THE SUPREME COURT OF WASHINGTON

SUPREME COURT NO. 96655-9
COURT OF APPEALS NO. 76576-1-I

GREAT OCEAN CAPITAL HOLDING, LLC, a Washington limited liability company; HUY YING CHEN and XUE PING WANG, Husband and Wife Residing in Washington State;

Petitioners.

v.

YANLU LIU and AI HUA PAN, Husband and Wife Residing in King County, Washington; PENG ZHANG and ZHONGYUAN PAN, Husband and Wife Residing in Ontario, Canada,

Respondents,

Respondents' Response in Opposition to Petitioner Huy Ying Chen and Xue Ping Wang's Petition for Review

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RESPONSE TO THE CHEN'S PETITION FOR REVIEW

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(I). INTRODUCTION.

As a preliminary matter, it must be noted that Petitioners Xue Ping Wang and Huy Ying Chen ("the Chens") are pro se, and therefore cannot make any arguments on behalf of Petitioner Great Ocean Capital Holding, LLC (GOCH). To the extent the Chens make any arguments on behalf of GOCH, Respondents request that this court strike any such arguments and statements.

As they have done countless times before, the Chens have filed petitions that rehash the same arguments made in multiple pleadings before the Court of Appeals and the trial court. Notably, on October 15, 2018, the Court of Appeals affirmed the King County Superior Court's granting of summary judgment and specifically rejected the Chens' arguments.[1]

In rejecting the Chens' position, the Court of Appeals noted that the federal law that governs EB-5 investments and the creation of "regional centers" specifically carves out an exception that allows for a victim of a fraudulent EB-5 scheme to sue for damages in state court. Additionally, the Chens' arguments rest on semantics and not a meaningful examination of the applicable law or the record. Like they did

[1] See Division 1's October 15, 2018 ruling at p. 14, attached hereto as "Appendix A."

in their appeal, the Chens repeatedly fail to challenge the reasonableness of Respondent Bonnie Pan's (Pan) reliance on the Chens' materially false and misleading statements. The Chens' current petition is rife with conclusory and speculative claims that are unrelated to Pan's WSSA claims.

Notwithstanding these facts, it must be noted that the court has personal jurisdiction over the Chens and subject matter jurisdiction exists over this matter. Preliminarily, the Chens live in King County, Washington. Further, Petitioners have waived any claim to lack of personal jurisdiction because they appeared in this matter and never filed a CR 12(b) motion to dismiss on personal jurisdiction grounds. Finally, the Chens waived their personal jurisdiction claim by requesting affirmative relief at the trial court. CP 1323-1328. A personal jurisdiction challenge is deemed waived if the party seeks affirmative relief. See CR 12. There is simply no basis to claim that the King County Superior Court lacked personal jurisdiction.

Washington courts have subject matter jurisdiction over this matter because the principal claim in this matter is violation of the Washington State Securities Act ("WSSA"). There is no federal preemption. Washington securities laws are designed to protect investors such as the Respondents. See RCW 21.20 et. seq. Additionally, Washington courts

have heard claims that derive out of EB-5 investments. See Grant County Port Dist. No. 9 v. Wash. Tire Corp., 187 Wn. App. 222, 349 P.3d 889 (2015).

Because the Chens' arguments are not grounded in law or in fact, their motions must be denied in its entirety.

(A). Identity Of Respondents.

Respondents, (collectively as the "Respondents") are Yanlu Liu and Ai Hua Pan, Zhongyuan Pan and Peng Zhang.

(II). RESPONSE TO THE CHENS' ISSUES PRESENTED FOR REVIEW

(1). The trial court did not lack jurisdiction to render judgment against the Chens on Pan's WSSA claim.

(2). Pan's WSSA claim did not interfere with any federal law or Congressional Act.

(3). The Court of Appeals did not err when it held that Pan's WSSA claim is not preempted by federal law, and cited that under 15 U.S.C. 77r(c)(1)(A)(i) that states retain the authority "under the laws of such state to investigate and bring enforcement actions in connection with securities or securities transaction…with respect to---fraud or deceit."

(4). Pan had a right to bring her WSSA claim against the Chens, and was not required under RCW 25.15.386 to bring a derivative action.

(5). The trial court did not err in striking the Chens' answer and affirmative defenses.

(6). There is no legal basis for the Supreme Court to review de novo the issuance of a Temporary Restraining Order.

(7). Pan was not required to bring a derivative action against the Chens.

(III). LEGAL ANALYSIS

(A). Considerations Governing Acceptance Of Review.

Under Rule of Appellate Procedure 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, none of these bases exist. Accordingly, discretionary review by the Washington Supreme Court must be denied. The Chens appear to allege that the Court must accept discretionary review because there is a lack of jurisdiction and lack of standing.[2] For the reasons set forth below, it is clear that subject matter exists over this Washington State Securities Act matter, that Pan had standing to bring suit in the state court, and that Washington courts have jurisdiction over the Chens.

