IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 22-0094

LOYD FRANKLIN RANSOM, JR.,

PETITIONER,

VERSUS

GUARDIAN REHABILITATION SERVICES, INC., AND GUARDIAN ELDER CARE AT FAIRMONT, LLC,

RESPONDENTS.

APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF MARION COUNTY, CASE NO. CC-24-2019-C-93

PETITIONER'S REPLY BRIEF WITH RESPONSE TO CROSS-ASSIGNMENTS OF ERROR

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I. Introduction

1. Respondents' Opening Brief and Cross-Assignments of Error ("Respondents' Brief"), because of the cross-assignments of error, extended the deadline for this Reply from July 14, 2022 (*see* Scheduling Order) to July 25, 2022 (*see* W. Va. R. App. P. 10(g) (where respondents assert a cross-assignment of error, "time for filing a reply brief is automatically extended, without need for further order, until thirty days after the date the respondents' brief containing cross-assignments of error was filed"). Respondents filed their brief (with the assignments of error) on June 23, 2022.

2. This Reply is organized as follows:

a. Section II below ("Reply to Respondents' Opening Brief") is Petitioner's ("Mr. Ransom's") replies to the portion of Respondents' Brief that addresses Petitioner's Assignments of Error (Respondents' Brief at 1-24).

b. Section III below ("III. Response to Respondents' Cross-Assignments of Error") replies to the portion of Respondents' Brief that asserts for the first time their single cross-assignment of error (Respondents' Brief at 24-27).

II. Reply to Respondents' Opening Brief

3. Petitioner generally stands by his opening brief, and here has a small number of responses.

4. Typographical error in Petitioner's opening brief: In paragraph 119, page 33, in the Conclusion section, "default" should have been "summary". The undersigned counsel apologizes for the mistake. The relief sought by Mr. Ransom was properly stated in ¶ 8 on page 4 ("Relief Sought").

5. Respondents falsely assert that Mr. Ransom filed a "sham affidavit" to respond to their motion for summary judgment. Mr. Ransom's summary judgment affidavit is entirely consistent with his deposition testimony. The fact is that Respondents' counsel didn't ask Mr. Ransom follow-up question on a number of topics (such as on Mr. Ransom, after his termination, recreating the position of his rifle in his car, and he was not able to see the rifle at all from the outside of his car). Mr. Ransom's summary judgment affidavit simply provided additional details that were not asked about in his deposition.

6. For example: Mr. Ransom testified at his deposition that he had situated the rifle in his car on the floorboard, covered, with bullets and magazine removed, with the stock collapsed, at an angle to the seat (A.R. 41), and that someone "should not have been able to see" it "unless they had their face up against the window and were looking in" (A.R. 41, Respondents' Brief at 5). The important thing is that Mr. Ransom described covering the entire rifle, collapsing it, and

putting it on the floorboard leaning against the seat, all making it hidden from view. He then said he later, after he was fired, recreated the position of the rifle in his car, and attempted to take pictures with different light at different times, and "I could not see it at all" (A.R. 41).

7. Mr. Ransom then acknowledged it was "possible" that the laptop cover covering the barrel (front) of the rifle "might have slid off" (A.R. 42; Respondents' Brief at 5). Mr. Ransom was not asked further about whether that was anything more than a probability. That is all the more striking because Mr. Ransom, as discussed above, testified at his deposition that he hid the rifle well enough that he didn't think someone couldn't see it unless they pressed their face against the window, and that he recreated the location of the rifle in his car after his termination, and experimenting in different light conditions, he couldn't see the rifle at all (A.R. 41). Mr. Ransom's affidavit elaborates on those facts, whereas counsel at Mr. Ransom's deposition didn't similarly ask him to explain the situation in any more detail.

