No. 1041128

IN THE SUPREME COURT
STATE OF WASHINGTON

APOLLONIA KWAN and WILLIAM KWAN, a married couple; JAS GROUP LLC, a Washington limited liability company; 8168 INVESTMENT LLC, a Washington limited liability company; and each of the foregoing derivatively on behalf of MOUNTLAKE VILLAGE LLC, a Washington limited liability company; and MOUNTLAKE 228 LLC, a Washington limited liability company,

Respondents,

v.

ALAN B. CLARK and LYNN CLARK, a married couple; KYLE CLARK and NATALIE BRAGER, a married couple; GREENSPACE, INC., a Washington Corporation; GREENSTREET LLC, a Washington limited liability company; FIRST HILL PARTNERS LLC, a Washington limited liability company; FIRST HILL PROPERTIES LLC; a Washington limited liability company; MLV3-23258 LLC, a Washington limited liability company; MLT GALLERIA 228 LLC, a Washington limited liability company; EAST HILL SUMMIT LLC, a Washington limited liability company,

Appellants

RESPONDENTS' ANSWER TO APPELLANTS' PETITION FOR REVIEW

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Attorneys for Respondents

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I. IDENTITIES OF APPELLANTS AND ANSWERING RESPONDENTS

Respondents Apollonia Kwan; JAS Group LLC; and 8168 Investment LLC and each of the foregoing derivatively on behalf of Mountlake Village LLC and Mountlake 228 LLC, ("Respondents") submit this Answer to Respondents' Petition for Review.

II. APPELLANTS' PETITION FOR REVIEW SHOULD BE DENIED

A. Appellants request for Review of Prior 2023 Appellate Decision is Untimely

In the "Citation to Court of Appeals Decision" of the Petition, the Appellants request review by this Court of a separate and distinct appellate decision by the Court of Appeals rendered under No. 83693-5-I, which ruling was filed April 10, 2023 ("2023 Ruling"). The Appellants' request is untimely and also fails to identify any error they contend was made by the trial court, or the issues pertaining to any such assignments of error. As a result, this Court should deny this relief requested by Appellants.

B. Appellants Waived Their Argument That a Payment of an "Offsetting Credit" Should Have Made to Them.

In the Court of Appeal's recent January 21, 2025, ruling ("2025 Ruling"), it stated that "the omission of the offsetting credit was a known issue at the time of the first appeal but was not presented to us as an issue for review." Appellants now argue that the sum of the "offsetting credit" should have been paid to them, as opposed to it being offset as expressly provided in the Judgment[1].

Once again, this assignment of error is directed toward the Original Judgment, which the Court of Appeals in the 2023 Ruling affirmed, except as to the award of prejudgment interest on a portion of the Original Judgment and as to language in the Original Judgment serving as an unused placeholder for allocation of damages against the Appellants. There does not

[1] "Original Judgment" in the King County Superior Court Cause No. 19-2-05254-6 SEA, was filed on February 25, 2022, under Docket No. 654, with the Judgment on remand entered on March 18, 2024, under Docket No. 960. References to the "Judgment" refer to the provisions of both which were not revised in the Judgment on remand.

appear to be a single assignment of error in Appellants' Petition arguing that the form of Judgment on remand is inconsistent with the 2023 Ruling in any way.

Prior to the present appeal, Appellants first notice of appeal was filed on February 4, 2022 (the "First Notice"). *See* Appx. A. The First Notice challenged multiple orders entered over the life of the case. *Id.* On March 22, 2022, Appellants filed a second notice of appeal (the "Second Notice"). The Second Notice included the February 25, 2022, Original Judgment but failed to assign any error to the Original Judgment with respect to any "offsetting credit" right or any allegation that any "offsetting credit" right failed to be appropriately handled or recognized. The Judgment (both the Original Judgment and Judgment on remand) expressly detailed the application of offsets as to the several "projects" which were the subject of the lawsuit, which are also summarized in the several worksheets incorporated into the Judgment. The net judgment amount owing

by the Appellants ***after offsets*** is properly reflected in the Judgment Summary.

After entry of the Original Judgment, the Appellants' interest in Mountlake 228 LLC (which is the project to which the present "offsetting credit" issue arises) was conveyed to the Respondents, and they also received a distribution of cash from the General Receiver which were proceeds of liquidated receivership assets pursuant to a Post-judgment Order on April 25, 2022[2]. The Post-judgment Order has never been appealed.

Thereafter on September 7, 2022, Respondents filed a Partial Satisfaction of Judgment ("the Satisfaction of Judgment") to reflect the distributions of cash and assets they received.

The Clarks filed their Opening Brief under Court of Appeals Number 83693-5-I on September 12, 2022 (the "First Appeal Brief"). Page 10 of the First Appeal Brief acknowledged

[2] Superior Court Docket No. 729.

that there remained a deficiency of $1,657,824.58, which is consistent with the amounts indicated as due and owing under the Satisfaction of Judgment. As support for this number, Appellants cited to the September 7, 2022, Satisfaction of Judgment.

In the Appellants first appeal, they contested the Original Judgment on various grounds not including the "offsetting credit" theory they now attempt to advance. Nor did Appellants assign error to the calculation of the net-judgment amount against them reflected in the Judgment Summary beyond the improper inclusion pre-judgment interest, which the Court 2023 Ruling ordered be removed. This net-judgment amount after offsets is properly reflected in the Judgment on remand.

The Appellants in their Reply in the First Appeal[3] did raise the "offsetting credit" issue arguing that the Original Judgment was "overstating the principal balance owed to Respondents by

[3] Filed on November 17, 2022.

$597,666, *the amount of the offsetting credit awarded by the arbitrator*". (emphasis added) *Id.* at 4, 19-21.

