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Supreme Court No. 100492-3
Court of Appeals No. 81865-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS,

Plaintiff/Petitioner,

v.

JOHN E. COLLINS, Jr., a/k/a JAKE E. COLLINS, Jr.,

Defendant/Respondent,

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Villa Marina Association of Apartment Owners ("Association"), plaintiff at the trial court and respondents at the Court of Appeals, ask this Court to accept review of the decisions identified in Part II below.

II. CITATION TO COURT OF APPEALS DECISION

The Association asks this Court to accept review of (1) the October 4, 2021 decision by Division I of the Court of Appeals, which reversed King County Superior Court's order granting the Association's motion for summary judgment as to all issues; and (2) Division I's order denying reconsideration on November 18, 2021. See Appendices A and B.

III. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review in order to reverse the decisions of Division I, where Division I's decisions discourages settlement and erodes long-standing authority regarding finality of judgments of this Court and Washington's Courts of Appeals in at least two ways:

1. Division I's decisions in this case permitted a collateral attack on a final judgment to which both parties had already previously stipulated, which policy would affect all Washington litigants and discourage settlements; and

2. Division I's decisions in this case disregarded the doctrines of claim preclusion and issue preclusion in a manner which, again, implicates the finality of judgments for all Washington citizens.

IV. STATEMENT OF THE CASE

This case arises from Defendant John E. Collins, Jr. a/k/a Jake E. Collins, Jr.'s ("Collins") failure to pay monthly condominium association assessments owed to the Association for amounts that accrued after the parties had settled an earlier delinquency in 2017. Prior to the current lawsuit, the Association filed suit against Collins for failure to pay assessments in 2016 (the "2016 Lawsuit"). CP 220 ¶6 & 334-39. The 2016 complaint set forth the amount of the debt as of December 22, 2016 was $9,384.71 and that the Association was entitled to "any regular or special assessments, fees, interest,

and attorneys' fees and costs which become due before entry of judgment…" CP 337 ¶11.1 (emphasis added).

To resolve the 2016 Lawsuit, the Association's attorneys provided a detailed payoff statement to Collins' attorney ("Payoff"). CP 220 ¶7 & 341-345. The Payoff set forth the outstanding balance of $12,006.86, which was "good through February 7, 2017", provided an itemization of all charges through February 7, 2017, stated that upon receipt of "full payment, all association liens will be released, and our files closed", and set forth the "fee to dismiss lawsuit" and release the *lis pendens* recorded against the property. *Id.*; *see also* CP 488 ¶5 (noting that the Association's attorneys naturally had not yet billed its client for certain amounts set forth in the Payoff until the following months once work such as filing lien releases occurred).

Collins, in his own declaration, acknowledged receipt of the Payoff and that he tendered the demanded amount to settle the 2016 Lawsuit. CP 407 (Collins stating "rather than pay

attorneys' fees [to continue disputing the claim], I made the business decision to settle the lawsuit. I paid the Association what it demanded, $12,006.86."); *see also* CP 347 (a copy of the check referred hereto as the "Settlement Payment"). Based on this accounting and voluntary payment, the parties entered a stipulated order dismissing the 2016 Lawsuit with prejudice after stating on the record that "Collins' account has been settled." CP 656-657 ¶3.

Suit was not filed again until 2019 when Collins failed to keep his account current for monthly assessments levied after the 2016 Lawsuit was dismissed. Rather than acknowledge the terms to which he agreed in February 2017, Collins is asserting through the present litigation that, based on his own internal accounting not previously shared with the Association, the $12,006.86 Settlement Payment should have resulted in an $11,310.00 credit on his account when he tendered it in 2017. CP 407 ¶22. Despite this self-serving affidavit being the only supporting evidence that the Settlement Payment should be

applied as a credit to assessments levied after February 2017 and in abrogation to the existence of the Payoff and resulting dismissal order, Division I concluded that there was "no agreement as to how the Association would apply the funds." Appendix A at 2. It also held that the "starting point" of the debt was an issue of material fact because there was "no admissible evidence in the record establishing that the balance on Collins' account was at least $12,006.86 before he made the Settlement Payment." Appendix A at 9.

This conclusion overturned the holding of the trial court which ruled on reconsideration of the Association's summary judgment motion that "[a]ll of the uncertainties created by the multiple ledgers in this case are removed by Villa Marina's motion because the motion takes the facts most favorably to Mr. Collins on every disputed point." CP 707; Appendix C. Although there had been confusion as to how the Association's managing agent had applied the Settlement Payment differently from the itemization in the Payoff, the Association successfully

demonstrated that Collins received a windfall to the assessments that came due after the 2016 Lawsuit was dismissed based on what was being sought at summary judgment. CP 194-198 (the Association's managing agent's ledger demonstrating sporadic payments in 2017 & 2018 and a credit balance of $421.20 in late August 2018 – the date after which the Association's current legal action seeks recovery); CP 221 ¶¶10-11 & CP 349-53 (summary ledgers demonstrating how, if just totaling the assessments levied and payments received after February 2017, a delinquency existed on Collins's account in late August 2018 when the managing agent's ledger demonstrated the $421.20 windfall); CP 531-532 & 548-587 (summary ledgers demonstrating how, after applying Collins's post-settlement payments most favorably to him, he was sued for an amount less than what the Association could legally pursue).

Division I ruled against the Association based on this "starting point" issue, despite the majority of the parties'

briefing being dedicated towards Collins's insistence that the trial court improperly considered evidence on reconsideration. Collins asserted no authority that the Settlement Payment and dismissal order were not binding. The Association addressed the issue in its primary brief by referring Division I to *Le Bire v. Department of Labor & Indus*tries for the doctrines of claim and issue preclusion. 14 Wn.2d 407, 418 (1942).

