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NO. 67916-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARCY GRANTOR, an individual, individually
and as Guardian ad Litem for Malia Grantor, a minor,

Appellant/Cross-Respondent,

v.

BIG LOTS STORES, INC., an Ohio corporation, and
PNS STORES, INC., a California corporation,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS IN SUPPORT OF CROSS-APPEAL

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I. INTRODUCTION

This cross appeal by BLSI regarding the *sua sponte* ruling of the trial court to revise the caption on the order of default and default judgment to name BLSI and PNS Stores, Inc. (hereinafter "PNS"), and entry of terms against BLSI in the amount of $10,000 is properly before this Court and the requested relief should be granted. The trial Court's ruling was beyond the scope of the matter before it, and entered without properly legal or factual foundation; accordingly, the orders amending the caption and imposing $10,000 sanctions must be reversed.

II. NEITHER CR 60(A) NOR *ENTRANCO* SUPPORTS THE AMENDMENT OF THE CAPTION.

Appellant incorrectly argues that CR 60(a) and *Entranco v. Envirodyne*, 34 Wn.App. 503, 662 P.2d 73 (1983) provide a basis for the amendment to the caption (suggesting that the amendment was simply a "correction"). CR 60(a) does permit a trial court to correct "clerical mistakes," but it does not authorize a court to change a caption, sans motion, when the inaccuracy in the caption is the direct result (arguably intentional) of a party, as is the case here.

The facts sets forth in cross-appellant's opening brief clearly outline the knowledge of the Grantors and their counsel that the caption identified the wrong party, such knowledge was likely know at the time of

filing the complaint, but certainly known prior to seeking a default order and judgment – this was not a simple clerical mistake. Despite their knowledge, and admissions to the lower court through the default proceedings, that their suit identified the wrong party, they never took steps to amend the caption or perfect service to the proper party. Instead, plaintiff's pursued their charade in an attempt to acquire and enforce a default against an unidentified party upon whom process was never effectuated.

Corrections under CR 60(a) contemplate true clerical errors such as an arithmetic error or a minor, *unintentional* mistake in a property description. *See, e.g., United Stated v. Mosbrucker*, 340 F.2d 664 (8th Cir. 2003) (error in legal description of property corrected five years after entry of judgment). Clerical error which can be remedied under CR 60(a) involves error or mistake be clerk or other judicial or ministerial officer in writing or keeping records, but does not include error made by the court itself. *Barros v. Barros,* 26 Wn.App. 363, 613 P.2d 547 (1980). A judicial error involves issue of substance, not the mechanical mistake contemplated by clerical error. *Marchel v. Bunger*, 13 Wn.App. 81, 533 P.2d 405 (1975). Where there is no evidence of clerical error, CR 60(a) may not be applied to correct the error. *In re Marriage of Getz,* 57 Wn.App. 602, 789 P.2d 331 (1990). Thus, CR 60(a) offers remedies for

clerical errors only, not judicial errors. Here, the "error" was clearly one of substance, not a simple mechanical error; thus, the authority for correction under CR 60(a) is inapplicable and the court's ruling must be reversed.

Appellant's reliance on *Entranco* to support the trial court amendment of the caption is likewise misplaced. As set for the cross-appellant's opening brief, the facts of *Entranco* are distinguishable from the instant question. In that suit, both the named defendant and the intended defendant had actual knowledge of the suit, and that both understood that plaintiff had named one corporation, but served the other. Here, the trial court affirmatively ruled that neither BLI nor BLSI had actual notice of the suit. A key distinction and factor in the decision to amend the caption in *Entranco* was the knowledge of the parties and the clarity of the complaint, both of which are absent in the instant matter. Accordingly, the facts of this suit, do not support an amendment to the caption as contemplated by *Entranco.*

Finally, amending the caption to name BLSI as a defendant is clear error, as the record in clear the BLSI did not own or operate the premises in question.

III. THIS COURT SHOULD REVIEW THE TRIAL COURT'S *SUA SPONTE* AWARD OF SANCTIONS

The Grantors have not responded substantively to BLSI's arguments that the trial court exceeded its discretion in *sua sponte* awarding sanctions that were unjustified, excessive, and lacked any factual basis. The Grantors have apparently conceded these arguments. Instead of responding, the Grantors assert -- without citation to authority -- that BLSI waived its right to appeal these issues by not raising them before the trial court.

BLSI admits, as it must, that it did not raise these issues before the trial court. BLSI's reticence was understandable, given the circumstances. The trial court's *sua sponte* award was unorthodox. It was unclear what an appropriate response would have been. The 10-day limit for BLSI to file a motion for reconsideration of the sanctions had already passed when the Grantors filed their notice of appeal. *See* CR 59(b). In any event, BLSI was not required to file a motion for reconsideration in order to preserve its appeal rights.

Under these circumstances, review under RAP 2.5(a) is appropriate.[1] One of BLSI's arguments is that there is no factual basis for

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[1] RAP 2.5 (a) provides, in pertinent part:

> Errors raised for first time on review. The appellate court *may* refuse to review any claim of error which was not raised in the trial court. However, a party may raise the

the $10,000 award, i.e., that the Grantors "fail[ed] to establish facts upon which relief can be granted." RAP 2.5(a)(2). Even if this specific criterion is not satisfied, "RAP 2.5(a) is written in discretionary, rather than mandatory, terms." *Roberson v. Perez*, 156 Wn.2d 33, 39 (2005).

This Court may consider any issue that is "'arguably related' to issues raised in the trial court . . . " *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), *aff'd* 166 Wn.2d 264, 208 P.3d 1092 (2009)(quotation in original). The Court may also consider any issue which is "necessary to a proper decision." *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 6, 159 P.3d 473 (2007), *aff'd* 166 Wn.2d 710, 213 P.3d 591 (2009). BLSI properly filed a notice of cross-appeal. An appeal of a trial court's order generally brings up for review an attorney fee award associated with that order. *See, e.g.,* RAP 2.4(g), 7.2(i). The trial court's actions in awarding sanctions and vacating the default judgment are inextricably linked; both should be considered in this appeal.

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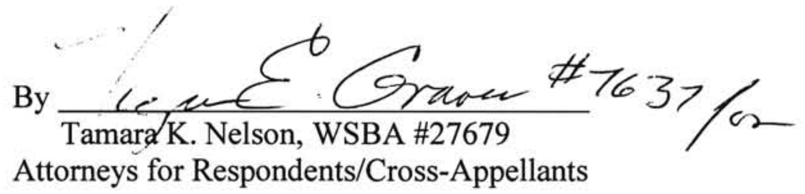
following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RESPECTFULLY SUBMITTED this 14th day of September, 2012.

MERRICK, HOFSTEDT & LINDSEY, P.S.



By ______________________
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of this document was served September 14, 2012 on the following individuals both via e-mail and via U.S. Mail:

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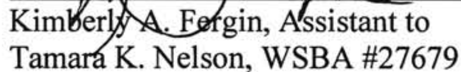
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED September 14, 2012, at Seattle, Washington.



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