

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 90854-1

(Court of Appeals Division I, No. 70526-1-I)

Shanghai Commercial Bank Limited,

Respondent,

v.

Kung Da Chang,

Petitioner.

FILED

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

PETITION FOR REVIEW BY
THE WASHINGTON STATE SUPREME COURT

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 **TOLLEFSEN LAW**

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Kung Da (“KD”) Chang seeks review of a Court of Appeals decision enforcing a \$9 million Hong Kong judgment against him. The lower courts’ recognition of the Hong Kong Judgment constitutes state action subject to constitutional scrutiny and violated KD’s due process in several respects.

The underlying Hong Kong case stems from Shanghai Commercial Bank Limited (“SCB”) employee Daniel Chan’s systematic and ongoing deception of KD’s father and his family. Chan’s fraud resulted in a \$25 million loss for the Chang family. The Hong Kong courts left KD and his family without a remedy.

Following Chan’s fraud, SCB sued KD and his father for approximately \$9 million (“HCA 806”). KD and his father counterclaimed for fraud. KD and his father also instituted another lawsuit against SCB and a second bank, Bank of East Asia (“BEA”), on the same claims (“HCA 1996”). SCB filed counterclaims identical to those in HCA 806.

The Hong Kong court system allows residents to seek pre-litigation security for costs, including attorney fees, against non-resident plaintiffs. Thus, non-residents must pay in order to exercise their fundamental right of access to the courts. In some instances, like this case, those sums are substantial.

Both SCB and BEA applied for security for costs against KD

and his father. In an order that clearly favored the banks, the Hong Kong court ordered KD and his father to pay \$835,000 in cash as security for SCB's and BEA's costs within 14 days or their claims would be dismissed. KD and his father could not pay and were forced to abandon their claims and defenses. As a result, SCB was able to obtain \$9 million judgments against KD and Clark in both HCA 806 and HCA 1996.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision filed by Division I of the Court of Appeals on August 25, 2014, affirming the Superior Court's order granting summary judgment in favor of Respondent. A copy of the decision is included in the Appendix. App. 1.

III. ISSUES PRESENTED FOR REVIEW

1. Whether The Court of Appeals decision raises questions of law under the U.S. and Washington Constitutions because the recognition of the Hong Kong Judgment under RCW 6.04A, *et seq*, denied KD his procedural and substantive due process rights and equal protection of the laws.

2. Whether the Court of Appeals decision raises issue of public interest because the Hong Kong securities for costs requirement violates due process and the Hong Kong Proceedings violated public policy and raises questions about the integrity of the

Hong Kong Court.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Clark Chang, KD's father, first met Daniel Chan in New York in the 1980s. Eventually, Chan became a financial and investment advisor for Clark and his companies.¹

In 2002, Clark moved to Shanghai. Around the same time, Chan relocated to Hong Kong. Chan helped Clark move his accounts to SCB in Hong Kong and continued to manage Clark's accounts and investments.²

In or about 2004, Chan began recommending to Clark that he invest in Equity Linked Notes ("ELNs") and other types of high-risk investments. Chan did not inform Clark of the high risks associated with ELNs or that they were only suitable for sophisticated investors. As Clark trusted Chan would only recommend suitable investments, he followed his advice.³

In early-2007, Chan left SCB to work for BEA. At the time, more than \$20 million of Clark's portfolio, more than 80%, was invested in ELNs. Chan convinced Clark to transfer his accounts from SCB to BEA, so that Chan could continue to manage the

¹ CP 899-901 (Ex. 2 to the Decl. of Clark Chang, pp. 2-5, ¶¶ 9-13).

² CP 901 (Ex. 2 to the Decl. of Clark Chang, p. 5, ¶¶ 14-15).

³ CP 905-909 (Ex. 2 to the Decl. of Clark Chang, pp. 9-13, ¶¶ 25-41).

accounts. The accounts were in the name of KD, but Clark was the beneficiary and the only person authorized to give instructions.⁴

Chan then arranged for Clark to receive lending facilities from BEA and recommended that he use the lending facilities to acquire additional high-risk investments. He failed to explain to Clark that this was an extremely high-risk proposal that could expose Clark to huge liabilities.⁵

In March 2008, Chan informed Clark that he would be leaving BEA and returning to SCB. By this time, and unknown to Clark, his portfolio had suffered significant loss in value. Unaware of the losses, Clark agreed to allow Chan to transfer all of the investments he could back to SCB.⁶

Chan arranged a new lending facility for Clark through SCB, but failed to inform Clark the true purpose for the lending facility was to repay over \$15 million in loans from BEA that Chan had used to purchase ELNs for Clark.⁷

Chan used the value of Clark's portfolio as collateral for the SCB lending facility. At the time of the repayment to BEA, the

⁴ CP 910-913 (Ex. 2 to the Decl. of Clark Chang, pp. 14-17, ¶¶ 42-55).

