COURT OF APPEALS
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STATE OF WASHINGTON
BY
DEPUTY

NO. 35737-2-II

COURT OF APPEALS, DIVISION TWO
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.

Appeal from the Superior Court for Pierce County
The Honorable Bryan E. Chushcoff

BRIEF OF RESPONDENT

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A. IDENTITY OF RESPONDENT

Respondent Bradley and Cynthia Marshall (the "Marshalls") submit this brief pursuant to RAP 10.1.

B. ASSIGNMENTS OF ERROR

The Marshalls make no assignments of error as they have not filed a cross appeal.

C. STATEMENT OF THE ISSUES

The Marshalls make the following counterstatement of issues.

1. Is a party whose attorney approves a form of proposed order by signing it in open court prior to its presentation to the judge following a summary judgment hearing, entitled to notice that the order has been filed with the clerk?

2. Is the judgment summary required by RCW 4.64.030(2) a substantive part of the judgment or simply a summary of its essential terms to assist the clerk in performing his/her functions in entering judgments in the execution docket?

3. Is it an irregularity for an attorney to complete a judgment summary on a form provided by the court clerk at the time the judgment is filed?

4. Does a clerical mistake in the judgment summary affect the validity of the judgment?

5. Is the Wheelers' appeal frivolous and are the Marshalls entitled to be reimbursed their reasonable attorney's fees?

D. STATEMENT OF THE CASE

The Marshalls filed a single claim for contribution against six named parties. Four parties settled with the Marshalls and the claims against them were dismissed with prejudice. This left a single claim for contribution against Mark and Jane Doe Wheeler (the "Wheelers"). CP 30 at p. 12; CP 32 at p. 21, 22 and 44.

On November 16, 2005, the Marshalls filed a motion for summary judgment against the Wheelers on the issue of liability. CP 2. On December 16, 2005, the Court granted the Marshalls' motion for summary judgment finding the Wheelers liable in an amount to be determined. *Id.* The Marshalls thereafter filed a motion for summary judgment as to damages, or in the alternative, setting an evidentiary hearing to determine damages in lieu of trial. CP 7-9.

On March 3, 2006, the court heard the Marshalls' motion for summary judgment on damages and entered an Order on Plaintiff's Summary Judgment Motion (the "Judgment") following the hearing. CP 8. The Judgment expressly states, in Judge Chushcoff's own handwriting, "Plaintiffs (sic) is awarded $59,567.60." *Id.* The Judgment also expressly states that "Plaintiffs' Motion for Summary Judgment regarding damages is hereby: Granted." *Id.* The Wheeler's attorney initialed all of the interlineations made by Judge Chuschoff and

endorsed the Judgment. CP 23 at ¶ 4. Following the hearing, Mr. Marshall[1] presented the Judgment to the Court Clerk. CP 23 at ¶ 5. Because the Judgment did not contain a judgment summary, Mr. Marshall requested and was provided a form of judgment summary by the Pierce County Court Clerk, which he completed and which the clerk filed as the first page of the Judgment. CP 23 at ¶ 6.

Mr. Marshall claims to have spoken with the Wheeler's attorney, John Davis, shortly after the Judgment was entered, which is disputed by Mr. Davis. CP 23 at ¶ 7; CP 5-6. However, it is undisputed that the Wheelers were aware that the Judgment had been entered by May 4, 2006. CP 2 and 6. After the Marshalls' attempts to obtain payment voluntarily failed, the Marshalls garnished the Wheelers' bank account on two separate occasions: first on June 29, 2006, and then on October 20, 2006. On neither occasion did the Wheelers controvert the garnishment.

On November 14, 2006, following the second garnishment, more than eight months after the judgment was entered, and more than six months after the Wheelers admit they were aware of the judgment, the

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[1] Mr. Marshall was a licensed attorney and was representing his wife and himself.

Wheelers moved for and obtained an Order to Show Cause to Vacate the Judgment.[2] CP 1. At the show cause hearing on December 1, 2006, the court denied the Wheeler's' Motion to Vacate and signed an Order Denying the Motion to Vacate, dated December 15, 2006. CP 70.

On December 15, 2006, the court entered an Order Denying the Motion for Reconsideration. CP 53 and 72. On December 29, 2007, the Wheeler's filed a Notice of Appeal, appealing both the denial of the Motion to Vacate and the Motion for Reconsideration. CP 74.

