

NO. A08-1295

State of Minnesota
In Supreme Court

T.A. Schifsky & Sons, Inc., a Minnesota corporation,

Plaintiff,

vs.

Bahr Construction, L.L.C., et al.,

Defendants,

Consolidated Lumber Company, d/b/a Arrow Building Center,

Respondent,

Premier Bank,

Appellant-Petitioner,

Larson Contracting, Inc., et al.,

Intervening Defendants,

and

Premier Bank,

Appellant-Petitioner,

vs.

Bahr Construction & Contracting, L.L.C.,

d/b/a Bahr Construction, L.L.C., et al.,

Defendants,

Consolidated Lumber Company, d/b/a Arrow Building Center, Inc.,

Respondent.

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ARGUMENT

- I. **The Court Of Appeals Erred In Dismissing Premier Bank's Appeal As Untimely Because The December 13, 2007 Judgment Was Not Properly Certified Under Rule 54.02.**
 - A. **The December 13, 2007 partial judgment was not properly certified under Rule 54.02 because it was not an adjudication of one entire claim.**

In its response, Consolidated Lumber recognizes, as did the court of appeals, that the December 13, 2007 was a partial judgment because it reserved the issue of actual attorney fees for later determination. (Respondent Consolidated Lumber's Brief at p. 6) It argues that the district court's December 13, 2007 partial judgment was proper under Rule 54.02 because the district court "stated the mandatory certification language required by Rule 54.02. (*Id.*) Consolidated Lumber contends further that a district court's order for judgment is final if it contains the certification language of Rule 54.02 (*Id.*) But merely invoking the language of Rule 54.02 does not, standing alone, render a district court's attempted certification proper or the partial judgment final for appeal purposes.

According to the Minnesota Court of Appeals, "the time to appeal a judgment entered with a *proper* rule 54.02 certification begins to run once the judgment is entered." *Javinsky v. Commissioner of Admin.*, 725 N.W.2d 393, 397 (Minn. App. 2007) (emphasis added). In reaching its decision, the court of appeals noted this court's decision in *Matter of Commodore Hotel Fire & Explosion Case*, 318 N.W.2d 244 (Minn. 1982). In *Commodore*, this court ruled that Rule 54.02 was inapplicable because an "adjudication

of liability, without a determination of damages, is not an adjudication of even one entire claim." *Id.* at 246. This court reasoned that a judgment that only determines the issue of liability as to all the parties and not the issue of damages is merely "a *partial adjudication* of a claim or claims and not a *partial judgment* of an entire claim." *Id.* at 246-47 (emphases in original). The decision in *Commodore*, therefore, establishes the rule that a partial judgment that does not adjudicate an entire claim cannot be properly certified under Rule 54.02 because it is merely a potential adjudication of the claim.

In analyzing this issue, Magnuson and Herr succinctly note:

Because it is less than a full adjudication of a claim or claims, a partial adjudication cannot properly be certified as final by the trial court under Rule 54.02 and Rule 104.01.

* * * *

[W]here a court enters judgment with respect to only a portion of the relief sought and a party specifically reserved consideration of further relief on the same claim, the judgment is not final and is not an adjudication of an entire claim. Because only part of a claim has been resolved, the judgment cannot be certified as final under Rule 52.02 or Rule 104.01 and is not appealable.

There can be no appeal from a partial adjudication until damages are determined and judgment can be entered, even if the trial court tries to certify its decision as "final."

3 Eric J. Magnuson & David F. Herr, *Appellate Rules Annotated* § 103.6, at 49, § 104.5, at 328 (Minnesota Practice Series 2008 ed. 2008) (citations and footnotes omitted).

Contrary to the assertion of Consolidated Lumber, a partial judgment is not properly certified under Rule 54.02 simply because it contains the express certification language of the rule. To be properly certified and final under Rule 54.02, a partial

judgment must fully adjudicate an entire claim. Thus, a partial judgment that only partially adjudicates an entire claim cannot be properly certified under Rule 54.02, even though the district court attempts to certify it as final by invoking the language of the Rule 54.02.

