When Waiting to Seek Review Can Hurt Your Client

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Washington's appellate courts strongly disfavor interlocutory review prior to a final judgment. But our appellate courts have also — in limited situations — encouraged litigants to seek discretionary review and even penalized them for failing to do so. This article discusses the few instances where our courts have encouraged, rather than discouraged, interlocutory review.

Washington appellate courts disfavor interlocutory review. The reasons for disfavoring interlocutory review are long-standing and well founded. As our Supreme Court stated more than 60 years ago, "[p]iecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business."1 In other words, waiting for a final judgment conserves judicial resources by allowing an appellate court to review all of a trial court's alleged errors in a single appeal at the end of trial court proceedings, rather than in multiple appeals throughout a case.

Our courts' preference for review after a final judgment is reflected in RAP 2.4(b), which provides that an appellate court will review any order or ruling that prejudicially affected a final judgment designated in a notice of appeal. Underscoring that parties are generally free to wait until a final judgment before seeking review of interlocutory orders, our Supreme Court recently held that although a trial court had certified its orders as partial final judgments under CR 54(b) and RAP 2.2(d), that simply meant "the parties may have been allowed to appeal," not that they were "required to in order to appeal the final judgment."2

Although parties can (and usually should) wait until a final judgment to seek review, our appellate courts have also encouraged parties to seek interlocutory review in limited situations, and even imposed consequences on parties that do not seek interlocutory review. Four examples are discussed below:

Order denying a change of venue. Where a party fails to ask for discretionary review of an order denying a change of venue and then seeks to set aside an unfavorable judgment based on the erroneous venue decision, "it is incumbent upon [the] appellant to show that he was prejudiced by the denial of a change of venue."3 As noted by the Supreme Court in Lincoln, this will be an almost impossible burden to meet because "except in rare instances, the mills of justice grind with equal fineness in every county of the state."4

Order compelling arbitration. In Saleemi v. Doctor's Associates, Inc., the Supreme Court, citing Lincoln, held that a party who fails to seek discretionary review of an order compelling arbitration must show prejudice as a condition of relief from the arbitration award.5 While the Supreme Court acknowledged in Saleemi that the appellants were not required to seek immediate review of the order compelling arbitration, it nonetheless reasoned that requiring a showing of prejudice if review is delayed until after final judgment "promotes [the] prime purposes of arbitration, speed and convenience, while allowing the truly aggrieved party to obtain relief."6 In Hill v. Garda CL Nw., Inc., the Supreme Court again underscored its desire to avoid potentially wasteful arbitration proceedings and allowed an immediate appeal of an order compelling arbitration, reasoning that without immediate review the parties would "be forced to proceed through a potentially costly arbitration before having the opportunity to appeal."7

Like Saleemi and Hill, in Zimmerman v. W8LESS Products, LLC, the Court of Appeals observed the appellants would have made a "better use of judicial resources" if they had sought discretionary review of a partial summary judgment order establishing liability prior to arbitration on the amount of damages, rather than appealing from a final judgment entered after the arbitration.8 But the Court of Appeals also noted "there is no rule requiring discretionary review of such an order" and thus rejected the respondent's argument that appellants could not seek review of the order after final judgment.9

Order denying a change of judge under RCW 4.12.050. In Marriage of Hennemann, the Court of Appeals reversed because the trial court erroneously denied a motion for a change of judge under RCW 4.12.050.10 The Court of Appeals, however, was not pleased the appellant had not sought discretionary review of the order on the motion for change of judge, because "[h]ad she sought discretionary review, a second trial and the attendant expense and waste of judicial resources might have been avoided."11 The appellant instead "decided to gamble on the outcome of trial before raising the issue," and as a consequence the Court of Appeals refused to award appellant her attorney's fees and costs, stating it would not "countenance her failure to seek discretionary review."12 Consistent with Hennemann, the Supreme Court has also noted that "[p]erhaps a party should seek discretionary review when a change of judge is denied."13

Order disqualifying counsel. In First Small Business Investment Co. of California v. Intercapital Corp. of Oregon, the Supreme Court noted that when deciding whether to reverse an order on a motion to disqualify counsel, courts have "considered as a factor whether the review of the motion for disqualification is made before or after a judgment has been entered in the case."14 The Supreme Court then cited with approval the Court of Appeals' decision in Bank of Commerce v. Fountain,15 which held reversal of a trial court judgment is not required unless the former client can show she was prejudiced by the attorney's breach of ethics and ultimately affirmed the trial court's judgment because "there is no evidence [the attorneys] used any confidential information obtained from [the client]."16

Common threads. A few common themes emerge from these cases in which our appellate courts have taken the unusual step of encouraging litigants to seek interlocutory review. First, they all involve situations where seeking interlocutory review would avoid wasting judicial resources on proceedings that were flawed in some fundamental respect, e.g., they were before the wrong judge or in the wrong county. As commentators have noted, discretionary review is appropriate in such circumstances under RAP 2.3(b)(1) because "[w]aiting for a final judgment would be incredibly wasteful and ultimately pointless."17

