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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANDREW and SIMONE CONCOFF, Plaintiffs and Appellants, v. WILLIAM P. AULL et al., Defendants and Respondents; SOTHEBY'S INTERNATIONAL REALTY, INC. et al., Respondents and Cross-Appellants.	B228490 (Los Angeles County Super. Ct. No. SC094044)

APPEALS from a judgment and post-judgment order of the Superior Court of Los Angeles County, Terry B. Friedman and Richard A. Stone, Judges. The Concoffs' appeal is dismissed; the order awarding attorney fees to Aull is affirmed; and the order under review in the cross-appeal filed by Sotheby's and Montgomery is affirmed.

Hillel Chodos and Jonathan P. Chodos for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup and Caroline E. Chan for Defendant and Respondent William P. Aull.

Manning & Kass, Ellrod, Ramirez, Trester, David I. Gorney and Darin L. Wessel for Respondents and Cross-Appellants.

INTRODUCTION

Dr. Andrew and Simone Concoff purchased a townhome from Dr. William P. Aull, after which, according to the Concoffs' operative second amended complaint in this action, they discovered undisclosed damage from mold and water intrusion. As a result, they sued Aull and his representatives, Sotheby's International Realty and its broker Susan Montgomery. The current appeal and cross-appeal in the action involve a lengthy procedural history, which we summarize below. In short, the result is that: (1) the appeal by the Concoffs from the judgment in favor of Aull following a bench trial is untimely and must be dismissed, (2) the cross-appeal by Sotheby's and Montgomery is properly taken from a post-judgment order affecting their substantial rights, and (3) on the merits the cross-appeal fails.

For clarity's sake, we summarize the history of this case, to be supplemented by additional necessary facts in later portions of our opinion. As against all three defendants, the Concoffs alleged claims for fraud, negligent misrepresentation, and intentional infliction of emotional distress. As against Aull alone, they alleged claims for rescission and breach of contract. Finally, they alleged a claim for negligence. That claim named only Sotheby and Montgomery as defendants in the heading, and specifically alleged that Sotheby's and Montgomery (with no mention of Aull) breached their duty of care in failing to conduct a reasonable inspection of the property. However, the claim also alleged that Aull had a duty to disclose all material facts concerning the property, though, as previously mentioned, it included no allegation of breach by Aull.

The trial court conducted a bench trial on the Concoffs' equitable cause of action for rescission against Aull and Aull's indemnity cross-complaint against Sotheby's and Montgomery. In that trial, the court made factual findings that resolved all of the Concoffs' claims (with the possible exception of the negligence

cause of action) in favor of Aull, Sotheby's, and Montgomery, and resolved Aull's cross-complaint for indemnity in favor of Sotheby's and Montgomery.

Thereafter, on December 30, 2009, the trial court signed a judgment that granted judgment against the Concoffs and in favor of Aull, Sotheby's, and Montgomery on all claims and awarded them costs. Aull served notice of entry of judgment on January 11, 2010. Aull, Sotheby's, and Montgomery filed costs memoranda, and Aull moved for attorney fees. The Concoffs did not file a notice of appeal from the judgment.

In the meantime, the judge who had tried the case retired and a different judge was assigned. In opposing Aull's motion for attorney fees before the newly assigned judge, the Concoffs argued that the motion was premature, contending (for the first time) that Aull was a defendant in the negligence claim and that the December 2009 judgment did not dispose of that claim against him. Following briefing and a hearing, the trial court (the newly assigned judge) issued an order on October 21, 2010, concluding that: (1) Aull's motion for attorney fees was not premature, because Aull was not a defendant in the cause of action for negligence, and the December 2009 judgment disposed of all claims against him; (2) the judgment contained a clerical error as to Sotheby's and Montgomery, because it was not intended to dispose of the negligence claim against them; (3) the clerical error must be corrected by deleting the language that granted full judgment in favor of Sotheby's and Montgomery; and (4) this correction did not modify the previously entered judgment in favor of Aull.

Having not appealed from the December 2009 judgment in favor of Aull, the Concoffs filed a notice of appeal from the October 2010 order. That purported appeal, which is now before us, seeks to raise a variety of issues covered by the December 2009 judgment. We conclude that the notice of appeal from the October 2010 order is ineffectual to challenge the December 2009 judgment. Having failed

to timely appeal from that judgment, the Concoffs cannot challenge it now, and their appeal must be dismissed.

Sotheby's and Montgomery filed a cross-appeal from the October 2010 order. That order corrected the December 2009 judgment so as to deprive them of a full judgment in their favor. We conclude that Sotheby's and Montgomery's cross-appeal from the October 2010 order is appealable as a post-judgment order affecting their substantial rights. We therefore consider the cross-appeal, but conclude that the trial court did not err in correcting the clerical error in the judgment.

We now set forth the in full detail the relevant factual and procedural background.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Lawsuit and the Trial Court's Decision*

In 2006, Aull sold his Pacific Palisades townhome to the Concoffs for $1.45 million. During the transaction, Aull was represented by Sotheby's and its broker Montgomery; the Concoffs were represented by Coldwell Banker and its broker Sharon Gavin. The Concoffs allege that shortly after they moved into the townhome, they discovered significant mold and water intrusion damage, and that Aull, Sotheby's and Montgomery misrepresented the property's condition and failed to disclose reports showing drainage, plumbing, and mold problems.

The Concoffs filed suit against Aull, Sotheby's and Montgomery.[1] The operative pleading is the seconded amended complaint (SAC). As against all three defendants, the Concoffs alleged claims for fraud (intentional concealment of

[1] The Concoffs filed a separate action against Coldwell Banker and Sharon Gavin that was later consolidated with the present lawsuit. This proceeding raises no issues about that action.

material information about water and mold damage), negligent misrepresentation (false statements about the property's condition made without a reasonable grounds for believing them to be true), and intentional infliction of emotional distress (outrageous conduct in concealing material information resulting in severe emotional distress). As against Aull alone, they alleged claims for breach of contract (failure to perform his contractual promise to disclose material information) and rescission.

