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No. 99876-1

Court of Appeals No. 79808-1-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

LAGUNA CREEK CALIFORNIA PARTNERS, LLC, a Washington limited liability company; and LAGUNA CREEK ADMINISTRATION, INC., a Washington corporation

Respondents,

v.

BRENIA LAGUNA CREEK, LLC, a Washington limited liability company; BRITTINGHAM LAGUNA CREEK, LLC, a Washington limited liability company; CHANG LAGUNA CREEK, LLC, a Washington limited liability company; CHRISTENSEN LAGUNA CREEK, LLC, a Washington limited liability company; CHRISTENSEN II LAGUNA CREEK, LLC, a Washington limited liability company; DD LAGUNA CREEK, LLC, a Washington limited liability company; DECKER I LAGUNA CREEK, LLC, a Washington limited liability company; DECKER II LAGUNA CREEK, LLC, a Washington limited liability company; DREIS LAGUNA CREEK, LLC, a Washington limited liability company; DYKIER LAGUNA CREEK, LLC, a Washington limited liability company; EIGHT-ELEVEN LAGUNA CREEK, LLC, a Washington limited liability company; FOUR TWELVE NINETEENTH STREET LAGUNA CREEK, LLC, a Washington limited liability company; GOULD I LAGUNA CREEK, LLC, a Washington limited liability company; GOULD II LAGUNA CREEK, LLC, a Washington limited liability company; HO LAGUNA CREEK, LLC, a Washington limited liability company; HSIEH II LAGUNA CREEK, LLC a Washington limited liability company; LEE I LAGUNA CREEK, LLC, a Washington limited liability company; KRUEGER I LAGUNA CREEK, LLC, a Washington limited liability company; KRUEGER II LAGUNA CREEK, LLC, a Washington limited liability company; KWAN LAGUNA CREEK, LLC, a Washington limited liability company; LARSON LAGUNA CREEK, LLC, a Washington limited liability

company; LEUNG LAGUNA CREEK, LLC, a Washington limited liability company; LIPNOSKY LAGUNA CREEK, LLC, a Washington limited liability company; MARUMOTO LAGUNA CREEK, LLC, a Washington limited liability company; POON LAGUNA CREEK, LLC, a Washington limited liability company; RICHARDS LAGUNA CREEK, LLC, a Washington limited liability company; SWAN LAGUNA CREEK, LLC, a Washington limited liability company; SWEDBERG LAGUNA CREEK, LLC, a Washington limited liability company; TAYLOR G. LAGUNA CREEK LLC, a Washington limited liability company; and WHITNEY LAGUNA CREEK, LLC, a Washington limited liability company,

Petitioners.

PAUL S. BRENIA TRUST; WILLIAM BRITTINGHAM, a Florida resident; JEAN CHANG, a Taiwan resident; ELIZABETH CHRISTENSEN, a California resident; STEVE CHRISTENSEN, a California resident; DONALD DECKER, a California resident; M. STEPHEN DAVISON, a California resident; ALICE DECKER, a California resident; MARTIN DREIS, a California resident; CHELSEA AND ENRICHETTA DYKIER TRUST; EIGHT ELEVEN CORP., a Virginia corporation; FOUR TWELVE NINETEENTH STREET LLC, a Virginia corporation; ANA GOULD, a Virginia resident; JEFFREY GOULD, a Virginia resident; BANG L. HO, a California resident; LEH-AN-HSIEH, a Maryland resident; JOHN R. KRUEGER and BOBE HA KRUEGER, Texas residents; ALAN KWAN, a California resident; HELEN LOUISE LARSON REVOCABLE TRUST; LIN-NAN LEE, a Maryland resident; LEUNG PROPERTY TRUST; JULIE THERON, a California resident; SUGAKO MARUMOTO, a California resident; FLORENCE AND CHRIS FAMILY TRUST; RICHARDS FAMILY TRUST; DONNA LEF SWAN REVOCABE TRUST; SWEDBERG 1997 FAMILY TRUST; GARY and EMMA TAYLOR, California residents; and JOAN CAROLYN M. WHITNEY, a California resident,

Third-Party Plaintiffs/Petitioners,

v.

JON A. WOOD and JANE DOE WOOD, Washington residents; ROGER E. KUULA and JANE DOE KUULA, Washington residents; and 1031 XPRESS LAGUNA CREEK, INC., a Washington corporation.

Third-Party Defendants/Respondents.

PETITION FOR REVIEW

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INTRODUCTION

Appellants "Brenia" are 31 of the original 39 investors using single-use limited liability companies (LLC's) to invest in a 160-unit apartment complex located in Elk Grove California. In 2017, Respondents "Laguna" sued Brenia, asserting breach of contract and damages. Brenia asserted numerous counterclaims including breach of contract, breach of the Washington State Securities Act (WSSA), ch. 21.20 RCW, and CPA violations. The trial court dismissed some Brenia claims on summary judgment, reserving others. Months later it issued a second summary judgment order purporting to dismiss "all" remaining Brenia claims, though Laguna had not raised six (of eleven). Later still, the court dismissed Laguna's remaining claims. All the while, the parties and the court worked toward entry of a "final judgment."

Laguna eventually proposed a final judgment and "findings" that the matter was already final. The court agreed, so Brenia timely appealed that order. But the appellate court ruled the appeal untimely and refused to extend time under this Court's decision in ***Denney***, *infra*. ***Laguna v. Brenia***, Court of Appeals No. 79808-1-I (May 10, 2021). Both decisions are incorrect and conflict with numerous controlling cases. This Court should accept review and reverse.

ISSUES PRESENTED FOR REVIEW

This Court recently held in ***Denney v. City of Richland*** that a summary judgment order disposing of all claims, but anticipating the entry of a "final judgment" on costs, created reasonable confusion as to which was the final appealable judgment. 195 Wn.2d 649, 659-60, 462 P.3d 842 (2020). Under ***Denney*** (and others), is an extension of time warranted here, where three orders combined to dispose of all claims (assuming *arguendo* that one of those orders disposed of claims that were not raised), still four more orders were arguably "final," and the parties and the court continued working toward the "final judgment"?

Where Laguna's second summary judgment motion pertained to only five of Brenia's eleven remaining claims, and where it is reversible error for a trial court to dismiss claims on summary judgment that are not raised in the pending motion, did Brenia timely appeal from the subsequent order entering incorrect findings of fact that the court's second summary judgment order actually dismissed "all" remaining Brenia claims? And if Brenia had to appeal from the summary judgment order itself, does the trial court's extraordinary act warrant an extension of time?

FACTS RELEVANT TO PETITION FOR REVIEW

Given the nature of this petition, the relevant facts are entirely procedural. They are set forth in the Introduction above and in the Arguments below. For additional context, Brenia refers this Court to the appellate opinion.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with this Court's decision in *Denney v. City of Richland* and others from this Court and the Court of Appeals. RAP 13.4(b)(1) & (2).

In ***Denney***, this Court extended time for filing the notice of appeal when counsel appealed from the judgment on costs, not the summary judgment order finally resolving all legal claims. The rationale was simply that the summary judgment order anticipated entry of a "final judgment," so confusion was reasonable. Confusion was just as reasonable, if not more so, here. This Court should accept review and reverse.

