

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PROCEDURAL HISTORY.....2

III. RESTATEMENT OF THE ISSUES.....4

IV. ARGUMENT.....5

A. The Trial Court Correctly Held that North Coast’s Motion was Not Filed Within the 10-Day Period of CR 54(d)(2).....5

1. Standard of Review.....5

2. The Trial Court Correctly Held that the Order Granting Summary Judgment was a “Judgment” Within the Meaning of CR 54(a)(1).....11

3. The Trial Court’s Order Triggered the 10-Day Period because it was a Final Determination of the Parties’ Rights.....11

4. North Coast’s Entry of a Judgment on April 24, 2015 Did Not Cure the Untimely Filing of its Motion for Fees.....16

5. RCW 4.36.240 Does Not Apply to Untimely Filed Pleadings.....16

6. North Coast’s Motion for Summary Judgment Did Not Satisfy the Requirements of CR 54(d)(2).....17

B. The Trial Court Properly Exercised its Discretion in Denying North Coast’s Untimely Motion for Attorney Fees.....18

1. Standard of Review.....18

(a)	Denial of an Untimely Motion for Attorneys' Fees is Reviewed for Abuse of Discretion.....	18
2.	The Trial Court Properly Exercised its Discretion When it Enforced the 10-Day Period Set Forth in CR 54(d)(2).....	19
3.	<i>Corey</i> is Still Good Law and Directly on Point.....	22
4.	Fidelity was Prejudiced.....	27
5.	North Coast Did Not Establish Excusable Neglect.....	28
V.	CONCLUSION.....	31
VI.	REQUEST FOR COSTS ON APPEAL.....	32
VII.	DECLARATION OF SERVICE.....	33

TABLE OF AUTHORITIES

<i>Carrara, LLC v. Ron & E Enterprises, Inc.</i> , 137 Wash. App. 822, 826, 155 P.3d 161, 163 (2007).....	7
<i>Clipse v. Commercial Driver Servs., Inc.</i> , No. 45407-6-II, 2015 WL 5023388, at *5 (Wash. Ct. App. Aug. 25, 2015).....	17, 26, 27, 30, 31
<i>Colorado Structures, Inc. v. Blue Mountain Plaza, LLC</i> , 159 Wash. App. 654, 660, 246 P.3d 835 (2011).....	24, 25
<i>Corey v. Pierce Cnty.</i> , 154 Wn.App. 752, 225 P.3d 367 (2010).....	22, 23, 26, 27
<i>Davies v. Holy Family Hosp.</i> , 144 Wash.App. 483, 499, 183 P.3d 283 (2008).....	18, 21, 22
<i>Dep't of Labor & Indus. v. City of Kennewick</i> , 99 Wash. 2d 225, 227, 661 P.2d 133, (1983).....	9
<i>Eubanks v. Klickitat Cnty.</i> , 181 Wash. App. 615, 619, 326 P.3d 796, 798 review denied sub nom. <i>Eubanks v. Brown</i> , 181 Wash. 2d 1012, 335 P.3d 940 (2014).....	24
<i>Gourley v. Gourley</i> , 158 Wash.2d 460, 466, 145 P.3d 1185 (2006).....	5
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wash. 2d 662, 665, 709 P.2d 774 (1985).....	25
<i>In re Estate of Black</i> , 153 Wash. 2d 152, 170, 102 P.3d 796 (2004).....	7
<i>In re Estate of Christensen</i> , 77 Wash. 629, 630, 138 P. 1 (1914).....	9
<i>Jafar v. Webb</i> , 177 Wash. 2d 520, 526, 303 P.3d 1042 (2013).....	6, 19
<i>Kim v. Lee</i> , 102 Wash. App. 586, 592, 9 P.3d 245, 249 (2000) rev'd, 145 Wash. 2d 79, 31 P.3d 665 (2001), as amended (Dec. 12, 2001) opinion corrected, 43 P.3d 1222 (Wash. 2001).....	10

<i>Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Nw. Youth Servs.</i> , 97 Wash. App. 226, 233, 983 P.2d 1144 (1999).....	8
<i>O'Neill v. City of Shoreline</i> , 183 Wash.App. 15, 21, 332 P.3d 1099 (2014).....	18, 23, 25, 26
<i>Peters v. Simmons</i> , 87 Wash. 2d 400, 403, 552 P.2d 1053 (1976).....	7
<i>Pratt v. Pratt</i> , 99 Wash. 2d 905, 910, 665 P.2d 400 (1983).....	7
<i>Puget Sound Med. Supply v. Washington State Dep't of Soc. & Health Servs.</i> , 156 Wash. App. 364, 376, 234 P.3d 246 (2010).....	28
<i>Pybas v. Paolino</i> , 73 Wash. App. 393, 403, 869 P.2d 427 (1994).....	27
<i>Rose ex rel. Estate of Rose v. Fritz</i> , 104 Wash. App. 116, 120, 15 P.3d 1062 (2001).....	6, 7
<i>Salas v. Hi-Tech Erectors</i> , 168 Wash.2d 664, 669, 230 P.3d 583 (2010).....	18, 19
<i>Spokane County v. Specialty Auto & Truck Painting, Inc.</i> , 153 Wash.2d 238, 249, 103 P.3d 792 (2004).....	5
<i>State v. Carlyle</i> , 84 Wash. App. 33, 35, 925 P.2d 635 (1996).....	5
<i>State v. Cline</i> , 21 Wn.App. 720, 586 P. 2d 545 (1978).....	30
<i>State v. George</i> , 160 Wash.2d 727, 735, 158 P.3d 1169 (2007).....	5
<i>State v. Kone</i> , 165 Wash. App. 420, 435, 266 P.3d 916, 923 (2011), <i>as amended</i> (Dec. 27, 2011).....	6
<i>State v. Logan</i> , 102 Wn.App. 907, 911, 10 P.3d 504 (2000).....	16
<i>State v. Oakley</i> , 129 Wash. 553, 562, 225 P. 425, 428 (1924).....	13
 Washington Statutes	
RCW 4.36.240.....	8, 16

