always Appealing: Courts Should Focus on the "Notice" in Notice of Appeal

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Several recent appellate decisions have narrowly construed what orders "prejudicially affect" a final judgment for purposes of determining whether they may be reviewed on appeal if not designated in the notice of appeal. This article reviews the relevant RAPs and related precedent before explaining why these cases reflect a potentially worrisome trend that is inconsistent with the RAPs, in particular the mandate in RAP 1.2(a) that the RAPs "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

RAP 5.3 governs the content of a notice of appeal. RAP 5.3(a) provides that "[a] notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken." RAP 2.4 governs the scope of review. RAP 2.4(b) provides that "[t]he appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review."

Washington's Supreme Court has held that an order "prejudicially affects" a later order if "the order appealed from would not have happened but for the first order."1 Washington courts have historically construed the phrase "prejudicially affects" broadly and recognized that "[a]n appeal from a final judgment brings up most pretrial orders."2 Commentators have likewise explained that "[a]s a practical matter, designation of the final judgment brings up for review all previous decisions affecting the judgment, including evidentiary rulings, rulings and orders on summary judgment and other pretrial motions, and jury instructions."3

In several recent cases, however, the Court of Appeals has narrowly construed RAP 2.4(b) as a basis for refusing to review orders not designated in a notice of appeal that designated the final judgment. For example, in Lost Lake Resort Inv. Grp. Two, LLC v. RV Resort Mgmt., LLC, Division Two refused to consider an order dismissing the defendants' counterclaims, reasoning the dismissal order did not "prejudicially affect" the final judgment because "[a]lthough [the parties' claims] rely on the same facts, the two sets of claims are not dependent on each other and the judgment would have occurred in the absence of the order to dismiss."4 The Court similarly reasoned that an order denying appellants' motion to disqualify the respondent's counsel did not prejudicially affect the final judgment because "[w]hether the [appellants] conspired to tortiously interfere with [the respondent] is unrelated to the alleged attorney conflict."5

Likewise, in Tandem, a Wine & Cheese Bar LLC v. NWCV Assocs., LLC, Division One refused to consider an order denying the appellants' cross-motion for summary judgment based on a notice of appeal that designated the order granting the respondent's cross-motion for summary judgment.6 The Court reasoned that "one ruling does not prejudicially affect another ruling merely because both rulings were made in the context of cross-motions for summary judgment."7 And although it ultimately reviewed the undesignated order denying the appellant's cross-motion for summary judgment, Division One in In re Joanne K. Blankenship Survivor's Trust criticized the appellant for his "failure to strictly comply with RAP 2.4" by "not includ[ing] the trial court's order denying his summary judgment motion in his notice of appeal."8

These cases are worrisome. As noted at the outset of this article, RAP 1.2(a) provides that the RAPs "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a) expressly specifies that "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)."9 Consistent with RAP 1.2(a), RAP 5.3(f) provides that "[t]he appellate court will disregard defects in the form of a notice of appeal or a notice for discretionary review if the notice clearly reflects an intent by a party to seek review."

It is difficult to square the Court of Appeals' recent refusals to consider issues based on purported defects in a notice of appeal with these rules. These narrow constructions of RAP 2.4(b) ignore that the purpose of a notice of appeal is to — as its name suggests — provide notice that an appeal is being taken.10 It is the assignments of errors and related arguments in the merits brief that specify the orders challenged on appeal and the reasons they are erroneous. Prior to its most recent decisions, the Court of Appeals had endorsed this view and rejected the argument that "RAP 5.3 requires a complete listing in the notice of appeal of the issues to be reviewed" because it "confuses the requirements for the contents of the notice of appeal with the requirements for appellate briefs."11

Appellants should be able to rely upon the RAPs as written in drafting and filing a notice of appeal from a final judgment as the means for seeking review of earlier rulings in the case. Requiring parties to list every order they might challenge in a notice of appeal from a final judgment provides no benefit while burdening appellate courts with over-inclusive notices of appeal. Moreover, if parties must list every order they might challenge in a notice of appeal, the parties will undoubtedly be called upon to brief — and the appellate court to rule upon — not only the merits of any decision prejudicially affecting the final judgment, but whether the notice of appeal properly raised it for review.