B. Under Minnesota's mechanic's lien statute attorney fees are an element of lien claimant's damages.

Consolidated Lumber contends that even though the district court's December 13, 2007 partial judgment reserved the determination of actual attorney fees for later consideration, it was a final judgment under Rule 54.02 because its claim for attorney fees is a separate claim and not an element of its damages. This argument, however, ignores the plain language of Minn. Stat. 514.14 (2008).

The mechanic's lien statute provides that, "[j]udgment *shall* be given in favor of each lienholder for the amount demanded and proved, *with* costs and disbursements to be fixed by the court at the trial, and such amount shall not be included in the lien of any other party." Minn. Stat. § 514.14 (2008) (emphasis added). The preposition "with" as used in this sentence operates as a conjunction that joins the amount of the lien "demanded and proved" at trial together with the phrase "costs and disbursements to be fixed by the court at trial." The use of the word "shall" means that it is mandatory that the judgment on a successful mechanic's lien claim include the amount of the lien proven at trial together with the lien claimant's costs and disbursements. See Minn. Stat. § 645.44, subd. 16 (2008) (providing "'shall' is mandatory"). Under well settled Minnesota law, attorney fees and costs constitute part of the statutory foreclosure costs that are

recoverable under the mechanic's lien statute. *Obraske v. Woody*, 294 Minn. 105, 108, 199 N.W.2d 429, 432 (1972) (citing *Schmoll v. Lucht*, 106 Minn. 188, 118 N.W. 555 (1908) and other cases). Because attorney fees are considered part of the statutory costs and disbursement allowed under the mechanic's lien statute, the plain language of Minn. Stat. § 514.14 requires that they must be included in the judgment awarded to a successful mechanic's lien claimant.

Here, there is no dispute that the district court's December 13, 2007 partial judgment did not adjudicate or include the actual amount of Consolidated Lumber's attorney fees. By reserving this issue for later consideration, the district court necessarily did not fully adjudicate Consolidated Lumber's entire mechanic's lien claim.

In support of its argument that the December 13, 2007 partial judgment was final and properly certified under Rule 54.02, Consolidated Lumber relies on this court's decision in *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984). This reliance, however, is misguided. In *Spaeth*, this court ruled that a district court has continuing jurisdiction to issue an order setting the actual amount of attorney fees awarded at trial even though the case has been appealed. *Id.* at 825-826. The court the claim for attorney fees in that case "should be treated as a matter independent of the merits of the litigation." *Id.* at 825.

The decision in *Spaeth* is distinguishable. The case did not involve an award of attorney fees under Minnesota's mechanic's lien statute; rather, the case involved the award of attorney fees under Minnesota's Eminent Domain Statute. *Id.* at 822. The eminent domain statute at issue provided that an aggrieved person "shall be entitled a

person to *petition* the court for reimbursement for his reasonable costs and expenses, including reasonable attorney fees, actually incurred in the bringing such an action." *Id.* at 822 (*quoting and citing* Minn. Stat. § 117.045). The statute provided that such costs were allowed only in accordance with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. *Id.* at 822 (*citing* 42 U.S.C. § 4601 *et seq.*) But unlike the mechanic's lien statute at issue in this case, nothing within Minn. Stat. § 117.045 mandated that the judgment awarded to the aggrieved person include that award of attorney fees. The decision in *Spaeth* is inapposite to this case because attorney fees awarded to a successful mechanic's lien claimant are an element of the lien claimant's damages, and by the plain and unambiguous language of Minn. Stat. § 514.14, must be included in the judgment awarded to the lien claimant.

Contrary to the assertion of Consolidated Lumber, the decision in *Spaeth* does not stand for the blanket rule that in all instances attorney fees are costs that are separate and independent of the merits of the litigation. (*See* Consolidated Lumber's Brief at p. 13) This court has recognized that under certain circumstances attorney fees are recoverable as actual or special damages and are not collateral to and independent of the merits of the litigation. *See Paidar v. Hughes*, 615 N.W.2d 276, 280 (Minn. 2000) (holding attorney fees recoverable as special damages in slander of title action because they are incurred as direct and necessary result of tort); *Hill v. Okay Constr. Co, Inc.*, 312 Minn. 324, 347, 251 N.W.2d 107, 121 (1977) (holding attorney fees recoverable as damages where litigation with third parties was necessary and resulted from negligent representations of plaintiff's attorney to plaintiff's creditors); *Prior Lake State Bank v. Groth*, 259 Minn.

