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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.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

This is an appeal of the trial court's decision to vacate Appellant Marcy and Malia Grantors' Orders of Default and Default Judgment against Big Lots Stores, Inc. (hereinafter "BLSI"); and a 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.

In exercising its discretion and equitable powers, the trial court properly held (1) BLI and BLSI did not have actual notice of the lawsuit, and thus their failure to appear was excusable neglect; and (2) the Default Order and Judgment should therefore be set aside and vacated under CR 55(c) and CR 60(b).

II. RESTATMENT OF THE ISSUES/ASSIGMENTS OF ERROR

1. Whether the trial court properly exercised its discretion by vacating the default order and judgment in their entirety when it is undisputed that the named defendant did not have actual notice of the suit and when it is undisputed that the default order and judgment were entered against an entity not named in the complaint.

2. Whether the trial court abused its discretion in vacating a default order and judgment when the defendant demonstrated both a

conclusive and prima facie defense, in, at a minimum, the pleadings filed after notice of the entry of a default judgment.

3. Whether the trial court properly exercised its discretion in concluding that the default order and judgment should be vacated under CR 55(c) and CR 60 (b) for mistake, inadvertence, surprise and/or excusable neglect when the court found the reason that BLI nor BLSI did not answer the personal injury complaint was that they did not have actual notice of the suit as a result of mistakes by both parties.

4. Whether the trial court properly exercised its discretion in concluding that the default order and judgment should be vacated under CR 55(c) and CR 60(b) for mistake, inadvertence, surprise and/or excusable neglect when it was clear from the record that plaintiff had made a knowing mistake in the entry of the default order and judgment.

5. Whether the court abused its discretion by sua sponte awarding terms to the plaintiff in the amount of $10,000 when no monetary award had been requested, and when the trial court ruled that mistakes were made by both parties and, as a result, the record contains no evidence supporting the amount of the award.

6. Whether the court abused its discretion in revising the caption of plaintiffs' complaint as against BLSI and PNS when BLSI is not a proper party and when service was never attempted against PNS.

III. RESTATEMENT OF THE CASE/STATEMENT OF THE CASE

This case arises out of an incident in a retail store on February 29, 2008. CP 1-4. Plaintiffs, Marcy and Malia Grantor, mother and minor child respectively, alleged personal injuries from falling objects in the store. *Id.* The retail store at issue was what is familiarly referred to as "Big Lots!" (trade name) located in Burien, Washington, operated by PNS, a California Corporation. CP 176-177; 182-186.

The Grantors filed suit on or about February 26, 2010 naming Big Lots, Inc., an Ohio Corporation as the only defendant. CP 1-4. The complaint alleged that "Defendant Big Lots, Inc. is an Ohio Corporation doing business in King County Washington." *Id.* The complaint made no reference to BLSI. *Id.* Big Lots, Inc. (hereinafter "BLI") is an Ohio corporation; however, Big Lots, Inc. does not do business in the State of Washington; nor is it registered with the Washington Secretary of State to conduct business in the State of Washington. CP 182-186, 290.

BLSI, argued by the Grantors in the lower court to be the intended named defendant, is an Ohio corporation. CP 176-177; 182-186. BLSI does do business in the State of Washington and is registered with the Washington Secretary of State. CP 176-177, 294. However, PNS Stores, Inc., a California Corporation and the true operator of the retail store at

issue, is a separate corporation from BLI and BLSI as evidenced by the separate incorporations, distinct states of incorporation, and unique UBI numbers. CP 176-177; 292-294

Prior to filing suit, in the Fall and Winter of 2009, the Grantors communicated with BLSI, not BLI, regarding their potential claim for injuries; all communications were with Michelle May of BLSI's risk management department. CP 309-310; 318-319. Ms. May is an employee of BLSI (not BLI) as clearly evidenced by her email communications with plaintiffs. *Id.* Ms. May advised that the registered agent for BLSI was Corporation Service Company (hereinafter "CSC"). *Id.*

On March 1, 2010 the Grantors attempted service of a summons and complaint directed to BLI (not BLSI) at CSC's, Tumwater, Washington office. CP 7-8, 178-181. Both the caption and the plain language of the complaint identified only BLI and was no reference to BLSI. *Id.* CSC is not a registered agent for BLI in Washington. CP 178-180; 182-186. BLI had no agreement with CSC to accept process documents, was not a client of CSC, and was not registered to do business in the state of Washington. CP 178-180; 476-495. Consequently, CSC had no authority to accept service for BLI. *Id.* CSC is not a registered agent for BLI in Washington. *Id.* Additionally, because BLI is a foreign

corporation, the attempted in-state personal service was improper.[1] Lastly, there is nothing in the record showing that CSC was ever put on notice by the Grantors that the complaint identified the incorrect defendant; or that the intended defendant was BLSI. CP 7-8.

Following delivery of the summons and complaint at the CSC office, CSC processed the documents and discovered that CSC did not have authority to accept documents directed to BLI. A rejection of service letter was issued the following morning. CP 178-180.

In that letter, the Grantors were immediately notified by CSC that the service of process could not be completed as the documents identified an entity for whom CSC was not authorized to except service.[2] CP 181. This notice was provided in writing, via a formal Rejection of Service of Process issued by CSC. *Id.* Most importantly, the documents were not forwarded to any corporate entity. CP 178-180.

Despite the clear notice to the Grantors of the lack of effective service of process, they inexplicably thereafter moved the court for entry of default against BLSI (not BLI to whom the complaint and summons were directed) on January 11, 2011, nearly a year after filing suit. CP 33-

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[1] *RCW 4.28.080.*

[2] The documents were delivered on March 1, 2010, the Rejection of Service of Process was sent March 2, 2010.