8. Respondents quote a passage from pages 39-40 of Mr. Ransom's deposition (A.R. 42) where the question is why Mr. Ransom didn't put the rifle in his truck or under the seat (Respondents' Brief at 5-6). Mr. Ransom responded that he wasn't thinking about that, and he was in a hurry to get to work early. His concluding statement in the quotation, that he "would have probably repositioned" his rifle, is in response to the question about putting the rifle in the trunk. But Mr. Ransom had already explained that he hid the rifle by collapsing the stock, covering it with two different covers (jacket and computer case), and positioned it on the floorboard so it was out of sight (and he couldn't see the rifle when he relocated the scene after his termination). In that context, Mr. Ransom was saying (to paraphrase): I hid the rifle with two covers and by positioning it on the floorboard; I didn't think about putting it in the trunk because I was in a hurry to get to work early, and if I had had the time to think about it more carefully, I would have put it in the

trunk. But the fact that there could have been an even better way to hide the rifle doesn't change the fact that Mr. Ransom in fact hid the rifle so it was "out of view", such that he testified at deposition that he couldn't see the rifle at all when he recreated the scene later, and he thought the rifle was hidden well enough that someone would have to have their face pressed against his car window to see it (A.R. 41).

9. The evidence of who claimed to have seen the rifle and how, is remarkably thin. The first part consists solely of Respondents' unverified interrogatory answer (A.R. 225/19-226/12; Petitioner's Brief at 27, para. 94-96). That unverified interrogatory answer was inadmissible hearsay and procedurally defective, and is not admissible summary judgment evidence (Petitioner's Brief at 28, para. 97-98). The lawyer's interrogatory answer asserts, as an unsupported conclusion, that the rifle was in "open view", but there is no foundational evidence to explain the facts and circumstances under which the employee claimed to have seen the firearm. The attorneys' conclusion in the unverified interrogatory answer is simply no evidence of what the employee claimed to have seen and how. The only other evidence is discussed at Respondents' Brief at 6, where Mr. Ransom was told by management, when he was fired, that someone had reported to management that the unnamed person saw his rifle in his care (Respondents' Brief at 6). In fact, Mr. Ransom testified that no one during the termination meeting told him the rifle was in "open view", only that he was told someone reported to management having seen the rifle (A.R. 42; Respondents' Brief at 6).

10. Petitioner respectfully submits that he has adequately addressed the legal issues in his opening brief.

III. Response to Respondents' Cross-Assignment of Error

A. Statement of the Case (for Respondents' Cross-Assignment)

11. This lawsuit, from which this appeal is taken, was filed for the Plaintiff, named "Franklin L. Ransom," which is the name he "goes by" (in other words, it is the name he commonly uses). His full legal name, with which he is identified in the two notices of appeal he has filed, is Loyd Franklin Ransom, Jr.

12. As Mr. Ransom testified in his deposition, he commonly goes by "Frank Ransom" (with Frank being short for Franklin), but his full and correct names is Loyd Franklin Ransom, Jr. (A.R. 237, ¶¶ 7-8 (motion to correct name); 238 (motion to correct name), ¶ 13; 249/19-24 (Ransom deposition); A.R. 270, ¶ 2(d) (order granting motion to correct name); 114, ¶ 32 (Ransom affidavit for opposition to defendants' motion for summary judgment). Not only does Mr. Ransom commonly go by "Frank Ransom," some of the documents produced in this lawsuit identify him as either Frank Ransom or Franklin Ransom. Mr. Ransom had overlooked the fact that the lawsuit was styled as being filed by "Franklin L. Ransom."

13. In July 2021, Mr. Franklin brought to the attention of his undesigned counsel his correct name. That full, correct name is Loyd Franklin Ransom, Jr. (A.R. 237).[1]

14. In August 2021, Plaintiff began styling this case in filed documents with the Plaintiff's correct name "Loyd Franklin Ransom, Jr" (A.R. 237).

