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STATE OF WASHINGTON

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IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON

DIVISION II

NORTH COAST
ELECTRIC COMPANY, a
Washington corporation;

Plaintiff,

v.

SIGNAL ELECTRIC, INC.,
a Washington corporation;
and FIDELITY AND
DEPOSIT COMPANY OF
MARYLAND, a foreign
corporation;

Defendants.

Trial Court Case No. 14-2-
05321-1

Court of Appeals No.
47618-5-II

PLAINTIFF/APPELLANT'S REPLY BRIEF

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Fidelity's response brief is long on inflammatory adjectives and adverbs, emphatic assertions that it should prevail, and repetition, but short on arguments and relevant authorities. We ignore the former and respond to the latter as follows.

I. The Trial Court Erred in Holding that its Order Granting North Coast's Motion was a Judgment Triggering the 10-Day Deadline in CR 54(d) Because it Was Not a "Final Determination" of the Rights of the Parties.

A. CR 54(a) Does Not Say What Fidelity Claims.

1. The Rule Does Not Make Decisions that Resolve the Merits of a Dispute "as a Practical Matter" Final Determinations.

Fidelity first argues that CR 54, and particularly the phrase "the final determination," is unambiguous. Although Fidelity seems to acknowledge that a document labeled "decision" does not do so even if it resolves the merits of a dispute, Fidelity asserts that any document labeled "order" that "effectively," "for all intents and purposes," or "as a practical matter" resolves the merits of a dispute is a judgment triggering post-judgment deadlines. (Resp., pp. 1, 12-13, 14.) On the contrary, CR 54(a)(1) is ambiguous because it does not clarify whether a document that does not end litigation (for example by entry of a judgment or order of dismissal) is a "final determination." In other words, the rule does not have the "as a practical matter" expansion of its plain language Fidelity

argues for. In addition, the rule does not clarify whether an order entered without following the presentation procedure and opportunity to object required by CR 54(e) and (f) can be a “final determination.”

As it did in the trial court, Fidelity misstates the holdings of its authorities and incorrectly claims that a number of courts have “interpret[ed] the plain language of CR 54(a)(1)” and determined “beyond dispute that an order granting summary judgment on all causes of action is a ‘judgment’ as defined by CR54(a)(1).” (Response, pp. 7-8.) On the contrary, none of the cases Fidelity cites for that proposition say what it claims. If fact, none of them even mention CR 54.¹ In truth, no case holds

¹ Fidelity first cites *Peters v. Simmons*, 87 Wn.2d 400 403, 552 P.2d 1053 (1976). That case does not discuss CR 54 (because it long predates the rule). That decision holds only that an order dismissing a case is an appealable final order determining an action under the appellate rules in effect in 1974. That continues to be true under RAP 2.2(a)(2)(a written decision that “discontinues the action” is appealable). The fact that an order of summary judgment dismissing an action is appealable tells us nothing about whether an order granting a motion for money damages is a “judgment” under CR 54.

Fidelity then cites *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004), giving an incomplete quote. However, that case deals only with finality for the purposes of *res judicata*, and says nothing about the issue in dispute.

Next, Fidelity cites *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wn. App. 822, 826, 155 P.3d 161, 163 (2007). That case held only that a document that “ordered, adjudged, and decreed” that a case be dismissed was appealable under RAP 2.2 and, after the time for appeal expired, the plaintiff could not appeal the merits under the guise of appealing an award of attorney’s fees. Both propositions are clear under RP 2.2 and say nothing about the issues here.

Fidelity then cites *National Union v. NWYS*, 97 Wn. App. 226,

that an order granting a motion for summary judgment seeking money damages or other affirmative relief (as distinguished from an order granting a summary judgment dismissing claims) is a “judgment” triggering post-judgment deadlines under CR 54.

