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STATE OF WASHINGTON
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NO. 50922-9-II

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

MANDON FOLEY,

Appellant,

v.

JIM BAYS HOMES, LLC and AUSTIN SUMMERS, LLC,

Respondents

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The instant appeal seeks to reverse the Trial Court's Amended Order on Defendant's Motion for an Award of Attorney Fees & Costs entered in Pierce County Superior Court Cause No. 16-2-06458-8 on September 15, 2017 (hereinafter the "Amended Order for Fees") in favor of Defendant Jim Bays Homes, LLC (hereinafter "JBH").¹ CP 336-340. The Amended Order for Fees followed the Trial Court's Findings of Fact, Conclusions of Law and Order on JBH's Motion to Dismiss and For Terms entered on April 21, 2017 (hereinafter "Order Denying Fees") wherein the Trial Court granted partial dismissal (of JBH's surety) but denied JBH's request for attorney's and costs under CR 11 and RCW 4.84.185. CP 102 and 105-106. The Trial Court entered the Amended Order for Fees as a final judgment. CP 338 at Para. 5.

After it unsuccessfully moved the Trial Court to reconsider its request for an award of attorney's fees and costs incurred in obtaining a dismissal of its surety, on June 1, 2017, JBH filed its Motion for an Award of Attorney Fees & Costs Pursuant to RCW 18.27.040(6). CP 144 and 145-

¹ Defendants Jim Bays Homes, LLC and Austin Summers, LLC are both owned and controlled by Jim Bays. Accordingly, for purposes of this Opening Brief, the term "JBH" collectively refers to both Defendants.

196. The motion was JBH's third attempt at recovering attorney's fees and costs.¹

Here, the statutory provision at issue, RCW 18.27.040(6), provides:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, *for breach of contract by a party to the construction contract* involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.

(Emphasis Added.)

Thus, in order to recover attorney's fees and costs under RCW 18.27.040(6), one has to (a) be the prevailing party (b) in an action under RCW 18.27 (c) for breach of contract and (d) be a party to the construction contract involving a residential homeowner. Here, JBH did not (and cannot) establish all the statutorily required requisites in (a)-(d). In particular, JBH cannot establish that either Mr. Foley or it filed a breach of contract claim. On the one hand, Mr. Foley's Verified Complaint does not contain a breach of contract claim or allegations that he was party to a construction contract.

¹ JBH initially sought fees and costs under CR 11 and RCW 4.84.185 on its March 17, 2017 Motion to Dismiss and For Terms. CP at 22-54. Then, on April 27, 2017, JBH sought reconsideration of the Trial Court's denial of its request for fees and costs. CP 111-127. Finally, after the Trial Court denied its Motion for Reconsideration, on June 1, 2017, JBH filed its Motion for an Award of Attorney Fees & Costs Pursuant to RCW 18.27.040(6).

CP 1-8 and 82-83. On the other, JBH did not assert any counterclaims. Therefore, the parties to this suit were not party to a residential construction contract, nor were they prosecuting or defending any breach of said contract. Without a breach of contract action, RCW 18.27.040(6) is inapplicable in the instant case and, therefore, JBH cannot recover attorney's fees and costs for obtaining partial dismissal of its surety.

For the reasons set forth herein, this Court should reverse the Trial Court's Amended Order for Fees.

II. ASSIGNMENTS OF ERROR

1. Finding of Fact 1: The Trial Court erred by finding that "...\$14,322.50... is a reasonable sum based upon the lodestar method." CP 337.
2. Finding of Fact 2: The Trial Court erred by finding that JBH "[was] the prevailing party on the Bond Claim action per RCW 18.27.040(6)." *Id.*
3. Finding of Fact 3: The Trial Court erred by finding that the bond claim was separate and distinct. *Id.* 337-338.
4. Finding of Fact 5 & 6: The Trial Court erred by finding that "additional Findings" support "no just reason for delay" in entering final judgment. *Id.* 338-339.

5. Conclusion of Law 1: The trial court erred by concluding JBH was “... the prevailing party in the bond claim brought by Plaintiff against it [and] is entitled to an award of its attorney fees and costs pursuant to RCW 18.27.040(6).”
6. Conclusion of Law 2: The trial court erred by concluding that JBH “incurred the amount of \$14,322.50 as reasonable attorney fees.”
7. Conclusion of Law 3: The trial court erred by concluding that, pursuant to CR 54(b), there is no just reason for delay in entry of the Amended Order for Fees as a final judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err in awarding JBH attorney’s fees and costs under RCW 18.27.040(6) when Mr. Foley’s Complaint did not contain a breach of contract claim or otherwise allege a contract with JBH? *Answer: Yes*
2. Did the Trial Court err by awarding JBH attorney’s fees and costs based upon a new argument raised for the first time as part of its Motion for Reconsideration and Motion for An Award of Attorney’s Fees and Costs? *Answer: Yes*

3. Did the Trial Court err by dismissing Mr. Foley's Claim Against Bond when RCW Ch. 18.27 is designed to protect the public and Mr. Foley is a member of the public? *Answer: Yes*
4. Did the Trial Court err by awarding JBH attorney's fees and costs as the prevailing party under RCW 18.27.040(6) when it concluded Mr. Foley was not a member of the class of persons or entities intended to be protected under the provisions of the Contractor Registration Statute, RCW Ch. 18.27 because there was no privity of contract between the parties? *Answer: Yes*
8. Did the Trial Court err by finding that the bond claim was separate and distinct? *Answer: Yes.*
9. Did the Trial Court err by concluding that JBH "incurred the amount of \$14,322.50 as reasonable attorney fees"? *Answer: Yes.*
5. Did the Trial Court err by concluding that, pursuant to CR 54(b), there is no just reason for delay in entry of the Amended Order for Fees as a final judgment? *Answer: Yes*
6. Did the Trial Court err by concluding that JBH was the prevailing party when Mr. Foley may ultimately prevail in the matter?
Answer: Yes

