SUPREME COURT

OF THE STATE OF WASHINGTON

SCOTT HILLIUS, et. al., Appellants, v. 18 PARADISE, et. al. Respondents.	CASE NO. 1036850 **MJ MANAGEMENT'S MOTION TO DISMISS APPELLANTS' APPEAL AS UNTIMELY OR ALTERNATIVELY FOR NOT COMPLYING WITH THE REQUIREMENTS FOR A DIRECT APPEAL**

I. IDENTIFY OF THE MOVING PARTY

Respondents, MJ Management, William "Mick" O'Bryan, and Josh Williams ask the Court to provide the relief requested in Part 2 of this Motion.

II. STATEMENT OF RELIEF SOUGHT

1. The moving parties ask the Court for the following relief: (a) dismiss the Appellants' appeal from the Trial Court's Summary Judgment Order dismissing Appellant Consumer Protection Act Claim, and to (b) dismiss the Appellant's appeal from the Judgment for MJ Management for Fees and Costs.
2. The Moving Parties further ask the Supreme Court to dismiss the Appellant's entire appeal or alternatively to assign it to the Court of Appeals because Appellants did

not timely file a Motion for Direct Review as required under RAP 4.2.

3. The Moving Parties ask the Supreme Court to dismiss the Appellant's appeal from the Order and Judgment discussed in Statement of Relief 1 based on RAP 18.9(c) as it was filed with the intention to delay.

III. RELEVANT FACTS

1. Brief Factual Background

In a case that spanned nearly 5 years in the Whatcom County Superior Court, this case was essentially about how a management company—MJ Management—which operated under contract with the owner—18 Paradise—of a Planned Residential Development (PRD) that also included a golf course, could increase and use joint maintenance fees, which homeowners paid to maintain the PRD. Plaintiffs also challenged whether it was legal for the owner to own the Common Open Space and assess joint maintenance fees at all. In their case below, Appellants also alleged that MJ Management (including its owners personally) and 18 Paradise (under some respondeat superior theory) had violated the Consumer Protection Act, when they modified the Conditions, Covenants, Rights and Restrictions (CC&R's) to permit them to raise necessary funds to preserve the community.

The Homestead community is a PRD in Lynden, Whatcom County, Washington. It has approximately 600 homes, a restaurant, a small hotel, and a golf course. 18 Paradise owns the PRD and entered a Management and Lease Agreement with MJ Management in late 2017. MJ Management managed the golf course, provided services for the common benefit, and maintained the community. The community was intended as an integrated space, with Homeowners benefiting from the golf course and vice versa. Facing a looming economic and maintenance crisis in 2019, MJ Management amended the CC&Rs—based on what it believed at the time was assigned authority from 18 Paradise—so that it could raise the Joint Maintenance Fee from $36 a month to $93 a month. The change in the Joint Maintenance Fee prompted the lawsuit.

2. Relevant Procedural History.

On March 21, 2024, the Whatcom County Superior Court issued a written decision granting the Defendants' Joint Motion for Summary Judgment to Dismiss the Plaintiffs/Appellants' Consumer Protection Act Claim and to Dismiss Mick O'Bryan and Josh Williams from the lawsuit entirely. *See* Declaration of Jeffrey Possinger, Ex. A.

On March 29, 2024, following entry of the Court's Order granting the Defendants' Joint Motion for Summary Judgment to Dismiss the Appellants' Consumer Protection Act claim, the

Court dismissed Mr. Williams and Mr. O'Bryan from the litigation. *See* Possinger Decl., Ex. B. The Court dismissed the two men from the litigation because the only claim pleaded against them was the Consumer Protection Act claim.

On April 12, 2024, the parties provided, and the Court signed, a conformed order formally dismissing Appellants' Consumer Protection Act claims. *See* Possinger Decl., Ex. C. On the same day, the Court granted the Parties' stipulated request to certify the Consumer Protection Act claims under CR 54(b). *See* Possinger Decl., Ex. D. Under CR 54(b), that Order became a final Judgment, subject to all appeal windows and timeframes for a final Judgment. *See* CR 54(b).