"The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal …." RAP 18.8.(b); ***Shumway v. Payne***, 136 Wn.2d 383, 394-95, 964 P.2d 349 (1998). "'Extraordinary circumstances' include instances where the filing, despite reasonable diligence, was defective due to excusable

error or circumstances beyond the party's control.'" ***Shumway***, 136 Wn.2d at 395 (quoting ***Hoirup v. Empire Airways, Inc.***, 69 Wn. App. 479, 482, 848 P.2d 1337 (1993)). In its most recent application of this rule, this Court granted an extension of time, reversing the appellate court. ***Denney***, 195 Wn.2d at 659-60. Since that decision, this Court took the extraordinary step of suspending RAP 18.8(b) due to the COVID-19 pandemic, ruling that motions for extension of time that would be governed by RAP 18.8(b) "will be decided in accordance with the 'ends of justice' standard set forth in RAP 18.8(a). Order No. 25700-BN-659 Suspending RAP 18.8(b) (2/22/2021).

In ***Denney***, firefighter Christopher Denney sued the City of Richland alleging Public Records Act violations.195 Wn.2d at 651. Both Denney and the City moved for summary judgment, and the trial court granted the City's motion, ruling that the requested records were exempted from disclosure. *Id*. at 651-52. The order: (1) granted the City's motion; (2) denied Denney's motion; (3) "dismissed with prejudice" "[a]ll claims and causes of action alleged by plaintiff"; and (4) stated that the City was "the prevailing party herein and may present judgment accordingly." *Id*. The City did so, and the Court entered a judgment awarding the City $200 in costs. *Id*. at 652. Denney then filed a notice of appeal within two weeks of the final

judgment, but more than 30 days after the summary judgment order was entered. *Id.*

The appellate court *sua sponte* set Denney's appeal for dismissal as untimely. *Id.* Denney argued the 30-day limitation for filing the notice of appeal ran from the judgment, not the summary judgment order, alternatively seeking an extension of time "based on the extraordinary circumstance that the [summary judgment] order was misleading." *Id.* The appellate court disagreed, dismissing Denney's appeal save for the $200 cost award. *Id.*

This Court accepted review and reversed in part, holding that Denney's appeal warranted an extension of time. *Id.* at 660. This Court held that the summary judgment order was a "final judgment" on "the merits," defined as the "last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs" and sometimes fees, or "a judgement … that eliminates the litigation between the parties," leaving nothing else for the trial court to do except enforce the judgment. *Id.* at 654. As such, the summary judgment order was the appealable order regardless of whether it reserved fees or costs for future determination. RAP 2.2(a)(1). Denney's failure to appeal within 30 days from the

summary judgment order, rendered his appeal was untimely. ***Denney***, 195 Wn.2d at 660.

But this Court held that CR 54 introduced "confusion" into the appellate rules so extraordinary that "treating [the] appeal as untimely would be a miscarriage of justice." 195 Wn.2d at 659. CR 54 directs the prevailing party to "'prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision.'" *Id.* at 657 (quoting CR 54(e)). "CR 54's process promotes uniformity and lessens the potential for confusion stemming from multiple final judgments." *Id.* at 658. Its aim is to prevent the bar from having to act as "soothsayers" divining finality:

> "'As a practical matter, the bar should not have to act as soothsayers to determine when a written trial court opinion or decision might be a final judgment. For the sake of uniformity, the better practice is to follow CR 54; the prevailing party should submit a proposed judgment, decree or order, with appropriate notice and service upon the opposing party. All parties are then aware of the status of the proceeding and can consider the applicability of postjudgment motions such as motions for reconsideration, CR 59(b), appeals under RAP 2.2, and other time-limited procedures hinging upon entry of judgment.'"

Id. at 657-58 (quoting ***Dep't of Labor & Indus. v. City of Kennewick***, 99 Wn.2d 225, 231, 661 P.2d 133 (1983) (quoting ***Dep't of Labor & Indus. v. City of Kennewick***, 31 Wn. App. 777, 783, 644

P.2d 1196 (1982), *rev'd*, 99 Wn.2d 225 (1983))). Thus, this Court held that Denney reasonably (though mistakenly) interpreted the judgment, not the summary judgment order, to be the final judgment from which to appeal, and that his error justified an extension of time. ***Denney***, 195 Wn.2d at 660.

This Court concluded with the warning to future appellants that summary judgment orders may be final and appealable, regardless of pending fees:

> [We] caution future, similarly situated appellants that our appellate rules establish the correct procedure on review: a summary judgment order disposing of all substantive legal issues can constitute a final, appealable judgment regardless of a subsequent attorney fees award. As *Washington Practice* advises, "counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending."

Id. at 659 (quoting 2A Tegland, WASH. PRAC.: RULES PRAC., RAP 2.4, at 198 (8th ed. 2014)). Brenia did not have the benefit of this warning as this Court decide ***Denney*** after appellate briefing was complete. For the same reason, the appellate court did not have the benefit of briefing, though Brenia brought ***Denney*** to the court's attention.

The appellate court declined to apply ***Denney***, holding "Brenia does not benefit from the same confusion …." Op. at 17. Here, as in

Denney, the orders at issue dismissed all causes of action[1] and identified the substantially prevailing party, though here, it took three orders to get there:

- The April summary judgment order resolves some Laguna causes of action, dismisses some Brenia causes of action, and leaves others in the case. CP 1973-85. It provides that Laguna is the "substantially prevailing party" entitled to fees at the end of the case. CP 1980. This order plainly is not a final judgment, as it leaves claims on both side in the case.

- The October summary judgment order – a 19-page order denying Brenia's CR 56(f) motion for extension, granting Laguna's second summary judgment motion, and "ruling on outstanding motions brought to the court's attention" – states "all of [Brenia's] claims are dismissed with prejudice," reserves for "further motion or trial" Laguna's claims for damages from breach of contract, and provides that Laguna is "the substantially prevailing party in this lawsuit" entitled to fees and costs "to be determined" after further proof and argument. CP 12647-65. This order also is not a final judgment, leaving Laguna claims in the case.[2]

- The December order dismisses "without prejudice" Laguna's "remaining claims for damages" arising from their breach of contract claims. CP 13524. It does not mention fees. *Id.* The appellate court held this was the "final judgment." Op. at 16.

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[1] The trial court's second summary judgment order did not actually dismiss numerous claims and parties that were not raised in Laguna's motion. *Supra*, Argument § B. This first argument, however, assumes – as the appellate court concluded – that all claims were dismissed. Op. at 16.

[2] Again, this order could not resolve claims and parties Laguna did not raise in its motion. *Supra*, Argument § B.

The appellate court purports to distinguish ***Denney*** on the bases that the October summary judgment order "in plain language dismissed all of Brenia's claims with prejudice," and the December order "in plain language dismissed all of Laguna's remaining claims with prejudice." Op .at 17. That is not a basis for distinguishing ***Denney***, where the summary judgment order there – in plain language – "dismissed with prejudice "[a]ll [plaintiff's] claims and causes of action …." 195 Wn.2d at 652.

The appellate court also noted that Brenia conceded Laguna had prevailed. Op. at 17. That too fails to distinguish ***Denney***, whose summary judgment order plainly stated that the City was "the prevailing party." 195 Wn.2d at 652. And ***Denney*** cannot be distinguished based on Laguna's claim that the only thing left here was fees and costs, where the same was true in ***Denney***. After summary judgment there, only costs remained. *Id*. at 652-53.