IV. STATEMENT OF THE CASE

The gravamen of this case concerns Mr. Foley's allegations of trespass and timber trespass committed by JBH during summer 2015. CP 1-8. In particular, after obtaining a Record of Survey during the development of its real property located at the common address of 5623 76th Avenue East, Puyallup, WA (hereinafter the "Bays Property"), JBH unlawfully felled Mr. Foley's trees and caused damage to his real property and improvements located at the adjacent common address of 5707 76th Avenue East, Puyallup, WA (hereinafter the "Foley Property"). *Id.*

Mr. Foley's claims did not include any allegations of a construction contract between the parties. *Id.* Likewise, Mr. Foley did not allege or claim any breach of contract between the parties. *Id.* Instead, Mr. Foley included a claim against JBH's bond under RCW 18.27 *et seq.* as a member of the public to be afforded protection for "...unreliable, fraudulent, financially irresponsible, or incompetent contractors." *See* RCW 18.27.140.¹

¹ RCW 18.27.140 reads: **Purpose.** It is the purpose of this chapter to *afford protection to the public including all persons*, firms, and corporations furnishing labor, materials, or equipment to a contractor *from unreliable, fraudulent, financially irresponsible, or incompetent contractor.* (Emphasis Added.)

After it admitted that it felled and removed the trees and despite Mr. Foley's efforts to amicably resolve the matter, JBH refused to engage in further communications with Mr. Foley. *Id.* at 4. Accordingly, through his counsel, Mr. Foley arranged for service of his Summons and Complaint via Acceptance of Service by JBH's counsel on January 7, 2016. CP 36-37. With the matter left unresolved, Mr. Foley sought redress with the court and filed his Summons and Verified Complaint for Timber Trespass and Damages on March 23, 2016. *Id.* at 1-8, 9-11, and 82-83. On March 30, 2016, JBH filed its Answer and Affirmative Defenses. CP 12-17. As part of its Answer, JBH plead that "...RCW 18.27.040 is not applicable to the facts and claims in this case." *Id.* at 13:2. Further, JBH's answer did not cite RCW 18.27.040 as a basis for any request for an award of fees and costs, and, instead, solely pled RCW 4.84.185 and/or Superior Court Civil Rule 11. *Id.* 16 at Para. 2.2.11.

On August 5, 2016, Mr. Foley filed a Confirmation of Joinder. CP 18-20. On March 17, 2017, JBH filed its Motion to Dismiss Bond Claim, Bonding Company and For Terms (hereinafter "Motion to Dismiss"). CP 22-54.¹ As with its Answer, JBH's Motion to Dismiss only cited RCW

¹ JBH originally filed its Motion to Dismiss on a 6-day calendar, but obliged Mr. Foley's request to renote the same on the basis that "matters outside the pleading [were] presented" and, as such, required a CR 56 hearing date. CP 56 at footnote 1.

4.84.185 and CR 11 as a basis for its attorney's fees and costs request. *Id.* 7:20. Its Motion to Dismiss did not mention RCW 18.27 as a basis for fees and costs a single time. CP 22-54. Likewise, JBH did not raise RCW 18.27 as an argument for attorney's fees in its April 17, 2017 Reply on the Motion to Dismiss. CP 85-89. Mr. Foley timely filed his Response to JBH's Motion to Dismiss on April 11, 2017. CP 56-67. Mr. Foley's Response was supported by the Declaration of Chad Ahrens. CP 68-80.

At the hearing on the Motion to Dismiss on April 21, 2017, after having been fully briefed and hearing arguments from counsel, the Trial Court entered its Order Denying Fees ruling that JBH's surety, Lexon Insurance Company, should be dismissed. CP 102-107. However, the Trial Court further ruled that, while his argument may have been "novel," Mr. Foley's claim against the surety bond was not frivolous, and, that, accordingly, JBH's claim for an award for attorney's fees and costs for frivolous claims was denied.¹

On April 27, 2017, JBH filed its Motion for Reconsideration on the Trial Court's Order Denying Fees. CP 110-127. For the first time, as part of its Motion for Reconsideration, after clearly pleading that the parties

¹ JBH's counsel, Klaus Snyder, did not appear on behalf of Defendant Lexon Insurance Company until April 17, 2017 – after JBH filed its Motion to Dismiss and just four (4) calendar days prior to the hearing on the same.

were not subject to a construction contract and, therefore, RCW 18.27 was inapplicable, JBH argued that it was entitled to recover attorney's fees and costs under RCW 18.27.040(6). CP 119-121. On May 3, 2017, Mr. Foley filed his Response to JBH's Motion for Reconsideration. CP 128-136. On May 22, 2017, the Trial Court denied JBH's Motion for Reconsideration on the Order Denying Fees. CP 143.

On June 1, 2017, after entry of the Order Denying Fees and having its Motion for Reconsideration denied, JBH filed its Motion for an Award of Attorney's Fees and Costs Pursuant to RCW 18.27.040(6) for hearing on June 16, 2017. CP 144-196. On June 14, 2017, Mr. Foley timely filed and served his Response to JBH's Motion. CP 197-204.¹ In his Response, Mr. Foley raised the issue that RCW 18.27.040(6) did not apply because 1) his Verified Complaint did not contain a claim for breach of contract and 2) the parties lacked privity with regard to any construction contract. CP 200. In addition, by his Response, Mr. Foley raised the issue that JBH's Motion was essentially yet another motion for consideration after the Trial Court already denied its April 27th Motion for Reconsideration. CP 202-203 and 110-127.

On June 16, 2017, the Court entered an Order granting JBH's Motion for Attorney's Fees and Costs on the sole basis of RCW

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18.27.040(6) with Findings of Fact and Conclusions of Law and the amount of the award reserved for a subsequent hearing. CP 210. On June 26, 2017, Mr. Foley timely filed his Motion for Reconsideration on the June 16th Order granting JBH's Motion for Attorney's Fees and Costs. CP at 211-217.