They also alleged a claim for negligence, styled the seventh cause of action. The heading for this claim recites that it is for "Negligence Against Defendants MONTGOMERY, SOTHEBY'S, and DOES 11 through 30, Inclusive." The heading does not mention Aull.

The cause of action has five paragraphs, 114-118. Paragraph 114 simply incorporates by reference the underlying factual allegations contained in the first 44 paragraphs about the parties' transactions and conduct. Paragraph 115 alleges that "[p]ursuant to the applicable statutes including, but not limited to, California Civil Code sections 1102, et. seq., and 2079, et seq., and common law, *Defendants AULL* and DOES 1 through 10, inclusive, owed a duty to PLAINTIFFS to disclose" all material facts concerning the condition of the property. (Italics added.)

However, paragraph 116 alleges that Montgomery and Sotheby's (no mention of Aull) "breached their duty to exercise reasonable skill and care in performing their duties in that *said* Defendants failed to conduct a reasonably competent and diligent visual inspect of the PROPERTY and disclose to [the Concoffs] the [specific] conditions and problems" of the property as set forth in eight previous paragraphs. (Italics added.) Paragraph 117 recites that as a result of "*said* Defendants' breaches of their duties to exercise reasonable skill and care in performing their duties," the Concoffs purchased the townhouse and incurred

specific economic damages. (Italics added.) Paragraph 118 concludes with an allegation of emotional and physical damages as a result of "*said* Defendants'" conduct.

Aull filed a cross-complaint seeking indemnity against Sotheby's on the basis that Sotheby's and Montgomery were responsible for any liability he incurred. Over the Concoffs' objection, the trial court (Judge Terry B. Friedman) ruled that it would conduct a bench trial on the Concoffs' cause of action to rescind their purchase of Aull's townhome and on Aull's cross-complaint for indemnity, because those claims sounded in equity. The rescission action claimed that Aull and/or his agents Sotheby's and Montgomery had concealed material information about the property (mold and water damage) and had failed to make the disclosures required by law during a sale of real property. In particular, the Concoffs claimed that when Aull had purchased the townhome in December 2005 from Donald and Beverly Popielarz, Aull received reports identifying mold growth and water intrusion, but that Aull, Sotheby's and Montgomery failed to disclose those reports to the Concoffs.

The bench trial was conducted over 13 days in May, June and July 2009. Fifteen witnesses testified and dozens of documents were introduced into evidence.

In September 2009, the trial court issued a lengthy Statement of Decision explaining its resolution of the case, as follows. When Aull purchased the townhome in 2005 from the Popielarzes, he "did not read any documents he signed" in connection with that transaction. Instead, he relied upon the advice of Montgomery (who represented him both in his purchase of the townhome as well as its sale to the Concoffs) to sign the documents. Consequently, Aull—whom the trial court found to be "highly credible"—lacked any knowledge about the property's material defects (mold and water damage) that he could have learned had he read the reports furnished to him during his purchase of the townhome.

Therefore, Aull did not intend to deceive the Concoffs about the property's condition.

At the time of the Concoffs' purchase in 2006, it was a "hot" residential real estate market. There were sharp price increases and a heavy demand for property. Montgomery was "extremely busy" and did not give "careful attention to detail." In particular, she "failed to read or review many documents which she transmitted" to the Concoffs' agent Gavin for signature.[2] Overall, Montgomery failed "to act as a thorough, careful professional in her work on the Aull-Concoff transaction." Although she knew about the property's material defects, she did not intend to deceive the Concoffs about the property's condition. Because the Concoffs had developed reasonable doubts about Montgomery's representations concerning the townhome, they "did not justifiably rely on Sotheby's representations" about the property.[3]

Each of the Concoffs "carefully and thoroughly read every document which they signed" related to their purchase of Aull's townhome. Further, Andrew Concoff testified that because of a serious health condition, he wanted to avoid "exposing himself to dangerous airborne toxins." In light of that testimony, the trial court found "that it is not credible that Dr. Concoff could have reasonably relied on statements by Montgomery regarding the condition of the property." (See fn. 3, *ante*.)

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[2] In regard to Gavin's potential liability, the court concluded that, "[b]ased on her testimony and the evidence in this phase of the action, the Court does not find that she engaged in intentional conduct to deceive the Concoffs or conceal material information from them."

[3] The prima facie case of negligent misrepresentation requires, inter alia, evidence that the plaintiff (here, the Concoffs) justifiably relied upon the misrepresentations. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 818, pp. 1181-1182.)

During the Aull-Concoff escrow, Sotheby's supplied the Concoffs with the required disclosure forms. In addition, the Concoffs retained their own physical inspector. His report recommended that they retain a drainage specialist to inspect for water intrusion. Many of the documents that the Concoffs read during escrow "contained clear, boilerplate statements directing them to obtain independent inspections of the property, *including to determine the presence of mold.*" (Italics added.) The Concoffs did not follow any of those recommendations and their failure to do so was not reasonable.

The trial court concluded: "The Concoffs fail[ed] to meet their burden to establish all necessary elements that either Aull or Sotheby's defrauded them by concealment or misrepresentation. [¶] The Concoffs cannot rescind the purchase agreement with Aull. [¶] Judgment for Defendants and against [the Concoffs] on the bifurcated issue of rescission."

2. *Aull Offers a Proposed Judgment*

In November 2009, Aull's attorney proffered a proposed judgment for the trial court to sign. It is entitled "Judgment After Trial By Court [Proposed]." It recited, inter alia, that the trial court's factual conclusions disposed of all of the causes of action in favor of the three defendants. The defendants filed a brief in support of the proposed judgment. In regard to the negligence cause of action, the brief stated that that claim was directed only at Sotheby's and Montgomery and that the claim failed because the trial court's factual findings established that the Concoffs had failed to act reasonably on their own behalf.

The Concoffs' opposition urged that the trial court's findings did not dispose of all remaining causes of action. In particular, they argued that the findings that intentional fraud had not been committed did not resolve their claim for negligent misrepresentation. Contrary to what the Concoffs' attorney asserted at the hearing

on this appeal, this pleading did *not* argue that the seventh cause of action for negligence claim was directed at Aull in addition to Sotheby's and Montgomery.

