

NO. 35737-2-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

BRADLEY R. MARSHALL and JANE
DOE MARSHALL, and the community
comprised thereof,

Respondents,

v.

MARK WHEELER and JANE DOE
WHEELER, husband and wife and
the marital community comprised thereof,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal raises a narrow question of statutory interpretation and civil procedure: May a party insert a judgment summary into an order on summary judgment and award itself costs without giving the opposing party notice? Contrary to the trial court's ruling, the answer is clearly no, and this Court should reverse the trial court and vacate the improper judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Wheeler's motion to vacate the judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a judgment summary is required for an order on summary judgment to constitute a judgment? (First Assignment of Error)

2. Whether a party may insert a judgment summary into an order on summary judgment without giving notice to the opposing party, either before or after entry? (First Assignment of Error)

3. Whether a party may award itself statutory costs in a judgment summary that is inserted into a summary judgment order after the order is signed by the judge? (First Assignment of Error)

IV. FACTUAL BACKGROUND

The relevant facts are few and undisputed. This appeal arises from the trial court's denial of a motion to vacate a judgment in a contribution action between two attorneys, Bradley Marshall and Mark Wheeler, following a malpractice judgment against Bradley.

On March 3, 2006, the trial court signed an Order on Plaintiff's Summary Judgment Motion re: Damages or in the Alternative Motion for an Evidentiary Hearing in Lieu of Trial as to Defendants Wheeler. CP 7-8. This order states that "Plaintiff is awarded \$59,567.60" CP 8. However, the order does not direct entry of judgment, award costs or contain a judgment summary. *Id.*

After the order was signed, plaintiff and attorney Bradley Marshall¹ took the signed order to the clerk for filing. CP 23 at ¶ 6. Before filing the order, Marshall "obtained a judgment summary form from the Clerk, completed it, and filed it and the Order with the Clerk." CP 23 at ¶ 6.

Marshall claims that he was directed to add a judgment summary by the trial judge, the Honorable Bryan E. Chuschoff, when opposing

¹ The action arose out of a contribution claim between co-counsel after a legal malpractice action. Mr. Marshall represented himself at the time, but has been suspended for 18 months because of his conduct in the lawsuit that was the subject of the malpractice action. *In re Disciplinary Proceeding Against Marshall*, ___ Wn.2d ___, ___ P.3d ___, 2007 WL 1377914 (2007).

counsel was not present. CP 23 at ¶ 5. Marshall also claims that he informed opposing counsel about the judgment summary a few days later (CP 23-24 at ¶ 7), but that claim is disputed by contrary testimony. CP 5-6. In any event, it is undisputed that Marshall did not provide opposing counsel a copy of the order with the Judgment until May 4, 2006, more than two months after the order was entered. CP 6 at ¶ 5. Marshall does not deny this fact. CP 23-24 at ¶¶ 7-8.

Upon learning of the judgment summary, Wheeler brought a motion to vacate the judgment. CP 1-4. The trial court denied the motion. CP 70-71. Wheeler then brought a motion for reconsideration, which also was denied. CP 53-57, 72-73. This appeal followed.

V. LEGAL ANALYSIS

CR 60 provides for judgments to be vacated in specified circumstances. Wheeler brought his motion pursuant to CR 60(b)(1) on the grounds of “irregularity in obtaining a judgment” (CR 60(b)(1)) and fraud, misrepresentation and other misconduct (CR 60(b)(4)). The trial court’s order denying the motion to vacate is appealable pursuant to RAP 2.2(a)(10). The standard of review is abuse of discretion. *Showalter v. Wild Oats*, 124 Wn.App. 506, 511, 101 P.3d 867, 869 (2004). A trial court abuses its discretion “by issuing a manifestly unreasonable or untenable decision.” *Id.* In this case, the trial court abused its discretion

by permitting a judgment to be entered in violation of statute and the civil rules.

A. Marshall's Unilateral Addition of the Judgment Summary Is an Irregularity.

Entry of judgment is a significant event. Parties have rights to enforce, and deadlines begin to run. For that reason, courts should be clear when entering a judgment. This was perhaps best summed up by Judge Munson in his 1982 dissent to the majority opinion in *Department of Labor and Industries v. City of Kennewick*, 31 Wn.App. 777, 783, 644 P.2d 1196, 1199 (1982):

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 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.