On June 10, 2024, the Trial Court granted MJ Management's motion for an Award of Attorney's Fees and Costs jointly and severally against both Appellants and their Counsel. *See* Possinger Decl., Ex. E. Appellants moved the Court to reconsider that order, which the Court denied. Because Appellants failed follow the trial court's Order awarding fees, MJ Management sought and obtained a judgment, jointly and severally, against the Appellants and their Attorneys. The Court entered the judgment in MJ Management's favor on August 9, 2024. *See* Possinger Decl., Ex. F. On August 19, 2024, Appellants moved to stay execution of the judgment, and MJ Management's ability to collect, but neither moved for nor

obtained a vacation of the judgment, nor had it modified in any way.

This complex case resulted in a two-week bench trial, which ended on May 10, 2024. The trial court took the parties' arguments, witnesses, and evidence under advisement for the next several months, including hearings on the presentation of final orders. On September 11, 2024, the Court issued its Findings of Fact, Conclusions of Law and Order from trial which resolved all outstanding issues (the trial court's "Final Judgment") *See* Possinger Decl., Ex. G. The scope of the trial court's declaratory decisions is contained in the Final Judgment, *Id.* And was briefly amended in its order denying MJ Management and Appellants' motions for reconsideration. *See* Possinger Decl., Ex. H.

On September 12, 2024, the Court orally granted Appellants' earlier motion to stay execution of MJ Management's judgment. The Court's order stayed execution on the judgment pending an appeal. The Court reaffirmed and clarified its earlier oral ruling staying execution on October 4, 2024, by requiring the Plaintiffs and their Counsel to post a bond before the 30-day window to appeal the trial court's Final Order. *See* Possinger Decl., Ex. I. The Court explicitly stated that its ruling would not change the plaintiffs' deadlines to appeal the decision, and the Court further concluded the stay on the

judgment for fees would automatically lift if the bond was not posted by the deadline to appeal the Final Judgment.

MJ Management and the Plaintiffs both moved for reconsideration on September 20, 2024, and while the Court made minor changes to its findings and conclusions to the Final Order, it nonetheless denied both motions on October 4, 2024.

On November 4, 2024, Appellants filed their Notice of Appeal to the Supreme Court, but due to circumstances beyond their control, Washington State's E-Filing system was down, and the Whatcom County Clerk did not send their Notice of Appeal to the Supreme Court until November 22, 2024.

On December 11, 2024, the Supreme Court prompted the Appellants to explain why they had filed their appeal late, giving the Appellants until December 31, 2024, to explain the circumstances. Appellants filed the requested motion explaining the circumstances they had faced with the E-Filing system and their diligence to ensure that the Notice of Appeal was properly filed, ostensibly pursuant to RAP 4.2, which details the procedure for Direct Review by the Supreme Court.

The Court granted Appellants' motion to accept Notice of Appeal on December 31, 2024, and deemed the Notice of Appeal as having been timely filed on November 4, 2024.

IV. GROUNDS FOR RELIEF AND ARGUMENT

1. **The Appellants appealed more than a dozen different orders and judgments, including two that the Court should dismiss because their respective appeal windows have passed.**

Appellants' Notice of Appeal identified more than a dozen different orders, including three separate judgments—one certified under CR 54(b), one arising from the Courts inherent powers(the judgment on fees)—from nearly the entire span of a five year long litigation, and the Final Judgment. Appellants' appeal of the CR 54(b) certified judgment and the judgment on Fees are untimely, brought far after the window to appeal them has closed. For the sake of judicial economy and to prevent the Court of Appeals from having to engage in the same exercise again this Court should dismiss them outright.

Normally, a party cannot appeal the trial court's decisions until the Court issues a final judgment, a decision which determines the action, or another specifically defined order, which are not relevant here. *See* RAP 2.2(a). However, a party dealing with multiple issues and/or multiple parties also has the option, if they choose, to certify an Order they want to appeal under CR 54(b).[1] CR 54(b) empowers the trial court to "direct the entry of a final judgment as to one or more but fewer than all

[1] Or RAP 2.2(a) which is analogous to CR 54(b).

of the claims or parties...” before a case ends. In practical effect CR 54(b) certification severs a decision from the remaining claims and lets the remaining litigation move forward while a party appeals the certified decision.

RAP 5.2(a) provides a party has 30 days from entry of such a final judgment to file their notice of appeal, notwithstanding the effect of certain motions, or if statute sets a different length of time to file notice for an appeal.

a. It is too late to appeal the trial court's order granting Summary Judgement because that order was certified for appeal under CR 54(b) in April 2024.