On December 4, 2009, a hearing was conducted before Judge Friedman at which the parties discussed the proposed judgment. In regard to the negligence cause of action, the court stated: "As to the negligence cause of action versus Montgomery, isn't there yet to be determined the issue of comparative negligence, which was not before the court [in the bench trial]? . . . *I would be prepared to sign the judgment, except that I do not believe that it would apply to the negligence cause of action*." (Italics added.)

During presentation of argument from the Concoffs' attorney, the following colloquy occurred:

> "[The trial court]: Is the negligence claim against Aull as well as Montgomery?
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> "[The Concoffs' attorney]: I believe so.
>
> "[Aull's attorney]: I believe not, Your Honor.
>
> "[The trial court]: I didn't think it was, which is why I only addressed it as to Montgomery.
>
> "[The Concoffs' attorney]: Forgive me, then, if I've gotten that wrong."

At the end of the hearing, the trial court noted that the proposed judgment would entirely dispose of the Concoffs' case not only against Aull, but also against Sotheby's and Montgomery. The court stated that it did not agree: "Paragraph 4 [of the proposed judgment] provides that the negligence cause of action is disposed [of]. [But] I think that there are factual issues with regard to the negligence claim that are not encompassed within the scope of the initial phase of the trial, not the

least of which is the question of comparative negligence. So unless you convince me otherwise, *I'm not prepared to sign a judgment that disposes of the negligence cause of action as to Sotheby's and Montgomery*." (Italics added.) Counsel for Sotheby's and Montgomery argued that the negligence claim against his clients was essentially the same as the negligent misrepresentation claim and was resolved by the court's factual findings that the Concoffs had not acted reasonably and could not have justifiably relied upon Montgomery's or Sotheby's representations about the property. Counsel for the Concoffs argued that the still-unresolved issue of comparative fault applied both to their negligence and negligent misrepresentation claims. He did not argue that the negligence cause of action was directed at Aull in addition to Sotheby's and Montgomery.

The trial court ruled: "*I'm not going to grant judgment to Montgomery and Sotheby's on the seventh cause of action [for negligence].*" (Italics added.) The court explained that "*[t]he only outstanding issue on the judgment proposed by [defendant] Aull*" was his liability for breach of contract. (Italics added.) The court directed the parties to file briefs solely on that issue.[4] Lastly, Judge Friedman stated that he would retire effective February 28, 2010 but would not be presiding after December 7.

3. *The Trial Court Files its Judgment and Aull Serves Notice of Entry of Judgment*

On December 30, 2009, the trial court filed its judgment that specifically incorporated by reference its earlier Statement of Decision. The court made three changes to Aull's proposed judgment. The court drew a line through the word

[4] The Concoffs' breach of contract claim alleged that Aull breached his contractual obligation to disclose known defects to them. Ultimately, the trial court held that its finding that "Aull lacked knowledge of any material defects at the property" required resolving the breach of contract claim in favor of Aull.

"proposed" so that the document is now entitled "Judgment After Trial By Court." The court also drew lines through the two words that would have disposed of the seventh cause of action for negligence. In pertinent part, the judgment reads:

> "1. Plaintiffs having failed to meet their burden to establish all necessary elements that Defendants defrauded them by concealment or misrepresentation, Plaintiffs are not entitled to rescission of the purchase agreement between Plaintiffs and Aull;
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> "2. The finding against Plaintiffs and in favor of Aull on the rescission claim moots the issue of indemnity between Aull and Sotheby's;
>
> "3. Plaintiffs' failure to prove the elements of fraud with respect to their rescission cause of action is dispositive of Plaintiffs' Second, Third, Fifth, and Sixth causes of action for Fraud and Negligent Misrepresentation;
>
> "4. The Factual Conclusions reached by the Court are dispositive of the First, ~~Seventh~~, and Eighth cause of action for Breach of Contract, ~~Negligence~~ and Intentional Infliction of Emotional Distress;
>
> "5. The finding against Plaintiffs and in favor of Aull on the remaining causes of action moots the issue of indemnity with respect to those causes of action between Aull and Sotheby's.
>
> "THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:
>
> "Plaintiffs are to take nothing by their Second Amended Complaint, and Judgment shall be entered in favor of Defendants and against Plaintiffs.
>
> "Cross-Complainant Aull is to take nothing by his Cross-Complaint, and Judgment shall be entered in favor of Cross-Defendants and against Cross-Complainant.

"Aull is awarded costs in the amount of $_____ against Plaintiffs Andrew Concoff and Simon Concoff.

"Sotheby's are awarded costs in the amount of $_____ against Plaintiffs Andrew Concoff and Simone Concoff, and costs in the amount of $_____ against Cross-Complainant Aull."

On January 11, 2010, Aull's attorney served notice of entry of judgment by mail. On January 15, 2010 Aull, Sotheby's and Montgomery filed costs memorandum. By February 4, 2010, the case had been reassigned to Judge Richard A. Stone.

On March 1, 2010, Aull filed a motion for attorney fees. The Concoffs' opposition, filed April 8, 2010, contended that the motion was premature. For the first time in the trial court, they argued that the judgment was not final as to Aull, because their negligence claim included him and it was still pending.[5]

4. *The Concoffs' Writ Petition*

On March 17, 2010, the time to file a notice of appeal from the trial court's December 30, 2009 judgment expired.[6] The Concoffs did not file a notice of appeal within that period. Instead, the next day, on March 18, 2010, they filed a petition for extraordinary relief in this court. (*Concoff v. Superior Court (Aull, et al.)* – B223080.)

The petition primarily challenged the trial court's May 21, 2009 order that the Concoffs' cause of action for rescission would be tried to the court and the trial court's subsequent decision that the Concoffs had failed to establish fraud, the

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[5] The Concoffs also took that position in a "Status Conference Statement" filed the same day (April 8, 2010).

[6] The calculation of this time period will be explained below.

predicate to the equitable remedy of rescission. The petition claimed that "[n]o final or appealable judgment has yet been entered" in the case because the Concoffs' negligence claim against Aull "remains to be tried."

On March 26, 2010, we summarily denied the petition "on the ground [the Concoffs] are not entitled to extraordinary relief from an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(1).)" On May 20, 2010, the California Supreme Court denied the Concoffs' petition for review.