E. ARGUMENT

1. Standard of Review

A trial court's discretionary decision denying a motion to vacate a judgment cannot be reversed on appeal unless "it plainly appears that the trial court abused its discretion." *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999) (citing *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990) *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1991)); *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302

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[2] The statement in Appellants' Brief at 3 that the "Wheelers moved to vacate the judgment as soon as they learned of the judgment summary" is demonstrably false. The Wheelers were aware of the judgment summary, and the circumstances regarding its entry, from Michael Feinberg's letters dated June 7, 2006, and July 17, 2006, which were sent more than four and five months, respectively, before the Wheelers moved to vacate the judgment. CP 41; CP 19-20 and 44.

(1978). A trial court abuses its discretion only where its decision is based on untenable grounds or reasons, or where the discretionary act was manifestly unreasonable. *Id.* A trial court's decision that is based on tenable grounds and is within the bounds of reasonableness must be upheld. *Id.*

2. There Was No Irregularity In The Entry Of The Judgment; The Trial Court Properly Exercised its Discretion

The Wheelers claim that Mr. Marshall's completing a judgment summary on a form provided him by the court clerk, at the time he delivered the Judgment for filing, is an irregularity justifying vacation of the Judgment. They cite no authority to support this proposition. Rather they argue, without any basis in the record, that because "the bar has come to rely on the presence of a judgment summary to distinguish between an interlocutory order and a final judgment" they were not aware that a final judgment had been entered. Appellants Brief at 4. The court rules provide otherwise.

a. The Judgment Was A Final Judgment And Was Delivered To The Clerk For Filing As Required By CR 54 And 58

The Wheelers assert that "courts should be clear when entering a judgment" so that one is "not compelled to guess at the court's unexpressed subjective intent about the effect of an order." Appellants

Brief at 4. CR 54(a)(1) unambiguously defines what is a final judgment. A final judgment is an order that adjudicates all the claims, counts, rights, and liabilities. CR 54(a)(1); *Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001). It must be "in writing and signed by the judge and filed forthwith as provided in Rule 58." CR (54)(a)(1). An order granting summary judgment may be a final judgment if it meets these requirements. *Rose v. Fritz*, 104 Wn. App. at 120. The presence or absence of a judgment summary has no bearing on whether a judgment is a final judgment.

There is no question that the Judgment granting the Marshalls summary judgment was a final order. The Judgment awarded the Marshalls judgment against the Wheelers, who were the only remaining parties in the case, in the amount of $59,567.60, struck Marshalls' alternative request for an evidentiary hearing because there was nothing left to try, and denied the Wheelers' motion to amend their complaint, which they made orally during the argument on the motion. The Judgment was in writing and the Wheeler's attorney initialed all the interlineations made by Judge Chushcoff and endorsed the Judgment. It

was thereafter delivered to the court clerk for filing. The Wheelers do not dispute the Judgment was a final order as defined by CR 54(a)(1).[3]

b. The Time For Filing An Appeal Runs From The Date When A Judgment Is Delivered To The Clerk For Filing And Is Not Based On The Presence Of A Judgment Summary.

The Wheelers argue based on RCW 4.64.030 that the Judgment was not effective because it did not have a judgment summary, and that their appeal rights ran from the date a judgment summary was filed. The Wheelers' supposed reliance on the presence of a judgment summary to determine their appeal rights is misplaced and their argument fails for three reasons. First, as noted the presence or absence of a judgment summary is not determinative of whether a judgment is a final order. Not all judgments are required to contain a judgment summary: only those that "provide for the payment of money, including foreign judgments, judgments in rem, mandates of judgments, and judgments on garnishments." RCW 4.64.030(2)(a). Second, the Judgment was filed with a judgment summary on a form provided to the Marshalls by the

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[3] The Wheelers argued in the court below, that the Judgment was not intended as a final order because it did not dispose of all issues. CP. 1-4. They have now abandoned this argument. It is not the subject of any of the issues they have identified in their brief nor is it addressed in their argument.

court clerk. Third, and more importantly, CR 58, not RCW 4.64.030, governs the time for filing an appeal from a judgment.

CR 58(a) provides that "[u]nless the court otherwise directs and subject to the provisions of rule 54(a), all judgments shall be entered immediately after they are signed by the judge." CR 54(b) provides that "[j]udgments shall be deemed entered ***for all procedural purposes from the time of delivery to the clerk for filing***." (emphasis added). This includes the time for filing an appeal. *Narrowsview Ass'n v. Tacoma*, 84 Wn.2d 416, 425-26, 526 P.2d 897 (1974). The time for appeal started to run from the Marshalls' delivery of the Judgment to the clerk for filing.

