

**B254024**

**CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT, DIVISION FIVE**

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**LINDA DE ROGATIS, et al.,**

Plaintiffs and Appellants,

v.

**KAREN MICHELLE SHAINSKY,**

Defendant and Respondent.

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APPEAL FROM SUPERIOR COURT OF  
LOS ANGELES COUNTY, CASE NO. BC457891  
HON. JAN PLUIM

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**APPELLANTS' PETITION FOR REHEARING**

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## INTRODUCTION

Rehearing should be granted because the Opinion’s dismissal of plaintiffs’ appeal for failure to appeal the costs order rests on a faulty premise—that the minutes from the costs hearing constituted a “separately appealable post-judgment order.” (Opinion, p. 2.)

They did not.

As this Division recently held, where (as here) a minute order is neither file-stamped, nor correctly titled, it fails to give notice under Rule 8.104(a)(1), and so does not trigger any appeal deadline. (*Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn.* (2009) 174 Cal.App.4th 579, 586-587 (Opinion by Just. Mosk).)

This is because a minute order that fails to comply with Rule 8.104(a)(1) puts “plaintiffs’ counsel in the position of guessing” whether the “time period within which to file the notice of appeal” is “triggered” or not—“guesswork” that the Rule was “intended to obviate.” (*Ibid.*)

Thus, the minutes at issue here did not constitute an appealable order under *Bi-Coastal*.

Accordingly, because no appealable costs order ever issued, plaintiffs’ appeal of the judgment must be deemed to embrace the costs award, requiring the grant of this rehearing petition.

## DISCUSSION

### I.

**The Opinion’s premise—that the minutes constituted an appealable order—contravenes this Court’s decision in *Bi-Coastal*.**

The Opinion dismissed the appeal for lack of jurisdiction on the ground that appellants failed to appeal the “separately appealable post-judgment order awarding expert witness fees.” (Opinion, p. 2; see also pp. 5, 8.)

But, as shown below, the Opinion’s premise—that the minutes constituted an appealable order—contravenes this Court’s decision in *Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn.*, (2009) 174 Cal.App.4th 579.

**A. Under *Bi-Coastal*, because the minutes did not “strictly” comply with Rule 8.104(a)(1), they failed to trigger any deadline to appeal.**

California Rule of Court 8.104(a) “controls the determination of the timeliness of the appeal.” (*Bi-Coastal*, 174 Cal.App.4th at 583.)

As the California Supreme Court has explained, “[b]ecause the time limits for filing a notice of appeal are jurisdictional,” *Rule 8.104(a)(1) must be interpreted “strictly and literally according to its terms.”* (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902-903 (emphasis added; internal citations omitted).)

**1. *Bi-Coastal* held that minutes that do not “strictly” comply with the requirements of Rule 8.104(a)(1) do not trigger any appealable deadline.**

*Bi-Coastal* held that minutes that do not “strictly” comply with the requirements of Rule 8.104(a)(1) do not trigger any appealable deadline. Under Rule 8.104(a)(1), “a notice of appeal” must be filed on or before “60 days after the superior court clerk serves the party filing the notice of appeal with” either a:

- (1) “document entitled ‘Notice of Entry’” or a
- (2) “file-stamped copy” of the order or judgment.<sup>1</sup>

(*Id.* at 583-584.)

In *Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn, supra*, this Court issued an order to show cause why the appeal should not be dismissed on grounds of untimeliness. (*Id.* at 583.)

Yet, as Justice Mosk explained, the minutes in *Bi-Coastal* did not trigger the deadline to appeal because (1) they were not entitled “‘Notice of Entry’ of judgment or order” and (2) “even assuming the minute order is the judgment itself,” “it is not file stamped as required under rule 8.104(a)(1).” (*Id.* at 586.) “Thus, neither of the two alternative means of giving notice that are required under rule 8.104(a)(1) . . . has been satisfied in this case.” (*Ibid.*)

Thus, *Bi-Coastal* held that the minute order triggered no deadline to appeal:

“Because rule 8.104(a)(1) was intended to obviate the need for such guesswork when calculating jurisdictional time limits, we conclude that . . . *the minute order did not commence the 60-day time period for filing the notice of appeal in this case.*” (*Id.* at 587 (emphasis added).)

Accordingly, the appeal in *Bi-Coastal* was not dismissed.