495, 499 108 N.W.2d 619, 622 (1961) (holding attorney fees recoverable as damages when litigation with third party was natural and proximate consequence of defendant's tortious conduct in embezzling from bank); *Tarnowski v. Resop*, 236 Minn. 33, 40 51 N.W.2d 801, 804 (1952) (holding attorney fees recoverable as damages when litigation with third party was directed traced to defendant's false representations regarding business for sale); *Mitchell v. Davies*, 51 Minn. 168, 169, 53 N.W. 363 (1892) (holding attorney fees recoverable as special damages in malicious prosecution cases).

Akin to the attorney fees that are incurred in a slander of title action to remove a cloud on title, the attorney fees that a lien claimant incurs in a mechanic's lien action are the direct and proximate result of the lien claimant not being paid for the labor or materials it furnished to the improvement and property being liened. The mechanic's lien claimant is forced to incur the cost and expense of bringing and litigating a lien claim because of the tortious conduct of another, i.e., the breach of contract that occurred when the lien claimant was not paid for its work or materials furnished for the improvement. Thus, unlike the attorney fees at issue in *Spaeth*, the attorney fees in a mechanic's lien action are not a separate claim that is collateral to and independent of the merits of the litigation. They are an element and integral component of successful mechanic's lien claimant's damages.

As such, a partial judgment that awards attorney fees on a mechanic's lien claim, but reserves the issue of the actual amount of attorney fees for later consideration is not a final adjudication of one entire claim and cannot be properly certified under Rule 54.02. The district court in this case, therefore, did not properly certify the December 13, 2007

judgment under Rule 54.02. It consequently was not immediately appealable under Rule 54.02 and Rule 104.01. The court of appeals, therefore, erred in dismissing Premier Bank's appeal as untimely because Premier Bank was not required to take an immediate appeal from the December 13, 2007 partial judgment.

II. This Court Should Establish A Rule That Interlocutory Appeals Of Judgments Certified Under Rule 54.02 Are Permissive, Rather Than Mandatory.

A. This court and courts across the country recognize that interlocutory appeals are generally permissive, rather than mandatory.

This court is called upon to address Minnesota law on interlocutory appeals of judgments certified under Rule 54.02 of the Minnesota Rules of Civil Procedure. An interlocutory appeal is "[a]n appeal that occurs before the trial court's final ruling on the entire case." Black's Law Dictionary 94 (7th ed. 1999). An appeal from a partial judgment certified under Rule 54.02 is an interlocutory appeal. *See Brookfield Trade Center, Inc. v. County of Ramsey*, 609 N.W.2d 868, 873 n.6 (Minn. 2000) (characterizing Rule 54.02 as rule that may "permit an appeal from an interlocutory ruling"). This court can find guidance from analogous legal authorities on the question of whether interlocutory appeals containing an express Rule 54.02 determinations are permissive, rather than mandatory.

In *Engvall v. Soo Line R. Co.*, 605 N.W.2d 738 (Minn. 2000), this court recognized that interlocutory appeals are generally permissive, rather than mandatory. In that case, this court reviewed an interlocutory appeal taken from the dismissal of a party for lack of subject matter jurisdiction where the district court did not make an express

Rule 54.02 determination. 605 N.W.2d at 741. One of the issues confronting this court was "whether appeal from an immediately appealable interlocutory judgment is permissive rather than mandatory." *Id.* at 741. The court defined "mandatory" as "mean[ing] that if the appeal is not taken from an interlocutory ruling, the right to appeal the ruling is lost." *Id.* It defined "permissive" to "mean that a party who is authorized to take an interlocutory appeal has the option to appeal the ruling immediately or to wait to appeal from the final judgment." *Id.* After thoroughly reviewing its prior cases and the policies underlying interlocutory appeals, this court held that an appeal from an immediately appealable interlocutory judgment that does not contain an express Rule 54.02 determination is permissive and not mandatory. *Id.* at 744-745. In establishing this rule, this court overruled the court of appeals' decision in *Semiconductor Automation, Inc. v. Lloyds of London*, 543 N.W.2d 123 (Minn. App. 1996), in which the court of appeals held that an immediately appealable interlocutory appeal not containing an express Rule 54.02 determination was mandatory.