Discretionary review is an extraordinary procedure that should be granted in only extraordinary cases. See Right-Price Recreation LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380 46 P.3d 789 (2002);

[2] See The Chens' Petition for Discretionary Review at p. 9.

See also State v. State Credit Asso, 33 Wn. App. 617, 657 P.2d 327 (1983).

In this matter, discretionary review is not proper because the Chens have failed to show that the Court of Appeal's October 15, 2018 ruling was erroneous. The Chens further fail to show how the trial court lacks personal jurisdiction over them—who are by their own admission, Washington residents[3]—and fail to show that the trial court lacked subject matter jurisdiction over Pan's claims.

(B). The Standard Of Review For A Challenge To A Court's Jurisdiction Over A Person Or Issue Is De Novo; And Challenge To A Court's Issuance Of Sanctions For Discovery Violations Is Abuse of Discretion.

(i). Jurisdiction Is A Question Of Law Reviewed De Novo.

Jurisdiction is a question of law reviewed de novo. State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997). The burden of contesting jurisdiction requires that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction. State v. L.J.M., 129 Wn.2d 395, 918 P.2d 898 (1996). Accordingly, the Chens have the burden of contesting jurisdiction. As explained below, the Chens have not and cannot meet this burden.

[3] See The Chens' Petition for Discretionary Review at p. 1

(ii). The Trial Court Did Not Abuse Its Discretion When It Struck The Chen's Answers and Affirmative Defenses.

Review of a trial court's issuance of discovery sanctions is for abuse of discretion. See Snedigar v. Hoddersen, 114 Wn. 2d 153, 169, 786 P.2d (1990). A trial court exercises broad discretion in imposing discovery sanctions, and its determination will not be disturbed absent a clear abuse of that discretion. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's reasons for imposing discovery sanctions should be clearly stated on the record so that meaningful review can be had on appeal. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Court rules provide that a court may impose sanctions for a party's failure to abide by discovery orders. CR 37(b), (d). Sanctions may range from the exclusion of certain evidence to granting a default judgment when a party fails to respond to interrogatories and requests for production. Magana v. Hyundai Motor Am., 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

Before imposing a harsh discovery sanction, a trial court is required to consider the factors from Burnet v. Spokane Ambulance:

> A trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation

> was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.
>
> Teter v. Deck, 174 Wn.2d 207, 216-17, 274 P.3d 336 (2012)(citing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 496-97, 993 P.2d 1036 (1997)).

In their Petition, the Chens fail to discuss the Burnet factors and fail to articulate a clear abuse of discretion from the trial court.[4] Instead, the Chens argue that because the Court lacks jurisdiction—which is demonstrably false, "the court has no authority to reach merits, but rather, should dismiss the action."[5]

Here, the court did not abuse its discretion when it issued the November 28, 2016 order striking Chens' Answer and Affirmative Defenses.[6] In utilizing the Burnet factors, the court noted that the Chens had a pattern of willfully disobeying court orders.[7] For example, on June 21, 2016, the court ordered the Chens to provide supplemental answers to Pan's discovery request by June 30, 2016.[8] The Chens never provided answers to Pan, in direct violation of the court's order.[9]

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[4] See Chen and Wang's Petition for Discretionary Review at p. 9 and 13.
[5] Id. at p. 13.
[6] CP at 1330-1333.
[7] Id.
[8] Id. at 1331.
[9] Id.

Furthermore, the court noted that on September 26, 2016, the Court found the Chens in Contempt for their failure to supplement their answers to discovery.[10] The Court sanctioned the Chens and their counsel $5,000.00 and ordered that all discovery the Chens were trying to conduct be stayed until they complied with the Order of Contempt.[11]

In the November 28, 2016 order striking the Chens' Answer and Affirmative Defenses, the court noted that Chens never filed a protection order which they are required to do if they believed the discovery sought was confidential. [12] Instead, they just refused to engage in discovery in violation of the Court's prior Orders.[13] In light of the Chens repeated discovery violations, the court reasoned that the striking of the Chens' Answer was the least harsh remedy.[14] The court did not abuse its discretion.

Because the Chens fail to articulate why the court abused its discretion, their argument must be disregarded.

(C). Chen And Wang Have Not Articulated A Cohesive Argument That Would Warrant This Court Accepting Review To Examine Whether The Court of Appeals Erred When It Determined That Washington Courts Had Subject Matter Jurisdiction Over Pan's Claims.

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[10] Id.
[11] Id.
[12] Id. at 1330-1333.
[13] Id.
[14] Id. at 1331-32.

(i). There Is No Federal Preemption Of Pan's Claims and Subject Matter Jurisdiction Exists Over Pan's Claim.

Although Pan struggled to understand the legal basis for Chen and Wang's challenge of the Court of Appeals determination that Washington courts have subject-matter jurisdiction over Pan's state law claims, Pan's understanding is that Chen and Wang are claiming federal law preemption and that Pan's Purchase of a Security was not subject to WSSA. Neither of these claims can serve as the basis for this Court to accept review.

Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case. See ZDI Gaming, Inc. v. Wash. State Gambling Comm'n, 173 Wn.2d 608, 268 P.3d 929 (2012)("[i]f the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." (internal marks omitted)(quoting Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 190 (1994)). Subject matter jurisdiction is a broad concept, one that can only be attacked when the court has no power to entertain the controversy, as when the constitution or legislature explicitly denies jurisdiction. In re Marriage of Major, 71 Wn. App. 531, 859, P.2d 1262 (1993). As courts of general jurisdiction, superior courts have long had the "power to hear and determine all matters, legal and equitable, except in so far these powers

have been expressly denied." State ex rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P.257, 4 A.L.R. 572 (1918). Courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the Legislature of Congress. As the court stated in Burnside v. Simpson Paper Co., 66 Wn. App. 510, 517, 832 P.2d 537 (1992), review granted, 120 Wn.2d 1019 (1993):

> Because the Washington State Constitution confers such a broad grant of jurisdiction on the superior courts, exceptions to that jurisdictional grant will be narrowly read. Orwick v. Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). If a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation. 21 C.J.S. Courts § 13.

In this matter, federal law does not preempt Pan's WSSA claim. With all due respect to Chen and Wang, Pan does not understand Chen and Wang's argument fully. However, from what Pan can gleam, the Chens appear to believe that because Pan's investment in GOCH was related to an EB-5 Visa, her investment was not related to the sale of a security. Pursuant to RCW § 21.20.005, the definition of sell is expansive and unrelated to the definition of sale of a security under federal law. While it is unclear how Petitioners' argument relates to subject matter jurisdiction or the Court of Appeal's opinion, the argument nevertheless fails.

The Chens then state that "EB-5 as Federal question jurisdiction that WSSA cannot substitute."[15] Presumably the Chens are arguing that an investor who is defrauded cannot bring a cause of action under WSSA if the investment was related to an EB-5 Visa. The Chens have made this argument at the trial court, the court of appeals, and now before this Court. At the prior two levels, numerous judges have disagreed and the Chens have failed to present any authority to support that position. Before this Court, the Chens again do not cite any substantive authority. Yes, 28 USC § 1332 discusses when federal district courts have jurisdiction over a claim. However, that statute does not state that Washington courts do not have jurisdiction over a WSSA claim simply because the investment was related to an EB-5 Visa application. Accordingly, the Chens are not entitled to review.

(ii). There Is No Diversity Jurisdiction In This Matter.

The Chens next argue that complete diversity existed in this matter[16]. First, whether complete diversity exist—which it does not—has nothing to do with subject matter jurisdiction. Regardless, even if complete diversity did exit, the fact that the Chens did not remove this

[15] See Pet. for Review at p. 11, Section (a2).
[16] See Pet. for Review at p. 11 Section (a3).

matter to federal court did not somehow strip the trial court of subject matter jurisdiction.

The Chens appear to argue that the trial court did not have general jurisdiction over Pan's WSSA claim because it was actually a claim specifically related to her EB-5 application and not the purchase of a security.[17] This statement is false and the Chens do not cite to any authority to support their position nor do they site to any portion of the record to support their factual claim.

Finally, the Chens appear to argue that because GOCH's offering was exempt from registration with Washington state that Pan could not bring a WSSA claim against the Chens.[18] The Chens cite no case law to support their position and registration requirements under WSSA are wholly unrelated to a defrauded investor's ability to bring a civil cause of action under RCW § 21.20.430. Accordingly, the Chens' argument fails.

The Chens present no compelling reason as to why this court lacks subject matter jurisdiction over this matter. The statutes and cases to which they cite do not support their position. The Chens present no cognizant argument as to why this Court should grant the Chens' motion for discretionary review. The ability to argue a Washington state claim in

[17] See Pet. for Review at p. 11 Section (a2).
[18] See Pet. for Review at p. 12 Section (b)

a Washington state superior court is not reserved only to U.S. citizens or residents of Washington state. Quite frankly, the Chens' arguments are nonsensical. Accordingly, this Court should deny the Chens' Petition for Discretionary Review.

(D). The Temporary Restraining Order (TRO) Was Properly Entered By The Trial Court.

(i). Washington Law And Federal Law Allowed Pan To Seek The Ex Parte TRO.

The Chens raise no substantive legal argument as to why the TRO was improperly entered. Instead, the Chens argue that because there is no personal jurisdiction and subject matter jurisdiction over this matter, the TRO must be voided.[19] Washington law and federal law allows individuals to seek ex parte temporary restraining orders. Accordingly, there was no due process violation with the restraining order was issued ex parte.

The usual purpose of a temporary restraining order is to preserve the status quo until the Court can hear an application for a preliminary injunction. State ex rel. Pay Less Drugstores v. Sutton, 2 Wn.2d 523, 98 P.2d 680 (1940). RCW § 7.40.020 provides the legal basis for the issuance

[19] See Pet. for Review at p. 7 and 13 Section (d)

of a temporary restraining order. State v. Ohrt, 71 Wn. App. 721, 725-26, 862 P.2d 140 (1993).