Despite Collins not contesting the application of *Le Bire* and Division I not requesting oral argument, it ruled against the Association and distinguished *Le Bire* without citing any precedent. Appendix A at 10-12. It did so by noting how the facts in *Le Bire* involved a more detailed stipulated order than what was entered in the 2016 Lawsuit and how the application of the Settlement Payment to Collins's debt was not set forth in the stipulated order – despite the parties acknowledging in the order that the "account was settled" and that the case should be dismissed with prejudice. CP 656-657.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(1), (2), and (4). Under RAP 13.4(b)(1) and (2), Division I's decision conflicts with Supreme Court and the Court of Appeals precedent as to claims and issue preclusion and what it means when an order dismisses a prior action "with prejudice." Under RAP 13.4(b)(4), this decision involves an issue of substantial public interest; namely, when a private settlement may be ignored in subsequent litigation regarding the same issue.

If left to stand, the Division I decision will allow a party to attack an agreed order of dismissal with prejudice years later under a different case, despite the order explicitly stating that the earlier dispute was "settled." It will further encourage debtors to challenge prior decisions to voluntarily pay a debt whenever it happens to suit them.

A. Review is necessary under RAP 13.4(b)(4) because Division I's decision discourages parties from entering private settlements, and undermines the finality of judgments based on such settlements.

Division I's refusal to consider the language of the stipulated order and related evidence, including the Payoff and Settlement Payment, necessitates review for the chilling effect the decision has on private settlements. In essence, Division I's decision requires the details of out-of-court settlements be made in court if the parties wish for a judgment based on a settlement to have any finality. Such a policy goes against Washington's preference for settlements.

1. Private settlements are strongly encouraged in Washington.

"Washington law strongly favors the public policy of settlement over litigation." *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772 (2007) (sting citations omitted)).

> [I]f litigants cannot assume the disclosures and representations of the opposing party are made in good faith, they will be reluctant to settle. Assurance of an adversary's good faith is particularly critical when parties are attempting to resolve a dispute amicably.

Hawkins v. EmpRes Healthcare Mgmt., LLC, 193 Wn. App. 84, 98 (2016) (citation omitted).

The parties settled the 2016 Lawsuit by way of the stipulated order which states as much. CP 656. Nonetheless, Division I's decision effectively rules the opposite and allows Collins to collaterally attack, and effectively undermine a judgment based on a previously stipulated to settlement.

2. Division I's decision fails to acknowledge the stipulated order is itself a settlement contract, with its terms subject to interpretation by extrinsic evidence.

> A stipulation agreement signed and subscribed by the attorneys representing the parties is a contract and its construction is governed by the legal principles applicable to contracts.

Allstot v. Edwards, 114 Wn. App. 625, 636 (2002) (citing *Riley Pleas, Inc. v. State*, 88 Wash.2d 933, 937–38 (1977); CR 2A).

Division I erred by ignoring how the parties agreed that the "starting point" of the debt could not be prior to February 2017 when the stipulated order established that the "account was settled." Division I did not recognize the stipulated order as a "settlement agreement" with terms sufficient for a trier of

fact to reach but one reasonable conclusion after considering undisputed evidence on the record. *See* Appendix A at 2 (stating that "the record contains no signed settlement agreement" or agreement how the Settlement Payment would be applied). Hence, Division I concluded that there was "no admissible evidence on the record establishing that the balance on Collins' account was at least $12,006.86 before he made the Settlement Payment. *Id*. at 9. This finding is both incorrect, and is an impediment to the enforceability of stipulations to settle.

The stipulations in the March 1, 2017 Agreed Order fall within the purview of CR 2A as a subscribed "consent between parties or attorneys in respect to the proceedings in a cause." Stipulated judgments are interpreted under the laws of contract.

> A judgment by consent or stipulation of the parties is construed as a contract between them embodying the terms of the judgment. It excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment. In the absence of fraud, mistake, or want of jurisdiction, a judgment by consent will not be reviewed on appeal.

Wash. Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 91 (1957); *see also Condon v. Condon*, 177 Wn.2d 150, 162 (2013).

The laws of contract interpretation leave but one understanding of what the parties meant by settling the account. "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504 (2005). Extrinsic evidence and surrounding circumstances can be considered to "give[] meaning to words used in the contract" but not to "show an intention independent of the instrument" or "vary, contradict or modify the written word." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695 (1999) (citations omitted).

The ordinary definition of "settle" when it comes to a money dispute is:

> To ascertain (a balance due, an amount owed, etc.) <to settle the amount due on the unclear account>
> …

> To pay (money that is owed); to liquidate (a debt) <she settled her accounts>
> …
> To end or resolve (an argument or disagreement, etc.); to bring to a conclusion (what has been disputed or uncertain) <they settled their dispute>

Black's Law Dictionary 1649 (11th ed. 2019). Here, Collins posits that he "was never behind on assessments" and then agreed to pay the $12,006.86 as a business decision "to settle the lawsuit." CP 407. Despite agreeing that the balance owed was "ascertained" and paid (per the ordinary meaning of "settle"), he contradicts his stipulation and claims he actually prepaid thousands of dollars with his $12,006.86 Settlement Payment for future assessments not even asserted in the litigation. *Id*. This nonsensical position essentially demands that the Association prove part of a claim that was settled, liquidated, ascertained, and resolved. But because Collins capitulated to the debt owed, there is nothing left to establish.

