89523-6

Court of Appeal Cause No. 67916-3-I
(consolidated with 67917-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARCY GRANTOR, an individual, individually and as Guardian *ad Litem* for MALIA GRANTOR, a minor,

Petitioners/Appellants.

v.

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

Respondents/Appellees.

PETITION FOR REVIEW

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I. INTRODUCTION

This case involves a default judgment on personal injury claims against Big Lots. Plaintiffs properly served the registered agent for Big Lots' subsidiary in Washington. Although the body of the complaint specifically identified the subsidiary, the caption contained a misnomer identifying the parent company. Despite knowing that such misnomers were common, Big Lots had, for over two years, specifically instructed its registered agent not to forward complaints with any misnomers, regardless of the circumstances. Thus, Big Lots' headquarters' officers were not given the complaint, and Big Lots failed to appear.

This petition presents the simple question of whether Big Lots' policy of ignoring complaints with a misnomer constituted "excusable neglect" supporting vacation of the default judgment. Where, as here, it is undisputed that service on the subsidiary was effective despite the misnomer, a defendant cannot hide behind its deliberate decision to ignore service. Yet that is exactly what the Court of Appeals held, contrary to longstanding Washington law. *See Little v. King*, 160 Wn.2d 696 (2007); *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503 (1983). The default judgment also could not be vacated because defendant presented no evidence supporting a *prima facie* defense. Petitioners respectfully request discretionary review pursuant to RAP 13.5(b)(1) & (2).

II. IDENTITY OF PETITIONER

Petitioners are Marcy Grantor, as Guardian Ad Litem for Malia Grantor, and Marcy Grantor individually (collectively the "Grantors").

III. COURT OF APPEALS DECISION

The Grantors seek review of the Court of Appeals opinion filed on September 16, 2013, which affirmed vacation of a default order and judgment. A copy of the decision, and the Superior Court order are attached in the Appendix at pages A1 - A19 & B1-B5.

IV. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether the court of appeals committed obvious error in holding that Big Lots' subsidiaries had no "actual notice" of the lawsuit. Appendix at A13.

Issue No. 2: Whether the court of appeals committed obvious error by holding that Big Lots presented evidence of a *prima facie* defense. Appendix at A15.

Issue No. 3: Whether the court of appeals committed obvious error by holding that Big Lots' failure to appear because of its instruction to its registered agent was excusable neglect. Appendix at A16-A17.

Issue No. 4: Whether the court of appeals committed obvious error by holding that the misnomer was excusable neglect. Appendix at A18.

V. STATEMENT OF THE CASE

A. Big Lots Had a Deliberate Policy of Ignoring Service With Any Misnomer, Regardless of the Circumstances

Big Lots, Inc. ("BLI") is a holding company with two wholly-owned subsidiaries operating in Washington: Big Lots Stores, Inc. ("BLSI") and PNS Stores, Inc. ("PNS") (collectively "Big Lots"). *See* CP 253-291 at Ex. K at Ex. 21; CP 134-135 at ¶¶ 4-5. BLI's sworn Securities and Exchange Commission filings specifically stated that "Big Lots," not a subsidiary, had **21** stores in Washington, which it held out to the public as simply "Big Lots" stores. CP 253-291 at Ex. K at 3. For example, Big Lots' website "Store Locator" identified the Burien store where plaintiffs were injured as a "Big Lots" store. *See* CP 253-291 at Ex. G.

Both PNS and BLSI had the same: (1) corporate offices, (2) top officers and directors, and (3) registered agent as the parent, BLI. CP 253-291 at Exs. K, H , & I. And Big Lots' "staff counsel" for both PNS and BLSI worked at BLI's headquarters in Columbus, Ohio and reported to BLI's counsel, Chad Reynolds, who worked in the same office. CP 134-35 at ¶ 2; CP 332-365 at Ex. M (Big Lots' Depo.) at 7:20-8:14, 14:19-15:22. The registered agent for BLI, BLSI, and PNS was Corporation Services Company ("CSC"). In fact, CSC's client contact for the subsidiary BLSI was Chad Reynolds, counsel for **the parent**, BLI.

Over several years before this action, some 20 to 30 complaints against Big Lots had named the wrong entity in the caption. CP 332-65 at Ex. M (Big Lots Depo.) at 52:5-53:15. Where a complaint contained such a misnomer, which CSC termed a "name variation," CSC's ordinary practice was to notify its corporate clients of the service. CP 332-65 at Ex. L at 37:15-22. Yet, at the time of the Grantors' complaint in March 2010, Big Lots' specific instructions to CSC, had, for at least two years, been to ignore any and all complaints "served on a name variation." CP 332-65 at Ex. N; *id.* at Ex. M (Big Lots Depo.) at 12:9-16, 19:9-18, 20:22-21:3, 22:14-18, 25:8-13; *id.* at Ex. L (CSC Depo.) at 39:9-15, 44:7-18, 45:1-4.

Big Lots admitted that this instruction not to forward complaints with misnomers applied to **any** name variation, no matter how slight, including even trivial misspellings such as "Bag Lots" or "Big Lot." CP 332-65 at Ex. M (Big Lots Depo.) at 28:10-25, 29:8-21, 30:18-24. Big Lots changed this instruction to CSC in June 2010, just three months after the Grantors' complaint, and CSC now forwards complaints with misnomers to Big Lots' headquarters officers. *Id.*, Ex. M (Big Lots Depo.) at 25:14-15, 26:9-15, 57:14-21. Big Lots has never offered any reason why it could not or should not have made this change earlier.

B. Because CSC Followed Big Lots' Instructions, Big Lots Failed to Appear

On February 29, 2008, then two-year old Malia Grantor was seriously injured at a Big Lots store in Burien, Washington when an assistant manager knocked heavy boxes onto the little girl, slamming her face into a metal shelving unit. CP 41-89 at ¶¶ 3-12. Malia's face was cut to the bone, leaving a prominent and permanent facial scar and subjecting her to significant future emotional distress and pain and suffering as well as medical costs. *Id.* at ¶¶ 13-26; CP 90-101 at Ex. B.

At the time of the injury, Big Lots gave Malia's mother, Marcy Grantor, (collectively the "Grantors") a card identifying BLI, the parent company, as the corporate entity. CP 41-89 at ¶ 11 & Ex. A; CP 253-291 at Ex. A. That same card had been "in place for years and years and years." RP, v. II (Sept. 16, 2011) at 15:5-10 (emphasis added). Only after entry of default did Big Lots disclose the existence of PNS, while Big Lots responded to the Grantors' pre-suit communications through its other Washington subsidiary, BLSI. CP 253-291 at ¶¶ 3-5 & Exs. B & C.

The Grantors contacted BLI at the address on the card they had been given in an attempt to resolve their claims. In the course of those negotiations, the Grantors sent Big Lots a draft complaint with a caption identifying the defendant as BLI, the name on the card. CP 253-291 at ¶ 5

& Exs. C.1 & D. The body of the complaint also identified the specific Big Lots' store in Burien by number and address. CP 253-291 at ¶ 5. And the Grantors asked Big Lots to identify its registered agent for service in Washington. CP 253-291 at ¶ 6 & Ex. D. Yet, throughout these pre-suit communications, Big Lots never identified PNS and never told the Grantors that: (1) a subsidiary was the proper defendant, (2) the complaint identified the wrong entity, or (3) service of a complaint naming BLI would somehow be improper. *Id.* at ¶¶ 8-12.

