NO. 849212

COURT OF APPEALS DIVISION I,
OF THE STATE OF WASHINGTON

JODY AUCOIN, individually and as personal representative of the Estate of DUCAS AUCOIN; HOLLAND AUCOIN; and TELLIS AUCOIN,

Appellant/Plaintiff.

v.

C4 DIGS, INC.; HOL-MAC CORPORATION d.b.a. DONKEY FORKLIFTS; LEONARDI LANDSCAPING, INC.; and JOHN DOES 1-5,

Respondent/Defendant.

RESPONDENT C4DIGS, INC.'S OPPOSITION TO APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Table of Cases

CASES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Respondent C4Digs, Inc. was the general contractor for the construction site located at 134 – 26th Avenue East, Seattle, Washington 98112. C4Digs subcontracted the landscaping work at the site to Leonardi Landscaping, Inc., which ordered materials from a third-party entity, SiteOne Landscape Supply, LLC. Ducas Aucoin was an employee of SiteOne. He was delivering supplies in a location outside the construction site when his forklift, which was manufactured by Hol-Mac Corporation, tipped and crushed him, tragically killing him. Plaintiff-Appellant Jody Aucoin brought suit on behalf of Mr. Aucoin's Estate against C4Digs, Leonardi, and Hol-Mac.

In November 2021, the superior court properly dismissed the Estate's claims against C4Digs and Leonardi on summary judgment based on its determination that no duty is owed by a general contractor to a third-party material supplier or delivery person such as Mr. Aucoin. The superior court properly denied reconsideration as well. The Estate failed to raise a genuine

issue for trial on the merits of the claims asserted in this action. There is no support for Appellant's claims that C4Digs owed Mr. Aucoin any common law duty or that it breached a statutory duty owed to Mr. Aucoin.

In early 2022, the Estate petitioned for discretionary review of the same issues raised in the instant appeal but was denied. Rather than go forward with trial as scheduled on February 6, 2023, the Estate and Hol-Mac agreed it would be beneficial to stay the trial and address resolution of the matter after the Estate had an opportunity to appeal the dismissal of C4 Digs and Leonardi. The Estate's solution was to sign a tolling agreement and voluntarily dismiss all claims against the remaining defendant, Hol-Mac, pursuant to CR 41; this procedural tactic was done with the understanding that all dismissed claims would be preserved and may be refiled against Hol-Mac up to 90 days after the appellate court entered a decision on the claims against C4Digs and Leonardi.

The Estate filed a Notice of Appeal in January 2023, believing it was entitled to de novo appeal of the summary judgment and reconsideration orders entered against C4Digs and Leonardi. The appellate court was concerned the matter was not appealable as a matter of right because Hol-Mac had been dismissed "without prejudice," so it requested the parties address the appealability of the summary judgment orders in writing. Review was denied a second time, because the Estate had failed to identify controlling authority establishing that an order of dismissal without prejudice that includes a tolling provision is appealable as a matter of right; the Estate was instructed to proceed with filing a petition for discretionary review. In a notation ruling, the commissioner clerk advised "a dismissal without prejudice is generally not final and appealable until the lawsuit may not be re-filed by operation of the statute of limitations. Although the Estate indicated it would be moving to modify the commissioner's rulings, no motion was filed. Instead, upon stipulation of the Estate and

Hol-Mac, the superior court entered an order pursuant to CR 54(b). The stipulated facts stated final judgment was appropriate because it would save the Estate from trying two trials and avoid the risk that the two juries could apportion a different amount of fault to Hol-Mac, C4Digs, and Leonardi, ultimately resulting in inconsistent jury verdicts. This basis proffered by the Estate is contrary to well-established law.

As C4Digs previously argued on interlocutory appeal, trial against Hol-Mac would not be useless, as full recovery is possible and there is no risk of inconsistent fault apportionment because Hol-Mac cannot assign liability or fault to C4Digs or Leonardi because as dismissed parties. This court agreed and denied review. The Estate has never motioned to modify the court commissioner's rulings pursuant to RAP 17.7; instead, the Estate has exercised procedural gamesmanship to circumvent the rules of appellate procedure and obtain de novo review before a panel of judges.

Accordingly, the interlocutory orders that are the subject of Appellant's instant appeal are not ripe for review pursuant to RAP 2.2 and should not be afforded de novo review by this court. Instead, the court should treat the Estate's opening brief as a petition for discretionary review and deny on the same grounds stated in the court commissioner's July 2022 ruling.

II. ASSIGNMENT OF ERROR

C4Digs offers the following counterstatement of the issues raised by Appellant:

1. Whether superior court's order granting summary judgment to C4Digs was proper, based on the court's determination that C4Digs owed no duty to Mr. Aucoin as the employee of a third-party material supplier?

2. Whether superior court's order granting summary judgment to C4Digs was proper based on the court's conclusion that general contractors do not owe a duty to employees of third-party material suppliers who are injured in an area located outside the general contractor's control and supervision?

III. STATEMENT OF THE CASE

A. This appeal arises out of a wrongful death suit based on a forklift accident.

This appeal arises out of summary judgment dismissal of two of three defendants in a wrongful death case based on a forklift accident. On May 14, 2018, Mr. Ducas Aucoin was delivering pavers to a construction site in Seattle when his forklift tipped over and crushed him, killing him. Clerk's Papers (CP) 11, 14, 88. Mr. Aucoin's Estate and family (hereinafter the "Estate") brought suit against the general contractor (C4Digs), the landscaping subcontractor (Leonardi Landscaping, Inc.), and the forklift manufacturer (Hol-Mac Corporation). CP 46. At the time of his death Mr. Aucoin was employed by and acting within the scope of his employment as a delivery driver for SiteOne Landscape Supply, LLC (SiteOne). CP 88.

The construction project involved construction of a set of six townhomes. CP 87. The job site was located on a corner. *Id.* On the north end, where the front of the home is located, is

26th Avenue East, which is a flat street. CP 87-88. C4Digs obtained a construction staging permit to use this portion of 26th Avenue East for construction parking, materials staging, and loading/unloading. *Id.* East John Street is located on the eastern side of the property and is sloped. *Id.*

C4Digs subcontracted the landscaping work at the site to Leonardi, which in turn ordered materials from SiteOne Landscape Supply, LLC, Mr. Aucoin's employer. CP 88.

In May 2018, the construction project was in its final stages. CP 87-88. On the day of the accident, the C4Digs project manager arrived in the morning to set up the touch-up painters of a subcontractor and then left for another job site. CP 88. The only workers on site during Mr. Aucoin's delivery and accident were the touch-up painter subcontractors. *Id.* No one from C4Digs or Leonardi was present. *Id.*

Mr. Aucoin was not on the project site at the time of the accident; instead, Mr. Aucoin was parked and operating his forklift along the sloped side of the project, the East John Street

side, which was not the designated loading/unloading zone on 26th Avenue East. *Id.* More specifically, the accident occurred on the far end of East John Street, away from the project. *Id.* No one called to notify C4Digs of any deliveries or that Mr. Aucoin would be arriving prior to the delivery. *Id.* Despite all his completed training in forklift safety and operation, Mr. Aucoin negligently operated his forklift, including his failure to wear his seat belt. *Id.*

B. C4Digs moved for summary judgment on the basis that it owed no duty to Mr. Aucoin as the employee of a third-party material supplier.