2. **It is At Least Unclear Whether the Order was Immediately Appealable Independent of the Formal Judgment Entered on It.**

Fidelity also claims that all cases interpreting CR 54 “agree that an order granting summary judgment on all causes of action constitutes a final and appealable judgment.” (Resp. p. 7.) However, only one of the cases it cites, *Peters*, discusses appealability and it only confirms the undisputed proposition that an order dismissing a case is appealable. The question of whether the court’s order here was immediately appealable, without waiting for entry of the formal judgment is at least an open question. North Coast reads RAP 2.2 as providing that it was not appealable. We have not found any authority directly addressing the question of whether an order granting a motion for summary judgment

233, 983 P.2d 1144 (1999), for the position that “a grant of summary judgment is a final judgment . . .” Again, Fidelity miscites that case. It did not deal with CR 54 and does not support the proposition Fidelity claims. The court only stated, in *dicta* after holding that the issue was moot, that a summary judgment has the same preclusive effect for the purposes of collateral estoppel as a judgment entered after trial.

seeking a money award is appealable separate from the judgment entered on that order, and we leave that issue to this court's expertise in its jurisdiction. Of course, if the order was not independently appealable, it was not a "judgment" under CR 54(a).

3. **CR 54(a) Must Be Read in Conjunction with Subsections (e) and (f).**

Fidelity also argues that the definition of "judgment" in CR 54(a) should not be read in conjunction with the rest of the rule, particularly CR 54(e) and (f). In other words, Fidelity asserts that document can trigger post-judgment deadlines even though it was not presented in accordance with CR 54(e) and was entered without the opportunity to object required by CR 54(f). Again, Fidelity has no authority to support its assertion. Reading subsection (a) without considering the remainder of the rule runs contrary to one of the most basic principles of construction. More importantly, Fidelity dismisses the controlling authority here, *Department of Labor & Industries v. City of Kennewick*, 99 Wn.2d 225, 661 P.2d 133 (1983), by asserting a distinction without a difference.

North Coast discusses *Kennewick* at pages 13-16 of its Opening Brief. There, the Supreme Court reversed a decision holding that a trial court document with an unknown title, but described as a "memorandum decision," was a judgment under CR 54(a). Noting that the phrase "final determination" in the definition standing alone could be read the way

Fidelity asserts, the Supreme Court opted instead for a reading that promoted certainty and more efficient operation of the courts by limiting judgments triggering post-judgment deadlines to “formal” judgments or final orders presented under CR 54(e) and the opportunity to object required by CR 54(f). It summarized its ruling by quoting from a dissenting opinion in this court:

As a practical matter, the bar should not have to act as soothsayers to determine when a written trial court opinion or decision might be a final judgment. For the sake of uniformity, the better practice is to follow CR 54; the prevailing party should submit a proposed judgment, decree or order, with appropriate notice and service upon the opposing party. All parties are then aware of the status of the proceeding and can consider the applicability of postjudgment motions such as motions for reconsideration, CR 59(b), appeals under RAP 2.2, and other time-limited procedures hinging upon entry of judgment. 31 Wn. App., at 783, 644 P.2d 1196.

99 Wn.2d, at 228-31.

Fidelity dismisses that statement of policy by the Supreme Court by asserting that an “opinion or decision” like the one considered in *Kennewick* is different from an order granting a motion for summary judgment. However, Fidelity does not explain why one should be treated differently from the other. In addition, it is often difficult to distinguish between a decision and an order. Courts often make decisions in the form of orders (as the court did here), and opinions often contain words such as

“the court rules accordingly,” “it is so ordered,” or similar things.² As a practical matter, there is little or no difference between at least many documents labeled “opinion,” “decision,” and “order.”³ Accordingly, this court should reject Fidelity’s attempt to distinguish *Kennewick* and the cases that follow it,⁴ and hold that the court’s order did not trigger post-judgment deadlines because it was not a formal judgment entered in compliance with CR 54(e) and (f).

B. The Order was Not a Final Determination of All the Parties’ Rights.

² The trial court have done granted North Coast’s motion by issuing a document entitled “decision on motion” or “memorandum decision” that said essentially the same thing its order says (it considered the filings and arguments of the parties and grants North Coast’s motion). If it had, *Kennewick* would indisputably provide that it did not trigger post-judgment deadlines. We ask the rhetorical question: “Why should the label placed on the document require a contrary result?”

³ Note that CR 54(b) recognizes that an order can be a decision: “any order or other form of decision” is not final without the required findings and direction.

⁴ Fidelity does not respond to this division’s decision in *State v. Knox*, 86 Wn. App. 831, 835-36, 939 P.2d 710 (1997), overruled on other grounds by *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)(applying *Kennewick* and holding that a decision with an order remanding a case was not a judgment under CR 54 because it did not have a proper title for a “formal order or judgment”). *See also, Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn. App. 610, 618-19, 789 P.2d 792 (1990)(“It follows from [CR 54(a), (e), and (f)] that there is no final judgment until a formal written judgment signed by the trial judge and supported by findings of fact and conclusions of law is filed with the clerk of the court.”).

