

NO. 64154-9-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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BOARD OF TRUSTEES OF THE NORTHWEST IRONWORKERS HEALTH &  
SECURITY FUND, NORTHWEST IRONWORKERS RETIREMENT TRUST,  
NORTHWEST FIELD IRONWORKERS ANNUITY TRUST FUND, NORTHWEST  
IRONWORKERS EMPLOYERS VACATION TRUST, NORTHWEST  
IRONWORKERS & EMPLOYERS APPRENTICESHIP & TRAINING TRUST FUND,

Plaintiffs,

v.

SOUTH-N-ERECTORS, LLC, et al., a Washington Limited Liability Company

Defendant,

and

OHIO CASUALTY INSURANCE CO., Bond No. 3-904-997,

Additional Defendant,

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**REPLY BRIEF OF APPELLANT**

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## II. ADDITIONAL STATEMENT OF THE CASE

An additional statement as to the entry of Trial Court's July 24, 2009 Order (hereafter as the "July 24 Order") may be helpful.

First, the July 29 Order was the Trial Court's decision on Ohio Casualty's Motion for Involuntary Dismissal. CP 59 and 90 (Motion and Decl. dated July 8), CP 48 (noted for consideration on July 21), CP 67 (Plaintiffs' Response dated July 17)<sup>1</sup>, and CP 87 (Order signed July 24).

Second, Plaintiffs did not file an actual motion. Rather, their request for "summary judgment" was a truncated one at the end of their Response to Ohio Casualty's Motion for Involuntary Dismissal. CP 66:10-23. Nor did Plaintiffs file a Note for Motion as required by LCR 7(b)(5)(A) notifying both the Court and Ohio Casualty that they wished to bring a dispositive Motion.

Third, Plaintiffs' request for a dispositive ruling was made three weeks after the scheduled trial date of June 29, and over one month from the June 15 deadline for the Court to hear dispositive motions. CP 21.

Fourth, Plaintiffs' request for "summary judgment" did not comply with the time mandates of CR 56(c) and LCR 56(c). Both of those rules require that a motion for summary judgment "be filed and served not later

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<sup>1</sup> Pursuant to LCR 7(b)(4)(D), since Ohio Casualty's Motion was noted for a Tuesday (July 21), Plaintiffs' Response was due two Court days prior, Friday, July 17.

than 28 calendar days before the hearing.” Plaintiffs’ request was made less than two Court days, and less than four calendar days, from the date for the Court’s consideration. CP 60-67 and CP 48.

Fifth, the Trial Court did not state it reviewed or interpreted the bond. While the July 24 Order states the Trial Court “considered” the declaration attaching the bond, it does not state that it reviewed the bond, nor are there any findings or conclusions as to the bond itself. CP 86-87.

Sixth, the July 24 Order does not enter an actual judgment, but instead conveys the Trial Court’s intent as to what Plaintiffs were to receive in the future: “[t]he plaintiffs are entitled to a judgment against the surety, Ohio Casualty in the amount of \$13,865.95...” CP 87:14-16. There is no identification of the judgment creditor or debtor, no listing of the attorney for the judgment creditor or debtor, and no mention of interest (post or pre), costs, or fees. CP 86-87.

Seventh, a month later the Court entered its final judgment against Ohio Casualty (CP 83-85) (hereafter the “August 20 Judgment”). It states that “judgment be entered against defendant, Ohio Casualty...” and contains a “judgment summary” listing the judgment creditor and debtor and their respective attorneys, and addresses interest. CP 83-85.

### III. LEGAL AUTHORITY AND ARGUMENT

#### A. THE TRIAL COURT'S JULY 24 ORDER IS PROPERLY BEFORE THIS COURT FOR REVIEW

##### 1. The July 24 Order Was Designated in the Notice of Appeal

As required by RAP 5.3(a), Ohio Casualty designated both the both the July 24 Order and the August 20 Judgment in its Notice. CP 81-82. RAP 2.4(a) defines the scope of review to those decisions identified in the Notice of Appeal:

The Appellate Court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal...

RAP 2.4(a). Thus, by operation of RAP 5.1(a), RAP 5.3(a), and RAP 2.4(a), the scope of review includes both decisions of the Trial Court.