RCW 4.64 et seq.....	19
RCW 4.64.030.....	8, 9, 10, 11, 16
RCW 4.64.060.....	8, 9
RCW 49.48.030.....	22
Court Rules	
CR 6(b).....	21, 22, 24, 26
CR 6(b)(1).....	20, 21, 22, 24, 29, 30, 31
CR 6(b)(2).....	20, 21, 22, 24, 26, 27, 30, 31
CR 6(d).....	25
CR 54(a)(1).....	1, 4, 5, 6, 7, 8, 9, 10, 11, 14, 30
CR 54(d)(2).....	1, 5, 6, 7, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31
CR 54(e).....	8, 10
CR 54(f).....	8
CR 56(f).....	22
CR 59.....	18, 20
CR 78.....	8
CR 78(e).....	11
PCLR 7(a)(3)(A).....	4, 29
PCLR 7(a)(4).....	4, 29
PCLR 7(a)(8).....	4, 29

Rules of Appellate Procedure

RAP 2.2(a)(1).....12

RAP 14.2.....32

RAP 14.3.....32

RAP 18.1.....32

Other Authorities

Webster’s Unabridged International Dictionary.....19

I. INTRODUCTION

On December 9, 2014, this Court entered “Order Granting Plaintiff’s Motion for Summary Judgment” (the “Order Granting Summary Judgment”). The Order Granting Summary Judgment effectively determined and resolved all causes of action asserted in the litigation. The deadline for North Coast to file its motion for fees was December 19, 2015. North Coast failed to file its motion for fees until February 13, 2015. Pursuant to CR 54(d)(2), the trial court denied the Motion as untimely pursuant to CR 54(d)(2). North Coast appealed.

On appeal, North Coast attempts to justify the late filing for a variety of reasons, none of which are supported in fact or law. The trial court correctly determined that its Order Granting Summary Judgment was a judgment within the meaning of CR 54(a)(1) and properly exercised its discretion in denying North Coast’s untimely motion for attorney fees pursuant to CR 54(d)(2). The trial court’s order denying North Coast’s Motion for attorney fees should be affirmed.

II. PROCEDURAL HISTORY

This case is a relatively straightforward collection matter arising out of a business relationship between an electrical equipment supplier, Plaintiff North Coast Electric Company (“North Coast), and an electrical contractor, Defendant Signal Electric, Inc. (“Signal”). *CP 13*. The

construction project relevant to this particular lawsuit was Contract No. 7929 commonly known as the Tacoma Narrows Bridge Electrical Project (the “Tacoma Narrows Project”). *Id.* Signal was the general contractor and Washington State Department of Transportation (“WSDOT”) was the owner. *Id.*

Fidelity & Deposit Company of Maryland (“Fidelity”) issued payment, performance, and retainage bonds on behalf of Signal on more than 40 transportation system projects for various local governments and general contractors in Washington, including the Tacoma Narrows Project. *CP 13.* The bonds guaranteed that Signal would perform all its work and pay all material suppliers and laborers on the Tacoma Narrows Project. *Id.*

On February 26, 2011, Signal filed a voluntary petition in this Court for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Sections 101-1330. *CP 13.* As a result, Signal was unable to pay many of its material suppliers, such as North Coast. *CP 13.* Shortly thereafter, North Coast filed suit against Signal and Fidelity seeking to recover payment for electrical equipment supplied to Signal on the Tacoma Narrows Project. *CP 1-5.*

On August 14, 2015, North Coast filed its Motion for Summary Judgment. *CP 11-25.* Fidelity opposed North Coast’s Motion for

Summary Judgment because Signal alleged that North Coast supplied nonconforming electrical equipment. *CP 95-110*. On December 5, 2014, North Coast argued its Motion for Summary Judgment before the trial court. On December 9, 2014, the trial court entered Order Granting Summary Judgment. *CP 135*. On December 19, 2015, Fidelity filed a motion for reconsideration, which was denied on January 22, 2015. *CP 136-149*.

On February 9, 2015, North Coast filed its motion for fees and costs. *CP 164-175*. For reasons unknown to Fidelity, the Motion was not served until February 26, 2015, when counsel for Fidelity noticed that the Motion had been filed with the trial court, but not served.

On April 22, 2015, Fidelity filed and served its response in opposition to North Coast's motion for fees and costs because the Motion was untimely and because the fees were unreasonable and could not be accounted for with contemporaneous billing records. *CP 212-226*. On April 24, 2015, the trial court heard oral argument on North Coast's motion for fees and costs and for entry of judgment. That same day, the trial court entered a formal money judgment against Fidelity on North Coast's principal claim, but requested additional briefing and oral argument on the issue of attorney fees. *CP 227-228*. The parties submitted additional briefing to the trial court. *CP 229-262; CP 292-304*.

On May 8, 2015, North Coast's submitted a Reply brief in support of its motion for fees nearly three ("3") times the length permitted by Pierce County Local Civil Rule ("PCLR") 7(a)(8). *CP 229-262*. In addition, it failed to file or serve a Note for Motion on its Motion to Extend Deadlines as required by PCLR 7(a)(4) and it failed to timely file or serve the Motion to Extend Deadlines as required by Pierce County Local Rule 7(a)(3)(A). *CP 291*.

Fidelity filed a Motion to Strike North Coast's over-length Reply brief and its improperly noted and untimely Motion to Extend Deadlines. *CP 321-326*. Fidelity also filed a Motion to Shorten Time to hear its Motion to Strike. *CP 330-334*.

On May 15, 2015, the trial court heard additional oral argument and denied North Coast's motion for fees. *CP 305-306*. North Coast appealed. *CP 307-310*.