The Grantors filed suit and personally served the complaint and summons on CSC, which was the registered agent for both BLSI and PNS in Washington. *See* CP 1-6 & 253-291 at Exs. E & I. As in the draft provided to Big Lots earlier, however, the caption still named BLI. Just as in the draft, however, the final complaint also specifically alleged that the events giving rise to the Grantors' claims occurred at "Big Lots store No. 4436 at 125 B 148th St., Burien, Washington, 98148." *See* CP 1-4 at ¶ 5.

Following instructions, CSC did not to forward the complaint to Big Lots' headquarters, and Big Lots failed to appear. *See* CP 255 at ¶ 9; CP 332-65 at Ex. L (CSC Depo.) at 32:4-33:15. As noted above, but for Big Lots' specific instructions, CSC would have forwarded the Grantors'

complaint to Big Lots' headquarters. CP 259; CP 332-65 at Ex. L at 27:7-15, 31:18-32:3, 37:15-22; *Id.* at 48:25-49:4 & Ex. O.[1]

C. The Superior Court and Court of Appeals Decisions

While preparing to seek default, the Grantors discovered the misnomer. Relying upon *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503, 505-06 (1983), and disclosing the misnomer, the Grantors obtained a default judgment on the basis that service was effective notwithstanding the misnomer. *See* CP 25-26, 104-08. The default judgment was supported by substantial evidence, including plaintiff Marcy Grantor's declaration and the declaration and report of an expert witness. *See* CP 14-24, 31-40, 41-89 (Marcy Grantor Decl.) at ¶¶ 8-9, 12-15, 18, 22-26, and CP 90-101 (Haeck Md. Decl.).

Big Lots then appeared through BLSI, moved to vacate the default, and stipulated to substitution of PNS. RP, v.I (July 22, 2011) at 38:4-10. The superior court granted the motion, but revised the caption to name

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[1] It was undisputed that CSC accepted service on March 1, 2010, saying nothing about any error in the defendant's name. CP 366-373 (Nervik Decl.) at ¶¶ 4-6; CP 332-65 at Ex. M (Big Lots Deposition) at 46:3-13; RP (July 22, 2011) at 14:15-15:-14. After default a year later, CSC produced a letter marked "null," but dated March 2, 2010, the day **after** service, purporting to reject service. CP 136-39 at Ex. 1. The only evidence in the record shows that this letter was never sent or received. CP 136-39 at Ex. 1; CP 255 at ¶ 10; CP 332-65 at Ex. P; *id.* at Ex. L (CSC Depo.) at 53:15-18, 54:10-15. Regardless of whether it was sent, however, the letter is irrelevant. There is no authority allowing a defendant to reject service the day after it is effected.

BLSI and PNS. Appendix at B4, ¶ D. The superior court held that service was effective notwithstanding the misnomer. *Id.* at B3-B4, FoF 4 & CoL 2. The superior court also found that Big Lots "instructed its registered agent not to notify it of service where there was any variation in its name," and this instruction was the reason CSC failed to forward the complaint to Big Lots. *Id.* at B3, FoF 5 & 6. Finally, the court held: "Big Lots Stores, Inc. has not submitted or identified any evidence supporting a prima facie defense to plaintiffs' claims." *Id.* at FoF 9.

Despite these findings, the superior court vacated the default judgment and order on the grounds that: (a) "Neither Big Lots, Inc. nor Big Lots, Stores, Inc. had actual notice of the commencement of this suit," and (b) Big Lots' "failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent." Appendix at B4, CoL 3 & 4.

The court of appeals affirmed, holding that Big Lots had no actual notice of the suit and that its' instructions to its registered agent constituted excusable neglect. Appendix at A17. In addition, although the superior court's holding that Big Lots presented no evidence of defense was not challenged on appeal, the court of appeal held that Big Lots had presented such evidence. *Id.* at A15-A16. As set forth below, the court of appeals' holdings were obvious error warranting review by this Court.

VI. ARGUMENT[2]

While defaults are generally disfavored, "we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Id.* "[W]hen served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court's jurisdiction." *Morin v. Burris*, 160 Wn.2d 745, 759 (2007).

The primary – and minimum – showing required to vacate a default order or judgment under CR 60 or CR 55 is that (a) "there is substantial evidence supporting a prima facie defense," and (b) the defendant's "failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect." *Little*, 160 Wn.2d at 704 (2007). Thus, Washington courts have repeatedly affirmed default judgments where the defendant presented no evidence of a defense or failed to establish excusable neglect. *See, e.g., Aecon Bldgs. Inc. v. Vandermolen Const. Co.*, 155 Wn. App. 733, 740 (2009) (affirming denial of motion to vacate where no inequitable conduct by plaintiff); *Little*, 160

[2] An order vacating a default judgment is reviewed for abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702 (2007). "Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law." *Id.* at 703.

Wn.2d at 706 ("Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment."); *Prof'l Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 705 (2003) (affirming default notwithstanding misnomer); *Morin*, 160 Wn.2d at 759-60 (default proper where defendant failed to show excusable neglect and meritorious defense).

The court of appeals decision contradicts longstanding Washington law and the record here by affirming vacation of the default despite Big Lots' failure to establish either of these elements.

A. Big Lots' Failed to Present Any Evidence of a Defense

At a minimum, Big Lots had to establish "substantial **evidence** supporting a prima facie defense." *Little*, 160 Wn. 2d at 703-04 (emphasis added). Argument and speculation are not sufficient – a defaulting defendant must submit specific and substantial evidence. *Id.* As this Court has explained: it "is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing." *Little*, 160 Wn. 2d at 704; *Shepard Ambulance v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 240-41 (1999) ("a defaulting defendant bears the risk of

surprise at the size of a default judgment."). Nor is "mere speculation ... substantial evidence of a defense." *Little*, 160 Wn.2d at 705.

The superior court held that: "Big Lots has not submitted or identified any evidence supporting a prima facie defense to plaintiffs' claims, although potential defenses were identified." CP 502 at FoF No. 9; RP, v.II (Sept. 16, 2011) at 47:20-22 (Big Lots "made no showing of evidence relating to a defense or a diminution in damages"). Indeed, as to each of the purported defenses Big Lots argued, the superior court found a complete failure to present any evidence whatsoever.

Big Lots did challenge this finding on appeal. Yet, the court of appeals nonetheless found that Big Lots presented such evidence. Appendix at A15-A16. The court of appeals committed obvious error by disregarding the superior court's unchallenged finding and the record.

The court of appeals held that Big Lots presented evidence that PNS rather than BLI was the liable party. Appendix at A16. In other words, the defense was based on the misnomer in the caption. Yet Big Lots did not challenge service on appeal, and the court of appeals did not disturb the superior court's holding that service was effective on PNS despite the misnomer. Moreover, PNS stipulated to substitution. Thus, the misnomer in the caption cannot have been evidence of a defense.

In a footnote, the court of appeals stated that Big Lots' attorney presented photographs supporting a defense of alleged open and obvious risk. Appendix at A16, fn. 4. But those photographs could not be viewed at all, CP 535-537, and Big Lots relied only on counsel's arguments about what they **might** show. RP v.II (Sept. 16, 2011) at 25:10-13. Thus, there was no "evidence" of such a defense in the record. As the superior court explained: "You have presented no evidence. You've presented ideas about a prima facie defense. **There is no evidence whatsoever**." RP, v.II (Sept. 16, 2011) at 20:22-24 (emphasis added). "I'm saying there is not a single declaration ... I don't see that this mitigates or presents an issue of contributory negligence just because you say so. ... **that's not evidence**." RP, v.II (Sept. 16, 2011) at 24:13-22 (emphasis added); *see also* RP, v.II (Sept. 16, 2011) at 27:6-8 ("I don't actually think in any of your papers there actually is anything that amounts to evidence.")[3]

In *Little v. King,* the defendant offered a declaration opining that the plaintiff had a pre-existing condition. Because that declaration was conclusory, and therefore not evidence of causation, this Court held the defendant failed to meet its burden to vacate the default. *Little*, 160

[3] The court of appeals glossed over the superior courts' explanation, claiming that these oral statements were not incorporated into the final order. Appendix at A16, fn. 5. The court of appeals was incorrect. The final order specifically found that Big Lots had not "submitted or identified any evidence supporting a prima facie defense to the Grantors' claims, although potential defenses were identified." Appendix at B3-B4, FoF No. 9 & Order A.

