the fifth was compatible with the other four (4) for purposes of Supreme Court review. *See id.* But here, the core of the ruling below is the opposite of those SEIU 775 attempts to group it with, and accepting review involves interfering with trial court proceedings that would otherwise proceed on – perhaps only to say that there was no error in the ruling.

review to sit on the docket until such time as discretionary review is no longer necessary to settle the legal question.[4] Stated differently, the Commissioner could not rely on the "inherent power" of the Court to avoid making the findings required by RAP 13.5 – there is no such power. If SEIU 775's burden was unsatisfied at the time that the motion came up for hearing on the Court's docket (which it quite obviously was),[5] the Commissioner's duty was to deny the motion for discretionary review.

B. No Authority Supports a Stay of Concurrent Trial Court Proceedings, Apart from That Set Forth in the RAP.

SEIU 775 again attempts to rely upon the "inherent authority" of the Court to issue a stay of trial court proceedings. Answer, at p. 11. The authority to control a court's own docket cannot extend to the dockets of other courts,[6] however, and so here, the Court's "inherent authority" must arise from its prerogative of ensuring the effectiveness of appellate review. *See In re Koome*, 82 Wn.2d 816, 818-19, 514 P.2d 520 (1973) ("This court's authority to issue such an order, <u>in aid of its appellate or original jurisdiction</u>, emanates from its inherent power and the state constitution…") (emphasis added). Here, again, the Court's "inherent authority" is contained in and limited by the Rules of Appellate Procedure, this time by Rules 8.1

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[4] *See* Answer, at p. 10.

[5] Again, Commissioner Johnston all but acknowledged that there had been shown neither "obvious error" nor "probable error" as to the meaning of the statute. *See* Ruling, at p. 3.

[6] Because it dealt with a trial court's entry of a stay *in the matter before it*, and not a stay issued by an appellate court as to trial court proceedings, *Lloyd v. Superior Court for Walla Walla County*, 42 Wn.2d 908, 909, 259 P.2d 369 (1953), is of very little value in resolving the Motion to Modify. It is worth noting, however, that the appellate court in that case reversed the stay for an abuse of discretion. *See id.*

and 8.3. The Rules further make clear that only one of the foregoing authorities can support a stay of ongoing trial court proceedings while a party seeks discretionary review of an interlocutory order.[7] *See* RAP 7.1.

SEIU 775 argues that "[t]his Court has repeatedly exercised its authority to stay trial or intermediate appellate proceedings in appropriate circumstances, including when a pending appeal will resolve a dispositive issue" (Answer, at p. 11), but again, none of the cases it string-cites are remotely on point. Indeed, those cases involved situations where the stay was necessary to preserve the efficacy of appellate review or avoid clearly irreparable harm (or a final resolution had been entered), so they only reinforce the arguments set forth in the Motion to Modify.[8] SEIU 775's

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[7] SEIU 775 argues, without citation to authority, that "[t]he power to stay one decision includes the power to stay trial proceedings entirely" (*see* Answer, at p. 13), but consideration of the text refutes this argument. Instead, the Rule makes clear that "decision" is intended to mean 'judgment' or 'final, enforceable ruling.' *See* RAP 8.1(b) ("Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review. Stay of a decision in other civil cases is a matter of discretion."). RAP 8.1(b)(3) is simply concerned with non-monetary judgments, such as the entry of injunctive relief – to the extent injunctive relief does not affect real, personal or intellectual property. But whether a party has the right to secure a stay, or whether the stay is discretionary, the entirety of the Rule is clear that it only operates as to final decisions. This includes its reference to CR 62(a), (b), and (h) and its provision for "additional" means of issuing a stay. *See Davis v. State, Dept. of Licensing*, 137 Wn.2d 957, 977 P.2d 554 (1999) ("The principle of *ejusdem generis* applies: '[S]pecific terms modify or restrict the application of general terms where both are used in sequence.'"). Also, if RAP 8.1 was "one source of authority for staying the trial court proceedings" (s*ee* Answer, at p. 13), it would be listed in RAP 7.1 alongside RAP 8.3. But it is not, and does not permit stays of interlocutory orders.