⁵ CP 911-913, 915-917 (Ex. 2 to the Decl. of Clark Chang, pp. 15-17, ¶¶ 45-55; p. 19-21, ¶¶ 59-67).

⁶ CP 924-931 (Ex. 2 to the Decl. of Clark Chang, pp. 28-35, ¶¶ 94-118); CP 1142-1143 (Decl. of KD Chang, ¶¶ 4-6). As before, the new SCB account was in the name of KD, but Clark was the beneficiary of the account and the only person authorized to give instructions.

⁷ CP 924, 926-228 (Ex. 2 to the Decl. of Clark Chang, p. 28, ¶ 96; pp. 30-32, ¶¶ 102-105).

portfolio was worth several million dollars less than what Chan had told Clark it was worth. The actual value was barely enough to cover the SCB loan.⁸ None of the account paperwork or statements reflected the loss.⁹

In October 2008, Chan informed Clark that SCB was requesting additional collateral to secure his accounts. Clark now realized that Chan had been misleading him about his investment accounts. Clark refused to provide SCB with further collateral.¹⁰

In November 2008, SCB's counsel in Hong Kong contacted KD and Clark via letter demanding repayment of the SCB facility. At the time, Clark's SCB portfolio had a negative account value which exceeded \$5 million. The portfolio continued to decline in value over the next couple of months.¹¹

1. The Hong Kong Lawsuits.

On March 21, 2009, SCB filed claims against Clark and KD in the Hong Kong Court relating to the \$16 million SCB loan facility.¹² The claims asserted that the Changs owed SCB approximately \$8.84 million on the loan plus interest.

On September 24, 2009, Clark filed his Defence and

⁸ CP 926-928 (Ex. 2 to the Decl. of Clark Chang, pp. 30-32, ¶¶ 102-105).

⁹ CP 1145, 1190-1193 (Decl. of KD Chang ¶ 12 and Ex. 3 to the Decl. of KD Chang).

¹⁰ CP 937 (Ex. 2 to the Decl. of Clark Chang, p. 41, ¶ 153).

¹¹ CP 938-940 (Ex. 2 to the Decl. of Clark Chang, pp. 42-44, ¶¶ 158-171).

¹² This was Hong Kong High Court Action 806.

Counterclaim to High Court Action (“HCA”) 806, alleging the ongoing and systematic deceit perpetrated by Chan.¹³ On September 24, 2009, KD and Clark brought action HCA 1996 (“HCA 1996”) against SCB and BEA.¹⁴ The claims asserted by Clark and KD in HCA 1996 were identical to the counterclaims asserted by Clark in HCA 806.

The Hong Kong court rules allow a defendant to seek an order requiring non-resident plaintiffs to pay security for costs, including attorney fees, into the court. Both SCB and BEA sought security for costs in the Hong Kong lawsuits. SCB sought security for costs against KD and Clark of approximately \$1 million.¹⁵

The Hong Kong Court heard arguments on SCB’s and BEA’s motions for security costs in HCA 805 and HCA 1996 at the same time. Despite the evidence of improper attorney billings presented by KD and his openness about his inability to pay security for costs, the Hong Kong Court ordered him to pay approximately \$385,000 in security for costs for SCB in HCA 1996 and \$450,000 for BEA. The security for costs had to be paid in cash within 14 days.¹⁶

¹³ CP 749, 897-967 (Decl. of Clark Chang, ¶¶ 21 and Ex. 2 to the Decl. of Clark Chang).

¹⁴ CP 29-30 (Decl. of DSK Chiu ¶¶ 8) and CP 45 - 115 (Ex. C) and CP 749 (Decl. of Clark Chang, ¶¶ 22) and CP 968 - CP 1047 (Ex. 3).

¹⁵ CP 364-366 (Decl. of Pamela Mak, pp. 4-6, ¶¶ 11-21).

¹⁶ CP 1400-1416 (Ex. 16 to the Decl. of KD Chang).

The Chang family had already spent a total of \$500,000 on legal expenses for the three cases.¹⁷ The Changs were unable to pay the security for costs awards and their claims against SCB and BEA were dismissed. Because KD and Clark did not contest HCA 806 or 1996, SCB obtained two identical \$9 million judgments against them.¹⁸

B. Procedural History.

On June 20, 2012, SCB filed a Petition for Recognition of and Enforcement of Foreign-Country Judgment (the "Petition") in King County Superior Court. KD filed a response to the Petition, which included additional affirmative defenses, as well as counterclaims against SCB.