##### 2. The RAP Rendered Plaintiffs' Outdated Contention Moot.

Plaintiffs rely upon three pre-RAP cases for their contention that if Ohio Casualty desired review of the July 24 Order, it was required to file its Notice of Appeal within 30 days thereafter or lose its appeal rights.

(Brief of Resp., Section IV.A, 8-10). This contention has been rejected:

These provisions [referring to the RAP] make it clear that a party does not automatically lose the right to appellate review of either 'appealable orders' or partial 'final judgments' by failing to file a notice of appeal within 30 days.

*Fox v. Sunmaster Prod., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990).

Prior to enactment of the RAP, former CAROA 33 indicated a “notice of appeal must be filed within 30 days after entry of an appealable order.” *Kelly v. Schorzman*, 3 Wn.App. 908, 911, 478 P.2d 769 (1970).

The enactment of the RAP eliminated this notion in favor of a single appeal from a final judgment:

Before RAP 2.4 was adopted, Washington courts did not allow review of a trial court order on appeal from the final judgment if the order was one that could have been appealed when entered. The rule encouraged piecemeal review and occasionally trapped unwary practitioners who did not realize that a particular order was appealable when entered. By changing the rule, RAP 2.4 was designed to encourage appeals only from a final judgment, and to eliminate the procedural trap.

2A Wash.Prac., *Rules Practice* RAP 2.4 (6<sup>th</sup> ed.).

The Supreme Court referred to the pre-RAP procedure “as a trap for the unwary” because it was unclear to litigants precisely what was an appealable order, and therefore at which point should a litigant appeal without running the risk of losing its appeal rights *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257 (1988), referring to the Comment RAP 2.4(b), 86 Wn.2d 1150 (1976). *See also*, 2A Wash.Prac, *supra*, publishing the Comment stating “A pitfall under prior rules has been that the failure to appeal an appealable order may prevent its review upon appeal from final judgment.”

The enactment of RAP 2.4 eliminated the trap for the unwary “by including prior appealable orders within the scope of review.” 2A Wash.Prac., *supra*, citing Comment RAP 2.4 (1976). Litigants no longer had “to act as soothsayers to determine when a written trial court opinion or decision might be a final judgment.” *Dept. of Labor & Indus. v. City of Kennewick*, 99 Wn.2d 225, 231, 661 P.2d 133 (1983). In addition to eliminating the trap, the RAP further diminished piecemeal appeals and provided certainty and uniformity:

All parties are then aware of the status of the proceeding and can consider the applicability of post-judgment motions such as motions for reconsideration, CR 59(b), appeals under RAP 2.2, and other time-limited procedures hinging upon entry of judgment.

*City of Kennewick, supra*, 99 Wn.2d at 231 (citation omitted).

Accordingly, Plaintiffs’ contention was expressly rejected with the enactment of the RAP, is without merit, and is contrary to interpreting the RAP liberally “to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a).

3. In any Event, the July 24 Order was Not an Appealable Order

Consonant with the above principals, when a trial court enters a decision adjudicating all of the claims then later enters a formal judgment, a notice of appeal filed within 30 days of the later judgment is timely to obtain review of the earlier order. *See, e.g., City of Kennewick, supra*, 99

Wn.2d at 226-228 (written memorandum decision not a final order); *Corrigal v. Ball & Dodd Funeral Home*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978) (written memorandum decision followed by entry of judgment); *Dix v. ICT Group, Inc.*, 125 Wn.App. 929, 932-933, 106 P.3d 841 (2005) (letter opinion dismissing complaint later incorporated into a final judgment of dismissal); *Nicacai v. Yakima Chief Ranches*, 63 Wn.2d 945, 946 and 948, 389 P.2d 888 (1964) (memorandum opinion denying summary judgment then entering order of dismissal nearly two years later); and RAP 2.2(a)(1) and (3) (distinguishing between “final judgment” and a “decision determining action”).

A decision of the Trial Court that may adjudicate all issues and claims is not a final judgment; the final judgment is the formal order that is later entered. *See, e.g., Dix, supra*, 125 Wn.App. at 833-844 (“The final, appealable order was the order of dismissal..., not the trial court’s letter opinion...The notice of appeal was timely filed.”); and *City of Kennewick, supra*, 99 Wn.2d at 228 (holding CR 54(e) “on its face, requires entry of a formal order prepared (in most cases) by the prevailing party and signed by the judge. The memorandum decision in this case did not comply with these requirements.”); and *Nicacai, supra*, 63 Wn.2d at 948 (“The issue is not resolved until an order is entered.”).

