

Appeal Case No. 68095-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WILLIAM S. BROWN and JULIE C. BROWN,
Appellants

v.

ROD J. GARRETT D/B/A BEST AUTO LIMITED and
MARK A. THOMPSON D/B/A BEST AUTO,
Appellees

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STATE OF WASHINGTON
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APPELLANTS' BRIEF

On appeal from the Superior Court in and for King County, Washington
Cause No. 11-2-36782-7 SEA, The Honorable Richard F. McDermott Presiding

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Oral Argument Requested

ORIGINAL

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INTRODUCTION

1. **Nature of the Case:** William S. Brown and Julie C. Brown (the “Browns”), residents of Texas, purchased a 2004 Mini Cooper from Rod J. Garrett d/b/a Best Auto Limited and Mark A. Thompson d/b/a Best Auto (collectively “Best Auto”), residents of Washington. Best Auto advertised the 2004 Mini Cooper on eBay, indicating their intent to sell throughout North America, including Texas. The Browns and Best Auto agreed to a price by telephone, and the Browns issued payment. Afterwards, Best Auto sent the Browns a one-page Vehicle Purchase Order via facsimile. William S. Brown signed the front and only page; Julie C. Brown did not. The 2004 Mini Cooper did not meet Best Auto’s representations. After attempts to resolve their dispute, the Browns filed a lawsuit against Best Auto in Parker County, Texas (the “Texas Lawsuit”). Best Auto acknowledged service of process, stated they would challenge jurisdiction based on a purported forum selection clause not sent to the Browns, but failed to appear. The Browns took a default judgment (the “Texas Judgment”), domesticated it here in Washington, and garnished bank funds.

2. **Proceedings:** Best Auto filed a Motion to Vacate Foreign Judgment and Quash Garnishment in the Superior Court of the State of Washington in and for King County. Best Auto asserted that the purported forum selection clause required the Superior Court to vacate the Texas Judgment.

3. **Disposition of the Case:** On December 14, 2011, the Superior Court vacated the Texas Judgment. The Browns have brought this appeal complaining that the Superior Court committed error.

ASSIGNMENTS OF ERROR

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1. The Superior Court erred with its order of December 14, 2011 when it vacated the domestication of a valid foreign judgment in contravention of the Full Faith and Credit Clause of the United States Constitution and Washington's codification of the same with the Uniform Enforcement of Foreign Judgments Act.

2. The Superior Court erred when it found that the defendants had satisfied their burden in proving that the Texas judgment, domesticated in Washington, was not a valid final judgment under the laws of Texas.

3. The Superior Court erred with its order of December 14, 2011 when it enforced a forum selection clause despite the defendants' waiver of that defense in the Texas proceedings where the original judgment was entered.

4. The Superior Court erred with its order of December 14, 2011 when it enforced a forum selection clause despite the defendants' failure to prove that the clause was actually a term included in any contract with the plaintiffs.

5. The Superior Court erred when it found that the Texas proceedings related to the "enforcement" of the Vehicle Purchase Order.

6. The Superior Court erred with its order of December 14, 2011 when it enforced a forum selection clause upon its erroneous finding that the original Texas judgment was entered on a breach of contract claim despite the fact that the Texas judgment was actually entered on the plaintiffs' claim under the Texas Deceptive Trade Practices Act.

7. The Superior Court erred when it found that the plaintiffs' breach of contract claim in the Texas proceedings related to the enforcement of the Vehicle Purchase Order when in fact the claim concerned only the oral contract between the parties.

8. The Superior Court erred when it refused to find that the enforcement of an inconspicuous venue provision would be unreasonable and unjust under the circumstances.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err with its order of December 14, 2011 when it vacated the domestication of a valid foreign judgment in contravention of the Full Faith and Credit Clause of the United States Constitution and Washington's codification of the same with the Uniform Enforcement of Foreign Judgments Act?

2. Did the Superior Court err when it found that the defendants had satisfied their burden in proving that the Texas judgment,

domesticated in Washington, was not a valid final judgment under the laws of Texas?

3. Did the Superior Court err with its order of December 14, 2011 when it enforced a forum selection clause despite the defendants' waiver of that defense in the Texas proceedings where the original judgment was entered?

4. Did the Superior Court err with its order of December 14, 2011 when it enforced a forum selection clause despite the defendants' failure to prove that the clause was actually a term included in any contract with the plaintiffs?

5. Did the Superior Court err when it found that the Texas proceedings related to the "enforcement" of the Vehicle Purchase Order?

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7. Did the Superior Court err when it found that the plaintiffs' breach of contract claim in the Texas proceedings related to the enforcement of the Vehicle Purchase Order when in fact the claim concerned only the oral contract between the parties?

8. Did the Superior Court err when it refused to find that the enforcement of an inconspicuous venue provision would be unreasonable and unjust under the circumstances?

STATEMENT OF THE CASE

This case involves used car salesmen defrauding consumers, a default judgment taken against them in the State of Texas, their failure to timely raise a questionably unenforceable forum selection clause by motion to dismiss in Texas, and their tardy effort to collaterally attack the Texas Judgment based solely on the forum selection clause. Even so, alternatively, they failed to carry their burden to prove that the forum selection clause was made a part of the transaction, or applies to the allegations in the Texas Lawsuit or the findings and award in the Texas Judgment.