On June 7, 2013, the parties appeared before King County Superior Court Judge Laura Middaugh for oral argument on SCB's Motion for Summary Judgment. SCB sought summary judgment on issue of recognition and enforcement of the Hong Kong Judgment against KD. The Motion also sought summary judgment on whether the Hong Kong Judgment was enforceable against KD's community property.¹⁹ The court granted summary judgment with

¹⁷ In HCA 805, SCB had sued KD's sister, Ching Ho Chang and his brother, Grant, on their alleged failure to pay a \$2 million Loan. CP 1146, 1196 - 1205 (Decl. of KD Chang, ¶ 19 and Ex. 5 to the Decl. of KD Chang).

¹⁸ CP 367 (Decl. of Pamela Mak, ¶ 26).

¹⁹ CP 1-26 (SCB's Motion for Summary Judgment).

regards to recognition, but denied summary judgment on the community property issue.²⁰

The Court of Appeals affirmed the trial court's order granting summary judgment, finding that there were no grounds for non-recognition of the Hong Kong Judgment.

V. ARGUMENT

A. Considerations for Granting Review.

The Uniform Foreign-Country Money Judgments Recognition Act, RCW 6.40A, *et seq*, provides multiple grounds for non-recognition of a foreign country judgment. The grounds for non-recognition asserted by KD involved the violation of procedural and substantive due process, as well as matters of public policy.²¹ Therefore, the decision of the Court of Appeals raises significant questions under the U.S. and Washington State Constitutions and issues of great public interest under RAP 13.4 (b) (3) and (4) as discussed hereafter.

B. This matter involves significant questions of law under the U.S. and Washington State Constitutions.

1. The trial court and Court of Appeals decisions constitute state action depriving KD Chang of his property without due process in violation of the Fourteenth Amendment.

The actions of Washington state courts and of judicial officers in their official capacities constitute actions of the State of

²⁰ CP 1480-1483.

²¹ CP 401-429 (Response to Motion for Summary Judgment).

Washington thereby invoking the Fourteenth Amendment of the United States.²²

When a Washington court recognizes a judgment from a foreign country, it grants the foreign judgment the same legal effect as a judgment obtained in Washington.²³ More importantly, the court is also giving the foreign creditor the ability to enforce the foreign judgment using the various collection mechanisms set forth in Title 6 of the RCW, which includes seizure, attachment, and garnishment.²⁴ By recognizing a foreign judgment, the Washington court acts jointly with the foreign creditor to deprive the debtor of his property.²⁵ Thus, under the Fourteenth Amendment, when recognizing a foreign judgment, courts must ensure that the underlying foreign action was compatible with due process.²⁶

Washington has codified this constitutional principle in its Uniform Foreign-Country Money Judgments Recognition Act. The Act plainly states that Washington courts are not required to recognize a foreign judgment if the foreign proceedings were not compatible with the requirements of due process of law.

²² Ohno v. Yasuma, 723 F.3d 984, 993 (9th Cir. 2013) (citing Shelley v. Kraemer, 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)).

²³ RCW 6.40A.060.

²⁴ RCW 6.40A.060(2). See generally RCW 6.17, 6.25, and 6.27.

²⁵ Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982).

²⁶ Dahl v. Akin, 630 F.2d 277, 280, 1980 U.S. App. LEXIS 12422, 6 (5th Cir. 1980) (Trial court's failure of procedural due process constituted "state action").

In the lower courts, SCB relied on the *Ohno* case for the assertion that recognizing and enforcing a foreign judgment does not constitute state action. This is a gross misstatement of the *Ohno* case which specifically stated, “So there is no doubt that the district court’s decision in this case applying California’s Uniform Act—legislation that is itself the result of governmental action—constitutes state action for purposes of constitutional scrutiny.”²⁷ Moreover, *Dahl*, the case cited by *Ohno*, held that “whatever other judicial action may constitute ‘state action,’ a failure of procedural due process surely does.”²⁸ Unlike KD in this case, the appellant in *Ohno* did not raise any due process, equal protection, or access to justice issues.

As discussed below, the proceedings leading to the Hong Kong Judgment against KD violated due process in several respects. Therefore, the recognition of the Hong Kong Judgment in Washington raises questions of law under the U.S. and Washington Constitution.

- a. **The Hong Kong security for costs rule violates substantive due process by infringing upon non-resident plaintiffs’ fundamental right of access to the courts.**

The due process guaranteed by the Fifth and Fourteenth

²⁷ *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013); See also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-33 (1982).

²⁸ *Dahl v. Akin*, 630 F.2d 277, 280 (1980).