Likewise, the Trial Court's July 24 Order was not the appealable final judgment, but simply a written expression of the Trial Court's belief that all claims and defenses regarding Ohio Casualty had been resolved, and therefore Plaintiffs were entitled to summary judgment. The July 24 Order was not the formal final judgment as dictated by CR 54(e) and CR 58 for all of the reasons stated in Section II, "Additional Statement of the Case," *supra*. In addition, the July 24 Order never adjudicated whether Plaintiffs met the terms and conditions of the bond, nor did the Trial Court ever adjudicate Ohio Casualty's defenses to those claims.

Rather, the August 20 Judgment was the formal final judgment dictated by CR 54(e) and 58. *See City of Kennewick, supra*, 99 Wn.2d at 228 (requiring entry of a formal order); and *Dix, supra*, 125 Wn.App. at 933 ("An appeal cannot be taken until the formal order is entered."). This is precisely what the Trial Court did in ruling upon Ohio Casualty's Motion for Involuntary Dismissal. The Trial Court declined to dismiss Plaintiffs' claims, believing (erroneously) that all issues regarding Ohio Casualty had been previously resolved and therefore Plaintiffs "are entitled to a judgment against" Ohio Casualty.

This is entirely consistent with and is supported by the accepted axiom established even prior to enactment of the RAP—an appeal from

the final judgment brings up for review both most pretrial orders and the decisions made during the course of trial:

The policy of the law is to avoid a multiplicity of appeals and relegate the party aggrieved, so far as possible, to but one appeal after final judgment, which brings up for review all orders made in the action, thus avoiding needless delays which frequently amount to a denial of justice, saving expense to litigants, and relieving the courts of useless and unnecessary labor.

*Van Buren v. Peterson*, 107 Wash. 697, 698, 185 P. 572 (1919); and *Behavioral Sciences Institute v. Great-West Life*, 84 Wn.App. 863, 870, 930 P.2d 933 (1997) (“an appeal from a final judgment brings up most pretrial orders.”); and 2A Wash.Prac., *Rules Practice* RAP 2.4 (6<sup>th</sup> ed.).

#### 4. The July 24 Order was a Partial Order

It is undisputed that the July 24 Order only addressed claims as to Ohio Casualty and its principal, South-N-Erectors, and as such could have only adjudicated some of the claims in the action as to one of the parties. It therefore is a partial Order under CR 54(b) that can neither be appealed nor executed upon. CR 54(b), RAP 2.2(d); *Gazin v. Hieber*, 8 Wn.App. 104, 504 P.2d 1178 (1972); and *Fluor Enter. V. Walter Const. Ltd.*, 141 Wn.App. 761, 766-769, 172 P.3d 368 (2007).

As a partial order, it cannot it not be appealed or executed upon, and the Trial Court retained the right to revise or modify it at any time prior to entry of final judgment. *Fox, supra*, 115Wn.2d at 504; *Washburn*

*v. Beatt Equip. Co.*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992) (“Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.”); *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (“An expressed intention to perform a future act is not the same as performing the act itself. Until final judgment is entered, the trial judge is not bound by a prior expressed intention to rule in a certain manner.”); and *In re Estate of Hooper*, 53 Wn.2d 262, 269, 332 P.2d 1077 (1958) (prior to entry of final judgment, trial court had authority to vacate erroneous findings of fact and conclusions of law, which were interlocutory in character).

Indeed, even absent CR 60, the Trial Court had the inherent authority to vacate, modify, or amend its orders, whether final or not. *See, e.g., Seattle First Nat. Bank v. Treiver*, 13 Wn.App. 478, 480-81, 534 P.2d 1376 (1975).

5. RAP 2.4(b) Further Provides for Review of the July 24 Order

RAP 2.4(b) provides an “order or ruling not designated in the notice” may be reviewed upon two conditions: “(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.”

Obviously, there is no question that the July 24 Order was entered before this Court accepted review. CP 86-88 (July 24 Order) and CP 81-82 (Notice of Appeal). Nor should there be any question that the July 24 Order “prejudicially affects” the August 30 Judgment. Indeed, the August 30 Judgment would not have occurred but for the July 24 Order.