Before addressing these fatal errors by the judgment debtors and the Superior Court, the following summary of the background facts as pleaded and admitted in the Texas Lawsuit,¹ and as argued in the Superior

¹ In a no-answer default judgment, the failure to file an answer operates as an admission of the material facts alleged in the petition. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W. 2d 80, 83 (Tex. 1992). In contrast, when a nonresident properly appears to challenge personal jurisdiction based on a contractual forum selection clause, then there is no default and pleadings are not taken as true – requiring extraneous evidence. *See Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617-18, 937 P.2d 1158, 1161 (1997)(citing *Argueta v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996).

Court here in Washington, should provide this Court with a sufficient understanding of the controlling issues.

I. Best Auto’s Deceptive and Fraudulent Sale to the Browns.

The used car salesmen are Rod J. Garrett d/b/a Best Auto Limited and Mark A. Thompson d/b/a Best Auto (collectively “Best Auto”).² Best Auto is in the business of selling used vehicles worldwide and advertises numerous vehicles for sale to residents in Texas via the internet.³ In fact, Best Auto solicits buyers from around the globe – stating, including in this case, that Best Auto “Sells to: N. and S. America, Europe, Australia”, “on the East Coast”, “Alaska, Arizona, the Midwest, Florida, Eastern Canada and even the Mexican Baja.” (emphasis added).⁴ Texas is obviously part of North America.

² Clerk’s Papers at 88 (hereafter cited as “CP at ___”). Both d/b/a businesses operate from the same location (6704 NE 175th, Kenmore, Washington 98028) and under the same dealer license. Washington State records demonstrate that only Rod J. Garrett has a Motor Vehicle Dealer license (#2878), the same license used by Mark A. Thompson in their acquisition, sale, and transfer of the 2004 Mini Cooper at issue in this lawsuit. See <http://bls.dor.wa.gov/LicenseSearch/lqsLicenseDetail.aspx?RefID=2204519>.

³ CP at 88, CP at 103-134.

⁴ CP at 103, CP at 108. In complete contradiction to these facts, Best Auto offered the self-serving and false declaration of Mark A. Thompson stating, among other conclusory, vague, or irrelevant things, that “I did not advertise this vehicle in Texas, and I did not contact the Plaintiffs regarding the sale of this vehicle. Instead, they saw the advertisement on eBay and contacted me.” CP at 174. Nonetheless, the undisputed documentation shows that they did advertise in Texas, and did contact the Browns in deciding to sell the 2004 Mini-Cooper to them. CP at 103-134. Even the “Vehicle Purchase Order” upon which they rely reveals their written statement that the Browns were a “Non-Resident Buyer.” CP at 136. The actual advertisement, subsequent sales communications, and basic geography each directly discredit the Thompson Declaration.

In late April 2008, Best Auto listed a 2004 Mini Cooper with vehicle identification number WMWRC33434TJ56243 (the “2004 Mini Cooper”) for sale on www.ebay.com under item number 250239362324.⁵ In the listing, Best Auto stated that it would sell to any buyer in North America, which would include Texas.⁶ Best Auto represented that the 2004 Mini Cooper “RUNS AS SMOOTH AS SILK” and that “[i]t idles, runs and drives as it should – strong oil pressure, strong battery and charging system, no overheating, no brake pull or alignment issues! I’ve driven it many miles over the past few weeks and freeway cruised at 75 MPH.”⁷ Best Auto also claimed that the prospective buyer could “take corners on those twisty country roads at 90+ MPH!”⁸ Finally, Best Auto stated “I have every confidence this MINI Cooper could easily be driven cross-country tomorrow.”⁹

On April 27, 2008, based on the representations Best Auto made in its eBay listing and in a subsequent telephone conversation regarding the same, Best Auto and the Browns voluntarily negotiated and orally agreed on a sale price of Eleven Thousand Two Hundred Fifty and 00/100

⁵ CP at 91, CP at 103-134.

⁶ CP at 103.

⁷ CP at 91, CP at 107.

⁸ CP at 91-92, CP at 107.

⁹ CP at 92, CP at 107.

(\$11,250.00) Dollars and a sale outside of the eBay auction.¹⁰ Best Auto then voluntarily elected to sell the 2004 Mini Cooper to the Browns, well aware that they are residents of Texas, and ended the eBay auction.¹¹ The parties' agreement was an oral contract, not supported by any written agreements.¹² On April 28, 2008, the day after agreeing to the sale terms, Best Auto requested the Browns to wire transfer the purchase funds.¹³ The Browns complied, thereby completing their purchase obligation and awaiting Best Auto's release of the 2004 Mini Cooper and related title documents.¹⁴

II. Best Auto's Post-Sale Facsimile Transmission of a One-Page Vehicle Purchase Order Without a Forum Selection Clause.

Hours after the Browns had fully performed and consummated their payment obligation, Best Auto sent, via facsimile transmission, a one-page Vehicle Purchase Order form to the Browns.¹⁵ In light of the Browns' completion of their payment obligations according to their agreement with Best Auto, Steve Brown was made to believe that the one-

¹⁰ CP at 92.