Wn.2d at 704-05. Thus, here, Big Lots' attorney's arguments about what unviewable pictures might show could not satisfy Big Lots' burden to present "substantial evidence" of a defense. The court of appeals' decision is therefore contrary to *Little v. King* and record, and this Court should accept review and reverse. RAP 13.5(b)(1) & (2).

B. Big Lots' Deliberate Policy Choice and Affirmative Instruction to its Agent Cannot Be Excusable Neglect as a Matter of Law

Even if Big Lots had presented evidence of a defense, vacating the default judgment also required a showing of "excusable neglect." *Little*, 160 Wn. 2d at 703-04; *In re Estate of Stevens,* 94 Wn. App. 20, 31 (1999) (without excusable neglect, a meritorious defense is irrelevant); *Shepard Ambulance,* 95 Wn. App. at 239 (excusable neglect required under both CR 55 and CR 60). The court of appeals found excusable neglect because Big Lots "did not receive notice of the lawsuit, and the evidence does not show that the instruction to CSC was inappropriate." Appendix at A17. These holdings are directly contrary to settled Washington law, and constitute obvious error warranting review.

1. Big Lots Had Notice of the Lawsuit

"An objection on the ground of mere misnomer of a party defendant, whether an individual or a corporation, does not render the summons insufficient **for the purpose of giving notice** to the defendant

upon whom it is served ...." 59 AM. JUR. 2d, MISNOMER § 243(2d ed. 1987) (emphasis added). Washington courts have followed this rule for over 30 years. "[A]n objection on the ground of a mere misnomer of a party defendant . . . does not render the summons insufficient **for the purpose of giving notice** to the defendant upon whom it is served." *Entranco*, 34 Wn. App. at 505-06 (emphasis added).

Accordingly, the superior court correctly held that service was effective notwithstanding the misnomer, and revised the caption to identify the Big Lots subsidiaries. Appendix at B3-B4, FoF No. 4, CoL No. 2, & Order D; *see also Entranco*, 34 Wn. App. at 507 (correcting misnomer in caption pursuant to CR 60(a) after default judgment). Big Lots did not challenge this holding on appeal, and the court of appeals did not disturb that holding.

Because service was effective notwithstanding the misnomer, Big Lots had notice of the lawsuit. Washington law provides that: "A corporation's registered agent **is the corporation's agent for service of process, notice**, or demand required or permitted by law to be served on the corporation." RCW 23B.05.040(1) (emphasis added). Similarly, service on a registered agent "**shall be taken and held to be personal service**." RCW 4.28.080 (emphasis added); *see also* CR 4(d)(2) (authorizing service pursuant to RCW 4.28.080(9)). These rules serve to

"(1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants." *Sheldon v. Fettig*, 129 Wn.2d 601, 608 (1996).

The court of appeals nonetheless held that Big Lots did not have actual notice of the suit. Appendix at A13. This holding confused notice with knowledge. There is no support in law or logic for giving a plaintiff the responsibility to ensure that a corporate defendant's agents notify the right person within the corporation about service. To the contrary, the law squarely places that responsibility upon the corporate defendant. Thus, because service was effective against PNS and BLSI, those entities had actual "notice" regardless of whether or not their headquarters' officers had actual "knowledge" of the complaint.

Indeed, just this year, the same court of appeals rejected the rational it adopted here. In *Trinity Universal Ins. Co. of Kansas v. Ohio Casualty Ins. Co.* 298 P.3d 99 (2013), Division I of the Court of Appeals affirmed in part a default judgment where the same registered agent as here, CSC, did not notify the defendant of service. *Id.* at ¶ 8. The court held that service was effective under Washington law, and that CSC's failure to notify the defendant could not be excusable neglect. *Id.* at fn. 6.

The court of appeals also incorrectly attempted to distinguish *Entranco* on the ground that the Grantors' complaint did not name the

subsidiaries. Appendix at A14. But as the court of appeals conceded, the complaint does in fact identify the specific store in Burien at issue. *Id.*

Moreover, the court of appeals simply glossed over the key issue: the fact that CSC did not forward the complaint to Big Lots' headquarters in Ohio does not defeat service – and therefore Big Lots unquestionably had notice. Rather, the issue is whether CSC's failure to notify Big Lots' headquarters officers constituted excusable neglect.

2. Big Lots' Deliberate Choice to Ignore Service Cannot Be Excusable Neglect

Under long-settled Washington law, there can be no "excusable" neglect – and it is error to vacate a default judgment – where the failure to appear was deliberate. "The decision not to participate does not meet the standard required" for excusable neglect. *Little*, 160 Wn.2d at 706.

> [W]here the defaulting party's actions are deemed willful, equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims. ... **Willful defiance of the court's authority can never be rewarded in an equitable proceeding.**

TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 205-06 (2007); *Johnson v. Cash Store*, 116 Wn. App. 833, 841 (2003); *Commercial Courier Serv. v. Miller*, 13 Wn. App. 98, 106 (1975) (no excusable neglect can be shown where party disregards process); *White v. Holm*, 73 Wn. 2d 348, 352 (1968) (factors can justify

vacating default "**provided** the ... failure to properly appear in the first instance was **not willful**") (emphasis added); *Bishop v. Illman*, 14 Wn. 2d 13 (1942) (abuse of discretion to vacate where defendant acted willfully).

CSC's failure to notify Big Lots headquarters' officers of the complaint was caused by Big Lots' specific instructions, then in place for at least two years, not to forward service with any "name variation," regardless of how slight. Big Lots knew at the time that the plaintiffs frequently misnamed the corporate entity in suits against it. Furthermore, Big Lots' deliberate policy was directly contrary to longstanding Washington law. *See Entranco*, 34 Wn. App. at 505-06 (discussed *supra*). And but for Big Lot's instruction, CSC would have forwarded the Grantor's complaint to the Big Lots' officers in Ohio. Significantly, as noted above, counsel for the parent BLI was CSC's client contact and staff counsel for PNS and BLSI worked in his offices and reported to him.

Thus, as the superior court held, and the court of appeals repeated, Big Lots' failure to appear was caused by its consciously adopted, affirmative policy to ignore service containing misnomers, or even minor spelling errors. The court of appeals nonetheless held, in a single conclusory statement, that "the evidence does not show that the instruction to CSC was inappropriate." Appendix at A17. Yet, Big Lots' deliberate policy choice and affirmative instruction to its registered agent were

precisely the type of willful disregard for service Washington courts have refused to sanction. The court of appeals decision was obvious error.

Moreover, even if Big Lots' instruction was not willful disregard – and it clearly was – CSC's failure to forward the Grantors' complaint to Big Lots' headquarters officers still could not constitute excusable neglect. CSC's failure to forward the complaint to Big Lots was not due to a mistake, inadvertence, irregularity, or surprise. CR 60(b). To the contrary, CSC did exactly what Big Lots instructed it to do. CSC's failure to notify Big Lots was therefore – at best – an internal failing between a corporation and its registered agent.