In resolving the issue, this court reviewed the collateral order doctrine and its underlying policy. *Engvall*, 605 N.W.2d at 742. Under the collateral order doctrine, "parties may appeal from interlocutory orders or judgments under circumstances where the decision is (1) a final determination of a claim of right, (2) 'too important to be denied review[,] and (3) 'too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The court noted that "[s]everal appellate courts have explicitly held that when appeals are available under the collateral

order doctrine, they are permissive rather than mandatory." *Id.* (citing *Sierra Club v. Robertson*, 28 F.3d 753, 756 n. 3 (8th Cir. 1994); *Jamison v. Wiley*, 14 F.3d 222, 231 n. 11 (4th Cir. 1994); and *United States v. Michelle's Lounge*, 39 F.3d 684, 692 (7th Cir. 1994)). The court also noted the policy underlying this rule:

. . . Any rule that requires forfeiture of appellate opportunities for guessing wrong about doctrines of appealability that often are obscure would greatly increase the costs of collateral order doctrine by forcing protective appeals in many situations in which appealability is uncertain and in which all parties might prefer to await review on appeal from the final judgment. Forfeiture, moreover, would trap some parties in a box framed by a rule designed to alleviate untoward risks, not to create them.

Id. (quoting 15A Charles A. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3911 at 359 (2d ed. 1992)).

This court also drew on its decisions in *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995), and *City of Shorewood v. Metropolitan Waste Control Com'n*, 533 N.W.2d 402 (Minn. 1995). See *Engvall*, 605 N.W.2d at 742-43, 744-45. In both *McGowan* and *Shorewood*, this court allowed "procedural flexibility" to protect appellants in the timing of appeals from immediately appealable district court decisions. *Id.* at 744-45. In rejecting the court of appeals decision in *Semiconductor* stated:

A rigid determination that these types of appeals are mandatory would be inconsistent with the policy evinced in both *McGowan* and *Shorewood*. Such a rule would also be inconsistent with the collateral order doctrine of the federal system, under which similar appeals are permissive rather than mandatory.

Id. The court continued:

. . . Finally, consistent with our policy against piecemeal litigation, construing these interlocutory appeals as permissive allows appellants to wait to appeal from the final judgment if they so choose. This avoids "trap[ping] some parties in a box framed by a rule designed to alleviate untoward risks, not to create them."

Id. (quoting Charles A. Wright, et al., *Federal Practice and Procedure*, § 3911 at 359).

This court held that, "the better rule is that failure to appeal from such an interlocutory order or judgment does not result in forfeiture of the right to appeal from the final judgment." *Id.*

This court has since construed its decision in *Engvall* to mean that interlocutory appeals are generally permissive, rather than mandatory. For example, in *Kastner v. Star Trails Association*, this court cited *Engvall* for the proposition that failure to take an interlocutory appeal permissible under the principles of the collateral order doctrine does not forfeit the right of appellate review of the interlocutory order or judgment taken from the final judgment. 646 N.W.2d 235, 240 n.9 (Minn. 2002); *see also, e.g., State v. Dahlin*, 753 N.W.2d 300, 303, 304 (Minn. 2008) (stating interlocutory appeals "are not necessarily mandatory" and recognizing exception to *Engvall's* general principle that interlocutory appeals are permissive for "unique circumstances" involving peremptory removal of judge). No subsequent decision from this court has challenged *Engvall's* policy of favoring permissive interlocutory appeals. *See generally id.*