40. In that motion, the Grantors affirmatively represented to the court that BLSI, not a named party to the suit, had personally been served. *Id.* In so doing, the Grantors also affirmed they had been in contact with BLSI and researched the Washington Secretary of State database to acquire the registered agent in the State of Washington for BLSI - not BLI the named defendant. *Id.;* CP 16-26. Thus, Grantors' motion for default is improper on its face, as it was entered against a different corporation than the one named in the complaint to whom service was directed.

In their motion for default, the Grantors argued that the intended defendant to their suit was BLSI, and admitted that their summons and complaint were incorrect such that they were directed to BLI, a different entity than to whom their motion for default was directed: "The complaint identifies defendant 'Big Lots, Inc.' rather that Big Lots Stores, Inc." CP 9-13. The Grantors attempted to neutralize the overt mistake in the pleading and the clear deficiency in process by arguing that the error was a mere "misnomer" that had no effect on the requested relief. *Id.* Such argument should not have been considered, and was properly rejected by the trial court later on the motion to vacate. The default was sought against an entity which was not a party to the suit. The court therefore did not have jurisdiction to enter the default. CP 548-552.

The Grantors further discounted this significant mistake by arguing

the same was harmless because BLSI was nonetheless served via its registered agent CSC –clearly incorrect given the Rejection of Service of Process. CP 9-13. The Grantors argument to the lower court on the motion for default was an acknowledgment of the deficient summons, complaint and process, and begged the question of why they did not take appropriate steps to correct the admitted error in the caption, or the deficiencies in process, despite their apparent knowledge of the error and the intended corporate entity to their suit. Also noteworthy is the fact that during the year which elapsed following filing the suit, the Grantors made no attempt to contact BLSI, despite their admitted prior communications and knowledge of contact information. CP 309-310; 318-319. Based apparently on the Grantors' attorney's representations alone, the lower court entered an Ex parte Order of Default Against Defendant Big Lots Stores, Inc. (BLSI) on January 21, 2010 under a caption and complaint identifying only Big Lots, Inc., (BLI) and despite no indication in the record that BLSI had ever been named in the suit, properly identified, properly served, or provided actual notice of the litigation. CP 27-28.

Days after entry of the Order of Default, the Grantors moved the court for entry of default judgment against BLSI. CP 33-40. The motion was brought under the still wrong caption identifying BLI as defendant, and despite the lack of process on BLSI. *Id.* In that motion, the Grantors

again conceded that they had been in contact with BLSI and researched the Washington Secretary of State database to acquire the registered agent in the State of Washington for BLSI – not BLI, the named defendant. CP 9-13; 16-26. Yet, the Grantors sought a default judgment against BLSI who had never been identified as a party to the suit. The motion also once again admitted the error in the naming of the defendant. CP 9-13. Yet, the record is void of any evidence demonstrating attempts to correct the caption or perfect service.

During the default proceedings the Grantors sought monetary damages for physical injuries (including permanent scarring to Malia Grantor), pain and suffering, and emotional distress as follows: (1) Malia Grantor: $220,000 (based on $3,228.03 past medical expenses, and $7,000.00 future medical expenses paid by Marcy Grantor); (2) Marcy Grantor: $30,000 general damages plus $336.06 costs of suit. CP 33-40; 46-47. Marci Grantor, clearly not a neutral advisor, was appointed as Guardian Ad Litem for the minor plaintiff, Malia Grantor. CP 119-120.

In support of the damages, they presented a declaration from Dr. Phillip Haeck, who conducted a single examination of Malia Grantor. CP 105-116. Dr. Haeck confirmed the injury to Malia Grantor and the past and anticipated future medical expenses, including $7,000.00 for potential surgical revision for scarring; though no evidence of an affirmative

intention by the Grantors to undertake that procedure was present. *Id.* Similarly, nothing was presented to substantiate the value of the claims for non-economic damages, other than the self-serving statements of Marcy Grantor. CP 56-60.

Judgments were subsequently entered against BLSI (still not a party to the suit) on February 28, 2011, under the still incorrect caption, in favor of Marcy Grantor and Malia Grantor. CP 126-129. On May 31, 2011 the Grantors served a letter on BLSI, via its registered agent CSC notifying of the judgments. CP 285. This was BLSI's first notice of this suit. CP 422-425.

Tellingly, on March 1, 2011 - the day immediately following entry of the judgments, but months before notice of the judgments to BLSI – the Grantors filed an identical suit arising out of the same incident and seeking the same relief as the instant action, but this time naming BLSI as the defendant.[3] CP 274-278. The 2011 complaint acknowledges the mistakes in the default proceedings in the instant action. *Id.* Service of the 2011 lawsuit was made on BLSI via its registered agent on May 31, 2011, which by no innocent coincidence was the same date of service of the judgments from the 2010 lawsuit on BLSI. CP 281-283; 285.

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[3] King County Superior Court Cause No. 11-2-08393-4.

Following receipt of the 2011 lawsuit and the notice of the judgments in this suit, BLSI conducted an investigation of the underlying proceedings. CP 422-425. Thereafter, via letter dated June 10, 2011, the Grantors were notified of the deficiencies outlined in these appeal proceedings (among other things), and further advised that the correct defendant to the Grantor's claims was PNS. CP 287-288. BLSI requested a voluntarily vacation of the default and judgment given the numerous mistakes, but the Grantors refused, BLSI subsequently brought a motion to vacate the order of default and default judgment. CP 161-175. Following two hearings (RP I & II), the trial court vacated the default order and judgment remanding the matter to trial, sua sponte awarded terms to the Grantors, and revised the caption of the case to reflect BLSI and PNS as defendants.[4]

IV. STANDARD OF REVIEW

"Default judgments are not favored in the law." *Griggs v. Averbeck Realty, Inc.,* 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Washington courts favor resolving cases on their merits over default judgments. *Sacotte Construction, Inc. v. National Fire & Marine Ins. Co.,* 143 Wn. App. 410, 414, 177 P.3d 1147 (2008). Our courts "will liberally set aside

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[4] Separate proposed orders were submitted by the respective parties; however, the Order as entered by the trial court was drafted by the Grantors.

default judgments in the interests of fairness and justice." *Id.* At 414-15 (citations omitted).