Amendments requires more than just fair process,²⁹ and the protection of liberties extends beyond just the absence of physical restraint.³⁰ Substantive due process prohibits government actions that infringe on fundamental rights and liberties,³¹ “regardless of the fairness of the procedures used to implement them.”³² A substantive due process violation has occurred except where the infringement has been narrowly tailored to serve a compelling government interest.³³

- i. The right of access to the courts is the most fundamental right of the People.

Fundamental rights and liberties are the interests of the People that are “deeply rooted in this Nation’s history and tradition”,³⁴ without which “neither liberty nor justice would exist if they were sacrificed.”³⁵ In *Marbury v. Madison*, the United States Supreme Court stated, “No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights.”³⁶ Access to the courts is not just a fundamental right; it is

²⁹ Collins v. Harker Heights, 503 U.S. 115, 125 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

³⁰ Wash. v. Glucksberg, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

³¹ Reno v. Flores, 507 U.S. 292, 301-302 (1993); Wash. v. Glucksberg, at 720.

³² Daniels v. Williams, 474 U.S. 327, 331 (1986).

³³ Reno, 507 U.S. at 301-302.

³⁴ Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

³⁵ Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937).

³⁶ Marbury v. Madison, 1 Cranch 137 (1803).

the fundamental right of the People:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.³⁷

The fundamental right of access to courts is also inherent in Article I, Section 10 of the Washington State Constitution.³⁸ The Washington State Supreme Court has found, "The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'"³⁹

By requiring non-resident plaintiffs to post security for costs, including attorney's fees, the Hong Kong security for costs rule unavoidably impacts each and every non-resident claimant's fundamental right of access to the courts. In addition to worrying about his own costs, the non-resident plaintiff must also contemplate having to post his opponent's costs and attorney fees. The immediate effect is two-fold: 1) the non-resident plaintiff may

³⁷ Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 148 (1907).

³⁸ Putnam v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 979, 216 P.3d 374 (2009).

³⁹ *Id.* at 979 (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

be altogether dissuaded from pursuing justice; and 2) the non-resident plaintiff's case is compromised because he cannot dedicate all resources towards the prosecution of his own case. Should a non-resident plaintiff choose to move forward, the security for costs rule permits the Hong Kong court to dismiss the non-resident plaintiff's claims if he cannot post the security for costs ordered. As a result, the non-resident plaintiff is arbitrarily denied his fundamental right of access to the courts.

- ii. **The Hong Kong security for costs rule does not survive strict scrutiny because security for costs statutes are archaic and unnecessary and serve no compelling interest.**

Since the Hong Kong security for costs rule infringes upon a fundamental right, the rule is subject to strict judicial scrutiny.⁴⁰ Few statutes survive strict scrutiny.⁴¹ A rule will only pass strict scrutiny if it has been narrowly tailored to serve a compelling government interest.⁴² The government interest must be "sufficiently compelling to place within the realm of the reasonable refusal to recognize the individual right asserted."⁴³

There are only two purposes for the Hong Kong security for costs rule that can be advanced: 1) assuring that a Hong Kong

⁴⁰ Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9th Cir. 2008).

⁴¹ *Id.*

⁴² Reno, 507 U.S. at 301-302.

⁴³ Wash. v. Glucksberg, 521 U.S. at 760 (Souter, J., concurring).

party entitled to recover costs from a foreign plaintiff can do so; and 2) dissuading frivolous lawsuits. However, if dissuading frivolous lawsuits were actually a legitimate and compelling interest, security for costs would be allowable in every case.

Securities for costs statutes arose out of spite and stayed out of necessity, but they are now arcane and unnecessary. In his 2000 article in the *St. John's Law Review*, *Access to Federal Courts and Security for Costs and Fees*, John A. Gliedman provides a concise and enlightening history of security of costs in England and the United States.⁴⁴

Access to the courts is the basis for all other rights. There is no sufficiently compelling reason why a person should ever be forced to pay significant costs just for the chance to exercise this fundamental right. Undoubtedly, the reason these unconstitutional statutes still exist is that they are very effective. They deny those persons who cannot afford security for costs access to the courts. If you cannot afford the security for costs, you cannot afford to challenge the constitutionality of the statute on an appeal.⁴⁵ Even if a person can afford security for costs, it is purely unjust that he

⁴⁴ See John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 *St. John's L. Rev.* 953, 957-960.

⁴⁵ Washington has a security for costs statute similar to the Hong Kong rule (see RCW 4.84.210). The statute was originally passed in 1854, but has never been constitutionally challenged.

must compromise the strength/strategies of his own case to do so.

2. The Hong Kong security for costs rule violates the Equal Protection and Privileges and Immunities Clauses of the Washington State and U.S. Constitutions.