On October 1, 2021, defendant C4Digs moved for summary judgment on all of the Estate's claims. CP 78-86. Leonardi filed its own motion for summary judgment asserting many of the same arguments. CP 182-191. C4Digs argued that it owed no duty to Mr. Aucoin as the employee of a third-party material supplier. CP 82-86. Primarily, it argued (1) under *Shingledecker v. Roofmaster Prods. Co.*, 93 Wn. App. 867, 868, 971 P.2d 523 (1991), general contractors do not owe duties to

third-party material suppliers; and (2) that *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 452 P.3d 1205 (2019), was not applicable because this incident did not involve a subcontractor or an independent contractor employee. CP 82-86. It also argued that it owed no duty to Mr. Aucoin as it had no right to control Mr. Aucoin's work. CP 82-86. Lastly, C4Digs asserted that any statutory duty owed by general contractors to persons on the job site did not extend to areas beyond the job site, or, the adjacent street in this case. CP 84-86.

In response, the Estate argued that "undisputed" facts and the *Vargas* case prevented the court from entering summary judgment in favor of C4Digs. CP at 105; *see also* CP 223-24, 229, 233-34 (on reconsideration). At no point did the Estate address the substance of the *Shingledecker* case in the below proceedings. *See* CP 105-110; *see also* CP 233. To support its position that summary judgment be denied, the Estate cited answers to deposition questions which C4Digs object to during the deposition, *see generally* CP 119-129, 131, 133, and again

in C4Digs's reply to plaintiffs' response to summary judgment, CP 210-16.

C. The superior court correctly dismissed C4Digs and Leonardi.

The superior court agreed with C4Digs and Leonardi and granted their motions for summary judgment. CP 218-21. In so ruling, the court detailed the undisputed facts of the case, the test for duty, and held that *Shingledecker* controlled and *Vargas* did not. 1 Report of Proceedings (1RP), 24-29. It found undisputed evidence established that C4Digs and Leonardi did not have control over the delivery or over the area where the delivery occurred. 1RP 24-25. It did not, as the Estate alleges, find that C4Digs and Leonardi were not liable purely because they were not on site:

> I think that there is a distinction between *Vargas* and the case here, and also with *Kelley,* because both in *Vargas* and *Kelley*, the plaintiff was working at the site, and least in *Vargas*, the general contractor was present coordinating where the pump truck [...] needed to be parked, which is not the case here.

> In this case, we did not have anybody from C4Digs, the general contractor, telling Mr. Aucoin where to park or not to park. So that is a big distinction from the Court's perspective with respect to *Vargas*.
>
> As I indicated earlier, I believe this case is more like *Shingledecker* in that Mr. Aucoin was simply delivering the supplies, the pavers to this site. And neither C4Digs nor Leonardi had control over the area where Mr. Aucoin was dropping the pavers, because that was not part of the load/unload zone.
>
> 1RP 25-26.

The court did not, as the Estate claims, rule in contradiction to *Vargas*. *Id.* The court's ruling was that C4Digs did not have any control over Mr. Aucoin's activities or the area where he made his delivery. *Id.* The fact that C4Digs was not present merely factored into the right-to-control analysis, but this observation was not the sole basis for dismissal. 1RP 26 ("In this case, we did not have anybody from C4Digs, the general contractor, telling Mr. Aucoin where to park or not to park. So that is a big distinction from the Court's perspective with respect to *Vargas*."). Additionally, the court found that C4Digs had no control over the area where Mr.

Aucoin was injured, which was a different street, wholly separate from the designated loading/unloading zone. *Id.* ("And moreover, the incident happened in an area that was not under the control of C4Digs"). For those reasons, the court found C4Digs did not owe Mr. Aucoin a duty as a matter of law and dismissed C4Digs. *Id.*

D. Procedural History

On November 29, 2021, the Estate sought reconsideration of the summary judgment order dismissing C4Digs and Leonardi, which was denied. CP 223-39.

On December 13, 2021, the Estate filed a "Notice of Discretionary Review" pursuant to RAP 5.1(a) of the dismissal orders. *See* CP 241. The Estate filed its petition on February 7, 2022. *See Aucoin v. C4Digs, Inc., et al.*, No. 83502-5-I, Petitioner's Motion for Discretionary Review (Feb. 7, 2022). Respondent filed its opposition on February 17, 2022. *See Aucoin v. C4Digs, Inc., et. al.*, No. 83502-5-I, Respondent

C4Digs, Inc.'s Opposition to Motion for Discretionary Review (Feb. 17, 2022).

On July 11, 2022, Commissioner Jennifer Koh entered a notation ruling denying review. *See* CP 241; *see also* Appendix (App.), 1-3. The record does not indicate the Estate objected to the ruling pursuant to RAP 17.7, as required.

Approximately five months later, on January 3, 2023, upon the stipulation of the Estate and Hol-Mac, the trial court entered an order dismissing all claims against Hol-Mac without prejudice pursuant to CR 41(a)(1)(A) and tolling the statute of limitations pending the interlocutory appeal of the issue of duty with respect to C4Digs and Leonardi. CP 240-43.

On January 19, 2023, the Estate filed a "Notice of Appeal" of the summary judgment and reconsideration orders dismissing C4Digs and Leonardi pursuant to RAP 5.1(a), indicating this matter was appealable as a matter of right pursuant to RAP 2.2. CP 245-47.

On February 3, 2023, the court clerk indicated in a letter to counsel that the notice of appeal had been received, but "the order may not be reviewable as of right pursuant to RAP 2.2(a)." App., 6-7. The court requested the parties to address in writing "whether the order is appealable under RAP 2.2(a) and provide any supporting documentation," after which the case would be routed to a commissioner for determination of appealability. App., at 6. The letter pointed out that the Stipulated Order was entered "without prejudice." *Id.* On March 10, 2023, the court clerk sent a second letter identical in substance, except that it requested a response on or before March 30, 2023. App., 8-9.

In its response on March 29, 2023, the Estate argued the summary judgment orders against C4Digs and Leonardi were "interlocutory because they adjudicated the rights and liabilities of less than all the parties." App. at 10. Citing *Fox v. Summaster Prod Inc.*, 115 Wn.2d 498 (1990), the Estate argued that "filing a notice of appeal within 30 days of the trial court's

order would have been improper, absent a CR 54(b) certification, because the order was not yet final when entered." App. at 10. The Estate concluded, however, the action was final and appealable as a matter of right because "the trial court issued an order dismissing the remaining claims against Hol-Mac Corporation," and "there are no longer any remaining claims in this case." App. at 10-11. Therefore, the Estate contended the fact that Hol-Mac was dismissed "without prejudice should not change the Court's analysis." App. at 11.

C4Digs argued the orders were not appealable as a matter of right because the Estate could not show it was an aggrieved party under RAP 3.1. App. 13-15. Rather, the Estate had created a "but for" precedent to the dismissal order based on the parties' stipulation; therefore, the underlying action was not final because the judgment had been obtained by consent. App. at 14-15. Accordingly, C4Digs argued the Estate could not establish it had been aggrieved or that it was entitled to appeal as a matter of right. App., 18.

On May 4, 2023, the court clerk issued a letter ruling which provided: "Aucoin has not identified controlling authority to establish that an order of dismissal without prejudice that includes such a tolling provision is appealable as a matter of right under RAP 2.2(a), this matter should proceed as a discretionary review matter at this point." App. at 19. Appellant was directed to proceed with filing a motion for discretionary review by May 22, 2023. *Id.*

On May 18, 2023, the Estate sent a letter to Commissioner Koh expressing it intended to ask for the decision to be modified, because it was not appealing the January 3, 2023 order, but the November 18, 2021 orders granting summary judgment of C4Digs and Leonardi. App., 20-21. The Estate insisted the orders became appealable as a matter of right because Hol-Mac, the remaining defendant, had been voluntarily dismissed; it asked for an extension to file a petition for discretionary review until after the deadline to file a motion to modify on June 4, 2023. App., 20.