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[1] This is the explanation the undersigned attorney provided to the Trial Court as to why undersigned attorney did not promptly file a motion to correct Mr. Ransom's name: "When Mr. Ransom notified me of his correct name in July 2021, I had a series of events which I hope explain to some extent why I did not do what I should have done, which was to motion this Court to formally correct Mr. Ransom's name. I was in Chicago for a week with my 16-year old daughter at the national karate competition. Then my daughter was in a significant car wreck in which she suffered hip and head injuries, and she was then diagnosed with a concussion. Then her dear childhood friend, age 14 and our next-door neighbor died tragically, and my daughter saw him taken out of our neighbor's house in a body bag. Those latter two events involving my daughter were extremely disruptive in the following weeks" (A.R. 240).

15. Beyond the style of the documents filed by Plaintiff, the correct name of Plaintiff was disclosed to Defendants in other ways.

16. On September 16, 2021, Plaintiff filed "Mr. Ransom's Amended Opposition to Defendant's Motion for Summary Judgment", which attached as Exhibit A the "Affidavit of Loyd Franklin Ransom, Jr.", signed by Mr. Ransom and notarized.

a. At paragraph 32, page 12, of Mr. Ransom's affidavit: Mr. Ransom testified: "My correct name is Loyd Franklin Ransom, Jr. In documents that were earlier filed in my lawsuit, my name was incorrectly stated as Franklin L. Ransom. I am the same earlier named as person, "Franklin L. Ransom." My lawyer filed this lawsuit on my behalf, and the complaint for that lawsuit incorrectly stated my name as Franklin L. Ransom." Plaintiff signed the Affidavit as "Loyd Franklin Ransom, Jr." (A.R. ¶ 32 (Ransom affidavit for opposition to defendants' motion for summary judgment)).

b. The same opposition and affidavit were also filed on September 15, 2021, but without the signature for Mr. Ransom's affidavit. Otherwise, the two filings (Opposition and Amended Opposition) were identical (A.R. 86, with affidavit attached)

17. On July 16, 2021, the Defendants deposed Mr. Franklin in this lawsuit, and at page 7, lines 19-24: Mr. Ransom was asked: "Mr. Ransom, for the record, could you please state your full legal name." Mr. Ransom testified: "Loyd Franklin Ransom, Jr." The next question was: "Is it accurate, Mr. Ransom, that you go by Frank?" Mr. Ransom testified: "Yes" (A.R. ¶ 32 (Ransom affidavit for opposition to defendants' motion for summary judgment)) Defendants attached excerpts from Mr. Ransom's deposition transcript to their "Memorandum of Law in Support of Motion for Summary Judgment," filed in this lawsuit on August 13, 2021 (A.R. 30).

18. The Trial Court on October 8, 2021, issued "Order Granting Defendants' Motion for Summary Judgment and Dismissing Case from Docket" ("Summary Judgment Order"), and the Plaintiff in the style of the case was stated as "Frank L. Ransom" (A.R. 205).

19. On November 5, 2021, Plaintiff in this lawsuit timely filed "Plaintiff's Notice of Appeal", and the Plaintiff's name in the notice of appeal was "Loyd Franklin Ransom, Jr.," which is the full legal name of the Plaintiff below, Mr. Ransom. The appeal case number was 21-0911,

20. Ms. Gaiser, The Clerk of Court for this Court, noticed the difference in the Plaintiff's name between the name on the Summary Judgment Order ("Franklin L. Ransom") and the name of the Petitioner in the Notice of Appeal ("Loyd Franklin Ransom, Jr."), and told Plaintiff's counsel, in a phone call on Thursday, December 2, 2021, to obtain an Order from this Court correcting Plaintiff's name in this Court's file, to harmonize the Plaintiff's name at both levels (A.R. 237, ¶¶ 4-5 (motion to correct name); 262/15-263/12 (hearing on motion to correct name).