An order vacating a default judgment is within the trial court's discretion and will not be disturbed on review absent an abuse of discretion. *Hardesty v. Stenchever*, 82 Wn. App. 253, 263, 917 P.2d 577 (1996). An appellate court's review of a decision to vacate a default judgment is extremely deferential, and the decision will be reversed only for a clear abuse of discretion. 92 Wn.2d at 582. "Abuse of discretion is less likely to be found if the default judgment is set aside." *Griggs,* 92 Wn.2d at 582; *see also Bank* of *the West v.* F *& H Farms, LLC,* 123 Wn. App. 502, 505, 98 P.3d 532 (2004)("We are very deferential when we pass upon a court's decision to set aside a default judgment because we want parties to have an opportunity to defend on the merits.")

A trial court abuses its discretion when it exercises "its discretion on untenable grounds or for untenable reasons, or [its] discretionary act was manifestly unreasonable." *Id.* Default judgments are disfavored. *Id.*

> A trial court must exercise its authority "liberally, as well as equitably, to the end that substantial rights [are] preserved and justice between the parties [is] fairly and judiciously done." ... "[W]here the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default

> judgment is set aside and a trial on the merits ensues."

Id. (citations omitted).

As the prevailing party before the trial court, BLSI is entitled to have the evidence viewed in the light most favorable to it. *Lopez v. Reynoso,* 129 Wn. App. 165, 170, 118 P.3d 398 (2005), *rev. denied,* 157 Wn.2d 1003 (2006). This court "may affirm the trial court on any grounds established by the pleadings and supported by the record." *Otis Housing Ass'n, Inc. v. Ha,* 165 Wn.2d 582, 587, 201 P.3d 309 (2009); RAP 2.5(a). Here, the trial court reached the correct result by vacating the entire judgment under CR 55(c), CR 60(b) and *White v. Holm,* 73 Wn.2d 348, 438 P.2d 581 (1968).

V. ARGUMENT

A. THE TRIAL COURT CORRECTLY VACATED THE ENTIRE DEFAULT JUDGMENT UNDER CR 55(C), CR 60(B) AND *WHITE V. HOLM.*

1. Legal Standard for Vacating Default Judgment.

Default judgments are disfavored in Washington, and courts will "liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice" to allow the determination of controversies on their merits. *Sacotte,* 143 Wn.App. at 415. A court may set aside a default judgment under CR 55(c):

> For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

Or under CR 60(b):

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> (5) The judgment is void;
> (11) Any other reason justifying relief from the operation of the judgment.

In exercising its discretion to vacate a judgment pursuant to CR 60(b), Washington courts have considered whether: (1) there is substantial evidence to support, at least prima facie, a defense to the opposing party's claim; (2) the moving party's failure to timely appear in the action, and answer the opponent's claims was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) vacating the default judgment would result in a substantial hardship to the opposing party. *White* v. *Holm,* 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Each factor "var[ies] in dispositive significance as the circumstances of the particular case dictate." *White,* 73 Wn.2d at 352; *see also Norton v. Brown,* 99 Wn. App. 118, 124, 992 P.2d 1019, 3 P.3d 207, *rev. denied,* 142 Wn.2d 1004 (2000). ("These factors are interdependent; thus, the requisite proof that needs to be shown on anyone factor depends on the degree of proof made on each of the other factors. ").

Here, the trial court did not abuse its discretion in vacating the entire default judgment under CR 55(c), CR 60(b) and *White v. Holm* because service was not proper, and as a result, actual notice was never accomplished. The mistakes giving rise to the failed process and lack of notice constitute excusable neglect, as ruled by the trial court, demanding vacation of the default order and judgment. Even if the Plaintiff was entitled to a default judgment, it could only have been against BLI and could not have legally been against BLSI because BLI is the only entity named in the Complaint. Moreover, absent effective process and notice, the trial court did not have jurisdiction over BLI (because BLI was never served) or BLSI (because BLSI never had actual notice of the suit). In entering default against BLSI, the trial court exceeded its authority because it "granted more or different relief from that requested in the Complaint" – an error which unquestionably mitigates in favor of the trial court's ruling vacating the default order and judgment.

2. *BLSI Has a Virtually Conclusive Defense As Well as A Prima Facie Defense.*

"[I]n determining whether a party is entitled to vacation of a default judgment, one of a trial court's initial inquiries is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims." *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.,* 140 Wn. App. 191, 201, 165 P.3d 1271 (2007).

Alternatively, if the defaulting party "demonstrate[s] a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default," so long as the motion is timely and the failure to appear was not willful. *White,* 73 Wn.2d at 352. If the moving party shows only a "prima facie defense," the reasons for failing to timely appear may "be scrutinized with greater care," "as will the seasonability of his application and the element of potential hardship on the opposing party." 73 Wn.2d at 352-53. When analyzing the existence of a prima facie defense, a court must "view the facts proffered in the light most favorable to the defendant, assuming the truth of that evidence favorable to the defendant, and disregarding

inconsistent or unfavorable evidence." *TMT Bear Creek Shopping Center, Inc. Petco Animal Supplies, Inc.,* 140 Wn. App. at 203.

Here, there is a conclusive defense: BLSI is not the owner or operator of the property where the incident occurred, PNS Stores, Inc. is – a fact that is not disputed. CP 176-177. Thus, there is no theory of liability which could support the default. As a fundamental principle, a plaintiff must have at least a prima facie showing of valid claims for an entry of default. Here, that showing is clearly absent as BLSI is not the operator of the retail store where the Grantors' alleged damages occurred. Any imposition of liability against an entity other than the premises owner would be contrary to fundamental legal principles and unduly prejudicial.

