SUPREME COURT

OF THE STATE OF WASHINGTON

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

I. REPLY

Respondents' MJ Management, LLC, Wm. "Mick" O'Bryan, and Josh Williams brought a Motion to Dismiss Appellants' Appeal and Direct Review; Seeking Alternative Relief: (1) Dismissal of Appellants' appeal of its CPA claim as untimely filed, (2) Dismissal of Appellants' appeal from a Judgment for MJ Management's attorneys' fees and costs, and (3) either (a) Dismissal of Appellants' entire appeal or (b) in the alternative; assign any remaining appellate issues to the Court of Appeals because the Appellants did not timely file a Motion for Direct Review under RAP 4.2. In their Answer, Appellants failed to respond to the Motion to dismiss the issue of the Judgment on

Fees, and the Court should only consider the remaining disputed issues on this Motion.

A. Appellants Have Conceded to Their Failure to Timely Appeal MJ Management's Judgment for Attorneys' Fees and Costs, which the Court entered on August 9, 2024.

In its Answer, Appellants failed to even make reference to much less argue MJ against MJ Management's argument that Appellants failed to timely appeal the August 9, 2024, Judgment for Attorney Fees[1].

Accordingly, Appellants have conceded this portion of MJ Management's Motion, and the Court should dismiss this part of Appellants' Appeal.

B. The Consequence of CR 54(b) Certification is Obvious – The Reasoning in *Acquavella* and *Sunmaster* Do Not Apply in the Current Case.

Appellants argue vigorously in their Answer that an Appeal of an Order certified under CR 54(b) is always permissive, relying entirely on selective case law. Yet in doing so, Appellants fail to take into account the plain language of CR 54(b) and its

---

[1] The Court should note that Appellants' failure to timely file an appeal of the Judgment entered by the Trial Court on August 9, 2024, is separate from and unrelated to Appellants' failure to take an appeal on their CR 54(b) CPA claim.

counterpart in RAP 2.2(d), that conclude that when a Court certifies an Order under these rules, it has, *de facto,* entered a final judgment as to that claim. See CR 54(b); RAP 2.2(d) the result, under RAP 5.2(a) is that "a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." This interpretation of the plain language of this requirement is further supported by RAP 5.2(c), which sets out that "The date of entry of a trial court decision is determined by CR 5(e) and 58". CR 58(a) further supports the notion that CR 54(b) certification is considered a final judgment. RAP 2.2(d) specifically states: "The time for filing notice of appeal begins to run from the entry of the required [CR 54(b)] findings."

To reach their desired conclusion, Appellants rely on the Court's decision in *State v. Acquavella*, 198 Wn.2d 687, 498 P.3d 911 (2021), which itself heavily relies on *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990), to support their proposition that an appeal taken after CR 54(b) certification is <u>always</u> permissive. It is true that the Court has articulated a rule that taking an appeal of a CR 54(b) partial judgement may be permissive, but in closely reading these cases, the Court has also articulated that there are circumstances where a party may lose their right to appellate review by failing to file a notice of

appeal within 30 days." See. *Fox v. Sunmaster*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). All of the cases articulating this permissive rule, contain certain elements are present that are not present here. The Court in *Acquavella,* indeed decided in that case that an appeal after CR 54(b) certification was permissive; however, the Court's basis for its decision not to require an immediate appeal from a partial final judgment was "because [q]uite possibly some subsequent order will render an adverse decision moot, or the party will ultimately prevail on remaining issues or recover against other parties." And went further to state that "[a] party cannot know if subsequent rulings in a multiparty case will affect a partial final judgment or if they will ever need to appeal an adverse ruling. Allowing parties to wait until the final order to appeal prevents 'perhaps unnecessary appeals in multiparty and multiclaim cases.'" *Id.* At 921 (quoting *Sunmaster*). In *Acquavella*, the partial summary judgments were "Conditional Final Orders" or "CFOs)" that were ultimately made part of the final judgment in the case. *Id.* at 914-15. In Sunmaster, the Court stated: "Depending upon the nature of the case and the relationship of the parties' claims, a partial summary judgment order can prejudicially affect every other entered thereafter, and often will plainly so affect the judgment that ultimately disposes of the case. *Sunmaster* 115 Wn.2d at 504. It goes on to say "A party cannot always know, when the first