III. RESTATEMENT OF THE ISSUES

1. Did the trial court correctly determine that its Order Granting Plaintiff's Motion for Summary Judgment was a "judgment" as defined by CR 54(a)(1)? Answer: **Yes**.
2. Did the trial court properly exercise its discretion when denied North Coast's untimely motion for attorney fees? Answer: **Yes**.

IV. ARGUMENT

A. The Trial Court Correctly Held that North Coast's Motion was Not Filed Within the 10-Day Period of CR 54(d)(2).

1. Standard of Review.

The application of a court rule to particular facts is a question of law, reviewable de novo. *State v. Carlyle*, 84 Wash. App. 33, 35, 925 P.2d 635 (1996). Court rules are interpreted the same as statutes drafted by the legislature. *State v. George*, 160 Wash.2d 727, 735, 158 P.3d 1169 (2007). Initially, the court will examine the plain language of the rule and construe the rule in accord with the drafting body's intent. *Gourley v. Gourley*, 158 Wash.2d 460, 466, 145 P.3d 1185 (2006). If the rule's meaning is unambiguous, the court need look no further. *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wash.2d 238, 249, 103 P.3d 792 (2004).

2. The Trial Court Properly Held that the Order Granting Summary Judgment was a "Judgment" Within the Meaning of CR 54(a)(1).

The trial court denied North Coast's motion for attorney's fees and expenses because the Motion was not timely filed within the ten days following the entry of "judgment" as required by CR 54(d)(2). *CP 305-306*.

As a starting point, it is critical (and logical) to review the plain and unambiguous language of CR 54(a)(1), which defines “judgment” as follows:

A judgment is the final determination of the rights of the parties in the action and includes any decree or order from which an appeal lies. A judgment shall be in writing and signed by the judgment and filed forthwith as provided for in rule 58.

(emphasis added). “Court rules are interpreted in the same manner as statutes. If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent.” *Jafar v. Webb*, 177 Wash. 2d 520, 526, 303 P.3d 1042 (2013). “If the rule's meaning is unambiguous, we need look no further.” *State v. Kone*, 165 Wash. App. 420, 435, 266 P.3d 916, 923 (2011), *as amended* (Dec. 27, 2011). The definition of “judgment” as used in CR 54(a)(1) is plain and unambiguous. Nevertheless, in its appeal brief, North Coast asks this Court to sift through its tortured, self-serving analysis of “judgment” as defined by CR 54(a)(1), thus disregarding the plain and unambiguous language in the civil rule.

A judgment is an order that “adjudicat[es] all the claims, counts, rights, and liabilities of all the parties.” *Rose ex rel. Estate of Rose v. Fritz*, 104 Wash. App. 116, 120, 15 P.3d 1062 (2001). It must be “in writing and signed by the judge and filed forthwith.” *Id.* It can be an order

granting summary judgment if it meets these requirements. *Id.* A judgment also includes “any decree or order from which an appeal lies.” CR 54(d)(2). Thus, a judgment, as defined by CR 54(a)(1), need not be the last judgment entered by the trial court in the litigation, it need only be an order that finally determines the rights of the parties in the action. “A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it.” *Pratt v. Pratt*, 99 Wash. 2d 905, 910, 665 P.2d 400 (1983).

Washington court’s interpreting the plain language of CR 54(a)(1) agree that an order granting summary judgment on all causes of action constitutes a final and appealable judgment. *Peters v. Simmons*, 87 Wash. 2d 400, 403, 552 P.2d 1053 (1976) (“The appeal was not prematurely filed because the rights of the parties were finally determined by the order granting defendant’s motion for summary judgment.”); *In re Estate of Black*, 153 Wash. 2d 152, 170, 102 P.3d 796 (2004) (“[A] grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial.”); *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wash. App. 822, 826, 155 P.3d 161, 163 (2007) (Defendant’s Order Granting Summary Judgment for Dismissal of Plaintiff’s claims constitutes “a final, dispositive judgment” subject to appeal.); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Nw. Youth Servs.*, 97 Wash. App. 226,

233, 983 P.2d 1144 (1999) (“[A] grant of summary judgment constitutes a final judgment on the merits.”).

In light of the above-authorities, it is beyond dispute that an order granting summary judgment on all causes of action is a “judgment” as defined by CR 54(a)(1). North Coast has not cited one case directly on point to rebut this general rule. Instead, North Coast relies exclusively on case law interpreting the finality of “memorandum decisions” and goes to great lengths to argue that a “judgment” as defined in CR 54(a)(1) must contain a “judgment summary” pursuant to RCW 4.64.030 or be presented in accordance with CR 54(e) and (f).

North Coast’s lengthy appeal brief creates more confusion than clarity on the issue of whether the trial court’s Order Granting Summary Judgment constitutes a “judgment” within the meaning of CR 54(a)(1). Rather than examine the language of CR 54(a)(1), North Coast cites a series of inapplicable statutes (RCW 4.64.030, RCW 4.64.060, and RCW 4.36.240), court rules (CR 54(e), CR 54(f), and CR 78), and case law to support its contrived analysis.

Try as it might, none of the arguments raised in North Coast’s appeal brief alter the fact that Order Granting Summary Judgment is a final and appealable “judgment” under CR 54(a)(1). In an effort to sidestep the plain and unambiguous language of CR 54(a)(1), North Coast

now re-characterizes the trial court's Order Granting Summary Judgment as merely a "decision," not a judgment or order. Again, North Coast cites no authority to support its proposition that the trial court's Order Granting Summary Judgment is not a final determination of the parties' rights.