Washington courts have consistently held that such internal failures to act upon validly served complaints do not constitute excusable neglect. *See, e.g., TMT Bear Creek,* 140 Wn. App. at 212, (2007) (Washington courts have "repeatedly" held that a failure to appear due to "breakdown of internal office procedure" is "not excusable."); *Prest v. Am. Bankers Life Assurance Co.,* 79 Wn. App. 93, 100 (1995) (no excusable neglect where defendant misplaced legal process after being reassigned); *Beckman v. DSHS.,* 102 Wn. App. 687, 695-96 (2000) (failure to timely route documents not excusable neglect); *Johnson v. Cash Store,* 116 Wn. App. at 848-49 (that person who accepted service neglected to forward to attorney is not grounds to vacate).

A contrary rule would be patently unjust and entirely without legal support. Under the court of appeals' decision, a corporate defendant could simply hide behind its registered agent's failure to forward a complaint, even if the corporation caused that failure and even the complaint were validly served. That is exactly the kind of delay and refusal to participate in legal proceedings that the default procedures are designed to avoid.

Finally, the court of appeals wrongly held that vacating the default judgment was justified by the Grantors' "mistakes." Appendix at A18. But the Grantors' only possible mistake was the initial misnomer in the caption. Because service was effective, and thus Big Lots' subsidiaries were on notice notwithstanding the misnomer, the Grantors made no mistake in seeking default. To the contrary, entry of default judgment under exactly these circumstances had been specifically approved by Washington courts for nearly 30 years.

In *Entranco*, as here, the plaintiff served a corporate subsidiary, and described that entity in the body of the complaint, but erroneously named the parent company in the caption. 34 Wn. App. at 504. Holding default judgment was proper against the subsidiary, the court explained: "A judgment, whether by default or after full proceedings, is as conclusive against such a party as it would be if the party were described by its correct name." 34 Wn. App. at 506; *see also Prof'l Marine Co.*, 118 Wn.

App. at 705 (affirming default even though defendant incorrectly named in lawsuit where "complaint gives sufficient notice"). Just as in *Entranco*, the misnomer here was not a valid ground for vacating the default judgment or order.

VII. CONCLUSION

For the reasons stated above, the Grantors' respectfully request that this Court grant review and reverse those portions of the court of appeal's decision holding that: a) Big Lots had no actual notice of the lawsuit, b) Big Lots presented evidence of a prima facie defense, and c) Big Lots' failure to appear constituted excusable neglect.

Date: October 16, 2013

Respectfully submitted,

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APPENDIX

A

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

MARCY GRANTOR, an individual, individually and as Guardian ad Litem for M.G., a minor, Appellants/Cross Respondents, v. BIG LOTS STORES, INC., an Ohio corporation, and PNS STORES INC., a California corporation, Respondents/Cross Appellants.	)	No. 67916-3-I (Consolidated with No. 67917-1-I) UNPUBLISHED OPINION FILED: September 16, 2013

SCHINDLER, J. — Marcy Grantor, individually and as the guardian ad litem for M.G. (Grantor), obtained a default judgment of $250,000 against Big Lots Stores Inc. (BLSI). Grantor appeals the order to vacate the default judgment. BLSI cross appeals the award of attorney fees and amendment of the caption. We affirm.

FACTS

On February 28, 2008, Marcy Grantor and her two-year-old child M.G. went to the Big Lots store in Burien. Grantor stopped in one of the aisles to look at some items. An employee was stacking heavy boxes across the aisle from Grantor and M.G. The stack of boxes fell over. The boxes hit M.G., pushing her head-first into a metal shelf.

Grantor said that when she "picked [M.G.] up from beneath the boxes," she saw a large gash on M.G.'s forehead and "[t]he wound started to bleed heavily."

Grantor said that right after the accident happened, "the Big Lots assistant manager named Tracy came rushing up to me, saying 'I'm so sorry,' and that she had knocked the boxes over with her foot." Tracy gave Grantor a business card "identifying herself and giving a phone number and contact person named Rebecca at 'Big Lots, Inc.' for [Grantor] to call to report the injury." One side of the business card is signed by Tracy and contains the name and address of "BIG LOTS STORE NO. 4436" at "125 B 148TH STREET[,] BURIEN, WA 98148," with the handwritten name of "Rebecca" and her telephone number. The other side of the card states:

> WE WILL PROMPTLY NOTIFY OUR HOME OFFICE OF THE INCIDENT IN WHICH YOU WERE INVOLVED. THIS CARD IS NOT A GUARANTEE FOR PAYMENT BUT FOR INQUIRY PURPOSES ONLY.
>
> PLEASE DIRECT CLAIMS OR INQUIRIES ABOUT THIS MATTER TO:
>
> **BIG LOTS INC.**
> **RISK MANAGEMENT DEPARTMENT**
> **300 PHILLIPI ROAD**
> **COLUMBUS, OHIO 43228-5311**
> **TOLL FREE 1-888-244-5687**
>
> DATE OF INCIDENT 2/29/08 LOCATION NUMBER #4436

Big Lots Inc. (BLI) is a holding company and the parent company of Big Lots Stores Inc. (BLSI). BLI is an Ohio corporation. BLI does not operate any retail stores or do business in Washington. BLSI is a "retail operating company" that owns retail stores in multiple states, including Washington, and is registered with the Secretary of State in Washington. BLI is also the parent company of PNS Stores Inc. PNS Stores also operates Big Lots retail stores.

M.G.'s wound required seven stitches, resulting in $3,228.03 in medical expenses. Dr. Devorah Steinecker diagnosed M.G. with a mild head injury. Dr. Steinecker stated that the accident resulted in "cervical, upper thoracic, sternal, occipital and intracranial dural strains along with a low back strain."

A year later, Grantor's attorney sent a letter to BLI at the Columbus, Ohio address listed on the business card. In response to the letter, BLSI Risk Management Department employee Michelle May called Grantor's attorney to obtain "documents relating to [Grantor's] claims."

Grantor's attorney and May exchanged a number of e-mails discussing settlement of the claim. The e-mails from May clearly identify her as a claims examiner for the Risk Management Department of "Big Lots Stores, Inc." Grantor's attorney sent May photographs and documentation of medical expenses.

After Grantor's attorney and May were unable to reach a settlement, the attorney asked May, "Who is Big Lots' agent for service of process in Washington?" May told the attorney that "[t]he agent is CSC, the United States Corporation Company." Corporation Service Company (CSC) is the registered agent in Washington for BLSI. CSC is not the registered agent for BLI.

On February 26, 2010, Grantor, individually and as the guardian ad litem for M.G. (Grantor), filed a personal injury complaint for damages against "Big Lots, Inc., an Ohio corporation," King County Superior Court Case Number 10-2-08519-0 SEA. The complaint alleged that BLI is an Ohio corporation doing business in Washington, and that venue in King County is proper "because Big Lots committed a tort giving rise to

plaintiff's claims in King County." The complaint alleged M.G. was injured at "Big Lots store No. 4436" in Burien.

On March 1, Grantor served CSC with a copy of the summons and the complaint. The next day, CSC sent a "Rejection of Service of Process" by regular mail to Grantor's attorney. The letter states, in pertinent part:

> **Rejection of Service of Process**
> Return to Sender Information . . . .
>
> **Date:** 03/02/2010
>
> **Party Served:** Big Lots, Inc.
> **Title of Action:** Marcy Grantor vs. Big Lots, Inc.
> **Court:** King County Superior Court, Washington
> **Case Number:** 10-2-08519-0 SEA
>
> The service of process received for the Party Served, as listed above, cannot be forwarded to the intended party for the reason(s) listed below.
>
> Because two different companies can have very similar names, the name of the company to whom service is directed MUST BE IDENTICAL to the company name on file with the Secretary of State, or other appropriate state agency.