[8] *See Riddle v. Elofson*, 193 Wn.2d 423, 428, 439 P.3d 647 (2019) (writ of prohibition denied); *In re Hambleton*, 181 Wn.2d 802, 816, 335 P.3d 398 (2014) (stay order unopposed by both estates involved); *State v. Puapuaga*, 164 Wn.2d 515, 520, 192 P.3d 360 (2008) (stay granted for protection of privileges, in a matter of direct review); *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 431-32, 90 P.3d 37 (2004) (emergency stay regarding implementation of water fluoridation order, *i.e.*, an issue of forced medical treatment); *Waterjet Tech., Inc. v. Flow Int'l Corp.*, 140 Wn.2d 313, 318, n.3, 996 P.2d 598 (2000) (stay to determine whether assignment of patent was required); *Brady v. Daily World*, 105 Wn.2d 770, 771, 718 P.2d 785 (1986) ("The trial court granted

"unbroken string of authority" makes clear that the Court's use of RAP 8.3 is (and properly so) anything but "routine." *See* Answer, at p. 12; *see also Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702 (1955).

C. The Trial Court's Dismissal Does Not Concern a Question of Subject Matter Jurisdiction.

The Union argues that a stay is warranted because "[i]f SEIU 775 is right, the trial court has no jurisdiction to adjudicate the suit at all and every penny the union spends defending the suit is money that it should have never needed to spend." Answer, at p. 14. There are at least three (3) interrelated problems with this argument: (1) first, the statutory issue does not concern the trial court's subject matter jurisdiction; (2) second, even if it did, a possible jurisdictional issue introduces no threat of irreparable harm or ineffective review on appeal; and (3) spending money defending a lawsuit is not "irreparable harm," as a matter of well-settled law.

SEIU 775 ignores the axiom, reiterated in cases cited by the Union, that "[s]ubject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *Buecking v. Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013). While the Legislature may impose reasonable regulations on a court's exercise of jurisdiction, it may not divest the court of subject matter jurisdiction – even

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defendant's motion for summary judgment on all claims."); *State ex rel. Wallen v. Judges Noe, Towne, Johnson*, 78 Wn.2d 484, 486, 475 P.2d 787 (1970) (stay of contempt proceedings); *Bolling v. Sup. Ct. of Clallan Cty.*, 16 Wn.2d 373, 376, 133 P.2d 803 (1943) (writs of prohibition concerning child custody). The remaining cases cited on pp. 11-12 of the Answer are criminal matters, involving imprisonment of persons, some of which dealt with final judgments of conviction. These cases do not support the Union's position.

where jurisdiction exists only by virtue of a statute. *In re Estate of Jepsen*, 184 Wn.2d 376, 381, 358 P.3d 403 (2015) (statutory proceeding of will contest) (*citing Buecking*, 179 Wn.2d at 449); *see also In re Marriage of Major*, 71 Wn. App. 531, 533-34, 859 P.2d 1262 (1993).[9]

Citizens actions fall within the subject matter jurisdiction of superior courts, pursuant to former RCW 42.17A.765(4). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 209, 258 P.3d 70 (2011). Simply stated, Washington law does not treat timeliness as a question of subject matter jurisdiction. To the contrary, it has long been held in a variety of statutory contexts that "…durational requirements do not affect a court's subject matter jurisdiction." *Buecking*, 179 Wn.2d at 453; *see also State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996) (*applying Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 540, 886 P.2d 189 (1994)). Much like the statute of limitations established by the Legislature can be equitably tolled – and therefore necessarily does not concern the court's subject matter jurisdiction – the statutory conditions precedent to a citizen's action (even to the extent they concern timeliness) did not constrain the trial court's jurisdiction here. *See In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). There is no precedent whatsoever for SEIU 775's proposition that the FCPA's conditions precedent have been applied as jurisdictional bars. *See In re*

[9] "Even under statutory law, jurisdiction is broadly given; a superior court sits as 'family court' in any Title 26 dispute…".

Marriage of Major, 71 Wn. App. at 534; *Cole*, 163 Wn. App. at 205-06. Even if the Union could proffer such authority, however (and it cannot), the introduction of a jurisdictional issue would not render the harm irreparable, a dismissal of the action impossible, or this Court's review ineffective.[10]

Its suggestion that the expenditure of time and money in defending this suit represents "irreparable harm" fares no better. *See* Answer, at pp. 15-16. SEIU 775 is no worse off than any other litigant who spends money to defend a suit and may ultimately prevail, even if that requires an appeal in the meantime. *See Maness v. Meyers*, 419 U.S. 449, 460 (1975) ("Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice."); *General Teamsters Local Union No. 439 v. Sunrise Sanitation Services, Inc.*, 2006 WL 2091947, at *4 (E.D. Cal. Jul 26, 2006). And the Union simply does not otherwise explain its contention that a question of jurisdiction somehow