Also noteworthy is the fact that the lower court did not have jurisdiction over BLI or BLSI. Neither BLI nor BLSI had been served or had notice of the pending lawsuit or that a default had been taken until it was served with notice of the executed judgments on May 31, 2011. The Rejection of Service of Process clearly establishes that CSC could not validly accept service for BLI, nor did it forward the summons and complaint to anyone.[5] CP 181. And, nothing in the pleadings suggested that the summons and complaint were intended for anyone other than BLI.

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[5] It is important to note that as Big Lots Stores, Inc. is a foreign corporation with no business in the State of Washington any attempts at in-state personal service automatically fail.

BLI does not do business in the State of Washington. CSC had no authority to accept service for BLI.

Yet, it is black letter law that proper service of the summons and complaint is necessary to invoke the court's jurisdiction over a defendant.[6] Because proper service was not made in this case, the court had no personal jurisdiction over BLI or BLSI. Jurisdiction is also wanting because BLSI, against whom the default judgment was improperly entered, was never named as a defendant to the suit and was never provided notice of the suit. Accordingly, the trial court exceeded its authority when it entered default against an entity that was not a named defendant.[7]

Alternatively, there is at a minimum a prima facie defense to the claim as based on the facts of this case and the allegations of the Grantors' complaint. Generally speaking, a possessor of land is liable for injuries to a business visitor caused by a condition encountered on the premises only if the possessor (a) knows or should have known of such condition and that it involved an unreasonable risk; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make

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[6] *RCW 4.28.020.*

[7] A judgment is void where there is a lack of personal jurisdiction. *Lee v. Western Processing Co.*, 35 Wn. App. 466, 667 P.2d 638 (1983).

the condition reasonably safe or to warn the visitor so that the latter may avoid the harm.[8] The Grantors' own pleadings acknowledge that they knew about and understood the alleged risk – thereby creating a prima facie defense. CP 1-4. Specifically, in their Complaint, they acknowledge seeing the boxes they contend fell on the date of loss. *Id.* The Declaration of Marci Grantor makes the same admission. CP 56-60. Furthermore, photographs taken on the date of loss demonstrate the appearance of the alleged risk, further evidence of a prima facie defense due to the open and obvious nature of the risk. CP 535-537.

During the first hearing on the motion to vacate, the Court ruled that "there's certainly a prima facie defense;" explaining the nature of premises liability suits and the underlying facts here. RP I, 44:13-18. At the second hearing, the Court questioned some of the defenses in response to arguments by the Grantors' counsel (which the Grantors rely heavily upon in this appeal), but the ultimately ruled that "potential defenses were identified" which supported a finding of a prima facie defense. CP 548-551.

Finally, BLSI further has a valid defense relative to the damages awarded on default as the award of the same did not comport with the

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[8] *See, e.g., Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992); *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991).

method for procuring a default judgment under CR 55 (b).

> (b) *Entry of default judgment.* As limited in rule 54(c), judgment after default may be entered as follows, if proof of service is on file as required by subsection (b)(4):
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> > (1) *When amount certain.* When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in default, . . .
> >
> > (2) *When amount uncertain.* If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.
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> > . . .

CR 55(b).

A default judgment may not grant more or different relief from that requested in the complaint.[9] When the amount sought is uncertain, the party seeking entry of judgment is required to present evidence to establish entitlement to, and the amount of, damages. Where the damage award is not supported by substantial evidence, vacation of the damages is

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[9] *CR 54 (c).*

required.[10] The cases of *Calhoun v. Merritt,* 46 Wn. App. 616, 731 P.2d 1094 (1986) and *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 974 P.2d 1275 (1999) are instructive in this regard.

In *Calhoun,* the court allowed a default on liability to stand, but vacated the default on the issue of damages and remanded for trial. 46 Wn. App. at 622. There the defendant presented no defense at all. 46 Wn. App. at 619-20. And in *Shepard,* the defendant's defense was belied by its own allegations. 95 Wn. App. at 240. In the present case, unlike *Calhoun* and *Shepard,* BLSI submitted substantial evidence to support a defense to the Grantor's claims. (See argument supra.) Despite evidence of several valid defenses, the Grantors ask the court to reverse the trial court's ruling vacating the default on the entirety of the claims. Neither *Calhoun* nor *Shepard* supports such an extreme result.

3. BLSI'S Failure to Appear Was Not Willful, But Rather Caused by Mistake, Inadvertence, Surprise, and/or Excusable Neglect: There Was Never Actual Notice Of Suit.

Because BLSI have demonstrated both a conclusive defense, as well as prima facie defense, on the Grantors' claims, "scant time" should be "spent inquiring into the reasons which occasioned entry of the

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[10] *Shepard Ambulance v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (1999).

default." *White, 73* Wn.2d at 352. The above notwithstanding, BLSI's failure to answer was due to excusable neglect and thus the trial court was still correct to vacate the entire default judgment.

This appeal by the Grantors contemplates only the issues of service and excusable neglect. The Grantors argue that service of a summons and complaint directed to a different entity constitutes service, but they cite no law to support their claim. They further argue that BLSI had a duty to respond, but elected to ignore that duty; in essence suggesting that a defendant has a duty to present evidence that it did not receive notice of the suit, but the fact remains that the summons and complaint at issue were directed to BLI when they were delivered to CSC. CSC had no authority to accept process for BLI, and CSC notified the Grantors of the same. Put simply, CSC could not have known the intended defendant was BLSI.