When a later decision of the trial court “would not have occurred absent” an earlier decision or is “based on...[an] earlier ruling[,]” then the prior decision “prejudicially affects” the latter decision. *Adkins, supra*, 110 Wn.2d at 134; and *Behavioral Sciences, supra*, 84 Wn.App. at 870.

In *Adkins*, the trial court granted a defense motion for a mistrial. The defense prevailed at the second trial, and the plaintiff appealed the earlier ruling granting the mistrial. 110 Wn.2d at 130-132 and 135. In deciding whether review could be had, the Supreme Court held because the “second trial would not have occurred absent the trial court’s decision granting the motion for a mistrial,” the decision granting a mistrial “prejudicially affected the final decision which was designated in the notice of appeal.” 110 Wn.2d at 134-135.

Likewise, in *Behavioral Sciences*, the trial court had earlier entered a partial summary judgment order in favor of the plaintiff, then months later refused to consider the defendant’s motion for summary judgment on the same matter as an untimely motion for reconsideration. 84 Wn.App. at

868-869. The defendant appealed, and the plaintiff argued that it was too late to review the initial order granting plaintiff's motion. This Court rejected that contention, holding "the previous orders were prejudicially affected by the final order because [plaintiff's] entitlement to relief under the final order was based on these earlier rulings. Thus, review of all orders is proper." 84 Wn.App. at 870.

Just as in *Adkins, supra*, and *Behavioral Sciences, supra*, the July 24 Order "prejudicially affected" the August 20 Judgment—the Judgment would not have been entered but for, and was based upon, the Order.

One the purposes of RAP 2.4(b) is to have the "beneficial effect [of] the avoidance of undesirable piecemeal appeals." *Adkins, supra*, 110 Wn.2d at 135. Requiring a litigant to appeal an initial order, such as a partial summary judgment order, encourages piecemeal appeals. The Civil Rules contemplate a formal process for entry of a final judgment, and the RAP "require only" that the Notice of Appeal be filed within 30 days of entry of that judgment. *See, e.g., City of Kennewick, supra*, 99 Wn.2d at 228 (discussing the "formal procedure" contemplated by the Civil Rules); and *Corrigal, supra*, 89 Wn.2d at 961 (holding "our rules require only that the notice be filed within 30 days of the entry of judgment," citing RAP 2.1(a)(2); 5.2(a), (c); and CR 58).

**B. THE TRIAL COURT SHOULD HAVE DISMISSED THE ACTION FOR PLAINTIFFS' FAILURE TO APPEAR AT TRIAL**

In its Opening Brief, Ohio Casualty asserted that both LCR 4(i) and 41(b)(2)(A) mandated a dismissal for Plaintiffs' failure to appear for trial. In their Brief, the Plaintiffs did not dispute that they failed to appear for trial, and made no effort to distinguish or dispute that the Trial Court's Local Rules mandated dismissal. Brief of Resp., 16-17.

Rather, Plaintiffs asserted that "dismissal is considered a harsh remedy," citing but one authority, *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686-687, 41 P.3d 1175 (2002). The decision in *Rivers* is inapplicable because it discussed discovery violations, not an instance where plaintiff failed to appear at trial. These are wholly disparate situations, with different legal standards.

When a party fails to comply with its discovery obligations, CR 37 provides a whole host of sanctions available to the Trial Court, from extending time in which to respond and/or imposing monetary expenses, up to entering default or dismissing claims. *See, e.g.,* CR 37(b)(2). The standard for a trial court imposing one of the harsher sanctions, such as dismissal or default, contains three elements: (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponents ability to prepare for trial, and (3)

the Trial Court explicitly considered whether a lesser sanction would probably have sufficed. *See, e.g., Rivers, supra*, 145 Wn.2d at 686-687.

On the other hand, for a failure to appear at trial, LCR 4(i) and 41(b)(2)(A) provide that “an order of dismissal will be entered...” This language indicates a mandatory dismissal, without regard to whether the failure to appear was willful or deliberate, and without regard to whether there was “substantial prejudice” to the defendant. Therefore, the legal standards are distinct and disparate, and the decision in *Rivers* is wholly inapplicable to the instant action where the Plaintiffs failed to appear for trial as opposed to failing to respond to discovery.