It is well established Washington law that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. See Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 324 P.2d 1099 (1958).

(ii). Pan Met The Threshold Requirements For Issuance Of The TRO.

Here, issuance of a TRO is proper because Pan had expressed a well-founded fear that absent immediate action Chen was likely to transfer funds outside the reach of the trial court's jurisdiction.[20] Given the ease by which Chen could remove the company's funds from this Court 's jurisdiction, Pan argued that the status quo should be maintained until the return hearing on December 18, 2015.[21] A prime example of the basis for their fear is the fact that on November 27, 2015, Chen caused $160,000.00 to be transferred to a company in Indonesia.[22] This transfer was made

[20] CP 1334-1356.
[21] Id.
[22] CP 1363.

despite the fact that the projects discussed in the PPM (and therefore the projects that were to serve as the basis for Bonnie Pan's EB-5 Visa) cannot move forward. [23]

The federal statutes and cases cited by the Chens do not expressly or impliedly address a Washington state superior court's authority to hear a WSSA claim. Accordingly, the Chens' arguments should be dismissed.

(E). Pan Had a Right To Rescission Under RCW 21.20.430(2).

(i). RCW § 21.20.430(2) Allowed Pan, A Defrauded Seller, To Sue For Rescission To Recover Her Investment.

The Chens further raise new false allegations—that were not in the record—that "Chens even agreed to return Pan's EB-5 investment if Plaintiff withdrew their EB-5 Permanent Resident Card application, but Plaintiffs refused with because they want both "green card" and required "investment return", which give no alternative for only Chen break Congress enacted § 203(b)(5) of the Immigration and Nationality Act U.S.C. § 1153."[24] First, that is a false statement. The Chens only offered a partial refund on Pan's investment. Secondly, Pan never stated that she wanted both a refund of her investment, which she mostly definitely did want, and a green card. That claim is baseless. Furthermore, the Chens do

[23] CP 1353.
[24] See Pet. for Review at p. 13.

not cite any authority to support the argument that Pan must make a demand before filing a lawsuit under WSSA because no such authority exists.

Moreover, the unambiguous language of RCW § 21.20.430(2) provides that a defrauded seller may sue for rescission to recover his or her investment. Helenius v. Chelius, 131 Wn. App. 421, 432, 120 P.3d 954 (2005).

The purpose of RCW § 21.20.430 is to provide a defrauded investor with the statutory mechanism to receive a complete refund of her investment. Accordingly, Pan was entitled to a return of her initial investment of $519,500.[25]

(F). Petitioners Waived Their Personal Jurisdiction Claim By Answering The Complaint, Seeking Affirmative Relief, And By Appearing In State Court.

(i). The Chens Have Sought Relief In King County Courts and Reside In King County, Washington.

The Chens reside in King County, Washington. Accordingly, Washington courts have jurisdiction over them. Further, a defendant who seeks relief from a trial court by way of a counterclaim, crossclaim, or third-party claim waives any challenge he or she may have to personal jurisdiction. Kuhlman Equipment Co. v. Tammermatic, Inc., 29 Wn. App.

[25] CP 1338.

419, 628 P.2d 851 (1981); see also Grange Ins. Ass'n v. State, 110 Wn. 2d 752, 756, 757 P.2d 933 (1988). In seeking affirmative relief, the defendant is invoking the court's jurisdiction; "He cannot at the same time deny that jurisdiction." Kuhlman, 29 Wn. App. at 424 (quoting Globig v. Greene & Gust Co., 193 F. Supp. 544 549 (E.D. Wis. 1961). The Chens, through their former attorneys, appeared in this matter and filed multiple motions and requested affirmative relief.[26] Consent to jurisdiction may be implied by a party's appearance and by actively participating in the matter. In re Marriage of Peck, 82 Wn. App. 809, 920 P.2d 236 (1996). Accordingly, Petitioners have waived their personal jurisdiction claim.

The notion that the Chens can raise this argument at this stage given the numerous motions that the Chens filed at the trial and appellate level is unsupportable. Furthermore, the Chens live in King County. To argue that the King County Superior Court does not have personal jurisdiction over them is void of any legal reasoning. For these reasons and for the reasons stated above, this Court should deny the Chens' petition for review.

(G). The Chen's Allegation That The Court Of Appeals Erred By Not Applying RCW 25.15.386 Is Not Supported By Law Or Fact.

(i) Pan Was Not Required to Bring a Derivative Action Against The Chens.

[26] CP 1026-1035; 1619-1628; and 1629-1690,

While not entirely clear, the Chens appear to argue that Pan was required to bring a derivative action against GOCH.[27] The argument is nonsensical, and unfortunately appears to be a misunderstanding of the law on the part of the Chens. The statute states:

> A member may bring a derivative action to enforce a right of a limited liability company if:
> (1) The member first makes a demand on the members in a member-managed limited liability company, or on the managers of a manager-managed limited liability company, requesting that they cause the limited liability company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or
> (2) A demand would be futile.