¹¹ CP at 92, CP at 103.

¹² CP at 92.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ CP at 88, CP at 136.

sided Vehicle Purchase Order was a post-transaction formality.¹⁶ So Steve Brown (not Julie Brown) signed the front (and only) page and sent it back to Best Auto.¹⁷ Best Auto sent the 2004 Mini Cooper to its recommended auto shipper – Dependable Auto Shippers (“DAS”).¹⁸ DAS shipped the vehicle from Lakewood, Washington, to Mesquite, Texas, where it arrived on May 13, 2008.¹⁹

III. Delivery of the 2004 Mini Cooper and the Browns Discovery of Best Auto’s Fraud.

Excited about their new vehicle purchase, the Browns drove across the D/FW metroplex to pick up the 2004 Mini Cooper in Mesquite, Texas.²⁰ After visually inspecting the newly arrived vehicle, Best Auto and the Browns communicated with Best Auto by telephone the cost of repairing several trim items.²¹ Under the impression that these issues would be resolved, the Browns took possession of the 2004 Mini Cooper and Julie Brown began driving away from the shipment center.²²

¹⁶ CP at 92 (he had already paid).

¹⁷ CP at 88, CP at 136.

¹⁸ CP at 92, CP at 108.

¹⁹ CP at 92.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Less than 10 miles down the road, Julie Brown noticed that the air conditioning did not function.²³ Within moments, she also noticed that the engine temperature gauge had escalated to “HOT” and the vehicle began overheating.²⁴ Rather than risk any new engine damage to the vehicle, she immediately pulled over, parked the vehicle, and called a tow truck.²⁵ The 2004 Mini Cooper was towed to Moritz Mini – the nearest authorized dealership.²⁶ The Browns requested an inspection as to the cause of the problems and an estimate of the cost of repairing the 2004 Mini Cooper.²⁷ They also immediately contacted both Best Auto and DAS regarding the state of things.²⁸

The next day, Moritz Mini reported their findings to the Browns.²⁹ Among the many problems discovered, the primary defects included a cracked radiator and front panel, bald front tires, a leaking valve cover gasket, and a broken power steering pump that needed replacement.³⁰ In the opinion of Moritz Mini and any discerning eye, the 2004 Mini Cooper

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ CP at 93.

²⁸ *Id.*

²⁹ CP at 93, CP at 140-147.

³⁰ *Id.*

had previously been in a wreck and poorly repaired.³¹ As a result of these defects, the 2004 Mini Cooper would not even pass state inspection.³² The estimate of the cost of repairs was at least \$4,012.61.³³ On the very day Moritz Mini informed the Browns of these issues, they relayed this information to Best Auto and faxed the supporting documentation to Best Auto's attention.³⁴

IV. Best Auto's Refusal to Accept Return of the 2004 Mini Cooper and Efforts to Arrange for a Substitute Auction Sale in Texas.

Just five days later, on May 19, 2008, after several communications with Best Auto, the Browns informed Best Auto that the 2004 Mini Cooper simply did not meet Best Auto's representations.³⁵ It would not run as represented by Best Auto and had apparently been in a wreck.³⁶ In order to get the vehicle running properly, the Browns would have to spend almost half of the original price.³⁷ As a result, the Browns requested that Best Auto take the vehicle back and refund their purchase price.³⁸ The Browns did not want a car that did not run or one that had

³¹ CP at 93.

³² *Id.*

³³ CP at 93, CP at 140-147.

³⁴ CP at 93, CP at 140-148.

³⁵ CP at 93.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

been in a wreck.³⁹ After all, it is well known that the stigma of a wrecked vehicle severely limits its fair market value.⁴⁰

In response, Best Auto offered to pay just \$350 toward the cost of repairing the radiator and assist in placing the car for auction at ADESA Auction in Texas.⁴¹ Best Auto assured the Browns that because Best Auto sold them a high demand vehicle at wholesale price, the auction should fetch what they paid for it.⁴² Once again, the Browns relied upon Best Auto's representations and agreed to Best Auto's proposition.⁴³ On that same day, the Browns authorized Moritz Mini to do some of the repair work so that the 2004 Mini Cooper would be minimally drivable for auction.⁴⁴ On May 27, 2008, the Browns picked up the vehicle at Moritz Mini, paid the \$828.74 repair bill, and drove the vehicle to the auction site.⁴⁵ The Browns informed Best Auto that the power steering problem was still draining the battery and compromising its ability to start.⁴⁶ Best Auto assured them that the auction operators would be able to address that

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ CP at 93-94.

⁴⁵ CP at 94.

⁴⁶ *Id.*

problem and ensure that it would not affect the amount it could retrieve at auction.⁴⁷ However, after several attempts, ADESA Auction was unable to obtain a single bid on the 2004 Mini Cooper.⁴⁸

V. Best Auto's Continued Refusal to Accept Return of the 2004 Mini Cooper and the Browns Discovery of Additional Fraud by Best Auto.

