

**FILED**

Court of Appeals No. 347893  
Walla Walla County Sup. Ct. No. 16-2-00215-4

MAR 22 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**IN THE  
COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

**DIVISION III**

---

**BANNER BANK;**  
*Respondent / Plaintiff*

— vs. —

**RUNNING MC RANCH, a Washington partnership;  
JESSE MCCAWE and KATE MCCAWE, husband and wife;**  
*Petitioners / Defendants*

---

**ON REQUEST FOR APPEAL FROM THE SUPERIOR COURT OF  
WASHINGTON IN AND FOR THE COUNTY OF WALLA WALLA**

---

**OPENING BRIEF**

---

Attorney for Appellant(s)/Defendants: ZACHARY P. HUMMER, WSBA #43249  
Carlson Boyd, PLLC  
230 South Second St., Ste. 202  
Yakima, WA 98901  
(509) 834-6611  
Attorney for Appellant(s)/Defendants

## TABLE OF CONTENTS

<b>INTRODUCTION</b>	<u>1</u>
<b>STATEMENT OF CASE</b>	<u>2</u>
<b>ARGUMENT</b>	<u>8</u>
<b>A. Prefatory Note Regarding Effect of Automatic Stay</b>	<u>8</u>
<b>B. The Judgment Does Not Adhere to the Requirements of C.R. 54(b) and Should Not Be Considered a Final Judgment</b>	<u>10</u>
<b>C. The Judgment Should Be Vacated for Irregularity as to the Timing of its Entry Which Was Prejudicial to Appellants</b>	<u>13</u>
<b>D. The Entry of Judgment Should be Deemed to Have Lacked Any Legal Effect</b>	<u>17</u>
<b>CONCLUSION</b>	<u>19</u>

## TABLE OF AUTHORITIES

### CASE LAW

<i>Polello v. Knapp</i> , 68 Wash. App. 809, 813 (Div. 3 1993) _____	8, 9
<i>Ingersoll-Rand Fin. Corp. v. Miller Min. Co.</i> , 817 F.2d 1424, 1426-27 (9th Cir. 1987) _____	9
<i>Fluor Enterprises, Inc. v. Walter Const., Ltd.</i> , 141 Wash. App. 761, 766-67 (Div. 1 2007) _____	11
<i>Loeffelholz v. Citizens for Leaders with Ethics &amp; Accountability Now (C.L.E.A.N.)</i> , Wash. App. 665 (Div. 2 2004) _____	11
<i>Schiffman v. Hanson Excavating Co.</i> , 82 Wash. 2d 681, 686-687 (1973) _____	12
<i>Snyder v. State</i> , 19 Wash. App. 631, 637 (Div. 1 1978) _____	15

### STATUTES AND RULES

11 U.S.C. § 362 _____	8
C.R. 54(b) _____	10
Wash. Rev. Code § 4.56.190 _____	18
Per Wash. Rev. Code § 4.56.200 _____	19
Walla Walla County Superior Court Local Rule 13 (Prior to Sept. 1 <sup>st</sup> , 2016) _____	13
Walla Walla County Superior Court Local Rule 52 (After Sept. 1 <sup>st</sup> , 2016) _____	14

## INTRODUCTION

The appellants Running MC Ranch, Jesse McCaw and Kate McCaw would respectfully appeal the entry of the judgment against them on September 7<sup>th</sup>, 2017 in the Walla Walla County Superior Court under cause number 16-2-00215-4.

The judgment should be vacated due to its failure to comply with the requirements of C.R. 54(b) and due to procedural irregularities attendant in its entry which prejudiced the rights of the appellants. Whether the judgment is characterized as being void or merely voidable, it should further be ruled that the judgment, during its existence, was insufficient as a matter of law to create any basis for enforcement thereof.

The appellants Jesse and Kate McCaw filed a voluntary petition for bankruptcy on September 13<sup>th</sup>, 2016, that bankruptcy case remains pending, and the automatic stay may preclude any action insofar as the debtor appellants are concerned. *See* 11 U.S.C. § 362. However, the McCaws received their discharge on January 25<sup>th</sup>, 2017 which likely terminated any stay automatically.