What is left is the appellate court's assertion that while the ***Denney*** order anticipated presentation of a final judgment, nothing in the October and December orders "directed entry of a separate final judgment." Op. at 17. But the parties here were already litigating fees before the court entered the December order and continued to

do so afterward, acknowledging along the way that a separate "final judgment" was still coming. *Id.*; CP 13710, 13714-19, 13733-36.

Here, as in ***Denney***, the parties were bound by CR 54(e), so Laguna was tasked with preparing and presenting a proposed final judgment. Laguna did so, but waited until January 16, 2019, more than 30 days after the December order was entered. CP 13685. The court did not enter the findings until March 8 and did not enter the judgment until March 27. CP 13694-713, 13737-43. In the interim, numerous pleadings exchanged hands, and orders entered. *See* CP 13526-63, 13564-68, 13569-618, 13619-62, 13663-67, 13668-72, 13673-80, 13681-90, 13691-93. Twice Brenia pointed out that the trial court had not yet resolved certain Brenia claims, leaving "judicial labor" before a final judgment could be entered.[3] CP 13664 n.1, 13673-80. When the court finally entered the findings, it ordered that a "judgment shall be entered," stating "judgment shall be sent to the court." CP 13710. Laguna then moved to include even more fees in "the final judgment," and the court granted that motion, directing

[3] The appellate court's assertion that Brenia too late asserted their remained unsettled claims in the case is irrelevant to whether ***Denney*** applies. Op. at 17. As above, Brenia believes there were unsettled claims in the case because the trial court could not dismiss claims on summary judgment that were not raised in the motion it was ruling on. But that goes to timeliness, not to an extension of time.

Laguna to "submit their form of final judgment to the Court." CP 13714-19, 13733-36. Again, the "final judgment" was entered on March 27, more than three months after the matter became final (per the appellate decision). *Compare* CP 13737 *with* Op. at 17. In sum, while there were two potentially "final" judgments in ***Denney*** – the summary judgment order and the judgment on costs – there are seven here: (1) the April summary judgment order (CP 1973-85); (2) the October summary judgment order (CP 12647-65); (3) the December order dismissing Laguna's remaining claims (CP 13522-25); (4) an order granting fees (CP 13691-93); (5) the findings and conclusions (CP 13694-713); (6) the order granting Laguna's motion to include fees in the final judgment (CP 13733-36); and (7) the final judgment on costs and fees. CP 13737-44.

This goes to the heart of this Court's holding in ***Denney*** that lawyers are not supposed to be "soothsayers" and multiple "final" orders are not supposed to be a trap. 195 Wn. 2d at 658-59. In ***Denney***, a single order dismissed all claims, leaving only costs for a future final judgment, yet this Court found "confusion" sufficient to constitute extraordinary circumstances. 195 Wn.2d at 659. Here, it took three orders to resolve all legal claims, both sides understood the "final judgment" was forthcoming, and Laguna waited until after

the 30-day deadline had passed to propose it. Brenia's "confusion stemming from [these] multiple final judgments" is just as reasonable as in ***Denney***. 195 Wn.2d at 658.

So holding would be consistent with other cases on this subject from this Court and the appellate court. Extraordinary circumstances also include delays in the mail and failure to appreciate a recent change to the RAPs. ***Scannell v. State***, 128 Wn.2d 829, 834-35, 912 P.2d 489 (1996); ***Moore v. Boardman***, 84 Wn.2d 408, 409, 413, 526 P.2d 893 (1974). Conversely, extraordinary circumstances do not include failing to implement office procedures to ensure proper case-tracking, or one attorney leaving the firm coupled with another's heavy workload. ***Beckman v. DSHS***, 102 Wn. App. 687, 695-96, 11 P.3d 313 (2000); ***Reichelt v. Raymark Indus., Inc.***, 52 Wn. App. 763, 765-66, 764 P.2d 653 (1988)). A delay in the mail (***Moore***) is "beyond the party's control," and "confusion" over a rule change (***Scannell***) or a court order (***Denney***) is "excusable error," but workload (***Reichelt***) and office procedures (***Beckman***) are not. *See* **Shumway**, 136 Wn.2d at 395-97. Brenia is not claiming it was too busy and understaffed (***Reichelt***) or failed to track the entry of a proposed order (***Beckman***). Rather, its point is that in the context of multiple orders combining to achieve

"finality," followed by an exchange of pleadings and orders anticipating the future entry of a "final judgment," its "confusion" over when to appeal is as reasonable as it was in ***Denney***.

In sum, this Court should accept review and enlarge time.

B. The appellate decision also conflicts with numerous cases limiting summary judgment disposition to those issues properly before the court. RAP 13.4(b)(1) & (2).

The appellate court incorrectly held that the October order dismissed all remaining Brenia claims, bypassing Brenia's argument that the trial court may not dismiss claims that Laguna did not raise on summary judgment. Brenia timely appealed when the court later found it had dismissed claims Laguna never raised. Alternatively, this extraordinary decision is an additional basis to extend time.

The appellate court held that save for attorney fees, Brenia's appeal was untimely, where: (1) the October summary judgment order dismissed all Brenia's remaining claims; (2) the December order dismissed Laguna's remaining claims; (3) the December order was the "final judgment for purposes of RAP 2.2(a)(1)"; and (4) Brenia did not timely appeal that order. Op. at 16. This decision rests on language in the October order that Laguna was "'entitled to judgment as a matter of law on all [Brenia's] claims, and all [Brenia's] claims are dismissed with prejudice.'" *Id.* (quoting CP 12653). The

court failed to address Brenia's argument that the trial court could not dismiss claims and parties that Laguna did not raise in its motion.

It is reversible error for the trial court to grant summary judgment on an issue not raised in the motion. ***R.D. Merrill Co. v. Pollution Control Hearings Bd.***, 137 Wn.2d 118, 147, 969 P.2d 458 (1999); ***White v. Kent Med. Ctr., Inc.***, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). In ***R.D. Merrill Co.***, for example, R.D. Merrill applied to consolidate water rights for irrigation, domestic and stockwatering purposes as part of an effort to develop a cross-country ski resort. 137 Wn.2d at 123. As to one of R.D. Merrill's many applications, the Pollution Control Hearings Board granted partial summary judgment that the plaintiffs, the non-moving party, had the burden of establishing abandonment and relinquishment of irrigation rights, but failed to present sufficient evidence that water rights had not been used. *Id.* at 139, 146. This Court reversed, holding that since R.D. Merrill did not raise nonuse in its partial summary judgment motion, the issue was not before the Board, who erred in deciding it. *Id.*

This Court explained that while R.D. Merrill's summary judgment motion noted plaintiff's claims regarding abandonment and relinquishment, its "motion did not discuss whether nonuse occurred, and did not raise nonuse as an issue." *Id.* at 147. Rather, R.D. Merrill

sought summary judgment on the basis that two statutory exceptions applied, excusing any nonuse. *Id*. at 146-47.

This Court explained too that R.D. Merrill could not raise nonuse for the first time in its reply, where allowing it to do so would deny the non-moving party the opportunity to respond. *Id*. at 147 (citing ***White***, 61 Wn. App. at 168). That the nonmoving party bore the burden of proof was irrelevant, as they "had no reason at all to provide evidence of nonuse" since R.D. Merrill did not raise it. *Id*. at 148. And this Court rejected R.D. Merrill's argument that the Board's error in considering nonuse was harmless, doubting seriously that a harmless error analysis would even apply. *Id*. at 148.