On June 6, 2008, the Browns informed Best Auto that its plan to auction the 2004 Mini Cooper had failed and, again, that they wanted to rescind the transaction and get their money back.⁴⁹ Best Auto refused and, despite all the internal mechanical damage covered up by Best Auto's poor body work, Best Auto claimed that the damage must have occurred during the transport by DAS.⁵⁰ Best Auto also claimed that the 2004 Mini Cooper was in perfect condition when Best Auto left it at DAS and that Best Auto had driven it at least 75 miles with no issues.⁵¹

On June 17, 2008, the Browns picked up the 2004 Mini Cooper at ADESA Auction and, after the staff jumped the car battery, drove it to their private mechanic, Brian Richert.⁵² The Browns made several further

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

unsuccessful attempts to contact Best Auto to resolve the matter, but received no substantive response.⁵³

Notably, up to that point, Best Auto had never provided the vehicle certificate of title.⁵⁴ After repeated continued requests by the Browns, Best Auto finally sent the vehicle title over a month after the sale transaction.⁵⁵ At that time, the Browns discovered further evidence of Best Auto's misrepresentations.⁵⁶ Even though Best Auto represented driving the vehicle "many miles" (at least 75 miles) before selling it to the Browns, the vehicle title showed that, on May 27, 2008, through a related entity named Newport Motor Co., Ltd., Best Auto purchased the 2004 Mini Cooper from BBC Dodge.⁵⁷ At that time, it had 76,112 miles.⁵⁸ Exactly one month later, when Best Auto sold the vehicle to the Browns, it had 76,115 miles.⁵⁹ In other words, during the course of the month that Best Auto had the 2004 Mini Cooper in its possession, Best Auto did not drive it more than a couple of miles.⁶⁰ Either Best Auto lied about its

⁵³ CP at 94, CP at 149-152.

⁵⁴ CP at 94.

⁵⁵ CP at 94, CP at 137-139.

⁵⁶ CP at 95.

⁵⁷ CP at 95, CP at 107, CP at 137-139.

⁵⁸ CP at 95, CP at 138.

⁵⁹ CP at 95.

⁶⁰ *Id.*

history of driving the vehicle or Best Auto falsified vehicle title documents.⁶¹ In either event, Best Auto's actions violated state laws in a manner that amounted to a knowing fraudulent misrepresentation to the Browns.⁶²

VI. The Browns' Initiation of Legal Proceedings in Texas Against Best Auto and Service of Same.

In July 2008, in light of Best Auto's refusal to communicate or resolve the dispute, the Browns sought legal assistance.⁶³ On July 17, 2008, legal counsel for the Browns sent a demand letter to Best Auto setting forth a deadline for return communication no later than August 1, 2008.⁶⁴ Best Auto ignored the demand letter and failed to respond in any manner.⁶⁵

On August 6, 2008, after more than a month of refusal by Best Auto to respond to the Browns' efforts to communicate with them, the Browns filed their lawsuit against Best Auto.⁶⁶ The Browns set forth the above allegations in support of their case and Texas jurisdiction over Best

⁶¹ CP at 95.

⁶² *Id.*

⁶³ CP at 88-102, CP at 153-157.

⁶⁴ CP at 153-157.

⁶⁵ CP at 101, CP 153-157.

⁶⁶ *Id.*

Auto, as further evidenced by their Original Petition.⁶⁷ Pursuant to Texas law, on August 13, 2008, the Browns accomplished service on the Texas Secretary of State obtaining Certificates of Service showing that the Secretary of State forwarded the process to Best Auto.⁶⁸ Pursuant to Texas law, the deadline for Best Auto to file an answer was 10:00 a.m. on Monday, September 8, 2008.⁶⁹

VII. Aware of the Texas Lawsuit, Best Auto Claimed the Applicability of an Extra-Contractual and Unenforceable Forum Selection Clause.

Best Auto received service of process, and legal counsel for the parties exchanged telephone messages.⁷⁰ On September 1 and 2, 2008, legal counsel exchanged email communications in which counsel for Best Auto stated “[m]y client has contacted an attorney in Texas to seek a dismissal of this action. In the interim, I have attached a copy of the Vehicle Purchase Order. My client has the original. I suggest you review paragraph 7” (emphasis added).⁷¹ Notably, the signature on Best Auto’s version of the Vehicle Purchase Order is suspiciously different than the copy provided by Best Auto to the Browns via facsimile (without page 2),

⁶⁷ *Id.*

⁶⁸ CP at 75-79.

⁶⁹ TEXAS RULES OF CIVIL PROCEDURE 99(b).

⁷⁰ CP at 71-72.

⁷¹ CP at 71-73, CP at 159.

which only Steve Brown executed and returned to Best Auto.⁷² Nonetheless, the subject language on page 2, never before seen by the Browns or their legal counsel, is set forth on the back of the post-transaction Vehicle Purchase Order, under paragraph 7 (out of 13) with a misleading heading, in 9 pt., and appears in substantially the same form as follows:⁷³

* * *

Attorney's Fees and Costs. If this contract is placed in the hands of an attorney by reason of Purchaser's default or to enforce any of the provisions of this contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs. The parties agree that the venue for any suit, action, or proceeding relating to the enforcement of this contract shall be in the county in which the Dealer's principal place of business is located within the State of Washington. The laws of the State of Washington shall be applied in the interpretation and construction of this Agreement.