The trial court's order triggered post-judgment deadlines only if it was "the final determination of the rights of the parties in the action" CR 54(a). It was not for the following reasons.

1. **The Order Did Not End the Action.**

Although the court's order grants North Coast's motion and constitutes a decision on North Coast's claims against Fidelity, but that decision was subject to clarification of ambiguities (e.g., did the court's award of North Coast's "*prima facie* claim" resolve Fidelity's defenses), reconsideration, and other proceedings, including entry of a monetary judgment that set a date for the beginning of post-judgment interest and compounding of interest. Those things left substantial potential disputes to be resolved. In other words, the order decided the merits of the motion, but did not end the trial court proceedings (exclusive of costs and fees expressly excepted by RAP 2.2(a)(1)) by entry of judgment, dismissal, or otherwise.⁵

⁵ We refer the court to the cases cited on page 18 of North Coast's opening brief. We also note a case Fidelity cited for an immaterial proposition, *Pratt v. Pratt*, 99 Wn.2d 905, 665 P.2d 400 (1983). There, the Supreme Court emphasized that a decision is not binding and is subject to modification for a variety of reasons until a final judgment (or decree) is entered, citing *Kennewick*. 99 Wn.2d at 910. When viewed with the reference to *Kennewick*, that decision holds that a decision is not final until a judgment complying with the presentation and opportunity to object requirements of CR 54(e) and (f). See also, *Marsh, supra*, 57 Wn. App. at 618-19(holding that a court was free to change its mind until entry of a final judgment); *Schoening v. Grays Harbor Community Hosp.*, 40 Wn.App. 331, 336 n. 1, 698 P.2d 593 (1985)(Holding that a decision was not effective because no order to dismiss had been entered, leaving the court free to consider additional evidence, and citing CRT 54(e).

2. **CR 54(b) Prevents the Order From Being a Final Determination of the Parties' Rights.**

More importantly, CR 54(b) is clear. In the absence of findings, a determination that justice requires the entry of final judgment on part of a case, and a direction to enter judgment as a final judgment, “any order or other form of decision, however designated” that leaves any issue for later resolution (other than fees and costs) is not final and cannot be a “judgment” under CR 54(a).

The order in dispute resolved only North Coast’s claim against Fidelity on its bonds and did not decide North Coast’s claim against Signal Electric, Inc. for a declaration that Signal owes a larger amount of money (interest at 18 percent), accruing from an earlier date, under a contract. In response, Fidelity only (1) denies that North Coast asserted a breach of contract claim against Signal, and (2) argues that the trial court’s decision on North Coast’s bond claim indirectly resolved its breach of contract claim. Fidelity is wrong on both counts.

a. **North Coast Asserted a Claim Against Signal Electric.**

North Coast’s complaint asserted three causes of action. CP 1-5. The first of those was a claim for declaratory relief “asserted against Defendant Signal Electric, Inc.” That cause of action alleged that Signal Electric entered into a credit agreement that entitled North Coast to recover interest at 18 percent per annum on the principal, accruing from

a date earlier than statutory interest accrued against Fidelity,⁶ and its attorneys' fees from Signal. North Coast went on to allege that Signal Electric was indebted to it for interest at the rate of 18 percent under that contract. North Coast prayed for a judgment against Signal Electric, separate from its prayer against Fidelity, declaring that Signal owed certain amounts, including interest at 18 percent. CP, 1-2, 4; ¶¶ 1.3, 1.5, 4.1. Fidelity answered that claim, describing it as North Coast's "First Cause of Action (asserted against Defendant Signal Electric, Inc.)" and responding in part by asserting that a number of allegations in that claim "are not directed against Defendant Surety and, therefore, Defendant Surety need not respond." CP 6, 7.

Fidelity primarily denies that North Coast asserted that claim. However, the language of North Coast's complaint and Fidelity's answer is clear. Fidelity also seems to make the irrelevant argument that North Coast did not really intend to assert that claim against Signal. With respect to both, Fidelity relies on an order for relief that is not in the record and, in any event, does not control here.⁷ The short answer is

⁶Signal owed interest from the date payment to North Coast was due under its credit agreement. Fidelity owed interest only from the date on which North Coast filed its bond claims.