Division I reversed summary judgment based on Collins's claim that a trier of fact could conclude that the case was "settled" based on an internal set of accounting he

apparently concealed during the 2016 Lawsuit. CP 407 ¶22; Appendix A at 4 (referencing Collins's "own accounting of assessments" as a basis for denying summary judgment). By leaving this open as a question of fact, Division I ruled contrary to Washington law:

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made.
>
> (a) That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
>
> (b) That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts §201(2) (1981); *Berg v. Hudesman*, 115 Wash. 2d 657, 669 (1990) (adopting §201). Both subsections apply here.

There is no evidence on the record that the Association had any knowledge of or reason to believe that Collins, by tendering the Settlement Payment and executing the agreed order, intended his payment to be applied to some internal

accounting he maintained. *See Lynott v. Nat'l Union Fire Ins. Co*., 123 Wn.2d 678, 684 (1994) (stating that "[u]nilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions"); *DePhillips v. Zolt Constr. Co*., 136 Wn.2d 26, 32 (1998) (parties may not admit extrinsic evidence to contradict the plain meaning of an agreement); *Go2Net, Inc. v. CI Host, Inc*., 115 Wn. App. 73, 84-85 (2003). Collins knew what he was paying based on the Payoff and corresponding Settlement Payment, and the Association relied on his actions. CP 341-345 & 407. Allowing Collins to assert that his Settlement Payment was actually for future assessments to which he should be credited is equivalent to him writing in new terms to the agreement between the parties that only he knew about.

In sum, Division I's decision ignores the power of a private settlement that has resulted in a binding agreement that the parties "settled" the matter as subscribed by a stipulated judgment dismissing the lawsuit with prejudice. Division I's

decision permits a collateral attack on the finality of a valid judgment and discourages parties from similar settlements in the future, since it makes all such settlements unpredictable.

B. Review is necessary under RAP 13.4(b)(1)&(2), because Division I's decision conflicts with its own precedent as well as this Court's with respect to claim and issue preclusion.

1. Claim preclusion established the "starting balance" of the debt at issue and cannot be challenged simply because the accounting was not set forth in the stipulated order dismissing the prior litigation.

Claim preclusion (*res judicata*) bars re-litigation of a claim that has been determined by a final judgment. *Emerson v. Dep't of Corr.*, 194 Wash. App. 617, 626 (2016). *Res judicata* applies to matters that were actually litigated and those that could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding. *Id*. It is intended to prevent piecemeal litigation, ensure the finality of judgments, and promote judicial economy. *Id*.

a. The Association met the threshold determination of having a final judgment.

The threshold requirement of claim preclusion is a valid final judgment on the merits in a prior proceeding. *Emerson*, 194 Wash. App. at 626. A "final judgment on the merits" includes a grant of summary judgment, *id*., a default judgment, *Lenzi v. Redland Ins. Co*., 140 Wash. 2d 267, 282 (2000), a consent judgment, *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 459 (1915), and/or a settlement release. *Knuth v. Beneficial Washington, Inc*., 107 Wash. App. 727, 731 (2001).

> This is because "on the merits" does not require actual litigation. It is sufficient that the parties might have had their suit disposed of in that manner if they had properly presented and managed their respective cases.

In re Diafos, 110 Wash. App. 758, 764 (2001).

It is undisputed that there is a valid final judgment on the merits in the 2016 Lawsuit. CP 657-657; CP 407 ¶21 (Collins admitting that he "made the business decision to settle the lawsuit.").

b. The Association meets all the elements for claim preclusion.

Review is needed in this case because Division I refused to apply claim preclusion, which bars the subsequent action where there is a concurrence of identity in the following respects: "(1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." *Landry v. Luscher*, 95 Wn. App. 779, 783 (1999).

The persons and parties in both lawsuits are identical, and Collins has admitted that the quality of persons is identical. CP 642. Without going into significant detail in this petition, the cause of action and subject matter prongs are also satisfied.

> To consider whether the causes of action are identical, we consider the following: (1) Would the second action destroy or impair rights or interests established in the first judgment? (2) Is the evidence presented in the two actions substantially the same? (3) Do the two suits involve infringement of the same right? (4) Do the two suits arise out of the same nucleus of facts?

Landry, 95 Wn. App. At 784. *See also Hayes v. City of Seattle*, 131 Wash. 2d 706, 713 (1997).

The subject matter in this case is the same as the prior litigation; i.e., how much Collins owed the Association prior to entry of the March 1, 2017 dismissal order. The stipulated order dismissing the 2016 Lawsuit was predicated upon the payment of the Settlement Payment as admitted to by Collins. The parties would not have dismissed the lawsuit without it, CP 341 & 656, and did so with prejudice after the Association received the payment. The 2016 Lawsuit was filed to recover all assessments "which become due before entry of judgment…" CP 133-134. Judgment was entered on March 1, 2017. CP 656-657. The $12,006.86 was tendered in February "to settle the lawsuit." CP 407. The application of all four factors is straightforward and supports identity of subject matter as well as cause of action.

Failing to apply claim preclusion here has destroyed the Association's rights and the interests established in the first final order. By *sua sponte* distinguishing *Le Bire*, Appendix A

at 10, Division I has contradicted a myriad of its own precedent as well as this Court's, to which this petition now turns.

2. The trial court properly granted summary judgment via claim preclusion; Division I erred by distinguishing *Le Bire*.

Division I's opinion allows Collins to attack a claim wholly resolved in another lawsuit that was dismissed *with prejudice*. As established above, the complaint for the 2016 Lawsuit expressly stated that the Association was entitled to all amounts that came "due before entry of judgment." CP 337 ¶11.1. Final judgment on the merits was entered on March 1, 2017. CP 656-657. Pursuant to the Division I and Supreme Court precedent analyzed below, all claims surrounding how debits and credits should be applied prior to that date – which served as a basis refuted by Division I for the Association's position that the "starting point" of the debt was known – became unassailable when the parties stipulated to entry of a dismissal order with prejudice. Indeed, a court need not have any evidence besides the entry of that dismissal order and the language of the complaint to reach this necessary conclusion.

