No. 902445

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 43138-6-II

ALEX VON KLEIST,
Respondent,

v.

PAUL J. LUKSHA, a Canadian citizen, and GREGORY COCHRANE, a Canadian citizen,

Appellants,

GRAOCH 161-1 GP, INC., a Washington corporation, GRAOCH 161 GP, L.P., a Washington limited partnership, GRAOCH 160-1 GP, INC., a Washington corporation, GRAOCH 160 GP, L.P., a Washington limited partnership, THE JACKALOPE FUND LIMITED PARTNERSHIP, a British Columbian limited partnership, GARY GRAY and JANE DOE GRAY, and the marital community thereof, LES PIOCH, a Canadian citizen,

Defendants.

APPELLANT'S REPLY TO PETITION FOR REVIEW

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IDENTITY OF RESPONDING PARTY

Appellant Alex von Kleist, a resident of British Columbia, Canada, and the plaintiff in the underlying action.

CITATION TO COURT OF APPEALS OPINION

Cochrane seeks review of parts of the Court of Appeals' decision in Alex von Kleist v. Paul J. Luksha and Gregory Cochrane, No. 43138-6-II, filed in February 4, 2014 (the "Opinion"). Cochrane also seeks review of those parts of the Opinion which did not vacate the default judgment entered against Cochrane on May 10, 2010, and the denial of Cochrane's post-judgment motion on April 2, 2014.

ISSUES PRESENTED FOR REVIEW

Did the trial court logically conclude that because personal service was required on an out-of-state defendant, and because personal service was effected on that out-of-state defendant in Toronto, Ontario, substantial compliance with the requirement of RCW 4.28.185(4) had been met?

May a defendant raise a CR 60(b)(1) motion alleging mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order for the first time on appeal, more than three years after the entry of the judgment?

Does the trial court abuse its discretion if it enters a default judgment against defendants following a default judgment which named the same defendant, but was void ab initio for lack of jurisdiction?

STATEMENT OF THE CASE

Alex Von Kleist is a Canadian citizen who resides in British Columbia, Gregory Cochrane, also a Canadian citizen, is a general partner in Graoch Associates Limited Partnership (GALP), a Canadian limited partnership, which controls hundreds of corporate entities in Canada and the United States under GALP President Gary M: Gray' s management.

On the advice of GALP general partner Les Pioch, Von Kleist decided to invest $1,012,000 in a GALP - controlled Washington limited partnership, "GRAOCH ASSOCIATES Limited Partnership # 161" (Graoch 161). Pioch presented Von Kleist with various documents about Graoch 161 and explained to him that (1) Graoch 161 was a Washington "Loan and Funding vehicle" for "GRAOCH ASSOCIATES # 160 LP , (Graoch 160) (Graoch 160 was another GALP - controlled limited partnership in Washington.); (2) Von Kleist' s investments would be returned and payable back to him no later than October 15, 2008; and (3) if Graoch 161 missed a repayment date, Von Kleist would be entitled to 18 percent compounded interest per annum until Graoch 161 repaid his (Von Kleist' s) investment. Based on these representations, Von Kleist felt that his investment "would be secure." On November 15, 2007, Von Kleist entered into a "Subscription Agreement" with Graoch 161 to invest in that limited partnership.

This Agreement provided that (1) for $ 1, 012,000, Von Kleist would acquire a limited partnership interest in Graoch 161; (2) Graoch

161 would make one or more loans of $6,784,000 to Graoch 160, due and payable no later than October 15, 2008 (" Loan Repayment Date"); (3) within 30 days of the Loan Repayment Date, Von Kleist would receive a written option (a) to remain a limited partner of Graoch 161 for an additional 12 months or (b) to withdraw as a limited partner of Graoch 161 and to recover his total investments plus accrued distributions.

Von Kleist signed this Agreement as a "Subscriber"; he was the sole "undersigned" to which the Agreement referred. Although there was a blank signature line for GALP President Gray, neither Gray nor anyone else signed the Agreement on behalf of the referenced partnership. "GALP general partner Pioch signed only as a "Witness." Immediately thereafter, Graoch and its principals breached the terms of the purchasing transaction; the never provided a fully executed agreement; they never provided any accounting, or even generic corporate documents as represented to Von Kleist at the time of the sale of the security.

On December 12, however; a month after Von Kleist had signed the Agreement, GALP President Gray sent Von Kleist a "written acceptance" acknowledging receipt of Von Kleist' s bank wire transfer of $1,012, 658. 23 to Graoch 161. Gray' s letter also represented that Von Kleist' s initial distribution check was enclosed and that the next check would be delivered in January.