Having unilaterally recast the trial court's Order Granting Summary Judgment as merely a "decision," North Coast cites a series of cases holding that a "memorandum decision" is not a final judgment. *Dep't of Labor & Indus. v. City of Kennewick*, 99 Wash. 2d 225, 227, 661 P.2d 133, (1983); *In re Estate of Christensen*, 77 Wash. 629, 630, 138 P. 1 (1914). However, whether a memorandum decision constitutes a "judgment" is immaterial for the purpose of this Court's analysis because the trial court did not issue a memorandum decision, it issued an Order Granting Summary Judgment. *CP 135*. Remarkably, not one of the cases cited by North Coast addresses whether an order granting summary judgment is a "judgment" as defined by CR 54(a)(1).

Instead, North Coast devotes the significant majority of its appeal brief to a completely irrelevant discussion of the technical requirements of RCW 4.64.030 and RCW 4.64.060 and the presentation processes of CR 54(e) and (f), yet it fails to cite a single Washington case holding that an Order Granting Summary Judgment is not a "judgment" because it did not comply with RCW 4.64 et seq. or was not presented in accordance with

CR 54(e) and (f). In this case, the relevant analysis is whether an order granting summary judgment on all causes of action constitutes a “judgment” as defined by CR 54(a)(1), not whether the trial court’s order complies with the technical requirements of RCW 4.64 et seq. or was presented in accordance with CR 54(e) and (f), which are entirely separate procedural issues.

On its face, there is no requirement in CR 54(a)(1) that a “judgment” contain a judgment summary or be presented in accordance with CR 54(e) and (f) in order for it to qualify as a “judgment.” Although RCW 4.64.030 requires a money judgment to contain a judgment summary, the statute has no bearing on whether a judgment is final or appealable and North Coast has not cited any authority to support this proposition. The purpose of a judgment summary is to facilitate lien and title searches. *Kim v. Lee*, 102 Wash. App. 586, 592, 9 P.3d 245, 249 (2000) *rev'd*, 145 Wash. 2d 79, 31 P.3d 665 (2001), *as amended* (Dec. 12, 2001) *opinion corrected*, 43 P.3d 1222 (Wash. 2001). RCW 4.64.30 relates strictly to enforcement and execution, not whether it is a “judgment” as defined by CR 54(a)(1). North Coast is unable to cite a single Washington case that stands for the proposition that an order granting summary judgment is not a “judgment,” pursuant to CR 54(a)(1), if it does not comply with RCW 4.64.030.

Similarly, North Coast attempts to bootstrap the failure of the clerk's office to enter a cost bill pursuant to CR 78(e) as an implicit endorsement of its argument that an indeterminate period of time was reserved to file pursuant to CR 54(d)(2). Under the plain language of CR 78, the Clerk does not have the authority to enter the cost bill until ten days have passed. Once ten days have passed, the Clerk is under no specific time constraints pursuant to CR 78 as to when to enter a cost bill. There is no reason to conclude the failure to enter a cost bill on the part of the Clerk is linked to the time to file requirements of CR 54(d)(2). CR 78 also provides that the cost bill contemplated under CR 78 shall not delay entry of a judgment. Implicit in the rule is that the cost bill may amend or be an adjunct to a judgment already entered. CR 78(e). Consequently, no conclusions can be drawn from the failure of the Clerk to yet enter a cost bill.

3. The Trial Court's Order Triggered the 10-Day Period because it was a Final Determination of the Parties' Rights.

The trial court's Order Granting Summary Judgment constitutes "judgment," pursuant to CR 54(a)(1), because it granted summary

judgment in favor of North Coast on all causes of action in the Complaint, with the exception of North Coast's claim for attorney fees.¹ *CP 135*.

The Order Granting Summary Judgment was a final determination of the parties' rights and liabilities. Significantly, the trial court did not enter an order granting partial summary judgment – it entered Order Granting Summary Judgment on all claims. *CP 135*. The only relevant question is whether the trial court's Order Granting Summary Judgment was a final determination of the parties' rights. The trial court stated that it was and North Coast never argued at the trial court that it had any remaining claims or causes of action left for determination. *CP 229-262*. That North Coast did not appear at trial to present any additional causes of action is further confirmation of the finality of the trial court's Order Granting Summary Judgment.

For the first time on appeal, North Coast contends that the Order Granting Summary Judgment did not resolve North Coast's claims against Signal. *Appellant's Brief* at 19. That is false and misleading. The trial court record demonstrates that all of North Coast's claims were fully and finally determined in the Order Granting Summary Judgment because, as a

¹ RAP 2.2(a)(1) demonstrates that a final judgment need not be the last judgment entered in the litigation because the court may still reserve for "future determination an award of attorney fees or costs." Thus, by its terms, RAP 2.2(a)(1) confirms that a final judgment need not be the last judgment entered in the litigation.

practical matter, any additional claims against Signal were precluded by the automatic stay.

Further, North Coast's complaint is proof that the Order Granting Summary Judgment was a final determination of the parties' rights because it did not include any independent causes of action against Signal or Fidelity beyond those asserted its Motion for Summary Judgment. *CP 1-5*. North Coast's sole "claim" against Signal was for Declaratory Relief "to the extent necessary to recover against the bonds" issued by Fidelity. *Id.* In other words, North Coast did not have any independent claims against Signal. Moreover, North Coast could not have asserted any independent claims against Signal because it was in bankruptcy. *CP 13*.