While Mr. Foley's Motion for Reconsideration was pending, JBH filed its Memorandum of Law In Support of JBH's Motion for Attorney's Fees and Costs on July 13, 2017. CP 218-230. JBH subsequently re-noted its Motion for July 28, 2017. CP 235. On July 26, 2017, JBH filed its Response in Opposition to Plaintiff's Motion for Reconsideration. CP 236-248. On July 27, 2017, Mr. Foley filed his Response to JBH's Motion for Reasonable Attorney's Fees & Costs. CP 249-258. That same day, the Trial Court entered an Order Denying Mr. Foley's Motion for Reconsideration. CP 271.

On August 2, 2017, JBH noted a hearing for determining fees and costs on August 11, 2017. CP 277. On August 9, 2017, JBH supplemented its prior filings by filing a Reply In Support and Declaration of Klaus O. Snyder. CP 273-289. After considering briefing and argument from the parties' respective counsel, the Trial Court entered its Order on Defendant's Motion for Attorney's Fees & Costs Pursuant to RCW 18.27.040(6)

wherein JBH was awarded \$14,322,50 in reasonable attorney's fees and \$213.00 in costs as the prevailing party. CP 290-294.

On August 31, 2017, in response to collection efforts by JBH, Mr. Foley filed his Note and Motion for Revision Pursuant to CR 54 for hearing on September 15, 2017. CP 295-300. On September 7, 2017, JBH filed its own Note and Motion to Amend Order Awarding Attorney's Fees and Costs Pursuant to CR 54. CP 301-309. Mr. Foley filed his Response to JBH's Motion to Amend on September 12, 2017. CP 310-326. JBH filed its Reply In Support of its Motion to Amend on September 14, 2017. CP 327-334. After considering briefing and argument of the parties' the Trial Court entered an Order Denying Mr. Foley's Motion for Revision and entered the Amended Order on Fees. CP 335 and 336-340, respectively.

On September 25, 2017, Mr. Foley initiated the instant appeal by filing his Notice of Appeal with Fee. This Court issued a Perfection Notice on October 5, 2017. Subsequently, Mr. Foley filed both the Designation of Clerk's Papers and Statement of Arrangements on December 7, 2017.

Presently, pursuant to the Mandatory Arbitration Rules, the parties have an arbitration hearing scheduled for July 31, 2018 regarding the remaining claims in the matter.

V. ARGUMENT

This Court should reverse the Trial Court's Amended Order on Fees.

A. Standards Of Review.

Here, Mr. Foley appeals the Trial Court's Findings of Fact and Conclusions of Law as set forth in the Amended Order on Fees. An appellate court reviews a "trial court's conclusions of law de novo." *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013). By contrast, an appellate court reviews challenged findings of fact under a substantial evidence standard. *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 342. "Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 341-42 (quotes omitted). The substantial evidence standard "views reasonable inferences in the light most favorable to the prevailing party." *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 342. An appellate court "may affirm on any ground supported by the record." *Hoover v. Warner*, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015), *review denied*, 185 Wn.2d 1004, 366 P.3d 1243 (2016).

Further, "[a]n appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion." *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013). "Discretion is

abused when the trial court exercises it on untenable grounds or for untenable reasons.” *Berryman*, 177 Wn. App. at 657.

Next, Mr. Foley’s appeal of the Trial Court’s Amended Order on Fees necessarily implicates several prior orders that led up to the Amended Order on Fees including the Order Denying Fees on April 21, 2017; the Order Granting Attorney’s Fees on Costs on June 16, 2017; the Order Denying Mr. Foley’s Motion for Reconsideration on July 27, 2017; and the Order on Defendant’s Motion for Fees & Cost Pursuant to RCW 18.27.040(6) on August 11, 2017. CP 102-107; 210; 271; and 290-294, respectively. In addition, the Amended Order on Fees also implicates the Trial Court’s Order Denying Mr. Foley’s Motion for Revision on September 15, 2017 – the same day the Amended Order on Fees was entered. CP 210. Since Mr. Foley’s Motion for Reconsideration was denied by the Trial Court, this Court must examine the Trial Court’s decision since it involved the award of fees and costs. CP 271.

Even if an order ruling is not specifically designated in Mr. Foley’s Notice of Appeal, this Court may review it if “(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made before the appellate court accepts review.” RAP 2.4(b). This rule ensures that all adverse interlocutory decisions—rulings on evidence, decisions regarding jury

instructions, and so forth—will be reviewable in an appeal from the final judgment, and that the failure to appeal prior appealable orders will not foreclose review of the orders upon appeal from the final judgment. See *Fox v. Sunmaster Products, Inc.*, 115 Wash. 2d 498, 798 P.2d 808 (1990)(further citation omitted). An appeal from a final judgment brings up most pretrial orders. *Behavioral Scis. Inst. v. Great-W. Life*, 84 Wn. App. 863, 870, 930 P.2d 933, 937 (1997) citing *Wlasiuk v. Whirlpool Corp.*, 76 Wash.App. 250, 884 P.2d 13 (1994). In the present case, the previous orders were prejudicially affected by the final order because JHB’s entitlement to relief under the Amended Order for Fees was based on the Trial Court’s earlier rulings cited above. Thus, this Court’s review of all underlying orders is proper. *Behavioral Scis. Inst.*, 84 Wn. App. 863, 870, 930 P.2d 933, 937 (1997).

An appellate court reviews a trial court’s denial of a motion for reconsideration for an abuse of discretion. See *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283, 290 (2008). “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” *Id.* (citing *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987)). Put another way, a trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wash.App.

896, 906, 977 P.2d 639 (1999). As set forth below, Defendant Jim Bays has failed to establish that this Court abused its discretion in rendering its decision on April 21, 2107.

