IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SCOTT HILLIUS, et al., Appellants, v. 18 PARADISE, LLP, et al., Respondents.	No. 1036850 REPONSE TO MOTION OF MJ MANAGEMENT TO DISMISS

I. INTRODUCTION

This motion reveals a lot about this case. Current counsel for MJ Management appeared three years after the case was filed and defended the case by raising countless spurious objections and claims. The sad reality is that such strategies can sometimes succeed. This Court exists in part to correct those instances. This motion is contrary to this Court's holdings concerning CR 54(b) and devoid of authority. If the Court does not take action to discourage such conduct, it will continue. The Court should deny the motion and award terms under RAP 18.9.

II. DISCUSSION

A. This Appeal Was Timely Filed.

The fundamental premise of the motion is that this appeal is untimely because the appeal was not filed within thirty days of entry of a CR 54(b) order. The motion cites a single case, *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990),

and even then not as authority for the motion, but to distinguish it.

No authority is cited for the proposition that a CR 54(b) order "severs a decision from the remaining claims" and requires a party to immediately appeal. Motion at 8. MJ Management cites no such authority because none exists. That is not to say that no authority on the question exists.

To the contrary, this Court has spoken to the question many times, and its answer has been abundantly clear. Most recently, this Court clearly held that CR 54(b) is permissive.

> We hold that RAP 2.2(d) and CR 54(b), which govern the appealability of a partial final judgment in a case with multiple parties, are permissive rules and that a failure to appeal from an order certified for appeal under these rules does not preclude an appeal from the final judgment.

State v. Acquavella, 198 Wn.2d 687, 498 P.3d 911 (2021).

The only case cited by MJ Management is to the same effect. This Court's ruling in *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990) was clear:

> Generally, a notice of appeal must be filed within 30 days of the entry of the order or judgment the party wants reviewed. RAP 5.2(a). The trial court dismissed the Foxes' claims against Ladder Industries in February of 1989 and declined to reconsider that decision the following month. The Foxes did not seek review of those decisions at that time. Instead, the Foxes designated the Ladder judgment for review some months later, when they filed a notice of appeal from the trial court's order dismissing their remaining claims (against Sunmaster). Despite this delay, we conclude that the appeal as to Ladder was timely. **We reach this conclusion for two reasons**: **First, the February 1989 order did not contain a proper CR 54(b) certification** and was not, therefore, appealable until the remaining claims were dismissed in January of 1990. **Second, even if the CR 54(b) certification had been proper and the 1989 order thus had been**

appealable when entered, that would have meant only that the Foxes could have appealed immediately. The failure to appeal at that time, however, does not necessarily foreclose later review.

* * * *

Even if there had been a proper basis for immediate entry of a final judgment on the Foxes' claims against Ladder Industries, it does not follow that this appeal should have been dismissed as untimely as to Ladder. As noted above, RAP 2.2(d) says an appeal "may be taken" from certain kinds of decisions entered before the case is finally disposed of. The rule "does not explicitly say what must be appealed to avoid loss of the right of review or other prejudice." 2A L. Orland, Wash.Prac., *Rules Practice*, § 3061, at 432 (1978). Nor is there any "indication of an attempt to abandon the final judgment rule as a central organizing principle". 2A L. Orland, *supra.* To the contrary, the rules contemplate that various kinds of decisions--specifically including earlier appealable orders--will be reviewed in the appeal from the final judgment in the case.

The general rule, set forth in RAP 2.4(a), says the appellate court will review, at the instance of the appellant, "the decision or parts of the decision designated in the notice of appeal...." A partial summary judgment order is a "part of the decision" ultimately rendered in the case. Additionally, RAP 2.4(b) expressly permits the appellate court to review any earlier order or ruling, "including an appealable order," regardless whether it is designated in the notice of appeal, if it prejudicially affects the decision designated in the notice. Depending upon the nature of the case and the relationship between the parties' claims, a partial summary judgment order can prejudicially affect every order entered thereafter, and often will plainly so affect the judgment that ultimately disposes of the case.

These provisions make it clear that a party does not automatically lose the right to appellate review of either "appealable orders" or partial "final judgments" by failing to file a notice of appeal within 30 days. Indeed, in this particular the Rules of Appellate Procedure were specifically designed to eliminate "a trap for the unwary" which existed under the prior rules "in that a failure to appeal an appealable order could prevent its review upon appeal from a final judgment". *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988). "RAP 2.4(b) solved the

> problem by including prior appealable orders within the scope of review." *Id.*

Id. at 502, 504-05.