Whether the automatic stay ever applied as to the balance of this case is a less clear question as, unlike the McCaws, the co-judgment debtor, defendant, and appellant, Running MC Ranch, is not necessarily

protected by the stay and its appellate rights were never “tolled” by a stay in favor of other parties.

### **STATEMENT OF THE CASE**

Plaintiff Banner Bank, filed its COMPLAINT FOR MONIES DUE, FOR BREACH OF CONTRACT, FOR UNJUST ENRICHMENT, AND FOR ATTORNEY’S FEES AND COSTS (“COMPLAINT”) in the Walla Walla Superior Court on March 25<sup>th</sup>, 2016.

The COMPLAINT asserted claims for monetary liability arising from a defaulted loan against three Defendants: (1) Running MC Ranch, a Washington partnership; (2) Jesse McCaw and Kate McCaw, husband and wife; and (3) Double J Farms, LLC, a Washington limited liability company.<sup>1</sup>

Generally speaking, Banner Bank’s COMPLAINT sought a finding of liability against Running MC Ranch and Jesse and Kate McCaw as debtors and obligors under a promissory note and security documents. As to Double J Farms, LLC, Banner Bank asserted that it was liable for the debt under a theory of successor liability.

Following the filing of the Defendants’ ANSWER on June 9<sup>th</sup>, 2016, Banner Bank filed its MOTION FOR SUMMARY JUDGMENT AGAINST

---

<sup>1</sup> The parties’ pleadings allege and admit that the McCaw are partners in Running MC Ranch and that Jesse McCaw is a manager/member of Double J Farms, LLC.

DEFENDANTS on July 18<sup>th</sup>, 2016. The Defendants filed an objection and supporting affidavit to the summary judgment motion on August 18<sup>th</sup>, 2016, with a reply being offered by the Plaintiffs on August 24<sup>th</sup>, 2016.

The Superior Court held a hearing and heard oral argument with respect to the summary judgment motion on August 29<sup>th</sup>, 2016.<sup>2</sup> A transcript of that August 29<sup>th</sup>, 2016 summary judgment hearing was prepared by the court reporter and was filed herein on February 5<sup>th</sup>, 2016.

At the August 29<sup>th</sup>, 2016 hearing, the Superior Court partially granted Banner Bank's motion for summary judgment insofar that it found that Banner Bank was entitled to summary judgment as against Defendants Running MC Ranch and Jesse and Kate McCaw, but the summary judgment motion was not granted as to Double J Farms, LLC as the Court took that matter under advisement.<sup>3</sup>

Following the Superior Court's oral decision and towards the end of the summary judgment hearing on August 29<sup>th</sup>, 2016, Plaintiff's counsel sought the entry of a proposed "Order Granting Plaintiff Banner Bank's Motion for Summary Judgment Against Defendants" and "Judgment" as against Defendants Running MC Ranch and Jesse and Kate

---

<sup>2</sup> Attorney Arnold Willig appeared on behalf of the Plaintiff Banner Bank and attorney Zachary Hummer appeared on behalf of the Defendants.

<sup>3</sup> The Superior Court ultimately ruled, via letter ruling filed September 7<sup>th</sup>, 2016, that Banner Bank was *not* entitled to summary judgment against Double J Farms, LLC.

McCaw. Copies of those items proposed for entry were attached as Exhibits "A" and "B" to Plaintiff's MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS filed July 18<sup>th</sup>, 2016.

Defendants' counsel objected to the interim entry of a judgment as against only two of the parties given the lack of resolve as to the claim against Defendant Double J Farms, LLC and the corresponding awkward and conflicting position that placed the Defendants in addressing the liability only partially resolved among them:

MR. WILLIG: If I may, Your Honor, I prepared orders with respect to the other defendants. And then upon the Court's review of the Meisel case we would be happy to submit a further order regarding that motion.

THE COURT: All right. Hand up what you have. Have you seen the proposed order?

MR. WILLIG: Yes.