Grantor's attorney said that he never received the letter. But the Rejection of Service of Process letter was never "returned to [CSC] by the United States Postal Service as undeliverable."

On January 26, 2011, Grantor filed "Plaintiffs' Ex Parte Motion for Order of Default Order Against Defendant Big Lots Stores, Inc." In the motion, the attorney asserts that "service was properly effected upon Big Lots Stores, Inc. via personal service on its registered agent, CSC." The attorney also asserts that "CSC was identified as the registered agent for Big Lots Stores, Inc. by both Big Lots itself and the Washington Secretary of State registration documents for Big Lots Stores, Inc."

However, the attorney concedes that "[i]n preparing this motion, counsel for plaintiffs realized that the caption contains a clerical error in the name of defendant. The complaint identifies defendant as 'Big Lots, Inc.' rather than 'Big Lots Stores, Inc.' "

The court entered an "Ex Parte Order of Default Against Big Lots, Inc." The Ex Parte Order of Default Against Big Lots, Inc. states the complaint contains a "misnomer in the caption, identifying defendant as 'Big Lots, Inc.' rather than Big Lots Stores, Inc.," but the attorney filed an affidavit of "Personal Service On: BIG LOTS STORES, INC." stating that on March 1, 2010, the attorney served the complaint on CSC as the registered agent for BLSI, and BLSI did not "appear, answer or otherwise defend this action."

On February 25, Grantor filed an ex parte motion for entry of a default judgment against BLSI for general and special damages of $220,000 for M.G. and $30,000 for Grantor. In support, Grantor submitted evidence for the medical expenses of $3,228.03, a declaration from Dr. Phil Haeck stating that a future surgery would cost $7,000, and a declaration from Grantor.

On February 28, the court entered a judgment of $220,000 for M.G. against BLSI and a judgment of $30,000 for Grantor against BLSI. The case caption for each of the judgments names "Big Lots, Inc." as the defendant but "Big Lots Stores, Inc." is designated in the judgments as the "Judgment Debtor."

The next day on March 1, Grantor filed a personal injury action against "Big Lots Stores, Inc., an Ohio corporation," King County Case Number 11-2-08393-4 SEA, "out of an abundance of caution." The complaint states that Grantor filed "an identical action in this Court on February 26, 2010" but did not identify BLSI. The complaint alleges,

"Plaintiffs properly effected service on . . . both [BLI] and [BLSI]" and a default judgment was entered on February 28, 2011. The complaint states, in pertinent part:

> 1. Plaintiffs filed an identical action in this Court on February 26, 2010. King County Superior Court Case No. 10-2-08519-0. The caption of the complaint in that matter identified the defendant as "Big Lots, Inc.," but did not identify "Big Lots Stores, Inc." Plaintiffs properly effected service on Big Lots Stores, Inc., which was effective against both Big Lots, Inc. and Big Lots Stores, Inc. Neither Big Lots, Inc. nor Big Lots Stores, Inc. answered or otherwise appeared in that action.
>
> 2. The court in King County Superior Court Case No. 10-2-08519-0 entered an order of default on January 27, 2011, and entered default judgment on February 28, 2011. Plaintiffs believe that judgment is effective against either or both Big Lots, Inc. or Big Lots Stores, Inc.
>
> 3. Plaintiffs are filing this identical action out of an abundance of caution, in the event that service or the judgment in the prior action is held to be void or ineffective against either "Big Lots, Inc." or "Big Lots Stores, Inc." Plaintiffs intend to move this Court to stay the above-captioned matter pending resolution, or Big Lots' waiver or termination, of any challenge to or appeal of the judgment of King County Superior Court Case No. 10-2-08519-0 as against "Big Lots, Inc." or "Big Lots Stores, Inc."

On May 31, Grantor served CSC with the default judgment entered against BLSI on February 28 and the complaint filed against BLSI on March 1 at "Big Lots Stores, Inc. c/o Corporation Service Company[,] 300 Deschutes Way, S. W., Suite 304[,] Tumwater, Washington 98501." The May 31 letter states:

> On February 28, 2011, the King County Superior Court in Seattle, Washington entered default judgment against Big Lots in favor of [M.G.] and Marcy Grantor in Case No. 10-2-08519-0. Concurrently with this letter, the judgment has been served on Big Lots through its registered agent, Corporation Services Company.
>
> In addition, out of an abundance of caution, plaintiffs [M.G.] and Marcy Grantor have caused a second complaint to be filed against Big Lots, which also has been served today. That second complaint states identical claims to those upon which [M.G.] and Marcy Grantor already have obtained judgment, and has been brought solely to preserve the Grantors' rights in the event that Big Lots attempts to overturn the judgment in the prior action.

> Please have an attorney or other representative of Big Lots contact me at his or her earliest convenience to confirm how and when Big Lots will satisfy the judgment.

On June 1, BLI filed a notice of appearance in the first action, King County Case No. 10-2-08519-0 SEA, and contacted Grantor's attorney to inform him that BLI does not do business in Washington. The attorney also told Grantor's attorney that BLSI is not the correct defendant, "the correct defendant is PNS Stores, Inc." and "PNS Stores, Inc. did not receive notice of your client's lawsuit."[1]

In a June 10 letter to Grantor's attorney, the BLI attorney reiterated that BLI did not do business in Washington and enclosed a copy of the Rejection of Service of Process letter. The BLI attorney offered to "forward a stipulated motion to vacate" and substitute PNS Stores for BLSI. The letter states, in pertinent part:

> [T]he Complaint is denominated against "Big Lots, Inc., an Ohio corporation." In fact, as I advised you, Big Lots, Inc. is in fact an Ohio corporation that has no presence in Washington State and does not do business in Washington State. Apparently, the rejection of service was forwarded to you in response to your attempt to serve an out-of-state corporation by serving CSC which has no authority to accept service for Big Lots, Inc.
>
> . . . .
>
> Your pleadings indicate that the allegations in your Complaint "unambiguously indicate that the defendant is Big Lots Stores, Inc." In fact, I could find no reference to Big Lots Stores, Inc in the Complaint based on my first review. . . .
>
> You indicated in your declaration in support of default that you discovered your mistake before requesting *ex parte* relief. I would have expected you to then amend your Complaint, name the correct defendant, and see that the correct defendant was properly served.
>
> . . . Further, as I advised you by telephone, Big Lots Stores, Inc. is not even the correct defendant; rather, the correct defendant is PNS Stores, Inc. PNS Stores, Inc. did not receive notice of your client's lawsuit.
>
> Finally, the Rejection of Service of Process should have been clear notice to your client that Big Lots, Inc. was not the proper defendant. If in

[1] PNS Stores is a California corporation.

> fact, as all of the pleadings submitted to the court suggest, and your pleadings argue, it was really your client's intention to sue Big Lots Stores, Inc., you should have done so by amending and re-serving your original Complaint.

On July 14, BLSI filed a motion to vacate the ex parte order of default and entry of the default judgments. BLSI argued that because it was not served and did not receive notice of the lawsuit or entry of judgments until May 31, 2011, the order of default and default judgments were void and should be vacated. As the attorney for BLI previously told Grantor's attorney, BLSI stated that "[t]he entity operating the retail store where the alleged injuries occurred is PNS Stores, Inc., ('PNS') a California Corporation, separate and distinct from BLSI." BLSI pointed out that it was never named or identified by Grantor as a defendant in the complaint, and the caption in the ex parte motion for default and the default judgments named BLI, not BLSI. BLSI also argued there were questions of fact about actual or constructive notice of an unsafe condition.