> A dismissal with prejudice constitutes a final judgment on the merits.
>
> …
>
> A "final judgment" is "a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Black's Law Dictionary 971 (10th ed. 2014). A voluntary dismissal *is not* a final judgment by this definition when it "leaves the parties as if the action had never been brought."

Elliott Bay Adjustment Co. v. Dacumos, 200 Wash. App. 208, 213-14 (2017) (quoting *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481 (2000)).

Division I in *Elliott Bay Adjustment*, when dealing with a dismissal order with prejudice just like what is before the Court here, further interpreted the language in *Wachovia* to note that the Supreme Court there was dealing with a voluntary dismissal order without prejudice. A "voluntary dismissal is a final judgment when the court elects to dismiss with prejudice because then it does not leave the parties as if the action had never been brought." *Elliott Bay Adjustment*, 200 Wash. App. at 214 (emphasis added).

Collins convinced Division I to do exactly what is prohibited under Washington law – to leave the parties as if the 2016 Lawsuit had never been brought. This blatantly contradicts the agreement of the parties and the prejudicial language in the stipulated order. A prejudicial order serves as the basis for *res judicata*, which is the rule, not the exception:

> 'The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

Schoeman v. N.Y. Life Ins. Co., 106 Wash. 2d 855, 859 (1986) (citation omitted; emphasis added); *see also Krikava v. Webber*, 43 Wash. App. 217, 219-20 (1986) (holding that unasserted compulsory counterclaims are barred by *res judicata* if a dismissal order with prejudice is entered); *Lenzi*, 140 Wn.2d at 279 (finding a default judgment to be a judgment on the merits subject to res judicata); *Winton Motor Carriage Co.*, 84 Wash.

451. In other words, this Court has made it clear that a party and court need not have actually contemplated a particular claim for *res judicata* to apply to a dismissal order with prejudice. Those cases preclude the basis that Division I used in distinguishing *Le Bire*. Appendix A at 12.

The Association cited *Le Bire* for the basic principle that *res judicata* and collateral estoppel apply even to stipulated orders: "a final order or judgment, settled and entered by agreement or consent of the parties, is no less effective as a bar or estoppel than is one which is rendered upon contest and trial". 14 Wash. 2d at 418. Division I's determination that *Le Bire* should be distinguished simply because there is not a specific finding of fact on the record on the issue of how the Settlement Payment should be applied contradicts numerous precedent of this Court and Division I.

By allowing Collins to attack the accounting leading up to the dismissal order, Division I essentially held that order to be neither final nor prejudicial. The parties did not need to

specify the details of the accounting in the stipulation for *res judicata* to apply, as it applies to each and every claim, raised or not. If allowed to stand, the Division I decision will undoubtedly be used by other parties to challenge prior dismissal orders notwithstanding prejudicial language assented by both parties after stipulating that the matter was "settled."

3. Issue preclusion compels reversal of Division I's ruling.

The doctrine of collateral estoppel (issue preclusion) is equally applicable. It is similar to claim preclusion and referenced by *Le Bire*. 14 Wn.2d at 418. Rather than focusing on claims that could have been brought, issue preclusion seeks to identify the same issues that were raised in both litigations while ensuring the application of the doctrine will not result in injustice to the same parties. *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418 (1989). By distinguishing *Le Bire*, Division I denies that the application of the Settlement Payment is inextricable intertwined with what

the parties meant in the stipulated order by "Collins' account has been settled." CP 656.

The Settlement Payment was just another credit applied to the debt owed through entry of final judgment as set forth in the Association's 2016 complaint. CP 337 ¶11.1. And, as argued *infra*, the parties knew exactly how the payment was to be applied notwithstanding Collins' contradictory statement. The existence of the Payoff makes it obvious there is no separation of issues. Were the Court to grant review, the Association would easily demonstrate how the other elements of issue preclusion are satisfied, necessitating reversal of Division I's ruling.

Once again, by its refusal to even consider the well-briefed arguments regarding claim preclusion and issue preclusion, Division I's decision undermines Washington's well-established preference for finality of judgments.

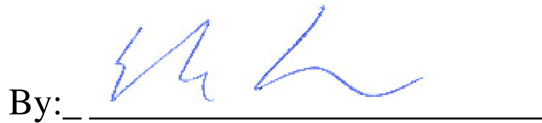
VI. CONCLUSION

The Association respectfully asks this Court to accept review, reverse Division I, and reinstate the summary judgment

order on reconsideration that the trial court correctly entered in this action because Division I's decisions discourages settlement and erodes long-standing authority regarding finality of judgments by: (1) permitting a collateral attack on a final judgment that both parties had already previously stipulated to; and (2) refused to consider well-briefed and supported arguments on claim preclusion and issue preclusion, again undermining Washington's preference of finality of judgments.

Respectfully submitted this 17th day of December, 2021.

SOUND LEGAL PARTNERS, PLLC



By:_ ____________________________

Stephen M. Smith, WSBA No. 42021
Of Attorneys for Petitioners Villa Marina
Association of Apartment Owners

I certify that this memorandum contains 4,373 words, in compliance with RAP 18.17.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on December 17, 2021, I caused to be served a copy of the foregoing petition to be served on the parties to this case via the Court's electronic service.