Notably, the statute is permissive, and not a requirement under Washington law. Further, the Chens fail to make any substantive argument as to why the court erred by not applying RCW 25.15.386. They simply recite the statute and make the conclusory argument that because Pan filed the lawsuit it must be futile and therefore Pan violated RCW 25.15.386. Accordingly, this argument must be disregarded in its entirety.

IV. CONCLUSION

Personal Jurisdiction exists over Petitioners as they are Washington residents. Subject matter jurisdiction exists over this matter, a

[27] See Pet. for Review, at p. 14.

Washington State Securities Act case. Discretionary review is not proper because Petitioners have failed to show the trial court abused its discretion when it struck the Chens' Answers and Affirmative Defenses. Furthermore, the Chens fail to establish federal preemption. Accordingly, the Chen's Petition for Review must be denied.

Respectfully submitted this 7th day of February, 2019.

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DECLARATION OF SERVICE

I certify that on February 7, 2019, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated below:

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APPENDIX A

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CASE #: 76576-1-I
Yanlu Liu, et al, Respondents v. Great Ocean Capital Holding, LLC, et al, Appellants
King County, Cause No. 15-2-28694-3 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Therefore, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Suzanne Parisien

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

YANLU LIU and AI HUA PAN, husband and wife, residing in King County, Washington; PENG ZHANG and ZHONGYUAN PAN, husband and wife, residing in Ontario, Canada, Respondents, v. GREAT OCEAN CAPITAL HOLDING, LLC, a Washington limited liability company; HUY YING CHEN and XUE PING WANG, husband and wife, residing in Washington state; Appellants.	No. 76576-1-I UNPUBLISHED OPINION FILED: October 15, 2018

VERELLEN, J. — Great Ocean Capital Holding, LLC challenges the trial court's jurisdiction and authority to enter judgment on Zhongyuan Pan's claim under the Washington State Securities Act, chapter 21.20 RCW (WSSA). Great Ocean fails to establish the trial court lacked subject matter jurisdiction or either field or conflict preemption applies.

Great Ocean also argues the trial court erred in granting summary judgment in Pan's favor but fails to establish the existence of a genuine issue of material fact. Great Ocean's other challenges to the trial court's orders striking Great

Ocean's answer and determining Pan was entitled to rescission of her investment are similarly without merit.

Therefore, we affirm.

FACTS

Great Ocean is a United States Citizen and Immigration Service designated regional center for purposes of the EB-5 Immigrant Investor Program. Appellants Huy Ying Chen and Xue Ping Wang, husband and wife, own a majority interest in Great Ocean. Respondents Yanlu Liu and Ai Hua Pan, husband and wife, own a minority interest. Yanlu Liu and Ai Hua Pan are the parents of Zhongyuan Pan.

Pan invested $519,500 in Great Ocean for the purpose of obtaining a visa through the EB-5 Program. The EB-5 Program allows foreign investors and their families to obtain residency in the United States.

In November 2015, Pan and her parents filed a lawsuit against Great Ocean for breach of contract, fraudulent and negligent misrepresentation, violation of the WSSA, violation of the Consumer Protection Act, chapter 19.86 RCW, breach of fiduciary duty, and accounting.[1]

The trial court entered orders granting partial summary judgment on Pan's WSSA claim, striking Great Ocean's answer and affirmative defenses, and entering findings of fact, conclusions of law, and judgment on Pan's WSSA claim. The principal amount of judgment was $519,500 for Pan's initial investment.

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[1] Respondents' claims for breach of contract, fraud, and violation of the Consumer Protection Act were submitted for arbitration. Following partial summary judgment on Pan's WSSA claim, respondents voluntarily dismissed all other claims.

Great Ocean appeals.

ANALYSIS

I. Jurisdiction

Great Ocean contends the trial court lacked subject matter jurisdiction to render judgment in this case.

We review whether a court has subject matter jurisdiction de novo.[2] "'A judgment entered by a court that lacks subject matter jurisdiction is void.'"[3]

"As courts of general jurisdiction, superior courts have long had the 'power to hear and determine all matters, legal and equitable, . . . except in so far as these powers have been expressly denied.'"[4] In light of this broad grant of subject matter jurisdiction, "courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the Legislature or Congress."[5]

Here, the trial court decided Pan's WSSA claim. Washington State superior courts have subject matter jurisdiction to decide WSSA claims. And Great Ocean fails to offer any compelling authority that the trial court lacked subject matter jurisdiction to render judgment on Pan's WSSA claim. Oddly, Great Ocean cites to

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[2] Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

[3] Cole v. Harveyland, LLC, 163 Wn. App. 199, 205, 258 P.3d 70 (2011) (quoting Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 541, 886 P.2d 189 (1994)).

[4] In re Marriage of Major, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (alteration in original) (quoting State ex rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P. 257 (1918)).