On June 2, 2023, the court sent a letter containing a notation ruling entered by Commissioner Koh on June 1, 2023, which stated in part:

> [A] dismissal without prejudice is generally not final and appealable until the lawsuit may not be re-filed by operation of the statute of limitations. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 487, 200 P.3d 683 (2009); *see also Munden v. Hazelrigg*, 105 Wn.2d 39, 42-44, 711 P.2d 295 (1985). Here, it appears that the January 3 order dismissing without prejudice Aucoin's claims against the final remaining defendant, Hol-Mac Corp, is designed to reserve Aucoin's ability to seek further relief against Hol-Mac in the trial court following resolution of appeal proceedings involving C4Digs and Leonardi. In other words, the order appears designed to circumvent RAP 2.2(d) and the general rule regarding a dismissal without prejudice and reserve Aucoin's claim against Hol-Mac by tolling the statute of limitations. But, as I intended to express in my May 3 ruling, Aucoin has not identified authority allowing an appeal to go forward in this manner.

App. 23-24. The notation ruling clarified the trial court normally enters findings as described in RAP 2.2(d) and CR54(b) to the extent review is sought before entry of final judgment as to all claims and all parties. App. 26.

On July 31, 2023, upon stipulation of the Estate and Hol-Mac, the court entered an order pursuant to CR 54(b). CP 259-61. That order found "no just reason for delay and expressly direct[ed] judgment be entered as to defendant C4Digs and Leonardi" based on its adoption of the following stipulated facts:

> [E]ntry of a final judgment as to defendants C4Digs and Leonardi under CR 54(b) would be appropriate so that plaintiffs can move forward with their appeal of the Court's November 18, 2021 summary judgment orders as to those defendants. To conclude otherwise would require the plaintiffs to take their claims against defendant Hol-Mac to trial, and possibly a verdict, and then re-try their claims against defendants C4Digs and Leonardi.
>
> ...
>
> [P]laintiffs and Hol-Mac would incur significant costs finishing discovery, including expert discovery, and the cost of a jury trial, only to turn around and be parties to another jury trial with C4Digs and Leonardi if the plaintiffs prevail on their appeal of the November 18, 2021 summary judgment orders as to those parties. This is particularly true as Hol-Mac's answer indicates it intends to blame C4Digs and Leonardi for the plaintiffs' damages, and the answers of C4Digs and Leonardi indicate they intend to blame Hol-Mac for the plaintiffs' damages, and there is no

> way to reconcile how to apportion fault between them if the claims against them are tried in separate jury trials. RCW 4.22.070(1) . . . There is also a considerable risk of inconsistent jury verdicts, including the risk that the two juries apportion a different amount of fault to Hol-Mac, C4Digs, and Leonardi, which would be followed by the plaintiffs recovering different amounts from each of those parties depending on their status in each jury trial, and possibly a "double recovery."

CP at 260-61.

IV. ARGUMENT

As a threshold issue, this matter may not be properly before this court pursuant to RAP 2.2. Although the case appears to meet the criteria of CR 54(b) and RAP 2.2(d), the claims against Hol-Mac have not been entirely disposed of, as they were dismissed without prejudice and are subject to a tolling agreement. Even more critical, Appellant's contention that a CR 54(b) order was appropriate and necessary to prevent inconsistent rulings of fault in the future pursuant RCW 4.22.070(1) is meritless, as a jury cannot assign liability or fault to C4Digs in any trial against Hol-Mac as a dismissed party.

The Estate never filed a motion to modify the court commissioner's ruling that this matter was not appealable as a matter of right. Instead, the Estate obtained an order pursuant to CR 54(b) and immediately assumed it was entitled to de novo review on its claims of negligence against C4Digs. The Estate's contention that the court cannot force it to re-file suit against Hol-Mac is undermined by the tolling agreement. It appears the Estate surreptitiously appeals as a matter of right for the second time when it is only entitled to discretionary review, which this court has already denied.

Appellant's Opening Brief is not ripe for appeal and is better characterized as a petition for discretionary review. Given the distinct standards of this court's review between RAP 2.2 and RAP 2.3, it should be treated as one, and denied. Should the court opt to review this matter *de novo*, it will find C4Digs was entitled to judgment as a matter of law because the Estate failed to present evidence to support its claims that C4Digs owed a duty of care to Mr. Aucoin, who was not the

employee of a subcontractor or an independent contractor for the project, but of a mere materials supplier.

A. This matter is not ripe for appeal.

For the second time, Appellant is seeking piecemeal litigation by means of this interlocutory appeal even though doing so conflicts with the Washington courts' policy against such practices. This case is not appealable under Washington law and judicial policy. "Interlocutory appeals are the antithesis of judicial efficiency and economy." *State v. Brown*, 64 Wn. App. 606, 617, 825 P.2d 350 (1992), *citing Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990); *Maybury v. Seattle*, 53 Wn.2d 716, 336 P.2d 878 (1959). Washington has an "overall policy against piecemeal appeals." *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977) (citation omitted). The Estate is seeking piecemeal litigation in this case by means of this interlocutory appeal, even though doing so conflicts with the Washington courts' policy against such practices. Because the Estate's

present attempt at interlocutory appellate review contravenes judicial policy and Washington law, this court should reject it.

CR 54(b) furthers the underlying policy of judicial efficiency and allocation of time and resources. It applies only when more than one claim for relief is presented or when multiple parties are involved. *Gazin v. Hieber*, 8 Wn. App. 104, 112, 504 P.2d 1178 (1972). That rule provides in part:

> When more than one claim for relief is presented in an action, whether as a claim [or] counterclaim, … the court may direct the entry of a final judgment as to one or more [claim] … 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.

Washington Superior Court Rule 54(b) is nearly identical to the Federal Rule of Civil Procedure 54(b), save minor and irrelevant additions. *Doerflinger*, 88 Wn.2d at 880. The basic purpose of the rule is to avoid the possible injustice of delay in entering judgment on a distinctly separate claim until the final adjudication of the entire case, by making an immediate appeal available. *Id.* (citing C. Wright & Miller, *Fed. Prac. & Proc.:*

Civil § 2654, at 32-33 (1973)). The rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multi-claim actions. *Id.*

In addition, the substance of RAP 2.2(d) is virtually identical to CR 54(b). *Nelbro Packing Co. v. Baypack Fisheries*, 101 Wn. App. 517, 522, 6 P.3d 22 (2000). RAP 2.2(d) states in part:

> In any case with multiple parties or multiple claims for relief … an appeal may be taken from a final judgment which does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay.
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> RAP 2.2(d).

In this case, the reasons presented by the Estate and Hol-Mac for final judgment against C4Digs and Leonardi are meritless. First, the Estate argues immediate appeal is necessary to resolve potential fault-based inconsistencies. In

essence, this is a damage issue that is not so distinct and separate to justify interlocutory appeal.