North Coast's claims against Signal were inextricably incorporated into its claims against Fidelity and, thus, its Motion for Summary Judgment. Absent judgment on North Coast's claim for Declaratory Relief against Signal, North Coast could not prevail on its claim against Fidelity. *State v. Oakley*, 129 Wash. 553, 562, 225 P. 425, 428 (1924) ("[I]t is well settled that a surety cannot be held liable upon a bond where the principal is not liable."). Under general suretyship principles, North Coast's claims for Declaratory Relief were an absolute precondition to it prevailing on its Motion for Summary Judgment. *Id.* North Coast's Complaint does not assert any claims against Signal that were independent

of the claims asserted against Fidelity. *CP 2*. In fact, North Coast's claims against Signal were only asserted "to the extent necessary to recover against the bonds" issued by Fidelity. *Id.*

As demonstrated herein, North Coast's assertion that it had remaining claims against Signal for 18% percent interest is simply not true. North Coast never asserted an independent claim against Signal for 18% interest at the trial court level because Signal was in bankruptcy and its claims against Signal were solely for the purpose of asserting its bond claims against Fidelity. *CP 2*. There were no independent claims against Signal. Any suggestion to the contrary is pure nonsense. When North Coast prevailed on its motion for summary judgment, its "claims" against Signal were, for all intents and purposes, fully and finally resolved because they were only asserted to the extent necessary to prevail against Fidelity. *Id.* Thus, the trial court's Order Granting Summary Judgment was a final determination of the rights of the parties in the action and, therefore, a "judgment" as defined by CR 54(a)(1).

If all the claims, rights, and liabilities of the parties were not resolved by the trial court's Order Granting Summary Judgment, then one would assume that North Coast appeared at trial to prosecute its remaining claims at the January 20, 2015 trial date. It didn't, and its failure to do so conclusively demonstrates that the trial court's Order Granting Summary

Judgment fully and finally resolved the rights of the parties in the litigation.

When North Coast did not appear at trial, all remaining claims were effectively finally resolved due to North Coast's failure to prosecute. North Coast's assertion that it had "remaining claims" in addition to those resolved by the trial court's Order Granting Summary Judgment cannot be reconciled with its failure to appear at trial to prosecute its remaining "claims." In the alternative, the rights of the parties were finally determined when the trial court denied Fidelity's Motion for Reconsideration on January 22, 2015. *Appellant's Brief* at 4.

The 10-day period began to run on the trial court's Order Granting Summary Judgment on December 9, 2015. At the very latest, the 10-day period began to run on January 20, 2015, when North Coast failed to appear at trial to prosecute its remaining claims or on January 22, 2015, when the trial court denied Fidelity's Motion for Reconsideration. Under either scenario, North Coast's Motion for attorney fees and costs was untimely.

4. North Coast's Entry of a Judgment on April 24, 2015 Does Not Cure the Untimely Filing of its Motion for Fees.

The judgment that triggered the 10-day period set forth in CR 54(d)(2) was entered on December 9, 2015. North Coast provides no

authority for its argument that the entry of a later judgment, in compliance with RCW 4.64.030, gave North Coast a “second bite of the apple” to file its motion for attorney fees and costs. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.” *State v. Logan*, 102 Wn.App. 907, 911, 10 P.3d 504 (2000). The absence of any case law effectively forecloses North Coast’s argument that the April 24 judgment renewed the 10-day time period in CR 54(d)(2).

5. RCW 4.36.240 Does Not Apply to Untimely Filed Pleadings.

North Coast argues that RCW 4.36.240 required the trial court to disregard any delay. Remarkably, North Coast fails to cite a single Washington case in which any court excused a late-filed pleading, much less a motion for fees, pursuant to RCW 4.36.240. RCW 4.36.240 relates solely to errors or defects in pleadings or proceedings. North Coast’s failure to timely file its motion for attorney fees was not an “error or defect in pleadings or proceedings,” it was a wholesale failure to comply with Washington’s civil rules. RCW 4.36.240 does not excuse or relieve a party’s failure to comply with the timelines set forth in the civil rules and North Coast cites no authority for such proposition. If that were the case,

the time periods set forth in the civil rules would be meaningless. RCW 4.36.240 is inapplicable.

6. North Coast's Motion for Summary Judgment Did Not Satisfy the Requirements of CR 54(d)(2).

North Coast's Motion for Summary Judgment did not satisfy the requirement that a motion for attorney fees be filed within the 10-day time period set forth in CR 54(d)(2). North Coast is essentially arguing that by requesting fees and costs in its motion for summary judgment, it had effectively "reserved" its right to file a subsequent motion for fees and costs outside the 10-day time period established by CR 54(d)(2). In a recent decision, the Court of Appeals rejected an argument similar to the one made by North Coast. In *Clipse v. Commercial Driver Servs., Inc.*, No. 45407-6-II, 2015 WL 5023388, at *5 (Wash. Ct. App. Aug. 25, 2015), the Court of Appeals denied, as untimely, a plaintiff's motion for fees even though the trial court's order said that fees and costs were "reserved."

Here, the trial court's Order Granting Summary Judgment did not grant, deny, or reserve North Coast's request for attorney fees. *CP 135*. Accordingly, it was incumbent upon North Coast to either seek reconsideration of the trial court's Order Granting Summary Judgment within 10 days as required by CR 59 or file a motion for attorney fees

within 10-days as required by CR 54(d)(2). North Coast did neither, and its failure to do so is inexcusable. Furthermore, North Coast's request for fees in its motion for summary judgment did not give it unlimited time within which to file its motion or extend the time for North Coast to file its motion and neither did the trial court's Order Granting Summary Judgment. Tellingly, North Coast cites no authority for the proposition that including a request for fees in its motion for summary judgment, in the absence of a court order, gave it unlimited time to file its motion or extend the time to file its motion. North Coast was required to file a motion for fees within 10-days of entry of judgment. It failed to do so.

B. The Trial Court Properly Exercised its Discretion in Denying North Coast's Untimely Motion for Attorney Fees.

1. Standard of Review.

(a) Denial of an Untimely Motion for Attorneys' Fees is Reviewed for Abuse of Discretion.