21. On Monday, December 6, 2021, the Clerk of Court for this Court issued an order (A.R. 254) stating that, because of the difference in names, "an appeal will not be docketed". Based on phone calls with the Clerk of Court, Ms. Gaiser, on December 2 and 8, the undersigned attorney mistakenly understood that Order was entered while this Court was on vacation to *delay the docketing of the appeal until a corrective order was obtained* from this Court on the Plaintiff's name (A.R. 254). But in a subsequent conversation with Mr. Gaiser, the undersigned attorney was informed that the order constituted a dismissal of the appeal (A.R. 237, ¶¶ 4-5 (motion to correct name); 262/15-263/12 (hearing on motion to correct name)).

22. The summary judgment affidavit discussed above, the deposition testimony discussed above, and the Plaintiff's court filings starting in August 2021, all make it clear that the names, "Franklin L. Ransom" (as this lawsuit was originally filed) and Loyd Franklin Ransom, Jr. (as the Notice of Appeal was styled), are the same person, with the correct name being Loyd Franklin Ransom, Jr. (A.R. ¶ 32 (Ransom affidavit for opposition to defendants' motion for

summary judgment)) Defendants attached excerpts from Mr. Ransom's deposition transcript to their "Memorandum of Law in Support of Motion for Summary Judgment," filed in this lawsuit on August 13, 2021 (A.R. 30).

23. The Trial Court ruled that it had the authority to modify the judgment, and enter a new judgment, under both W. Va. R. Civ. P. 60(a) and 60(b). The Trial Court said in its order granting Mr. Ransom's motion to correct his name:

> a. Under W. VA. R. CIV. P. 60(b), this Court has the authority to issue a *nunc pro tunc* ("now for then") order to correct the name of the Plaintiff, and has the authority to modify or amend the summary judgment order to correct the Plaintiff's name. The Court holds that the discrepancy in the Plaintiff's name in the filed documents is a result of inadvertent mistake for which good cause and just cause exist to (a) correct the name of the Plaintiff both in the Circuit Clerk's file in this case and (b) specifically to correct the name in the Summary Judgment Order. The Court holds that Plaintiff's request for this relief has been filed within the 1 year after date of judgment as required by Rule 60(b). The Court further holds that the corrections implemented in this order are just under Rule 60(b).
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> b. Under W. VA. R. CIV. P. 60(a), this Court has the authority, either on its own volition or motion from a party, to correct a "clerical mistake" and errors arising from "oversight or omission", and such corrective action can be taken at any time. Rule 60(a) provides that such mistakes may be made "[d]uring the pendency of an appeal", and that such mistakes may be corrected before the appeal is docketed, and that such correction before the appeal is docketed does not require leave of the Supreme Court. The Court holds that the corrections requested by Plaintiff are permitted by Rule 60(a) as "clerical mistakes" and errors arising from "oversight or omission."

Rule 60 Order Correcting Name of Plaintiff (A.R. 269 at 2-3, ¶ 3(a) & (b)).

24. The Trial Court therefore granted Mr. Ransom's motion (A.R. 256, ¶ 3(c)), and stated that it was going to enter a new summary judgment order, with the intend that that new order would constitute a final, appealable judgment:

> This Court shall, simultaneous to this Order, sign anew and issue an amended version of its Summary Judgment Order entered on October 8, 2021, "Order Granting Defendants' Motion for Summary Judgment and Dismissing Case from Docket", whereby the only changes shall be that (a) the name of the Plaintiff in the style of the Order shall be changed from "Franklin L. Ransom" to "Loyd Franklin Ransom, Jr." to conform to the correction of Mr. Ransom's

> name as ordered herein, and (b) the signature date shall be change to reflect the date on which the Amended Order is signed by the Court. *This new Amended Order is intended to and shall constitute a final appealable decision.*

(A.R. 269 (January 3, 2022) (emphasis added)). The Trial Court also held that the Plaintiff below, and the Petitioner in Mr. Ransom's first notice of appeal (22-0094), were the same person, and directed the Circuit Clerk to appropriately change the file (A.R 274). An important part of the holding quoted above is that the amended summary judgment order (which was entered on January 10, 2022) was "intended to and shall constitute a final appealable decision" (A.R. 271, ¶ 3(e)).