This motion would have the Court rewrite the rules and make an appeal after a CR 54(b) certification mandatory. Such a ruling would force piecemeal appeals and would force parties to file appeals to preserve their rights when the final judgment might obviate the need for an appeal altogether. The Court should deny the motion.

B. <u>The Statement of Grounds for Review Is Not a Basis to Dismiss the Appeal</u>.

As a factual matter, many of the deadlines set forth in the Rules of Appellate procedure cannot be met because of the Court's processes. For example, RAP 4.2 provides that a party seeking direct review of a decision by this Court must file a statement of grounds for review within 15 days after the Notice of Appeal. However, given its caseload, this Court cannot accept cases and assign a case number within 15 days. Many of the deadlines in the rules are either impossible or impractical to meet. However, the failure to meet a deadline in the rules is not grounds for summary dismissal of an appeal.

The only authority that MJ Management cites for its motion to dismiss this appeal is RAP 4.2(e)(1). RAP 4.2(e)(1) merely states:

> If the Supreme Court denies direct review of a superior court decision appealable as a matter of right, the case will be transferred without prejudice and without costs to the Court of Appeals for determination

Nothing in RAP 4.2(e)(1) supports MJ Management's motion.

An applicable rule does exist. Specifically RAP 1.2(a) expressly addresses compliance with technical compliance with the rules.

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases 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).

The provision that "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands" is not unclear or ambiguous. RAP 18.8 addresses waiver of the rules and extensions of time. RAP 18.8(e) provides that "The remedy for violation of these rules is set forth in rule 18.9."

RAP 18.9(c) in turn addresses motions to dismiss that are filed by a party to the appeal.

> The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

MJ Management never mentions let alone discusses RAP 18.9(c). It does not argue or present evidence that appellants have abandoned the appeal.

This Court has its own practices and procedures for enforcing the deadlines in the rules. Unless basing a motion on RAP 18.9(c), parties lack grounds to police compliance with deadlines in the rules. The fact that MJ Management never even cites the

applicable rules is more than sufficient evidence that its motion is brought without a legal basis.

C. <u>The Court Should Award Terms under RAP 18.9</u>.

Footnote 2 to the motion betrays the real reason why MJ Management brought this motion. Its entire purpose was to put before the Court its claim that Appellants' "disregard for the procedural rules . . . was evident during the litigation in the Trial Court," and that "Appellants regularly ignore Court rules when they find them inconvenient." Motion at note 2. If this Court does not take some action to discourage it, MJ Management will continue to file groundless motions and make *ad hominem* attacks against appellants and their counsel.

In *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 72 P.3d 741 (2003), this Court addressed a similar motion to dismiss. The Court denied the motion as groundless and then addressed the opposing party's motion for attorney fees.

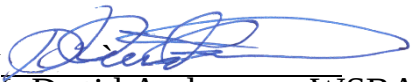
> After this court has accepted review of a case, a motion for sanctions for filing a frivolous motion is properly made under RAP 18.9(a). Fees are awarded only if an appeal, or in this case, a motion is frivolous. An appeal or motion is frivolous if there are "`no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility'" of success. *Millers Cas. Ins. v. Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983) (quoting *Streater v. White*, 26 Wash.App. 430, 435, 613 P.2d 187 (1980)).
>
> Here, Feetham cited no authority which would allow this court to dismiss this case. Because he presented no debatable point of law, this motion is frivolous and we grant Bergsma's motion for fees incurred defending it.

Id., 72 P.3d at 747. As in *Feetham*, this motion presents no debatable point of law. The Court should award appellants their

attorney fees incurred in responding to the motion. Appellants will file a motion for attorney fees if directed to do so but submit that an award of $2,500 would be well within the range of reason and save everyone time and trouble.

DATED this 26th day of February, 2025.

ANDERSSON CROSS-BORDER LAW

By 
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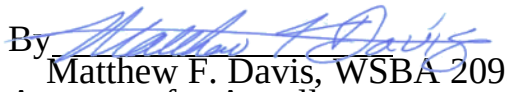
By 
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