Service of process rules exist to preserve the due process protections of defendants as well as their right to notice and opportunity to be heard.[11] Washington Courts require (1) constitutional sufficient notice of suit and (2) compliance with statutory requirements before affirming personal jurisdiction. These rights are so fundamental, that a plaintiff's failure to meet either requirement so deprives the Court of jurisdiction

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[11] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.865 (1950).

over a defendant, even if the defendant received actual notice of the proceeding.[12] Thus, in answering questions of personal jurisdiction, the Courts will often look to (1) adherence to process requirements and (2) actual notice to the defendant. Here, both key elements are absent. The Grantors abused the rules of service of process when they asked for a default against a defendant they knew they had not properly served. Moreover, because of Plaintiffs' attempt to circumvent the rules of service of process, BLI and BLSI never received actual notice of the suit until after the default judgment was entered. After confirming these facts, the trial court properly vacated the default order and judgment. CP 548-550.

The Grantors' appeal focuses greatly on the factor of excusable neglect, arguing that relationship between BLSI and its registered agent does not support such a finding. However, CR 60(b) also recognizes mistake, inadvertence, irregularity in obtaining judgment or order, a void judgment, or *any other reason justifying relief* from the operation of the judgment as grounds for vacating a default judgment. The record before the trial court established all of these grounds: no proper service[13], no

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[12] *Gerean v. Martin-Joven*, 108 Wn.App. 963, 33 P.3d 427 (2001)(delivery to defendant's father insufficient, even though father gave papers to defendant).

[13] CR 55(b)(4)(Costs shall not be awarded and default judgment shall not be rendered unless proof of service is on file with the court); *Lee v. Western Processing Co., Inc.*, 35 Wn. App. 466, 667 P.2d 638 (1983).

actual notice of suit[14], no notice of default proceedings[15], identification of the wrong party, judgment entered against an unnamed party, and judgment entered on general damages without proper foundation[16]. Specifically to the question of excusable neglect, that there was mistake in the service of the summons and complaint which resulted in BLSI never receiving actual notice of the suit; and an identification of the wrong party resulting in judgment being entered against an unnamed party.

The Grantors' argument on appeal is identical to that which they advanced in the lower court proceedings - that their admitted error was simply a "misnomer" which does not support the vacation. But this argument is an attempt to distract this Court from the valid legal issues precluding a default judgment: the Grantors' admitted failure to properly serve BLI and BLSI consistent with well-known statutory requirements, and BLI and BLSI's lack of actual notice of the suit. The Grantors never presented any evidence that BLSI, or any corporate entity, ever received actual notice of the suit prior to the entry of the default judgment, because there was no such evidence to present. Representatives of BLI, BSLI and CSC all affirmatively testified that the summons and complaint were never

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[14] *Lee v. Western Processing Co., Inc.* , 35 Wn. App. 466, 667 P.2d 638 (1983).
[15] See, *Tiffin v. Hendricks*, 44 Wn.2d 837, 271 P.2d 683 (1654).
[16] *Shepard Ambulance v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (1999).

delivered to BLI or BLSI. Absent proper notice, the default and judgment cannot stand as a matter of law.

Alternatively, the Grantors argue that BLI held itself out as the correct entity, and thus naming BLI (instead of BLSI) as a defendant (though never properly serving either) justifies affirming the default. The only occasion where BLI was addressed was in a card for risk management. Immediately upon contact with the risk management department, the Grantors were put on notice that BLSI, not BLI was the entity with whom they were communicating. CP 309-310; 318-319.[17]

The Grantors' allegations that CSC, as a mere registered agent authorized to accept process for specific corporations, could have discerned from the face of the pleadings ((Plaintiffs' allegation that the accident occurred at a specific store number) that the intended defendant was one other than the one identified in the caption is absurd. Equally absurd is the Grantor's argument that BLI or BLSI had some sort of obligation to advise them of their error when both were unaware of the suit's existence, or that CSC had a duty to decipher plaintiff's intent. Tellingly, the Grantors own admissions establish that they knew all along

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[17] The Grantors cite a printout purportedly from the SEC website as evidence that naming BLI as defendant was proper. The document lacks foundation, is hearsay, and is not authenticated. BLI has no control over the website content of the SEC or its accuracy. *See,* CP 422-425.

that their intended defendant was BLSI, not BLI. Yet they never corrected the caption, never served the intended defendant, and proceeded with default proceedings despite these overt and knowing mistakes.[18] CSC does business with multiple entities, and accepts process for those entities as directed on the face of the documents. A document that does not properly identify a client of CSC, obviously cannot be accepted. It would be an onerous duty – as well as one not contemplated by the rules of service of process – to impose on CSC to do a search and contact any and all potential clients of documents directed to entities with similar sounding named to those of their clients.[19]

BLSI had no notice of the pending lawsuit or that a default had been taken until it was served with notice of the executed judgments on May 31, 2011. The Rejection of Service of Process clearly established that CSC neither accepted, nor forwarded, the summons and complaint to anyone.[20] Nothing in the pleadings suggested that the summons and complaint were intended for anyone other than BLI. BLI does not do

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[18] Plaintiffs communications were with risk management of BLSI (as evidenced by the emails). Plaintiffs inquired as to the registered agent of BLSI. Thus, plaintiffs had full knowledge that the intended defendant was BLSI.

[19] By way of example, a simple business search reveals multiple unrelated businesses starting with the letters b-i-g-l-o-t. CP 515-526.

[20] It is important to note that as Big Lots Stores, Inc. is a foreign corporation with no business in the State of Washington any attempts at in-state personal service automatically fail.

business in the State of Washington. CSC had no authority to accept service for BLI. For these reasons, there can be no dispute that process was never effectuated against BLSI. Proper service of the summons and complaint is necessary to invoke the court's jurisdiction over a defendant.[21]

Just as in the lower court proceedings, the Grantors reliance on *Entranco Eng'rs v. Envirodyne, Inc.*, 34 Wn. App. 503, 662 P.2d 73 (1983) is entirely misplaced.[22] Unlike the facts presented here, in *Entranco* the correct entity was actually served. The undisputed evidence presented to the trial court showed that neither BLI nor BLSI received notice of the lawsuit. *Entranco* is further distinguishable because in that case, the court found that the allegations of the complaint described the activities of the intended defendant, which was also the party served. Here, the Grantors' summons and complaint in this suit make no reference to BLSI, or to the company that actually operated the store, PNS Stores, Inc. Moreover, CSC never delivered the complaint to anyone who could have responded to the suit because it simply had no authorization to do so. Finally, the Grantors had more than a year to correct the service of their deficient summons and complaint after CSC sent them the Notice of

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[21] *RCW 4.28.020.*

[22] 34 Wn. App. 503, 662 P.2d 73 (1983).