The Wheelers argument is based on a gross misunderstanding of the purpose of chapter 4.64 RCW, in general, and of RCW 4.64.030 in particular. These statutes deal solely with the mechanics of entering judgments in, and maintenance of, the execution docket. See RCW 4.64.030(1) ("The clerk *shall enter all judgments in the execution docket*, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action." (emphasis added); *See also* RCW 4.64.020(1) (*The clerk on the return of a verdict shall forthwith enter it in the execution docket*,

specifying the amount, the names of the parties to the action, and the names of the party or parties against whom the verdict is rendered; *such entry shall be indexed in the record index and shall conform as near as may be to entries of judgments required to be made in the execution docket."* (emphasis added); RCW 4.64.060 ("*Every county clerk shall keep in the clerk's office a record, to be called the execution docket*, which shall be a public record and open during the usual business hours to all persons desirous of inspecting it. The record must be indexed both directly and inversely, and include all judgments, abstracts, and transcripts of judgments in the clerk's office."); RCW 4.64.080 (describing how the clerk is to note executions, levies, assignments and satisfactions in the execution docket); RCW 4.64.080 (describing the procedures for noting the cessation of a judgment lien in the execution docket).

The judgment summary required by RCW 4.64.030(2) is nothing more than a summary of the essential terms of a judgment that the clerk is required to enter in the execution docket. This is no doubt the reason the Pierce County Clerk has a form of judgment summary, which he/she provides upon request. The legislative history clearly indicates that the information to be included in the judgment summary required by RCW 4.64.030 is "to assist the clerk in his or her record-keeping function."

Laws of 1983, ch. 28 et seq. This is also apparent from the language in the last sentence of RCW 4.64.030, which indicates that the effectiveness of the judgment is merely delayed until a complying summary is filed and that the clerk is not responsible for the accuracy of the summary. RCW 4.64.030(3). Apart from assisting the clerk from performing his statutory duties under chapter 4.64 RCW, a judgment summary has no substantive significance.

Under CR 58, the time to appeal runs from the date a judgment is physically placed in the court file regardless of whether or not the clerk dockets it as a judgment in the execution docket. *Narrowsview Ass'n v. Tacoma*, 84 Wn.2d at 425-26.[4] Thus even if Mr. Marshall had not obtained and completed the judgment summary at the time he delivered the judgment to the clerk, the time for the Wheelers to file an appeal would have nevertheless started to run.

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[4] To the extent there is any conflict between CR 58 and RCW 4.64.030 — which there is not — CR 58 controls. *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997) ("When a court rule and procedural statute are inconsistent, the court rule governs; however this court makes every effort to harmonize such apparent conflicts."). CR 58 and RCW 4.64.030(3) are not in conflict and are easily harmonized. CR 58(b), unambiguously indicates that a judgment is entered for "all procedural purposes" when it is delivered to the clerk, including for purposes of appeal. *Narrowsview Ass'n v. Tacoma*, 84 Wn.2d at 425-26. RCW 4.64.030(3), on the other hand, says nothing about appeals; indeed this is not even the subject of the statute. It governs how the clerk is to enter a judgment on the execution docket and when, as a substantive

The Wheelers contention that the absence of the judgment summary prevented them from determining when their appeal rights began to run is without merit. The Wheelers knew the court had entered a judgment against them for a specific monetary amount and that they were the only parties remaining in the case. The Wheelers attorney endorsed the Judgment for entry so that there was no requirement of presentation. CR 54(f)(2)(C). The Wheelers knew, or at the very least where charged with the knowledge that CR 54(a) and 58(a) required that the Judgment be immediately filed with the court clerk and that their appeal rights ran from the date the judgment was delivered to the clerk. It is undisputed that the Judgment was in the court file on March 3, 2005, and could have been found from 1either a physical inspection of the court file or through the courts online SCOMIS system.

Thus, the trial court properly exercised its discretion in denying the Wheelers Motion to Vacate and the Motion for Reconsideration.

c. There Was No Requirement Of Notice Because The Wheelers Endorsed The Judgment.

This court has held that assuming proper notice of presentation under CR 54, neither the court nor the prevailing party is obligated to

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matter, the judgment can be enforced. Understood in this light, the statutes are easily harmonized and do not conflict in the least.

notify the other parties of the date a judgment is entered, or to provide a copy of the judgment to the non-prevailing party. *Beckman v. Department of Social and Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000). Rather, the Wheelers had an obligation to monitor the actual entry of the Judgment, so that any post-trial motions or appeals were timely filed. *Id.*

The Wheelers contend that pursuant to CR 54(f), they were entitled to notice of the entry of the judgment summary. Appellant's Brief at 6. However, no notice of presentation is necessary if presentation is made while opposing counsel is in open court. CR 54(f)(2)(C). It is not disputed that the Marshalls provided a copy of the proposed Judgment to the Wheelers at the time they filed their motion for summary judgment. In addition, the Wheelers' attorney endorsed the Judgment and initialed all the interlineations, including the one awarding the Marshalls $59,567.60, in open court at the hearing following the judge's oral ruling. Moreover as pointed out by the court, the judgment summary is not a document that is signed by the judge so there would be nothing to present. RP at 7. CR 54(f) only applies to orders or judgments a judge is required to sign.

