

No.: 35737-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

MARK WHEELER,

Appellant,

v.

BRADLEY R. MARSHALL,

Respondent.

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DAVIS  
COURT CLERK

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REPLY BRIEF OF APPELLANT

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**TABLE OF AUTHORITIES**

**STATE CASES**

*Beckman ex rel. Beckman v. State, Department of Social and Health Services*, 102 Wn.App. 687, 11 P.3d 313 .....1

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*Malott v. Randall*, 83 Wash. 2d 259, 517 P.2d 605 .....3

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## I. INTRODUCTION

The positions of the parties could not be more starkly opposed. Wheeler asserts that the modification of a signed order to add a judgment summary and an attorney's unilateral award to himself of costs is both irregularity and misconduct of the highest order. Marshall, on the other hand, considers his conduct beyond reproach. In light of the gravity of the allegations, this Court should resolve the issue in a published decision.

## II. LEGAL ANALYSIS

It is difficult to conjure a more fundamental aspect of the judicial system than that the parties be given accurate and timely notice. Marshall truly makes a mockery of this principle when he asserts that he had no obligation to provide Wheeler with a copy of what he filed with the Clerk because Wheeler had "endorsed" the court's ruling before he inserted a judgment summary.

Marshall's reliance on *Beckman ex rel. Beckman v. State, Dept. of Social and Health Services*, 102 Wn.App. 687, 690, 11 P.3d 313, 315 (2000), is curious. In *Beckman*, the prevailing plaintiff noted a presentation of judgment, and the court signed the proposed judgment when the defendant failed to appear at the hearing. *Id.* at 690. The defendant filed a late appeal and sought leave to extend time to file because it had not received a copy of the signed order. *Id.* In denying the

motion, the court noted that with respect to judgments, parties are entitled to receive “a copy of the proposed order or judgment” before the hearing, but are not entitled to a copy of that order when it has been signed. *Id.* at 693. *Beckman* is not authority for a party to modify its proposed judgment without notice or for a party to unilaterally modify an order after execution but before filing. In any event, the basis of this appeal is not the failure to provide a copy of the signed order pursuant to CR 5(a). If Marshall had simply filed the order as signed by the judge, there would be no appeal. The issue instead concerns what occurred after Marshall left the courtroom with the signed order.

Marshall’s reliance on *Rose ex rel. Estate of Rose v. Fritz*, 104 Wash.App. 116, 15 P.3d 1062 (2001) is equally misplaced. *Rose* simply held that an order dismissing a case without prejudice and without costs constituted a judgment for purposes of CR 60. *Id.* at 118, 121. Although Marshall claims that *Rose* stands for the proposition that “[t]he presence or absence of a judgment summary has no bearing on whether a judgment is a final judgment,” *Rose* does not contain any reference to a judgment summary. A dismissal without prejudice and without costs does not require a judgment summary, but that fact does nothing to help Marshall in this case.

Marshall also relies on the decision in *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974), where it was argued that an appeal was filed too early. To the extent that *Narrowsview* provides any guidance, it suggests that parties should not be deprived of the right to appeal because of human error by the clerk.

We have held that a notice of appeal is premature if it is filed prior to entry of judgment. *Glass v. Windsor Nav. Co.*, 81 Wash.2d 726, 504 P.2d 1135 (1973). Subsequently, in *Malott v. Randall*, 83 Wash.2d 259, 517 P.2d 605 (1974), we held that a judgment was not entered under CR 58 until it was physically lodged in the office of the clerk. We there noted, at page 263, 517 P.2d at page 608, 'Our holding is a very narrow one confined to the facts which hopefully are unique and unlikely to occur again. Yet, if we held otherwise, this litigant would be deprived of his right to appeal because of an unfortunate set of misadventures which merely reflect the fact that human beings conduct the daily routines of the administration of justice.' The affidavits in this case indicate that, although the judgment was not stamped and a docket entry made until June 19, 1973, they were physically in the clerk's file and lodged in his office on May 14 and that, more importantly, all counsel in the proceedings were aware the judgment was signed and placed in the file on that date. We believe this distinguishes this case from our holding in *Malott v. Randall*, *Supra*, and the cases relied on therein and hold that the notice of appeal was filed pursuant to court rule, subsequent to entry of judgment.

*Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 425-26, 526 P.2d 897, 903 - 904 (1974). If human error by the clerk is grounds to permit an appeal, then unilateral changes to signed court orders should be as well.

Ultimately, Marshall's conduct is not disputed. The only dispute is whether that conduct constituted irregularity or misconduct. RCW 4.64.030(3) requires a judgment summary before a judgment may be entered or take effect. Marshall admits that he both inserted the judgment summary and awarded himself costs without notice before or after the fact. In fact, he candidly admits that "[t]he 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 clerks would enter it in the execution docket." Brief of Respondent at 14. It is up to this Court to decide whether Marshall had the right to do that without any notice.

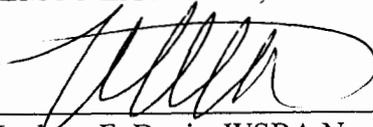
Finally, Marshall's conduct in awarding himself costs cannot be swept aside as "at most a clerical or ministerial error." Brief of Respondent at 16. Marshall made a deliberate and secret decision to award himself costs. He hand wrote in the award. That decision may explain his failure to provide Wheeler with a copy of the modified order. No attorney should ever modify a signed court order, particularly to his own financial benefit. The Court should soundly reject his attempt to excuse his actions as a "mistake."

**III. CONCLUSION**

This Court should reverse the order denying the motion to vacate  
and remand.

DATED this 20<sup>th</sup> day of April, 2003.

DEMCO LAW FIRM, P.S.

  
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Matthew F. Davis, WSBA No. 20939  
Attorneys for Mark Wheeler

DECLARATION OF SERVICE

I, Teresa L. DiTommaso, state:

On this day I caused to be mailed by U.S. Mail, postage pre-paid 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: Reply Brief of Appellant.

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 30<sup>th</sup> day of August, 2007 at Seattle, Washington.

Teresa L. DiTommaso  
Teresa L. DiTommaso