5. *The Concoffs' Motion for Relief from Default*

On May 5, 2010, the Concoffs filed a motion for relief from default in the trial court. They requested that the notice of entry of judgment be stricken as premature, arguing that the December 30, 2009 judgment did not constitute a final judgment because their negligence claim against Aull was still pending. In the alternative, the Concoffs, relying upon subdivision (b) of section 473,[7] argued that their failure to file a timely appeal from that judgment (assuming the trial court found it to be a final judgment) was the result of counsel's excusable neglect or mistake for which they should not be penalized. On that basis, they asked the trial court to vacate entry of the judgment and re-enter it so that they could "move for a new trial and if necessary file a timely appeal." A declaration from the Concoffs' counsel supported the request. He conceded that he had been served on or about January 11, 2010 with the "Notice of Entry of Judgment" but averred that he had not filed a notice of appeal because he and co-counsel believed the December 2009 judgment was not and could not be construed as a final judgment because the Concoffs' negligence claim against Aull had not yet been resolved.

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[7] All statutory references are to the Code of Civil Procedure.

6. *The Parties' Brief the Issue of the Finality of the December 30 Judgment*

At a April 13, 2010 status conference, Judge Stone "invited briefing on the limited topic of whether or not the 7th cause of action in the Second Amended Complaint is or remains viable as to Dr. Aull." Aull's brief argued that the December 30 judgment was final as to him. The Concoffs filed opposition. In addition, a portion of the opposition filed by Sotheby's and Montgomery to the Concoffs' request for relief from default argued that the December 30 judgment was final as to them, even though Judge Friedman had deleted the words that would have resolved in their favor the negligence claim in the seventh cause of action. Sotheby's and Montgomery relied upon the fact that the December 30 judgment recited that a judgment was to be entered "in favor of Defendants" and that Sotheby's was awarded costs against the Concoffs.[8]

7. *The Trial Court's Order*

After presentation of oral argument, Judge Stone filed an order on October 21, 2010 concluding that Aull's motion for attorney fees was not untimely, because the December 2009 judgment resolved all the Concoffs' claims against Aull. As to Sotheby's and Montgomery, however, the court ruled that there was a clerical error in the judgment insofar as it purported to grant judgment for them on the negligence claim. We set forth the court's findings.

Beginning with the Concoffs' motion for relief from default, the court found that the mandatory provisions of section 473, subdivision (b) regarding relief from attorney fault did not apply because counsel's mistake or neglect had not resulted in the entry of a default, default judgment or dismissal. (See, e.g., *Vandermoon v.*

[8] This was consistent with the position that Sotheby's and Montgomery took in their Status Conference Statement.

Sanwong (2006) 142 Cal.App.4th 315, 319-321.) In this proceeding, the Concoffs do not challenge that ruling.

With respect to Aull, the court found that based upon its reading of the Concoffs' second amended complaint, "the only reasonable conclusion is that Dr. Aull was not meant to be contemplated in the [seventh] cause of action for Negligence."[9] Further, "[b]ased upon [Judge Friedman's] statements during court proceedings after the taking of trial testimony," and because the negligence claim did not include Aull as already explained (see fn. 9, *ante*), "Judge Friedman's intentions are clear that the judgment was to dispose of the entire action by [the Concoffs] against Dr. Aull." Therefore, the court concluded that Aull's motion for attorney fees "was not premature, as the December 30 judgment was intended to be, and was, a full and complete disposition of all causes of actions against Dr. Aull."[10]

Insofar as Sotheby's and Montgomery were concerned, the court determined that there was "an internal inconsistency in the judgment" that was a result of a clerical error by Judge Friedman. The court found that Judge Friedman had intended for the Concoffs to be able to pursue their negligence cause of action

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[9] The order explained:

"1. CRC [California Rules of Court, Rule] 2.112: Each separately stated cause of action, count, or defense must specifically state:

"(1) Its number (e.g., 'first cause of action')

"(2) Its nature (e.g., 'for fraud')

"(3) The party asserting it if more than one party is represented on the pleading (e.g., 'by plaintiff Jones')

"(4) The party or parties to whom it is directed (e.g., 'against defendant Smith');

"2. CRC 2.112 is mandatory by its terms;

"3. Although Dr. Aull is referred to in paragraph 115, upon review of the caption and paragraphs 115-117, the only reasonable conclusion is that Dr. Aull was not meant to be contemplated in the cause of action for Negligence."

[10] In a subsequent proceeding, the trial court awarded Aull $249,000 in attorney fees.

against Sotheby's and Montgomery, but that the judgment's language inadvertently precluded that result because it ordered entry of judgment in favor of Sotheby's and Montgomery and awarded them costs.[11] The court reasoned that pursuant to

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[11] The court's order explained:

"13. The court finds that there is an internal inconsistency in the judgment rendered by Judge Friedman; . . .

"15. *Judge Friedman, using a blue pen making it abundantly clear that it is the 'original' judgment, struck out the word 'Proposed' on the face sheet, struck out the comma and the word 'Seventh' at line 3 on page 4 and struck out the comma and the word 'Negligence' at line 4 page 4*;

"16. *His intentions are clear. He intended the seventh cause of action, Negligence, to remain a viable cause of action that was not to be contemplated in the judgment*; . . .