The distinct legal standards are rightfully so because of the circumstances. With a discovery violation, the prejudice is the inability to properly prepare for trial, however because trial is several weeks or months away, that prejudice can be cured through an order to compel, monetary sanctions, or even the striking of certain claims or defenses. Therefore, dismissals for discovery violations will be made only where there is substantial prejudice that cannot be cured through lesser sanctions.

On the other hand, when a case is set for trial, both the Civil Rules and the Trial Court’s LCR “clearly require[] final disposition, a continuance upon a proper showing, or resetting.” *Wagner v. McDonald*, 10 Wn.App. 213, 216, 516 P.2d 1051 (1973) (referring to CR 40(d) and

CR 41). Thus, some disposition has to occur, and a lesser sanction of monetary sanctions will not accomplish the final disposition, or in other words a lesser sanction that might be available for a discovery violation is unavailable when a plaintiff fails to appear for trial.

Further, the defendant has appeared and prepared its case for trial; the prejudice has already occurred and cannot be cured. In *Wagner*, *supra*, the dismissal of the first suit and preclusion of the second suit due to *res judicata* was upheld for this reason:

to recognize the necessity that respect be shown to the convenience of the defendant who otherwise could be compelled to prepare a defense addressing the merits of the case on multiple occasions.

*Wagner, supra*, 10 Wn.App. at 218, further referring to the “inconvenience of preparing to meet plaintiff’s claims...”

Therefore, the Trial Court erred in failing to dismiss the case pursuant to LCR 4(i) and 41(b)(2)(A). Neither of those rules include the safe harbor of “good cause” (as is in LCR 4(j) for failing to list trial witnesses and exhibits), and any excuse for the failure to appear is of no consequence. Ohio Casualty appeared for trial ready to adjudicate the claims against it, but Plaintiffs failed to appear. The Trial Court erred in failing to dismiss the case, and this Court should dismiss Plaintiffs’ claims with prejudice, which would render moot any other issues on appeal.

**C. THE LIABILITY OF SOUTH-N-ERECTORS NEED NOT  
HAVE BEEN DETERMINED FIRST**

Plaintiffs agree on appeal that Ohio Casualty's liability is based upon the terms of the bond, and not automatically upon the liability of its bond principal (South-N-Erectors). Brief of Resp., pg. 11, and CP 62:14-63:3 (Plaintiffs' Response). Plaintiffs further agree that they can pursue, and could have pursued, Ohio Casualty separate and independent of any claims it had against South-N-Erectors. Brief of Resp., pg. 11.

But, Plaintiffs erroneously assert that the bond principal's *liability* must *first* be determined before the liability of the surety, because the surety's liability is a derivative from its principal. Plaintiffs are confusing establishing a condition of the bond with fixing liability. Typically, a surety bond is not implicated unless the bond principal fails to perform or breaches some obligation, and therefore establishing the bond principal's default or breach is necessary for a claim against the bond. However, a bond claimant need not establish the actual *liability* of the bond principal in order to recover against the bond.

If a surety can be sued independently and separately, with the bond claimant taking no action against the bond principal, as Plaintiffs have wholeheartedly agreed both before the Trial Court and on appeal, then *a fortiori* the liability of the surety can be fixed without first fixing the

liability of the bond principal. *See Holland v. Fahnestock & Co.*, 210 F.R.D. 487, 500 (S.D.N.Y. 2002); *Accord Cosmopolitan Eng'g Group v. Ondeo Degremont*, 159 Wn.2d 292, 301, 149 P.3d (2006); and *see Col. Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 628-629, 167 P.3d 1125 (2007) (a surety may require an obligee to sue principal as a condition of surety's liability).

The facts and decision in *Colorado Structures, supra*, demonstrate that the liability of the bond principal need not first be "fixed and ascertainable." *Colorado Structures* involved a construction project where the subcontractor and bond principal (Action) defaulted, and the general contractor (Structures) sued both Action and its surety (West). 161 Wn.2d at 583-584. However, Action went out of business and was "not a party to [the] suit." 161 Wn.2d at 583-584. The Court interpreted and construed the bond to determine if West was liable, and in so doing it was necessary to determine if Action was in default because default was a condition of the bond. 161 Wn.2d at 589-90 (principal's performance a condition subsequent to liability of bond, and no dispute Action breached subcontract). However, Action's *liability* was neither determined nor fixed, nor did it need to be because Action was not a party to the suit and because West's liability was neither conditioned upon nor coextensive with Action's liability.