25. The Trial Court then on January 10, 2022, entered the Amended Order Granting Defendants' Motion for Summary Judgment and Dismissing Case from Docket (A.R. 282), making no changes to its prior order other than correcting the plaintiff's name, from Franklin L. Ransom to Loyd Franklin Ransom, Jr (A.R. 282).

26. After Petitioner filed his first notice of appeal on November 6, 2021 (21-0911), the Clerk of this Court entered an Order on December 6, 2021, mistakenly stating that the Petition was not a party to the Circuit Court proceeding, and the stating: "Therefore, an appeal will not be docketed in this matter". *That order did not say the appeal was dismissed.* However, as is discussed above, the Clerk of this Court, Ms. Gaiser, informed the undersigned counsel in a phone call that the order (A.R. 254) constituted a dismissal (A.R. 263/3-12). At the hearing on Petitioner's motion to the trial court to correct his name (A.R. 236), the undersigned counsel discussed the series of phone calls he had with Ms. Gaiser:

> I originally filed the motion I had a bit of a misunderstanding in my discussions with Ms. Gaiser, the Clerk of Court at the West Virginia Supreme Court. I had a series of three conversations with her from December 2 to December 16, I think. And the second one was through a friend because I was actually quite ill. I had trouble talking at the time. But from the third conversation I had it was clear that she was not allowing the appeal to pend any longer, that the effect of her order was to dismiss the appeal.

(A.R. 262/15-23). The Trial Court then stated that this Court's order (A.R. 254) "says that it will not be docketed; it didn't say it was dismissed" (A.R. 263/1-2). The undersigned counsel responded to the Trial Court:

> Well, that's the issue that I raised with her [Ms. Gaiser], Your Honor, and she told me that it was dismissed. And that reinforced the idea that the relief that I'm requesting, that I needed by the Supreme Court's position, and the relief that literally she [Ms. Gaiser] is telling me to go to the trial court to get, is not only an order correcting the trial court record with the name of the plaintiff and correcting Nunc pro Tunc or after the fact the name that appears in the summary judgment order, but she wants a new summary judgment order, and that was why I filed this second on December 16, December amended order [second order granting the motion to correct Mr. Ransom's name], Your Honor.[2]

(A.R. 263/3-12).

27. But ultimately, this Court's order of December 6, 2021 (A.R. 254) did *not* say Petitioner's first appeal was dismissed. The best way to view this situation is that, when Petitioner

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[2] I (undersigned counsel) spoke with Ms. Gaiser twice, and a third time through an attorney friend, Lonnie Simmons (because I was ill). On Thursday, December 2, 2021, I spoke with Mr. Gaiser, she explained the problem with the difference in how Mr. Ransom was named in the appeal (compared to the trial court documents), and she said I needed to obtain what she thought would likely be an agreed order from the trial court to correct Mr. Ransom's name and either *nunc pro tunc* correct the summary judgment order or issue a new summary judgment order. I was ill and was delayed in addressing the issues. On Monday, December 6, 2021, this Court issued the order refusing to docket the appeal (A.R. 254). I received the order on December 8, and was quite ill (flu, aggravated by asthma and acid reflux) and was having a great deal of difficulty talking because of constant coughing. I first called my friend Lonnie Simmons, to talk to him about the order (Mr. Simmons is an attorney with extensive appellate experience). Mr. Simmons could tell that I was ill and was having trouble talking, so he volunteered to call Ms. Gaiser on my behalf. Mr. Simmons then called Ms. Gaiser on December 8, spoke to her, and called me afterwards. With what Mr. Simmons explained, I still understood that the order was not a dismissal, and that I needed to proceed with obtaining an order from the trial court correcting Mr. Ransom's name. After learning that Defendants opposed a motion to correct Mr. Ransom's name, I filed on December 9 the motion to correct his name (A.R. 236), with a proposed order (not in the appendix). I then called Ms. Gaiser again on December 13 about the status of the motion, and she clarified to me that the December 6 order constituted a dismissal.