As the October 15, 2008 loan repayment date neared, Von Kleist had not received any of the documentation promised commensurate with

his understanding of his investment, including the promised written option to withdraw his partnership. He contacted Pioch about this "missing" option letter and explained that he wanted to withdraw as a limited partner of Graoch 161 and to recover his investments and accrued distributions. Pioch repeatedly promised that Von Kleist would receive payment in March 2009, but Von Kleist never received it. On July 17, 2009, Von Kleist contacted GALP general partner Cochrane requesting corporate information about Graoch 161. Von Kleist sent a follow up email, to which Cochrane responded, promising to provide financial statements, which, again, Von Kleist never received.

On September 17, 2009 Von Kleist' s attorney, Stephen Pidgeon, sent demand letters to Graoch 161"s registered agent for service of process (Bruce P. Weiland), Gray, Pioch, Cochrane, and Luksha, demanding full and complete $1,248,845.53 payment to Von Kleist and complete financial statements for Graoch 161 and Graoch 160. Von Kleist received no response to these demand letters.

Von Kleist sued Graoch 160; Graoch 161; Graoch 161 - 1 GP, Inc.; Graoch 160 -1 GP, Inc.; The Jackalope Fund Limited Partnership; Gary Gray and Jane Doe Gray; Pioch; Cochrane; and Luksha (collectively, " Defendants ") for (1) accounting; (2) appointment of a receiver for Defendants under RCW 7. 60.025; and (3) damages based on violations of chapter 21. 20 RCW (securities fraud), intentional misrepresentation,

negligent misrepresentation, breach of contract, and violation of chapter 19. 86 RCW (Consumer Protection Act).

Von Kleist served Defendants with a summons and verified complaint; he served some of them personally and others by certified mail. On December 9, Von Kleist effected personal service on Bruce Weiland, attorney and registered agent for Graoch 161, Graoch 161 - 1 GP, Inc., Graoch 160, and Graoch 160 GP, Inc., with a summons and verified complaint. On December 11, Von Kleist served Pioch, The Jackalope Fund Limited Partnership ("The Jackalope Fund"), Cochrane, and Luksha by certified mail. On December 18, Von Kleist secured personal service on Gray with a summons and verified complaint.

On January 27, 2010, Von Kleist filed a motion for order of default against all Defendants for failure to appear or to indicate any intent to appear or to defend. To appear at ex parte, a case number was secured with an initial filing and then conformed copies of the filed documents were presented to ex parte. The superior court then entered an order of default against all Defendants, including Cochrane and Luksha, and a default judgment for $1, 245, 165. 31, listing all Defendants as judgment debtors.

In March 2009, attorney David Spellman spoke with Pidgeon on behalf of the out-of-country Defendants to negotiate an order relieving them from the default judgment. The attorneys prepared a stipulation agreement and order vacating the superior court' s default order and default

judgment against international Defendants: The Jackalope Fund, Luksha, Pioch, and Cochrane; they also discussed the possibility of settlement. On April 22, Pidgeon sent Spellman an email about the settlement and inquired whether Spellman had an offer; but he never heard back from Spellman about the settlement. The attorneys never signed the stipulation or filed it with the court.

Von Kleist then secured personal service on all international Defendants, except Luksha. On February 18, 2010, Von Kleist personally served the original summons and verified complaint on Cochrane and The Jackalope Fund. On March 1, 2010, Von Kleist secured personal service on Pioch. On May 10, Von Kleist filed affidavits of service as to Cochrane, The Jackalope Fund, and Pioch; he also filed a second motion for default judgment as to these defendants, but he did not include Luksha. That same day, the superior court entered a second default judgment as to international defendants Cochrane, Pioch and The Jackalope Fund. Von Kleist did not include Luksha' s name in the second default judgment' s list of debtors, which included Cochrane, Pioch and The Jackalope Fund. Nevertheless, the second default judgment mentioned Luksha on the third page of the default judgment, which appears to have been a scrivener' s error.

Defendants did not directly appeal either default judgment. Instead, on January 11, 2011, some 8 months later, they filed a motion to vacate both default judgments. The court dismissed Defendant's motion without

prejudice for the failure to properly serve plaintiff. Thereafter, Defendant's renoted the motion to be heard on May 18, 2011. The court took the motion under reservation, and did not consider the motion until it was calendared anew in March of 2012.

On April 6, 2012, the superior court denied Defendants' CR 60 motion, ruling that there was no basis for vacating the default judgments because it had jurisdiction over the Defendants.