In support of the motion to vacate the ex parte order of default and default judgments, BLSI submitted the declaration of CSC employee Andrew Gachaiya. Gachaiya states, in pertinent part:

> As a registered agent for the receipt of service of process, CSC is only authorized to receive service of process on behalf of entities that have named it as their registered agent. According to our records, CSC is not now, nor was it anytime during the pendency of this case, the registered agent for Big Lots, Inc. in the State of Washington.

Gachaiya testified that "[o]n March 2, 2010, CSC sent a Rejection of Service of Process letter via United States Postal Service regular mail" to Grantor's attorney and had no record of the letter "having been returned to it by the Unites States Postal Service as undeliverable."

BLSI attorney Tamara Nelson testified that because the summons and complaint served on CSC "were not directed to Big Lots Stores, Inc., Big Lots Stores, Inc. never received notice of the lawsuit." BLSI did not have notice of the lawsuit or entry of the order of default and default judgments until May 31, 2011.

Grantor argued that the misnomer in the caption did not mean service of process was defective because the registered agent for BLSI was served and the complaint identified BLSI. Grantor's attorney also states that he never received a rejection of service from CSC, and BLSI could not show excusable neglect.

The court held a hearing on the motion to vacate on July 22. At the beginning of the hearing, the BLSI attorney agreed to substitute PNS Stores as the named defendant in the lawsuit. At the conclusion of hearing, the court ruled that it was "clear there has been some miscommunication" caused by giving Grantor the business card and that Grantor also "made mistakes." Because there was "no information to show that Big Lots, Inc. the parent, Big Lots Stores, much less PNS had actual notice that a lawsuit had been filed," the court continued the hearing to allow the parties to engage in discovery.

Grantor took the depositions of Marc Amos, the attorney representing BLSI and PNS Stores, and CSC employee Gachaiya.

Amos testified that BLI is a holding company which does not do business in Washington and is not registered with the Washington Secretary of State.[2] Amos stated that BLSI operates retail stores in multiple states, including Washington, but that the

[2] Amos testified, in pertinent part:

[BLI] is a holding company only. It does not operate any retail stores or businesses. It does not employ any employees; rather it maintains only a Board of Directors which function only in the State of Ohio. Big Lots, Inc. does not do business within the State of Washington.

Burien Big Lots store is operated by PNS Stores. Amos testified that "PNS, a non party to this action, at all times relevant to this matter, **was** the entity that leased, maintained, operated and controlled the retail store in Burien, Washington referenced in Plaintiff's complaint."[3]

Amos testified about the instructions given to CSC:

> [T]he instructions to CSC regarding service on Big Lots Stores, Inc., and PNS Stores, Inc., in effect in 2010 were to accept service on behalf of Big Lots Stores, Inc., to accept service on behalf of PNS Stores, Inc., and to reject service on parties that are not properly named.

Amos also confirmed that BLSI did not receive notice of the lawsuit Grantor filed against BLI.

At the conclusion of the second hearing, the court granted the motion to vacate the ex parte order of default and the default judgments, and ordered the case set for trial. The court also ordered BLSI to pay $10,000 "for attorney fees incurred in relation to the default judgment," and revised the caption to name BLSI and PNS as defendants.

The court entered findings of fact and conclusions of law. The court found both parties had made mistakes and that BLSI, not BLI, had responded to Grantor's initial communications about her claims. The court also found that BLSI "did not learn about the commencement of this action from its registered agent and did not appear." The findings state, in pertinent part:

> 1. Mistakes were made by all parties from the commencement of the claim through the entry of the order of default and default judgment.
>
> . . . .
>
> 3. When plaintiffs contacted Big Lots, Inc., Big Lots Stores, Inc. responded and thereafter communicated with plaintiffs about their claims.
>
> 4. On March 1, 2010, plaintiffs personally served the registered agent in Washington for Big Lots Stores, Inc. and PNS Stores, Inc. with

[3] (Emphasis in original.)

> the summons and complaint in this action, the caption of which identified only Big Lots, Inc. as the defendant.
>
> . . . .
>
> 6. Because of Big Lots Stores, Inc.'s instruction [to CSC], it did not learn about the commencement of this action from its registered agent and did not appear. . . .
>
> . . . .
>
> 8. Big Lots Stores, Inc. was diligent in moving to vacate the orders of default and default judgment promptly after learning about the entry of default judgment.

The court concluded that Grantor's service upon the registered agent for BLSI was effective "notwithstanding the misnomer in the caption," but that "[n]either Big Lots, Inc. nor Big Lots Stores, Inc. had actual notice of the commencement of this suit" because CSC was not the registered agent for BLI, and BLSI had instructed its registered agent to only notify it of service if the lawsuit named BLSI as a party. The court also concluded BLI and BSLI established excusable neglect under CR 60(b).

ANALYSIS

Grantor contends the court erred in granting the motion to vacate the order of default and the default judgments against BLSI for $250,000.

We review a trial court's decision vacating a default judgment for an abuse of discretion. Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). "An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court." Little, 160 Wn.2d at 710 (citing Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)). "Abuse of discretion is less likely to be found if the default judgment is set aside." Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). We review a trial court's factual findings for substantial evidence. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded

person the premise is true. Sunnyside, 149 Wn.2d at 879. Unchallenged findings are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Default judgments are disfavored in Washington. Griggs, 92 Wn.2d at 581. Courts prefer to determine cases on their merit rather than by default. Griggs, 92 Wn.2d at 581. "A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles." Griggs, 92 Wn.2d at 581. In reviewing a motion to vacate a default judgment, the court's principle inquiry should be whether the default judgment is just and equitable. Little, 160 Wn.2d at 710-11. "This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity." Little, 160 Wn.2d at 704. The trial court may exercise its discretion "liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." White v. Holm, 73 Wn.2d 348, 351, 438 P.2d 581 (1968).

We engage in a fact-specific inquiry to determine whether or not justice is being done. Griggs, 92 Wn.2d at 582. Because we do not favor default judgments, we are less likely to find that the trial court based its decision on untenable grounds when the court vacated the default judgment than when it did not. Griggs, 92 Wn.2d at 582.

A motion to vacate a default judgment is governed by CR 55 and CR 60. Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). CR 55(c)(1) provides that a court may set aside an order of default for good cause and upon terms the court deems just. If a default judgment has been entered, the court may set it aside under CR 60(b). CR 60(b) sets out the specific grounds that warrant setting aside a default judgment,

including "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CR 60(b)(1). The moving party bears the burden of proof. Little, 160 Wn.2d at 704-05.

To vacate a default judgment, a moving party must demonstrate that (1) there is substantial evidence to support a prima facie defense; (2) the failure to timely appear and answer 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) the opposing party will not suffer a substantial hardship if the trial court vacates the default judgment. White, 73 Wn.2d at 352. The first two factors above are "primary," and the latter two are "secondary." Little, 160 Wn.2d at 704. We view the evidence in the light most favorable to the moving party when deciding whether there is substantial evidence of a prima facie defense. Pfaff v. State Farm Mut. Auto. Ins. Co., 103 Wn. App. 829, 835, 14 P.3d 837 (2000).