The reference to the "second" or "amended order" at the hearing (in the body text above) was this: When I filed the motion to correct name on December 9 (A.R. 236), I understood the December 6 order not to be a dismissal order. After my conversation with Ms. Gaiser on December 13, when she clarified that it was a dismissal order, I submitted a "second" or "amended" order granting the motion to correct name, with one of the few differences being that the trial court would issue a new, amended summary judgment order with the corrected name.

filed his *second* notice of appeal on February 3, 2022 (22-0094), it should be treated as a *continuation* of his original appeal. To the extent that a formal consolidation of the appeals is required, Petitioner formally requests such consolidation, and is filing a motion today to request that relief. But the reality is that requiring consolidation puts form over substance. This is the situation:

a. Petitioner filed his firm notice of appeal on November 6, 2021, docketed as 21-0911. As the Trial Court later found, the Plaintiff below is the same person as the Petitioner in the first notice of appeal. The appeal was in the legal name of the Petitioner, Loyd Franklin Ransom, Jr., whereas the style of the Trial Court proceeding was in the name of that Mr. Ransom "goes by", Franklin Ransom (A.R. 237, ¶¶ 7-8 (motion to correct name); 238 (motion to correct name), ¶ 13; 249/19-24 (Ransom deposition); A.R. 270, ¶ 2(d) (order granting motion to correct name); 114, ¶ 32 (Ransom affidavit for opposition to defendants' motion for summary judgment).

b. The Clerk of this Court entered the order dated December 6, 2021 (A.R. 254), refusing to "docket" the appeal, *but it did not say the appeal was dismissed.*

c. In a series of phone calls (December 2 and 8) before and after the December 6, 2021, order (A.R. 254), the undersigned counsel spoke with the Clerk of this Court, Ms. Gaiser, and Ms. Gaiser said the undersigned counsel needed to go back to the Trial Court and get an order correcting the Plaintiff's name and correcting the summary judgment order (A.R. 263/3-12).

d. Petition filed with the Trial Court his motion to correct his name (A.R. 236) and explained to the Trial Court the series of phone calls with Ms. Gaiser (A.R. 263/3-12), and the Trial Court granted the motion to correct Mr. Ransom's name (A.R. 269) and issued an amended order granting summary judgment (A.R. 282).

e. Petitioner then filed a second notice of appeal on February 3, 2022, explaining in Section 10:

    i. the issue of Mr. Ransom's name,

    ii. the first notice of appeal,

    iii. the December 6, 2021, order refusing to docket the first appeal (A.R. 254),

    iv. the conversations between the undersigned counsel and Ms. Gaiser (A.R. 263/3-12),

    v. the motion and order granting Mr. Ransom's motion to correct his name (A.R. 236, 269), and

    vi. the amended summary judgment order with Mr. Ransom's corrected name (A.R. 282).

28. This Court's order of December 6, 2021 (A.R. 254) in fact did not say that Petitioner's initial was dismissed (as the Trial Court observed, A.R. 263/1-2 (the Order "says that it will not be docketed; it didn't say it was dismissed"). The proper interpretation of the December 6, 2021 order and the two notices of appeal by Mr. Ransom, is that the two notices are a continuation of a single appeal, in that the first appeal was never dismissed. Treating the 2 appeals (and notices of appeal) as a single appeal moots the issues raised in Respondents' cross-assignment of error.

29. The fact is that Petitioner *timely* filed his first notice of appeal, *timely* filed his second notice of appeal (after an amended summary judgment order (A.R. 282), and timely filed his opening brief pursuant to this Court's scheduling order. Viewing this as a single appeal (with the first notice of appeal never having been formally dismissed) gives Mr. Ransom his right to appeal without needing to address Respondents' hyper technical arguments over W. Va. R. Civ. 60, what is a "clerical" error, etc.