Similarly in ***White***, the appellate court held that the trial court erred in addressing proximate cause on summary judgment, raised for the first time in the moving party's reply. 61 Wn. App. at 168. The court explained that CR 56(c), governing summary judgment proceedings, does not allow the moving party to raise issues at any time other than in its motion, and that allowing new issues in a reply is improper "because the nonmoving party has no opportunity to respond." *Id*. Rather, "it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary

judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *Id.* at 169.

Here, Laguna did not seek summary judgment on many of Brenia's counterclaims, so they were not before the trial court. In its second summary judgment motion, Laguna asked the court to: (1) dismiss Brenia's WSSA and fraud claims related to the original investment or TIC to LLC conversion; (2) rule that the second and third capital calls were enforceable as a matter of law; (3) dismiss as time barred all Brenia claims for fraud, breach of fiduciary duty, and improper maintenance; and (4) dismiss Brenia's construction defect claims. CP 3066. Laguna acknowledged that Brenia was in the process of preparing its proposed amended counterclaims, but filed anyway, assuming the court would approve them. CP 3062-96, 4214-44, 11211-22. Laguna's hasty approach created unnecessary confusion, as its motion did not align with Brenia's amended counterclaims. *Compare* CP 2649-725 *with* CP 3062-96.

Brenia did not state counterclaims for improper maintenance or construction defect (Laguna's 3 and 4). CP 2649-725. Laguna did not seek summary adjudication of Brenia's claims for unjust enrichment, accounting, CPA violations, or receivership. *Compare* CP 2649-725 *with* CP 3062-96. Brenia's amended counterclaims

also added new parties, to which Laguna's pending motion plainly did not pertain. CP 2045 n.8.

Brenia explained this disconnect, identifying and declining to address its counterclaims Laguna did not seek to summarily dismiss. CP 4214-44. In reply, Laguna did not disagree that many of Brenia's claims were not before the court. CP 11211-22.

This disconnect is reflected in the court's summary judgment order. CP 12647-65. As part of that order, the trial court ruled on Brenia's pending motion to amend its counterclaims and "deemed filed" 11 Brenia claims for: unjust enrichment, breach of fiduciary duties, accounting, WSSA violations in 2003 and 2012, fraudulent misrepresentation and Inducement in 2003 and 2012, CPA violations and related injunctive relief, and receivership. *Id.* The court dismissed as time-barred five Brenia claims for WSSA violations, fraud, and breach of fiduciary duty. *Id.* It did not mention Brenia's six remaining claims for unjust enrichment, accounting, CPA violations, or receivership, but later found that the October order dismissed these claims. *Id.*

The appellate court's holding that the October order dismissed all Brenia claims, including those Laguna did not raise, conflicts with ***R.D. Merrill*** and ***White***. Op. at 16. The court ignored

Brenia's argument on this point. It states only that the October order dismissed the "bulk of Brenia's claims," where it stated "all" claims were dismissed with prejudice. *Id*. But "all" cannot refer to claims that Laguna did not raise, that Brenia expressly declined to address in response, and that the trial court did not mention.

This boilerplate imbedded in the middle of a 19-page order at best creates an ambiguity: either "all" refers only to those Brenia claims Laguna raised in its summary judgment motion, or "all" includes those claims Laguna did not raise, contrary to ***R.D. Merrill*** and ***White***. *See* ***City of Vancouver v. Pub. Emp't Relations Comm'n***, 180 Wn. App. 333, 352, 325 P.3d 213 (2014) (holding that an order containing contradictory language created an ambiguity). When an order is ambiguous, a reviewing court interprets it consistent with the lower court's intent. ***City of Vancouver***, 180 Wn. App. at 353. Here, the trial court clarified its intent when it "found" – almost five months later – that the October order in fact summarily resolved every Brenia claim, including those that were not before the court on summary judgement. CP 13694-713. That is exactly why Brenia timely appealed from those findings. CP 13747.

Again, the appellate court ignored Brenia's argument that the October order could not, so did not, summarily resolve claims that

Laguna did not raise in its motion. Op. at 16. It also ignored Brenia's argument that the October order was, at best, ambiguous. *Id*. Instead, the court seems to take up Laguna's argument that Brenia's objection to the court's "findings" on finality was an untimely motion to reconsider the October order. *See id*.[4] Brenia objected to and appealed from those findings because they are the first time the trial court took the incorrect position that the October order summarily resolved claims that were not before the court, making the December order the final judgment in the case. CP 13712. Brenia's decision not to seek reconsideration of the October order does not waive appellate review.

At the very least, this is an additional basis to enlarge time. As addressed above, the confusion here far exceeded that in ***Denney***, where there are seven potentially final judgments, and it took three orders just to resolve the parties claims, still leaving open entry of the final judgment in the future.

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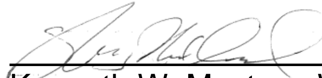
[4] The appellate court states "even if the trial court's order granting attorney fees was characterized as a motion to reconsider, the motion was neither granted nor timely." Op. at 16. A court order cannot be a party's motion. It appears the court was referring to Brenia's motion challenging the court's findings on fees. *See* CP 13673-80.

CONCLUSION

This Court should accept review to enlarge time under ***Denney***, and/or hold that Brenia's appeal is timely, where the trial court could not, so did not, dismiss claims that were not before it on summary judgment.

RESPECTFULLY SUBMITTED this 9th day of June 2021.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 9th day of June 2021 as follows:

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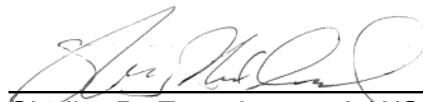

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FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LAGUNA CREEK CALIFORNIA PARTNERS, LLC, a Washington limited liability company; LAGUNA CREEK ADMINISTRATION, INC., a Washington corporation, Respondents/Cross-Appellants, v. BRENIA LAGUNA CREEK, LLC, a Washington limited liability company; BRITTINGHAM LAGUNA CREEK, LLC, a Washington limited liability company; CHANG LAGUNA CREEK, LLC, a Washington limited liability company; CHRISTENSEN LAGUNA CREEK, LLC, a Washington limited liability company; CHRISTENSEN II LAGUNA CREEK, LLC, a Washington limited liability company; DD LAGUNA CREEK, LLC, a Washington limited liability company; DECKER I LAGUNA CREEK, LLC, a Washington limited liability company; DECKER II LAGUNA CREEK, LLC, a Washington limited liability company; DREIS LAGUNA CREEK, LLC, a Washington limited liability company; DYKIER LAGUNA CREEK, LLC, a Washington limited	No. 79808-1-I DIVISION ONE UNPUBLISHED OPINION