"19. There is internal inconsistency in the judgment prepared by counsel for Dr. Aull and signed by Judge Friedman in the following respects: When Judge Friedman struck the language and punctuation described in number 15 above, the plaintiff's Second Amended Complaint, being the operative pleading, alleged Negligence against the realty defendants and that cause of action was left to be decided another day. . . . However, the judgment indicates that 'Plaintiffs are to take nothing by their Second Amended Complaint, and Judgment shall be entered in favor of Defendants and against Plaintiffs.';

"20. *The court finds that Judge Friedman's failure to delimit the language to be applicable to only defendant Aull was a clerical error that should be corrected by this court. It is unreasonable to believe that Judge Friedman, by his own hand, left the Negligence action alive to only eliminate it seven lines later regarding the realty defendants. He simply failed to modify the language to reflect his intention to leave a viable Negligence cause of action for determination at a later time against the realty defendants*;

"21. In addition, the judgment also contains the following language: 'Sotheby's are awarded costs in the amount of $_____ against Plaintiffs Andrew Concoff and Simone Concoff, and costs in the amount of $_____ against Cross-Complainant Aull.' That language is inconsistent with Judge Friedman's intention to allow the Negligence cause of action to remain viable. *The court finds that Judge Friedman's failure to strike out the costs award for the realty defendants from the plaintiffs was a clerical error that should be corrected by this court. Again, Judge Friedman intended to award costs to the realty defendants for their successful defense of the Cross-Complaint, but not for the defense to the Second Amended Complaint that he did not intend to completely resolve when he left the seventh cause of action for Negligence to be dealt with on a future occasion*;

subdivision (d) of section 473, it had the power to correct that clerical error in order to conform the judgment to Judge Friedman's clear and unambiguous intent. To that end, it deleted the language directing entry of judgment in favor of Sotheby's and Montgomery and awarding Sotheby's costs against the Concoffs. Consequently, the relevant portion of the judgment now reads: "Plaintiffs are to take nothing by their Second Amended Complaint against Defendant Aull, and Judgment shall be entered in favor of Defendant William Aull and against Plaintiffs."

Finally, the court found that "[t]here has been no modification of the judgment for Dr. Aull and against [the Concoffs]." The court took no position on the "timeliness" of any appeals concerning Aull and the Concoffs.

On October 26, 2010, the Concoffs filed a notice of appeal from the trial court's October 21 order and "from all orders preliminary thereto including but not limited to the said 'Judgment After Trial By Court' [entered on December 30, 2009] insofar as it was adverse to [the Concoffs] and in favor of Aull, and from all orders for costs and attorney fees."

On November 10, 2010, Sotheby's and Montgomery filed a notice of appeal from the October 21, 2010 order, characterizing it as "[a]n order after judgment under Code of Civil Procedure section 904.1(a)(2)."

"22. *It is clear that Judge Friedman thoughtfully and carefully evaluated the case regarding all of the parties, he simply failed to strike or modify a few words in the judgment that was prepared by counsel*;

"23. The court will modify the judgment as follows: on page 4 at line 10 the word 'Defendants' shall be changed to 'Defendant Aull', and the language regarding costs to be awarded to 'Sotheby's' against plaintiffs is to be deleted." (Italics added.)

DISCUSSION

A. TIMELINESS OF THE CONCOFFS' APPEAL

The Concoffs' appeal is based on their notice of appeal from the October 2010 order of Judge Stone. Insofar as Aull is concerned, that order rejected the Concoffs' contention that Aull's motion for attorney fees following entry of December 2009 judgment in his favor was premature. Yet in their appeal, the Concoffs purport to challenge rulings encompassed by the December 2009 judgment, having never filed a notice of appeal from that judgment. Aull contends that the Concoffs' appeal challenging the December 2009 judgment is untimely and must be dismissed.[12] For reasons explained below, we agree.

"Compliance with the time for filing a notice of appeal is mandatory and jurisdictional. [Citation.] If a notice of appeal is not timely, the appellate court must dismiss the appeal. [Citation.]" (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582.) In this case, California Rules of Court, rule 8.104(a)(2), contains the applicable time period for filing a notice of appeal. It provides that a notice of appeal must be filed within 60 days after a party has been served with a document entitled "Notice of Entry" of judgment. If a party is

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[12] Sotheby's and Montgomery's opening brief also raises this contention. Aull first raised it in a motion to dismiss the appeal filed after the Concoffs filed their opening brief. In an order signed by Presiding Justice Epstein, we summarily denied the motion. The Concoffs suggest that this summary denial precludes us from reconsidering this issue. They are mistaken. "[A] summary denial of a motion to dismiss the appeal should not preclude later full consideration of the issue, accompanied by a written opinion, following review of the entire record and the opportunity for oral argument." (*Kowis v. Howard* (1992) 3 Cal.4th 888, 900, overruling the contrary holding in *Pigeon Point Ranch, Inc. v. Perot* (1963) 59 Cal.2d 227, 230-231; accord: *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509, fn. 6; see also *Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1023, fn. 6 [summary denial of motion to dismiss the appeal in an order signed by only one Justice cannot constitute law of the case because a determination of the merits of a cause must have the concurrence of at least two justices].)

served by mail, the party has an additional five days in which to file the notice of appeal. (§ 1013, subd. (a).)

Here, Aull served the Concoffs with notice of entry of the December 2009 judgment by mail on January 11, 2010. Thus, the Concoffs were required to file a notice of appeal by March 17, 2010. They failed to do so.

The Concoffs contend that their failure to file a notice of appeal from the judgment is not fatal to their appeal, because the judgment was not final as against Aull. To be final, a judgment must dispose of all issues between the two parties and terminate the litigation on the merits between them. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304; see also § 577 ["A judgment is the final determination of the rights of the parties in an action or proceeding."].) Stated another way, if no causes of action remain to be adjudicated between the parties, the judgment is final. (*Kurwa v. Kislingler* (2012) 204 Cal.App.4th 21, 28.) That an issue of attorney fees or costs may remain does not preclude a final appealable judgment from being entered. (*Laraway v. Pasadena Unified School Dist., supra,* 98 Cal.App.4th at p. 582.) Nor does it matter that a plaintiff (here, the Concoffs) may still have causes of action pending against other defendants (here, Sotheby's and Montgomery). (§§ 578 & 579; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1830.)

According to the Concoffs, the December 2009 judgment did not dispose of their seventh cause of action for negligence, Aull was a defendant in that cause of action in addition to Sotheby's and Montgomery, and therefore the judgment was not final as to Aull. The defect in this argument is that Judge Friedman clearly intended the judgment to dispose of all the Concoffs' claims against Aull, and the judgment certainly so provides. It was therefore a final judgment.

Aull was named as a defendant in the causes of action for breach of contract, fraud, negligent misrepresentation, and intentional infliction of emotional distress

(the first, second, third, and eighth causes of action). The judgment recites that its factual findings resolved those claims against the Concoffs and rendered moot their claim for rescission (the fourth cause of action). On that basis, the trial court ordered that judgment be entered in favor of Aull. In addition, Judge Friedman awarded Aull his costs against the Concoffs and ruled that Aull's cross-complaint against Sotheby's and Montgomery was moot, orders that he would have made only if he intended the judgment to dispose of all of the Concoffs' causes of action against Aull.