Defendants appealed. Cochrane and Luksha also filed a separate Notice of Appeal seeking review of the superior court' s denial of their motion to vacate the default judgments entered against them. On November 20, 2012, the Court of Appeals dismissed the appeals of all Defendants except Cochrane and Luksha, who remain the only active appellants.

The Court of Appeals, upon oral argument, then held that because Cochrane and Luksha did not consent to service by mail, (1) Washington' s long arm statute governed service of process over them, (2) Von Kleist did not properly serve them in person outside the state with his first motion for default so as to confer personal jurisdiction, and (3) the first default judgment was void for lack of personal jurisdiction. However:

The Court of Appeals further held that the superior court similarly lacked jurisdiction to enter the second default judgment only as to Luksha. The Court of Appeals then upheld that the superior court did not lack

jurisdiction over Cochrane to enter the second default judgment, and sustained judgment against Cochrane.

Cochrane then sought a reconsideration of the unanimous decision of the Court of Appeals, and that reconsideration was denied, again unanimously. Cochrane now seeks review before Washington's Supreme Court.

The Court of Appeals found that personal service was proper as to Cochrane, and that such service bestowed personal jurisdiction over Cochrane.

ARGUMENT ON REVIEW

The decision of the Court of Appeals is consistent with existing law.

Personal jurisdiction is established by well-settled law. As the Court of Appeals ruled:

> Here, as Cochrane and Luksha acknowledge, Von Kleist personally served Cochrane on February 18, 2010. Von Kleist' s affidavit of service on Cochrane in Canada, and Pidgeon's later declaration in support of Von Kleist's motion for default judgment against international defendants, established that Cochrane is a Canadian citizen residing in Toronto, Ontario. Thus, Von Kleist' s affidavit of service as to Cochrane substantially complied with the long arm statute' s requirement that the affidavit of service include

a statement "to the effect that service cannot be made within the state" of Washington. RCW 4.28.185(4).

Cochrane argues that substantial compliance with the statute was not met, yet Cochrane agrees that the term "substantial compliance" is established and reiterated in the *Sharebuilder Securities* decision. The standard for compliance with the long arm statute is substantial, not strict compliance. "Substantial compliance means that, viewing all affidavits filed prior to judgment, *the logical conclusion* [italics added] must be that service could not be had within the state *Corp. V. Hoang,* 137 Wn.App. 330, 334-335, 153 P.3d 222 (2007).

Gregory Cochrane was personally served with the summons and complaint at his residence in Toronto, Ontario while he was present. CP 1297-1299. In reaching *a logical conclusion*, the court may apply a hypothetical syllogism (If A, then B, if B, then C; therefore, if A, then C). If Gregory Cochrane was personally served in Toronto, Canada (A), then Gregory Cochrane was not in the State of Washington at the time of service (B). If Gregory Cochrane was not in the state of Washington at the time of service (B), then service on Gregory Cochrane at the time of service could not been made in the state of Washington (C). Therefore the conclusion using well-established rules of logic is that if Gregory Cochrane was personally served in Toronto, Canada (A), then service on Gregory Cochrane at the time of service could not have been made in the state of Washington (C). Given the clear logic that a person cannot be in

more than one place at one time, it can be deductively reasoned that if Cochrane was personally served in Toronto, Ontario, he necessarily could not be subject to personal service in the state of Washington. Hence, substantial compliance is achieved if there is any affidavit on file indicating that Gregory Cochrane was served in Toronto, Ontario at a time when he was present. CP 1298. The Court of Appeals so found and the conclusion is well-supported by the evidence.

Cochrane makes an argument not included in the evidentiary record before the court that the affidavit of service was docketed on the same day as the entry of the judgment but somehow stamped later than the default judgment. The court should disregard this argument as the court has no record to review to reach this conclusion.

It is Cochrane's burden to perfect the record on appeal. "If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." RAP 9. 2(b). When an appellant has failed to perfect the record on appeal, the court may decline to reach the merits of an issue because it does not have all the evidence relevant to the issue before it. *Rhinevault v. Rhinevault,* 91 Wn. App. 688, 692, 959 P. 2d 687 (1998), *review denied,* 137 Wn.2d 1017 (1999). Consider the following discussion on this subject:

> The Court of Appeals in theory has the power to order the trial court to consider new evidence before it renders a decision.

RAP 9.11. However, this power is applied very sparingly. Six criteria must be met before the trial court will order the taking of new evidence. Generally, if a party or its attorney could have presented the "new" evidence at trial, but failed to do so through no fault of the opposing party, the Court of Appeals will not consider or order the consideration of new evidence.

David Corbett, Questions and Answers about Civil Appeals in the Washington State Court of Appeals, 2011.

Cochrane's Argument as to what was on file is a CR 60(b)(1) motion brought for the first time on appeal.