A trial court's decision to accept or reject untimely filed documents is reviewed for an abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wash.App. 483, 499, 183 P.3d 283 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *O'Neill v. City of Shoreline*, 183 Wash.App. 15, 21, 332 P.3d 1099 (2014). A decision is manifestly unreasonable if the trial court takes a view that no reasonable person would take. *Salas v.*

Hi-Tech Erectors, 168 Wash.2d 664, 669, 230 P.3d 583 (2010). And a trial court's decision rests on untenable grounds or reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Salas*, 168 Wash.2d at 669.

2. The Trial Court Properly Exercised its Discretion When it Enforced the 10-Day Period Set Forth in CR 54(d)(2).

An award of attorney fees is governed by CR 54(d). Under CR 54(d)(2), a claim for attorney fees is made by motion, which “must be filed no later than 10 days after entry of judgment.” (emphasis added). CR 54(d)(2) provides:

Claims for attorneys' fees and expenses, other than costs and, disbursement, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(emphasis added). “Must” means “to be obliged or bound by an imperative requirement.” *Webster’s Unabridged International Dictionary*. “Must” means “to be obliged or bound by an imperative requirement.” *Webster’s Unabridged International Dictionary*. Thus, the requirement set forth in CR 54(d)(2) is mandatory, not permissive. “If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent.” *Jafar v. Webb*, 177 Wash. 2d at 526.

The trial court properly enforced the mandatory 10-day time period established by CR 54(d)(2).

Under CR 54(d)(2), North Coast's motion for attorney's fees and expenses was timely filed only if it was filed on or before December 19, 2014. Unlike North Coast, Fidelity complied with the 10-day filing requirement when it filed its motion for reconsideration on December 19, 2014, as required by CR 59. *CP 136-149*. On the other hand, North Coast ignored the 10-day time period set forth in CR 54(d)(2) applicable to its motion for attorney fees. In fact, North Coast waited nearly 63 days before it decided to file its motion for attorney fees – well beyond the 10-day period required by CR 54(d)(2). North Coast did not ask the Court to extend the time to file its motion for fees prior to the expiration of the filing period as required by CR 6(b)(1) and it failed to file a proper motion after the expiration of the 10-day period as required by CR 6(b)(2). There is no question that North Coast's motion for attorney fees was untimely and, therefore, properly denied by the trial court.

North Coast contends that Fidelity's alleged failure to establish prejudice gives it the right to file a motion for fees without regard to the time constraints of CR 54(d)(2). Under North Coast's analysis, if Fidelity is not prejudiced, North Coast reserves the right to file its motion for fees for an indefinite period of time. This is not the law. North Coast was

required to file its motion in accord with CR 54(d)(2) or request additional time per CR 6(b)(1) or (2).

CR 54(d)(2) indicates more time will only be provided upon the order of the trial court:

Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

Tellingly, no such order exists, nor was a proper motion brought to request more time. A specific procedural rule is applicable to such a situation. CR 6(b) permits a party to request an expansion of the time to file. North Coast had two options at its disposal: (1) file a motion to request additional time pursuant to CR 6(b)(1) prior to the expiration of the 10-day period or (2) to file a motion to enlarge the 10-day time period after its expiration as authorized by CR 6(b)(2). Under CR 6(b)(1), a motion would necessarily require, and be demonstrated by (1) a request as to the time needed and (2) a showing of cause. The complete absence of a motion requesting for more time or a mention of cause firmly supports the trial court's discretion to deny North Coast's motion for attorney fees.

The case of *Davies, supra*, is instructive. In that case, the litigant mentioned in court filings an excuse for failing to file timely documents in response to a motion for summary judgment. *Id.* at 499. In *Davies*, although the litigant provided a reason for the late filing (albeit a reason

ultimately rejected by the Court), the Court faulted the plaintiff for failing to make a motion for a continuance pursuant to CR 56(f), a fact also considered when the court refused to accept the late filing. *Id.* Contrastingly here, not only did North Coast fail to make a motion for an extension under CR 6(b)(1) upon a showing of cause, but it also failed to make a proper motion under CR 6(b)(2) upon a showing of establish excusable neglect. *CP 321-326.*

None of the court rules at issue in this case require Fidelity to establish prejudice. The trial court's enforcement of the plain and unambiguous requirements of CR 54(d)(2) and CR 6(b) was a proper exercise of its discretion.

3. Corey is still good law and directly on point.

In *Corey v. Pierce Cnty.*, 154 Wn.App. 752, 225 P.3d 367 (2010), the plaintiff prevailed after a jury trial and sought an award of fees under RCW 49.48.030. Judgment was entered on the jury verdict on September 24, 2008, and the plaintiff moved for an award of fees on October 30, 2008 – 36 days after entry of judgment. The Court of Appeals ruled that although “RCW 49.48.030 is a remedial statute and must be construed liberally in favor of the employee,” the mandate for liberal construction did not “preclude[] the application of a temporal limitation, such as that in CR 54(d).” *Id.* at 773-74. The Court held that the plaintiff failed to show

excusable neglect in not timely requesting the fees and the trial court properly denied the plaintiff's motion for attorney fees. *Id.* The *Corey* case is indistinguishable from the instant case.

Corey stands for the proposition that a trial court should deny an untimely fee request unless there is a showing of excusable neglect. In *Corey*, the trial court properly denied the plaintiff's untimely fee request where the plaintiff failed to show excusable neglect. *Corey* remains good law and directly on point. In fact, the case law relied upon by North Coast, *O'Neill v. City of Shoreline*, did not overrule *Corey*. ("But *Corey* merely affirmed a trial court's exercise of discretion to enforce the time requirements of CR 54(d)(2) and did not address whether a court must enforce them.") 183 Wash. App. at 15. In other words, *Corey* remains good law and stands for the proposition that a trial court has the discretion to enforce the 10-day time period of CR 54(d)(2).