Grantor argues that the court's finding that notwithstanding the misnomers in the caption, service on CSC as the registered agent for BLSI was effective, contradicts the conclusion that BLSI did not have notice of the lawsuit. Grantor contends the trial court erred in concluding that neither BLI nor BLSI had "actual notice" of the lawsuit, citing the statute that states the corporation's registered agent is the corporation's agent for service of process. RCW 23B.05.040(1). But the record clearly establishes that BLI and BLSI did not have actual notice of the lawsuit. Grantor ignores the unchallenged finding that BLSI expressly instructed the registered agent CSC to not accept service or notify BLSI of a lawsuit that did not name BLSI as a party.

Grantor also relies heavily on Entranco Engineers v. Envirodyne, Inc., 34 Wn. App. 503, 662 P.2d 73 (1983), to argue service was effective. In Entranco, the summons and complaint named a parent corporation but served the subsidiary at its headquarters. Entranco, 34 Wn. App. at 504. The complaint described only the activities of the subsidiary and not those of the parent corporation. Entranco, 34 Wn. App. at 504. The plaintiff obtained a default judgment against the parent corporation. Entranco, 34 Wn. App. at 505. The trial court granted the parent company's motion to vacate the default judgment for lack of personal jurisdiction, and denied the motion to amend to substitute the subsidiary for the parent corporation. Entranco, 34 Wn. App. at 505.

On appeal, we affirmed the decision to vacate the default judgment against the parent company for lack of jurisdiction. Entranco, 34 Wn. App. at 506. But we concluded the court erred in denying the motion to amend the default judgment to name the subsidiary because the allegations in the complaint were specific enough to give the subsidiary notice that the parent company "could not reasonably have been understood to be the intended defendant because [the parent company] never transacted business in Washington." Entranco, 34 Wn. App. at 506.

Here, the undisputed findings establish that neither BLI nor BLSI received notice of the lawsuit. And unlike in Entranco, the allegations in the complaint make no reference to BLSI or PNS. While the complaint identifies the Burien store, the only entity named in the complaint is BLI. There is no dispute that BLI does not do business in Washington and CSC was not the registered agent for BLI.

Grantor also contends BLSI did not present evidence of a defense or excusable neglect. In determining whether the defendant presented substantial evidence of a prima facie defense, the court "view[s] 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 Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 203, 165 P.3d 1271 (2007).

Where the moving party demonstrates a strong or "virtually conclusive" defense, the court spends "scant time" looking into the reasons for default, as long as the moving party timely applies to vacate and did not willfully fail to appear. White, 73 Wn.2d at 352. If the moving party can only "demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits," the court scrutinizes the remaining three factors with greater care. White, 73 Wn.2d at 352-53.

Substantial evidence does not support the finding that BLSI presented no evidence of a prima facie defense. But the error had no effect on the court's ultimate conclusion that vacating the default judgment was warranted. Ritter v. Bd. of Registration for Prof'l Eng'rs & Land Surveyors, 161 Wn. App. 758, 762 n.1, 255 P.3d 799 (2011) ("An erroneous finding of fact that does not materially affect conclusions of law is not prejudicial.")

Viewed in the light most favorable to BLSI, the record establishes BLSI had a strong defense. A landowner owes a duty of care in a premises liability case. Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). BLSI presented evidence that it was not liable to Grantor.

The undisputed evidence established that BLSI did not own or operate the Burien Big Lots store. BLSI attorney Amos testified that "PNS – not BLSI – conducted business and sold goods and services at the Burien, Washington store" and that "BLSI has not conducted business, or sold goods or services at the Burien, Washington location."[4] Viewing the evidence in the light most favorable to BLSI, the record shows evidence of a strong defense.[5]

Grantor claims the court erred by concluding that "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect." The court concluded that "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent." Grantor contends the "misnomer" in the caption and the instructions to the registered agent do not establish excusable neglect. Grantor asserts the failure of BLSI to appear was willful. The cases Grantor relies on, Little and TMT, do not support her argument and are distinguishable.

In Little, the superior court directed the defendant to file an answer, ruling that failure to file an answer would result in entry of an order of default judgment. Little, 160 Wn.2d 706. On appeal, the court held that the defendant "made the deliberate choice . . . not to prevent default judgment by filing an answer. The decision not to

[4] BLSI also argued that the boxes posed an open and obvious risk. " 'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.' " Ford v. Red Lion Inns, 67 Wn. App. 766, 770-71, 840 P.2d 198 (1992) (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)). The defense attorney presented photocopied photographs of the location of the boxes and argued the photographs would show that the high stack of large boxes presented an obvious danger.

[5] Grantor also relies heavily on the court's statements at the September 16 hearing that BLSI presented no evidence of a defense. Because the court did not incorporate its oral ruling into the findings or conclusions, the court's oral ruling " 'has no final or binding effect.' " Grieco v. Wilson, 144 Wn. App. 865, 872, 184 P.3d 668 (2008) (quoting Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963)).

participate does not meet the standard required" for excusable neglect. Little, 160 Wn.2d 706.

In TMT, the trial court denied the defendant's motion to vacate the default judgment because the defendant did not establish either a strong defense or excusable neglect. TMT, 140 Wn. App. at 199. The defendant PETCO failed to appear or respond to either the initial summons and complaint or the amended complaint. TMT, 140 Wn. App. at 197. According to PETCO, it received the summons and complaint, but its legal assistant did not enter that information into the tracking system and did not notify the general counsel of the lawsuit before leaving for vacation. TMT, 140 Wn. App. at 198. However, a PETCO employee testified that PETCO received the summons and complaint and delivered the documents to the attorney. TMT, 140 Wn. App. at 197 n.2. Further, before entry of the default judgment, TMT called PETCO to notify it "that the company was in danger of default." TMT, 140 Wn. App. at 197 n.2. On appeal, we concluded the court did not abuse its discretion in concluding that PETCO did not establish excusable neglect. TMT, 140 Wn. App. at 212-13.

Here, unlike in TMT and Little, the complaint named BLI and not BLSI, there is no dispute that BLSI did not receive notice of the lawsuit, and the evidence does not show that the instruction to CSC was inappropriate.[6]

[6] The other cases Grantor cites are also distinguishable. In In re the Estate of Stevens, 94 Wn. App. 20, 32, 35, 971 P.2d 58 (1999), and Commercial Courier Service, Inc. v. Miller, 13 Wn. App. 98, 105-06, 533 P.2d 852 (1975), there was no question that the defendants had notice but simply ignored service of process and chose not to appear. See also Johnson v. Cash Store, 116 Wn. App. 833, 848-49, 68 P.3d 1099 (2003) (where defendant established only a prima facie defense and did not explain properly-served store manager's failure to forward complaint, court did not abuse discretion by denying motion to vacate default judgment); Beckman v. Dep't of Social & Health Servs., 102 Wn. App. 687, 696, 11 P.3d 313 (2000) (addressing a late filing of a notice of appeal, not a motion to vacate a default judgment).

Grantor also challenges the finding 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." Substantial evidence supports the finding. While the assistant manager at the Burien Big Lots store gave Grantor a business card with the name and address of BLI, the record shows that before filing the ex parte motion for an order of default against BLI, Grantor's attorney knew that BLSI was the correct defendant. And by June 2011, Grantor knew that PNS Stores was the correct defendant.

It is undisputed that the two secondary factors favor vacating the default. The court's unchallenged finding of fact states that "Big Lots Stores, Inc. was diligent in moving to vacate the orders of default and default judgment promptly after learning about the entry of default judgment." There is no substantial hardship to Grantor. The prospect of trial does not constitute substantial hardship, and the court awarded Grantor the attorney fees incurred in responding to the motion to vacate the default judgments. Pfaff, 103 Wn. App. at 836; Berger v. Dishman Dodge, Inc., 50 Wn. App. 309, 313, 748 P.2d 241 (1987) (where the court orders the defendant to pay the plaintiff's attorneys fees incurred in obtaining the default judgment, there is no hardship).