B. The Trial Court Cannot Award Fees & Costs Without An Applicable Contractual or Statutory Provision

The general rule in Washington, commonly referred to as the American rule, is that each party in a civil action will pay its own attorney fees and costs. See *In re Impoundment of Chevrolet Truck*, 148 Wash.2d 145, 160, 60 P.3d 53 (2002); *Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). This general rule can be modified by contract, statute, or a recognized ground in equity. *Chevrolet Truck*, 148 Wash.2d at 160, 60 P.3d 53; *Mellor*, 100 Wash.2d at 649, 673 P.2d 610. According to one principle of statutory construction, statutes in derogation of the common law must be construed narrowly. See, e.g., *Price v. Kitsap Transit*, 125 Wash.2d 456, 463, 886 P.2d 556 (1994) (“a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it”); see also *Lumberman's of Wash., Inc. v.*, 89 Wash.App. 283, 286, 949 P.2d 382 (1997).

Thus, without a fees and costs provision, the Trial Court cannot award attorney's fees and costs. In the present case, Mr. Foley did not allege the existence of a contract between himself and JBH. CP 1-8.

Further, the parties do not dispute that there was, in fact, no construction contract between them. Verbatim Report of Proceeding (“VRP”) 4/21/17 at 16:13-16; 20:6-10; and 30:5-9. Without the allegation of a construction contract between the parties and corresponding allegation of breach, the Trial Court could not award fees and costs to JBH under RCW 18.27.040(6) – as it requires both elements to be present.

C. The Trial Court Erred in Awarding JBH Fees & Costs Under RCW 18.27.040(6) When Foley’s Complaint Did Not Allege A Construction Contract or Breach

The Trial Court erred when it awarded JBH attorney’s fees and costs pursuant to RCW 18.27.040(6) where 1) the statute requires the allegations (a) that Mr. Foley was party to a construction contract with JBH and (b) that JBH breached that contract and 2) Mr. Foley’s Complaint contained no such allegation(s). CP 1-8.

With respect to pleadings, the civil rules require only “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.” CR 8(a).

Here, the statutory provision at issue, RCW 18.27.040(6), provides:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, ***for breach of contract by a party to the construction contract*** involving a

residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.

(Emphasis Added.)

Thus, in order to recover attorney's fees and costs by statute one has to (a) be the prevailing party (b) in an action under RCW 18.27 (c) for breach of contract and (d) be a party to the construction contract involving a residential homeowner. Defendant JBH did not (and cannot) establish all the statutorily required requisites in (a)-(d). In particular, Defendant JBH cannot establish that either Mr. Foley or it filed a breach of contract claim (or, in the case of JBH, a counterclaim). On the one hand, Mr. Foley's Verified Complaint does not contain a breach of contract claim or allegations that he was party to a construction contract. CP 1-8. On the other, JBH did not file any counterclaims. *See* court file generally; VRP 7:2-5; and VRP 8/11/17 at 12:4-6. It is undisputed that the parties to this suit were not party to a residential construction contract, nor were they prosecuting or defending a breach of said contract. Without a breach of contract action, RCW 18.27.040(6) is inapplicable in the instant case.

Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. *Lewis v. Bell*, 45 Wash.App. 192, 197, 724 P.2d 425 (1986).

The purpose of this “notice pleading” rule is to “facilitate a proper decision on the merits.” *Stansfield v. Douglas County*, 146 Wash.2d 116, 123, 43 P.3d 498 (2002) (internal quotation marks omitted). Although inexpert pleading is permitted, insufficient pleading is not. *Lewis*, 45 Wash.App. at 197, 724 P.2d 425. “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Lewis*, 45 Wash.App. at 197, 724 P.2d 425 (citation omitted); *Molloy v. City of Bellevue*, 71 Wash.App. 382, 385, 859 P.2d 613 (1993) (complaint must apprise defendant of the nature of plaintiff’s claims and legal grounds upon which claim rests).

Even under Washington State’s liberal notice pleading rules, Mr. Foley’s Verified Complaint does not alleged or bring a breach of contract action. CP 1-8. Washington is a *notice* pleading state and merely requires a simple, concise statement of the claim and the relief sought. CR 8(a). Complaints failing to give the opposing party fair notice of the claim asserted are insufficient. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wash.App. 18, 26, 974 P.2d 847 (1999) (a party who fails to plead a cause of action “cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along”); *Lundberg v. Coleman*, 115 Wash.App. 172, 180, 60 P.3d 595 (2002). Here, Mr. Foley’s Verified Complaint does not allege a breach of contract action or

that he was a party to a residential construction contract. CP 1-8. Without such allegations, JBH cannot be found to defend claims of being party to a construction contract or breach of that contract claim and, without those claims, cannot be deemed a prevailing party under RCW 18.27.040(6).

D. The Trial Court Erred In Determining That Mr. Foley Is Not Of The Class of Persons Protected by RCW 18.27 et seq.

Statutory interpretation is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002) (citing *State v. Breazeale*, 144 Wash.2d 829, 837, 31 P.3d 1155 (2001); *State v. J.M.*, 144 Wash.2d 472, 480, 28 P.3d 720 (2001)). The goal of the inquiry is to ascertain and carry out the legislature's intent. *Id.*

If possible, the Court “must give effect to [the] plain meaning [of a statute] as an expression of legislative intent.” *Id.* at 9–10, 43 P.3d 4. This plain meaning is derived from the context of the entire act as well as any “related statutes which disclose legislative intent about the provision in question.” *Id.* at 11, 43 P.3d 4.