Second, contrary to the Estate's contention a trial against Hol-Mac risks inconsistent fault apportionment, full recovery is against Hol-Mac is possible. *See* CP 260-61. The jury in the Hol-Mac trial cannot assign liability or fault to C4Digs because juries cannot assign liability to dismissed parties. *Kottler v. State*, 136 Wn.2d 437, 446–47, 963 P.2d 834 (1998) ("Settling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable under RCW 4.22.070(1)(b)"); *Anderson v. City of Seattle*, 123 Wn.2d 847, 852, 873 P.2d 489 (1994) (a released party "cannot under any reasonable interpretation of RCW 4.22.070(1)(b) be a defendant against whom judgment is entered."); *Gerrard v. Craig*, 122 Wn.2d 288, 298–99, 857 P.2d 1033 (1993) (a dismissed defendant cannot be potentially liable to a plaintiff and thus cannot be a defendant against whom judgment is entered); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d

246, 294, 840 P.2d 860 (1992) (only defendants against whom judgment is entered are jointly and severally liable and only for the sum of their proportionate share of the total damages); *see also Smelser v. Paul*, 188 Wn.2d 648, 656, 398 P.3d 1086 (2017)) ("Thus, '[w]here no tort exists, no legal duty can be breached and no fault attributed or apportioned under RCW 4.22.070(1).'").

Third, RCW 4.22.070 is not self-executing. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921, 928 (1993). "If the plaintiff signals an intention to present evidence of fault solely against one defendant . . . is it is incumbent upon the defendant to provide proof that more than one entity was at fault." *Adcox*, 123 Wn.2d, at 25-26. Unless there is sufficient evidence to support a defendant's claim that more than one entity was at fault, it would be improper for the trial court to allow the jury to allocate fault. *Id.*, at 25. As such, the Estate prematurely assumes apportionment of fault will be an issue.

In sum, neither the Estate nor Hol-Mac can argue at trial that C4Digs holds all or part of the liability in this case. While Hol-Mac can present evidence and argue that it is not liable, the jury cannot allocate fault to a party who has already been dismissed from the case. Therefore, there is no risk of an inconsistent judgment of damages as to C4Digs or Leonardi if trial proceeds against Hol-Mac.

It is clear that Appellant's notice of appeal of the stipulated order dismissing Hol-Mac "without prejudice" is an interlocutory maneuver to seek automatic de novo review on the issue of duty and secure a ruling on liability. CP 260-61. However, the law does not favor this procedural gamesmanship. In *Wachovia SBA Lending, Inc. v. Kraft*, our supreme court stated it is well-accepted rule that a "voluntary dismissal" is not a final judgment, as "[n]o substantive issues are resolved, and the plaintiff may refile the suit." *Id.*, 165 Wn.2d 481, 487, 200 P.3d 683 (2009); *see also Bank of America, N.A. v. Owens,* 177 Wn. App. 181, 192, 311 P.2d 594

(2013) (holding a trial court's "preserving and tolling" of a party's claim "did not constitute 'disposing' of that claim, as contemplated by CR 54(b) and RAP 2.2(d).").

As a matter of law, the court has already found that C4Digs is not liable and dismissed it, as no duty exists. This court previously denied discretionary review, which was not challenged pursuant to RAP 17.7. Even though a final judgment was entered under CR 54(b) and this judgment might appear appealable under RAP 2.2(d), it makes no sense to mandate an immediate appeal because the inconsistent result proffered by the Estate on the issue of fault, as stated in the stipulated CR 54(b) order, is contrary to law and to appellate procedural rules. Because the Estate has failed to satisfy the requirements of CR 54(b) and RAP 2.2(d), this matter is not ripe for appeal and is better characterized as a petition for discretionary review.

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B. As C4Digs previously argued to this court, there is no basis under RAP 2.3(b)(1) to warrant discretionary review.

Appellant has already filed a petition for discretionary review, which was denied. The stated error and underlying issues asserted by Appellant's Opening Brief are the same as those included in the earlier petition. Although the court entered a CR 54(b) order based on stipulated factual findings, the status quo has not changed. For purposes of judicial economy, should the court treat the instant appeal as a petition for discretionary review, Respondent C4Digs will incorporate by reference the briefing regarding appealability pursuant to RAP 2.3 as set forth in its opposition filed on February 17, 2022. *See Aucoin v. C4Digs, Inc., et. al.*, No. 83502-5-I, Respondent C4Digs, Inc.'s Opposition to Motion for Discretionary Review (Feb. 17, 2022). For the reasons previously briefed by C4Digs, this court should deny discretionary review.

C. Should this court accept review, the superior court properly granted summary judgment to C4Digs.

An appellate court reviews an order granting summary judgment de novo. *Green v. Am. Pharmaceutical Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). This court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990). Here, this court should affirm the superior court's decision because C4Digs did not owe Mr. Aucoin any duties as a matter of law.

1. While scope of duty may involve questions of fact, existence of duty is a question of law.

The Estate's statement of issues makes clear that it understands neither the superior court's ruling nor the relevant law. The issue before the superior court was whether C4Digs (and Leonardi) owed a duty of care to Mr. Aucoin, who was not the employee of a subcontractor or an independent contractor for the project, but of a mere materials supplier. The Estate

argues the superior court erred by concluding C4Digs and Leonardi did not have a duty to supervise Ducas's delivery because a reasonable jury could have listened to the undisputed evidence and concluded that C4Digs: (1) had the right to supervise and/or to control Ducas's work; (2) exercised that right by requiring that C4Digs be notified of all deliveries and be present for all deliveries, including "problem deliveries" like the one involving Mr. Aucoin; (3) knew that making deliveries to its job site was dangerous; knew it was time for Mr. Aucoin's "problem delivery" but also knew Leonardi had failed to provide notice of when Mr. Aucoin's materials would be delivered; (5) left the jobsite despite knowing Mr. Aucoin "may be coming with a problem delivery"; and (6) failed to supervise the delivery and failed to ensure Mr. Aucoin could deliver the materials in a safe manner. Appellant Br., at 36-37. The Estate's argument that "undisputed evidence" created "issues of material fact" to be decided by a jury is clearly controverted by the superior court's oral ruling. *Compare* CP at 30 *and* 1RP 24-

25. Even so, the question of duty is one of law, not of fact, *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999), such that statements made in a deposition and objected to by C4Digs have no bearing on the right-to-control analysis and does not establish a legal duty.

2. As a matter of law, C4Digs did not owe Ducas Aucoin a duty of care.

Under Washington law, there are two ways a duty to provide a safe workplace can arise: (1) the common law or (2) Washington Industrial Safety and Health Act (WISHA).

a. Common law duty.

Under common law, a general contractor has the duty to provide a safe place to work only if it maintains a sufficient degree of control over the work. *Afoa v. Port of Seattle*, 191 Wn.2d 110, 121, 421 P.3d 903 (2018). If the general contractor has the right to exercise control, it also has a duty, within the scope of that control, to provide a safe place of work. *Afoa,* 191 Wn.2d at 121, 431 P.3d 903. The test for the right to exercise control is not established by actual interference with

the subcontractor's work, but where the general retains control over some part of the work. *Straw v. Esteem Const. Co., Inc.*, 45 Wn. App. 869, 874, 728 P.2d 1052 (1986). A right to control can arise where the general contractor affirmatively assumes a duty, such as furnishing lighting or assuming the responsibility for implementing safety precautions. *Id.* The general contractor does not retain control by controlling the timing or order of work, but by retaining the right to order the work be stopped or by inspecting the contractor's work to ensure adequate progress under the terms of the contract. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 663, 240 P.3d 162 (2010).

Although Mr. Aucoin's employer was a material supplier, not an independent contractor, in a similar vein, courts have routinely held that businesses that employ independent contractors are not liable for the actions taken by employees of those independent contractors. "Generally, a principal is not vicariously liable for the acts of an independent contractor."

Phillips v. Kaiser Aluminum & Chemical Corp., 74 Wn. App. 741, 749, 875 P.2d 1228 (1994).