The Wheelers argue that the Marshalls failed to meet the exception provided under CR 54(f)(2)(C) because "Marshall took an

order and converted it to a judgment outside the presence of opposing counsel" Appellant's Brief at 6. The fallacy of this argument is that under CR 54(a)(1) the Judgment was already a final judgment that the Wheelers' attorney endorsed in open court.

The addition of the judgment summary did not add or detract from the Judgment. As the trial judge observed discussing the attachment of a judgment summary to the Judgment,

> My view is that the Judgment Summary could be modified. That doesn't change the judgment at all. I don't think that the Judgment Summary itself has any actual legal effect,
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> * * *
>
> If for instance, let's say, the Judgment Summary had a typographical error. Instead of saying $57,000, it said $58,000, but the body of the judgment said $57,000, you wouldn't have to pay the extra $1,000 . . . You don't owe the extra $1,000. The Judgment Summary is incorrect. The judgment is the judgment. That's what you appeal from, and that's what the judge's order is. The summary is a summary. It has no effect, in my view, except to provide notice to folks for recording purposes.

RP 16 at ¶ 7-25 and 17, 18. *See also* RCW 4.64.030(3) (clerk is not liable for an incorrect summary).

The very reason the Marshalls completed the judgment summary on the form provided by the court clerk was so that the Judgment would become effective as an enforceable judgment and the clerk would enter it in the execution docket. Substantial compliance is all that was necessary to comply with RCW 4.64.030. *Kim v. Lee*, 102 Wn. App. 586, 9 P.3d 245 (2000) *reversed on other grounds,* 145 Wn.2d 79, 31 P.3d 665 (2001). The Judgment was in actual compliance with the substantive purpose of RCW 4.64.030 because it contained the information required by the statute. *Kim v. Lee*, 102 Wn. App. at 591-92.[5] The unstated premise of the Wheeler's argument is that the judgment summary has some independent substantive effect apart from the Judgment. However, the Wheelers cite no authority that a judgment summary is anything other than what it purports to be, a summary of the essential terms of the Judgment.

The cases cited by the Wheelers are inapposite. They hold, consistent with longstanding case law, that a memorandum decision of the court is not a final order under CR 54. *Department of Labor & Indus, v. City of Kennewick*, 99 Wn.2d 225, 661 P.2d 133 (1983); *State*

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[5] The issue in *Kim* dealt with the potential enforceability of a judgment lacking a proper judgment summary and not with the timing of an appeal.

v. Knox, 86 Wn. App. 831, 939 P.2d 710 (1997). Here we are not dealing with a memorandum decision.

The cases the Wheelers cite note that the better practice under CR 54, is for the prevailing party to submit a proposed order with appropriate notice and service on the opposing party. *Department of Labor & Indus, v. City of Kennewick*, 99 Wn.2d at 229; *State v. Knox*, 86 Wn. App. at 837. This is precisely what the Marshalls did here; not only was a proposed order properly served, but it was also signed by the Wheelers' attorney following the hearing.

The Marshalls are not responsible for the Wheelers erroneous assumptions about the significance of the judgment summary. *cf. Beckman v. DSHS*, 102 Wn. App. at 695 ("Plaintiffs' counsel was not legally obligated to bring the State's mistake, if any, to the State's attention."). Because the Wheelers' attorney endorsed the Judgment in open court, there was no requirement that the Marshalls notify the Wheelers of the date the Judgment was entered or provide them a copy of the Judgment.

d. **There Was No Irregularity.**

Under CR 60(b)(1), irregularities occur when there "is a procedural defect, such as failing to follow a proscribed rule." *Birchfield v. Harford*, 86 Wn. App. 259, 936 P.2d 48 (1997), *review*

denied, 135 Wn.2d 1011, 960 P.2d 938 (1998). The only rule mentioned by the Wheelers is CR 54(f)(2). As discussed above, and as the trial court noted, the Marshalls complied with CR 54(f)(2) and the rule is not applicable to the filing of a judgment summary because its not signed by the judge. RP 7 at ¶ 1-16.