[5] Id. at 534.

a federal regulation addressing preemption of state laws in the area of chemical facility anti-terrorism standards.[6] Great Ocean makes the conclusory argument that a state trial court does not have jurisdiction over matters touching on immigration. But this is not an immigration case, and Great Ocean cannot establish lack of subject matter jurisdiction simply because of Great Ocean's status as a United States Citizen and Immigration Service designated regional center or the nature of the EB-5 program.

The trial court did not lack jurisdiction to render judgment against Great Ocean on Pan's WSSA claim.

II. Preemption

Great Ocean argues the trial court's authority to enter judgment on Pan's WSSA claim is preempted by federal law.

A state law can be preempted in two ways: (1) field preemption (express or implied) or (2) conflict preemption.[7] "If Congress indicates an intent to occupy a given field (explicitly or impliedly), any state law falling within that field is preempted; even if Congress has not indicated an intent to occupy a field, state law is still preempted to the extent it would actually conflict with federal law."[8] "Such a conflict occurs (1) when compliance with both laws is physically

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[6] See Br. of Appellant at 22-23 (citing 6 C.F.R. § 27.405).

[7] Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 701, 836 P.2d 823 (1992).

[8] Id.

impossible, or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

Here, Great Ocean fails to establish field preemption. The federal statutes cited by Great Ocean do not expressly or impliedly address a Washington State superior court's authority to hear a WSSA claim.[10]

As to conflict preemption, Great Ocean argues the return of Pan's investment stands as an obstacle to the purpose of the EB-5 program to foster foreign investment and job creation. But Great Ocean fails to cite any compelling authority to support this argument.

Additionally, under 15 U.S.C. § 77r(c)(1)(A)(i), states retain the authority "under the laws of such [s]tate to investigate and bring enforcement actions, in connection with securities or securities transactions . . . with respect to—fraud or deceit."

We conclude Pan's WSSA claim is not preempted by federal law.

III. Partial Summary Judgment—WSSA Claim

Great Ocean contends the trial court erred in granting partial summary judgment on Pan's WSSA claim.

We review an order granting summary judgment de novo.[11] "The moving party has the burden of showing that there is no genuine issue as to any material

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[9] Id. at 702.

[10] See Br. of Appellant at 27 (citing 15 U.S.C. § 771(a)(1) (Federal Energy Administration Comptroller General, powers and duties)).

[11] CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

fact."[12] A response to a summary judgment motion "'must set forth specific facts showing that there is a genuine issue for trial.'"[13]

"To establish liability under the WSSA, the purchaser of a security must prove that the seller and/or others made material misrepresentations or omissions about the security, and the purchaser relied on those misrepresentations or omissions."[14]

On May 6, 2016, Pan filed a motion for partial summary judgment on her WSSA claim. Specifically, Pan requested "an Order holding that: (1) The statements in the Private Placement Memorandum ("PPM") were materially misleading; (2) That Plaintiffs' reliance on the statements made in the PPM was reasonable."[15]

The court addressed the two issues separately. On June 3, 2016, the trial court granted Pan's motion for partial summary judgment as to the first issue and determined Great Ocean's statements in the PPM that it "had secured an [e]ighty (80) year lease with the Port of Longview were material, false, and misleading."[16] On September 27, 2016, the court granted the motion as to the second issue and

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[12] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

[13] State v. Mandatory Poster Agency, Inc., 199 Wn. App. 506, 517, 398 P.3d 1271 (quoting CR 56(e)), review denied, 189 Wn.2d 1021 (2017).

[14] Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004) (citing RCW 21.20.010(2)).

[15] Clerk's Papers (CP) at 414-15.

[16] CP at 2062.

determined "Pan [r]easonably relied on materially false and misleading statements set forth in the PPM."[17]

"A 'material fact' is one 'to which a reasonable [person] would attach importance in determining his [or her] choice of action in the transaction in question.'"[18] A "misrepresentation" is a false statement regarding an existing fact.[19]

Here, the PPM provides information about Great Ocean's investor-funded projects. At issue are the statements contained in the PPM concerning a lease with the Port of Longview and Great Ocean's plans to build a cold storage facility:

> The Project currently consists of approximately 65 acres of land for long term 80 years lease (40 years plus 40 years right's extension) from Port of Longview with 500,000 Sq. Ft. warehouse for further project re-development, that is entitled and ready for the construction of 500,000 Sq. Ft packinghouse and CA (Cold Atmospheres) cold-storage warehouse at Port of Longview, Washington.[20]

The PPM also describes the packinghouse as "shovel ready."[21] But in response to interrogatories, Great Ocean admitted that "Great Ocean and Huy Ying Chen did not enter into a contractually binding lease agreement with the Port of Longview."[22] Despite this response, Great Ocean argues the statements in the PPM were not

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[17] CP at 1162.

[18] Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 114, 86 P.3d 1175 (2004) (alterations in original) (quoting Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)).

[19] Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 182, 876 P.2d 435 (1994) (negligent misrepresentation claim).

[20] CP at 57.