Likewise, the Trial Court here did not need to fix the liability of South-N-Erectors before determining the liability of Ohio Casualty. Rather, Plaintiffs simply needed to establish the terms and conditions of the bond, which would have included establishing South-N-Erectors' breach or default. Plaintiffs declined to do so, instead choosing to undertake the expense to fix the liability of a defunct LLC, wrongfully believing that if it established the liability of South-N-Erectors it equally established the liability of Ohio Casualty.

It is from the faulty premise that the bond principal's liability need be first fixed sprung the errors of the Trial Court below: (1) that the surety is strictly liable if the bond principal is, and (2) that Plaintiffs were relieved of making disclosures for, and appearing at, trial on its claims against Ohio Casualty.

**D. THE RECORD INDICATES THE TRIAL COURT DID NOT INTERPRET THE BOND**

The July 24 Order makes clear that the Trial Court neither reviewed nor construed the bond. CP 86-88. If the Trial Court did "review" the bond, and interpreted and construed it, then it would logically follow that the Trial Court would have made some finding or conclusion as to its determinations, such as per CR 52(a).

Rather, the Trial Court's own findings demonstrate that it did not consider, let alone review or construe, the bond. In its third finding, the Trial Court stated that all issues of fact and law regarding Ohio Casualty's liability had been previously resolved by Judge Kallas's June 26 Order which denied South-N-Erectors' Motion to Vacate. CP 87:10-12 (June 26 Order at CP 75-76). So, the Trial Court believed that by the end of June 2009 there were no factual or legal issues remaining, so that when it decided Ohio Casualty's Motion for Dismissal in late July, there was no need or reason for it to even look at the bond. As such, in entering its July 24 Order the Trial Court did not review, interpret or construe the bond.

However, in entering the June 26 Order (CP 75-76), Judge Kallas neither could nor did construe the bond. There is no indication that the bond was before the Court at that time. *See, e.g.,* CP 68-71 (bond not before Court until July 17). Further, the only issue before the Court was the validity of the summary judgment against South-N-Erectors. CP 61:12-18 and CP 74-76. As such, at no time did the Trial Court ever review or construe the bond, and the Trial Court erred in concluding that its June 26 Order resolved all issues as to Ohio Casualty. CP 87:4-11.

Moreover, Plaintiffs' argument to this Court is inconsistent. In responding to Ohio Casualty's Motion for Involuntary Dismissal, Plaintiffs asserted that there were no issues of fact or law remaining on its

bond claim, and upon that erroneous assertion predicated the request for summary judgment. CP 66:21-23. Plaintiffs to now claim that in July, when deciding Ohio Casualty's Motion for Involuntary Dismissal, that the legal issue of interpretation and construction of the bond was before the Trial Court. *See, e.g.,* Brief of Resp., Section IV.C, 12:13.

The only possible connection between the July 24 Order and the bond is tenuous and cannot be taken at face value. The July 24 Order states that the Trial Court "considered" the Declaration to which the bond was attached. CP 86:25 (item 4 as to Lee Worley, CP 68-71). However, it does not necessarily follow that a Trial Court's "consideration" of a declaration necessarily means the Trial Court also "considered" the bond, or that such "consideration" meant interpretation and construction. Consideration is wholly distinct from interpretation and construction.<sup>2</sup>

**E. THERE WERE AND ARE FACTUAL QUESTIONS AS TO WHETHER PLAINTIFFS MEET THE TERMS OF THE BOND**

If the Trial Court reviewed the bond, its review would have revealed that Ohio Casualty was not strictly liable if its bond principal was, and that factual issues remained. CP 70. For example, the bond

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<sup>2</sup> "Consideration" in this sense means "taking into account." *Webster's New Collegiate Dictionary*, 239 (1980). On the other hand, in regard to a legal writing or agreement, "interpretation" means "the process whereby one person gives a meaning to the symbols of expression used by another person," and "construction" determines the legal effect through "a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation." *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (citations omitted).

included a time limitations period—Plaintiffs were to institute their suit “within six (6) months after date of expiration or cancellation of the bond.” CP 70. The bond is dated and was signed on March 14, 2006, and provides that it “shall remain in force for a period of one year after the date it is signed.” CP 70. Thus, the record before the Trial Court was that Plaintiffs were required to have commenced their suit by approximately September 12, 2007, but Plaintiffs filed on January 10, 2008. CP 1-3, 21.