A statute is ambiguous when, after examination, we find “that it is subject to more than one reasonable interpretation.” *City of Seattle v. Winebrenner*, 167 Wash.2d 451, 456, 219 P.3d 686 (2009) (citing *State v. Jacobs*, 154 Wash.2d 596, 600–01, 115 P.3d 281 (2005)). At that point, we “may resort to statutory construction, legislative history, and relevant

case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

The recent Washington State Supreme Court case *Jametsky v. Olsen* is instructive with regard to how remedial consumer protection statutes are to be liberally construed in favor of those parties, e.g. consumers, they are intended to protect. 179 Wn.2d 756, 762, 317 P.3d 1003, 1006 (2014). In *Jametsky*, the Supreme Court contemplated:

We construe remedial consumer protection statutes, such as the DPCA, ***liberally in favor of the consumers they aim to protect***. *Carlsen v. Global Client Solutions, LLC*, 171 Wash.2d 486, 498, 256 P.3d 321 (2011) (“[A]s a remedial statute enacted to stem the ‘numerous unfair and deceptive practices’ rife in the growing debt adjustment industry, the debt adjusting statute should be construed liberally in favor of the consumers it aims to protect.” (quoting *Performance Audit: Debt Adjusting, Licensing and Regulatory Activities*, Report No. 77–13, at 7 (Jan. 20, 1978) (on file with Wash. State Archives, H.B. 86) (1979))); *State v. Pike*, 118 Wash.2d 585, 591, 826 P.2d 152 (1992) (“[C]onsumer protection statutes like [the automotive repair act (ARA)] have been adopted ‘to foster fair dealing ... in a trade which [has] been replete with frequent instances of unscrupulous conduct.’ ***As a remedial statute, the ARA is to be liberally construed to further this legislative purpose.***” (fourth alteration in the original) (citation omitted) (quoting *I–5 Truck Sales & Serv. Co. v. Underwood*, 32 Wash.App. 4, 11, 645 P.2d 716 (1982))). Because of this, “at risk of loss” must be ***construed to offer homeowners more rather than less protection.***

Jametsky v. Olsen, 179 Wn.2d 756, 765, 317 P.3d 1003, 1007 (2014)(Emphasis Added.)

RCW Ch. 18.27 is a remedial statute and, as such, should be liberally construed to afford more rather than less protection. Washington state requires contractors to register with the Department of Labor and Industries. *See* RCW 18.27.020. To register, the contractor must show proof of insurance and must file a surety bond. *See* RCW 18.27.030–18.27.050. The legislature provides a definition of a contractor:

“Contractor” means any person, firm, or corporation who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate.....

(Emphasis Added.) RCW 18.27.010(1).

Furthermore, the Legislature is clear in that the purpose of requiring contractors to register is to protect the public. The Contractor’s Registration Act expressly provides:

It is the purpose of this chapter to afford protection to the public including all persons, firms, and corporations furnishing labor, materials, or equipment to a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors.

(Emphasis Added.) RCW 18.27.140. *See also Stewart v. Hammond*, 78 Wash.2d 216, 219, 471 P.2d 90 (1970)(“[the contractor registration statute] was designed to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors”).

Furthermore, our Supreme Court for the State of Washington has determined that the protection of the public is so vital relative to the Contractor's Registration Act that, if the registration statute applies, it is applied regardless of loss to the contractor or unjust enrichment to the consumer:

The overriding public policy must not be defeated by an attempt to accommodate one who has violated its specific provisions, albeit unwittingly. The law will be nullified if noncomplying contractors are permitted to evade the statute by a claim of "unwitting violation" or "undue loss" or by a claim that the other contracting party will be "unduly enriched."

Stewart, 78 Wash.2d at 220, 471 P.2d 90 (footnote omitted).

Thus, by the above, it is clear that both the Legislature and the Washington State Supreme Court intend the Contractor's Registration Act, RCW 18.27 *et seq.*, to afford the public protection from losses from "unreliable, fraudulent and incompetent contractors". Mr. Foley is undisputedly a member of such a public, and, therefore, should be entitled to the protections afforded by Washington law.

It is also noteworthy that, by its own motion, JBH acknowledges that it must "pay all amounts ***that may be adjudged against the contractor by reason of*** breach of contract including ***improper work in the conduct of the contracting business.***" RCW 18.27.040(1). CP. 29:13-15.

Furthermore, in the instant case, Mr. Foley can recover attorney's fees and costs if he prevails on his trespass and/or timber trespass claim(s).

More specifically, RCW 4.24.630(1) provides:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.¹

(Emphasis Added.)

¹ While RCW 4.24.630 is applicable to the present case, RCW 64.12.030, and its corresponding reduced burden of "without lawful authority," is an alternative claim of Mr. Foley. RCW 64.12.030 provides:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.
(Emphasis Added.)

As a plaintiff and member of the public, Mr. Foley's recovery against the bond is contemplated by RCW 18.27.040(4) which provides in relevant part:

...claims shall be satisfied from the bond in the following order:

- (a) Employee labor and claims of laborers, including employee benefits;
- (b) Claims for breach of contract by a party to the construction contract;
- (c) Registered or licensed subcontractors, material, and equipment;
- (d) Taxes and contributions due the state of Washington;
- (e) ***Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover.*** The surety is not liable for any amount in excess of the penal limit of its bond.

(Emphasis Added.)

Taken as a whole, as a member of the public having a claim against JBH, as a registered contractor, for damages to his real and personal property, Mr. Foley would be able to collect an award of attorney's fees and costs under RCW 4.24.630, RCW 64.12.030, or other applicable statutory fee scheme as against the bond company pursuant to RCW 18.27.040(4)(e): as a "...plaintiff ...entitled to recover... any court costs, interest, and attorney's fees."

Despite the statute (RCW Ch. 18.27) expressly providing the bond shall cover claims for contractor's "improper work," the Trial Court apparently accepted JBH's interpretation of this provision and the

provision establishing for the priority of claims against the bond, RCW 18.27.040(4), that results in a conclusion seemingly contradictory to the findings by the Legislature and Washington State Supreme Court that the bond protect the public. Here, if Mr. Foley's claims prove to be true along with Defendant Bays' conclusion, Mr. Foley, as a member of the public, would have no recourse against JBH's bond even though JBH would presumably be found to be an unreliable and/or incompetent contractor causing damage to Mr. Foley's real property and improvements after JBH, or those under its control and direction, committed trespass. In other words, in the event JBH proves to be insolvent, Mr. Foley could not recover or otherwise benefit from JBH's bond – a bond which is expressly for the protection of the public and required for JBH to operate as a contractor in the State of Washington. Put another way, in the hypothetical, JBH, as an insolvent and irresponsible contractor, could cause damage to Mr. Foley's property without any meaningful recourse for Mr. Foley. Such a result is surely not intended under RCW Ch. 18.27.