After consideration of the Appellants' briefing and oral arguments, the Court of Appeals expressly affirmed the Original Judgment, *other* than (i) the language in the Original Judgment which served as an unused placeholder for allocation of damages against the Appellants, and (ii) the award of prejudgment interest on the portion of the Original Judgment which pertained to the Appellants. Appellants did not file a motion for reconsideration or appeal to this Court of the 2023 Ruling in any way.

The Court of Appeals in its 2025 Ruling considered the foregoing and correctly found that:

> [T]he Clarks' briefing in the prior appeal mentioned the $597,666 offset and the "failure to apply this offsetting credit." Thus, the omission of the offsetting credit was a known issue at the time of the first appeal but was not presented to us as an issue for review.

It is also worth noting that the portion of the Judgment which pertains to the "offsetting credit" amount of $597,666 which the Appellants now seek to have this Court address, relates

to the Mountlake 228 LLC project. Shortly after entry of the Original Judgment the trial court entered the Post-judgment Order extracting Mountlake 228 LLC and all related accounts from the consolidated receivership pursuant to the Post-judgment Order, which in pertinent part ordered:

> **5. Termination of Receivership as to ML228**. Plaintiffs' Motion to terminate the receivership as to ML228 is granted. All right, title and interest to ML228 and all ML228 assets shall be relinquished by the Receiver to Plaintiffs, and the Receiver shall provide Plaintiffs with copies of all leases, insurance policies, service agreements pertaining to ML228 and sign any documentation necessary to allow Plaintiffs to take over control of such relationships and all ML228 assets. Following the Receiver's compliance with the terms of this Order, the Receiver shall be discharged of all duties with respect to ML228.
>
> **6. Post-Termination Expenses**. Following the termination of the receivership as to ML228, ML228 shall be solely responsible for the payment of all its liabilities and expenses, whether or not the factual bases for such liabilities or expenses accrued before or after termination, including but not limited to, real and personal property taxes, and insurance claim deductibles.
>
> **7. Summary of Funds to be Paid**. Total funds to be reimbursed by the Receiver to ML 228 shall be $143,263.21.

Respondents respectfully submit that in addition to other reasons for denying the Appellants' request to either offset or require the Respondents to pay the Appellants the "offsetting credit" amount, granting their request would in effect overrule the Post-judgment Order entered over two years ago and never previously appealed. Any modification of the Post-judgment Order comes much too late and is barred by *res judicata*.

Respondents respectfully request that this Court affirm the 2025 Ruling which correctly concluded "that the trial court properly complied with our instructions and affirm" and in no event should the recent 2025 Ruling be reversed as to this issue.

C. No Allocation of Receivership Administrative Expenses Were Assessed Against Appellants.

The Original Judgment included the following provision (emphasis added):

> This court [adopts] the suggestion that the administrative fees and costs of the receivership should be borne by the Defendants Clark, which holding is approved, including without limitation the amounts detailed in Exhibit 1 through Exhibit 4 and the Arbitration Award, which Alan Clark or any of the Defendant Entities were otherwise entitled to

> receive. ***If adopted, Plaintiffs will present a supplemental judgment to address this***.

At the time the Original Judgment was entered, the foregoing language was a placeholder ***for the potential*** to enter a supplemental judgment which actually allocated the administrative fees and costs of the receivership should be borne by the Defendants Clark. While the intent in the cited language could have resulted in such an allocation, there was never an entry of any supplemental judgment allocating any administrative fees and/or costs of the receivership against the Appellants.

The Court of Appeals' 2023 Ruling directed the deletion of the cited language from the Judgment on remand and its 2025 Ruling affirmed that the Judgment on remand complied with its prior ruling.

As to the Appellants characterization of receivership administrative fees and costs as having been paid by them, this is incorrect. RCW 7.60.230 governs distributions out of a

receivership estate and to date, the payment of all receivership administrative fees and costs in the consolidated receivership have been made pursuant to this authority. The expenditure of these administrative fees and costs have in effect reduced the value of the receivership estate significantly, at present, it is unlikely that there will be sufficient funds required to fully satisfy the Judgment against the Appellants.

The net result as to the Appellants is that they will not receive any proceeds from the receivership estate unless and until the Respondents' Judgment is paid in full. This may feel unfair to the Appellants, but it is worth pointing out the Arbitrator's finding that "the primary responsibility and liability of the damages to the Claimants and losses to these investments were a consequence of mismanagement, comingling, breach of fiduciary duty and misrepresentations on the part of respondents Clark. The need for a Receiver was caused directly by the actions and misfeasance of these respondents." CP 319.

The 2025 Ruling as to this issue is sound and should not be reversed.

III. CONCLUSION

The Court of Appeals prior 2023 unpublished ruling has been complied with in the Judgment on remand entered by the trial court. The Appellants' efforts in their present appeal are barred by *res judicata* in both instances as (i) the "offsetting credit" was properly factored into the Judgment and (ii) there has never been any allocation of receivership administrative fees and costs against the Appellants who presently attempt to creatively recalculate the Judgment amount.

I certify that this document contains 1,776 words, in compliance with RAP 18.17.

Dated, this 5th day of June, 2025.

/s/ George S. Treperinas
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CERTIFICATE OF SERVICE

I, Shawn Menning, hereby certify that on the 5th day of June, 2025, I caused to be served true and correct copies of the foregoing to the following persons via the Supreme Court of Washington electronic filing system:

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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 5th day of June, 2025 at Seattle, Washington.

/s/ Shawn Menning
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RYAN SWANSON CLEVELAND

June 05, 2025 - 10:38 AM

Transmittal Information

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