The purpose of the Equal Protection Clause is to protect persons against intentional and arbitrary discrimination by state actors.⁴⁶ It requires that all similarly situated persons be treated alike.⁴⁷ Any statute that creates a suspect classification of individuals will be subjected to strict judicial scrutiny.⁴⁸ Classifications based upon race, nationality, and/or alienage are inherently suspect.⁴⁹ Even if the classification is not deemed “suspect,” any classification that affects a fundamental right will also be subjected to strict judicial scrutiny.⁵⁰

Government action burdening the fundamental rights of one group more than that of another group subjects the classification to strict scrutiny and will be sustained only if the classifications are suitably tailored to serve a compelling state interest.⁵¹ A compelling interest will only be found if the purpose and interest behind the

⁴⁶ Sunday Lake Iron Co. v Wakefield, 247 U.S. 350, 62 L. Ed. 1154, 38 S. Ct. 495 (1918).

⁴⁷ City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1984).

⁴⁸ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978); Nielsen v. Washington State Bar Ass'n, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

⁴⁹ Graham v. Richardson, 403 U.S. 365, 371 (1971).

⁵⁰ Bakke, 438 U.S. 265, 357 (1978); Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); Nielsen, 90 Wn.2d 818, 820 (1978).

⁵¹ Cleburne, 473 U.S. at 440.

statute are constitutionally permissible and substantial.⁵²

In this case, the Hong Kong security for costs rule clearly distinguishes between residents and non-residents. Resident defendants are permitted to move for security for costs against a non-resident plaintiff, but non-resident defendants cannot. As such, resident plaintiffs can freely file suit without worrying about having to post security for costs, while non-resident plaintiffs are subject to security for costs. Hong Kong's classification based on non-residency is suspect because non-residents of Hong Kong are in "a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁵³ In addition, the classification is akin to one based upon nationality and alienage, which are both inherently suspect classifications.

As noted above, the Hong Kong security for costs rule infringes upon non-resident plaintiffs' fundamental right of access to the court. Since the rule burdens the fundamental right of one class of citizens, but not another, whether or not the classification is suspect is actually irrelevant. There still must be a compelling government interest to justify the infringement upon non-resident plaintiffs' fundamental right of access to the courts.

The Hong Kong security for costs rule does not comport with

⁵² Nielsen v. State Bar Ass'n, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

⁵³ San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

the Equal Protection and Privileges and Immunities Clauses of the U.S. and Washington State Constitutions. The trial court's recognition of the Hong Kong Judgment violated the Fourteenth Amendment and this Court must reverse the ruling.

3. The Hong Kong court violated due process in its application of the security for costs rule in the Hong Kong Proceedings by depriving KD Chang of his property without a meaningful opportunity to be heard.

When imposing security for costs, courts are necessarily infringing upon a claimant's fundamental right of access to the court. Yet, various U.S. courts have upheld security for costs rules. Under the Fourteenth Amendment, though, the States are still obligated to ensure that each individual receives due process.⁵⁴ Thus, even though a statute is valid on its face, the court's application of the statute may nonetheless offend due process.⁵⁵

Due process includes the fundamental of right of access to the courts and the right to be heard in one's defense.⁵⁶ A person must be given a meaningful opportunity to be heard.⁵⁷ The hearing must be appropriate for the nature of case.⁵⁸

In the case at hand, the Hong Kong court twice deprived KD of property by foreclosing his meaningful opportunity to be heard.

⁵⁴ Boddie v. Connecticut, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

⁵⁵ *Id.*

⁵⁶ Boddie, 401 U.S. at 378.

⁵⁷ *Id.*

⁵⁸ *Id.*

The Hong Kong court did so through its application of the Hong Kong security for costs rule. First, the Hong Kong court deprived KD of his right to have a meaningful hearing on his claims against SCB in HCA 1996. Second, the Hong Kong court denied KD his right to present a meaningful defense to SCB's claims against him and to pursue his counterclaims against SCB in HCA 806.

C. The Hong Kong security for costs rule and conduct of the Hong Kong Proceedings raise issues of substantial public interest.

1. The Hong Kong judgment violates the public policy of access to the courts embodied in the U.S. and Washington State Constitutions.

The Hong Kong security for costs rule infringes upon non-resident plaintiffs' fundamental right of access to the courts and, therefore, is repugnant to public policy. When a foreign judgment is repugnant to a public policy embodied in the U.S. Constitution, the "refusal to recognize the judgment is 'constitutionally mandatory.'"⁵⁹ Access to the courts is clearly a public policy embodied by the U.S. and Washington Constitutions. Since the Hong Kong security for costs rule and the court's application of KD's right of access to the courts, the Hong Kong judgment is repugnant to public policy and, thus, raises issues of great public interest.