Moreover, as set forth earlier, a hearing was conducted on December 4, 2009 to discuss, among other issues, Aull's proposed judgment. Judge Friedman opined that the negligence claim found in the seventh cause of action did not include Aull. Aull agreed and the Concoffs ultimately acquiesced in that understanding. Later in the hearing, Judge Friedman stated that the *only* issue remaining for him to decide regarding Aull's potential liability to the Concoffs was the breach of contract claim. Further, when Judge Friedman discussed whether his factual findings resolved the Concoffs' negligence claim against Sotheby's and Montgomery, he did not indicate that his tentative analysis (the issue of comparative fault remained to be resolved) applied to any negligence claim against Aull. Nor did the Concoffs urge that this issue of negligence applied to Aull or that judgment could not be entered in Aull's favor because the negligence claim included him as a defendant and remained outstanding.

In short, from the face of the judgment and the proceedings leading to it, we see no reasonable basis for contending that the judgment was not intended to, and did not, dispose of all claims against Aull. If the Concoffs believed that the court erred in concluding that all claims against Aull were resolved, that was an issue for appeal, or perhaps a post-judgment motion for a new trial or a motion to set aside and vacate the judgment if the motions had been filed within 15 days of service of

notice of entry of judgment. (§§ 659, subd. (2) [motion for new trial] and 663a, subd. (2) [motion to set aside and vacate the judgment]; see *In re Marriage of Micalizio* (1988) 199 Cal.App.3d 662, 670 ["[T]rial court remedies are generally speedier and less costly than an appeal."].) Regardless, as here relevant, the Concoffs failed to appeal from the judgment and their current attempt to appeal from it (based on a notice of appeal from the October 2010 ruling deeming the Aull's motion for attorney fees timely) is ineffectual.

None of the Concoffs' remaining arguments has merit. They argue that to the extent that Judge Stone's October 21, 2010 order concluded that their negligence cause of action did not include Aull, that ruling was error. However, that argument is not properly before us because it erroneously assumes that insofar as the Concoffs and Aull are concerned, Judge Stone's order is appealable. It is not. Judge Stone's order did *not* amend the judgment insofar as Aull was concerned. Instead, it found clerical error in the judgment only insofar as Sotheby's and Montgomery were concerned and corrected that error.[13] That correction left Aull as the sole defendant for whom judgment was entered. As a result, the December 30 judgment "ascertained and fixed absolutely and finally the rights of [the Concoffs] as against [Aull] in relation to the subject matter of the litigation between them. No issue between them was left for further consideration." (*George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 482.) In other words, Judge Stone's October 2010 order amending the judgment to correct the error in regard to Sotheby's and Montgomery "did not, in any wise, affect the original judgment as between [the Concoffs and Aull] [so that the]

[13] The propriety of that correction and whether it constitutes an order from which Sotheby's and Montgomery can cross-appeal will be discussed later.

original [December 30] judgment was the final judgment as between [them]." (*Ibid*.)

The Concoffs contend that in his October 2010 order "Judge Stone did not just make a clerical correction, he made a substantive legal ruling that gave rise—for the first time—[to] a right on the Concoffs' part to appeal the judgment." Not so. Whether the Concoffs' appeal from the December 2009 judgment is untimely has nothing to do with Judge Stone's ruling. Judge Stone simply rejected the Concoffs' argument that Aull's motion for attorney fees was premature. In doing so, he rejected the Concoffs' argument that the judgment was not final as to Aull, but that ruling did not somehow create or revive the right to appeal from that judgment when the time period to file a notice of appeal had expired long before that. "A party who fails to take a timely appeal from a decision or order from which an appeal might previously have been taken [here, the December 30, 2009 judgment] cannot obtain review of it on [a purported] appeal from a subsequent judgment or order. [Citations.]" (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.)

Lastly, the Concoffs argue that "until Judge Stone issued his [October 2010] order determining that the Seventh Cause of Action in the [SAC] did not set forth a cause of action for negligence against Aull, [they] properly construed the judgment signed by Judge Friedman on December 30, 2009 as interlocutory." But, as we have stated, the face of the judgment and the proceedings leading to Judge Friedman's execution of the judgment leave no reasonable basis to believe that the judgment was not final as to Aull. Moreover, implicit in the Concoffs' argument is the premise that their counsel's belief that the December 30 order was interlocutory and therefore not appealable could constitute an excusable mistake entitling them to relief. As noted earlier, this was the basis of the Concoffs' section 473, subdivision (b) motion for relief from default. The trial court,

consistent with precedent, found that the statutory provision did not apply because counsel's conduct did not result in entry of a default, default judgment, or dismissal. (*Vandermoon v. Sanwong, supra,* 142 Cal.App.4th at pp. 320-321.) The Concoffs, with good reason, do not contest that ruling in this proceeding. "[E]xcept as authorized by statute, section 473, subdivision (b) may not excuse the untimely filing of a notice of appeal. [Citation.] 'The requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period. In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune.' [Citation.]" (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372-373.)

For these reasons, the December 2009 judgment constituted the final judgment between the Concoffs and Aull. The Concoffs' failure to file a timely appeal from that judgment requires dismissal of their appeal. This result precludes consideration of any of the Concoffs' contentions that Judge Friedman committed error either in conducting the bench trial or in rendering his factual findings and entering judgment based upon those findings.[14]

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[14] The Concoffs' brief makes passing reference to contesting the trial court's award of attorney fees to Aull. However, they make no fact-specific argument that the award was improperly calculated and, in fact, do not even include in the voluminous appellate record the pleadings proffered to the trial court regarding calculation of that award. Instead, the Concoffs state: "Obviously, if the judgment in favor of Aull is reversed for any of the reasons set for in this [Opening] Brief, the award of fees and costs will also have to be reversed." Because we cannot reach the merits of any of the Concoffs' assignments of error, we affirm the award of attorney fees.