liability company; EIGHT-ELEVEN LAGUNA CREEK, LLC, a Washington limited liability company; FOUR TWELVE NINETEENTH STREET LAGUNA CREEK, LLC, a Washington limited liability company; GOULD I LAGUNA CREEK, LLC, a Washington limited liability company; GOULD II LAGUNA CREEK, LLC, a Washington limited liability company; HO LAGUNA CREEK, LLC, a Washington limited liability company; HSIEH II LAGUNA CREEK, LLC, a Washington limited liability company; LEE I LAGUNA CREEK, LLC, a Washington limited liability company; KRUEGER I LAGUNA CREEK, LLC, a Washington limited liability company; KRUEGER II LAGUNA CREEK, LLC, a Washington limited liability company; KWAN LAGUNA CREEK, LLC, a Washington limited liability company; LARSON LAGUNA CREEK, LLC, a Washington limited liability company; LEUNG LAGUNA CREEK, LLC, a Washington limited liability company; LIPNOSKY LAGUNA CREEK, LLC, a Washington limited liability company; MARUMOTO LAGUNA CREEK, LLC, a Washington limited liability company; POON LAGUNA CREEK, LLC, a Washington limited liability company; RICHARDS LAGUNA CREEK, LLC, a Washington limited liability company; SWAN LAGUNA CREEK, LLC, a Washington limited liability company; SWEDBERG LAGUNA CREEK, LLC, a Washington limited liability company; TAYLOR G. LAGUNA CREEK LLC, a Washington limited liability company; and WHITNEY LAGUNA CREEK, LLC, a Washington limited liability company,

Appellants/Cross-Respondents,

PAUL S. BRENIA TRUST; WILLIAM BRITTINGHAM, a Florida resident; JEAN CHANG, a Taiwan resident; ELIZABETH CHRISTENSEN, a California resident; STEVE CHRISTENSEN, a California resident; M. STEVEN DAVISON, a California resident; DONALD DECKER, a California resident; ALICE DECKER, a California resident; MARTIN DREIS, a California resident; CHELSEA AND ENRICHETTA DYKIER TRUST; EIGHT ELEVEN CORP., a Virginia corporation; FOUR TWELVE NINETEENTH STREET LLC, a Virginia corporation; ANA GOULD, a Virginia resident; JEFFREY GOULD, a Virginia resident; BANG L. HO, a California resident; LEH-AN-HSIEH, a Maryland resident; JOHN R. KRUEGER and BOBE HA KRUEGER, Texas residents; ALAN KWAN, a California resident; HELEN LOUISE LARSON REVOCABLE TRUST; LIN-NAN LEE, a Maryland resident; LEUNG PROPERTY TRUST; JULIE THERON, a California resident; SUGAKO MARUMOTO, a California resident; FLORENCE AND CHRIS FAMILY TRUST; RICHARDS FAMILY TRUST; DONNA LEE SWAN REVOCABLE TRUST; SWEDBERG 1997 FAMILY TRUST; GARY and EMMA TAYLOR, California residents; and JOAN CAROLYN M. WHITNEY, a California resident,

Third-Party Plaintiffs/Appellants/
Cross-Respondents,

v.

JON A. WOOD and "JANE DOE" WOOD, Washington residents; ROGER E. KUULA and "JANE DOE" KUULA, Washington residents; and 1031 XPRESS LAGUNA CREEK, INC., a Washington corporation,

Third-Party Defendants/ Respondents/Cross-Appellants.

MANN, C.J. — A group of investors, through their single-purpose investor limited liability companies (LLCs) invested in a 160-unit apartment complex in Elk Grove, California, beginning in November 2003. In 2017, Laguna Creek California Partners, LLC, and Laguna Creek Administration, Inc., (collectively, Laguna) sued the investor LLCs (collectively, Brenia) to enforce the underlying project master LLC agreement. Brenia asserted counterclaims seeking injunctive relief, declaratory judgment and damages for breach of contract, breach of fiduciary duty, unjust enrichment, and breach of the Washington State Securities Act (WSSA), ch. 21.20 RCW. The trial court granted summary judgment and dismissed Brenia's contract claims on the merits, and Brenia's non-contract claims as time barred. The trial court subsequently awarded Laguna its attorney fees under the terms of the master LLC agreement.

Brenia did not appeal within 30 days of the trial court's orders dismissing its claims, but instead appealed after the trial court entered judgment on Laguna's motion for attorney fees. Laguna seeks dismissal of Brenia's claims on the underlying merits as untimely. Laguna cross appeals the trial court's judgment awarding attorney fees. Laguna argues that the trial court erred by not awarding fees against the individual investors, only their corresponding LLCs.

We agree with Laguna that Brenia's appeal on the merits was untimely and dismiss their appeal on those claims. We also affirm the trial court's award of attorney fees against the Brenia LLCs. Because the trial court's award of attorney fees is unclear as to whether it intended the attorney fee award to be against the LLCs and the individual investors, or just against the LLCs, we remand for clarification.

Dismissed in part, affirmed in part, and remanded for clarification of the award of attorney fees.

I. FACTS

A. The Project and Original Investment

In 2003, the American Capital Group, Inc. (ACG) developed, built, and financed The Laguna Creek Apartments (the Project), a 160-unit complex located in Elk Grove, California. The Project was originally owned by Laguna Creek Apartment Associates Partners, LLC (LC Associates). In 2003, LC Associates offered the Project for sale to individual investors as tenants in common (TIC).[1] LC Associates sought investors that were interested in benefiting from Section 1031[2] of the Internal Revenue Code. Potential investors received a 225-page confidential private placement memorandum (PPM) describing the risks, fees, documents, entities, processes, and structure of the investment.

The appellants here represent 31 of the original 39 original investors in the Project. We refer to the 31 original investors collectively as Brenia or the Brenia investors. Each of the Brenia investors received the PPM prior to investing. The PPM

[1] According to ACG in the early 2000s, TIC structures were commonly used to own, manage, and finance commercial real estate projects.

[2] Section 1031 allows investors to sell income-producing real property, then roll profits from the sale of that property into a new real estate investment without having to pay capital gain taxes.

established that the Brenia investors would have a passive role, giving the Project's manager the ability to make management and financing decisions on their behalf.

Each of the individual Brenia investors each formed single purpose LLCs and then signed a subscription agreement to acknowledge the terms of the PPM. By signing the subscription agreement, the Brenia investors represented that they were accredited investors as defined in the securities laws, had experience and expertise, had the opportunity to review investment in the Project with legal and tax counsel, understood the risk of the Project, and were purchasing the project "as is." The subscription agreement included a limited power of attorney authorizing the Project managers to execute and file on behalf of investors any necessary amendments to the original LC Associates LLC agreement and other Project Documents.

LC Associates sold approximately 98% of its interest in the Project to the Brenia investors, retaining approximately 2% of its interest in the Project. Each Brenia investor was subject to an investor operating agreement that was intended to hold each investor's interest in the project through its membership in the LC Associates LLC. The investors operating agreements contained safeguards to ensure that the individual investors remained passive investors. Safeguards included naming Laguna Creek Administration as the "Special Purpose Manager" (Manager) that had the sole authority to execute documents required to finance or refinance the project on behalf of the Investor LLCs. The Manager could not be removed without Laguna Creek Administration's authorization.

Management of the Project was originally governed by the "Master Lease Agreement." The Master Lease Agreement ran between LC Associates and 1031

Xpress Laguna Creek, LLC, an ACG affiliate. The Master Lease Agreement identified LC Associates as the "Landlord" and 1031 Xpress Laguna Creek as the "Master Tenant."

The Brenia investors were also subject to an option to purchase. The option to purchase granted the Master Tenant an option to purchase the Project at fair market value beginning November 21, 2008. It also allowed the Master Tenant to purchase an individual ownership interest of a defaulting individual investor at 50 percent of fair market value.