B. Argument (for Respondents' Cross-Assignment)

1. Standard of Review

30. A Decision under W. Va. R. Civ. P. 60(b) is "within the sound discretion of the circuit court and will not be overturned absent an abuse of that discretion." *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 413–14, 541 S.E.2d 1, 8–9 (2000). It is logical to assume that the standard of review for a decision under W. Va. R. Civ. P. 60(a) is the same.

2. This Court Has the Power, for Independent Reasons, to Conclude Mr. Ransom's Appeal is Timely

31. As is explained above, Mr. Ransom has filed two notices of appeal, where the first notice of appeal was never formally dismissed (A.R. 254). As explained above, Mr. Ransom's second notice of appeal explained (Section 10) the issues relating to the name and the pior notice

of appeal. Mr. Ransom's pending appeal should properly be viewed as a continuation of his first appeal, so that:

a. There is no dispute that Mr. Ransom's notice of appeal was timely filed both as to his first notice and second notice (where the second notice of appeal was for a continuation of the prior appeal).

b. There is no dispute that Mr. Ransom timely filed his petitioner's brief and appendix to timely perfect his appeal under the scheduling order issued in response to his second notice of appeal.

32. Even if this situation is not treated as a single appeal: This court has the "implied or inherent authority" to extend appeal deadlines based on a showing of "good cause". *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 412–13, 541 S.E.2d 1, 7–8 (2000). While requests for such an extension "usually" need to be made "before the fact", 208 W. Va. at 412–13, 541 S.E.2d at 7–8, there was no need to request such relief earlier where the first appeal was held in abeyance by the December 6, 2021 order (A.R. 254), and the Trial Court issued a new, appealable amended summary judgment order (A.R. 269 & 282), and the Respondents did not contest the Trial Court's action until Respondents filed their response brief with a cross-assignment of error on June 23, 202. That response brief from the Respondents first the first time put in issue the propriety of the Trial Court's decisions (A.R. 269 & 282), which created a new, appealable summary judgment decision (A.R. 270 ("This new Amended Order is intended to and shall constitute a final appealable decision.").

33. Out of an abundance of caught in light of the procedural arguments made by Respondents, Mr. Ransom is today filing a separate motion for extension of appeal deadlines and for consolidation of the two appeals (because the first appeal was never dismissed).

3. The Trial Court Did Not Err in Granting Mr. Ransom's Motion to Correct his Name

34. The Trial Court, in granting plaintiff's motion to correct his name, ruled as follows:

a. Under W. VA. R. CIV. P. 60(b), this Court has the authority to issue a *nunc pro tunc* ("now for then") order to correct the name of the Plaintiff and to modify the summary judgment order. The discrepancy in the Plaintiff's name in the filed documents is a result of inadvertent mistake for which good cause and just cause exist to (a) correct the name of the Plaintiff both in the Circuit Clerk's file in this case and (b) specifically to correct the name in the Summary Judgment Order. Plaintiff's request for this relief is filed within the 1 year after date of judgment as required by Rule 60(b). The corrections implemented in this order are just under Rule 60(b).

b. Under W. VA. R. CIV. P. 60(a), this Court has the authority, either on its own volition or motion from a party, to correct a "clerical mistake" and errors arising from "oversight or omission", and such corrective action can be taken at any time. Rule 60(a) provides that such mistakes may be made "[d]uring the pendency of an appeal", and that such mistakes may be corrected before the appeal is docketed, and that such correction before the appeal is docketed does not require leave of the Supreme Court. The corrections requested by Plaintiff are permitted by Rule 60(a), and are "clerical mistakes" and errors arising from "oversight or omission."