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[10] The Union retorts that "[t]he Foundation's suggestion that the case would always be dismissed after resolution of the Local 117 appeal is not a sufficient answer because courts lacking jurisdiction can issue only void orders." Answer, at p. 15. Indeed, an order of dismissal would be the *only* appropriate action by Judge Dixon, in the unlikely event it were to be determined that his subject matter jurisdiction were lacking. *See Shoop v. Kittitas County*, 108 Wn.App. 388, 390, 30 P.3d 529 (2001) ("When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take."). Nonetheless, if the Union truly believed that the trial court lacked jurisdiction, it could have sought a writ of prohibition on that basis. If it had done so, however, it would have been required to show not only an absence or excess of jurisdiction, but *also* the additional criterion of an inadequate remedy at law. *Riddle v. Elofson*, 193 Wn.2d 423, 428, 439 P.3d 647 (2019) ("Couts may issue a writ of prohibition 'only when two conditions are met: '(1) [a]bsence or excess of jurisdiction, and (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure.'") (emphasis added). The standard for a writ of prohibition therefore dispels any suggestion that a lack of jurisdiction, by itself, incurs irreparable harm by the entry of "void orders." *See* Answer, at p. 15.

presents a threat to the efficacy of review. *See* Answer, at p. 15. This Court, just like the trial court, will face no obstacle in dismissing the action, should SEIU 775's strained and haphazard interpretation of the former citizen's action provision prevail.[11] While the Union complains that it has a right to "…dismissal as soon as the jurisdictional defect is identified" (*see* Answer, at p. 16), it does not explain why the trial court proceedings should wait for that defect to possibly, perhaps, be identifed on appeal.

This is particularly so because continuation of the stay until the Consolidated Appeals are concluded will result in a clear evidentiary prejudice in conducting discovery and otherwise pursuing this action in the event the Foundation prevails on the statutory question. *See, e.g., United States v. Anderson*, 2015 WL 294831, at *2 (N.D. Cal. Jan. 21, 2015) (not reported); *Avant Corp. v. Superior Court*, 79 Cal. App. 4th 876, 887 (2000) (*citing Clinton v. Jones*, 520 U.S. 681, 707-08 (1997)).[12] Lastly, to posit that the Foundation has no "particularized interest" (*see* Answer, at p. 14)

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[11] Of course, the Foundation recognizes that the reason for the Commissioner's duplicative stay is that the trial court could act to lift the stay it has entered, in its discretion. Answer, at 16. The lower court's stay does not expire on a firm date, however, as SEIU 775 suggests. *Id*. ("Judge Dixon's current stay remains in effect only until 14 days following the ruling on SEIU 775's motion for discretionary review."); *see also id.*, at p. 6. Instead, the stay will extend until the trial court is able to hold a status conference and to determine whether it should be lifted or not. *See* Supp. App., at p. 049. That decision should be left up to Judge Dixon, as a matter of controlling his own docket.

[12] As the Foundation argued in opposing SEIU 775's request for discretionary review, an indefinite stay will acutely prejudice the Foundation in conducting discovery in the trial court. The factual questions in this matter concern not only the Union's activities, but also the reasons for those activities and whether the reasons were political in nature – factual matters that may be contained only within the memories of relevant persons with knowledge at SEIU 775. Undoubtedly, these recollections will fade quickly while the matter remains stayed, with the Foundation unable to preserve its position.

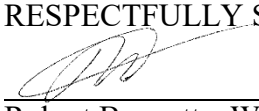
in pursuing a claim properly brought for the people of this State, ignores the purpose of citizen's actions and the public harm resulting from a stay.

Properly applying the rules concerning discretionary review, the appellate court has already determined that adjudication of the action below should not be delayed pending the Consolidated Appeals. Simply because this Court has the discretion to take whatever action is necessary to preserve its review, does not mean that it should award a stay entirely untethered thereto. *See Landis v. North American Co.*, 299 U.S. 248, 256 (1936).

II. CONCLUSION.

After spending most of its Answer attempting to justify Commissioner Johnston's disposition of its Petition, SEIU reverts back to the position it took before Commissioner: that the Court should issue the same stay it did after entry of final judgment in *Sound Transit* and/or simply accept discretionary review – irrespective of whether *Sound Transit* involved the same questions, and irrespective of whether there had been made any showing to satisfy the standards for discretionary review. *See* Answer, at pp. 16-19. For the reasons set forth above, however, as well as in the Motion, Commissioner Johnston's ruling should be modified and discretionary review denied.

RESPECTFULLY SUBMITTED this 16th day of December, 2019.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 16, 2019, I caused the foregoing Motion to Modify Commissioner's Ruling Staying Motion for Discretionary Review and Superior Court Proceedings to be filed via the Appellate Court E-filing System, which will transmit a true and correct copy to the following:

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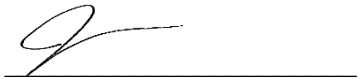

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FREEDOM FOUNDATION

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