* * *

As is readily apparent, the purported forum selection clause is hidden and buried at the bottom of a misleading paragraph entitled "Attorney's Fees and Costs."⁷⁴ Accordingly, counsel for the Browns withheld accusations of Best Auto's possible forgery and responded to the substance by stating:

I have reviewed the purchase order. I previously had not seen the purported choice of venue and law provisions, perhaps because of its clear lack of conspicuousness. It is in fine print and buried in the back end of a paragraph

⁷² CP at 42, CP at 58, CP at 136.

⁷³ CP at 43.

⁷⁴ *Id.*

entitled ‘Attorney’s Fees and Costs,’ a heading that in no way relates to choice of venue and law issues. Under both Texas and Washington law, it is clearly not enforceable. In addition, the Browns are not seeking to ‘enforce’ any terms within the purchase order. Their claims are under the DTPA, fraud, rescinding the purchase, etc. No Parker County judge in going to enforce this hidden provision.⁷⁵

In fact, after further review of the Browns’ file and subsequent discussion, it became apparent that neither the Browns nor their counsel had seen the provision because the entire page was absent from any previous communications from Best Auto.⁷⁶

VIII. Best Auto Voluntarily Chose to Ignore the Texas Lawsuit, So the Browns Took a Default Judgment.

More than three weeks passed after the above-referenced communications and, despite being served with process according to law, acknowledging service, and stating that they would make a special appearance or seek contractual dismissal in the Texas Lawsuit, Best Auto voluntarily chose to outright ignore the Texas Lawsuit.⁷⁷ Best Auto did not file an answer, or any other pleading constituting an answer, and did not otherwise enter any appearance.⁷⁸ On September 25, 2008, some seventeen days after Best Auto’s answer deadline, the Browns took a

⁷⁵ CP at 159.

⁷⁶ CP at 71-73.

⁷⁷ CP at 72, CP at 192-194.

⁷⁸ CP at 192-194.

default judgment against the defendants.⁷⁹ The Texas “Court determined it had jurisdiction over the subject matter and the parties to [the] proceeding” and awarded the Browns treble damages under the TEXAS DECEPTIVE TRADE PRACTICES ACT (“DTPA”)⁸⁰ and related interest, attorneys’ fees, and costs.⁸¹

IX. Domestication of the Texas Judgment in the State of Washington and Garnishment.

After two years of informal post-judgment investigation into the assets of Best Auto and waiting to see whether Best Auto would seek a late appearance in the Texas Lawsuit or some other appellate remedy, the Browns moved forward with the domestication of their Texas Judgment.⁸² On January 14, 2011, the Browns filed their Texas Judgment in King County, Washington.⁸³ On January 25, 2011, counsel for Best Auto issued a letter to counsel for the Browns, stating that the Vehicle Purchase Order required the lawsuit to be filed in Washington and asking that the Texas Judgment be withdrawn, contending that the Browns and their legal counsel ignored the contractual provision.⁸⁴ Counsel for the Browns sent

⁷⁹ *Id.*

⁸⁰ TEXAS BUSINESS & COMMERCE CODE § 17.41 *et seq.*

⁸¹ CP at 192-194.

⁸² CP at 187-188, CP at 190-191.

⁸³ *Id.*

⁸⁴ CP at 50-51, CP at 56-57.

another letter to counsel for Best Auto referencing their prior September 2008 communications, which Best Auto again ignored.

In November 2011, as part of ongoing collection efforts, the Browns located and garnished \$35,812.66 (“Captured Funds”) held in account for Best Auto by Banner Bank.⁸⁵ Banner Bank filed an answer and Best Auto was notified of the garnishment.⁸⁶

X. Best Auto’s Motion to Vacate the Texas Judgment.

On December 6, 2011, Best Auto filed their *Motion to Vacate Foreign Judgment and Quash Garnishment* (“Motion to Vacate”), whereby Best Auto challenged the personal jurisdiction of Texas for the first time.⁸⁷ On the question of personal jurisdiction, the only issue that Best Auto presented is stated as follows:

“Under the Washington Uniform Enforcement of Foreign Judgments Act and CRLJ 60, should the foreign default judgment be vacated where the contract upon which the judgment is based contains a forum selection clause designating the State of Washington as the proper venue and jurisdiction for litigation?”⁸⁸

In other words, in order to contest personal jurisdiction in Texas, Best Auto did not challenge the minimum contacts between Best Auto and

⁸⁵ CP at 7-8.

⁸⁶ CP at 1-4.

⁸⁷ CP at 5-15.

⁸⁸ CP at 8.

Texas, whether for specific or general jurisdiction, but relied solely upon the purported contractual forum selection clause on the back page (or a second page) of a Vehicle Purchase Order, the entirety of which Best Auto never directly claimed or proved it sent to the Browns.⁸⁹

In support of Best Auto's Motion to Vacate, they offered Declarations of Rod J. Garrett, Mark A. Thompson, Brian M. King, and Christopher J. Marston ("Best Auto's Declarations").⁹⁰ However, none of Best Auto's Declarations directly state that the purported forum selection clause was sent to the Browns.⁹¹ Instead, they either entirely omit the issue or gloss over it with vague semantics likely designed to avoid perjury.⁹² In fact, Best Auto's Declarations actually substantiated the contrary conclusion – that Best Auto never sent the Browns a copy of the purported forum selection clause.⁹³ First, the King Declaration implicitly admits the fact that Best Auto did not send to the Browns a purported forum selection clause – it simply is not in his Declaration; only the first or front page is included where no forum selection clause exists.⁹⁴ Second, the Thompson Declaration dances around the issue and only

⁸⁹ CP at 5-15.