B. THE CROSS-APPEAL FILED BY SOTHEBY'S AND MONTGOMERY

As indicated earlier, Sotheby's and Montgomery filed, on November 10, 2010, a notice of appeal from Judge Stone's October 21, 2010 order correcting the clerical error in Judge Friedman's December 30, 2009 judgment. They characterized it as an appeal taken from "[a]n order after judgment under Code of Civil Procedure section 904.1(a)(2)."

On December 6, 2010, the Concoffs filed a motion to dismiss that appeal. They claimed that no final judgment had been entered in their action against Sotheby's and Montgomery because the October 21, 2010 order meant that the negligence cause of action remained to be tried against Sotheby's and Montgomery.[15] As such, they urged that the appeal was taken from a non-appealable interlocutory order and should be dismissed.

On December 17, 2010, Sotheby's and Montgomery filed opposition to the motion. In addition, they filed what they characterized as a "protective" writ petition (*Sotheby's and Montgomery v. Superior Court* (*Concoff, et. al* – B229560).) The petition sought to preserve their right to seek review in this court of the October 21, 2010 order in the event we granted the Concoffs' motion to dismiss the appeal.

We summarily denied the motion to dismiss the appeal, and, on the same day, summarily denied the petition "on the ground [Sotheby's and Montgomery's] arguments will be considered with the related pending appeal (B228490)."

The issue is again before us, having been raised by the Concoffs in their brief.

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[15] When the Concoffs filed their motion, none of the parties had filed any briefs in the case.

To decide whether an appealable order exists, we must first determine whether the October 21, 2010 order can properly be characterized as an order correcting a clerical error in the judgment. It can. Section 473, subdivision (d) provides, in relevant part: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed."

"A clerical error in the judgment includes inadvertent errors made by the court 'which cannot reasonably be attributed to the exercise of judicial consideration or discretion.' [Citations.] 'Clerical error . . . is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is "whether the error was made in rendering the judgment, or in recording the judgment rendered." [Citation.] Any attempt by a court, under the guise of correcting clerical error, to "revise its deliberately exercised judicial discretion" is not permitted. [Citation.]' [Citation.] A judicial error is the deliberate result of judicial reasoning and determination. [Citation.]

"The court's inherent power to correct clerical errors includes errors made in the entry of the judgment or due to inadvertence of the court. 'The term "clerical error" covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected. . . .' [Citation.] *The signing of a judgment, which does not express the actual judicial intention of the court, is clerical rather than judicial error.*" (*Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1034-1035, italics added.)

Particularly relevant to this case is the principle that "[i]f the trial judge through inadvertence or mistake makes or signs an order or decision different from

that which the judge intended, he or she may correct this error as readily as that of the clerk in entering a judgment. [Citations.]" (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 69, p. 605.) Thus, it has been held that "'[w]here the judgment as signed does not express the actual judicial intention of the court, but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one.' [Citations.]" (*In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742, 746 [the trial court properly corrected clerical error when it modified the judgment to include a provision reserving jurisdiction over spousal support because the reporter's transcript and the court's minutes established that the trial court had intended to include such a provision in the judgment]; see also *Martin v. Ray* (1946) 74 Cal.App.2d 922 [the judgment prepared by counsel and signed by the judge failed to include a provision set forth in the judge's prior memorandum of decision; this constituted clerical error that the court could subsequently correct].)

The record in this case reveals clerical error. At the December 4, 2009 hearing, Judge Friedman indicated several times that he did not intend to enter judgment in favor of Sotheby's and Montgomery because he believed that issues remained to be tried on the Concoffs' negligence claim against those two defendants. After that hearing, Judge Friedman partially revised the proposed judgment in order to implement that intent: he drew lines through the two references to the seventh cause of action for negligence so that the judgment as entered no longer recited that the court's earlier factual conclusions were dispositive of that claim. However, Judge Friedman committed clerical error when he then failed to delimit the language in the paragraph that ordered entry of judgment in favor of the defendants. Consistent with his previously expressed intent, he should have struck the "s" from "defendants" and deleted the language awarding Sotheby's its costs against the Concoffs. His failure to do so constitutes

clerical error that Judge Stone could later correct. (See *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 117 ["The test which distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) versus advertently (which might be judicial error, but is not clerical error). [Citation.]")

Having concluded that Judge Stone's October 21, 2010 order corrected clerical error in the December 30, 2009 judgment signed by Judge Friedman, the next issue is whether Sotheby's and Montgomery can appeal from that order. Generally, an order correcting clerical error in a judgment is appealable as an order made after judgment. (§ 904.1, subd. (a)(2); *Ames v. Paley* (2001) 89 Cal.App.4th 668, 672, fn. 3.)

The Concoffs, however, urge that in this particular case, the order is not appealable. They argue: "[T]he previous [December 30, 2009] 'Judgment' on its face expressly declines to decide the Seventh Cause of Action in the Complaint against Sotheby's and Montgomery for Negligence, and as such, no final judgment has ever been entered against either of them in the underlying action." According to the Concoffs, Judge Stone's October 21, 2010 order simply "correct[ed] a judgment that was interlocutory" and that no appeal lies from an interlocutory order.

Sotheby's and Montgomery ask us to reject that argument and, instead, to "find that when a judgment's language plainly declares the plaintiff [here, the Concoffs] to take nothing and judgment be entered in favor of all defendants [here, Aull, Sotheby's and Montgomery] without qualification, it was and is a final judgment under Code of Civil Procedure section 904.1, subdivision (a)(1). Likewise, an order changing or modifying such a judgment is appealable under

Code of Civil Procedure section 904.1, subdivision (a)(2), even if the effect of such an order is to render all or part of the judgment to no longer be final."