MR. HUMMER: I saw the ones attached. Are these different?

MR. WILLIG: I just crossed out Double J for now.

MR. HUMMER: Well, Your Honor, one of the issues, you know, asking to enter final judgment against two of the parties, one of reasons I just said what I said is because this case just started. I think we have grounds to seek an amendment to our Answer after I discuss it with my client. I don't know if we are going to go there or need to go there but would like be able to do so.

This is only as to two defendants in the case. Here is the rub: I said earlier, Jesse McCaw is the guy. He has to pay his

debts. Gets it. He is on the hook for this. But the point is he has to file bankruptcy probably. I'm not going to commit him to do that on the record. But unrealistically that's foreseeable. The point is you enter a final judgment against Jesse McCaw and Running MC Ranch and it just leaves out there, what's going to happen to Double J? I don't know. I don't know if it's in the best interest of Jesse to go Chapter 12 or 7. I think final judgments are only entered when all claims are resolved against all parties. Rule 54 is very clear.

I object to the entry of a judgment. And I think, you know, 54 is expressly clear that that doesn't happen. And we have just reason not to do this, because fundamentally, you know, my guy is going to be running in collections and all that kind of stuff, probably going to have to file bankruptcy, but he doesn't know the fate of where he is going with this Double J thing.

THE COURT: For right now I'm going to enter a finding of summary judgment against these defendants. I'm not going to sign off on the final order.

VERBATIM REPORT OF PROCEEDINGS of August 29<sup>th</sup>, 2016, at pgs. 25-26  
(filed herein on February 5<sup>th</sup>, 2017).

Defendants' counsel also raised objections as to the form of the Plaintiff's proposed order on the basis that a mere "cross-out" of the name Double J Farms, LLC did not otherwise conform to the Court's partial grant of summary judgment or address that the entry of judgment was premature. In response to those objections, the Court and the parties resolved that a new form of order would be submitted for review and that fifteen (15) days' notice would be permitted for submission of objections or proposed alternatives as follows:

MR. HUMMER: I do object to the form of this. We need to discuss it. Because it does say you are going to enter a judgment. It does say you are going to -- all the defendants are jointly and severally liable, not just the two. This form was designed for winning against everybody. There is a number of things I don't know if it makes sense.

It has been a long morning, Judge. I know that Your Honor wants to sign an order granting summary judgment against Jesse McCaw and company A, you know, Running MC Ranch. This doesn't say that. And we're going to have to go through it because there is a lot of stuff that needs to be crossed out that's not that. It says enter a judgment against Double J. Double J's jointly and severally liability. All of them. We can work together.

MR. WILLIG: I'm happy to interlineate that order.

THE COURT: Why don't you go ahead and do that. We have, let's see, it's not September 1. We have new local rules as of September 1. But in terms of presenting orders, those terms will remain the same, although the rule number would have changed. It provides for you to prepare your orders, send them to the Court, send them to the other side. The other side has 15 days within which to file an objection or their own alternative proposed order. And the Court then will make a decision. You are not going to have to come back and reargue. But let's do that. See if you can work out of the form of the order. If not, present it.\

MR. HUMMER: Just so we are clear, there is no final judgment against anybody because 54 says until all claims, just an order granting summary judgment as to --

THE COURT: Just present your orders and I'll consider them. I understand your objection. I certainly noted it.

MR. HUMMER: Okay. Appreciate that.

THE COURT: Okay. It is under advisement as to the Double J. Court is in recess.

VERBATIM REPORT OF PROCEEDINGS of August 29<sup>th</sup>, 2016, at pgs. 27-28  
(filed herein on February 5<sup>th</sup>, 2017) (emphasis added).

Nine (9) days following the summary judgment hearing, on September 7<sup>th</sup>, 2016, Plaintiff's counsel filed a letter and NOTICE OF PRESENTMENT which included a proposed order and judgment against Double J Farms, LLC and which letter indicated that Plaintiff's counsel would ostensibly "stand behind" the previous form of its order and judgment as to the Defendants Running MC Ranch and Jesse Jay McCaw as previously "submitted" at the end of the August 29<sup>th</sup>, 2016.<sup>4</sup>

Also on September 7<sup>th</sup>, 2016, that is, nine (9) days following the summary judgment hearing, the Court filed its JUDGMENT AGAINST DEFENDANTS RUNNING MC RANCH AND MCCAWS ("JUDGMENT").