adverse "appealable order" in a case is entered, if review of that decision will ever be necessary." *Id.* The underlying facts, the reasoning, and rule articulated by the court in both *Acquavella* and *Sunmaster* do not apply in this case. In all the cited cases, the court was concerned about partial summary judgment that could affect, in some way the final judgment, or some other relief could render the earlier decision moot. Because the issue decided by the Trial Court with regard to Appellants' CPA claim was completely independent of any remaining issues in the case. This Court's interpretation of a permissive rule as applying to only certain kinds of court decisions is consistent with RAP 2.4(b), "the order or ruling prejudicial affects the decision in the notice." (i.e. the final judgment). The Court is correct in stating that the rule is permissive in that a party <u>may</u> bring a CR 54(b) certified appeal at a later date, but in that same permissiveness there are times when they <u>may not</u> be permitted to have a right to appellate review. Here, the Trial Court granted both MJ Management's[2] and 18 Paradise LLP's Motions for Partial Summary Judgment and dismissed Appellants' CPA claim with prejudice; a claim which had asserted that Respondents had engaged in unfair and

---

[2] MJ Management's Motion for Partial Summary Judgment was also brought by individual defendants, Wm. "Mick" O'Bryan and Josh Williams; the Trial Court's dismissal of Appellants' CPA Claim dismissed all three of these parties from the action as Defendants.

deceptive acts in trade or commerce. Once that claim had been dismissed, all that remained for Appellants' case was their Declaratory Judgment cause of action, which required the Court to rule on: (1) The definition of the Common Open Space ("COS"); (2) the definition of "maintenance"; (3) Whether the Sixth Amendment was valid; (4) Whether the Seventh Amendment was valid; (5) Whether the use of the "maintenance fee" was limited to "maintenance" as defined by the Declaration; (6) The identity of the properties that are subject to the Declaration; (7) Whether the Declaration established a homeowners' association as required by the PRD Ordinance; and (8) Whether the Declarant's ownership of the COS violates RCW 19.29.090.

None of the Trial Court's potential declaratory rulings on these remaining issues could have had any effect that would have mooted the Court's ruling on Appellant's CPA claim, nor would it have had any relationship to the remaining issues on Appellants' potential recovery on the remaining claims that survived the Partial Summary Judgment. These were entirely different legal issues and relief requested.

This is supported by the Trial Court's April 12, 2024 Order Certifying Ruling on CPA Claims Under CR 54(b), which was brought to the court as a stipulation by all parties, which the Trial Court then adopted and entered finding: "The need for review of

this Court's ruling on the CPA claim will not be mooted by future development at the trial court level because the remaining claims relate to declaratory judgment and a breach of contract claim. Those questions are separate and distinct from the CPA claim." *See* Supp. Decl. of Jeffrey Possinger, Ex. A.

Thus, even Appellants themselves believed and stipulated at the time that the CPA claims were separate and distinct from their other claims.

Under these circumstances, it would be inherently unjust to allow Appellants to have two separate opportunities to appeal their CPA claim. The very purpose of CR 54(b) is to make "an immediate appeal available in situations in which it could be <u>unjust to delay entering a judgment on a distinctly separate claim</u> until the entire case has been fully adjudicated." *Nelbro Packing Co. v. Baypack Fisheries,L.L.C.*, 101 Wn. App. 517, 522, 6 P.3d 22 (2000) (<u>Emphasis</u> added). In this case, Appellants were the ones who initiated the request for a CR 54(b) certification in the first place, arguing at the time that they needed to immediately appeal the Trial Court's ruling on the CPA claim. Yet, consistent with their conduct in the previous five years of litigation, they neglected to act and file a timely appeal; and are now requesting Direct Review of this issue by the Supreme Court, now arguing urgency, for a claim they certified and could have brought almost a year ago.

Under the facts of this case, the facts warranting a permissive reading of CR 54(b), as articulated in *Sunmaster* and *Acquavella* does not apply, and the Court can find Appellants failed to timely file their CR 54(b) certified claim and dismiss Appellants' appeal of the CPA claim.

C. Appellants Failure to File a Statement of Grounds is Dismissible Under RAP 18.9; Even When Not Easy, Parties Are Required to Follow the Rules

The reason Appellants provide for failing to timely file their Statement of Grounds boils down to this: "It is difficult to comply with the Court Rules". Without entertaining the absurdity of this argument, it is also patently false. Although it is inarguable that there were indeed circumstances, which were out of Appellants' control, the record is clear that Appellants have not demonstrated any attempt to act with diligence to even try to file their Statement of Grounds in a timely manner. To the contrary, Appellants missed their deadline to file their Statement of Grounds three separate times. (Months after the filing of the original Notice of Appeal). The Clerk for the Court had already issued a case number long before Appellants finally filed their Statement of Grounds. It seems obvious that Appellants did not regularly inquire as to whether a case number had been issued. Instead, they have slow walked every stage of this proceeding, which appears to have been a part of their strategy from the

beginning, namely to delay their requirement to pay MJ Management the attorneys' fees judgment they owe and failed to file timely for appeal.