⁷ Fidelity argues that "North Coast could not have asserted any independent claims against Signal because it was in bankruptcy." (Response, p. 13.) We assume that Fidelity is referring to the automatic stay. That argument must be rejected because (1) Fidelity has not submitted any evidence of the scope of the relief from the automatic stay issued by the Bankruptcy Court; and (2) this is not the proper forum for litigating that scope. In theory, the automatic stay could subject North Coast to penalties for contempt and make any judgment it obtained against Signal Electric void (if seeking declaratory relief violates the

that North Coast did assert a separate claim against Signal Electric for a declaration that Signal was obligated to pay interest at 18 percent; that claim still existed when the court issued its order granting North Coast's motion on its claims against Fidelity; and CR 54(b) prevents that order from being "the final determination of the rights of the parties in the action;" and it was not a judgment that triggered post-judgment deadlines.

b. **The Trial Court's Order Granting North Coast's Motion on Its Bond Claims Did Not Resolve All of Its Claims Against Signal Electric.**

Fidelity also asserts that the award against Fidelity indirectly resolved "for all intents and purposes" North Coast's claim against Signal. (Response, p. 14.) The award of summary judgment did indirectly determine that Signal Electric owed the \$301,851.49 principal amount North Coast sought. However, the court awarded North Coast pre-judgment interest against Fidelity only under the general pre-judgment interest statute, not Signal Electric's contract. Accordingly, the court's award did not resolve North Coast's claim for 18 percent interest under Signal's contract.⁸

stay), but it does not nullify the claim North Coast asserted here or affect this court's procedures. The truth is that North Coast did assert an independent claim for declaratory relief and additional interest against Signal.

⁸ More specifically, Fidelity claims that "North Coast's claims against Signal were inextricably incorporated into its claims against Fidelity" and "[u]nder general suretyship principles, North Coast's

c. **Fidelity's Arguments About Trial Have No Merit.**

Fidelity asserts that, well after North Coast submitted its proposed judgment dismissing all claims other than its bond claims and filed its motion for an award of attorney's fees, North Coast failed to appear at a "trial to present any additional causes of action" and that fact "conclusively demonstrates that the trial court's Order Granting Summary Judgment fully and finally resolved the rights of the parties in the litigation." (Response, pp. 12, 14-15.) That argument has no merit for two reasons. First, Fidelity does not cite to any portion of the record that supports its factual assertion, and we do not believe there is any. Second, the fact that North Coast chose to abandon its claim against Signal Electric after obtaining the award against Fidelity shows only that North Coast has good common sense and did not want to waste its money and the court's time on a no longer important claim. It does not negate the fact that North Coast asserted a claim against Signal in its complaint and is not "confirmation of the finality of the trial court's Order Granting Summary Judgment." (Resp., p 12.)

II. Entry of a Formal Judgment Cured Any Problem.

North Coast argues that it had ten-days after the court's entry of

claims for Declaratory Relief were an absolute precondition to it prevailing on its Motion for Summary Judgment." (Improper capitalization in original.) (Resp., p. 13.) Although true as to principal, Fidelity has no good faith basis to assert that North Coast's claim for interest at 18 percent, accruing from an earlier date, had anything to do with its bond claims, let alone was an essential element of those bond claims.

the formal judgment to file its motion for an award of fees under the plain language of CR 54. North Coast met that deadline. In response, Fidelity only makes the frivolous argument that, if there is no case law on point, this court may not interpret a rule, in accordance with its plain language or otherwise. (Response, p. 16: “The absence of any case law effectively forecloses North Coast’s argument [based on the language of the rule].”) We all know that is not correct. Accordingly, this court may and should interpret the rule in accordance with its plain language and hold that, even if the court’s order was a “judgment,” the court’s entry of a formal judgment restarted the time period and North Coast’s motion was timely.

III. North Coast’s Motion for Summary Judgment Complied with the Literal Requirement in CR 54(d).

Fidelity argues that North Coast’s request for an award of summary judgment on its entitlement to attorney’s fees was not sufficient to meet the requirement of CR 54(d), citing the recent case of *Clipse v. Commercial Driver Servs., Inc.*, ___ Wn.App. ___ (2015). There, the court only held that the work “reserved” in a judgment did not extend the deadline in CR 54(d)(2). That decision is irrelevant to the question of whether an order granting a motion for affirmative relief is “final” or a judgment under CR 54(a)(1). Since Fidelity has no other authority, this court should hold that North Coasts’ motion for a summary judgment declaring that it was entitled to recover attorney’s

fees met the 10-day requirement under the circumstances here.⁹

IV. If It Did Not Make a Legal Error, the Trial Court Abused its Discretion in Declining to Consider North Coasts' Motion on the Merits.