The trial court entered its Order dismissing Plaintiffs' Consumer Protection Act claim on March 21, 2024. *See* Possinger Decl., Ex A. On April 12, 2024, the Court entered the parties stipulated CR 54(b) certification. *See* Possinger Decl., Ex. D. That certification began the Plaintiffs' clock to file a Notice of Appeal; starting April 13, 2024, Plaintiffs had 30 days to appeal the Court's Order dismissing the Appellants Consumer Protection Act claims. *See* RAP 5.2.

Appellants didn't move the trial court to reconsider the Order Dismissing the Consumer Protection Act claim. Because they did not take steps to toll the appellate window, their window closed on May 13, 2024. While Appellants may argue that this

was not *the final judgment* in the case, this desperate grab for formalism should not save them from missing an obvious deadline.

This case is distinguishable from *Fox v. Sunmaster Products, Inc*., 115 Wn.2d 498, 798 P.2d 808 (1990). In *Sunmaster*, the Court held that the Plaintiffs did not lose their appeal rights after 30 days when they CR 54(b) certified an order dismissing a defendant in a single-claim, multi-party litigation. However, the *Sunmaster* Court decided this way for two reasons. The first and most glaring was that the CR 54(b) certification failed and thus the decision at issue was not actually a final judgment. And second, the Court reiterated that piecemeal appeals are generally undesirable, and the courts should try avoiding them .

In *Sunmaster*, during the litigation, two defendants—Sunmaster and Ladder Industries—won summary judgment dismissals at different times. Ladder Industries won summary judgment arguing it was not liable as a successor and therefore there was nothing connecting it to the plaintiff's claims. The Court granted the motion and certified the decision under CR 54(b). Later, Sunmaster won dismissal on a separate summary judgment motion. Almost a year after the CR 54(b) certification for Ladder Industries' dismissal, but within 30 days of

Sunmaster's dismissal, Plaintiff appealed Ladder Industries' summary judgment victory.

The Court rejected Ladder Industries' argument that the appeal window had run because the Court concluded that the trial court's CR 54(b) certification was not well grounded. The Court also concluded that given the plaintiff did not know if later moves in the litigation could have mooted their appeal, it was in the Court's best interest to avoid piecemeal appeals. Therefore, the Court concluded that the appeal was timely and could proceed.

Unlike *Sunmaster* however, the CR 54(b) certification in this case was valid, the trial court provided a thorough analysis of the reasons that certification was warranted, and why the plaintiffs would suffer hardship if they were not able to appeal in a reasonable time. *See* Possinger Decl., Ex. D.

Also distinguishing this case from *Sunmaster* is the fact that there was no chance that a later decision by the trial court would have rendered Plaintiffs' appeal on the CPA decision moot. The CPA claim was the Appellant's only claim involving money damages. This claim was separate and distinguishable from the remaining declaratory judgment claims, which determined if and how the parties could use Joint Maintenance Fees, and the procedure they had to use--and degree to which they could raise—the Joint Maintenance Fee. Those claims did not raise questions related to whether the Defendants had

violated the Consumer Protection Act, and what damages or financial penalties the Court could have assessed had a jury found them liable.

The Appellants' Notice of Appeal on the trial court's CPA decision came almost six months after the trial court certified that decision. This Court should dismiss their appeal of the Court's Order dismissing their Consumer Protection Act claims.

b. It is also too late to appeal MJ Management's Judgment for Attorneys' Fees and Costs, which the Court entered on August 9, 2024.

On June 10, 2024, MJ Management obtained findings of fact, conclusions of law, and order for its attorneys' fees related to the Court's order granting a temporary restraining order and preliminary injunction in 2023. When Plaintiffs and their Counsel refused to follow the trial court's order to pay the fees and costs, MJ Management obtained an order for entry of a judgment (for attorneys' fees and costs) on August 9, 2024. The entry of that judgment began the 30-day clock for Plaintiffs to appeal the judgment. Appellants moved the trial court to reconsider its order entering judgment, which temporarily tolled the appeal window, but the Court denied their motion for reconsideration on August 9, 2024.

Appellants' appeal clock on that judgment began on August 10th and expired on September 9, 2024. Appellants did

not appeal that judgment or seek discretionary review in that window. Their appeal only came on November 4, 2024, more than 6 weeks—well beyond 30 days—after the Court entered judgment.