We conclude the trial court did not abuse its discretion by granting the motion to vacate the order of default and the default judgments.

Cross Appeal

BLSI appeals amendment of the case caption to name BLSI and PNS Stores and the award of attorney fees.

BLSI argues the court erred by amending the caption because PNS Stores was not properly served and because BLSI did not own or operate the Burien store. The

attorney for PNS Stores and BLSI repeatedly asserted that PNS Stores was the operator of the Burien store and stipulated to amend the caption to name PNS Stores. While BSLI may not be properly named as a defendant, BSLI did not object below. We do not consider arguments made for the first time on appeal. RAP 2.5(a); Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007).[7]

BLSI also waived the right to challenge the award of attorney fees. BLSI concedes that it did not object below. Further, while the court expressly told the parties that "if somebody wants to present additional paperwork, if I have grossly exceeded a figure that you think is reasonable[,] you can provide the paperwork to me," BLSI did not do so.

Because the court did not abuse its discretion by granting the motion to vacate the order of default and default judgments, we affirm.

WE CONCUR:

[7] BLSI is not precluded from filing a motion to amend the caption.

APPENDIX

B

Hon. Carol A. Schapira

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARCY GRANTOR, an individual, individually and as Guardian ad Litem for Malia Grantor, a minor. Plaintiffs, vs. BIG LOTS STORES, INC, an Ohio corporation, and PNS STORES, INC., a California corporation, Defendants.	NO. 10-2-08519-0 SEA **ORDER GRANTING MOTION TO VACATE ORDER OF DEFAULT AND DEFAULT JUDGMENT**

THIS MATTER having come on before the undersigned judge of the above-entitled court on Big Lots Stores, Inc.'s Motion to Vacate Order of Default and Default Judgment, and the court having heard argument of the parties on July 22, 2011 and September 16, 2011, and having considered the pleadings and other records on file in this matter, including:

1. Big Lots Stores, Inc.'s Motion to Vacate Order of Default and Default Judgment;

2. Declaration of Tamara K. Nelson in Support of Motion to Vacate Default and Default Judgment, with exhibits;

3. Declaration of Marc Amos in Support of Motion to Vacate Default and Default Judgment;

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4. Declaration of Andrew Gachaiya in Support of Motion to Vacate Default and Default Judgment, with exhibits;

5. Plaintiffs' Opposition to Motion to Vacate Order of Default and Default Judgment;

6. Declaration of Gregory C. Schwartz in Opposition to Motion to Vacate Default and Default Judgment, with exhibits;

7. Big Lots Stores, Inc.'s Reply in Support of Motion to Vacate Order of Default and Default Judgment and Subjoined Declaration of Tamara K. Nelson, with exhibits;

8. Plaintiffs' Supplemental Opposition to Motion to Vacate Default and Default Judgment;

9. Declaration of George E. Nervik, with exhibits;

10. Supplemental Declaration of Gregory C. Schwartz in Opposition to Motion to Vacate Default and Default Judgment, with exhibits;

11. Big Lots Stores, Inc.' Supplemental Briefing on Motion to Vacate Order of Default and Default Judgment;

12. Supplemental Declaration of Tamara K. Nelson in Support of Motion to Vacate Default and Default Judgment, with exhibits, and;

13. Supplemental Declaration of Marc Amos in Support of Motion to Vacate Default and Default Judgment;

and being fully advised in the premises, the Court hereby makes the following Findings of Fact and Conclusions of Law:

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FINDINGS OF FACT:

1. Mistakes were made by all parties from the commencement of the claim through the entry of the order of default and default judgment.

2. On the day of the incident giving rise to this action, plaintiffs were given a card identifying Big Lots, Inc. as the corporate entity to contact about their claims.

3. When plaintiffs contacted Big Lots, Inc., Big Lots Stores, Inc. responded and thereafter communicated with plaintiffs about their claims.

4. On March 1, 2010, plaintiffs personally served the registered agent in Washington for Big Lots Stores, Inc. and PNS Stores, Inc. with the summons and complaint in this action, the caption of which identified only Big Lots, Inc. as the defendant.

5. Prior to March 1, 2010, Big Lots Stores, Inc. had instructed its registered agent not to notify it of service where there was any variation in its name.

6. Because of Big Lots Stores, Inc.'s instruction, it did not learn about the commencement of this action from its registered agent and did not appear. Big Lots, Inc. likewise did not learn about the commencement of this action from the registered agent.

7. An Order of Default and Default Judgment were entered against Big Lots Stores, Inc., who was not identified as a defendant in the caption.

8. Big Lots Stores, Inc. was diligent in moving to vacate the orders of default and default judgment promptly after learning about the entry of default judgment.

9. Big Lots Stores, Inc. has not submitted or identified any evidence supporting a prima facie defense to plaintiffs' claims. although potential defenses were identified.

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CONCLUSIONS OF LAW

1. Default judgments are not favored under Washington law.

2. Plaintiffs' service upon Big Lots Stores, Inc.'s registered agent was effective notwithstanding the misnomer in the caption.

3. Neither Big Lots, Inc. nor Big Lots, Stores, Inc. had actual notice of the commencement of this suit.

4. Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent.

5. Plaintiffs incurred attorney fees in relation to the default judgment, including in connection with this motion.

Based on the foregoing, the Court **HEREBY ORDERS THAT**:

A. The following orders and judgments are vacated:

- Ex Parte Order of Default Against Defendant Big Lots, Inc, on January 27, 2011;
- Default Judgment Against Defendant Big Lots, entered February 28, 2011;
- Judgment for Marci Grantor, entered February 28, 2011; and
- Judgment for Malia Grantor, entered February 28, 2011.

B. The matter shall be reinstated, and returned to the trial calendar.

C. Within 14 calendar days of entry of this order, Big Lots Stores, Inc. shall pay plaintiffs $10,000 for attorney fees incurred in relation to the default judgment.

D. The caption in this action is hereby revised in the form stated above in the caption of this order.

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IT IS SO ORDERED

DATED this 13th day of October, 2011.

Hon. Carol A. Schapira

Presented by:
ROHDE & VAN KAMPEN PLLC

Gregory G. Schwartz, WSBA No. 35921
Attorneys for Plaintiffs

DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury under the laws of the State of Washington, that on this day, he caused a true and correct copy of the foregoing to be served via email on the following:

Andrew C. Gauen
agauen@mhlseattle.com
Tamara K. Nelson
tnelson@mhlseattle.com
Merrick Hofstedt & Lindsey, P.S.
3101 Western Ave. Suite 200,
Seattle, WA 98121

Signed at Seattle, Washington on this 12th day of October, 2011.

Gregory G. Schwartz

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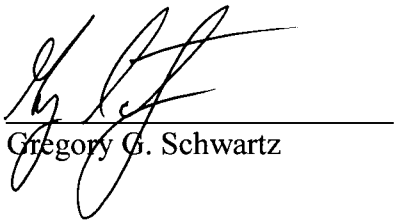
Seattle, Washington 98154-1000
(206) 386-7353

DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury under the laws of the State of Washington, that on this day, he caused a true and correct copy of the foregoing to be served via email upon the following counsel of record:

Andrew C. Gauen
agauen@mhlseattle.com
Tamara K. Nelson
tnelson@mhlseattle.com
Merrick Hofstedt & Lindsey, P.S.
3101 Western Ave. Suite 200

Signed at Seattle, Washington on this 16th day of October, 2013.



Gregory G. Schwartz