35. W. Va. R. Civ. P. 60(a) and (b) state as follows:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This

> rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

36. Respondents argue (Respondents' Brief at 25-26) that the filing of motions under Rules 60(a) and 60(b) do not toll or extend the time periods for filing a notice of appeal and perfecting an appeal. Respondents rely on a federal case applying the comparable federal rule 60(a), and this Court's *Rose* decision on Rule 60(b).

37. There are differences between federal and West Virginia Rules 60. Under West Virginia Rule 60, only Rule 60(b) says a pending motion under it does not affect the finality of the judgment. W. Va. R. Civ. P. 60(b) ("A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."). But that is not the same thing as saying that a motion *granted* under Rule 60(b) may not affect appeal rights and timeframe. In the decision relied upon by Respondents, the defendants' motion to vacate a judgment under Rule 60(b) was *denied. Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 408, 541 S.E.2d 1, 3 (2000). Obviously, there was no subsequent decision which created an appealable event. In the case at bar, the Trial Court *granted* (A.R. 269) Mr. Ransom's motion to correct his name, and issued a new, final, appealable judgment (and issued a new summary judgment decision, with the express intent of creating a new, appealable judgment A.R. 271, ¶ 3(e); 282).

38. Rule 60(b) understandably says that a mere "motion" under it does not extend appeal deadlines, but once the Trial Court grants the motion, that may well affect appeal deadline through, as here, a new, appealable final judgment. Thus, *Rose* does not control, in that, there the trial court denied a motion to vacate a judgment.

39. West Virginia Rule 60(a) does not expressly say that it has no impact on appeal deadlines. But the same principle controls, consistent with the federal case law cited by Respondents concerning the federal rule: the granting of a Rule 60(a) motion may impact the substantive rights of the parties, and therefore might affect the time for appeal. In the case at bar, the Trial Court granted Mr. Ransom's motion (A.R. 236, 269) and expressly issued a new summary judgment decision with the express intent of creating a new, appealable judgment (A.R. 271, ¶ 3(e); 282).

40. In the federal case on Fed. R. Civ. P 60(a) on which Respondents rely, *Cody, Inc. v. Town of Woodbury*, 179 F.3d 52, 56–57 (2d Cir. 1999), the trial court against *denied* a motion to alter the judgment under federal Rule 60(a). The Second Circuit in *Cody* discussed the peculiar issue there, where the trial court *denied* the Rule 60(a) motion but issued an amended judgment solely to extend the appeal time periods. The Court noted that there was no material or substantive change in that amended judgment—it was issued solely to extend the appeal deadline.

41. But Mr. Ransom's circumstances are different. The Trial Court for Mr. Ransom *granted* substantively his motion to correct his name, corrected the record on his name, issued an amended judgment reflecting that important correction, and expressly held that it was creating a new, appealable, final judgment (A.R. 269; 271, ¶ 3(e); 282). The amendment to the judgment was "material" in that it corrected Mr. Ransom's name, the plaintiff. That change was materially beneficial to Defendants because it gave them an order that identified Mr. Ransom correctly and more definitely precluded a further lawsuit or legal claim by the plaintiff—the amendment therefore strengthened defendants' rights to preclude and defend against any new lawsuit.

42. Thus, the Trial Court for Mr. Ransom *granted* his motion to correct his name and to issue a new summary judgment. That decision *granting* Mr. Ransom's *substantive and material*

relief created a new appealable event, and there is no dispute that Mr. Ransom's second notice of appeal (February 3, 2022) was timely under the amended summary judgment (A.R. 282, January 20, 2022)

IV. Conclusion

43. The Circuit Court's order granting summary judgment should be reversed, and this matter should be remanded for further proceedings. Respondents' cross-assignment of error should be rejected and the Trial Court's decision to grant Mr. Ransom's motion to correct his name and to issue an amended summary judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2022, true and accurate copies of the foregoing Petitioner's Reply Brief were faxed and emailed to counsel for all other parties to this appeal as follows:

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