Neither the JUDGMENT nor the accompanying LETTER DECISION contains findings or reference to C.R. 54(b) as to the basis for entry of a judgment as to only some of the parties and claims.

---

<sup>4</sup> This letter and NOTICE OF PRESENTMENT were received by Defendants' counsel on September 6<sup>th</sup>, 2016. On that September 6<sup>th</sup>, 2016, Defendants' counsel filed a STATEMENT [OF COUNSEL] RE: NOTICE OF RESERVATION OF RIGHT TO SUBMIT ALTERNATIVE PROPOSED ORDER(S) FOR ENTRY within the fifteen (15) days afforded by the local rule in effect at the time of the hearing and the Court's comments and a result of his stated objections to the order and entry of judgment sought by Plaintiff.

Jesse and Kate McCaw filed a voluntary petition for bankruptcy on September 13, 2016, under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of Washington. The bankruptcy case, and the automatic stay, remain pending.

The McCaws did receive their discharge on 11 U.S.C. § 727.

The Appellants subsequently filed a NOTICE OF APPEAL of the Superior Court's JUDGMENT on October 7<sup>th</sup>, 2016.

### **ARGUMENT**

#### **A. Prefatory Note Regarding Effect of Automatic Stay.**

Upon the filing of a bankruptcy petition, 11 U.S.C. § 362 and the automatic stay created thereby is widely understood to preclude the continuation of proceedings *against* the debtor or the property of the bankruptcy estate.

In *Polello v. Knapp*, 68 Wash. App. 809, 813 (Div. 3 1993), this Court of Appeals cited with favor that the decision of a Ninth Circuit Court of Appeals which held that the matter was potentially stays as to the debtor:

Although the instant appeal is clearly a continuation of a judicial proceeding, a question arises in the interpretation of the phrase "against the debtor." Because this appeal is brought by the debtor, it could be argued that the language of section 362 does not apply.

We agree, however, with the decisions of other circuits which have stayed appeals by the debtor when the original proceeding was brought against the debtor. The Sixth Circuit in *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir.1983), cert. denied, — U.S. —, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986), followed the Third Circuit's rationale stating:

In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

*Ingersoll-Rand Fin. Corp. v. Miller Min. Co.*, 817 F.2d 1424, 1426–27 (9th Cir. 1987).

Of course, the Debtors Jesse and Kate McCaw having been granted a discharge, “[t]he automatic stay of 11 U.S.C. § 362(a)(1) terminates as to an act against the debtor upon the earliest of the entry of an order granting or denying discharge, the closing or dismissing of the case, or when an order is entered granting stay relief.” *Polello v. Knapp*, 68 Wash. App. 809, 812 (Div. 3 1993).

The within appeal is involves multiple appellants that are debtors and non-debtors and largely involves identical assertions of error. Even to any extent the appeal may otherwise be deemed stayed insofar as it concerns the debtors (Jesse and Kate McCaw), such does not necessarily preclude the rights of other parties to pursue their own relief.

**B. The Judgment Does Not Adhere to the Requirements of C.R. 54(b) and Should Not Be Considered a Final Judgment.**

With respect to the entry of judgments in cases involving multiple claims or parties, C.R. 54(b) states as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, 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 claims or 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 courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

C.R. 54(b).

Per C.R. 54(b) and in matters concerning multiple claims and/or multiple parties, the Court of Appeals has stated:

We have held that four things are required for entry of a final judgment under CR 54(b): (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.