The question of how the pleadings were docketed, again is an alleged irregularity from the clerk's office subject to review under CR 60(b)(1). As this Court explained previously:

> The exclusive procedure for attacking an allegedly defective judgment is by appeal from the judgment, not by appeal from denial of a CR 60(b) motion. *Bjurstrom v. Campbell,* 27 Wn. App. 449, 451, 618 P. 2d 533 (1980). CR 60(b) is not a substitute for appeal. *Bjurstrom,* 27 Wn. App. at 451. An unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and then appealing the denial of the motion. *State v. Gaut,* 111 Wn. App. 875, 881, 46 P. 3d 832 (2002).

The course specifically denied in *State v Gaut* is exactly the course plotted by Cochrane. Cochrane knew of the judgment entered against him

in 2010, but deliberately elected a dilatory legal strategy to wait nearly a year before moving to set aside default. Cochrane made his election to forego direct appeal in 2010, and his ability to raise the issue on appeal vanished on June 10, 2010.

Cochrane then joined in a motion to vacate the default which was eventually heard in August, 2012, and sought to restore issues under CR 60(b)(1) to an appellate track by means of moving to vacate and then appealing the denial of the motion. The law is well-settled, and all issues brought under CR 60(b)(1) must be dismissed.

Von Kleist has no burden to meet an argument rendered moot as of April 10, 2010.

CR 55(b) requires the ex parte court to determine at the time of the entry of the judgment that "proof of service is on file," which it was. An irregularity by the clerk's office is not something over which Von Kleist has control. By logical conclusion, it was filed prior to judgment being granted. Under RAP 9.2(b) and pursuant to the standard set forth in the *Rhinevault* decision, *Rhinevault,* 91 Wn.App. 688, 692, 959 P. 2d 687 (1998), *review denied*, 137 Wn.2d 1017 (1999), this court should dismiss this motion.

Cochrane was personally served. The ex parte court so found when it entered the default judgment against Cochrane. The record before this Court does not contradict that fact. The affidavit of service indicates that Cochrane was in Toronto, Ontario at the time of service. The issue as

to the timing of the docketing was not raised in the motion to vacate default judgments, nor was it raised on oral argument. Cochrane has therefore raised a CR 60(b)(1) motion for the first time on appeal, 3 years and 10 months after the entry of the judgment.

CR 60 provides in applicable part that "the motion shall be made within a reasonable time and for reason (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." The language of RCW 4.72.020 (Pub. Law 2011 c 336 § 119; 1891 c 27 § 1; Code 1881 § 438; 1877 p 97 § 440; 1875 p 21 § 3; RRS § 466) is quite specific. "The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party or on his or her attorney in the action, and within one year." Further, CR 60 (e)(4) provides that "except as modified by this rule, RCW 4.72.010-090 shall remain in full force and effect.

The additional evidence would not change the issue being reviewed, because as Cochrane alleges, the issue should be vacated "because of procedural irregularity under CR 60(b)(1)." Again, Cochrane sought to advance on appeal that which he failed to appeal in 2010, and to do so by means of a CR 60 motion. The rule in *Bjurstrom* and *Gaut* is dispositive on this issue and renders the entire issue moot.

On review of an order that denies a CR 60(b) motion to vacate a judgment or order, only the propriety of the denial, not the impropriety of

the underlying judgment or order, is before the reviewing court *Barr v. MacGugan,* 119 Wn. App. 43, 48 n.2, 78 P.3d 660 (2003); *Bjurstrom v. Campbell,* 27 Wn. App. 449, 451 n.2, 618 P.2d 533 (1980); *see also In re Dependency of J.M.R.,* 160 Wn. App. 929, 938-39 n.4, 249 P.3d 193, review granted, 172 Wn.2d 1017 (2011).

Where the court can only decide on reconsideration concerning a case whose time for appeal has long expired, such arguments are moot and should be dismissed. "A case is moot if a court can no longer provide effective relief." *SEIU Healthcare 775 NW v. Gregoire,* 168 Wn.2d 593, 602, 229 P.3d 774 (2010).

Cochrane was part of a group of defendants who took over One Million Dollars from Von Kleist without signing a single document. They have used a dilatory strategy to retain this money to their own benefit for as long as possible in order to deny Von Kleist his due process in Washington courts. Von Kleist is deserving of finality.

The entry of default judgment against Gregory Cochrane on May 10, 2010, was a valid exercise of jurisdiction.