The parties have not offered any case authority directly addressing this particular fact pattern and our own research has found none. Based upon the peculiar facts of this case, we conclude that Sotheby's and Montgomery have the better argument. On its face, the December 30, 2009 judgment directed entry of judgment in favor of Sotheby's and Montgomery although that direction was a result of clerical error. Nonetheless, given the language of the judgment, the Concoffs could have appealed from it and claimed that entry of judgment in favor of Sotheby's and Montgomery was premature because, as indicated by Judge Friedman's remarks at the December 4, 2009 hearing and his editing of the December 30, 2009 judgment (deletion of the references to the negligence cause of action), the Concoffs' negligence claim against Sotheby's and Montgomery was still pending.[16] However, the Concoffs did not pursue that avenue. Instead, they waited more than four months to file a section 473 motion in the trial court that ultimately resulted in Judge Stone's finding that clerical error existed in the entry of the judgment. Judge Stone's correction of that clerical error resulted in there no longer being a final judgment as between the Concoffs and Sotheby's and Montgomery.

The general rule is that to be appealable, a postjudgment order "must raise issues different from those arising from an appeal from the judgment, '"affect the judgment or relate to it by enforcing it or staying its execution,"' and itself be final." (*In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 220, citing *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.) Judge Stone's

[16] Or the Concoffs could have filed timely post-judgment motions to bring this matter to Judge Friedman's attention.

October 21, 2010 order meets these criteria. The order is final. The order affected the December 30, 2009 judgment by essentially taking away its status as a final judgment of the action between the Concoffs and Sotheby's and Montgomery. And an appeal from the order raises issues different from those that would have arisen had the Concoffs appealed from the December 30, 2009 judgment. We therefore conclude that the October 21, 2010 order constitutes an order from which Sotheby's and Montgomery can properly appeal.

We therefore turn to the merits of the contention advanced by Sotheby's and Montgomery on their cross-appeal. We review Judge Stone's October 21, 2010 order correcting clerical error in the judgment under the deferential abuse of discretion standard. (*Conservatorship of Tobias, supra*, 208 Cal.App.3d at p. 1035; *Pettigrew v. Grand Rent-A-Car* (1984) 154 Cal.App.3d 204, 212; and *Escobedo v. Travelers Ins. Co.* (1964) 227 Cal.App.2d 353, 361; see also *Bastajian v. Brown* (1941) 19 Cal.2d 209, 215 ["The trial court's finding upon conflicting evidence that a clerical error exists and the nature thereof, is conclusive upon this court."] and *Meyer v. Porath* (1952) 113 Cal.App.2d 808, 811 ["A finding, express or implied . . . that a clerical error exists in the judgment in question is, if supported by substantial evidence, a conclusive finding which binds an appellate court on review."].)

Sotheby's and Montgomery urge that Judge Stone's October 21, 2010 order must be reversed because it improperly corrected judicial, not clerical, error. They argue that neither Judge Friedman's statements during the December 4 hearing nor his striking out of the words "seventh" and "negligence" from the signed judgment could "have an effect on the final decree which expressly and unambiguously disposed of all of the Concoffs' claims in favor of all defendants and granted costs to [Sotheby's] and Montgomery and against the Concoffs." They *speculate* that Judge Friedman "lined through those words ['seventh' and 'negligence'] *prior to*

the December 4, 2009 hearing, evaluated the further briefing and the Concoffs' assertion that all defendants were named in the Seventh Cause of Action, and, between submission and his signing of the judgment, determined that all claims were barred by his Phase One findings and signed the judgment fully intending judgment for all defendants as expressed in the plain language, but simply failed to 'stet' his prior lines." (Italics added.)

Their argument is not persuasive. First, Sotheby's and Montgomery mischaracterize the additional briefing the trial court received and considered after the December 4 hearing but before signing the judgment on December 30. The briefs addressed only whether the trial court's earlier factual findings resolved the Concoffs' breach of contract claim against Aull. Nothing in those briefs addressed the negligence claim in general or, specifically, the Concoffs' ability to pursue a negligence claim against Sotheby's and Montgomery notwithstanding the trial court's earlier factual findings.

Second, Sotheby's and Montgomery essentially advanced the same speculative arguments in the trial court. Judge Stone rejected them in a detailed and thoughtful ruling. (See fn. 11, *ante*.) Substantial evidence supports that ruling. Judge Stone relied primarily upon two factors to conclude that Judge Friedman entered the judgment in favor of Sotheby's and Montgomery as the result of clerical error. The first was Judge Friedman's statements at the December 4, 2009 hearing that he would not grant judgment to Sotheby's and Montgomery because issues remained to be tried on the Concoffs' negligence cause of action. The second was that Judge Friedman deleted, using the same blue pen he used to strike out the word "Proposed," the words "Seventh" and "Negligence" from the

judgment he signed and entered.[17] These facts constitute substantial evidence to support Judge Stone's finding of clerical error; ergo, no abuse of discretion occurred in rendering that finding.

Lastly, we reject Sotheby's and Montgomery's attempt to expand the scope of issues that can be reviewed on this cross-appeal. They contend that Judge Friedman erred when he concluded at the December 4, 2009 hearing that his findings in favor of Sotheby's and Montgomery on the Concoffs' negligent misrepresentation claim did not preclude the Concoffs from proceeding on their negligence claim. That contention cannot be raised on their cross-appeal. The cross-appeal is limited to review of Judge Stone's October 21, 2010 order correcting clerical error in the judgment. The ruling made ten months prior by Judge Friedman that Sotheby's and Montgomery seek to contest is an interlocutory ruling that can be reviewed only on an appeal prosecuted after a final judgment is entered in the Concoffs' action against Sotheby's and Montgomery.

DISPOSITION

To the extent that the Concoffs' appeal attempts to raise issues that could only be raised had a timely appeal been taken from the judgment entered on December 30, 2009, the appeal is dismissed as untimely; to the extent that the Concoffs' appeal attempts to contest orders made on October 21, 2010, the appeal is dismissed as taken from a non-appealable order; and to the extent that the Concoffs' appeal contests the trial court's post-judgment order awarding attorney

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[17] At the hearing on the section 473 motion, Judge Stone also noted that Judge Friedman had used the same blue pen to write a post-it note that he placed on the judgment. The note, directed to Judge Friedman's clerk, reads: "Please record this Judgment, conform the copy and prepare Order including that counsel for Aull serve notice. Thanks."

fees to Aull, that order is affirmed. In regard to the cross-appeal filed by Sotheby's and Montgomery, the trial court's October 21, 2010 order correcting clerical error in the judgment is affirmed. The parties are to bear their own costs in this proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.