Legal commentators have echoed this court's general reading of *Engvall*. In their treatise on Minnesota's appellate rules, Magnuson and Herr cite *Engvall* for the proposition "that an appeal from an interlocutory order or judgment that is immediately appealable, even in the absence of an express determination of no just reason for delay, is

permissive and not mandatory." 3 Eric J. Magnuson & David F. Herr, *Appellate Rules Annotated* § 103.5, at 40 (Minnesota Practice Series 2008 ed. 2008) Another observed that the *Engvall* court "ruled that interlocutory appeals are permissive rather than mandatory--thereby clarifying Minnesota's rules regarding interlocutory appeals." Bernard E Nodzon, Jr., *Civil Procedure--The Minnesota Supreme Court Inserts a Greater Degree of Judicial Efficiency Into Multi-Party Litigation*, *Engvall v. Soo Line Railroad Co.*, 27 Wm. Mitchell L. Rev. 1233, 1234 (2000)

The only exception to this common reading of *Engvall* as favoring a policy of permissive interlocutory appeals is the court of appeals' decision in *Javinsky v. Commissioner of Administration*, 725 N.W.2d 393 (Minn. App. 2007). The court of appeals, however, misread *Engvall* as establishing the rule that interlocutory appeals from judgments containing an express Rule 54.02 determination are mandatory. *Id.* at 397. In arriving at this conclusion, the court of appeals ignored this court's thorough review of legal authorities and policies favoring permissive interlocutory appeals. *See Engvall*, 605 N.W.2d at 742-45. Instead, the court of appeals simply drew a negative inference from this court's brief description of the type of interlocutory appeal at issue in *Engvall*:

The supreme court reversed the dismissal order in *Engvall* and overruled this court's decision in *Semiconductor Automation*, rejecting the rule established by this court, which it described as characterizing an appeal from "an immediately appealable interlocutory order or judgment that does not contain an express Rule 54.02 determination" as "mandatory rather than permissive." *Engvall v. Soo Line R.R.*, 605 N.W.2d 738, 745 (Minn.2000) (emphasis added). The supreme court's characterization of the holding being reversed created an inference that inclusion of an express rule 54.02 determination *would* make an interlocutory appeal mandatory."

Javinsky, 725 N.W.2d at 397 (emphasis in original).

The other basis of *Javinsky's* holding, was an inference from Rule 104.01 of the Minnesota Rules of Civil Appellate Procedure. *See id.* at 396 (inferring Rule 104.01's timing requirements make Rule 54.02 appeals mandatory). In making this inferential leap, the *Javinsky* court simply equated the time for commencement of an appeal period with a requirement that failure to appeal within this period forfeits all rights to appeal. *See id.* Nothing in Rule 104.01 supports this inference. In fact, the use of the permissive term "may" in Rule 104.01, Subdivision 1, invites an opposite reading. See Minn. R. Civ. App. P. 104.01, subd. 1.¹ Without more, these inferences from *Engvall* and Rule 104.01 formed the slender reed upon which the court of appeals rested its continued refusal to acknowledge this court's policies favoring permissive appeals and procedural flexibility for appellants facing immediately appealable decisions, as stated in *McGowan*, *Shorewood*, and *Engvall*.

Contrary to the holding in *Javinsky*, many courts endorse permissive interlocutory appeals. *See* Charles A. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3911 at 359 (noting "several courts of appeals have held explicitly, across a wide range of collateral order appeal circumstances, that failure to take an available collateral order appeal does not forfeit the right to review the order on appeal from a final judgment"; *see also, e.g., Sierra Club v. Robertson*, 28 F.3d 753, 756 (8th Cir. 1994) (holding party may forgo its rights to interlocutory appeal of immediately appealable order denying preliminary injunction and raise issue on appeal after final judgment); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 608 (7th Cir.1993) (same); *Chambers v.*

¹ For more discussion on this issue, *see* Section II.C below.