[21] CP at 52.

[22] CP at 435.

false because they had in fact entered into a "pre-contract" with the Port of Longview.

Great Ocean's briefing rests on semantics rather than meaningful authority or argument. Great Ocean cites minutes from a February 26, 2013 meeting between Great Ocean and representatives from the Port of Longview and argues the meeting minutes constitute a "pre-contract."[23] The meeting minutes memorialize that "[Port of Longview] agree lease maximum years for 80 years."[24] But the minutes also state "[Port of Longview] will provide a fair lease price," clear evidence that Great Ocean had not yet secured an enforceable lease. At the February 26, 2013 meeting, the lease was discussed, not finalized.

As to materiality, Pan submitted a declaration stating, "If my father and I knew the statement from PPM and Chen were not true, we would not invest money into the project."[25]

Great Ocean fails to establish the existence of a genuine issue of material fact as to whether the statements in the PPM were materially misleading.

As to the second issue, whether Pan reasonably relied on the statements, under the WSSA, the investor must also show the reliance was reasonable "'under the surrounding circumstances.'"[26] In general, whether reliance is reasonable is a

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[23] CP at 1208.

[24] CP at 1212.

[25] CP at 2078.

[26] Federal Home Loan Bank v. Barclays Capital, Inc., 1 Wn. App. 2d 551, 565, 406 P.3d 686 (2017) (quoting FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 868, 309 P.3d 555 (2013), aff'd, 180 Wn.2d 954 (2014)), review granted, 190 Wn.2d 1018 (2018).

factual inquiry.[27] But "if reasonable minds could reach only one conclusion, summary judgment on this element is proper."[28]

To determine whether reliance is reasonable, we apply the factors from Stewart v. Estate of Steiner.[29] No individual factor is necessarily dispositive.[30] "The factors are:

> '(1) the sophistication and expertise of the plaintiff in financial and securities matters, (2) the existence of longstanding business or personal relationships; (3) access to the relevant information, (4) the existence of a fiduciary relationship, (5) concealment of the fraud, (6) the opportunity to detect the fraud, (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction, and (8) the generality or specificity of the misrepresentations.'"[31]

In opposition to Great Ocean's motion for summary judgment, Pan submitted a declaration that she "viewed Captain Chen as my uncle."[32] She also stated, "Captain Chen was a family friend and at that time I did not have any reason to believe what he told us was not the truth."[33] Pan acknowledged that she did some translating work for Great Ocean, but she stated she "did not create the content of the documents."[34] "Ultimately, while I may have had access to some of Great Ocean's records, I did not have complete access to all of its records."[35]

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[27] Id.

[28] Id.

[29] 122 Wn. App. 258, 93 P.3d 919 (2004).

[30] Barclays, 1 Wn. App. 2d at 568 (citing Stewart, 122 Wn. App. at 274).

[31] Id. (quoting Stewart, 122 Wn. App. at 274).

[32] CP at 2079.

[33] Id.

[34] CP at 2081.

[35] CP at 2082.

On appeal, Great Ocean does not address the Stewart factors and does not specifically contend Pan failed to establish reasonable reliance. Rather, Great Ocean attempts to address reasonable reliance by arguing that Pan is barred from recovery under WSSA due to her various misrepresentations. But the individual arguments concerning Pan's alleged misrepresentations are conclusory and speculative.[36]

First, Great Ocean argues Pan misrepresented her date of entry into the United States. Great Ocean speculates Pan had actual knowledge of the preliminary nature of the lease agreement because she happened to be in the United States at the time of the February 2013 meeting between Great Ocean and the Port of Longview. Great Ocean accurately cites Guarino v. Interactive Objects, Inc. for the proposition that actual knowledge would defeat a WSSA claim[37] but fails to present specific evidence to support the contention that Pan was present at the meeting.

Second, Great Ocean argues Pan misrepresented herself as a "sophisticated" and "accredited" investor in the subscription agreement she signed. In her declaration, Pan stated, "I did not have any reason to believe what [Chen] told us was not the truth" and "I assumed that Great Ocean had a lease."[38] Great Ocean contends these statements reveal Pan was not a sophisticated or

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[36] See Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009)) ("a party resisting summary judgment cannot satisfy his or her burden of production merely by relying on conclusory allegations, speculative statements, or argumentative assertions").

[37] 122 Wn. App. 95, 113, 86 P.3d 1175 (2004).

[38] CP at 2079.

accredited investor because she "blindly invested $500,000.00 without conducting any due diligence."[39] But Great Ocean provides insufficient citation to the record to establish a misrepresentation and insufficient citation to authority to establish that Pan's alleged misrepresentation bars recovery. This conclusory argument is not persuasive.

Great Ocean fails to establish the existence of a genuine issue of material fact whether Pan's reliance on the statements in the PPM was reasonable. As a result, we conclude the trial court did not err in granting Pan's motion for partial summary judgment on the WSSA claim.

IV. Striking Answer

Great Ocean argues the trial court erred in striking its answer and affirmative defenses based on the failure to supplement its answers to discovery.