⁵⁹ See Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992).

2. The Hong Kong court system improperly favors its residents over non-residents.

As the Hong Kong court at issue shows, the Hong Kong court system improperly favors its residents over non-residents, which violates Washington and U.S. public policies. Enforcement of foreign judgments from the Hong Kong court system, thus, raises issues of great public interest.

3. Washington public policy eschews large corporations using wealth to manipulate the court system.

In this case, the Hong Kong Court also demonstrated favor towards two multi-billion dollar Hong Kong banks by awarding substantial securities for costs, despite being informed that the costs would stifle KD's claims and his ability to defend against SCB. Instead, the Hong Kong court ordered security for costs because *"the banks' reputation is at stake"* and the court wanted to ensure that the banks had "experienced counsel." This violates Washington public policy against "serving the interest of special classes of citizens to the detriment of the interests of all citizens" and, thus, raises issues of great public interest.

Even if the Hong Kong system itself does not favor large corporations, in the present matter, the Hong Kong Court clearly favored the banks and the Hong Kong judgment should not have been recognized for the court's lack of integrity. In these types of cases, the particular concerns of the courts are partiality, bribery,

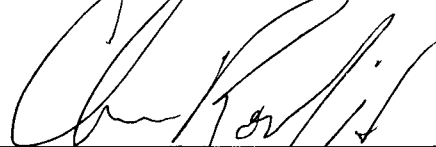
and overall lack of fairness during the foreign proceedings.⁶⁰ Partiality and lack of fairness were certainly involved in the Hong Kong Proceedings and the lower courts' decision to ignore these facts raises issues of great public interest.

VI. CONCLUSION

This Court is presented with the opportunity to make a statement about archaic and unnecessary security for costs statutes which unconstitutionally discriminate against non-residents. The lower courts recognized a Hong Kong judgment against Petitioner, despite the denial of Petitioner's access to justice in Hong Kong by a \$385,000 security for costs order. The deprivation of Petitioner's most fundamental right of access to the courts commands this Court to grant review of the Court of Appeals' decision.

Respectfully submitted this 24th day of September, 2014.

TOLLEFSEN LAW PLLC



John J. Tollefsen, WSBA #13214
Chris Rosfjord, WSBA #37668
Attorneys for Petitioner KD Chang

⁶⁰ 2005 Recognition Act § 4(c)(7) cmt 11.

APPENDIX

Appendix No.

Court of Appeals of the State of Washington Division One
Unpublished Opinion filed August 25, 3014 1

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

SHANGHAI COMMERCIAL BANK)	No. 70526-1-I
LIMITED, a banking corporation)	
organized and existing under the)	
Laws of Hong Kong Special)	
Administrative Region, the People's)	
Republic of China,)	
)	
Respondent,)	
)	
v.)	
)	
KUNG DA CHANG and JANE DOE)	UNPUBLISHED OPINION
CHANG, husband and wife and the)	
marital community comprised thereof,)	FILED: August 25, 2014
)	
Appellants.)	
)	

VERELLEN, A.C.J. — This appeal arises from the decision of the King County Superior Court granting recognition and enforcement of a foreign judgment entered by a Hong Kong trial court. Kung Da Chang fails to demonstrate that he was deprived of due process by either the Hong Kong judicial system generally or the rendering court specifically, that the judgment is repugnant to state or federal public policies, or that the judgment was rendered under circumstances raising doubts about the integrity of the rendering court. Chang fails to establish that the foreign judgment sought to be enforced was affected by a security-for-costs order issued in a separate action. The King County Superior Court correctly determined that the foreign judgment is valid and enforceable. We affirm.

FACTS

In Shanghai Commercial Bank Limited v. Chang Kung Da, HCA 806/2009 (Action 806), Shanghai Commercial Bank (SCB) sought to collect on an unpaid revolving multi-currency loan that Chang obtained in March 2008 in order to facilitate the transfer of investments from the Bank of East Asia (BEA) to SCB. Chang counterclaimed against SCB, raising fraud and securities claims. Chang did not appear at trial for Action 806, but the trial court considered evidence submitted by the parties, including pleadings and witness statements. In June 2011, the Hong Kong trial court entered judgment against Chang, which totaled almost USD\$9 million, exclusive of interest. Chang did not appeal.