DATED: December 17, 2021 at Kenmore, Washington.

s/ Stephen M. Smith
Stephen M. Smith, WSBA #42021

APPENDIX A

FILED
10/4/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS, a Washington Non-Profit Corporation, Respondent, v. JOHN E. COLLINS, JR. a/k/a JAKE E. COLLINS, JR., an individual; and JANE or JOHN DOE COLLINS, an individual, and the marital or quasi-marital community comprised thereof, Appellants.	)	No. 81865-1-I UNPUBLISHED OPINION

BOWMAN, J. — The Villa Marina Association of Apartment Owners (Association) sued John Collins Jr., an Association member, seeking a money judgment for delinquent assessments and a decree of foreclosure. Collins contends the court erred in granting summary judgment in the Association's favor on reconsideration, appointing a receiver over his unit, and awarding the Association its attorney fees and costs. We affirm the order appointing a receiver. But because there remains a genuine issue of material fact as to the amount of Collins' alleged delinquency, we reverse the order granting summary judgment. We also hold that because the trial court based the fee award at least in part on the Association's success in obtaining summary judgment, the court must vacate the award, and remand for further proceedings.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

Collins owns unit 173 of the Villa Marina Condominium.[1] As a unit owner, Collins is subject to Villa Marina's condominium declaration, which authorizes the Association to collect assessments. Collins is also subject to the Association's "Collection Policy," which authorizes the Association to collect late fees and interest.

In December 2016, the Association sued Collins for allegedly delinquent assessments (2016 Lawsuit). Collins made a $12,006.86 payment to the Association to settle the lawsuit (Settlement Payment). The Association claimed in a January 2017 payoff statement that this amount was the outstanding balance on Collins' account through February 2017. But the record contains no signed settlement agreement, no agreement as to how the Association would apply the funds, and no mutual releases of liability. On March 2, 2017, the trial court entered the parties' stipulation to dismiss the 2016 Lawsuit with prejudice.

In December 2019, the Association again sued Collins. That lawsuit is the subject of this appeal. The Association alleged that Collins' account had been delinquent since September 2018 and requested a money judgment, a decree of foreclosure, and appointment of a receiver.

In May 2020, the Association moved for summary judgment. In support of its motion, the Association relied on a "summary ledger" prepared by its attorney, Rachel Burkemper, to establish the amount Collins' owed. Burkemper prepared

[1] Collins does not live in the unit.

the summary ledger "based on the debits and credits found in the Association's accounting records," which the Association also submitted to the court.

Burkemper declared that the "starting point" for the summary ledger was August 17, 2018, the last time Collins was current on assessments according to the Association's accounting. According to the Association, Collins had a credit balance of $421.20 on that date. Burkemper observed that "it appeared that [the Association's] managing agent had applied the [Settlement P]ayment . . . in a manner that benefitted Mr. Collins by hundreds of dollars." But Burkemper declared that if one were to start with a $0.00 balance as of March 1, 2017 and track only assessments and payments from that date forward without late fees or interest, Collins' account was delinquent by $128.32 on August 17, 2018. Even so, Burkemper used the $421.20 credit balance as the starting point for the summary ledger "to minimize a dispute over how the . . . [S]ettlement [P]ayment was applied." The summary ledger showed that after considering the $421.20 credit balance and adding assessments, late fees, interest, and attorney fees, Collins owed the Association $40,072.65.

Collins opposed the Association's motion. He declared that when the Association filed the 2016 Lawsuit, he was not behind on assessments, and that the late fees and interest were "unjustified" because the Association imposed them on assessments not yet due. Collins said he "never had any problems with the Association until 2015," when he elected to pay certain special assessments in a lump sum instead of in monthly installments. Despite this election, the Association charged his account for monthly installments, and then late fees and

interest began to accrue. Collins also asserted that the Association's records revealed it did not credit his account for two 2016 payments and provided copies of the cancelled checks. According to Collins, the Association also had a practice of posting payments months after it received checks, leading to more interest and late fees.

Collins declared that "[b]ecause of the Association's confusing accounting, and rather than pay attorneys' fees, [he] made the business decision to settle" the 2016 Lawsuit by paying the Association "what it demanded," the $12,006.86 Settlement Payment. According to Collins, if one did not count the unjustified late fees, interest, and attorney fees, his account had a credit balance of $11,310 after applying the Settlement Payment. In support, Collins submitted his own accounting of assessments levied and payments made from July 1, 2014 through the February 2017 Settlement Payment. Collins argued that summary judgment was improper and that the court should order an accounting to "correctly identif[y] the credit Mr. Collins had after the [2016 L]awsuit[,] as this number is directly relevant to how much Mr. Collins owes now."

In its reply in support of summary judgment, the Association did not address the merits of Collins' assertions about its accounting before settlement of the 2016 Lawsuit. Instead, it argued that res judicata barred any argument about amounts incurred and paid before the parties agreed to dismiss the 2016 Lawsuit. Accordingly, Collins had "the ability to dispute only the credits tracked on the Association's ledger from March 1, 2017 to present."

The Association asserted that after making the Settlement Payment, Collins did not make another payment until May 2017, by which time another $1,648.02 of assessments ($824.01 for April 2017 and $824.01 for May 2017) had accrued. The Association pointed out that despite the foregoing, as of April 14, 2017, "the Association's accounting generously only showed [Collins] as owing $154.55; which is hundreds of dollars less than what he actually owed." Thus, any inaccuracy in the Association's accounting created a "windfall" to Collins.

In response to Collins' assertion that the Association improperly delayed depositing checks, it explained that rather than having a trial "over a possible error that might have resulted in $1-200 of interest, the Association would rather save the legal and expert fees by removing the interest that would have accrued if we accept [Collins'] assertions as true." So it submitted an updated summary ledger that removed interest it charged from March 1, 2017 through August 31, 2018. The updated ledger also purported to post payments on the dates the Association's management company originally stamped them as received, "further reducing the interest by several dollars." The Association asserted that "[t]hese adjustments fully resolve the accounting discrepancy" and that even after the adjustments, Collins owed the Association $44,092.27, including attorney fees, costs, late fees, and interest.