Ohio Dept. of Human Services, 145 F.3d 793, 796-97 (6th Cir. 1998) (holding party may forgo interlocutory appeal of injunction order and present issue after final judgment); *Schwarz v. Folloder*, 767 F.2d 125, 129 n.4 (5th Cir. 1985) (noting exceptions to final judgment rule permit, but do not require, parties to file immediate interlocutory appeals and "[m]aking interlocutory appeals mandatory in this manner would turn the policy against piecemeal appeals on its head.").

A federal case endorsing permissive interlocutory appeals that is analogous to this matter is *Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). In that case, the D.C. Circuit Court of Appeals held that an appellant's failure to appeal from an interlocutory order that awarded attorney fees, but reserved for later consideration the actual amount of attorney fees did not foreclose an appeal after determination of the amount of attorney fees. *See id.* at 1271-72. The D.C. Circuit reasoned that even if the order was appealable as a collateral order, this fact did not preclude appellate consideration of the collateral issue when the entire case was before the appeals court on appeal following final judgment in the entire case. *Id.* at 1271 (citing 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3911, at 498-99 (1976)).

Legal commentators have noted the "close kinship" between Rule 54(b), the federal counterpart to Rule 54.02, and the collateral order doctrine. *See* 15A Charles A. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3911 at 368 (noting "close kinship" between Federal Rule 54(b) and collateral order doctrine). As Wright, Miller and Cooper explain: "[c]ivil Rule 54(b) has the most obvious relationship to collateral order doctrine, both because each provides a means of final decision appeal and

also because collateral order doctrine has been rested in part on the notion of separability that underlies Rule 54(b)." 15A Charles A. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3911 at 366. Given this close relationship between the two doctrines (i.e. allowing separable immediate appeals from interlocutory rulings prior to final judgment of all claims), this court can and should endorse the rule that the interlocutory appeal of a judgment certified under Rule 54.02 is permissive, rather than mandatory.

B. The better rule is that an interlocutory appeal containing an express Rule 54.02 determination is permissive, rather than mandatory.

This court should rule that an interlocutory appeal of a judgment containing an express Rule 54.02 determination is permissive, rather than mandatory because it is the better rule that furthers the stated policies of this court.

1. A permissive rule prevents trapping parties in a dilemma of choosing between the expense of a protective appeal that may not be properly certified under Rule 54.02 or risking forfeiture of their right to appeal.

This court explained in *Engvall* that a rule of permissive interlocutory appeal "allows appellants to wait to appeal from the final judgment if they so choose . . . [which] avoids 'trap[ping] some parties in a box framed by a rule designed to alleviate untoward risks, not to create them.'" *Engvall*, 605 N.W.2d at 745 (quoting Charles A. Wright, et al., *Federal Practice and Procedure* § 3911 at 359).

The court of appeals' decision in *Javinsky* poses considerable traps and pitfalls for parties because it simultaneously insists that Rule 54.02 appeals are mandatory, while requiring that 54.02 certifications be "proper" for the case to be appealable. *See Javinsky*,

725 N.W.2d at 397 (holding "the time to appeal a judgment entered with a proper rule 54.02 certification begins to run once the judgment is entered."). The decision in *Javinsky* also requires a party to take a mandatory appeal applies where a district court "ma[kes] the rule 54.02 certification without being requested to do so by either party." *Id.* Unfortunately, *Javinsky* provides no forum for determining of the propriety of a district court's Rule 54.02 certification, apart from appeal. And because an unrequested Rule 54.02 certification triggers a mandatory appeal under *Javinsky*, parties are forced to bring an appeal of an adverse ruling even though they may have preferred to wait until all the claims of all the parties were resolved.

The implications of *Javinsky*'s rule of mandatory appeal are largely negative and are costly to parties and the courts. If a party guesses wrong on the propriety of Rule 54.02 certification, it forfeits its right to appeal if it waits until there has either been a final adjudication of at least one entire claim or final judgment on all claims as to all parties. If the party guesses right on a district court's improper Rule 54.02 certification, the party would still have to bring a **second** appeal on proper certification—even when the party would prefer to wait until the end of the case and no party requested the Rule 54.02 certification. And if that party wants to file an appeal as to claims and parties not subject to the Rule 54.02 partial judgment, it would then need to file a **third** appeal from the judgment resolving all of the claims as to all parties at the end of the case. This scenario forces parties to pay for three appeals and appellate courts to review three appeals where one appeal could have addressed all of the issues. Allowing a permissive appeal in this situation would alleviate both the risk of guessing wrong and the expense

of multiple appeals. Therefore, the better rule is that an interlocutory appeal from a judgment containing an express Rule 54.02 determination should be permissive, rather than mandatory.