We review a motion to strike made in conjunction with a motion for summary judgment de novo.[40]

Before imposing a harsh discovery sanction, a trial court is required to consider the factors from Burnet v. Spokane Ambulance:

> A trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.[41]

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[39] Br. of Appellant at 37.

[40] Southwick v. Seattle Police Officer John Doe, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

[41] Teter v. Deck, 174 Wn.2d 207, 216-17, 274 P.3d 336 (2012) (citing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 496-97, 933 P.2d 1036 (1997)).

"Findings regarding the Burnet factors must be made on the record."[42]

Here, the court sufficiently addressed the Burnet factors in its order striking defendants' answer and affirmative defenses entered on November 28, 2016.[43]

We conclude the trial court did not err in granting the motion to strike.

V. Judgment

Great Ocean challenges the trial court's award of damages, arguing that Pan's failure to make a demand under RCW 21.20.430 precludes any award of damages.

Under RCW 21.20.430(2):

> Any person who buys a security in violation of the provisions of RCW 21.20.010 is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security, together with any income received on the security, upon tender of the consideration received, costs, and reasonable attorneys' fees, or if the security cannot be recovered, for damages. Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

"The unambiguous language of RCW 21.20.430(2) provides that a defrauded seller may sue for rescission to recover the security."[44]

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[42] Id. at 217.

[43] The court determined the violation was willful, the refusal to provide discovery frustrated the ability to prosecute plaintiffs' claims, the court's use of monetary sanctions was ineffective, and striking portions of the answer was the least harsh effective remedy available.

[44] Helenius v. Chelius, 131 Wn. App. 421, 432, 120 P.3d 954 (2005).

Here, the trial court concluded, "The purpose and intent of the remedies set forth in RCW § 21.20.430 is rescission of the investment," and Pan was entitled to a return of her initial investment of $519,500.[45]

Great Ocean contends the trial court erred in determining Pan was entitled to rescission of her investment because she failed to demand a return of her investment prior to initiating her lawsuit.[46]

RCW 21.20.430(4)(b) provides:

> No person may sue under this section if the buyer or seller *receives* a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.[47]

Great Ocean fails to point to any evidence it issued a written rescission offer to Pan. Rather, Great Ocean argues Pan was not entitled to judgment because she never demanded return of her capital contribution. Great Ocean does not cite any authority to support the argument that Pan must make a demand before filing a lawsuit under the WSSA.

We conclude the trial court did not err in determining Pan was entitled to rescission and awarding a principal judgment amount of $519,500.

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[45] CP at 1338.

[46] Although Great Ocean frames the issue in terms of the adequacy of the court's findings of fact, it is not a true sufficiency challenge but rather a restatement of Great Ocean's theory that Pan is not entitled to rescission.

[47] (Emphasis added.)

VI. Motion to Strike

In Great Ocean's reply brief, Great Ocean renews its motion to strike respondents' brief.

On March 15, 2018, Great Ocean moved to strike respondents' brief and to remand to the trial court for RAP 9.11 proceedings. On April 5, 2018, Commissioner Neel denied the motion and directed Great Ocean to include such a motion in its briefing to the panel.

In the original motion, Great Ocean argued respondents improperly supplemented the record on appeal without complying with RAP 9.11. Great Ocean claimed the respondents improperly supplemented the record with evidence that Pan withdrew her EB-5 application and evidence that she demanded return of her investment prior to filing the lawsuit.

Because respondents have not complied with RAP 9.11, we decline to consider this evidence because it is not part of the record on appeal.[48] The absence of this evidence has no impact on the outcome of the merits of Great Ocean's appeal.

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[48] Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993) ("RAP 9.11 is a limited remedy under which this court may direct that additional evidence may be taken if all of the following six criteria are met: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.") (quoting RAP 9.11(a)).

VII. Fees on Appeal

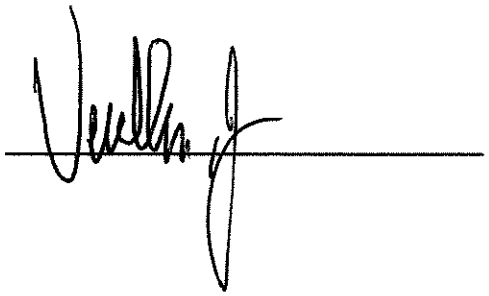
Pan seeks fees on appeal under the subscription agreement and RAP 18.1.

"RAP 18.1(b) requires more than a bald request for attorney fees on appeal."[49] The request must be accompanied by citation to authority, argument, and citation to the record.[50]

Here, Pan claims the subscription agreement contains a fee clause but provides no citation to the record identifying such a provision.[51]

We deny Pan's request for fees on appeal.

Therefore, we affirm.



WE CONCUR:

[49] Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992).

[50] Gardner v. First Heritage Bank, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013).

[51] See In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (courts are not obligated "to comb the record" where counsel has failed to support arguments with citations to the record).

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