The trial court held the summary judgment hearing on July 8, 2020. It denied the motion, stating that "the accountings are just too confusing for me to be able to clearly determine that you have granted . . . every possible credit that

Mr. Collins . . . may be entitled to," and "that means . . . there's a genuine issue of material fact as to how this accounting has to be done." But the trial court later granted the Association's motion to appoint a custodial receiver over Collins' unit.

On July 16, 2020, the Association moved for reconsideration of the trial court's order denying summary judgment. The Association again argued that there was "no lawful way for a party or trier of fact to analyze events that transpired prior to March 1, 2017" because "[t]he parties agreed to a sum-certain amount to bring [Collins'] assessment account current through the end of February 2017, which resulted in dismissal of the [2016 L]awsuit." It submitted another summary ledger that began with a $0.00 balance as of March 1, 2017; calculated the assessments, late fees, and interest accrued since then; and applied Collins' payments on the dates "most favorable" to him. According to that ledger, Collins owed the Association $49,425.79, $5,333.52 more than the $44,092.27 the Association requested in its earlier reply in support of summary judgment. The Association urged the court to grant summary judgment in its favor for $44,092.27, arguing that any inaccuracies in the Association's earlier ledgers amounted to "a windfall to [Collins] totaling more than $5,000."

The trial court granted the Association's motion for reconsideration, citing CR 59(a)(1)(7) and (9).[2] It ruled:

> There is no genuine issue of material fact presented in the case as framed by [the Association]'s motion. All of the uncertainties created by the multiple ledgers in this case are removed by [the] motion because the motion takes the facts most favorably to Mr.

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[2] These rules provide that a trial court decision may be vacated, and reconsideration granted, if "there is no evidence or reasonable inference from the evidence to justify . . . the decision, . . . it is contrary to law," or if "substantial justice has not been done." CR 59(a)(1)(7), (9).

> Collins on every disputed point. Consequently, the resulting judgment is the best that Collins could do if the case went to trial.

The trial court entered judgment for the Association for $44,092.27, the amount the Association requested at summary judgment. The trial court also entered findings of fact and conclusions of law in support of the attorney fees and costs totaling $24,922.13, awarded as part of the total judgment. The court later entered a supplemental judgment for another $11,415.35 in attorney fees and costs.

Collins appeals.

ANALYSIS

Summary Judgment

Collins contends that because there remains a genuine issue of material fact as to the amount of any delinquency owed to the Association, the trial court erred by granting summary judgment for the Association. We agree.[3]

We review orders on summary judgment de novo, engaging in the same inquiry as the trial court. Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). "Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rublee v. Carrier Corp., 192 Wn.2d 190, 198, 428 P.3d 1207 (2018). Put another way, summary judgment "should be granted only if, from all

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[3] Collins also assigns error to the trial court's separate order granting reconsideration. But because we hold that the trial court erred by granting summary judgment, we need not decide this issue. See Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) (" '[I]f resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.' ") (internal quotation marks omitted) (quoting State v. Peterson, 133 Wn.2d 885, 894, 948 P.2d 381 (1997) (Talmadge, J., concurring)).

the evidence, a reasonable person could reach only one conclusion." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

"Summary judgment 'is subject to a burden-shifting scheme.' " Bucci v. Nw. Tr. Servs., Inc., 197 Wn. App. 318, 326, 387 P.3d 1139 (2016) (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)). The party moving for summary judgment "bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). "Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact for trial." Schaaf, 127 Wn.2d at 21. "In reviewing the evidence, the trial court must consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party." Schaaf, 127 Wn.2d at 21.

Here, the Association bears the ultimate burden to prove the amount of Collins' alleged delinquency. See Tesdahl v. Collins, 2 Wn.2d 76, 81-82, 97 P.2d 649 (1939) ("To support a mortgage, there must be a debt capable of identification, and the amount thereof must be ascertainable."); see also RCW 64.34.364(9) (providing that a condominium association's lien may be foreclosed judicially as a mortgage); Conklin v. Buckley, 19 Wash. 262, 265, 53 P. 52 (1898) (remanding to trial court to set aside decree of foreclosure where there appeared to be "a substantial difference between the amount . . . found [by the trial court] and that justly due"). Accordingly, to prevail on summary judgment, the

Association needed to establish the absence of a genuine issue of material fact as to that amount.

The Association did not meet its initial burden to show the absence of a genuine issue of a material fact—namely, the correct “starting point” for calculating Collins’ alleged delinquency at summary judgment. The Association based its entitlement to judgment as a matter of law entirely on the premise that the 2017 Settlement Payment “zeroed out” the balance on Collins’ account as of March 1, 2017. Thus, to prevail on summary judgment, the Association had to prove that there was no genuine issue of material fact that the balance on Collins’ account just before he made the Settlement Payment was at least $12,006.86, the amount of the Settlement Payment. While the Association submitted a declaration from its managing agent to support the summary ledgers purporting to reconstruct the balance on Collins’ account from March 1, 2017 onward, it points to no admissible evidence in the record establishing that the balance on Collins’ account was at least $12,006.86 before he made the Settlement Payment.[4]

Furthermore, Collins declared that before the 2016 Lawsuit settled, the Association failed to credit two payments he made and charged special assessments (and resulting late fees and interest) monthly even though he

[4] The Association provided a declaration from Laura Lotz, its management company’s community association manager, attaching and authenticating the Association’s historical ledgers. But these ledgers date back to only September 2016, and they do not show an account balance of $12,006.86 as of the end of February 2017. In fact, one ledger shows a credit of $2,012.27 after receiving the Settlement Payment. Burkemper declared that her firm did not bill the Association for some of the fees included in the January 2017 payoff statement until March 2017. But Burkemper’s declaration is not sufficient to establish the accuracy of the Association’s underlying accounting.

elected to pay them in a lump sum. Viewed in the light most favorable to Collins, these assertions also raise a genuine issue of material fact as to whether the balance on Collins' account was $0 (or some credit balance) following application of the Settlement Payment.[5] The trial court erred by granting summary judgment.