In *Straw v. Esteem Const. Co., Inc.*, the court held that the general contractor had no duty to make the premises safe for a sub-subcontractor because the general contractor retained no right of control. *Straw*, 45 Wn. App. at 874-75. There, the general contractor coordinated the timing of the construction and framed the hole that the plaintiff fell in. *Id.* However, the court held that these were "not the type of affirmative act[s] which would indicate it retained control over the subcontractor's work." *Id.* at 875. The court also found it relevant that the general contractor had not contractually assumed responsibility for the safety of its subcontractor's employees. *Id.*

In *Shingledecker v. Roofmaster Products, Co.*, 937 Wn. App. 867, 868, 971 P.2d 523 (1999), the appellate court upheld the trial court's dismissal of a general contractor on summary judgment from the plaintiff's claims that it owed him a duty as

an employee of a third-party material supplier. The general contractor contracted with the plaintiff's employer to supply shingles and other materials on a roofing job. *Id.* The plaintiff was killed while a co-worker was attempting to return a conveyer to his employer's vehicle. *Id.* at 869. The appellate court held that the "duty to third parties is owed only by general contractors and owner/developers with supervisory authority." *Id.* at 871. The court reasoned that the plaintiff's employer was not "that of an independent contractor providing work to be supervised on the project." *Id.* at 872. The plaintiff's employer was "merely a supplier of goods and materials." *Id.* Furthermore, the general contractor "had no supervisory function or control over" the plaintiff's employer or its employees. *Id.* The plaintiff "was not acting under the direction or control" of the general contractor. *Id.*

Here, Mr. Aucoin was the employee of a material supplier hired by a subcontractor, Leonardi, over whom C4Digs had no control or right to control. The facts in this instant case

are incredibly similar to the *Shingledecker* case. Like in *Shingledecker*, Mr. Aucoin was not the employee of a subcontractor or independent contractor, but of a material supplier hired by a subcontractor. While operating a forklift at a location outside the control of C4Digs, he was killed, just as the *Shingledecker* plaintiff was killed while he and his coworker were loading their equipment onto a truck. C4Digs had no right to control Mr. Aucoin's delivery nor did they exert any control as it was not on site or even aware of the delivery. The *Shingledecker* court held that the general contractor owed no duties to the material supplier employees. Like the court in *Shingledecker*, this Court should affirm the summary judgment as there was no duty owed by C4Digs to Mr. Aucoin.

Appellant contends *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 452 P.3d 1205 (2019) is controlling. However, *Vargas* is irrelevant and does not apply here. The *Vargas* court found the general contractor there owed a duty to the subcontractor's injured employee, not the material supplier's

injured employee. *Id.* at 731. This is an important distinction. *Vargas* did not deal with the duties owed to a further removed party, a material supplier. *Shingledecker* remains good law. Therefore, the court should disregard Appellant's arguments under *Vargas* as it does not apply here.

b. Statutory duty to provide a safe place to work.

In addition to its common law duty, a general contractor may also have a statutory duty under the Washington Industrial Safety and Health Act (WISHA) to provide a safe place to "all employees working **on the premises**." *Stute v. P.C.M.C., Inc.*, 114 Wn.2d 454, 457–58, 460, 788 P.2d 545 (1990) (emphasis added). However, "this duty to third parties is owed only by general contractors and owner/developers with **supervisory authority**." *Shingledecker*, 93 Wn. App. at 871 (emphasis added). Appellant misstates the common work area rule in its argument that a general contractor's right to supervise or to control "the work" also involves whether a contractor was

"aware of a dangerous condition associated with the work." App. Br., 36 (internal quotes omitted).

In *Kelley v. Howard S. Wright Const. Co.*, which the *Vargas* opinion relies upon, the court determined it was a part of the general contractor's responsibilities "to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers **in common work areas** which create a high degree of risk to a significant number of workmen." *Id.*, 90 Wn.2d 323, 332, 582 P.2d 500 (1978) (emphasis added). In *Kelley*, the court found that plaintiff's accident occurred in an area **on the job site** where four different contractors had all worked within a short period of time. *Id.* (emphasis added). Finding the general contractor had supervisory and coordinating authority over all of the subcontractors, *Kelley* held the general contractor had a duty to see that property safety precautions were taken in that common area to provide the employees with a safe place to work. *Id.* This is otherwise deemed the common

areas rule by Washington courts. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 665, 240 P.3d 162, 170–71 (2010) (citing references omitted). *Vargas* expanded the common area rule discussed in *Kelley* to encompass "all areas in which a general contractor has the authority to supervise." *Vargas*, 194 Wn.2d at 733, 452 P.3d 1205 (2019). Even despite this expansion, however, no case law extends a general contractor's duties to areas **beyond or outside** the job site.

Here, Mr. Aucoin was killed on the far side of the street adjacent to the job site, and not within the staging permit's loading and unloading zone. CP 87-88. Therefore, C4Digs did not owe Mr. Aucoin any duty under WISHA, because he was not killed in any area on the premises, in a common area involving dangerous conditions that C4Digs was aware of, or in an area within C4Digs's supervision and control. 1RP 25-26. Based on these undisputed facts, the superior court properly found that C4Digs did not have control over that area of the public street where Mr. Aucoin was killed or owe a duty of

care, m accordance with *Vargas*, *Stute*, *Kelley*, and *Shingledecker*. 1RP 25-26. The Estate consistently fails to cite case law to support their argument that C4Digs's liability or right to control extends to the public road next to the site. CP 107-108. Therefore, the court did not err in ruling the scope of C4Digs' duties were limited to the job site and did not extend to Mr. Aucoin. *Stute*, 114 Wn.2d at 462.

3. Arguments attempting to distinguish *Shingledecker* must be disregarded.

The Estate did not raise any arguments regarding *Shingledecker* in its opposition to summary judgment, instead focusing on *Vargas*. *See* CP 105-109. Now, the Estate attempts to distinguish *Shingledecker*. App. Br., 41-42. This court does not consider arguments raised for the first time on appeal. *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 823, 394 P.3d 446 (2017); RAP 2.5(a). In addition, when reviewing orders on summary judgment, the appellate court "will consider only evidence and issues called to the attention of the trial court." RAP 9.12. The Estate's present

arguments that *Shingledecker* is distinguishable were not raised in the superior court, aside from a cursory mention at oral argument, and should not be considered by this court now.

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V. CONCLUSION

The Estate has failed to satisfy the requirements of CR 54(b) and RAP 2.2(d), this matter is not ripe for appeal and Appellant's Opening Brief should be treated as a petition for discretionary review and denied for reasons previously briefed by C4Digs. Should the court accept review, it should affirm the superior court's decision because C4Digs did not owe Mr. Aucoin any duties as a matter of law.

Respectfully submitted this 16th day of January, 2024.

I certify that this memorandum contains 6,921 words, in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 16, 2024, I caused service of the foregoing pleading on each and every attorney of record herein via Court of Appeals E-Filing Portal:

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DATED this 16th day of January, 2024, at Seattle, Washington.

s/ Jessica Leonard
Jessica Leonard, Legal Assistant

APPENDIX

LEA ENNIS
Court Administrator/Clerk

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July 11, 2022

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Case #: 835025
Jody Aucoin, et al., Petitioners v. C4Digs, Inc., et al., Respondents
King County Superior Court No. 20-2-13555-1

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on July 11, 2022, regarding Petitioner's Motion for Discretionary Review:

> Jody Aucoin, individually and as personal representative of the Estate of Ducas Aucoin, Holland Aucoin, and Tellis Aucoin seek discretionary review of November 18, 2021 superior court orders granting summary judgment dismissal of their wrongful death claims to C4Digs, Inc., and Leonardi Landscaping, Inc., and a December 10, 2021 order denying reconsideration. For the reasons discussed below, discretionary review is denied.