A. The Issue Here.

We initially note that Fidelity's arguments mischaracterize, or at least fail to recognize, the nature of North Coast's alternative abuse of discretion claim. North Coast does not claim a calendaring error, a lack of delivery, or the other kinds of problems typically involved in an excusable neglect case and involved in Fidelity's authorities. North Coast claims that its failure to recognize that the court's order granting its motion for summary judgment was a "judgment" triggering the deadline was excusable for the reasons set out below.¹⁰ Viewed properly, many of Fidelity's arguments, including those claiming that North Coast did not promptly file a motion for an extension of time, are misplaced.

B. The Trial Court Erred in Holding That RCW 4.36.240 Did Not Apply and in Refusing to Consider North Coast's Motion in the Absence of Substantial Prejudice.

⁹ Note that Fidelity appears to be arguing that North Coast's motion for summary judgment on its claim for fees is not sufficient because it did not include evidence that would allow the court to set the amount, and North Coast did not submit that evidence until it filed its second motion with its proposed judgment. That argument is resolved by the Washington Supreme Court's decision in *Keck v. Collins*, ___ Wn.2d ___, ___ P.3d __ (September 24, 2015) discussed below.

¹⁰ Fidelity also incorrectly claims that North Coast bases its argument on its subjective beliefs. North Coast does not do so-it relies solely on the objective interpretation of the facts and authorities.

RCW 4.36.240 provides:

RCW 4.36.240 Harmless error disregarded.

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party . . .

That statute is clear and mandatory, and it codifies a strong public policy favoring resolution of disputes on the merits. The Supreme Court most recently confirmed that policy in *Keck, infra*, discussed below. That statute required the trial court to disregard any technical failure to comply with the ten-day requirement in CR 54(d)(2) because Fidelity did not suffer any prejudice from the short delay here.¹¹ Fidelity’s only legal response is its assertion, unsupported by any authority, that a delay in filing North Coast’s motion is not a “defect in [the] proceedings.” (Resp., pp. 16-17.) Just stating that argument shows that it has no merit.

On the factual side, Fidelity claims that it was prejudiced by the delay in the general sense that it was delayed in resolving North Coast’s claims, citing an irrelevant CR 60 case discussing the need for “finality of a judgment.” (Resp., p. 27, citing *Pybas v. Paolino*, 73 Wn.App., 393, 403, 869 P.2d 427 (1994)). As the cases cited at note 18 on page

¹¹ Although Fidelity characterizes the delay as outrageous and unprecedented, North Coast filed its motion only 49 days late and only 18 days after the court denied Fidelity’s motion for reconsideration. Fidelity’s claim in its introduction that North Coast did not file its motion for fees until February 13 is wrong (CP index) and its assertion that the motion was due on December 19 (if the order was a “judgment”) does not include the additional time for service by mail.

24 of North Coast's Opening Brief demonstrate, that general kind of prejudice is not sufficient here. To establish prejudice, Fidelity must show that it did not have a full opportunity to respond to North Coast's motion. It did meet that burden, and the trial court did not find prejudice, for obvious reasons.

In addition, Fidelity asserts that it was prejudiced because it "had to pay additional interest on North Coast's principal claim" for 63 days. (Resp., p. 27-28.) That is an assertion that it did not make to the trial court, and an assertion contrary to the trial court's express refusal to find any prejudice. Tr. 29-30. More importantly, that assertion is frivolous because Fidelity could and should have paid the principal and interest due, if not earlier, at least when the court granted North Coast's motion for summary judgment. Had it done so, it would have stopped the accrual of additional pre-judgment interest. The fact that North Coast did not file its motion for fees for 63 days after the granting of its motion had no rational effect on Fidelity's decision not to pay the amount owed to North Coast until many months later.

In short, the trial court erred in accepting Fidelity's argument that its lack of prejudice was immaterial and in failing to consider North Coast's motion in the absence of prejudice.