Rejection of Service, and the Grantors' attorney knew who and how to contact BLSI in order to address the lack of response to Plaintiffs' complaint. Yet, instead, they elected to seek default with the full knowledge that the pleadings and service were deficient, but also to file a separate lawsuit against the proper defendant "just in case." This conduct should not be condoned by this court in overturning the trial court's ruling.

The Grantors' argument of "service on one is service on all" is likewise not supported by the case law. *Lee v. Western Processing, 35 Wn.App. 466, 667 P.2d 638 (1983)* and *Gerean v. Martin-Joven*, 108 Wn.App. 963, 33 P.3d 427 (2001) are on point in this regard.

In *Lee, 35 Wn.App. 466,* the vacation of the default and judgment was affirmed upon a showing that the intended defendant had no knowledge of the pending suit or that a default judgment had been taken until a writ of garnishment was issued. The case involved an automobile accident with pre-suit settlement communications between the plaintiff and defendant. Upon a showing of not actual notice of suit, despite the plaintiff's evidence of service on what he believed to be the proper party or agent, the Court found the default to be void because proper service of the summons and complaint was not made, actual notice was not had, and therefore the Court had no jurisdiction with which to enter judgment.

Gerean, 108 Wn.App. 963, is also instructive, In that case the trial

held that proper service requires actual service on the defendant. There, the plaintiff delivered documents to defendant's parent at the parent's home when the defendant maintained his own separate home. Process was held insufficient, notwithstanding the fact that the defendant had actual notice, because the fortuitous delivery of process by the defendant's father did not constitute valid service.

In the instant case BLI, to who the process was directed was not properly served because CSC does not have authority to accept service for BLI in Washington. BLSI was likewise not properly served because there was never any process directed to BLSI. It is undisputed that CSC did not forward the Grantors' complaint. [23] Proper service of the summons and complaint is necessary to invoke the court's jurisdiction over a defendant.[24] Neither BLI nor BLSI had notice of the pending lawsuit or that a default had been taken until it was served with notice of the executed judgments on May 31, 2011. Nothing in the pleadings suggested that the summons and complaint were intended for anyone other than BLI. BLI does not do business in the State of Washington. CSC had no authority to accept service for BLI. Thus, there can be no dispute that

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[23] It is important to note that as Big Lots Stores, Inc. is a foreign corporation with no business in the State of Washington any attempts at in-state personal service automatically fail.

[24] *RCW 4.28.020.*

process was never effectuated against BLI or BLSI occurred – fortuitous or otherwise – and the trial court properly concluded that "neither BLI nor BLSI had actual notice of the suit." CP 548-551.

4. BLSI Acted Diligently After Learning Of The Default, Appearing Within 10 days And Filing A Motion To Vacate A Within A Short Time Thereafter.

Where a defendant satisfies one of the *White* factors, a court may also analyze more closely the defendant's diligence in seeking to vacate the default. *White,* 73 Wn.2d at 353. BLSI resolutely believes that the deficiencies in service of process and its prima facie defense to Grantor's claims support the vacation of the default order and judgment, and thus the court need not analyze this factor. Regardless, here, BLSI's diligence in seeking to vacate the default judgment unquestionably supports the court's decision to vacate the judgment.

"Due diligence after discovery of a default judgment contemplates the prompt filing of a motion to vacate." *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 243, 974 P.2d 1275 (1999), *rev. denied,* 140 Wn.2d 1007 (2000). "[A] party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)'s diligence prong." *Gutz v. Johnson, 128 Wn. App. 901, 919, 117 P.3d 390 (2005); see also Boss Logger, Inc. v. Aetna Cas. & Sur. Co.,* 93 Wn. App. 682, 689-90, 970 P.2d 755 (1998) (defendant was

diligent where counsel appeared eight days after first receiving notice of default and moved to vacate two weeks after notice).

BLSI appeared the day after it learned of the default judgment. CP 139-140. Less than a week later, BLSI, through its counsel contacted the Grantors regarding the multiple errors in the default judgment, and requested that the judgment be vacated voluntarily. CP 287-288. Unable to resolve the issues between the parties, BLSI was forced to file a motion to vacate the default order and judgment just a few weeks later. CP 163-175. Thus, BLSI was more than diligent in seeking to vacate the default judgment.

5. The Grantor's Would Not Suffer Substantial Hardship From Vacating The Default.

"The possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party." *Gutz, 128* Wn. App. at 920. If there is prejudice from having to pay attorney's fees, the court may award the plaintiff her fees associated with vacating the default. *Berger v. Dishman Dodge, Inc.,* 50 Wn. App. 309, 313, 748 P.2d 241 (1987); *Graves v. P.* J. *Taggares Co.,* 94 Wn.2d 298, 306, 616 P.2d 1223 (1980); *White,* 73 Wn.2d at 357. If such fees are awarded, there is no prejudice to support maintaining the default. *Berger,* 50 Wn. App. at 313.

The only prejudice to be suffered in this case is if the default order

and judgment are not set aside. It is the policy of the law that controversies be decided on their merits, and allowing the default and judgment to stand here would not only contravene that public policy, it would result in ***almost a quarter of a million dollars' worth of prejudice*** to BLSI because it was not afforded opportunity to defend itself. One need look no further than the Grantors' re-filed 2011 case to discern that they anticipated the default judgment being set aside, and prepared for that contingency. Accordingly, it cannot credibly be argued that Plaintiffs' would suffer a substantial hardship in being required to prove their case.