2. A permissive rule furthers the Rule 54.02's policy of preventing piecemeal appeals and conserving judicial resources.

This court has long recognized that "the thrust of the rules governing the appellate process is that appeals should not be brought or considered piecemeal" and that "the purpose of th[is] policy . . . [includes] conserv[ing] judicial resources" *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179 (Minn. 1988). And this court stated in *Engvall* that "the purpose of Rule 54.02 is 'to prevent piecemeal, interlocutory appeals and possible prejudice from the adjudication of less than all claims involved.'" *Engvall*, 605 N.W.2d at 741 (*quoting Novus Equities Corp. v. EM-TY Partnership*, 381 N.W.2d 426, 428 (Minn.1986)). A rule of permissive interlocutory appeal, rather than mandatory appeal, would further this court's policy against piecemeal appeals and in favor of conserving judicial resources.

The rule in *Javinsky's* fosters—rather than prevents—the filing of multiple, piecemeal appeals in the same case. *Javinsky* leaves an appellant with no real choice but to file a protective appeal (or appeals), even when the appellant might believe that the Rule 54.02 certification was not proper or would prefer to file a single, unitary appeal of the final judgment at the end of the case. This, in turn, expends scarce judicial resources in resolving protective, piecemeal appeals that may well be dismissed as premature or mooted by subsequent events in the district court or by the parties' actions. The rule that

better serves the purposes of Rule 54.02 to prevent piecemeal appeals and conserve judicial resources, is one that establishes that an appeal from a judgment certified under Rule 54.02 is permissive rather than mandatory.

3. **A permissive rule furthers this court's longstanding policy of relieving parties and their attorneys of the necessity of deciding correctly the propriety of a district court's direction for entry of judgment.**

In *Shorewood*, this court provided "procedural flexibility" in appeals "to relieve the parties and their lawyers of the necessity to decide correctly the propriety of the district court's direction for the entry of judgment" *City of Shorewood*, 533 N.W.2d at 404 (citing *Bulau v. Bulau*, 208 Minn. 529, 294 N.W. 845 (1940)). See *Engvall*, 605 N.W.2d at 744-45 (noting *Shorewood* allowed "procedural flexibility" to protect appellants). The *Engvall* court applied this policy in establishing its rule of permissive interlocutory appeals. For the same reason, a rule of permissive interlocutory appeal in this case, rather than mandatory appeal, would further this policy of relieving parties and their lawyers of the necessity to decide correctly the propriety of the district court's direction for the entry of judgment pursuant to Rule 54.02.

The rule in *Javinsky* undermines this court's longstanding policy in *Shorewood* and *Bulau* and forces parties and their lawyers "to decide correctly the propriety of the district court's direction for the entry of judgment. . . ." *City of Shorewood*, 533 N.W.2d at 404. If a party decides incorrectly on the propriety of the Rule 54.02 certification, it forfeits its right to appeal for all time. If the party decides correctly on a district court's improper Rule 54.02 certification, the party would still have to bring a second, and perhaps a third,

appeal on this other claims in the litigation. This scenario certainly does not further the policy of "procedural flexibility" for the benefit of an appellant set forth in *Shorewood* and *Engvall*. A permissive rule is therefore a better rule to relieve parties and their lawyers of the necessity to decide correctly the propriety of the district court's direction for the entry of judgment pursuant to Rule 54.02.

C. The text of Rule 104.01, Subdivision 1 on timing of an appeal from a Rule 54.02 judgment is permissive, rather than mandatory.