C. The Trial Court Erred in Holding that CR 6(b) Controls and Excusable Neglect is Required.

Fidelity's legal arguments about discretion are unclear. However, it appears that Fidelity primarily argues that the trial court's

discretion was controlled by CR 6(b) and, as a result, the trial court could not excuse any delay because North Coast did not show excusable neglect.¹² We acknowledge that this court's decisions on that issue are at least superficially inconsistent and we urge it to squarely address the issue and hold that CR 6(b) is not controlling, trial courts have the discretion under CR 54 to consider the merits of late filed motions for fees without a showing of excusable neglect.

As of the time North Coast filed its Opening Brief, only one case squarely addressed the issue, *O'Neill v. City of Shoreline*, 183 Wn.App. 15, 21-22, 332 P.3d 1099, 1103-04 (2014). There, this court held that

¹² Citing *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 654, 660, 246 P.3d 835 (2011), Fidelity argues that North Coast cannot complain about the trial court's failure to find excusable neglect because North Coast did not file a motion that specifically asked the court to do so until 8 days before the continued hearing set by the court. That case does not help Fidelity for two reasons. First, to the extent it says what Fidelity claims, the Supreme Court reversed that holding in *Keck* discussed below when it reversed a trial court's refusal to consider a late filed affidavit that the plaintiff only informally requested be considered at the hearing. Slip, at 7. Second, North Coast asked the court to find, if necessary, that the delay was excusable in an oral motion made at the first hearing confirmed in Plaintiff's Reply in Support of its Motion for an Award of Fees. CP 242. In addition, North Coast filed a separate motion requesting the court to "extend the deadline set out in CR 54[(d)](2) or to excuse any failure to meet that deadline," with that reply. CP 291. North Coast also submitted evidence of excusable neglect in paragraph 5 of the Fourth Declaration of Wm. Randolph Turnbow submitted with that reply, CP 264-25, and argued for a finding of excusable neglect at the continued hearing set by the court. Tr. 12-15. In short, North Coast adequately brought its request for the court to excuse any delay to the court's attention.

the court's discretion to permit a late motion under CR 54(b)(2) is independent of and not controlled by CR 6, no excusable neglect is necessary to do so, and *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985), requires consideration of a motion for fees in the absence of substantial prejudice, at least in the context of an appeal of an award of fees. North Coast quoted the relevant language from *O'Neill* at pages 29-30 of its Opening Brief.

In the trial court, Fidelity incorrectly claimed that *Corey v. Pierce County*, 154 Wn. App. 752, 773-74, 225 P.3d 367 (2010), addressed the issue and held that CR 6(b) controlled extensions of time under CR 54 and required excusable neglect. Fidelity repeats that assertion on appeal, (Resp., pp. 22-23.) However, a close examination of *Corey* shows that it did not consider the question of whether CR 6(b) limits court's power to extend deadlines. In fact, it does not even mention CR 6. Similarly, it does not appear that any party made any argument about excusable neglect. The attorney's fee issue on appeal appears to have been only the question of whether CR 54 or a different time limit in RCW 49.48.030 applied. The court only commented, in *dicta*, that the prevailing party did not show excusable neglect. Note that this court in *O'Neill* rejected an argument that *Corey* determined that excusable neglect was required to excuse a delay under CR 54(d). 332 P.3d at 1104.

After the filing of North Coast's Opening Brief, this court decided *Clipse*. There, this court considered an appeal of a refusal to

consider a late filed motion for an award of attorney's fees. However, the parties and the court appear to have assumed that CR 6(b) controlled without argument on that issue. The appellant argued only that CR 6(b) should be interpreted differently based on interpretations of Fed. R. Civ. P. 6. Although the court did hold that excusable neglect was required under CR 6(b), that case did not decide whether excusable neglect is required under CR 54(d), at least squarely. Note that the court in *Clipse* did not mention *O'Neill* or its holding that no excusable neglect is required and lack of prejudice is the determining factor.

In short, we have a clear holding in *O'Neill* confused by seemingly contrary statements or holdings in *Corey* and *Clipse*. This court should resolve that confusion by directly addressing the issues and agreeing with *O'Neill*. It should do so for at least the following reasons.

1. *O'Neill* is the better reasoned decision and only decision directly addressing the question of whether CR 6 controls the court's discretion granted under CR 54(d).