The Association disagrees and contends, as it did below, that res judicata[6] bars any dispute about its accounting before March 1, 2017 as a matter of law.[7] The Association cites a single case in support of this proposition, Le Bire v. Department of Labor & Industries, 14 Wn.2d 407, 128 P.2d 308 (1942).[8] But Le Bire is readily distinguishable. In Le Bire, the joint board of the Department of

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[5] For this reason, this case is readily distinguishable from the case the Association cites in its statement of additional authority because there, the credits the lender applied to the borrower's account "conceded any possible contested amount." Howard v. JP Morgan Chase Bank, N.A., No. 81968-2-I, slip op. at 7-8 (Wash. Ct. App. Aug. 2, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/819682.pdf (emphasis added).

[6] The term "res judicata" has been used by courts to refer both to claim preclusion and issue preclusion. See Bunch v. Nationwide Mut. Ins. Co., 180 Wn. App. 37, 43, 321 P.3d 266 (2014) ("The generic term 'res judicata' may include both res judicata or claim preclusion and collateral estoppel or issue preclusion."). It is unclear which theory the Association had in mind here, in large part because the Association's briefs both below and on appeal address only whether the order dismissing the 2016 Lawsuit constituted a final judgment on the merits, a threshold requirement under both theories. See 14A DOUGLAS J. ENDE, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35:23, at 557-58 ("A judicial determination must generally be (1) final and (2) on the merits to have [claim preclusive] effect."), § 35:34, at 607 ("[T]he party asserting collateral estoppel bears the burden of persuading the court that the prior action ended in a final judgment on the merits.") (3d ed. 2018). The Association did not, and does not, address the remaining elements of either theory. Nevertheless, as we discuss below, the sole case that the Association relies on in this appeal is unpersuasive; thus, we need not determine which theory the Association had in mind.

[7] The Association asserts that the issue of res judicata "is abandoned by Collins's failure to meaningfully brief" it. Because the Association bore the burden at summary judgment to establish the absence of any genuine issue of material fact as to the correctness of its starting point for calculating Collins' alleged delinquency, we do not consider this issue abandoned.

[8] The Association asserts that it raised additional theories and arguments below to support its assertion that any challenge to its pre-March 2017 accounting is barred, and it tries to incorporate those arguments by reference. But the Association briefed only res judicata below. It invoked the voluntary payment doctrine, but only in passing, and only in footnotes. Accordingly, we do not consider whether the voluntary payment doctrine applies here. See Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration," and "trial court briefs cannot be incorporated into appellate briefs by reference.").

Labor and Industries (L&I) entered an order determining that Arthur Le Bire had arthritis when he injured his knee on the job, denied liability for treatment of his arthritis, and closed his claim for additional disability benefits based on the order. Le Bire, 14 Wn.2d at 409, 411-12. Later, Le Bire applied to L&I to reopen his claim, "alleging in his application that his knees had become stiff and more painful." Le Bire, 14 Wn.2d at 412. L&I refused, and Le Bire appealed to the superior court, which dismissed his appeal because the joint board's earlier order was "res judicata of the same issues" presented in Le Bire's appeal. Le Bire, 14 Wn.2d at 413-14.

Our Supreme Court affirmed the dismissal. Le Bire, 14 Wn.2d at 420. It observed that the board's earlier order "adopted the findings and recommendations of several medical commissions" and "determined that at the time of his injury," Le Bire "had a preexisting disease of arthritis" and that "his arthritic condition was not due or related to the knee injury." Le Bire, 14 Wn.2d at 414-15. The Supreme Court held that absent a successful appeal or a showing of "fraud or something of like nature," "an order or judgment of the department resting upon a finding, or findings, of fact becomes a complete and final adjudication, binding upon both the department and the claimant." Le Bire, 14 Wn.2d at 415. And because "the order of the joint board constituted a final judgment upon definite issues then before it," it barred Le Bire from reraising those issues in a subsequent appeal, even though the judgment stemmed from a settlement. Le Bire, 14 Wn.2d at 419.[9]

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[9] Emphasis added.

Here, unlike in Le Bire, the relevant issue—the amount, if any, of Collins' delinquency before the Association applied the Settlement Payment—was not a definite issue before the court when it dismissed the 2016 Lawsuit. Instead, the court merely stated that Collins' account had been "settled" and dismissed the 2016 Lawsuit based on the stipulation of the parties. Le Bire does not control, and the Association does not meet its burden to persuade us that Collins is barred from challenging the "starting point" for the Association's accounting in the present lawsuit.

Appointment of Receiver

Collins contends the trial court erred by appointing a receiver over his unit. We disagree.

The Association moved for a receiver under several statutes, including RCW 64.34.364(10). RCW 64.34.364(10) provides that an association "shall be entitled" to the appointment of a receiver to collect rent from the lessee of a nonowner-occupied unit "[f]rom the time of commencement of an action by the association to foreclose a lien for nonpayment of delinquent assessments." It is undisputed that Collins does not live in his unit and that the Association moved for a receiver after it commenced this action to foreclose its lien. As a result, the entitlement under the statute applies. Collins advances no argument or authority to the contrary, instead relying on the same arguments he makes related to summary judgment. Thus, we affirm the order appointing a receiver.