⁹⁰ CP at 8.

⁹¹ CP at 16-58.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ CP at 58.

states that the Browns “entered into a Vehicle Purchase Order agreement . . .”, attaches a copy of the front and alleged reverse side of the Vehicle Purchase Order, but does not state whether or how Thompson sent the alleged reverse side to the Browns.⁹⁵ In other words, despite the Browns’ prior insistence that the reverse side of the Vehicle Purchase Order was not sent to them as part of the transaction in question, the Best Auto parties have remained silent on the issue.⁹⁶ Their avoidance of this issue in their Motion to Vacate speaks volumes. But it again would be raised, and ignored, at the December 14, 2011 hearing on Best Auto’s Motion to Vacate.

XI. The Hearing on the Motion to Vacate.

At the outset of December 14, 2011 hearing on Best Auto’s Motion to Vacate, even though the Browns had already explained in their Response to the Motion to Vacate that they did not receive or execute a forum selection clause, the Superior Court indicated that he was predisposed by his past experiences:⁹⁷

* * *

JUDGE McDERMOTT: I’d like to hear why. I’ve always thought the contract provisions trumped other provisions, and I must

⁹⁵ CP at 37-40.

⁹⁶ CP at 5-15.

⁹⁷ Verbatim Report of Proceedings at 16-17 (hereafter cited as “RP at ___”).

tell you, Counsel, when I was in private practice many years ago, I lost – I was standing where you are, and I lost a couple of cases making the same argument you are making. I remember what the judge said, and so I want to hear you convince me why you should win because it just seems to me, as pretty much a threshold issue, that if your client signed an agreement – didn't have to buy the car. There wasn't anybody holding a gun to his head.

MR. PAINE:

Right.

JUDGE McDERMOTT:

Didn't have to buy the car. If he signed the agreement and bought the car, then it seems to me he took the terms of that agreement. He accepted those along with the car, and I don't understand why he didn't, so please tell me why he didn't.

* * *

Despite this opening salvo by the Superior Court, counsel for the Browns presented each argument in a succinct and direct manner, highlighting the failures of Best Auto's position with respect to the purported forum selection clause.⁹⁸

⁹⁸ RP at 15-19.

A. Discussion about Best Auto’s failure to send the purported forum selection clause to the Browns.

At the outset, Counsel for the Browns reiterated the initial threshold issue – it was Best Auto’s burden to prove that the purported forum selection clause was made a part of the agreement between the Browns and Best Auto and that it applied to the Texas Lawsuit.⁹⁹ In that regard, the following pertinent exchange took place between Judge McDermott and Best Auto’s legal counsel regarding his false assertion that the Browns had initialed the forum selection clause of the Vehicle Purchase Order and whether Best Auto sent the Browns a copy of the purported forum selection clause located on the reverse side (or second page) of the Vehicle Purchase Order:¹⁰⁰

* * *

JUDGE McDERMOTT: No, I want you to respond what he said. There is no evidence of initialing, and you did say in your argument that there was initialing.

MR. MARSTON: Yes.

JUDGE McDERMOTT: Where is the initialing?

MR. MARSTON: Your Honor, that’s – it’s not a –

JUDGE McDERMOTT: Where is the initialing?

⁹⁹ RP at 21.

¹⁰⁰ RP at 20.

MR. MARSTON: It's right on the front page, Your Honor.

* * *

As mentioned above, however, the forum selection clause was not found on the front of the document, but buried in small print of the second page of the document. The exchange continued:¹⁰¹

* * *

JUDGE McDERMOTT: Do you have a copy of the original?
Do you have the original?

MR. MARSTON: I don't have the original with me.

JUDGE McDERMOTT: Is it a one-page document or a two-page document?

MR. MARSTON: Usually these – it's – well, it's – one. It's –

JUDGE McDERMOTT: Is this a one-page document with printing on both sides of the page, or was it a two-page document?

MR. MARSTON: Your Honor, I do not – I can't answer that question definitively for you. Usually it's a one-page with printing on the back.

* * *

Simply stated, not only was Best Auto unable to prove that they sent the page containing the purported forum selection clause, but Best Auto could

¹⁰¹ RP at 21-22.

not even identify the original Vehicle Purchase Order, state whether it was a one-page or two-page document, or provide any evidence that they sent to the Browns the page containing the purported forum selection clause.¹⁰² Instead, the only evidence offered by Best Auto suggests that they never sent to the Browns the *entire* Vehicle Purchase Order with the purported forum selection clause.¹⁰³ In conjunction with the single page copy of the Vehicle Purchase Order attached to the Browns Original Petition in the Texas Lawsuit and the Vitanza Declaration that neither he nor the Browns had ever seen the mysterious second page, Best Auto's own inability to prove otherwise *should* have rendered the purported selection clause a non-issue.