The trial court reasonably exercised its discretion in denying the Wheelers Motion to Vacate and their Motion to Reconsider.

3. The Judgment Accurately Reflected The Court's Ruling And The Error In The Judgment Summary Does Not Effect The Validity Of The Judgment Or Provide A Basis To Vacate It.

The incorrect addition of the $125 in costs does not affect the validity of the Judgment or provide a basis for vacating it. The addition of the $125 in costs is at most a clerical or ministerial error that can be corrected at any time. CR 60(a). ("Clerical mistakes in judgments, order or other parts of the record and errors arising from oversight may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any as the courts orders"). A clerical mistake occurs when a judgment does not accurately reflect the intent of the court. *In re Marriage of King*, 66 Wn. App. 134, 138, 831 P.2d 1094 (1992). It is mechanical in nature, usually apparent by looking at the record, and does not involve substantive legal judgments.

Id.; *Foster v. Knutson*, 10 Wn. App. 175, 177, 516 P.2d 786 (1973) ("The term 'clerical mistake' ... merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others.").

The mistake in the judgment summary is apparent on the face of the record. As the trial court indicated, the proper remedy is the amendment of the judgment summary to correctly reflect the trial court's ruling, which is accurately reflected in the body of the Judgment. RP at 18. The erroneous inclusion of $125 does not affect the validity of the Judgment.

4. <u>The Wheelers Appeal is Frivolous</u>.

RAP 18.9(a) permits an appellate court on its own initiative or on motion of a party to sanction a party who files a frivolous appeal. Additionally, if an appeal is found to be frivolous, an appellate court can award CR 11 sanctions pursuant to RAP 18.7 against the party or his counsel filing the frivolous and nonmeritorious action. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990) (*citing Layne v. Hyde,* 54 Wn. App. 125, 136, 773 P.2d 83, *review denied,* 113 Wn.2d 1016 (1989)). *See also Bryant v. Joseph Tree, Inc.,* 119 Wn.2d

210, 223, 829 P.2d 1099 (1992) (holding that under RAP 18.7, CR 11's certification requirement applies to proceedings in the appellate courts as well as the superior courts). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

The Wheelers' appellate brief is virtually a verbatim copy of their Motion for Reconsideration. *compare* CP at 53-57. The arguments that the Wheelers make based on RCW 4.64.030 were made for the first time in their Motion for Reconsideration. As the Marshall's pointed out in their response to the Motion for Reconsideration, the Wheelers argument was not based on any of the grounds for reconsideration enumerated in CR 59, but rather their Motion for Reconsideration was a vehicle for them to present new arguments and new legal theories the did not include in their original motion to vacate.

In their appeal here, the Wheelers again cite absolutely no legal authority to support the legal contentions that underlie their arguments: (1) that a party's addition of a judgment summary on a form provided by the clerk for that purpose voids on otherwise final judgment; and (2) that a party's appeal rights run from the filing of judgment summary. Not

only do not cite any legal authority, they ignore and fail to cite the court rules that unambiguously provide otherwise.

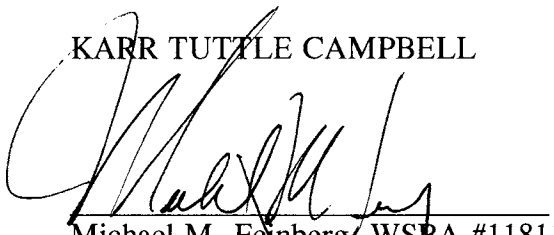
The Wheeler's appeal presents no debatable issues and the court should award the Marshalls their attorney fees in having to respond to this frivolous appeal.

F. CONCLUSION

For the reasons set out above, the Marshalls respectfully request that the Court affirm the trial court's decision denying the Wheelers Motion to Vacate and their Motion for Reconsideration and award the Marshalls their reasonable attorneys' fees.

Respectfully submitted this 19th day of July, 2007.

KARR TUTTLE CAMPBELL



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DECLARATION OF SERVICE

I, Rondi Moreau, am employed at the law firm of Karr Tuttle Campbell in the County of King, State of Washington. I am over the age of 18 years and not a party to the within action.

I hereby declare that on July 20, 2007, I caused to be served the following true and correct copy of the Motion for Extension of Time for Filing of Respondent's Brief via ABC Legal Messenger Service on the following counsel of record:

Matthew Davis, Esq.
Demco Law Firm, P.S.
5224 Wilson Ave. So, #200
Seattle, WA 98118

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

DATED in Seattle, Washington, this 19th day of July, 2007.

Rondi Moreau

Rondi Moreau

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