The Court should dismiss their appeal on this judgment as well.

2. Appellants missed their filing deadline under the RAP for their Statement of Grounds for Direct Review three separate times.

RAP 4.2 provides the procedure for a party seeking Direct Review of a trial court's decision at the State Supreme Court. This procedure lets a party bypass the Court of Appeals in certain limited circumstances. *See* RAP 4.2(a)(1-6). To seek direct review, the party seeking the review "must file a notice of appeal directed to the Supreme Court. Then within 15 days after filing the notice the party seeking review must serve on all other parties and file in the Supreme Court a statement of grounds for direct review in the form provided..." RAP 4.2(b). The rule requires the appealing party file their statement within 15 days after filing the notice.

Appellants first submitted their Notice of Appeal on November 4, 2024. Which meant their deadline to file their Statement of Grounds was November 19, 2024. They did not file a statement of grounds by November 19, 2024.

Because there were problems with the State's E-Filing system, Appellants' Notice of Appeal was sent to the Washington State Supreme Court on November 22, 2024. If the Court relies on that date, they had until December 9 (accounting for the weekend) to file their statement of grounds. They did not file a Statement of Grounds by December 9, 2024.

Finally, on December 11, 2024, the Court sent the Parties a letter, directing Appellants to explain why they had, from the Court's perspective, filed their notice of appeal late. December 11, 2024, was the last day the Appellants reasonably could have been put on notice that their appeal was in the Washington State Supreme Court, and not the Court of Appeals. Had that been their deadline, Appellants had until December 26, 2024, to file a Statement of Grounds. They did not file a Statement of Grounds by December 26, 2024, either.

Appellants have wholly ignored RAP 4.2's procedural requirements.[2] Direct Review is a special form of relief only available in certain circumstances; it is not granted as a matter of right. Here Appellants have ignored this requirement at every potential turn. The Court should dismiss their claims for what is

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[2] This only continues Appellants' disregard for the procedural rules which was evident during the litigation in the Trial Court. While this motion is not the place to explore this issue in depth, it is nonetheless worth notifying the Court that Appellants regularly ignore Court rules when they find them inconvenient.

effectively a failure to prosecute their claims or in the alternative transfer the case to the Court of Appeals, as RAP 4.2(e)(1) provides.

3. **The Appellants applied for direct review but have not provided a Statement of Grounds because they are slow walking this case.**

Appellants incomplete and now very late attempt to obtain Direct Review should make the fact they are delaying their own appeal obvious. Appellants have utterly ignored RAP 4.2. They must file their Statement of Grounds for Direct Review within 15 days of filing their notice of appeal, not within 15 days of perfection or any other deadline. They've missed their deadline three times now. MJ Management, Mr. O'Bryan and Mr. Williams are left to wonder if they will ever submit their Statement of Grounds for Direct Review.

Appellants' Counsel are acting in their own self-interest in filing this appeal to delay having to pay the judgment which MJ Management obtained. The Court ordered that Appellants, and their Counsel are jointly and severally liable for the attorneys' fees award for discovery misconduct and conduct to prevent MJ Management from mitigating the impact of their misconduct.

They are now simply trying to delay the inevitable fact that they must pay attorney fees for their discovery misconduct in the

hope that MJ Management, Mr. O'Bryan, and Mr. Williams will give up and go away.

The Court should dismiss this Application for Direct Review for Appellants' delay and award MJ Management, Mr. O'Bryan, and Mr. Williams' fees which they incurred in bringing this motion.

V. CONCLUSION

Given the foregoing grounds, namely that Appellants missed their appeal window for the CPA claim and MJ Management's Judgment on Attorneys' Fees and Costs and; the Court should dismiss these specific appeals. Considering further that they have completely ignored RAP 4.2 while simultaneously seeking extraordinary relief, this Court should dismiss Appellants' incomplete request for direct review on the remaining issues in its entirety.

[SIGNATURE PAGE TO FOLLOW]

This document contains 3035 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 7th day of January 2025.

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CERTIFICATE OF SERVICE

I, Jody Reigler, certify that on January 7, 2024, I served a true and correct copy of this Motion on Counsel of record using the Court's Electronic Service System and also via email.

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