As the general contractor of a townhome construction project, C4Digs obtained a construction staging permit to use a portion of 26th Avenue East for construction parking, materials staging, and loading and unloading during construction. C4Digs subcontracted the landscaping work to Leonardi, which ordered pavers from SiteOne Landscape Supply, LLC. On May 14, 2018, Ducas Aucoin, a SiteOne employee, was unloading pavers ordered by Leonardi for the construction project on East John Street, a sloped road on the eastern side of the property, when his forklift tipped over and crushed him, causing his death.

The Aucoins sued C4Digs, Leonardi, and Hol-Mac Corporation, the forklift manufacturer.

C4Digs and Leonardi each filed summary judgment motions, arguing, among other things, that they did not owe a duty to the employee of a third party material supplier under Shingledecker v. Roofmaster Prods. Co., 93 Wn. App. 867, 971 P.2d 523 (1991). They also argued that they could not be liable under the Washington Industrial Safety and Health Act because Ducas Aucoin was not working on the job site, but a public road, when the accident occurred. After a hearing, the trial court granted summary judgment in the November 18 order and denied reconsideration in the December 10 order.

The Aucoins seek discretionary review under RAP 2.3(b)(1). "Interlocutory review is disfavored." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn.App.457, 462, 232 P.3d 591 (2010). "It is not the function of an appellate court to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case." Maybury v. City of Seattle, 53 Wn.2d 716, 720, 336 P.2d 878 (1959). Discretionary review may be granted under RAP 2.3(b)(1) if the trial court committed "obvious error which would render further proceedings useless."

The Aucoins contend the trial court obviously erred by (1) overlooking material facts tending to show that C4Digs and Leonardi had the right to supervise and control dangerous deliveries but failed to ensure that there was a clear staging area for Ducas Aucoin to make his delivery; (2) relying on Shingledecker, which is factually distinguishable, rather than Vargas v. Inland Washington, LLC, 194 Wn.2d 720, 452 P.3d 1205 (2019); and (3) granting Leonardi's untimely motion over their objection.
However, I am not persuaded that the trial court obviously erred by distinguishing a general contractor's ability to discourage material suppliers it may observe attempting to unload materials on East John Street from a right to control the manner or timing of a specific delivery from SiteOne. The Aucoins have not identified any evidence tending to show that either C4Digs or Leonardi had the right to require a SiteOne employee to make a specific delivery at a particular time or place. I am also not persuaded that the trial court obviously erred by concluding that the Aucoins' repeated characterization that Ducas Aucoin was

"forced" to unload on an unsafe slope outside the job site simply because the safe loading area on the job site was occupied did not raise a genuine issue of material fact for trial as to any right C4Digs or Leonardi may have had to control a SiteOne employee's work. Similarly, I am not persuaded that Vargas controls here or that Vargas overruled Shingledecker. As the trial court recognized, unlike the circumstances in Vargas, it was undisputed that C4Digs had provided a load and unload zone on the job site, but Ducas Aucoin "went to a different street that was not part of the designated area for loading and unloading, and that's when the tragedy happened." Finally, as the materials presented indicate that the Aucoins did not show any prejudice resulting from the timing of Leonardi's motion – as it appears undisputed that the trial court held the hearing 29 days after Leonardi filed its motion – I am not persuaded that the trial court obviously erred as to the timing of the hearing of Leonardi's motion.

As to the effects prong of RAP 2.3(b)(1), the Aucoins contend that further proceedings will be useless because Hol-Mac intends to blame C4Digs and Leonardi for the Aucoins' damages, such that there is no way to reconcile how to apportion fault between them if the claims are ultimately tried in separate jury trials after reversal of the summary judgment orders. However, as C4Digs points out, a jury in a trial against Hol-Mac cannot apportion fault to C4Digs and Leonardi, given the dismissal orders, but may award the Aucoins their full recovery against Hol-Mac. Such a trial would not be useless.

Accordingly, the Aucoins fail to show that discretionary review is warranted under RAP 2.3(b)(1); the motion for discretionary review is hereby denied.

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Lea Ennis
Court Administrator/Clerk

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

JODI AUCOIN, individually and as personal representative of the Estate of DUCAS AUCOIN; HOLLAND AUCOIN; and TELLIS AUCOIN,	)	No. 83502-5-I
Petitioners,	)	CERTIFICATE OF FINALITY
v.	)	King County
C4DIGS, INC.; HOL-MAC CORPORATION dba DONKEY FORKLIFTS; LEONARDI LANDSCAPING, INC.; and JOHN DOES 1-5,	)	Superior Court No. 20-2-13555-1 SEA
Respondents.	)	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the ruling of the Court of Appeals of the State of Washington, Division I, filed on July 11, 2022, became final on August 16, 2022.

c: Jason Paul Amala
David M. Dawson
Loren A. Cochran
Carinne Elizabeth Bannan
Steven George Wraith
Paul S. Smith III
Martin J Pujolar
Mark Evan Sprague

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 16th day of August, 2022.

Lea Ennis
Court Administrator/Clerk of the Court of Appeals, State of Washington Division I

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 1, 2022

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Case #: 835025
Jody Aucoin, et al., Petitioners v. C4Digs, Inc., et al., Respondents
King County Superior Court No. 20-2-13555-1

Counsel:

A motion for discretionary review has been set in the above referenced case for June 17, 2022 without oral argument before Commissioner Jennifer Koh. The parties will be notified when a decision has been entered.

Sincerely,

Lea Ennis
Court Administrator/Clerk

lls

LEA ENNIS
Court Administrator/Clerk

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Case #: 84921-2
AUCOIN ET AL VS CHESLEDON HOMES ET ANO
King County Superior Court No. 20-2-13555-1

Counsel:

On January 19, 2023 a notice of appeal was filed in the above case. It appears that the order may not be reviewable as of right pursuant to RAP 2.2(a). (January 3, 2023 Stipulated Order of Dismissal & Tolling Agreement - Hol-Mac Corp "without prejudice" entered)

On or before April 29, 2022, the parties should address in writing whether the order is appealable under RAP 2.2(a) and provide any supporting documentation. The case will then be routed to a commissioner for determination of appealability.

Sincerely,

Lea Ennis
Court Administrator/Clerk

ssd

LEA ENNIS
Court Administrator/Clerk

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March 10, 2023

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Case #: 84921-2
AUCOIN ET AL VS CHESLEDON HOMES ET ANO
King County Superior Court No. 20-2-13555-1

Counsel:

CORRECTED AS TO RESPONSE DUE DATE

On January 20, 2023, a notice of appeal was filed in the above case. It appears that the order may not be reviewable as of right pursuant to RAP 2.2(a). (Stipulated Order of Dismissal & Tolling Agreement - Hol-Mac Corp "without prejudice" entered)

On or before **March 30, 2023**, the parties should address in writing whether the order is appealable under RAP 2.2(a) and provide any supporting documentation.The case will then be routed to a commissioner for determination of appealability.
3, 2023

entered)

Sincerely,

Lea Ennis
Court Administrator/Clerk

ssd

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March 29, 2023

Lea Ennis
The Court of Appeals of the State of Washington
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Re: Case # 84921-2
Aucoin et al. v. Chesledon Homes et al.
King County Superior Court No. 20-2-13555-1

Dear Ms. Ennis,

On behalf of Appellants Jody Aucoin et al., please let this letter serve as a response to your letter dated March 10, 2023, which asked the parties to "address in writing whether the [trial court's order dismissing defendant Hol-Mac Corp. without prejudice]" is appealable under RAP 2.2(a).