Attorney Fee Award

The trial court awarded fees to the Association under RCW 64.34.364(14). That statute provides, in relevant part:

> The association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment.

RCW 64.34.364(14). Collins does not challenge the statutory basis for the fee award. But he contends that the amount of the award was not reasonable because it included fees for a summary judgment motion on which the Association should not have prevailed. We agree.

We review the reasonableness of a fee award for abuse of discretion. 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 734, 281 P.3d 693 (2012). Here, the trial court awarded the Association attorney fees and costs totaling $36,337.48, the full amount requested by the Association. In doing so, the trial court expressly recognized that it must discount hours spent on " 'unsuccessful claims, duplicated effort, or otherwise unproductive time.' " 224 Westlake, 169 Wn. App. at 734-35 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). In other words, it is apparent the trial court considered the Association's ultimate success on summary judgment in awarding the Association its fees.

We cannot know what part of the fees the Association incurred that the trial court would have deemed reasonable had the Association not prevailed on summary judgment. Accordingly, we vacate the trial court's fee award without prejudice to the Association's ability to renew its request for fees on remand.

Fees on Appeal

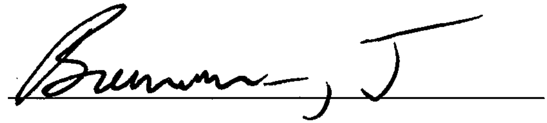
Both parties request fees on appeal. Under RAP 18.1(b), a party "must devote a section of its opening brief to the request for the fees." The rule "requires argument and citation to authority to advise us of the appropriate grounds for an award of attorney fees." Osborne v. Seymour, 164 Wn. App. 820, 866, 265 P.3d 917 (2011). Compliance with RAP 18.1(b) is mandatory and requires "more than a bald request for attorney fees on appeal." Osborne, 164 Wn. App. at 866.

Collins requests fees in a single sentence at the end of his opening brief in which he simply asks us to "award him attorney fees expended in this appeal." He provides neither argument nor authority to support such an award.[10] We deny Collins' request for fees on appeal based on his failure to comply with RAP 18.1(b).

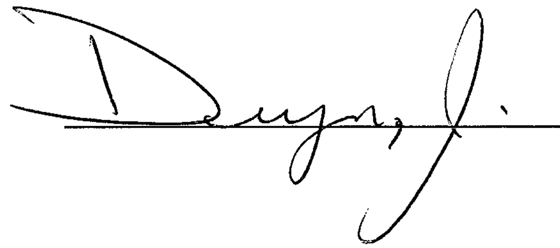
The Association requests fees under RCW 64.34.364(14), which authorizes an award of fees to an association "if it prevails on appeal and in the enforcement of a judgment." Because the Association is not the prevailing party, we decline to award it fees on appeal.

[10] Collins tried to remedy these shortcomings in his reply brief. But a legal theory raised for the first time in a reply brief comes too late to warrant consideration. See RAP 10.3(a)(6) (requiring appellant's opening brief to include argument and authority in support of the issues presented for review); Duncan v. Alaska USA Fed. Credit Union, 148 Wn. App. 52, 72, 199 P.3d 991 (2008) ("Arguments first raised in a reply are generally not addressed.").

We affirm the order appointing the receiver, reverse the order granting summary judgment, vacate the orders awarding the Association its attorney fees and costs, and remand for further proceedings.



WE CONCUR:



APPENDIX B

FILED
11/18/2021
Court of Appeals
Division I
State of Washington

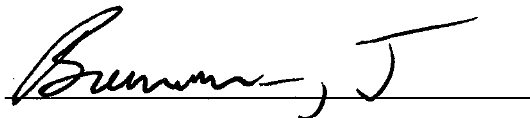
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS, a Washington Non-Profit Corporation, Respondent, v. JOHN E. COLLINS, JR. a/k/a JAKE E. COLLINS, JR., an individual; and JANE or JOHN DOE COLLINS, an individual, and the marital or quasi-marital community comprised thereof, Appellants.	No. 81865-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Villa Marina Association of Apartment Owners filed a motion for reconsideration of the opinion filed on October 4, 2021. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

APPENDIX C

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FILED
2020 AUG 19
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 19-2-32346-9 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS, a Washington Non-Profit Corporation, Plaintiff, vs. JOHN E. COLLINGS, JR. a/k/a JAKE E. COLLINS, JR., an individual, and JANE or JOHN DOE COLLINS, an individual, and the marital or quasi-marital community comprised thereof, Defendant.	NO. 19-2-32346-9 ORDER GRANTING MOTION FOR RECONSIDERATION

This court received Villa Marina's Motion for Reconsideration, a Response from Collins and a Reply from Villa Marina. Pursuant to CR 59(a)(1)(7), and (9), this court grants the motion and grants summary judgment to Villa Marina. There is no genuine issue of material fact presented in the case as framed by Villa Marina's motion. All of the uncertainties created by the multiple ledgers in this case are removed by Villa Marina's motion because the motion takes the facts most favorably to Mr. Collins on every disputed point. Consequently, the resulting judgment is the best that Collins could do if the case went to trial.

Noted this 19th day of August, 2020.

THE HONORABLE DOUGLASS A. NORTH

SOUND LEGAL PARTNERS, PLLC

December 17, 2021 - 1:36 PM

Transmittal Information

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Appellate Court Case Number:	81865-1
Appellate Court Case Title:	Villa Marina Association of Apartment Owners, Respondent v. John E. Collins, Jr., Appellant

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