B. THE TRIAL COURT EXCEEDED ITS DISCRETION IN SUA SPONTE AWARDING $10,000 IN TERMS AGAINST BIG LOTS STORES, INC.

BLSI recognizes that the trial court enjoys broad, equitable discretion to impose "such terms as are just" when vacating a judgment under CR 60(b).[25] A trial court "may award terms to either a moving or opposing party when considering a motion to set aside a default judgment. The rule is equitable in nature and gives the trial court liberal discretion to 'preserve substantial rights and do justice between the parties.'" *Housing Auth. v. Newbigging*, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001)(internal quotation omitted).

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[25] CR 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding[.]"

However, BLSI respectfully submits that the trial court exceeded the bounds of its discretion in several respects when it sua sponte awarded the Grantors $10,000 in terms:

(1) the trial court improperly granted the sanction sua sponte;

(2) the facts and circumstances did not warrant sanctions against BLSI particularly when the court found that the Grantors played an essentially equal hand in "mistakes" which led to the default judgment; and

(3) the $10,000 award for attorney and expert fees is excessive and lacks any evidentiary basis in the record.

1. CR 60(b) Does Not Authorize A Court To Impose Terms Sua Sponte.

Nothing in CR 60(b) explicitly gives the trial court authority to impose terms sua sponte. Courts frequently do impose sanctions sua sponte for such transgressions as discovery violations under CR 26(g), frivolous pleadings under CR 11, and frivolous appeals under RAP 18.9. However, all of these rules specifically provide that the court may impose sanctions upon motion or "its own initiative." No such language appears in CR 60(b). BLSI respectfully submits that the court exceeded the bounds of its discretion by spontaneously awarding terms when no party had requested them.

2. *The Facts And Circumstances Did Not Justify A One-Sided Imposition Of Terms Against Big Lots Stores, Inc., When The Trial Court Found That Both Sides Had Played A Role In "Mistakes" Which Led To The Default Judgment.*

If the trial court had the explicit or inherent authority to impose terms sua sponte, the facts before the trial court did not provide sufficient justification for a one-sided imposition of terms against BLSI. The trial court's discretion to award terms under CR 60(b) is not unfettered. The court may impose terms only "if there is sufficient justification." *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981). In *Knapp v. S. L. Savidge*, 32 Wn. App. 754, 757, 649 P.2d 175, *rev. denied*, 98 Wn.2d 1005 (1982), this Court ruled that the trial court had abused its discretion when it imposed sanctions of $1,000 on a plaintiff after vacating an order dismissing the plaintiff's case. The trial court had dismissed the plaintiff's case when the plaintiff was not in the courtroom when the case was called for trial. (He and his counsel showed up 35 minutes late.) *Id.*, at 756-57. This Court ruled that "the facts before the trial court here do not provide sufficient justification for the imposition of terms." *Id.*, at 757.

Here, the facts also did not provide sufficient justification for the imposition of terms. The court's findings of fact begin with the statement that "[m]istakes were made by all parties from the commencement of the

claim through the entry of the order of default and default judgment." CP 548-552. The pleadings and oral argument presented to the trial court clearly establish that the Grantors were abundantly cognizant of the errors at the time they sought the default, yet made no effort to correct the errors, resulting in a default against an unnamed party, who never received notice of the suit.

3. *The $10,000 Figure Is Arbitrary, Excessive, Lacks Any Basis In The Record, And Covers Fees Which The Grantors Would Have Incurred Regardless Of Any Default.*

Because the Grantors never requested terms, the trial court's selection of $10,000 as a sanction was necessarily speculative, a fact which the court readily stated. The court appeared to base this figure on its ballpark estimate of the Grantor's attorney and expert fees incurred in prosecuting the entire action up to that point, from the outset of the case all the way through the default judgment and the order setting it aside:

> [T]he plaintiffs have been put to a substantial amount of difficulty because of a number of factors caused by decisions made independent of them, that they were put through a substantial amount of trouble in the matter that led to the judgment that I'm now vacating.
>
> So the court is going to award $10,000 as the costs of getting an expert, prosecuting the underlying case and having to do the work to defend in a set of mistakes primarily caused by the defendants in this matter.

RP 40-41.

The court then stated that it had no basis for calculating those attorney fees and expert costs. It invited the parties to submit "additional paperwork" on that subject:

> So if somebody wants to present additional paperwork, if I have grossly exceeded a figure that you think is reasonable or if I've undervalued the amount of work that went into prosecuting the matter, before the motion for default and including the lots of extra work that has nothing to do with the lawsuit just to figure out the service issues, you can provide paperwork to me. But otherwise that is my order for today.

RP 41. Neither party submitted any "additional paperwork." The court's order vacating the default judgment, prepared by Grantor's counsel, states only that "Big Lots Stores, Inc. shall pay plaintiffs $10,000 for attorney fees incurred in relation to the default judgment." CP 548-552. No findings of fact were entered with respect to this aspect of the order. The language of "attorney's fees" in the written order is inconsistent with the court's ruling from the bench:

> The court is going to grant the motion. I think there has been -- I'll use the word loosely -- mistakes that created the mess that we have today. If I corrected the judgments, counsel would be back -- both counsel would be back promptly saying that of course Big Lots, Inc., never received it, they don't do business in Washington, he was not their registered agent and, you know, hopefully I would have a consistent ruling.