However, to continue the above exchange between Judge McDermott and Best Auto's legal counsel, Judge McDermott ignored the absence of any evidence on the Browns' timely receipt of the purported forum selection clause and stated as follows:¹⁰⁴

* * *

JUDGE McDERMOTT: My experience with these kinds of things has been that that's what it is. It's ordinarily – many of us have purchased automobiles, some of

¹⁰² RP at 20-22.

¹⁰³ CP at 42, RP at 20-23.

¹⁰⁴ RP at 22.

which we shouldn't have bought, and my recollection is that it's printing on both sides of the page.

* * *

Relying on his own personal “experience,” Judge McDermott ignored the fact that, whether on one page (front and back) or two separate pages, there still was no evidence that the “back” or second page containing the purported forum selection clause was timely sent to the Browns and made a part of the sale and purchase of the 2004 Mini Cooper.¹⁰⁵

B. Discussion about inconspicuous and hidden nature of the purported forum selection clause.

However, even assuming, *arguendo*, that Best Auto sent the forum selection clause to the Browns, their counsel argued that its manner of presentation made it unenforceable. He stated:¹⁰⁶

* * *

MR. PAINE:

* * *

Moreover, if you actually look at the agreement itself and not the portions that the defendants have selectively attempted to extract from the agreement, it's not obvious anywhere in this agreement that there is any sort of venue provision whatsoever. In fact, the first time I was contacted about it, I read through this terms and condition page that was presented to me by defendants' counsel, and I could not locate it anywhere. It was only on my fourth reading

¹⁰⁵ *Id.*

¹⁰⁶ RP at 18-19.

through this agreement that I finally located it, and that's because it is buried in a paragraph identified as attorney's fees and costs, which then begins: "If this contract is placed in the hands of an attorney by a reasonable purchaser's default or enforce any of the provisions in the contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs." Only after the paragraph discusses attorney's fees and costs is any mention of venue even raised in this paragraph.

* * *

Totally ignoring this argument, Best Auto and Judge McDermott failed to address the hidden format of the purported forum selection clause and the issue of its lack of conspicuousness.¹⁰⁷ Instead, they relied upon non-descriptive language on the front page of the Vehicle Purchase Order.¹⁰⁸ Specifically, Best Auto focused on the "language at the bottom of the [single front] page indicating that [the Browns] read both sides of it," and Judge McDermott seemingly found relevance in the fact that the Browns "are not disputing that the form reads: 'Purchaser agrees, one, this order includes all terms and conditions on the face of this form and reverse side, together with any attachments referenced herein'" and stated to the Browns' counsel that "[t]here is no attachments referenced, but it says on the face and reverse side. So you are not disagreeing with that, I

¹⁰⁷ RP at 19-25.

¹⁰⁸ RP at 20-23.

assume.”¹⁰⁹ The Browns’ counsel could only again reiterate that “there is no evidence on the record what was on the reverse side or that the plaintiffs even received a copy of it.”¹¹⁰ It appears then that the Superior Court believed a reference to a second page is controlling even if the second page is not there.

C. Discussion about the purported forum selection clause’s substantive inapplicability to the allegations in the Texas Lawsuit.

The question then arose regarding whether the purported forum selection clause applied to the Texas Lawsuit.¹¹¹ Pursuant to its direct language, it only allows for venue for any “proceeding relating to the **enforcement** of this [Vehicle Purchase Order]” (emphasis added).¹¹² Again, the Vehicle Purchase Order was executed after the Browns and Best Auto agreed to the terms of the transaction and after the Browns wired the entire purchase funds to Best Auto, fully meeting their obligation under the parties’ oral agreement.¹¹³ The Vehicle Purchase Order was sent *after* those events, and contains none of the representations

¹⁰⁹ RP at 20, RP at 22-23.

¹¹⁰ RP at 23.

¹¹¹ RP at 25-28.

¹¹² RP at 27, CP at 43. Such a clause would relate only to a suit by Best Auto to force the Browns to follow through with the purchase of the 2004 Mini Cooper, a suit by the Browns to force Best Auto to deliver the 2004 Mini Cooper, or a suit by either to rescind or unwind the transaction. None of those claims existed in the Texas Lawsuit.

¹¹³ RP at 27.

upon which the Browns ultimately filed their Texas Lawsuit.¹¹⁴ In other words, as reflected by the absence of any reference to the Vehicle Purchase Order in any cause of action set forth in their Texas Lawsuit, the Browns did not seek any determination or remedy related to the “enforcement” of the Vehicle Purchase Order.¹¹⁵ Instead, the Browns pleaded and sought recovery under breach of contract (the oral agreement, not the Vehicle Purchase Order),¹¹⁶ unjust enrichment, promissory estoppel, common law fraud, and violation of the TEXAS DECEPTIVE TRADE PRACTICES ACT (“DTPA”),¹¹⁷ in the following respects:¹¹⁸

- (1) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation or connection which he does not have;

¹¹⁴ *Id.*

¹¹⁵ CP at 88-102, CP at 136. It is only referenced as Exhibit “C” with respect to Best Auto’s repeated contacts with the Browns in Texas for purposes of establishing personal jurisdiction in Texas over Best Auto, not as to the terms of their oral agreement.