B. Recession and Beyond

For the first few years, the Project rental income and appreciation value were consistent with projections. In 2009, a real estate crisis hit, helping precipitate the "great recession." The recession devastated real estate throughout the country, including the Project. Despite the recession, ACG took measures that prevented the Project from failing and being lost to foreclosure.

On September 8, 2009, the Manager issued a $2,324,574 capital call, stating that the Project's initial lender required return of overpayments and advanced cash payments. All Brenia investors answered this capital call.

In 2014, the Project's initial financing was scheduled to come due, requiring ACG obtain a source of permanent financing. In addition to the real estate market, the recession affected the lending market as well. Notably, lending institutions were hesitant to issue loans to TIC structured projects due to a higher default rate. As a result, in 2012 the Manager proposed refinancing the project by consolidating the TIC interests into a single LLC.

Prior to consolidating the TIC interests into a single LLC, the Manager sent notice and consent authorizations to the Brenia investors. Ninety-five percent of investors approved the conversion, five percent did not return their ballots, and none voted against the conversion. Following this vote, the Manager formed Laguna Creek California Partners, LLC (the Master LLC), and its corresponding LLC agreement (the Master LLC Agreement). The Master LLC Agreement converted the former TIC interests into a percentage ownership of the Master LLC. The Master LLC Agreement maintained that investors had a passive role, and decisions to sell were limited to an up or down vote that must achieve approval by members meeting 51 percent ownership interests. The Master LLC Agreement also reaffirmed primary provisions of the Master Lease and option to purchase. On December 13, 2013, the Manager refinanced the Project.

In 2016, the Manager decided to sell the Project. It sent out a notice of sale and a consent authorization. Investors representing 67.1% of ownership approved the sale. The remaining investors did not return their authorization. No member voted against the sale.

In 2015, the Project began having water intrusion issues. During the winter of 2016-17, the Manager updated and obtained bids for necessary repairs to the roof, stairway, and individual units, informing the Brenia investors on March 20, 2017.

On April 21, 2017, presumably unsatisfied with the Manager’s performance, Brenia began a resolution to replace the Manager and revoke their consents to sell.

C. Procedural History

On April 24, 2017, the Master LLC and the Manager (collectively, Laguna) sued Brenia for the breach of the Master LLC Agreement. On May 2, 2017, the Manager issued a second capital call in order to address the repairs stemming from water intrusion. Three of the Brenia investors did not answer the capital call, so the Manager exercised the Purchase Option on their ownership interests.

On June 23, 2017, the trial court granted Laguna a preliminary injunction prohibiting Brenia from replacing the Manager, affirming the validity of the capital call for repairs, and barring Brenia from rescinding their consents to sell.

On September 11, 2017, Brenia amended their answer, adding eight counter claims including: injunctive and declaratory relief, an accounting under the Project Documents, damages for breach of the Master LLC Agreement, breach of fiduciary duty, unjust enrichment, violation of the WSSA, and fraud.

Laguna's litigation costs began to accrue, increasing the Project's overall operating expenses. With cash reserves low, the Manager issued a third capital call of $1 million on January 18, 2018, in order to create a reserve for debt services. The Brenia investors did not pay this capital call. As a result, Laguna exercised its purchase option and the purchased the Brenia investors' ownership interests in the Master LLC.

On March 30, 2018, the trial court granted partial summary judgment in favor of Laguna. The court determined that Laguna was entitled to declaratory judgment that Brenia had no right to remove the Manager and that Laguna had the right to sell the Project under the terms of the Master LLC agreement and executed consent to sell. In doing so, the court affirmed the Brenia investor's consent to sell and held that the

Brenia investors had breached the subscription agreements, the Investor LLC agreements, the buyer acknowledgement agreement (including the master lease agreement referenced therein), and the Master LLC Agreement by seeking to remove the Manager and challenging the authority of the Manager to sell the Project pursuant to the terms of the executed consents to sell. The trial court also dismissed Brenia's first cause of action for injunctive relief and second cause of action for declaratory relief finding the second capital call valid and enforceable. Finally, the trial court determined that Brenia had abandoned and therefore dismissed their cause of action claiming Laguna breached the Master LLC Agreement. The court granted Brenia's CR 56(f) motion to continue summary judgment on their WSSA claim. Brenia moved for reconsideration. The trial court denied the reconsideration as part of its subsequent order granting Laguna summary judgment.

On June 19, 2018, Brenia again moved to amend their answer. The trial court denied the portion of the proposed amendment involving claims related to the TIC to LLC conversion, capital calls, and the consent to sell, stating:

> [such claims] cannot be resurrected through amendments or through the addition of other entities which [Brenia] knew about and now claim were acting for [API] and were known at the time of the [first] Summary Judgment Motion.

The trial court allowed Brenia to add claims relating to investments, water intrusion, and receivership, directing them to submit a proposed amended answer to allow Laguna to raise objections.

On August 14, 2018, Brenia filed their second proposed amendment, three days before Laguna's second summary judgment motion was due under the trial court's CR

56(f) order. As reflected in Brenia's redlined comparison of their June and August proposed amendments, Brenia changed almost none of the alleged facts and struck only one of the causes of action proposed in June. Laguna opposed the motion to amend, and concurrently moved to dismiss all of Brenia's "counterclaims and third party claims," that had not previously been dismissed, including those asserted in the proposed amendment.

On October 26, 2018, the trial court granted Laguna's second motion for summary judgment, determining:

- Brenia's securities and fraud claims under the WSSA were barred by a plain reading of the WSSA and the parties' relevant contracts and dismissed with prejudice.
- Because it had previously confirmed the TIC to LLC conversion was valid, Brenia's challenge to the conversion or Master LLC's ability to act were dismissed with prejudice.
- Because it previously confirmed the second capital call was enforceable, and Laguna's enforcement of the third capital call, Brenia's challenges to the second and third capital calls were dismissed with prejudice.
- Brenia's remaining fraud, breach of fiduciary duty, and improper maintenance claims were time barred and dismissed with prejudice.
- By approving the as is provision in the TIC purchase and sale, Brenia's claims for construction defects were waived and dismissed with prejudice.

In summary, the trial court determined that “[b]ecause there is no genuine issue of fact regarding any of [Brenia’s] claims, [Laguna is] entitled to judgment as a matter of law on all [Brenia’s] claims, and all of [Brenia’s] claims are dismissed with prejudice.”

The trial court also expressly stated that it assumed that Brenia’s proposed second amended counterclaims and third party claims were approved in part and before the court on summary judgment. The court explained that the amendment “continues to be problematic, continuing to try and bring back in already dismissed or abandoned claims.” The trial court rejected as “not the case,” Brenia’s contention that “the claims they bring now are [based on] different, more recent acts” and found they “are obviously the very same claims, the very same course of conduct.”[3] The court denied Brenia’s motion to add three claims of its 14 claims and confirmed “the remainder of the [second amended] complaint is deemed filed without those claims and was considered for purposes of summary judgment.”

Finally, the trial court determined that Laguna was the “substantially prevailing party in this lawsuit” and that Laguna was entitled to an award of attorney fees and costs “to be determined after further submission of proof and argument by the parties as to the amount of those fees and costs.”