> I'm going to award $10,000 in terms to the plaintiff. I think the initial part of this snowball was the store itself that referred it to Big Lots, Inc. -- and again, I apologize. I don't mean to misspeak because we don't need any confusion on the record.
>
> There is -- a few things are clear. There were discussions, negotiations. Whether settlement was achieved is not what's important. Plaintiff was on notice that Big Lots Stores, Inc., is different from Big Lots, Inc., despite the fact that they are related.
>
> Again, the initial mistake was caused by the store. That's how it started, at Big Lots, Inc. But there's no question that before the summons was served on the registered agent there was information about Big Lots Stores, Inc. Both of them could have been sued. Again, internet research is powerful but has mistakes. We hold parties to a higher standard.

RP II, 37:23-38:23.

Although CR 60 grants the court broad discretion to impose terms when vacating a judgment, the court exceeded its discretion here when it awarded the Grantor's attorney and expert fees beyond those incurred in relation to the default judgment itself, and without any evidentiary basis in the record for calculating those fees. In the analogous CR 11 context, when a court awards attorney fees as a sanction, it must limit those fees to the amounts actually and reasonably expended in responding to the sanctionable filing. *In re Marriage of MacGibbon*, 139 Wn. App. 496,

510 , 161 P.3d 441 (2007). Likewise, under CR 60(b), an award of terms for vacating a dismissal order must be related to the reasons for the dismissal order itself. *Knapp v. S. L. Savidge*, 32 Wn. App. 754, 757, 649 P.2d 175, *rev. denied*, 98 Wn.2d 1005 (1982).

Here, the court awarded $10,000 "for attorney fees incurred in relation to the default judgment." CP 548-552. In its oral ruling, the trial court indicated that the $10,000 went well beyond that, encompassing the Grantor's attorney and expert fees incurred in prosecuting the entire case, up through and including the order vacating the default. RP II 40:23-41:8. Many of these fees would presumably have been incurred even in the absence of a default. For example, the only "expert" in the case was Grantor's IME physician, who prepared a report on her damages. CP 105-116. Since a plaintiff bears the burden of proving damages in any civil case, the Grantors would presumably have incurred these expert fees regardless of any default. *See Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 437, 157 P.3d 431 (2007) (remanding CR 11 attorney fee award *greater* than amount requested by moving party, which encompassed "general trial preparation").

Moreover, in the absence of any findings of fact or evidentiary basis whatsoever, it is impossible to determine the amount of attorney or other fees "incurred in relation to the default judgment." The only

evidence of Grantor's expenditures was $336.06 in costs which she requested when obtaining the default judgment. CP 46-47. If this Court finds that an award of any terms was appropriate, then this Court should still remand this issue to the trial court for a calculation of those fees and costs reasonably incurred in connection with the default judgment only. While CR 60(b) appears to contemplate a manner of rough justice, imposing $10,000 in terms was too rough for this case.

C. THE COURT ABUSED ITS DISCRETION IN REVISING THE CAPTION OF PLAINTIFFS' COMPLAINT AS AGAINST BLSI AND PNS WHEN BLSI IS NOT A PROPER PARTY AND WHEN SERVICE WAS NEVER ATTEMPTED AGAINST PNS.

In opposing the motion to vacate, the Grantors also requested relief in the form of an amendment to the caption pursuant to CR 60, relying on *Entranco Eng'rs v. Envirodyne, Inc.* 34 Wn.App. 503, 662 P.2d 73 (1983). CP 338-351. The trial court did revise the caption as *Marcy Grantor et al v. Big Lots Stores, Inc. and PNS Stores. Inc.*; however, neither CR 60 nor *Entranco* provide for such revision.

In *Entranco* the complaint identified the parent corporation, but the plaintiff served the subsidiary. The opinion does not identify any dispute as to actual notice of suit as to both entities – which is not the fact pattern presented here. The plaintiff then sought, and obtained, a default judgment against the parent corporation, identified as the defendant in the suit. The parent corporation thereafter sought to have that default

judgment vacated, as it was not the correct defendant. Relying on the knowledge is the parties, the actual notice of suit, and the admission of the subsidiary that the complaint was directed to the parent corporation but served on the subsidiary, this Court allowed the plaintiff to amend the caption to identify the subsidiary – who had been served and had actual notice of the suit - as the proper judgment debtor. The default judgment against the parent corporation was dismissed. Ultimately the Court remanded the matter back to the trial court allowing the subsidiary to pursue its own motion to vacate. *Entranco,* 34 Wn.App. at 508.

The most significant difference between *Entranco* and this suit is the notice issue. Presumably this Court determined that an amendment to the caption was appropriate because process was affected against the intended defendant, and the same had actual notice of the suit. These key facts are missing here. The trial court's revision of the caption in this suit identifying BLSI and PNS was plain error. Naming BLSI is improper as the overwhelming evidence establishes that BLSI is neither the owner nor operator of the subject property; it also never had actual notice of the suit. To revise the caption to identify BLSI is inconsistent with the evidence and contravenes fundamental theories of liability. While PNS is the owner/operator of the subject property, at no point in these proceedings was PNS identified in any capacity by the Grantors as the named or

intended defendant. To revise the caption to identify PNS would deny the same of due process.

VI. CONCLUSION

The trial court properly vacated the Order of Default and Default Judgment. The trial court did not abuse its discretion when it found that BLSI did not have actual notice of suit and that its failure to appear was due to mistake, excusable neglect and other reasons. The trial court did not abuse its discretion in finding BLSI satisfied the requirements of CR 55(c), CR 60(b) and the four part test under *White* v. *Holm.* The vacation of the order of default and default judgment should be affirmed.

Furthermore, the trial court abused its discretion in imposing terms in the amount of $10,000 and revising the caption; accordingly the ruling should be reversed.

RESPECTFULLY SUBMITTED this 25th day of June, 2012.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
Tamara K. Nelson, WSBA #27679
Of Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of this document was served June 25, 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 June 25, 2012, at Seattle, Washington.

Kimberly A. Fergin, Assistant to
Tamara K. Nelson, WSBA #27679

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