In general, a party should file a notice of appeal within 30 days of the entry of the order or judgment they want reviewed. *Fox v. Sunmaster Prod., Inc.*, 115 Wn.2d 498, 502, 798 P.2d 808 (1990). When there are multiple claims and multiple parties, "[i]n the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties." RAP 2.2(d); *see also* CR 54(b).

This case was originally filed against three defendants: 1) C4Digs, Inc.; 2) Hol-Mac Corporation; and 3) Leonardi Landscaping, Inc. On November 18, 2021, the trial court granted summary judgment in favor of two of the three defendants – C4Digs, Inc., and Leonardi Landscaping, Inc. At the time, those orders were interlocutory because they adjudicated the rights and liabilities of less than all the parties. Therefore, filing a notice of appeal within 30 days of the trial court's order would have been improper, absent a CR 54(b) certification, because the order was not yet final when entered. *See Fox*, 115 Wn.2d at 502.

However, on January 3, 2023, the trial court issued an order dismissing the remaining claims against Hol-Mac Corporation. Accordingly, since there are no longer any remaining claims in this case, the trial court's summary judgment orders adjudicated all the rights and claims of the parties to this action. This action is now final and the Appellants may appeal as a matter of right the trial court's order granting summary

judgment to defendants C4Digs, Inc., and Leonardi Landscaping, Inc. *See Denney v. City of Richland*, 195 Wn.2d 649, 657, 462 P.3d 84 (2020) ("A summary judgment order falls within this court's definition of final judgment.").

The fact that Ms. Aucoin and the other Appellants have a right to file claims against defendant Hol-Mac because the order dismissing Hol-Mac was without prejudice should not change the Court's analysis of whether the summary judgment orders as to defendants C4Digs, Inc., and Leonardi Landscaping, Inc., are now appealable as a matter of right. The procedural posture of this case is no different than a case where a plaintiff who has the right to file a lawsuit against Defendant A and Defendant B only files a lawsuit against Defendant A. If that lawsuit against Defendant A is dismissed on summary judgment before the statute of limitations has run on their claims against Defendant B, the fact that the plaintiff still has a right to file a lawsuit against Defendant B does not change the fact that the summary judgment order as to Defendant A can be appealed as a matter of right.

Sincerely,

Jason P. Amala

PFAU COCHRAN VERTETIS AMALA PLLC

March 29, 2023 - 3:19 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84921-2
Appellate Court Case Title:	Jody Aucoin et al, Appellant's v. C4DIGS, Inc et al, Respondent's

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March 29, 2023

Lea Ennis
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, WA 98101

Re: *Aucoin et al v. C4Digs, Inc., Case No. 84921-2*
King County Superior Court No. 20-2-13555-1

Dear Ms. Ennis:

I am writing in response to your letter dated March 10, 2023, in which the Court of Appeals, Division One requested the parties address in writing whether the order identified by petitioner's Notice of Appeal is appealable under RAP 2.2(a).

Respondent C4Dig Inc.'s ("C4Digs") contends the Stipulated Order of Dismissal & Tolling Agreement - Hol-Mac Corp ("Stipulated Order"), entered on December 23, 2022, is not reviewable as a matter of right pursuant RAP 2.2(a), and the Commissioner should deny consideration of this appeal. Further, this court should not exercise its discretion and grant review under RAP 2.3, because petitioner is not an aggrieved party under RAP 3.1.

I. Procedural History

This discretionary appeal arises out of the summary judgment dismissal of two of three defendants in a wrongful death case based on a forklift accident. Ducas Aucoin's Estate and family (hereinafter collectively the "Estate") brought suit against the general contractor (C4Digs), the landscaping subcontractor (Leonardi Landscaping, Inc.), and the forklift manufacturer (Hol-Mac Corporation).

On November 18, 2021, the King County Superior Court, Hon. Mafe Rajul, entered two orders in cause number 20-2-13555-1 SEA, (1) one granting Defendant C4Digs's Motion for Summary Judgment, dismissing C4Dig's with prejudice; and (2) a second granting third-party Defendant Leonardi Landscaping, Inc.'s Motion for Summary Judgement, dismissing Leonardi from the matter with prejudice. On December 10, 2021 Honorable Rajul entered an order denying Plaintiffs' Motion for Reconsideration on the Motions for Summary Judgment. As a result of the court's dismissal of Defendants C4Digs and Leonardi, the only remaining defendant in the litigation was Defendant Hol-Mac Corporation.

Rather than go forward with trial as scheduled on February 6, 2023, the Estate and Hol-Mac apparently agreed it would be beneficial to stay the trial and address "resolution of the matter after Plaintiffs have an opportunity to appeal the dismissal of C4 Digs, Inc., and Leonardi

Landscaping, Inc." The Estate's solution was to sign a tolling agreement and voluntarily dismiss all claims against Hol-Mac, with the understanding that all dismissed claims would be preserved and may be refiled in the future.

On January 3, 2023, the King County Superior Court, Honorable Tanya Thorp, granted the remaining parties' Stipulated Order of Dismissal and Tolling Agreement ("Stipulated Order"). The order expressly states: (1) "Plaintiffs' claims against Defendant Hol-Mac Corporation in this matter are dismissed without prejudice and without an award of attorneys' fees or costs to any party" pursuant CR 41(a)(1)(A); and (2) "The statute of limitations for any and all claims Plaintiffs have against Defendant Hol-Mac Corporation is tolled until 90 days after the final decision termination review of any appeal of this Court's dismissal of defendants C4 Digs, Inc. and Leonardi Landscaping Inc."

Having consensually and temporarily dismissed Hol-Mac from the matter, the Estate now mistakenly believes it is entitled to review.

II. Legal Authority & Argument

A. Only an aggrieved party may seek review by an appellate court, and petitioner is not aggrieved.

A party may seek review as a matter of right on "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). *Ferguson Firm, PLLC v. Teller & Assocs., PLLC*, 178 Wn. App. 622, 628, 316 P.3d 509 (2013). Critically, only an aggrieved party may appeal to this court. RAP 3.1. In Washington, courts define an "aggrieved party" to mean one "whose proprietary, pecuniary, or personal rights are substantially affected." *Breda v. B.P.O. Elks Lake City 1800 So-620*, 120 Wn. App. 351, 353, 90 P.3d 1079, 1080 (2004) (internal quotations omitted).

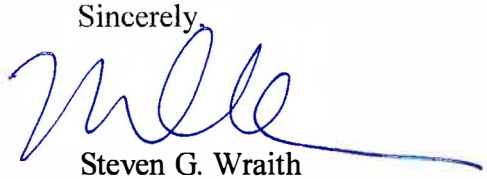
In this matter, the Stipulated Order does not seem to meet the criteria of RAP 2.2(a)(3) to the extent that it in essence preserves the Estate's proprietary, pecuniary, or personal rights to the underlying claims. The Estate stipulated to an order ***subject to a tolling agreement*** that extends the statute of limitations for any remaining claims ***until 90 days after a final decision terminates review*** of any appeal of this court's dismissal of C4Digs and Leonardi Landscaping. Stated another way, the Stipulated Order expressly reserves the Estate rights, claims, or defenses against the remaining defendant, Hol-Mac Corporation, and is not a certified final judgment. There is no indication the Stipulated Order substantially interferes with, or waives the Estate's right to pursue monetary relief or rights in this matter. There is also no indication the Estate's pecuniary interests have been substantially affected as the Stipulated Order was entered "without an award of attorneys' fees or costs to any party"– rights which have been preserved and may be pursued at a later time based on the tolling agreement.