In a parallel action before the Hong Kong trial court, Zhang Zhatzewal, also known as Chang Chih Hwa, Clark, and Chang Kung Da v. Shanghai Commercial Bank Limited and The Bank of East Asia, Limited, HCA 1996/2009 (Action 1996), Chang and his father, Clark Chang, as plaintiffs, asserted fraud and securities claims against SCB and BEA based on the Changs' multimillion dollar investment losses. The claims in Action 1996 are substantially similar to Chang's counterclaims in Action 806.

Prior to the resolution of these separate actions, SCB and BEA applied for security for their costs in Action 1996. The Hong Kong rules of civil procedure allow a defendant in any action to petition the court to order a nonresident plaintiff to post security for the possible costs of the litigation. Such a bond secures against a nonresident plaintiff avoiding payment of a winning defendant's attorney fees and other costs in the event that the nonresident plaintiff loses the lawsuit. The applications for

costs in Action 1996 were heard over two days.¹ In determining whether to order security against the Changs, the Hong Kong court considered a variety of factors established by Hong Kong case law, including whether imposing security would stifle the plaintiffs' access to the courts. In May 2011, the Hong Kong trial court ordered the Changs to provide security for Action 1996 in the amounts of HKD\$3 million² to secure SCB's potential costs and HKD\$3.5 million to secure BEA's possible costs. Despite being warned of the consequences, the Changs failed to post the required security. As a result, the Hong Kong court dismissed the Changs' claims in Action 1996 in June 2011. Shortly thereafter, the court awarded judgment against the Changs on counterclaims asserted by SCB in Action 1996. The Changs did not appeal.

In June 2012, SCB filed a petition, pursuant to Washington's Uniform Foreign-Country Money Judgments Recognition Act (UFMJRA), chapter 6.40A RCW, in King County Superior Court seeking recognition and enforcement of the Hong Kong judgment rendered in Action 806. In King County Superior Court, Chang argued that the security for costs ordered in Action 1996 rendered the Action 806 judgment unrecognizable in Washington. Upon SCB's motion for partial summary judgment, the trial court concluded that the Action 806 judgment was recognizable and enforceable, granted partial summary judgment in favor of SCB, and entered final judgment against Chang for approximately USD\$11.7 million.

Chang appeals.

¹ The petition for costs in Action 1996 was heard together with a petition for costs in HCA 805/2009, a third lawsuit to which Chang was not a party.

² This amount, HKD\$3 million, equals approximately USD\$387,000.

DECISION

Chang contends that the trial court improperly granted partial summary judgment in favor of SCB. We disagree.

We review the trial court's summary judgment decision de novo.³ Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law.⁴ All reasonable inferences from the evidence must be drawn in favor of the nonmoving party.⁵

The UFMJRA provides that Washington courts "shall recognize a foreign-country judgment" for money damages that is "final, conclusive, and enforceable" where rendered,⁶ unless one or more of the mandatory or discretionary grounds for non-recognition applies.⁷ Chang does not argue that the foreign judgment here was not final, conclusive, or enforceable. Instead, he argues that four exceptions render the judgment unrecognizable.

First, a Washington court is prohibited from recognizing a foreign judgment if it was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process."⁸ Second, even where the court may not have found the foreign judicial system to be defective as a whole,⁹ a

³ Lakey v. Puget Sound Energy, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

⁴ Id.

⁵ Id.

⁶ RCW 6.40A.020(1).

⁷ RCW 6.40A.030.

⁸ RCW 6.40A.030(2)(a).

⁹ See 2005 Recognition Act § 4(c)(7), cmt. 11.

tribunal-specific due process concern grants Washington courts discretion to deny recognition if “[t]he specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”¹⁰ Third, a Washington court “need not recognize a foreign-country judgment if . . . [t]he judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of [Washington] or of the United States.”¹¹ Fourth, a Washington court is “not required to recognize a foreign-country judgment if . . . [t]he judgment was rendered in circumstances that raise a substantial doubt about the integrity of the rendering court with respect to the judgment.”¹²

Chang fails to establish that any of these grounds for non-recognition apply in this case. Chang conflates Action 806 and Action 1996 and analyzes each of the exceptions by considering the Action 1996 security-for-costs order rather than the Action 806 judgment. Chang asserts that, in evaluating the proceedings in Action 806, we should consider the effect of the security-for-costs order in Action 1996 because “HCA 806 and HCA 1996 were essentially one and the same matter” and “any ruling in one matter should be considered by the Court to be a ruling in the other matter.”¹³ All of Chang’s arguments for non-recognition of the Action 806 judgment stem from this premise.¹⁴ But Chang provides no authority for this proposition, and we find no reason

¹⁰ RCW 6.40A.030(3)(h).

¹¹ RCW 6.40A.030(3)(c).

¹² RCW 6.40A.030(3)(g).

¹³ Appellant’s Br. at 18.