In determining whether an appeal is brought for delay under this rule, our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i. e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. See. Black's Law Dictionary 796 (Rev. 4th ed. 1968); Means v. Sears, Roebuck & Co., 550 S.W.2d 780 (Mo.1977); United States v. Piper, 227 F.Supp. 735 (N.D.Tex.1964). Streater v. White, 26 Wn.App, 430, 613 P.2d 187 (1980). Here, Appellants have filed what can be a kitchen sink appeal, that identifies nearly every order issued; yet in their Statement of Grounds, they only essentially argue a basis for Direct Review on the CPA claim; and when confronted with their late filing of the Judgment on Attorney's Fees and Costs, they remain utterly silent.

As further evidence of the other parties ability to work within the rules of Court, that Respondents filed the current Motion to Dismiss, using the assigned case number on January 7, 2025, seven days before Appellants finally filed their Statement of Grounds.

This provides further evidence that Appellants have filed their application for review solely for the purpose of delay. The Court

should Dismiss either their appeal in its entirety or their request for Direct Review; and further consider sanctions for this violation in accordance with RAP 18.9(c).

D. <u>Appellants Do Not Have a Basis for Sanctions or Attorneys' Fees</u>

Appellants appear to lack any sense of self-awareness. After being late filing their Statement of Grounds, and even then primarily arguing the urgency of Direct Review of their CPA claim, a CR 54(b) certified decision that was made nearly a year ago; their conduct in this case is at the very least irregular. Yet after all this, Appellants have the audacity to request that the Court impose sanctions because they deem MJ Management's Motion as frivolous.

The only thing that is frivolous in the Motion before this Court is Appellants' request for sanctions and terms. Frivolousness under RAP 18.9 is typically related to a claim of a frivolous appeal. "[A]n appeal is frivolous if it raised no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wash.App. 201, 220, 304 P.3d 914 (2013). "All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." *Advocates for Responsible Dev. v. W.*

Wash. Growth Mgmt. Hearings Bd., 170 Wash.2d 577, 580, 245 P.3d 764 (2010).

MJ Management's Motion to Dismiss is based on both law and facts present in this case. Each and every claim made in the Motion is supported by the relevant rule of the Rules of Appellate Procedure. Furthermore, despite the fact that these issues are seldomly found in published caselaw, MJ Management supported its motion with applicable and relevant caselaw. Even if the Court deems MJ Management's Motion as challenging existing law or seeking a change in the interpretation of existing case law, the fact that it is supported by relevant facts and law could not be deemed not to raise any debatable issues or that is devoid of merits. inconsistent with *Advocates for Responsible Dev.,* any doubt as to the frivolousness of the claim should be resolved in favor of the party against whom the claim is asserted, which is MJ Management.

The very fact that Appellants have conceded to MJ Management's argument that Appellants failed to timely appeal the August 9, 2024, Judgment for Attorney Fees, is fatal to their argument that the Motion is frivolous, because the Court needs to consider the entire action before determining whether it is frivolous. *Id*. The Court should deny any request for sanctions or fees.

II. CONCLUSION

Based on the foregoing reasons, namely that: (1) Appellants missed their appeal window for their certified CPA claim, and (2) failed to timely appeal MJ Management's Judgment on Attorneys' Fees and Costs; the Court should dismiss these specific appeals outright. For the remaining issues on appeal, because Appellants 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 2428 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 6th day of March 2025.

Respectfully Submitted,

/s/ *Jeffrey Possinger*

Jeffrey Possinger, WSBA# 30854
Ian Ducey, WSBA# 59976
20250 144th Avenue, NE #205
Woodinville, WA 98072
(t) 206-512-8030
(f) 206-569-4792
(e) jeffrey.possinger@possingerlaw.com
(e) ian.ducey@possingerlaw.com

/s/ *R E Meyers*

Reid Meyers, WSBA# 51571
14122 Ervine Rd.
Anacortes, WA 98221
(e) reid@reidmeyers.com

Attorneys for Defendants: MJ Management, Willaim Mick O'Bryan, and Josh Williams

CERTIFICATE OF SERVICE

I, David Selka, certify that on March 6, 2025, 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.

K. David Andersson
kda@acblc.ca

Matthew Davis
matt@matthewfdavis.com

Benjamin Vandenberge
biv@montgomerypurdue.com

Adam Rosenberg
arosenberg@kellerrohrback.com

Robert Allen Carmichael
bob@carmichaelclark.com

Roger & Maureen Dowling (pro se)
romo@olypen.com

Matt and Kari Skinner (pro se)
mkkmskinners@comcast.net

/s/ *David Selka*___________
David Selka, Paralegal