Here, North Coast's delay in requesting fees is exceptionally longer than the delay in *Corey* and *O'Neill*, and North Coast provides no evidence of excusable neglect in failing to request fees within the 10-day time period imposed by CR 54(d)(2). North Coast had multiple procedural options at its disposal in order to circumvent the 10-day time period imposed by CR 54(d)(2). First, under CR 6(b)(1), North Coast had the opportunity to request an extension of time to file its motion before the

10-day period expired, but failed to do so. Second, North Coast could have filed a proper motion to enlarge the 10-day time period after its expiration as authorized by CR 6(b)(2). North Coast failed to avail itself of either of the procedural remedies provided in CR 6(b).

“Once a deadline has passed, courts can accept late filings only if a motion is filed explaining why the failure to act constituted excusable neglect. *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wash. App. 654, 660, 246 P.3d 835 (2011). Although North Coast filed a “Motion to Extend Deadlines” on May 8, 2015, the Motion was untimely filed under Pierce County Local Rule 7(a)(3)(A). *CP 321-326*. In addition, North Coast failed to file a Note for Motion as required by Pierce County Local Rule 7(a)(4). *Id.* Although the trial court did not indicate whether it denied the Motion to Extend Deadlines because it was procedurally improper, the trial court had adequate reasons before it to deny North Coast’s Motion to Extend Deadlines. The Court of Appeals “can affirm a trial court on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative.” *Eubanks v. Klickitat Cnty.*, 181 Wash. App. 615, 619, 326 P.3d 796, 798 *review denied sub nom. Eubanks v. Brown*, 181 Wash. 2d 1012, 335 P.3d 940 (2014). The trial court properly declined to extend the 10-day time period because North Coast failed to “note” its Motion to Extend

Deadlines and because it was untimely filed. Furthermore, North Coast's Motion to Extend Deadlines, even if properly filed and served, failed to explain why its late-filed motion constituted excusable neglect as required by *Colorado Structures, Inc., supra*, 159 Wash. App. at 660. *CP 291*. As such, the trial court properly exercised its discretion when it denied North Coast's untimely motion for attorney fees.

North Coast argues that this Court should adopt the court's holding in *O'Neill*, which affirmed a trial court's award of attorney fees and costs in the absence of the prejudice to the opposing party. *Id.* at 23. Significantly, *O'Neill's* prejudice requirement was based on an interpretation of *Goucher v. J.R. Simplot Co.*, 104 Wash. 2d 662, 665, 709 P.2d 774 (1985), which required the nonmoving party to demonstrate prejudice when a motion was served less than five days before the date set for hearing, as required by CR 6(d). The Court's holding in *Goucher* and *O'Neill* was based entirely on the prejudice requirement in CR 6(d). In this case, however, CR 6(d) is inapplicable. Fidelity does not contend that North Coast failed to provide adequate notice under CR 6(d) – rather, Fidelity contends that North Coast's failed to timely file its Motion in accordance with CR 54(d)(2) or request additional time as required by CR 6(b). Thus, the prejudice requirement imposed by *Goucher* and *O'Neill* is inapplicable.

In any event, *O'Neill* did not affirmatively overrule *Corey* and recent case law affirms the trial court's denial of North Coast's motion for attorney fees and costs for its failure to file timely file the Motion in accordance with CR 54(d)(2) or request additional time as required by CR 6(b). *Clipse, supra*, 2015 WL 5023388, at *5 (“[T]he trial court did not abuse its discretion by striking Clipse's late motion for fees and costs.”).

The proper standard is that set forth in *Corey* and *Clipse*, which require the moving party to establish excusable neglect in the context of a late-filed motion for attorney fees. *Corey*, 154 Wash. App. at 774 (“*Corey* has not shown excusable neglect or reason for delay in making her request for fees. The trial court properly denied the fees as untimely under CR 54(d).”); *Clipse*, 2015 WL 5023388 at *4 ([T]he trial court was permitted to enlarge time only if Clipse demonstrated excusable neglect.”). Thus, North Coast was required to establish excusable neglect by way of a CR 6(b)(2) motion in order for the trial court to consider its motion for fees. The onus was on North Coast to request to expand the time for filing under CR 54(d)(2) and make the appropriate motion under CR 6(b)(2). This was not done. North Coast failure to do so is fatal to its appeal.

The touchstone of the trial court's analysis is whether the moving party filed a motion, pursuant to CR 6(b)(2), and established excusable neglect. Where excusable neglect has not been shown and the time

constraints of CR 54(d)(2) have not been met, a trial court is well-within its discretion to deny of a late-filed motion for fees pursuant to *Corey* and *Clipse*, regardless of the existence or absence of prejudice. The bottom line is that a trial court is permitted to enforce the plain and unambiguous language of Washington's court rules. See *Corey* and *Clipse*, *supra*. The trial court's order denying North Coast's motion for attorney fees should be affirmed.

4. Fidelity was Prejudiced.

As to the absence of prejudice to Fidelity, which is repeatedly argued by North Coast, neither *Corey* nor *Clipse* require a showing of prejudice by the party opposing a late-filed motion for fees. Further, "the responding party can rarely show actual prejudice because the prejudice is to the system and an extension of time undermines the finality of a judgment." *Pybas v. Paolino*, 73 Wash. App. 393, 403, 869 P.2d 427 (1994). Like *Pybas*, the prejudice to Fidelity is the delay in settling its claims with North Coast until the motion for fees and costs was heard and resolved. If North Coast could wait for an indefinite period of time to file its motion for fees and costs, Fidelity would have to wait for an indefinite period of time, as it did here, before it could fully and finally settle its claims with North Coast. In this case, Fidelity had to wait 63 days before North Coast filed its motion for fees and, as a result, it had to pay

additional interest on North Coast's principal claim. North Coast admits in its brief that the trial court acknowledged prejudice to Fidelity resulting from North Coast's untimely filed brief. *Appellant's Brief* at 6. Although not required, Fidelity was prejudiced.