¹⁴ For example, Chang argues that Hong Kong’s security-for-costs procedures deprive plaintiffs of access to the courts and discriminate against nonresidents.

No. 70526-1-1/6

to make such an assumption in this case. Although a parallel proceeding, Action 1996 was a separate cause of action from Action 806.

Nevertheless, Chang asserts that material questions of fact remain regarding whether the Action 1996 security-for-costs order effectively prevented him from litigating Action 806. But even accepting Chang's factual allegations as true, he did not demonstrate that the security-for-costs order in Action 1996 actually prevented him from defending against SCB's claims in Action 806. Even if, as Chang alleges, he could not appear personally for fear that he would be imprisoned or ordered to remain in Hong Kong indefinitely, Chang does not establish that he could not continue to appear in Action 806 through counsel or that he could not submit evidence, such as witness affidavits, from outside of Hong Kong. Moreover, the issues Chang raises regarding the effect of the security-for-costs order on Action 806 should have been addressed to the Hong Kong court ordering Chang to provide security when that foreign court considered whether such an order would stifle Chang's access to the courts. For these reasons, Chang's arguments regarding the impact of the security-for-costs order are unavailing.

Moreover, even accepting Chang's premise that the Action 1996 security-for-costs order impacted Action 806, Chang does not establish that the judgment in Action 806 should not be recognized under any of the four exceptions he relies upon.

As to the mandatory exception under RCW 6.40A.030(2)(a) and the discretionary exception under RCW 6.40A.030(3)(h), Chang points to no authority holding that a security-for-costs mechanism is incompatible with due process or other constitutional standards. He argues that the security-for-costs mechanism implicates equal protection and privileges and immunities concerns by restricting nonresident plaintiff's access to

the courts. But he cites no court decision that has rejected a security-for-costs mechanism on such a theory. Chang also argues that he had no meaningful opportunity to be heard, but the hearing on the security-for-cost matter lasted for two days, and it appears that the limited materials he submitted were considered by the Hong Kong court. Chang had the opportunity to present evidence to the Hong Kong court demonstrating that he was not financially able to provide the requested security, but he did not do so. Chang also had the opportunity to appeal the security-for-costs order, and for that matter the judgment rendered in Action 806, but he did not appeal either judgment. Even after his claims were dismissed in Action 1996, Chang was given the right to be heard and to be represented in Action 806, although he chose not to exercise those rights. There is no indication that Chang was deprived of due process.

As to the exception under RCW 6.40A.030(3)(c), the security that the Hong Kong court ordered Chang to provide is not repugnant to Washington law, as the security-for-costs mechanism in Hong Kong is substantially similar to the Washington procedure under RCW 4.84.210.¹⁵ Although Chang vaguely asserts that Washington's security-for-costs statute may be "ripe" for a constitutional challenge, he provides no analysis or persuasive authority in support of this assertion.

As to the exception under RCW 6.40A.030(3)(g), Chang fails to establish that the security-for-costs order raises any doubt about the integrity of the Hong Kong court. He contends that the Hong Kong court gave undue deference to the interests of the banks.

¹⁵ See, e.g., White Coral Corp. v. Geyser Giant Clam Farms, LLC, 145 Wn. App. 862, 867-69, 189 P.3d 205 (2008) (affirming trial court's dismissal of action upon failure of foreign plaintiff to post \$125,000 security for costs for defendant's prospective attorney fees).

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But, rather than demonstrating impartiality, the Hong Kong court's passing reference to the bank's concern with its reputation was merely part of the court's observation that both parties were likely to incur significant attorney fees in Action 1996 because they had a lot at stake.

Chang's arguments are not persuasive. We affirm the King County Superior Court's determination that the Hong Kong judgment in Action 806 is recognizable and enforceable.

WE CONCUR:

Leach, J.

Vander Aal
↓
COX, J.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHANGHAI COMMERCIAL BANK
LIMITED,

Respondent,

vs.

KUNG DA CHANG, et al.,

Petitioner.

Supreme Court No. _____

(Div. I Case No. 70526-1-I)

PROOF OF SERVICE

I certify that on September 24, 2014, the Petition for Review by The Washington State Supreme Court for Petitioner Kung Da Chang was served on the following via courier delivery:

Counsel for Respondents:
Stellman Keehnel / Stephen Hsieh /
Katherine Heaton / Patsy Howson
DLA Piper LLC (US)
701 Fifth Ave., Ste 7000
Seattle, WA 98104-7044

Dated this 24th day of September, 2014, I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed in Lynnwood, Washington.

TOLLEFSEN LAW PLLC

Belinda Born-Reid
Belinda Born-Reid, Paralegal

Proof of Service

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