Most importantly, the Estate cannot show it is an aggrieved party under RAP 3.1. First, the trial court had no choice but to enter the Stipulated Order dismissing the remaining claims in the case. *See* CR 41(a)(1)(A) ("[A]ny action shall be dismissed by the court ... [w]hen all parties who have appeared so stipulate in writing."); CR 41(c) (making the rule applicable to counterclaims, cross claims, and third party claims). Rather, this "but for" precedent to the dismissal order was based on the parties' stipulation, not the finality of the underlying cause of

action. *See Tandem, a Wine & Cheese Bar LLC v. NWCV Assocs., LLC*, Case No. 82158-0-I (March 21, 2022) (unpublished). Second, because the Estate agreed to the dismissal order, it cannot argue that a court erred in entering that order. *See Fite v. Lee*, 11 Wn. App. 21, 25-26, 521 P.2d 964 (1974) ("The order of dismissal ... was in the nature of a judgment by consent, which, in the absence of fraud or mistake or want of jurisdiction, will not be reviewed on appeal.").

Although the Stipulated Order was seemingly entered in the nature of a judgment, the judgment was entered *by consent*, and precludes the Estate from challenging the dismissal on appeal as a matter of right pursuant RAP 2.2(a). Because the Estate cannot establish it is an aggrieved party under RAP 3.1, the Estate lacks standing to appeal and this court should deny review as a matter of right.

Sincerely,



Steven G. Wraith
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March 29, 2023 - 4:29 PM

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Letter re Appealability Issue in Response to Lea Ennis Letter of 10 March 2023

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Appellate Court Case Title:	Jody Aucoin et al, Appellant's v. C4DIGS, Inc et al, Respondent's

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Letter of C4Digs re Appealability in Response to 10 Mar 2023 LTR from Lea Ennis

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Case #: 849212
Jody Aucoin et al, Appellant's v. C4DIGS, Inc et al, Respondent's
King County Superior Court No. 20-2-13555-1

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on May 3, 2023, regarding appealability:

> In response to this Court's inquiry regarding appealability, Judy Aucoin, et al. contends that the trial court's January 3, 2023 order dismissing without prejudice claims against a single remaining defendant, Hol-Mac Corporation, and stating that the statute of limitations is tolled until 90 days after resolution of an appeal as to the other defendants, renders earlier summary judgment orders in favor of two other defendants appealable as of right. Respondent C4Dig Inc. disagrees, arguing that January 3 order was entered by consent, such that Aucoin, et al is not an aggrieved party.

Aucoin has not identified controlling authority to establish that an order of dismissal without prejudice that includes such a tolling provision is appealable as of right under RAP 2.2(a), this matter should proceed as a discretionary review matter at this point. Aucoin, et al. should file a motion for discretionary review by or before May 22, 2023 and may include further briefing supporting her view on appealability.

Sincerely,

Lea Ennis
Court Administrator/Clerk

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May 18, 2023

Commissioner Jennifer Koh
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, WA 98101

Re: Case # 84921-2
Aucoin et al. v. Chesledon Homes et al.
King County Superior Court No. 20-2-13555-1

Dear Commissioner Koh,

On May 4, 2023, the Court concluded that the trial court's January 3, 2023 order dismissing a single remaining defendant, Hol-Mac Corporation, is not appealable as a matter of right. For that reason, the Court directed Jody Aucoin et al. to file a motion for discretionary review by or before May 22, 2023, explaining why they believe the trial court's January 3, 2023 order is appealable as a matter of right.

Jody Aucoin et al. intend to ask the Court to modify that decision because they are *not* appealing the trial court's January 3, 2023 order. Instead, they are appealing the trial court's November 18, 2021 orders that granted summary judgment in favor of defendants C4Digs, Inc., and Leonardi Landscaping, Inc., which are the orders identified in their Notice of Appeal that was filed on January 19, 2023. Those orders became appealable as a matter of right after defendant Hol-Mac Corporation, the sole remaining defendant, was voluntarily dismissed on January 3, 2023.

It is unclear how Ms. Aucoin and her daughters should proceed as it appears the Court misunderstood what orders they are appealing. Unless the Court directs otherwise, they intend to file a motion to modify for the reasons stated above, which would be due on June 4, 2023. However, the Court set the deadline for them to file a motion for discretionary review on May 22, 2023, which means they would need to file a motion for discretionary review regarding relief that they do not seek (e.g., they are not appealing the voluntary dismissal of Hol-Mac and they are not asserting that voluntary dismissal can be appealed as a matter of right).

Unless the Court wants to sua sponte address the foregoing, Ms. Aucoin and her daughter request the Court extend the deadline for their motion for discretionary review to June 5, 2023, and further order that they do not need to file a motion for discretionary review if they file a motion to modify the Court's ruling before that deadline.

Sincerely,

Jason P. Amala

PFAU COCHRAN VERTETIS AMALA PLLC

May 18, 2023 - 11:55 AM

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Case #: 84921-2
Jody Aucoin et al, Appellant's v. C4DIGS, Inc et al, Respondent's
King County Superior Court No. 20-2-13555-1

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on June 1, 2023:

"By correspondence filed May 18, 2023, Jody Aucoin et al. indicate this Court misunderstood what orders they intend to appeal. I have considered the May 18 filing as a motion for clarification and/or reconsideration of my May 3, 2023 ruling on appealability. To clarify, it appears Aucoin wishes to challenge two superior court orders entered on November 18, 2021 dismissing with prejudice Aucoin's claims against two defendants: C4Digs, Inc. and Leonardi Landscaping, Inc. The question considered in my May 3 ruling was whether the trial court's January 3, 2023 order resolved all claims

of all parties for the purposes of RAP 2.2(d), such that Aucoin may seek review of the November 18, 2021 orders as a matter of right. To be clear, although this Court looks to the practical effect of an order when considering appealability, a dismissal without prejudice is generally not final and appealable until the lawsuit may not be re-filed by operation of the statute of limitations. See Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 487, 200 P.3d 683 (2009); see also Munden v. Hazelrigg, 105 Wn.2d 39, 42-44, 711 P.2d 295 (1985). Here, it appears that the January 3 order dismissing without prejudice Aucoin's claims against the final remaining defendant, Hol-Mac Corp, is designed to reserve Aucoin's ability to seek further relief against Hol-Mac in the trial court following resolution of appeal proceedings involving C4Digs and Leonardi. In other words, the order appears designed to circumvent RAP 2.2(d) and the general rule regarding a dismissal without prejudice and reserve Aucoin's claim against Hol-Mac by tolling the statute of limitations. But, as I intended to express in my May 3 ruling, Aucoin has not identified authority allowing an appeal to go forward in this manner. Instead, to the extent it intends an appeal of the November 18, 2021 orders to go forward before resolution of Aucoin's claims against Hol-Mac, the trial court would normally enter findings as described in RAP 2.2(d) and CR 54(b). Accordingly, to the extent they intend to assert a right to review of the November 2021 orders before entry of a final judgment as to all claims and all parties, Aucoin may obtain and file a trial court order including RAP 2.2(d)/CR 54(b) findings by or before June 22, 2023. To the extent Aucoin prefers to seek discretionary review at this time without such findings, a motion for discretionary review - or a proper motion for extension of time - should be filed by or before June 16, 2023."

Sincerely,

Lea Ennis
Court Administrator/Clerk

ssd

LEE SMART P.S., INC.

January 16, 2024 - 2:26 PM

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