2. *O'Neill* is properly based on the Supreme Court's decision in *Goucher*, 104 Wn.2d at 664-65 (holding that the court has discretion to accept a late filing in the absence of substantial prejudice without a showing of excusable neglect), as confirmed by the cases cited at pages 27-28 of North Coast's brief.¹³

¹³ Fidelity attempts to distinguish *Goucher* by pointing out that the motion considered there violated CR 6(d) rather than CR 54(d). (Resp., p. 25, incorrectly stating that the holdings in *Goucher* and *O'Neill* "was (sic) based entirely on the prejudice requirement in CR 6(d)," when CR 6(d) does not have a prejudice requirement and failing

3. The “no harm, no foul” rule in *Goucher* and *O’Neill* is consistent with RCW 4.36.240. The rule Fidelity argues for ignores the mandate of that statute and the public policy behind it.

4. *Goucher* and *O’Neill* are consistent with the general principle and conventional wisdom that courts have the discretion to disregard procedural irregularities when doing so promotes justice except when a statute or rule specifically prevents doing so.

5. *Goucher* and *O’Neill* are more consistent with the principle recently announced in *Keck, infra*.

D. If Excusable Neglect is Required, North Coast demonstrated it.

As is discussed above, the issue here is whether North Coast’s failure to recognize that the trial court’s order was a “judgment,” and submission of its motion with presentation of a real judgment, was excusable. The short answer is that, if the order is a “judgment,” failing to recognize that characterization was excusable under the circumstances here. We particularly note the following.

1. The order was not designated a judgment, did not contain adjudicatory language, did not award North Coast post-judgment interest, did not contain all the information required for a judgment

to recognize that *O’Neill* was based on CR 54.) However, Fidelity does not explain why that is important and it is a distinction without a difference. The question here is not which deadline was missed. It is whether the trial court incorrectly accepted Fidelity’s argument that CR 6(b) controls, the court could not accept North Coast’s late motion in the absence of a showing of excusable neglect.

awarding money under RCW 4.64.030, and was insufficient to give North Coast any enforcement remedies. In short, the court's order did not look like a judgment.

2. The order was consistent with the custom to, and North Coast's later submission of, a formal judgment meeting all the requirements for a true, enforceable judgment and a final resolution of the action.

3. The order did not resolve (or purport to resolve) North Coast's claims against Signal Electric and was not final under CR 54(b). Accordingly, it at least did not appear to be "the final determination of the rights of the parties in the action" under that CR 54(a).

4. The court's order did not purport to be "the final determination of the parties' rights" because it did not end the case. In particular, it left resolution of any dispute over the form of the real judgment North Coast would receive, including the date for compounding interest, for later resolution. On the contrary, that order was fully consistent with the later submission of a formal judgment that would end the proceedings in the trial court other than cost and fees and be "the" final determination of the parties' rights.

5. Fidelity's argument that an order that resolves the merits only "as a practical matter" and "for all intents and purposes" determined all issues in the case is a "final determination" under CR 54(a) was and remains a theory not accepted by any reported decision.

6. The order was not presented for entry as required by CR

54(e) and was filed without the opportunity to object to its form required by CR 54(f).

7. The order at least appeared to be a decision on North Coast's motion within the Supreme Court's holding and strong statement of policy in *City of Kennewick* and the cases that follow it.

8. Fidelity was well aware of North Coast's claim for fees, contributed to the confusion by claiming to be considering an offer to settle that claim, and suffered no prejudice.

9. Strong public policies favor both an award of fees to a prevailing bond claimant and resolution of disputes on the merits.

In evaluating those circumstances, the court should consider this court's explanation of its reversal of a trial court's decision to strike an affidavit filed ten days late and the day before the hearing in *Keck v. Collins*, 181 Wash. App. 67, 325 P.3d 306, 314 (2014), affirmed on other grounds, ___ Wn.2d ___ (2015)(discussed below). There, the plaintiff filed an affidavit late because her counsel was busy with a trial in Ephrata. The defendant moved to strike the affidavit and the trial court did so. This court reversed, finding that the trial court abused its discretion and explaining as follows.

Upon motion, the trial court may strike a late filing "unless good cause is shown for, or justice requires, the granting of an extension of time." CR 5(d)(2). Alternatively, upon motion, the trial court may forgive a late filing "for cause shown ... where the failure to act was the result of excusable neglect." CR 6(b)(2). These considerations are essential to fulfilling the civil rules' purpose of ensuring the trial court justly,

speedily, and inexpensively determines every action, preferably on the merits rather than technicalities. (Citations omitted.)