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<sup>1</sup> Though subsection (a) refers only to judgments, subsection (f) states: “As used in (a) and (e), ‘judgment’ *includes an appealable order* if the appeal is from an appealable order.” (CRC 8.104(f) (emphasis added).) Thus, for clarity, the word “order” is used throughout this Petition (instead of judgment).

2. **Here (as in *Bi-Coastal*), because the minutes did not comply with Rule 8.104(a)(1)'s requirements, they failed to trigger any deadline to appeal—leaving the judgment as the only appealable document.**

Just as this Court held in *Bi-Coastal*, the minutes at issue here did not comply with the requirements of Rule 8.104(a)(1), and so failed to trigger any deadline to appeal.

Accordingly, the judgment (from which plaintiffs did appeal) was the only remaining appealable document.

- a. **The minutes were not titled “Notice of Entry of Order”—one of two ways to satisfy Rule 8.104(a)(1).**

As shown above, one of two ways to satisfy Rule 8.104(a)(1) is for the minutes to be a “document entitled ‘Notice of Entry.’” (CRC 8.104(a)(1).)

Instead, in *Bi-Coastal*, the minutes were titled “COURT ORDER RE: STIPULATED JUDGMENT”—not “Notice of Entry of Judgment.”

And here, the title was even more vague: “NATURE OF PROCEEDINGS: PLAINTIFFS’ MOTION TO TAX COSTS.” (See Augmented Record (AR) 233, also attached to this brief.)

Thus, this failed to satisfy the Rule, which called for a “document entitled ‘Notice of Entry.’” (CRC Rule 8.104(a)(1).)

In sum, the minute order’s “NATURE OF PROCEEDINGS” title failed to give notice under Rule 8.104(a)(1) and so did not trigger any deadline to appeal.

And, as shown next, the minutes also failed to give notice under the only other method allowed under the Rule.

**b. The minutes were not “a file-stamped copy of the order”—the only other method under Rule 8.104(a)(1).**

As shown above, the only other way a clerk can give notice of an order is by serving “a file-stamped copy” of the order. (CRC 8.104(a)(1); *Bi-Coastal*, 174 Cal.App.4th at 583-583.)

But this requirement was not satisfied, either, because the minutes were not entitled “Order.” And, “even assuming” the minutes were the Order, they were not “file stamped as required under rule 8.104(a)(1).” (*Id.* at 586.)

Accordingly, the minutes failed to fulfill either of the only two methods “a clerk gives notice of entry” of an appealable order.

**c. Because the minutes failed to trigger any appeal deadline under Rule 8.104(a)(1), the judgment (from which plaintiffs did appeal) was the only appealable document.**

Here, as in *Bi-Coastal*, “neither of the two alternative means” for a clerk to give notice “under rule 8.104(a)(1) . . . has been satisfied.” (*Ibid.*)

As a result, “the minute order did not commence the 60-day time period for filing the notice of appeal in this case.” (*Id.* at 587.)

Accordingly, the only appealable document remaining is the judgment—from which plaintiffs did appeal.

**B. The *Silver*, *Pfeifer*, and *Fish* cases (in the Opinion) are irrelevant because they do not address the *absence* of an appealable order.**

The Opinion holds that the cases of *Pfeifer*, *Silver*, and *Fish* control because they show that 998 costs awards are separately appealable and so cannot be reviewed on appeal from the judgment. (Opinion, pp. 6-8; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316; *Silver v. Pacific American Fish Co.*,



*Inc.* (2010) 190 Cal.App.4th 688, 691; *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 146-148.)

But none of those cases claim to address the circumstance presented here—the complete *absence* of any appealable costs order.

“It is axiomatic that cases are not authority for propositions not considered.” (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 (internal citations omitted).)

Thus, neither *Pfeifer*, *Silver*, nor *Fish* control here, where no appealable costs order ever issued.

**C. Matters related to jurisdiction may be raised at any time.**

Respondent may complain that the *Bi-Coastal* case was not addressed in appellants’ briefing.

But such a complaint would be without merit for two reasons.

First, jurisdictional arguments may be “raised at any time.” (*National Union Fire Ins. Co. v. Stites* (1991) 235 Cal.App.3d 1718, 1724 (2d Dist., Div. 5).)