E. The Trial Court Erred In Its Award of Reasonable Attorney's Fees and Costs to JBH

Notwithstanding Mr. Foley's argument above that RCW 18.27.040(6) does not apply to the instant case, even if the Trial Court were correct in determining that the statutory provision applies, it only provides for an

award of reasonable fees and costs to the “prevailing party.” Here, only Lexon could be deemed the prevailing party as all of Mr. Foley’s other claims remain. *See Riss v. Angel*, 131 Wash.2d 612, 633, 934 P.2d 669 (1997) (prevailing party is generally one who receives affirmative judgment). In other words, Defendants Jim Bays and Austin Summers have not received an affirmative judgment. Thus, they cannot be deemed prevailing parties (or substantially prevailing parties) and, accordingly, any award of attorney’s fees and costs should not include time spent by JBH in defending Mr. Foley’s remaining claims. Until those claims are adjudicated, no party can be deemed the prevailing party.

Put more directly, as to JBH, no authority for an award of fees to either party was present as of the date of the Amended Order on Fees. A **prevailing party** may recover attorney fees **only if** provided by statute, agreement, or equitable principles.” *Kitsap Cty. Consol. Hous. Auth. v. Henry-Levingston*, 196 Wn. App. 688, 708, 385 P.3d 188 (2016) (emphasis added). Here, neither JBH nor the other remaining Defendant, Austin Summers, is the prevailing party. At best, Lexon would be deemed the prevailing party.

The Washington State Supreme Court’s decision and corresponding analysis in *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.* is illustrative on the issue. 159 Wn.2d 292, 149 P.3d 666,

668 (2006). In *Cosmopolitan*, the State Supreme Court ultimately upheld, the trial court's denial of fees and costs as requested by the subcontractor, Cosmopolitan, along with its entry of judgment in the amount of \$3,000 against the bond company. *Id.* at 295–96. In other words, the Court found that, absent a contractual provision on the award of fees and costs, Cosmopolitan was not entitled to an award of fees and costs against the other contractor, Ondeo Degremont, under RCW 18.27.040(6). *Id.* The recovery of fees and costs was limited to recovery against the bond company. Indeed, the Court went on to conclude:

Considering RCW 18.27.040 in its entirety, subsection (6) of that statute was intended to authorize attorney fees for the prevailing party only in actions against a contractor's bond. The legislative history and other principles of statutory construction support this conclusion.

Id. at 306.

As applied to the instant case, *Cosmopolitan* provides that any award of fees and costs under RCW 18.27.040(6) cannot provide, or operate to allow, for an award of fees and costs as between Mr. Foley and Defendants JBH and Austin Summers. To do so would be a departure from the American Rule as observed by Washington law.

Furthermore, in considering any award of fees and costs associated with Lexon (as prevailing party), the Court's examination is limited to

what reasonable fees and costs were actually incurred in the defense of the bond company, Lexon. A trial court may “determine fees and costs using the ‘lodestar’ calculation, multiplying the total number of hours reasonably expended in the litigation by the reasonable hourly rate.” *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012) (Emphasis Added). The number of hours reasonably expended is an objective test and may be adjusted downward if the number of hours appears unreasonable or duplicative. “The novelty and complexity of the issues are factors to consider in determining the reasonableness of the hours expended in the litigation.” *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999). While Washington recognizes multiple methods to determine an appropriate award of attorney fees, “ultimately, the fee award **must be reasonable in relation to the results obtained.**” *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958, (2001) (emphasis added).

Here, the only the claim against the bond company was dismissed. Defendants JBH and Austin Summers did not seek dismissal any of the underlying claims and, thus, were not successful in any of those claims. Thus, even if it is ultimately decided that JBH is entitled to attorney’s fees and costs in defending Lexon, it should not be allowed to recover any

attorney's fees and costs related to the defense of any of the underlying and remaining claims.

JBH's counsel did not appear on behalf of Lexon until April 17, 2017 - just days before the hearing on its Motion to Dismiss. CP 84. A party cannot incur attorney's fees on behalf of another that it does not represent. Furthermore, the record demonstrates the JBH's the vast majority of fees incurred were related to JBH's defense of the underlying claims – not the defense of the bond. *See* court record generally. Accordingly, the Trial Court should have only considered those fees incurred during the time period JBH's counsel appeared on behalf of the surety, Lexon, and for which time was spent successfully seeking dismissal.

In addition, under the lodestar method, the Trial Court must consider time spent on unsuccessful claims or arguments. Here, Defendants spent a great deal of time briefing RCW 4.84.185 and CR 11 arguments for dismissal. These arguments ultimately were unsuccessful.

Any fee award to JBH should be reduced for any time spent on these unsuccessful arguments. To the extent the fee descriptions do not sufficiently detail the work to allow for the Court's discernment as to how time was spent, the award for fees must be reduced. With the exception of a few time entries attached to the Declaration and Supplemental Declaration of Counsel, the fee descriptions are not sufficient to determine

what time was expended on the successful versus unsuccessful arguments. As the burden of establishing their fees and costs rests with JBH, as the requesting party, to the extent it cannot be determined from the Defendants' fee affidavits what time was spent unsuccessfully arguing alternative theories, the Court should exercise its discretion and reduce the fees an appropriate amount. In other words, Defendants should not benefit from any vagueness or ambiguity resulting from their fee affidavit as they bear the burden of establishing the reasonableness of their fees.