*Fluor Enterprises, Inc. v. Walter Const., Ltd.*, 141 Wash. App. 761, 766–67 (Div. 1 2007). Absent unusual circumstances, “entry of a final judgment should await the resolution of all claims for and against all parties.” *Fluor Enterprises, Inc.*, 141 Wash. App. at 767; *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wash. App. 665 (Div. 2 2004)

The purposes underlying the preference against interlocutory judgments are “(1) to offset judgments favorable to each side before any enforcement activity takes place; (2) to preclude the disruptive effects of enforcement and appellate activity while trial court proceedings are still ongoing; and (3) to avoid a multiplicity of appeals.” *Fluor Enterprises, Inc.*, 141 Wash. App. at 761.

The Supreme Court of Washington recognized the added benefit that addressing those matters to be certified as part of C.R. 54(b) lifted concerns which may arise from doubts as to a judgment’s enforceability or appealability:

The requirement in Rule 54(b) that the court make an express determination that there is no just reason for delaying the review of a judgment on fewer than all of the claims or involving fewer than all of the parties in an action Eliminates any doubt whether an immediate appeal may be sought. Conversely, it is important for a party to determine whether an order is a ‘final decision’ under Rule 54(b) since the time for appeal begins to run from the entry of an order that meets

the requirements of the rule. A litigant who erroneously decides that an order was not final and waits until the disposition of the entire case before seeking an appeal may lose his right to have that order reviewed. The guidance provided by Rule 54(b) also reduces the number of premature appeals.

*Schiffman v. Hanson Excavating Co.*, 82 Wash. 2d 681, 686-687 (1973)

(quoting 10 Fed. Prac. & Proc. Civ. § 2654 *Purpose and Significance of Rule 54(b)* (3d ed.)).

In the present case, though the JUDGMENT and LETTER DECISION lack any certification that “no just reason for delay” existed for their entry, the JUDGMENT was nevertheless entered even though the case remained pending against other parties as to the same debt. This has the practical effect of, among other things, creating a judgment “of record” in the underlying case upon which the Plaintiffs could jumpstart execution against the Defendants solely and entirely without having had any determination as to whether the a “right of contribution” might exist such that Double J Farms, LLC and its property was also available to satisfy the judgment or not.

In the absence of findings and certification pursuant to C.R. 54(b), the Judgment against the Appellants should be vacated.

\\ \\ \\

\\ \\ \\

**C. The Judgment Should Be Vacated for Irregularity as to the Timing of Its Entry Which Was Prejudicial to Appellants.**

During the hearing on August 29<sup>th</sup>, 2016 quoted, in part, above, the Superior Court Judge noted that the Walla Walla County Superior Court Local Rule (WWCSCLR) concerning the presentation and entry of orders was to change as of September 1<sup>st</sup>, 2016.

In addressing this issue, the Superior Court Judge expressly the intent that the Defendants would be afforded fifteen (15) days to present their own proposed orders:

THE COURT: We have, let's see, it's not September 1. We have new local rules as of September 1. But in terms of presenting orders, those terms will remain the same, although the rule number would have changed. It provides for you to prepare your orders, send them to the Court, send them to the other side. The other side has 15 days within which to file an objection or their own alternative proposed order. And the Court then will make a decision.

VERBATIM REPORT OF PROCEEDINGS of August 29<sup>th</sup>, 2016, at pgs. 28 (filed herein on February 5<sup>th</sup>, 2017) (emphasis added).

At the time of the hearing, WWCSCLR 13 was in effect and provided as follows:

(A) Within fifteen (15) days after a decision is rendered, any party desiring to submit Findings of Facts and Conclusions of Law, a Judgment, Order or other appropriate document (proposed document) for the Court's signature shall serve opposing counsel with the same.

(B) Any party objecting to the proposed document shall within fifteen (15) days after receipt thereof serve opposing counsel, and mail/deliver to the trial Judge, objections thereto in writing, together with any proposed substitutions if deemed appropriate. Upon receipt of the proposed document and objections/substitutions, the trial Judge will within fifteen (15) days sign and file those documents accurately reflecting the Court's decision.

(C) If no objections/substitutions have been received within the above-described fifteen (15) day period, counsel shall mail/deliver the original of the proposed documents to the trial court, together with an affidavit of service upon the opposing counsel, and upon receipt thereof, the Court shall sign such proposed documents, or if deficient, return such documents and inform all counsel as to such deficiencies and any requested changes or additions thereto.