Other factual issues were that Ohio Casualty had the ability to cancel its liability, and that the Plaintiffs had to satisfy the condition precedent of notifying Ohio Casualty “within thirty (30) days after the [Plaintiffs] shall have had knowledge of the default.” CP 70. There was no evidence before the Trial Court that Plaintiffs provided such notice to satisfy this condition. *See, e.g.*, CP 68-69 (Decl. Worley).

Assuming a proper motion for summary judgment, Plaintiffs had the burden to establish that there were no genuine issues of material fact and that they were entitled to summary judgment as a matter of law. CR 56(c); and, *e.g.*, *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 43 (1992). Plaintiffs’ burden in this regard surely included establishing that its suit was timely, and that it met the conditions precedent. Without any evidence so establishing, the reasonable inferences that had to be drawn in favor of Ohio Casualty were that Plaintiffs had not, and those issues were

to be resolved at trial not on summary judgment. *See, e.g., Michak v. Transnation Title and Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003), and *Kuyper v. State Dept't of Wildlife*, 79 Wn.App. 732, 739, 904 P.2d 793 (1995).

Whether Plaintiffs can ultimately demonstrate that they have satisfied the terms of the bond is a separate matter. There were factual questions that existed at the time of the trial date, June 29 (CP 21), as well as on July 24 when the Trial Court decided Ohio Casualty's Motion for Involuntary Dismissal (CP 86-88).

**F. PLAINTIFFS DID NOT RAISE *OLYMPIC STEAMSHIP* BELOW, AND THEREFORE SHOULD NOT BE CONSIDERED ON APPEAL**

In their Brief, Plaintiffs request attorney's fees under the equitable grounds set forth in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Brief of Resp., Section IV.F, 17-18. However, no request for fees was made to the Trial Court, let alone under this basis. CP 60-67 and CP 86-88. A well settled principal is that an appellate court will not consider an issue or alternate theory that was not raised before the Trial Court. *See, e.g., Hansen, supra*, 118 Wn.2d at 485 (declining to consider defenses not raised before Trial Court). As such, on this basis alone the Court should not consider a request for fees under *Olympic Steamship*.

Declining to consider Plaintiffs' request is appropriate because the record was never developed before the Trial Court. Even if an alternate theory is raised before the Trial Court, this Court has previously refused to consider such alternate theory on appeal because the record had not been properly and fully developed at the Trial Court level. *See, e.g., Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn.App. 352, 362-63, 110 P.3d 1145 (2005) (declining to address alternate theory for attorney's fees even though raised before Trial Court because "we cannot on this record consider this argument for the first time on appeal.").

Simply as illustrative examples, some of the factual issues that would need to be developed are whether Plaintiffs properly pleaded such a request; Plaintiffs' Complaint does not mention *Olympic Steamship* and arguably makes no request for attorney's fees as against Ohio Casualty. CP 3-6. Another example is whether this is a coverage or claim dispute; Ohio Casualty has never denied the existence of the bond and that the amounts claimed fall within the bond, but rather whether Plaintiffs satisfied the terms to recover *all* amounts claimed. *See, e.g., Colorado Structures, supra*, 161 Wn.2d at 606-607 (attorney's fees not available if a dispute over the claim and not coverage).

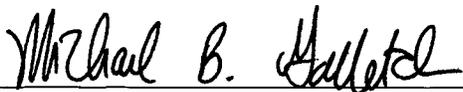
A third illustrative example as to the factual record that needs to be developed is whether the equities justify an award of fees, even assuming

Plaintiffs may make a claim under *Olympic Steamship*. As set forth in both *Olympic Steamship, supra*, and *Colorado Structures, supra*, any award of fees is based upon the particular equities in each individual case. There is nothing in the appellate record indicating what if any equities exist because this issue is not presented to the Trial Court, and neither party presented any facts or authority to the Trial Court.

Therefore, whether *Olympic Steamship* applies should not be considered by this Court. If any fees are to be considered by this Court, the only basis is that cited by both parties, RCW 4.84.010(6).

DATED this 14<sup>th</sup> day of January 2010.

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