Brenia did not seek reconsideration, argue that the trial court left claims unaddressed, or appeal the October 26, 2018, order granting summary judgment and dismissing all of their claims with prejudice.

[3] The trial court also noted Brenia’s counsel had a “regular habit of violating or ignoring local (and state) rules on filing, page limits, time deadlines, etc. and asking for forgiveness later, or not at all.”

On November 30, 2018, Laguna moved for an award of attorney fees as authorized by the October 26, 2018, order, stating that they had prevailed on all of their claims and defenses, and that they would be concurrently moving to dismiss their two remaining claims: damages and Brenia's breaches of contract. On December 12, 2018, Laguna filed its CR 41 motion for voluntary dismissal without prejudice, which the trial court granted leaving no further claims by either party remaining. Brenia did not oppose the CR 41 motion.

On December 12, 2018, Brenia opposed Laguna's fee motion. Brenia's opposition acknowledged that on October 26, 2018, the trial court "deemed [Laguna] the prevailing party in this lawsuit." On January 17, 2019, Brenia filed an opposition to Laguna's proposed findings of fact related to the fee award. In doing so, Brenia asserted for the first time that "all claims have not been adjudicated, [and] no party should be declared the prevailing party."

In March 8, 2019, the trial court entered findings of fact and conclusions of law on Laguna's motion for fees and costs, awarding $802,406.03. In doing so, the court noted that it granted Laguna's request for an award of fees in its dispositive rulings and that the "March 30, October 26, and December 12 [2018] orders together resolve and dispose entirely of all claims in this matter." The trial court also addressed Brenia's assertion that the court had not adjudicated all of Brenia's claims by stating:

> In an odd but inventive procedural move, instead of moving to reconsider the Court's [October 26, 2018] Summary Judgment Order docket no 467, [Brenia] assert, by opposition to an attorneys' fees motion, that [Brenia has] eleven causes of actions left to pursue.
>
> The Order docket no. 467 clearly states, on pages 7/19, and all of [Brenia's] remaining claims are dismissed with prejudice. If there was

> some question about the meaning of the very clear language, Defendants should have raised it. It has now been four months and obviously, the deadline under the rules has long passed. To the extent this legal position is a Motion to Reconsider, the Motion is Denied.

On March 26, 2019, the trial court entered a judgment for attorney fees and costs. On March 29, 2019, Brenia filed this appeal.[4] Laguna cross appealed.

On April 22, 2019, Laguna filed a motion to dismiss for an untimely filing of appeal. Brenia subsequently filed a motion to extend time to file. On June 14, 2019, a court commissioner referred these motions to the panel for resolution.

II. ANALYSIS

A. Timeliness of Appeal

We first consider Laguna's motion to dismiss and Brenia's alternative motion to extend time to file. We grant Laguna's motion to dismiss and deny Brenia's motion to extend time to file.

"[A] notice of appeal must be filed within . . . 30 days after entry of the decision of the trial court that the party filing the notice wants reviewed" or within 30 days of the entry of an order deciding a "timely . . . motion for reconsideration or new trial under CR 59." RAP 5.2(a), (e). An untimely motion for reconsideration is ineffective to challenge a judgment on the merits. Schaefco v. Columbia River Gorge Comm'n, 121 Wn.2d 366,

[4] Brenia filed its notice appealing orders spanning nearly two years including: (1) the March 26, 2019 Judgment Against Defendants for Attorneys' Fees and Costs; (2) the March 8, 2019 Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Fees and Costs and Defendants' Motion for Fees and Costs; (3) December 12, 2018 Order Granting Plaintiffs' and Third-Party Defendants' CR 41(a)(1)(b) Motion for Mandatory Dismissal of Remaining Claims Without Prejudice; (4) the October 26, 2018 Order Denying Defendants' CR 56(f) Motion and Granting Plaintiffs' Second Summary Judgment Motion; (5) the March 30, 2018 Omnibus Order Concerning Plaintiffs' Motion for Partial Summary Judgment, Defendants' Motion for Stay Pursuant to CR 56(f), and Related Motions; (6) June 23, 2017 Order Granting Plaintiffs' Motion for Preliminary Injunction; and (7) "all orders and decisions that prejudicially affect the listed orders."

367-68, 849 P.2d 1225 (1993); FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 190 Wn.2d 281, 291, 413 P.3d 1 (2018).

Read together, RAP 2.2(a)(1) and RAP 2.4(b) require an appeal of a final judgment on the merits, even where the judgment allows for a subsequent award of attorney fees. As this court explained in Carrara, LLC v. Ron & E Enters., 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007):

> RAP 2.2(a)(1) allows a party to appeal a final judgment of any proceedings, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. This notice must be filed within 30 days after the entry of the decision of the trial court. RAP 5.2(a). RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision, but makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e. it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on that decision. RAP 2.4(b); 2A Karl B. Tegland, *Washington Practice: Rules Practice RAP* 2.4 at 183 (6th ed. 2004). . . . “The practical lesson is clear—counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending.” 2A Tegland, supra, at 181.

See also Bushong v. Wilsbach, 151 Wn. App. 373, 375, 213 P.3d 42 (2009).

The final judgment for purposes of RAP 2.2(a)(1) is the trial 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.’” State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003) (quoting BLACK’S LAW DICTIONARY 857 (7th ed. 1999)).

“The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal. . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under [RAP

18.8].” RAP 18.8(b). The rigorous test for extension under 18.8(b) has rarely been satisfied since the effective date of the Rules of Appellate Procedure on July 1, 1976. See Reichelt v. Raymark Industries, Inc., 52 Wn. App. 763, 765, 764 P.2d 653 (1988).

Here, appeals of all Brenia’s claims save the trial court’s award of attorney fees are untimely. The bulk of Brenia’s claim—claims of which they seek this court’s review—were disposed of in the October 26, 2018, order granting summary judgment. The order explicitly stated “because there is no genuine issue of fact regarding any of Defendants’ claims, Plaintiffs are entitled to judgment as a matter of law on all Defendants’ claims, and all of Defendants’ claims are dismissed with prejudice.” The final claims, belonging to Laguna, were disposed of in the December 12, 2018 order granting mandatory dismissal of remaining claims without prejudice. Therefore, the mandatory dismissal of remaining claims was the final judgment for purposes of RAP 2.2(a)(1). Brenia did not timely appeal this order. See Carrara, 137 Wn. App. at 826 (order granting summary judgment and dismissing defendant’s claims with prejudice is a final appealable order).

Further, even if the trial court’s order granting attorney fees was characterized as a motion to reconsider, the motion was neither granted nor timely. Except for the judgment awarding attorney fees, none of Brenia’s claims have been timely-appealed. This judgment does not give Brenia an opportunity to revive their prior claims. Per RAP 2.4(b), an appeal of a decision awarding attorney fees cannot be used to review previously-entered decisions. See Carrara, 137 Wn. App at 825-26; Bushong, 151 Wn. App. at 175.