Furthermore, the matter warrants further discussion of lodestar method in determining an award of attorney fees. "Lodestar award is arrived at by multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993); *McGreevy v. Oregon Mutual Insurance*, 90 Wn. App. 283, 289, 951 P.2d 798. The first step is to look at the number of hours expended. The second step is to determine if the hourly fee charged was reasonable. The third step is to multiply the two to reach the lodestar fee. *McGreevy* at 291. The awarding court should take into account the hours spent on duplicated efforts or otherwise unproductive time. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The *Bowers*' court recognizes that other factors may need to be considered in addition to the usual billing rate. The court may consider

the level of skill required, the time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. *Id.*

Pursuant to *Bowers*, although an attorney's fees Declaration need not be exhaustive, it should provide information as to who is performing the work, and whether that individual's hourly rate is reasonable in consideration of the difficulty of the problem, the attorney's experience, and the amount involved in the controversy. *Id.* Here, although JBH detailed his hourly rate and experience as required, no such detail is provided for Mr. Snyder's "Contract Attorney." CP 273. In fact, Mr. Snyder's Contract Attorney (identified in the fee declaration merely as "CA") is not identified by name, bar number, locale of practice, or any other such useful information in evaluating the rate charged. CP 231-234 and 273. Without any such information to evaluate the reasonableness of the rate or time spent by the Contract Attorney, the Trial Court lacked sufficient support for the award of fees and should have reduced any award for fees to the corresponding rate and time spent.

In making its determination of reasonableness, the court may consider the factors in RPC 1.5(a). *Mahler*, 135 Wn. 2d 444 n. 20. RPC 1.5(a) provides as follows:

- (a) A lawyer shall not make an agreement

for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

The lodestar method requires deduction for wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Mahler*, 135 Wn. 2d 434. In applying the above standards and examining the fee declarations on file, the Trial Court should have excluded the following fees from any fee award (or, put another way, any request for fee award should be reduced by the same):

DATE	ATTY	SLIP DESCRIPTION	HOURS	RATE	TOTAL
12/23/2015	KOS	Review of letter from attorney for Mr. Foley, Chad Ahrens, along with brief review of Summons and Complaint. Email same to client with some analysis and proposed retainer agreement.	0.8	\$305.00	\$244.00
1/11/2016	KOS	Review of Complaint; email Chad Ahrens requesting his dismissal of the bonding company and to amend his Complaint. Begin drafting Answer to Complaint on behalf of Jim Bays, LLC and Austin Summers, LLC	1.4	\$305.00	\$427.00
3/29/2016	KOS	Review file and verified Complaint for Timber Trespass and Damages that has now been filed by Plaintiff's counsel. Finalize Answer of defendants Jim Bays Homes, LLC and Austin Summers, LLC.	0.8	\$305.00	\$244.00
3/15/2017	KOS	Research, preparation of Exhibits and begin drafting Motion to Dismiss claim and bonding company and for terms.	3.8	\$305.00	\$1,159.00
3/17/2017	KOS	Finalize Jim Bays Homes LLC's Motion to Dismiss Bond Claim and bonding company and exhibits and e-file and e-serve same upon opposing counsel. Preparation of draft of Order on Def. Motion.	2.8	\$305.00	\$854.00
4/10/2017	KOS	Preparation of Motion to Amend Answer, Affirmative Defenses and Counterclaim under CR 15 to add a counterclaim against Mandon Foley and "Jane Doe" Foley for defamation and for damage to its business expectancy. Begin drafting 1st Amended Answer, Affirmative Defenses and Counterclaim.	1.8	\$305.00	\$549.00

4/12/2017	KOS	Review of email from contract attorney re frivolous claim under 4.84.185. Follow up research re definition of "and action" as a bond claim under RCW 18.27 and additional research under CR 11. Email contract attorney with this information for aiding and completing the Reply Brief.	1.6	\$305.00	\$488.00
4/13/2017	CA	Review of Motion to Dismiss, Plaintiff's Responsive Pleadings, research and preparation of Reply Memorandum (Draft) (April 10-13, 2017)	8	\$175.00	\$1,400.00
4/17/2017	KOS	Finalize and e-file Reply Memorandum and Reply Declaration of KOS. Prepare Declar of Counsel re: Fees & Costs and Cost Bill. Finalize Proposed FF/CL & Order on Mtn to Dismiss and e-serve upon opposing counsel and working copies to Judge.	0.8	\$305.00	\$244.00
5/23/2017	KOS	Preparation of draft of Motion and Order for Attorney Fees and Costs; transcript of the 4/21/17 hearing for inclusion as part of my declaration in support	1.3	\$305.00	\$396.50
5/31/2017	KOS	Review of transcript of April 21st hearing provided by Ms. O'Neill and highlight appropriate sections. Amend and up-date Motion for Attorney Fees and e-file and e-serve same. Prepare Order on Motion for Award of Attorney Fees.	1.6	\$305.00	\$488.00
6/14/2017	KOS	Review of Response to Motion for Attorney Fees and prepare email to contract attorney for preparation of Reply and my thoughts.	0.8	\$305.00	\$244.00
6/15/2017	CA	Draft of Reply in Support of Motion for Attorney Fees & Costs	3.5	\$175.00	\$612.50
6/16/2017	KOS	Travel and Appearance at Court On Motion for Attorney Fees (under RCW 18.27.040(6)). Court Granted Motion and reserved ruling on amount, to be established at a later hearing. Dictate Memo to Contract Attorney re: preparation of Memorandum of Law in support of Request for Reasonable Attorney Fees and proposed Order with FF/CL.	2.2	\$305.00	\$671.00
6/21/2017	CA	Research and preparation of Memorandum of Law in Support of Request for Reasonable Attorney Fees & proposed Order. Email to attorney with notes.	6.5	\$175.00	\$1,137.50

		Review and finalize Memorandum re: Reasonable Attorney Fees and proposed Order. Prepare Second Supplemental Declaration of Counsel Re: Fees & Costs and instructions for efilng and eserving same. (2.2 hours - .7 waived as an accommodation to client)			
6/29/2017	KOS		1.5	\$305.00	\$457.50

Accordingly, when examining the above in light of JBH Defendant Jim Bays' fee request in light of the lodestar method, \$9,616.00 in the requested fees should be denied.

F. The Trial Court Erred In Certifying the Amended Order on Fees Pursuant to CR 54(b)

CR 54(b) provides in pertinent part as follows:

*[W]hen more than one claim for relief is presented in an action...or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the... parties only upon an express determination in the judgment, supported by written findings, that there is **no just reason for delay** and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment, or thereafter on the court's own motion or on motion of any party.*

(Emphasis Added.)