The Supreme Court was sufficiently impressed with Judge Munson's dissent to quote it when it overruled the majority's decision. *Department of Labor & Industries v. City of Kennewick*, 99 Wash.2d 225, 661 P.2d 133 (1983). Judge Munson was again quoted by Division II in *State v. Knox*, 86 Wn.App. 831, 837, 939 P.2d 710, 713 (1997).

As Wheeler argued in the motion to vacate, the bar has come to rely on the presence of a judgment summary to distinguish between an interlocutory order and a final judgment. Marshall successfully argued

below that the judgment summary is merely “for the convenience of the clerk.” CP 16. In fact, the judgment summary is not a mere convenience, but instead a substantive document indicating that judgment was entered.

Judgment summaries are required by RCW 4.64.030(2). This statute makes it perfectly clear that the judgment summary is mandatory, not a mere convenience. In fact, the law prevents entry of any judgment without the judgment summary.

The clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section.

RCW 4.64.030(3) (emphasis added). Under the plain language of the statute, the document that the court signed could never be entered as a judgment. That order could never take effect as a judgment. Adding the judgment summary transformed the document from a mere order into a judgment. Wheeler was entitled to notice before that happened. In *Kim v. Lee*, 102 Wn.App. 586, 592, 9 P.3d 245, 249 (2000) (reversed on other grounds 145 Wash.2d 79, 31 P.3d 665 (Wash. Sep 20, 2001)), the court acknowledged the effect and consequences of the statute, but held that substantial compliance permitted the summary to run to the second page. Noncompliance, as in this case, cannot be substantial compliance. *Banner Realty, Inc. v. Department of Revenue*, 48 Wn.App. 274, 278, 738 P.2d 279, 281 (1987).

Wheeler should not be compelled to guess at the court's unexpressed subjective intent about the effect of an order. The document presented to Wheeler and signed by the court could never under any circumstances constitute or take effect as a judgment. Even if Marshall had the Court's permission to insert a judgment summary, that procedure was irregular and is grounds to vacate the judgment.

B. Marshall's Unilateral Award of Costs Was an Irregularity.

According to his own declaration, Marshall "noticed there was a section that requested whether attorney fees were due. I included \$125 because I believed that I was entitled to statutory attorney fees because I was the prevailing party." CP 23 at ¶ 6. RCW Chapter 4.84 permits courts, not parties, to award costs. Wheeler cannot find any reported case from the entire country that even discusses the notion that a party can award itself costs.

C. Marshall Failed to Give Notice of Presentation.

CR 54(f) requires that the opposing party be given five days' notice of presentation of the judgment. CR 54(f)(2)(C) provides an exception when a judgment is presented after a verdict or findings "and while opposing counsel is in open court." Marshall took an order and converted it to a judgment outside the presence of opposing counsel. Even if the trial court did authorize Marshall's conduct, CR 54(f)(2)(C) plainly

dictates that the opposing counsel be informed in advance. In this case, opposing counsel was not informed until after the appeal period had run.

VI. CONCLUSION

This Court should declare in no uncertain terms that an attorney who inserts a judgment summary and awards himself costs without prior notice, and then fails to provide opposing counsel with a copy of the filed pleadings for 60 days, has committed egregious misconduct. Because of that misconduct and the irregularity in the entry of judgment, this Court should reverse the order denying the motion to vacate and remand this case for further proceedings.

DATED this 23rd day of May, 2007.

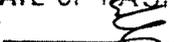
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DECLARATION OF SERVICE

I, Ellen Krachunis, state:

On this day I caused to be delivered by ABC Legal Messengers for delivery on May 24, 2007 to the Court of Appeals Division II and to Michael Feinberg, KARR TUTTLE CAMPBELL, 1201 Third Avenue, Suite 2900, Seattle, WA 98101, Bradley R. Marshall, Marshall Law Offices, 121 Lakeside Ave., Suite 100, Seattle, WA 98122 a copy of the following documents: Brief of Appellants.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of May, 2007 at Seattle, Washington.


Ellen Krachunis