Eight factors assist us in determining whether a delay resulted from excusable neglect:

(1) The prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily foreseeable; and (8) whether the omission constituted a complete lack of diligence.

15 Karl B. Tegland, *Washington Practice: Rules Practice* § 48:9, at 346 (2d ed.2009) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)).

325 P.3d at 314-15.

Applying those factors, this court found excusable neglect and reversed, noting that the plaintiff's counsel had acted in good faith; with "a reasonably debatable legal reason;" with "verifiable, not easily manufactured reasons for the delay;" and without a "complete lack of diligence." 325 P.3d at 315.

In holding that the trial court abused its discretion in denying a related motion for a continuance, the court explained:

The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one. *Coggle [v.*

Snow, 56 Wash.App. 499, 508, 784 P.2d 554 (1990)]; *Butler v. Joy*, 116 Wash.App. 291, 299, 65 P.3d 671 (2003). And “it is hard to see ‘how justice is served by a draconian application of time limitations’ . . .” *Butler [v. Joy]*, 116 Wash.App. 291, 299, 300, 65 P.3d 671 (2003)] (quoting *Coggle*, 56 Wash.App. at 508, 784 P.2d 554). Absent prejudice to the moving party, the trial court should grant a motion for continuance.

325 P.3d at 317.

Although different, the facts in *Keck* are closely analogous to the situation here, particularly (1) North Coast’s good faith determination that the ten-day deadline did not begin to run on filing of the court’s order, and would instead run upon entry of a true judgment, based on “reasonably debatable legal reason[s];” and (2) the lack of prejudice to Fidelity. Accordingly, this court should follow its decision in *Keck* and hold that the trial court abused its discretion here.

E. The Trial Court Abused its Discretion Under the Supreme Court’s Recent Decision in *Keck*.

The Supreme Court affirmed this court’s decision in *Keck* on September 24, 2015. In doing so, it expanded a rule formerly limited to discovery sanctions to motions to strike late filed affidavits. The Supreme Court held that a court may reject a filing, or at least one necessary for resolution of a dispute on the merits, only after considering and making findings on three factors:

We have said that the decision to exclude evidence that would affect a party’s ability to present its case amounts to a severe sanction. [*Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011).] And before imposing a severe sanction, the court must consider the three

Burnet factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

While our cases have required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion. * * * Essentially, the court dismissed the plaintiffs' claim because they filed their expert's affidavit late. But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." * * *

In this case, the trial court abused its discretion by not considering the *Burnet* factors before striking the third affidavit. Aside from noting that the trial date was several months away, which tended to reduce the prejudice to the defendants, the court made no finding regarding willfulness or the propriety of a lesser sanction. We reverse the order striking the third affidavit. (Footnote omitted.)

Slip, pp. 9-11.

The Supreme Court's decision is technically limited to late filings of evidentiary materials. However, it evidences a strong policy of requiring trial courts to consider, and make findings on the record as to, whether a lesser sanction will suffice to cure the problem, whether the late filing was willful, and whether the late filing would prejudice the opposing party, when a timing problem threatens to deprive a party of a resolution on the merits. That policy applies equally to the trial court's decision to refuse to consider North Coast's claim for attorney's fees on

the merits. Note that, because North Coast moved for an award of attorney's fees in its motion for summary judgment, the trial court's decision is really based on North Coast's failure to file the evidentiary materials necessary for the court to make a specific award earlier. Accordingly, this court should follow that policy and also hold that the trial court abused its discretion by refusing to consider North Coast's claim for attorney's fees on the merits because the trial court did not consider and make findings on the questions of whether Fidelity was prejudiced, any lesser sanction would cure any prejudice, and North Coast's submission of its claim for fees with its proposed judgment was a willful or deliberate violation of the rule designed to prejudice Fidelity.

V. Conclusion.

In summary, this court should reverse the trial court and remand North Coast's claim for fees for consideration on the merits because North Coast did not miss the 10-day deadline in CR 54(d) and, alternatively, because the trial court abused its discretion in refusing to excuse any delay.

DATED: October 19, 2015.



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Certificate of Service

I certify that I served Defendant/Respondent's counsel with a copy of

this reply brief by email and by First Class Mail on October 20, 2015.



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