CR 54(b) makes an immediate appeal available in situations in which it could be unjust to delay entering a judgment on a distinctly separate claim until the entire case has been finally adjudicated. *Nelbro*

Packing Co v Baypack Fisheries LLC, 101 Wn.App. 517, 6 P.3d 22 (2000) citing *Doerflinger v. New York Life Ins. Co.*, 88 Wash.2d 878, 567 P.2d 230 (1977). The Division I Court of Appeals provides an in-depth analysis of CR 54(b) in *Nelbro Packing*, so Plaintiff Foley has appended a true and correct copy of the case for the Court's convenience and review.

To obtain a CR 54(b) certification, the movant must show the following:

The following four elements must be met for a trial court to enter a CR 54(b) final judgment: ““(1) more than one claim for relief or more than one party against whom relief is sought; (2) ***an express determination that there is no just reason for delay***; (3) ***written findings supporting the determination that there is no just reason for delay***; and (4) an express direction for entry of the judgment.”

(Emphasis Added.) *Hulbert v. Port of Everett*, 159 Wn. App. 389, 405-06, 245 P.3d 779 (quoting *Fluor Enter., Inc. v. Walter Constr. Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007)), *rev. denied*, 171 Wn.2d 1024 (2011).

When adjudicated and pending claims are closely related and stem from essentially the same factual allegations, judicial economy generally is best served by delaying the appeal until all the issues can be considered by

the appellate court in a unified package. *Nelbro Packing* at 526 citing *Solomon v. Aetna Life Insurance Co.*, 782 F.2d 58, 60 (6th Cir.1986).

Courts consider the following factors in determining that there is no just reason for delay:

(1) [T]he relationship between the adjudicated and the adjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal.

Hulbert, 159 Wn. App. At 406 (quoting *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 772, 657 P.2d 804 (1983)).

A factor to consider to determine whether there was no just reason for delay in entering a final judgment is whether the need for review is likely to be mooted by future developments in the trial court. *Id.* at 528. In general, an appeal should be deferred if there is a possibility that developments in the litigation may moot a claim. *Id.* Here, like in *Nelbro Packing*, Plaintiff Foley will likely have no need for an appeal of the Order (if it is certified as final), if he is fully compensated for its damages under

its remaining claims.¹ *Id.* at 528. If Mr. Foley is compensated through the remaining claims and determines that no appeal is necessary, judicial economy is served by the avoidance of an unnecessary appeal. As a result, this factor, weighs against a determination that there is no just reason for delay of an appeal.

For example, in *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009), *rev. denied*, 168 Wn.2d 1018 (2010), the court found there was no just reason to delay an appeal of an order that was entered against only some of the defendants because of the potential for multiple trials and inconsistent rulings. *Cameron*, 151 Wn. App. At 651. *See also Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503, 798 P.2d 808 (1990) (“the record must affirmatively show that there is in fact some danger of hardship or injustice that will be alleviated by an immediate appeal.”); *Gull Indus., Inc. v. State Farm Fire and Cas. Co.*, 326 P.3d 782, 791 (2014) (“Essential to whether CR 54(b) certification should be granted is whether waiting for final judgment on all the claims or parties will expose the appellant to some danger of hardship or injustice that can be alleviated only through an immediate interlocutory appeal.”).

¹ By statute, the remaining timber trespass and trespass claims provide for a multiplier of damages and an award of attorney’s fees and costs.

In the present case, the bulk of the underlying claims and parties remain involved pending the outcome of this litigation.

Another factor to consider is whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial. *Id.* at 528-529. While the Trial Court's CR 54(b) certification of the Amended Order on fees probably will not delay the arbitration on the remaining claims, like the case in *Nelbro Packing* and as indicated above, the CR 54(b) certification may complicate the proceedings and waste judicial resources by encouraging an appeal of an order that will not be necessary if Plaintiff Foley prevails on his other claims. *Id.* at 529. Thus, the fourth factor does not weigh strongly in favor of the Trial Court's certification of the Amended Order on Fees.

Essential to whether CR 54(b) certification should be granted is whether waiting for final judgment on all the claims or parties will expose the appellant to some danger of hardship or injustice that can be alleviated only through an immediate interlocutory appeal. *Gull Indus., Inc. v. State Farm Fire and Cas. Co.*, 326 P.3d 782, 791 (2014). In the instant case, no threat of hardship or injustice to be alleviated through an immediate appeal is present or was authorized established. The bulk of the underlying claims and parties remain involved pending the outcome of this litigation.

Accordingly, this Court should revise its Order to take the form of an order and save any right of appeal for any party until after all claims are adjudicated. This result best serves judicial economy in the absence of a threat of hardship or injustice.

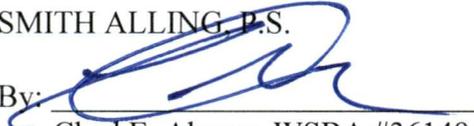
G. The Trial Court Erred In Its Award of Reasonable Attorney's Fees and Costs to JBH

Mr. RAP 18.1 permits this Court to award costs on appeal where a basis for a fee award exists. Under RCW 18.27.040, the statute at issue, this Court may award reasonable attorney's fees and costs to Mr. Foley as the prevailing party on appeal. Accordingly, Mr. Foley hereby requests this Court to so award his attorney's fees and costs as incurred on appeal.

VI. CONCLUSION

For the reasons set forth herein, Mr. Foley respectfully requests this Court to reverse the Trial Court's dismissal of the bond claim and corresponding award of fees and costs to JBH. Further, Mr. Foley further requests this Court to award his reasonable attorney's fees and costs incurred on this appeal.

SMITH ALLING, P.S.

By: 

Chad E. Ahrens, WSBA #36149
Attorneys for Respondents/
Cross-Appellants

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CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2018, I caused a true and correct copy of the foregoing document to be served on the following via email and first-class mail as indicated below:

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DATED at Tacoma, Washington, this 25th day of July, 2018.


Erin M. Diamond