(D) The preceding shall be the exclusive method for presenting Judgments and Findings of Facts and Conclusions of Law. Orders and other documents also may be presented pursuant to CR 54(f)(2), without oral argument. Any proposed document may be presented ex parte to the Court if opposing counsel has approved in writing entry of the proposed document or notice of presentment has been waived in writing.

E) If deemed appropriate in some circumstances the Court may shorten the preceding time frames for presentation and shall so notify all counsel/parties.

WWCSCLR 13.

As of September 1<sup>st</sup>, 2016, WWCSCLR 52 was adopted and modified the previous rule to effectively reduce the relevant time periods from fifteen (15) days to ten (10) days.<sup>5</sup>

---

<sup>5</sup> WWCSCLR 52 provides:

A. Within ten (10) days after a decision is rendered, any party desiring to submit Findings of Facts and Conclusions of Law, a Judgment, Order or other appropriate

Given the Superior Court's express comments at the August 29<sup>th</sup>, 2016, it was reasonably understood that, for purposes of the proposed orders/judgments encompassing the result of the August 29<sup>th</sup>, 2016 hearing, which hearing occurred *prior* to the local rule change, the parties were to operate under, and the Court would consider, the fifteen (15) day period to be that which was to be given effect with respect to the presentation of proposed orders/judgment.

With respect to the Superior Court's application of local rules, such is generally left undisturbed unless a variance from those rules works an injustice upon another party. *Snyder v. State*, 19 Wash. App. 631, 637 (Div. 1 1978) ("Rules of court are but expedients to further the transaction

---

document proposed for the entry shall serve opposing counsel with the same and provide the original thereof to the trial judge together with proof of service.

B. Any party objecting to the proposed document shall within ten (10) days after receipt thereof serve opposing counsel, and mail/deliver to the judge, objections thereto in writing, together with any proposed substitutions if deemed appropriate. Upon receipt of the proposed document and objections/substitutions, the judge will within ten (10) days sign and file those documents accurately reflecting the court's decision. The court may at any time call for either argument on the record or arrange for a chambers or telephonic conference to settle the issues.

C. If no objections/substitutions have been received within the above-described ten (10) day period, counsel shall mail/deliver the original of the proposed documents to the trial court, together with an affidavit of service upon the opposing counsel, and upon receipt thereof, the court shall sign such proposed documents, or if deficient, return such documents and inform all counsel as to such deficiencies and any requested changes or additions thereto.

D. The preceding shall be the exclusive method for presenting judgments and findings of facts and conclusions of law. Orders and other documents also may be presented pursuant to CR 54(f)(2), without oral argument. Any proposed document may be presented *ex parte* to the court if opposing counsel has approved in writing entry of the proposed document or notice of presentment has been waived in writing.

E. If deemed appropriate in some circumstances, the court may shorten the preceding time frames for presentation and shall so notify all counsel/parties.

of the business of the court, and departures therefrom are not reviewable unless the departure has operated to the injury of the complaining party.”).

In cases where a judgment is not “regularly” obtained, that is, where a judgment is entered prior to the exhaustion of an expressly stated period of time during which the Defendant could have otherwise acted to voice or protect his or her rights, the Supreme Court of Washington has reasoned that such a judgment should be set aside as a matter of right. *Tiffin v Hendricks*, 44 Wash. 2d 837 (1954) (Determining that default judgment entered prior to expiration of period for answer or objection should be set aside as a matter of right and without showing of cause or a meritorious defense).

In the present case, the Local Rule in effect at the time of the hearing allowed the Defendants fifteen (15) days to offer objection and/or alternatives to the proposed order(s)/judgment that was to be amended and resubmitted by Plaintiff’s counsel. Though the Local Rule was to change to be a ten (10) day period effective September 1<sup>st</sup>, 2016, this matter was specifically addressed by the Judge who expressly raised and confirmed that the Defendants would have the full benefit of fifteen (15) days.