Indeed, seeking to avoid this procedural morass, the Federal Rules of Appellate Procedure were recently amended to provide that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order," and that "[i]t is not necessary to designate those orders in the notice of appeal."12 The Committee on Rules of Practice and Procedure to the Judicial Conference of the United States explained the reason for the change was to eliminate the practice of "designat[ing] each and every order of the district court that the appellant may wish to challenge on appeal" because "[t]he notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals."13 The Committee's report further explained that "[i]t is the role of the briefs, not the notice of appeal, to focus the issues on appeal."14

Particularly troublesome is the recent refusal to consider undesignated orders ruling on motions for partial summary judgment or otherwise disposing of some, but not all, of the claims in a case. As the Supreme Court recognized in Fox v. Sunmaster Prod., Inc., upon appeal from a final judgment, "[a] partial summary judgment order is a 'part of the decision' ultimately rendered in the case."15 It is difficult to see how the dismissal of the appellant's counterclaims in Lost Lake could not have potentially affected the final judgment given that had the appellants prevailed on those claims they would have presumably been entitled to offset their recovery against the final judgment. Similarly, although the appellant's arguments in support of its cross-motion for

summary judgment are not set forth in Tandem (because they were not addressed by the Court), it is difficult to see how a ruling on one cross-motion for summary judgment could not "prejudicially affect" the ruling on the other given that a court typically cannot grant one cross-motion without denying the other.16

Hopefully Lost Lake and Tandem are aberrations and not reflective of a larger trend. The RAPs already make clear that it should not be necessary to designate in a notice of appeal every order that might potentially be challenged on appeal.

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1 Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380, 46 P.3d 789 (2002) (citing Adkins v. Alum. Co. of Am., 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988)).

2 Behav. Scis. Inst. v. Great-W. Life, 84 Wn. App. 863, 870, 930 P.2d 933 (1997) (citing Wlasiuk v. Whirlpool Corp., 76 Wn. App. 250, 884 P.2d 13 (1994)); see also Knox v. Microsoft Corp., 92 Wn. App. 204, 213, 962 P.2d 839 (1998) (considering undesignated summary judgment order limiting damages on appeal from final judgment citing RAP 1.2(a)); Hwang v. McMahill, 103 Wn. App. 945, 949, 15 P.3d 172 (2000) (reviewing undesignated order denying motion for revision on appeal from final judgment).

3 Washington State Bar Association, Appellate Practice Deskbook, § 5.6(2) (4th ed. 2016); see also Elizabeth Turner, 2A Wash. Prac., Rules Practice RAP 2.4 (8th ed. June 2021 Update) ("Generally, the appellate court considers the entire proceeding below and may review any decision prejudicially affecting the decision designated in the notice.") (quoting drafters' comment to RAP 2.4).

4 Lost Lake, No. 53777-0-II, __ Wn. App. 2d __, 2021 WL 6052570, at *8 (2021).

5 Lost Lake, 2021 WL 6052570, at *8.

6 Tandem, No. 82158-0-I, __ Wn. App. 2d __, 2022 WL 837516, at *3 (2022).

7 Tandem, 2022 WL 837516, at *3.

8 Blankenship, 18 Wn. App. 2d 686, 693 n.5, 493 P.3d 751 (2021),

9 RAP 18.8(b) restricts an appellate court's ability to extend certain deadlines. It in no way limits its ability to overlook alleged deficiencies in the form of a notice of appeal.

10 See Matter of Saltis, 25 Wn. App. 214, 219, 607 P.2d 316 ("The general purpose of a notice of appeal is to inform the party in whose favor a judgment or decree has been rendered that the unsuccessful party desires a review of the case by a higher tribunal."), aff'd, 94 Wn.2d 889 (1980).

11 Stevens v. Gordon, 118 Wn. App. 43, 58, 74 P.3d 653 (2003); see also RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."); RAP 12.1(a) (providing that "the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs").

12 FRAP 3(c)(4).

13 September 2020 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference ("Judicial Conference Report"), at Rules-Appendix A-4, available at https://www.uscourts.gov/sites/default/files/september_2020_jcus_rules_report_0.pdf (last visited May 2, 2022).

14 Judicial Conference Report at 4.

15 Fox, 115 Wn.2d at 505 (quoting RAP 2.4(a)); see also Gomez v. Sauerwein, 172 Wn. App. 370, 377, 289 P.3d 755 (2012) (reviewing ruling dismissing plaintiff's informed consent claim after it rested at trial based on notice of appeal that designated final judgment and order on posttrial motions), aff'd, 180 Wn.2d 610 (2014).

16 See, e.g., S & K Motors, Inc. v. Harco Nat. Ins. Co., 151 Wn. App. 633, 638-39, 213 P.3d 630 (2009) (reviewing order granting cross-motion for summary judgment based on notice of appeal that designated only order denying appellant's motion for summary judgment "[b]ecause the orders dispose of the same legal issues").

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