Cochrane argues that the first default judgment was a final judgment pursuant to CR 54(a)(1). However, the Court of Appeals has held that the judgment was void *ab initio* because personal jurisdiction did not attach. As the Appellate Court said in its opinion:

> As for the second default judgment, however, the record shows that Von Kleist complied with the long arm statute's service

requirement when he personally served Cochrane with the summons and complaint on February 18; thus, the second default judgment is not void as to Cochrane. The record also shows that Von Kleist neither named nor attempted to serve Luksha with the second motion for default.

We hold that because Cochrane and Luksha did not consent to service by mail, (1) Washington' s long arm statute governed service of process over them, (2) Von Kleist did not properly serve them in person outside the state with his first motion for default so as to confer personal jurisdiction, and (3) **the first default judgment was void for lack of personal jurisdiction**. [Bold added].

As a consequence, the default judgment taken on January 27, 2010, was not and could not have been a final judgment as to defendants over which the court had no personal jurisdiction. The court did find that personal jurisdiction did attach to allow for the entry of the default judgment over Pioch and Cochrane on May 10, 2010. As a consequence, the second default judgment was procedurally adequate and met the standards commensurate with the provisions of CR 55.

Cochrane alleges procedural deficiencies claiming that the motion for default needed to be served on him pursuant to the provisions of CR 60(e); however, Cochrane ignores the well-settled prescribed rule and mode of proceeding set forth in CR 55(a)(3), which provides as

follows: Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A).

Because jurisdiction did not attach until Von Kleist brought his motion for default as to certain international defendants, all actions by the trial court were void *ab initio* and of no legal force or effect. As a consequence, the first default judgment was not a final judgment, and Von Kleist was at liberty to seek "a belt and suspenders" second default judgment as to those parties over whom the court had just acquired jurisdiction.

CONCLUSION

Cochrane asks this court to assume facts not on the record in asking this court to use "common sense" that some Canadians own residences in the states. He also asks this court to consider his CR60(b)(1) issue that he brought for the first time on appeal. Finally, Cochrane seeks to misconstrue logic inapposite to the conclusions of the court as to the meaning of substantial compliance with the Long Arm Statute.

Personal jurisdiction did attach to Cochrane when he was personally served in Toronto, Ontario. Von Kleist is required to meet substantial compliance with the Long Arm statute in Washington, which requires that the court reach a logical conclusion that service could not be had within the state. Personal service is prima facie evidence of such

logic. As a consequence, this Court rightly found on a unanimous basis that jurisdiction attached.

The facts supporting Cochrane's argument of irregularity first are not before the court and not in the evidentiary record cited on appeal. Cochrane raises a novel item of irregularity for the first time in his most recent motion under CR 60(b)(1), three years and 10 months following the entry of the order. Cochrane elected in 2010 to forego his right to appeal the order, and instead elected to pursue a dilatory strategy to wait a year before attempting to set aside the default judgment. Bringing a motion to vacate under CR 60 in order to appeal the denial does not create a track to appeal the underlying decision that Cochrane elected not to appeal within the time allowed under CR 60 and RCW 4.72.020. Cochrane's CR 60(b) issues are moot and must be dismissed.

This Court should not ignore the procedural irregularities of this motion, which is called a motion for reconsideration, but is in fact a motion on the merits which 1) seeks to litigate anew matters that were clearly before the court in Cochrane's initial brief, in Cochrane's reply brief, and which were raised on oral argument; and 2) seeks to new issues under CR 60(b)(1) for the first time, based on evidence not before the Court.

The Court should not be misled by this obfuscation. Cochrane is craftily seeking to present an untimely CR 60(b) motion before this court, when the issue was moot as of June 10, 2011, when Cochrane failed to file

a notice of appeal, and instead elected to pursue a dilatory strategy of delay. He cannot have it both ways, and this court should not allow him to walk back over a path he long ago elected to ignore.

Dated this 4th day of June, 2014.

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Attorney for Alex Von Kleist, Plaintiff

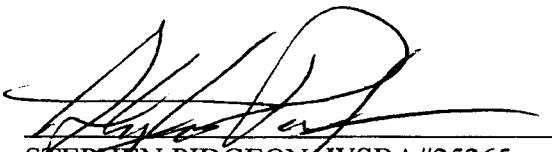
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 4th, 2014, I arranged for service of the foregoing Response to Motion for Stay to the court and to the parties to this action as follows:

Office of Clerk SUPREME COURT 415 12th Avenue SW Olympia, Washington 98501-2314	__ Facsimile __ Messenger X U.S. Mail __ E-file
David J. Corbett, 2106 N. Steele Street Tacoma, Washington 98406	__ Facsimile __ Messenger X U.S. Mail X E-file

Dated in Everett, Washington, this 4th day of June, 2014.



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