Notwithstanding the Local Rules, the Judgment was entered only nine (9) days after the hearing, and the same day as Plaintiff’s counsel submitted its NOTICE OF PRESENTATION. As such, the entry was premature

when analyzed under either Local Rule and certainly considering the in-court direction that the “fifteen (15) day rule” would govern.

The Judgment having been entered nine (9) days following the hearing effectively stripped the Defendants of the right to propose alternatives, including those that would address their concerns as to the finality of the proceedings and the appropriateness of a judgment being entered.

The premature entry of Judgment also stripped the Defendants of the potential legal advantage of seeking bankruptcy protection *prior to* the entry of judgment. The entry of judgment potentially resulting in the creation of a judgment lien, the filing of a judgment potentially created a secured creditor from one that would have otherwise been unsecured.

**D. The Entry of Judgment Should Be Deemed to Have Lacked Any Legal Effect.**

In assessing the execution and enforceability aspects of judgments that failed to adequately meet the C.R. 54(b) certification and finality requirements, the Court of Appeals recognized that, “[w]hile there is substantial Washington case law on whether a partial judgment is appealable, there is no case law specifically addressing whether a partial judgment is immediately enforceable if it is not appealed.” *Fluor Enterprises, Inc.*, 141 Wash. App. 761, 767 (Div. 1 2007).

Treating the matter as one of first impression, the Court of Appeals found favor with the reasoning of “other state courts addressing this issue [which] have applied CR 54(b) and held that execution of a partial judgment was unlawful when no final judgment had been rendered on all of the claims.” *Id.*

In approving their commissioner’s conclusion, the Court of Appeals that an order lacking the requirements of appeal cannot be deemed valid for purposes of execution either:

An order that is not appealable because it is not final is also not subject to execution. While there is no case law spelling out this axiom, it makes sense because otherwise a prevailing party could execute on a judgment before the losing party has the opportunity to seek appellate review to which it is not entitled by right until all claims are resolved.

*Fluor Enterprises, Inc.*, 141 Wash. App. 761, 769 (Div. 1 2007).

In Washington, the “lien of judgment” provisions are stated in terms that are interpreted to create the “judgment lien” when the judgment becomes enforceable as follows:

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the district court of the United States rendered in this state and any judgment of the supreme court, court of appeals, superior court, or district court of this state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200.

Wash. Rev. Code § 4.56.190. Per Wash. Rev. Code § 4.56.200, the judgment lien “attaches” so to speak “from the time of the filing by the county clerk upon the execution docket in accordance with RCW 4.64.030.”

Fundamentally, a judgment that is not final is not yet enforceable, and an unenforceable judgment cannot be held to create a lien to ensure its satisfaction. To allow otherwise would effectively permit a litigant a roundabout, unintended opportunity to obtain a pre-judgment writ of attachment, a remedy which, in most practical ways, effectively imparts the executory impact of the judgment itself against the debtor and his or her property while delaying the debtor any opportunity for review.

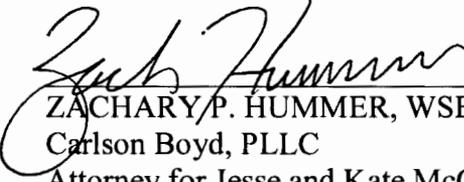
In sum, a Judgment involving multiple claims and parties which fails to meet the requirements of C.R. 54(b) and is no more enforceable than it is appealable. As such, no such rights attendant with enforcement, including the imposition of a lien, should be deemed to have occurred and the same should be so clarified as a matter of record.

### **CONCLUSION**

For each of the foregoing reasons, the Appellants respectfully request that the Court of Appeals direct that the JUDGMENT be vacated and that it be deemed to have been unenforceable during its existence.

\\ \\ \\

DATED this 21 day of March, 2017.

A handwritten signature in cursive script, appearing to read "Zach Hummer". The signature is written in black ink and is positioned above a horizontal line.

ZACHARY P. HUMMER, WSBA #43249  
Carlson Boyd, PLLC  
Attorney for Jesse and Kate McCaw