5. North Coast Did Not Establish Excusable Neglect.

“Excusable neglect,” may be found if the tardy party acted diligently despite the circumstances constituting “excusable neglect.” *Puget Sound Med. Supply v. Washington State Dep't of Soc. & Health Servs.*, 156 Wash. App. 364, 376, 234 P.3d 246 (2010). However, when a party fails to seek additional time by way of motion, when it has the opportunity to do so, that party has failed to establish excusable neglect. *Id.* at 376 (“Because PSM did not attempt to seek additional time when it had the opportunity to do so, we hold that PSM's reasons are not grounds for “excusable neglect.””). Like *Puget Sound Med. Supply*, in which the moving party failed to seek additional time to file its notice of appeal, North Coast failed to seek additional time to file its motion for fees under both CR 6(b)(1) and (2). North Coast's failure to request additional time by way of a proper motion eviscerates any plausible finding of excusable neglect.

North Coast has not shown excusable neglect – if anything, the record demonstrates that its neglect was inexcusable. North Coast's

neglect and inattention to CR 54(d)(2) was further compounded when (1) it submitted a Reply brief in support of its motion for fees nearly three (“3”) times the length permitted by Pierce County Local Civil Rule (“PCLR”) 7(a)(8); (2) it failed to file or serve a Note for Motion on its Motion to Extend Deadlines as required by PCLR 7(a)(4); and (3) it failed to timely file its Motion to Extend Deadlines as required by Pierce County Local Rule 7(a)(3)(A). *CP 321-326*. North Coast’s serial failure to comply with the civil rules is inexcusable and supports the trial court’s discretion to deny its late-filed motion for fees.

North Coast has offered no excusable reason for not filing the Motion for fees within the 10-day time period or failing to file a proper motion requesting additional time under CR 6(b)(1) or (2). North Coast’s assertion that “the law was at least unclear” is illogical and not excusable neglect. If the law was unclear, North Coast should have timely filed its Motion out of an abundance of caution or requested additional time from the trial court to file the Motion pursuant to CR 6(b)(1). In the alternative, North Coast could have timely and properly filed a motion pursuant to CR 6(b)(2) requesting an extension of time. North Coast’s failure to avail itself of any of the foregoing remedies is inexcusable.

Furthermore, North Coast’s subjective belief that the trial court’s Order Granting Summary Judgment was not a “judgment” as defined by

CR 54(a)(1) is irrelevant. As recently held in *Clipse*, a party's subject belief as to the practical effect of a trial court's order does not give it unlimited or additional time to file its motion for attorney fees. *Clipse*, 2015 WL 5023388, at *5 (There is "no authority for the proposition that his subjective intent controls the effect of the court's order.>"). CR 54(d)(2) is crystal clear: motions for fees and costs must be filed within 10-days of entry of judgment. Under *Clipse*, North Coast's mistaken belief as to the effect of the trial court's Order Granting Summary Judgment is not tantamount to excusable neglect.

The case of *State v. Cline*, 21 Wn.App. 720, 586 P. 2d 545 (1978) is also instructive. In *Cline*, the defense inadvertently "forgot" to note the time for appeal after trial and filed the notice of appeal late. As a result, the appeal (which was filed one date late) was dismissed. *Id.* at 721. North Coast's failure to follow the procedures available pursuant to CR 54(d)(2) or CR 6(b)(1) or (2) is an omission similar to the failure in *Cline* and is not excusable neglect. *Id.*

North Coast has not shown excusable neglect where it was aware of the Order Granting Summary Judgment, aware of the 10-day time limit in CR 54(d)(2), and failed to file a motion pursuant to CR 6(b)(1) prior the expiration of the 10-day time limit or properly file a motion pursuant to CR 6(b)(2) after the expiration of the 10-day time period. North Coast's

failure to properly pursue any of the foregoing procedural remedies effectively forecloses any serious argument that its conduct amounts to excusable neglect.

The trial court clearly did not abuse its discretion in denying North Coast's motion for fees based on North Coast's failure to timely file its motion for fees and its failure to establish excusable neglect. The decision was firmly supported by the plain language of CR 54(d)(2) and rested in the sound discretion of the trial court. Like *Clipse*, in which the Court of Appeals upheld the trial court's denial of a late-filed motion for fees in the absence of excusable neglect, the trial court's decision was not legally or factually flawed, nor was it one that no reasonable person would take. *Clipse*, 2015 WL 5023388, at *5. Accordingly, the trial court's denial of North Coast's motion for fees should be affirmed.

V. CONCLUSION

The trial court correctly determined that its Order Granting Summary Judgment was a "judgment" within the meaning of CR 54(a)(1) and properly exercised its discretion in denying North Coast's untimely motion for attorney fees. The trial court's order denying North Coast's Motion for Attorney Fees should be affirmed.

VI. REQUEST FOR COSTS ON APPEAL

Under RAP 14.2, 14.3, and 18.1, this Court may award costs and expenses allowed as costs to the prevailing party on appeal. Fidelity respectfully requests an award of its costs and expenses allowed as costs incurred on this appeal.

DATED this 28 day of September 2015.

YUSEN & FRIEDRICH

A handwritten signature in black ink, appearing to read 'Alexander Friedrich', written over a horizontal line.

Alexander Friedrich WSBA #6144

Paul Friedrich WSBA #43080

Attorneys for Defendant/Respondent

Fidelity & Deposit Company of Maryland

VII. DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On September 28, 2015, I served a copy of the
foregoing brief via email and US Mail postage prepaid to:

William Randolph Turnbow
Attorney at Law
2610 Highland Oaks Drive.
Eugene, OR 97405

Email: randy@steelheadlawyer.com

I declare under penalty of perjury under the laws of
the State of Washington that the foregoing is true and
correct.

EXECUTED THIS 28th day of September, 2015, at

Seattle, Washington.


Vanessa Stoneburner