Brenia relies on Denney v. City of Richland, 195 Wn.2d 649, 462 P.2d 842 (2020), to argue that the trial court's orders created confusion, and as a result we should use our RAP 18.8(b) discretion to extend time to file. In Denney, a summary judgment order directed the prevailing party to present a judgment pursuant to CR 54. Denney, 195 Wn.2d at 652. Denney incorrectly believed the proposed judgment pursuant to CR 54, rather than the order for summary judgment, to be the final appealable order. Denney, 195 Wn.2d at 652. As a result, he missed the deadline for appeal. Denney, 195 Wn.2d at 652. The Washington Supreme Court reversed, holding that Denney reasonably misunderstood the judgment pursuant to CR 54 as being the final order, justifying an extension under RAP 18.8(b). Denney, 195 Wn.2d at 659.

Brenia does not benefit from the same confusion found in Denney. To the contrary, the trial court's October summary judgment order in plain language dismissed all of Brenia's claims with prejudice, and trial court's December order in plain language dismissed all of Laguna's remaining claims with prejudice. Nothing in either order directed entry of a separate final judgment. Indeed, Brenia conceded in its opposition to Laguna's motion for attorney fees and costs that Laguna had prevailed. It was not until the trial court's judgment awarding attorney fees that Brenia changed course and asserted there were unsettled claims. This assertion came months too late.

Brenia's motion to extend time to file does not consist of "extraordinary circumstances," nor would granting the motion prevent a "gross miscarriage of justice" justifying an extension of time under 18.8(b). Brenia simply appealed the lower court's dispositions too late.

An appeal must be filed within 30 days of the decision a party wants the appellate court to review. Brenia failed to appeal multiple orders, including the order explicitly incorporating their amended pleadings. Brenia again tries to bring claims that were either dismissed or have since become untimely. They do not demonstrate conditions to overcome the rigorous test of extension put forth by RAP 18.8(b).

B. Attorney Fees

Brenia did timely appeal the trial court's award of attorney fees. Brenia argues that the trial court erred in its determination of attorney fees. Laguna cross appeals and argues that the trial court erred by awarding fees only against the Investor LLCs, and not the investors in their individual capacities as well. We disagree that the trial court erred in its determination of the fee award, but remand to the trial court for further explanation of why fees were not also awarded against the investors in their individual capacities.

1. Reasonableness of Award

Appellate courts apply a two-part standard of review to a trial court's award or denial of attorney fees: (1) they review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) they review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fees award for an abuse of discretion. Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

Courts may award attorney fees only when authorized by a contract provision, a statute, or a recognized ground in equity. King County v. Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper, JV, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017).

Here, the trial court recognized the legal basis for awarding Laguna its attorney fees was in the Project Documents. In its findings of fact and conclusions of law, the trial court directly quotes the relevant attorney fees provisions in the Subscription Agreement, the individual LLC operating agreements, the Buyer Acknowledgment agreement, and the Master LLC Agreement post-TIC to LLC conversion. These are appropriate bases to award attorney fees.

Trial courts have broad discretion when determining the amount of attorney fees awarded. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). In calculating these fees, the trial court must supply findings of fact and conclusions of law sufficient to permit this court to determine why the trial court awarded the amount in question. SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 311 P.3d 40 (2014).

The trial court properly exercised its discretion in determining the amount of attorney fees to award. In addition to identifying relevant clauses in the Project Documents justifying a fee award, the trial court properly examined the rates charged by each attorney and the hours billed. The court determined that the rates billed to Laguna were at or even sometimes below the market standard. In addition, the court recognized the complexity of the case, and the difficulty Brenia imposed with their multiple motions and abusive discovery tactics. As a result, the court's determination of fees was not an abuse of discretion.

2. Liability of Individual Investors

Laguna argues that the trial court should have awarded fees against not only the Investor LLCs, but the individual investors as well. It is unclear why the trial court did not award fees against the individual investors, meriting clarification.

Laguna asserts that the trial court found that the individual investors breached their subscription agreements, and that their claims lacked merit, thereby warranting an award of fees against the individual investors as well as the Investor LLCs. Oddly enough, both Laguna and Brenia appear to have at one point agreed on this issue. In Laguna's motion for fees, they requested fees against investors for the same reasons they argue on appeal. In Brenia's response, they did not contend that fees should not be awarded against the investors. Rather, Brenia's response conceded that fees should be awarded against both the investors and the Investor LLCs, but argues for a particular apportionment of the fees between the two. Laguna identified this concession in their reply.

In the trial court's findings of fact and conclusions of law on Laguna's petition for fees and costs, it stated:

> The award of attorneys' fees and costs is governed by a series of contracts arising from Defendants' and Third-Party Plaintiffs' investment in [the Project] . . . Several of those documents require an award of attorneys' fees and costs to the substantially prevailing party in this litigation. Because the Plaintiffs are the substantially prevailing parties, an award of attorneys' fees and costs is required under the relevant contracts against both the Third Party Plaintiffs—that is, the individuals who invested in the [Project]—and the Defendants—that is, the [Investor LLCs] formed by each of the individual investors in the Project as the vehicle for their investments.

In sum, both the investors and Investor LLCs are liable for attorney fees under the Project Documents.

The court further elaborated on the topic, stating:

> More specifically, before they were permitted to invest in the Project, all Third-Party Plaintiffs voluntarily executed a Subscription Agreement in which they made a number of specific representations and warranties.

> . . . .
>
> [T]o the extent the Third-Party Plaintiffs made any misrepresentation or untrue statement in the Subscription Agreement, they are obligated to pay Plaintiffs' attorneys' fees and costs under Section 4(c) of the Subscription Agreement. It is uncontested that Plaintiffs would not have agreed to enter into this investment with Third-Party Plaintiffs if Plaintiffs knew that Third-Party Plaintiffs' representation and warranties contained in the Subscription Agreement were untrue.

The trial court bolstered the case against individual investor's liability for attorney fees.

Following these findings of fact, the court stated that "after long consideration, [it concluded] that it ruled solely on the statute of limitations arguments and made no findings on the Third-Party Plaintiffs thus the fees are awarded only against the Defendants." This statement was in direct contradiction to the court's earlier findings, and merits further explanation.

Because the trial court found that the Project Documents were the legal grounds for awarding attorney fees, and that fees should be awarded against both the investors and Investor LLCs, it subsequently abused its discretion by failing to properly explain why it contradicted its earlier findings. We remand for determination of fees consistent with its opinion.

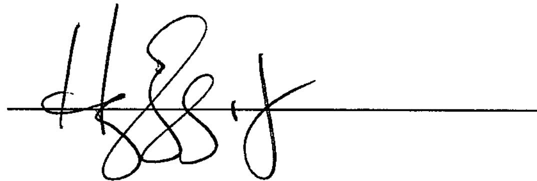
C. Attorney Fees on Appeal

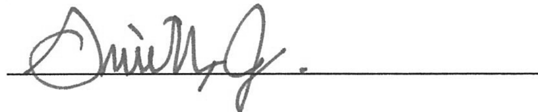
Laguna requests attorney fees on appeal under RAP 18.1. Under RAP 18.1, a party may request reasonable attorney fees on appeal if an applicable law grants the party the right to recover. Laguna requests attorney fees based on the provisions in the Project Documents that awarded fees at trial. We generally recognize a provision in a contract allowing attorney fees to include fees on appeal as well as at trial. Edmundson

v. Bank of America, 194 Wn. App. 920, 932-33, 378 P.3d 272 (2016). Because Laguna substantially prevailed, we award attorney fees on appeal subject to compliance with RAP 18.1.

Dismissed in part, affirmed in part, and remanded for determination of attorney fees consistent with this opinion.

WE CONCUR:





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