Second, it was Respondent who raised the issue of jurisdiction—this petition merely addresses the issue more specifically to illuminate this Court’s own jurisprudence on when minute orders do (and do not) trigger appealable deadlines.

Accordingly, any complaint by Respondent that the *Bi-Coastal* decision (or this argument generally) was not raised earlier would have no merit.

## CONCLUSION

Because the minutes of the costs hearing failed to constitute an appealable order under this Court's decision in *Bi-Coastal*, there was nothing other than the judgment from which plaintiffs could appeal, and so this Court does have jurisdiction and rehearing must be granted.

As shown in appellants' briefs, because a judge could not reasonably conclude that zero cash offer was a good faith offer in light of the large damages (the death of plaintiffs' daughter) and the retention of credible experts (who would—and did—opine that Dr. Shainsky breached the standard of care), the award of 998 costs must be reversed.

Dated: September 25, 2015.

Respectfully submitted,

THE ARKIN LAW FIRM

LAW OFFICE OF VALERIE T. MCGINTY

By: \_\_\_\_\_ /s  
Valerie T. McGinty  
Attorneys for Appellants

## CERTIFICATION

I hereby certify that this brief, excluding tables, consists of 1,509 words.

By: \_\_\_\_\_ /s  
Valerie T. McGinty  
Attorney for Appellants

PROOF OF SERVICE BY MAIL  
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is 524 Fordham Road, San Mateo, CA 94402. On this date I served the interested parties in this action the within document: APPELLANTS' PETITION FOR REHEARING by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Mateo, California, addressed as follows:

California Supreme Court  
350 McAllister St.  
San Francisco, CA 94102-3600 (served electronically)

Los Angeles County Superior Court  
Clerk, Pasadena Courthouse  
300 East Walnut St.  
Pasadena, CA 91101

Raymond Leslie Blessey  
Taylor Blessey LLP  
350 S. Grand Avenue, Suite 3850  
Los Angeles, CA 90071

Kenneth R. Pedroza  
Cassidy Cole Davenport  
Cole Pedroza LLP  
2670 Misison Street, Ste. 200  
San Marino, CA 91108

Executed at San Mateo, California on September 25, 2015

\_\_\_\_\_  
/s  
Valerie T. McGinty

## **APPENDIX**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 02/26/14			DEPT. NEP
HONORABLE JAN A. PLUIM	JUDGE	C. THOMAS	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	BC457891		Plaintiff ELIZABETH TRECKLER (X)
	LINDA DE ROGATIS		Counsel
	VS		Defendant RAYMOND BLESSEY (X)
	KAREN MICHELLE SHAINSKY, D.O.		Counsel

**NATURE OF PROCEEDINGS:**

NATURE OF PROCEEDINGS: PLAINTIFFS' MOTION TO TAX COSTS

Matter is called for hearing.

Counsel argue.

Motion is granted in part and denied in part.

Court taxes item #13 in its entirety in the sum of \$8,826.73.

The Memorandum of Costs in the amount of \$114,857.54 is hereby entered into the Judgment dated 12-2-13.

A copy of this order and the modified Judgment is sent to each counsel this date.

**CLERK'S CERTIFICATE OF MAILING**

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order and copy of modified Judgment upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Pasadena,

**MINUTES ENTERED**  
02/26/14  
**COUNTY CLERK**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 02/26/14

DEPT. NEP

HONORABLE JAN A. PLUIM

JUDGE

C. THOMAS

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

BC457891

Plaintiff  
Counsel

ELIZABETH TRECKLER (X)

LINDA DE ROGATIS  
VS

Defendant  
Counsel

RAYMOND BLESSEY (X)

KAREN MICHELLE SHAINSKY, D.O.

**NATURE OF PROCEEDINGS:**

California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

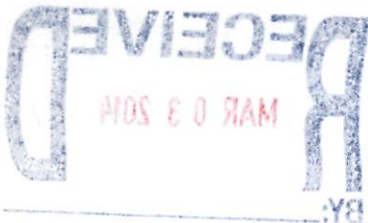
Dated: 2-26-14

Sherri R. Carter, Executive Officer/Clerk

By: \_\_\_\_\_ C. Thomas \_\_\_\_\_

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MINUTES ENTERED 02/26/14 COUNTY CLERK
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