The text of Rule 104.01, subdivision 1, as written and promulgated by this court, expressly states that "[a]n appeal *may* be taken from a judgment entered pursuant to Rule 54.02 * * * within 60 days of entry of judgment," provided the district court makes an express determination that there is no just reason for delay and directs the entry of judgment. Minn. R. Civ. App. P. 104.01, subd. 1. (emphasis added). The rule's use of the word "may" indicates that an appeal from an interlocutory partial judgment entered pursuant to Rule 54.02 is permissive and not mandatory. This construction of the rule is supported by canons of construction and dictionary definitions of "may" versus "shall", as well as legal commentary. *See* Minn. Stat. § 645.44, Subds. 15 & 16 (stating that "'[m]ay' is permissive" and "'[s]hall" is mandatory."); Black's Law Dictionary 979, 1375 (6th ed. 1990) (stating that "may" "usually is employed to imply permissive, optional or discretionary, and not mandatory action or conduct" while "shall" "is generally imperative or mandatory"); *see also* Bernard E. Nodzon, Jr., 27 Wm. Mitchell L. Rev. at 1251 n.76 (stating if Rule 104.01, subd. 1 was "intended to force parties to appeal all appealable interlocutory judgments within the sixty day time period, they would have substituted the

word may with shall or stated that a party will lose the right to appeal interlocutory orders if not perfected within sixty days of the ruling."). As one commentator explained, Rule 104.01, subdivision 1 "does not require a party to appeal interlocutory orders within sixty days of a judgment; it only grants a party permission to appeal within sixty days." *Id.* This reading of Rule 104.01 is line with the policy of permissive interlocutory appeals in federal courts. *See, e.g., Schwarz v. Folloder*, 767 F.2d 125, 129 n.4 (5th Cir. 1985) (noting exceptions to final judgment rule permit, but do not require, parties to file immediate interlocutory appeals). Therefore, a party reading Rule 104.01 could reasonably conclude that its text allows, but does not require, an immediate interlocutory appeal from a judgment certified under Rule 54.02.

D. This court is the final authority on the application of its procedural rules and may establish a decisional rule that an interlocutory appeal of a judgment certified under Rule 54.02 is permissive, rather than mandatory.

Contrary to Consolidated Lumber's Brief, Premier Bank is neither requesting adoption of a new Rule of Civil Appellate Procedure nor is it requesting revision of an existing procedural rule. Moreover, the current proceeding is not a Petition for Further Review— this court granted Premier Bank's Petition for Further Review on November 18, 2008. Instead, Premier Bank is asking this court to establish a decisional rule—through construction of its own current procedural rules—that an interlocutory appeal of a judgment certified under Rule 54.02 is permissive, rather than mandatory. Premier Bank can make this request because this court, and not the court of appeals, is the final authority on the application of this court's procedural rules. The court of appeals' decision

in *Javinsky* is not binding precedent and does not represent a definitive statement of Minnesota law unless and until its mandatory appeal rule is adopted by this court. See *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996) (observing that court of appeals decision on issue of appellate jurisprudence does not represent a definitive statement of the law of Minnesota until adopted by supreme court"); see also *Pulju v. Metropolitan Property & Cas.*, 535 N.W.2d 608-09 (Minn. 1995) (criticizing and reversing court of appeals' attempt "to wholly reshape long-accepted methods of appeal" contrary to discussions in two supreme court precedents and "[w]ithout decisional or statutory authority and for reasons not clear from its decision"). Because this court is the final authority on the application of its procedural rules, it is free to adopt a decisional rule that an interlocutory appeal of a judgment certified under Rule 54.02 is permissive, rather than mandatory.

CONCLUSION

The December 13, 2007 partial judgment was not immediately appealable under Rule 104.01 because it was not properly certified under Rule 54.02, despite the district court's express determination that there was no just reason for delay and direction that judgment be entered. The court of appeals therefore improperly dismissed Premier Bank's appeal as untimely. Premier Bank respectfully requests that this court reverse the decision of the court of appeals and allow this appeal to proceed in that court on the merits.

Respectfully submitted,

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Dated: 1/27/09

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is **5,732** words. This brief was prepared using Microsoft Word 2003.

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