Second, they involve discrete legal issues that are easily reviewed by an appellate court. Trial court decisions to compel or deny arbitration are typically reviewed de novo,18 as is a disqualification order under RCW 4.12.050.19 Orders on motions to disqualify counsel are likewise reviewed de novo.20

Third, the errors are not easily remedied after final judgment. When possible appellate courts will limit the scope of a remand so that only those portions of the trial court proceedings prejudicially affected by an error must be repeated, e.g., remanding for a new trial on damages, but not liability. That is not possible when an error is so fundamental that it permeates the entire trial court proceeding.

Fourth, a decision to delay seeking review is likely to be perceived as "gambling" on the ultimate outcome of the case. In Hennemann, the Court of Appeals' evident displeasure with the appellant's failure to seek discretionary review was likely motivated, at least in part, by the fact there was an "indistinguishable" case in which it had previously granted discretionary review and reversed the erroneous denial of a motion for a change of judge.21 Although not as explicit as Hennemann, the Supreme Court's decision in Lincoln also expressed apparent annoyance at the appellant's failure to seek discretionary review, noting that the Supreme Court had "consistently" granted interlocutory review of "orders pertaining to venue, so that parties desiring to enforce their statutory rights may have an adequate remedy."22

Conclusion. Practitioners should never lose sight of the fact that the cases discussed above are exceptions to the general rule disfavoring interlocutory review and that any party asking an appellate court to review an interlocutory order bears a heavy burden. But, like virtually every rule, there are exceptions and practitioners should be mindful of those exceptions.

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1 Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).

2 Matter of Rts. to Use of Surface Waters of Yakima River Drainage Basin, __ Wn.2d __, __ P.3d __, 2021 WL 5366709, at *7 (Nov. 18, 2021) (emphasis in original). For a more in-depth discussion of certifications under CR 54(b) and RAP 2.2(d), readers should consult an earlier "Always Appealing" article by my partner Howard Goodfriend. See Howard Goodfriend, "Certification of Interlocutory Rulings for Immediate Appeal," KCBA Bar Bulletin (April 2021).

3 Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978); see also Youker v. Douglas Cnty., 162 Wn. App. 448, 460, 258 P.3d 60 rev. denied, 173 Wn.2d 1002 (2011); Hauge v. Corvin, 23 Wn. App. 913, 915-16, 599 P.2d 23 (1979).

4 89 Wn.2d at 578 (quoting Russell v. Marenakos Logging Co., 61 Wn.2d 761, 765, 380 P.2d 744).

5 176 Wn.2d 368, 292 P.3d 108 (2013).

6 176 Wn.2d at 380. Disagreeing with that conclusion, Justice Madsen authored a concurring opinion arguing the majority's decision "encourages motions for interlocutory discretionary review" and "the delay that courts disfavor." 176 Wn.2d at 388.

7 179 Wn.2d 47, 54, 308 P.3d 635 (2013), cert. denied, 134 S. Ct. 2821 (2014). Unlike an order compelling arbitration, an order denying a motion to compel arbitration has been treated as a "decision affecting a substantial right in a civil case" that is appealable under RAP 2.2(a)(3). See Stein v. Geonerco, Inc., 105 Wn. App. 41, 43-45, 17 P.3d 1266 (2001). Although the Supreme Court did not cite RAP 2.2(a)(3) in Hill, it acknowledged "similar considerations are at play" for orders denying and compelling arbitration, namely the concern that the parties will be forced to proceed with potentially wasteful proceedings (either arbitration or trial court litigation) without an opportunity to appeal.

8 160 Wn. App. 678, 689-92 & n.9, 248 P.3d 601 (2011).

9 Id.

10 69 Wn. App. 345, 848 P.2d 760 (1993).

11 69 Wn. App. at 348.

12 Id.

13 Harbor Enterprises, Inc. v. Gunnar Gudjonsson, 116 Wn.2d 283, 291, 803 P.2d 798 (1991).

14 108 Wn.2d 324, 331, 738 P.2d 263 (1987)

15 9 Wn. App. 727, 514 P.2d 194 (1973).

16 First Small Business, 108 Wn.2d at 331.

17 Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 Seattle U. L. Rev. 91, 104 (2014).

18 Saleemi, 176 Wn.2d at 375.

19 See In re Parenting Plan of Hall, 184 Wn. App. 676, 681, 339 P.3d 178 (2014).

20 See Friends of N. Spokane Cty. Parks v. Spokane Cty., 184 Wn. App. 105, 136, 336 P.3d 632 (2014).

21 See 69 Wn. App. at 347.

22 89 Wn.2d at 578.