¹¹⁶ CP at 96-97. Specifically, the breach of contract claims was based on the allegation that “Best Auto knowingly and intentionally misrepresented that the 2004 Mini Cooper had certain **qualities** and then executed **sales documents conveying** it to the Browns. Best Auto failed to honor the terms of the sale by providing the Browns a vehicle that did not meet the sales description – it is not drivable.” (Bold emphases added). With respect to whether this allegation encompasses the Vehicle Purchase Order, it clearly does not. There are no “qualities” represented in the Vehicle Purchase Order – those were made as part of the oral representations. The “sales documents conveying” the vehicle to the Browns included only the certificate of title as a Vehicle Purchase Order does not “convey” anything.

¹¹⁷ CP at 97-101. TEXAS BUSINESS & COMMERCE CODE § 17.41 *et seq.*

¹¹⁸ CP at 99-100.

- (2) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
- (3) Advertising goods or services with intent not to sell them as advertised;
- (4) Making false or misleading statements of fact concerning the reasons for, the existence of, or amount of price reductions; and
- (5) Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

None of the complaints made by the Browns arose out of anything at issue in the Vehicle Purchase Order.¹¹⁹ The Browns did not seek to rescind or unwind the Vehicle Purchase Order.¹²⁰ The Browns only sought to hold Best Auto liable for their false representations made *before* the Browns orally agreed to purchase the 2004 Mini Cooper and they wired the purchase funds to Best Auto at their instruction.¹²¹

Due to Best Auto's default in the Texas proceedings, the Browns' pleading was taken as true and default judgment was entered awarding the

¹¹⁹ CP at 88-102.

¹²⁰ *Id.*

¹²¹ *Id.*

Browns recovery under the DTPA and treble damages – matters that have no relation to the Vehicle Purchase Order.¹²² In other words, the Texas Lawsuit and Texas Judgment were not contingent upon the existence of, and in no way addressed or affected the enforceability of, the Vehicle Purchase Order.¹²³

Despite the above facts, which are apparent from the face of the Original Petition and the Vehicle Purchase Order, the Superior Court apparently misunderstood the issues. Counsel for the Browns reminded Judge McDermott that the Browns “never sued to enforce any term on this vehicle purchase order. They sued for numerous tort actions, the oral agreement, and oral – and based on the oral representations made to them by [Best Auto] and on the [DTPA] claim.”¹²⁴ The Superior Court ignored those claims, including the DTPA cause of action upon which the trebled Texas Judgment clearly was rendered. Instead, Judge McDermott focused only on the breach of contract cause of action and unilaterally determined, without evidence, that the claim referred to the Vehicle Purchase Order.¹²⁵ In doing so, he was prepared to issue his ruling.

¹²² *Id.*, CP at 192-194. See *Holt*, 835 S.W.2d at 83.

¹²³ CP at 88-102, CP at 192-194.

¹²⁴ RP at 27.

¹²⁵ RP at 28-29.

XII. The Court's Inexplicable Decision to Vacate the Texas Judgment.

Despite Best Auto's failure to offer any evidence that the purported forum selection clause was a component of the sales transaction between the Browns and Best Auto, any rational argument as to its applicability to the Texas Lawsuit or the lack of conspicuousness of the language buried under an "Attorney's Fees and costs" heading, the Superior Court adhered to its opening admonition and substituted its own opinion as evidence in order to inexplicably vacate the Texas Judgment.

Without any evidence or analysis on these issues, the Superior Court ultimately made the unsupported conclusion that the second page of the Vehicle Purchase Order was sent to the Browns, that it placed the Browns on notice of the forum selection clause, and that it governed the claims at issue in the Texas Lawsuit, thereby requiring the Texas Lawsuit to have been brought in Washington instead. In that regard, the Superior Court concluded as follows:¹²⁶

* * *

JUDGE McDERMOTT: I'm going to rule that I believe that the vehicle purchase order requires that any action for the enforcement of the contract under breach of contract I believe constitutes an enforcement of the contract must be

¹²⁶ *Id.*

under Washington law, must be brought at the dealer's principal place of business located within the state of Washington and that the laws of the State of Washington apply.

* * *

As a direct result of the Superior Court's erroneous and manifestly unjust and unsupported ruling, it issued a formal *Order Granting Defendants' Motion to Vacate Foreign Judgment and Quashing Writ of Garnishment* ("Order"), thereby vacating the domestication of the Texas Judgment and releasing the Captured Funds to Best Auto. Though the Superior Court's action has damaged the Browns by releasing the Captured Funds to Best Auto, the Browns seek remedy by this appeal and respectfully request that this Court reverse the Order and enforce the domestication of the Texas Judgment in Washington so that the Browns may continue execution in aid of their domesticated judgment.

SUMMARY OF THE ARGUMENT

By this appeal, the Browns contend that the Superior Court erred in refusing to give Full Faith and Credit to the Texas Judgment and in vacating its domestication in the State of Washington. Specifically, Best Auto did not raise any contractual defense in Texas (and thereby waived it), asserted only the inconspicuous forum selection clause here in Washington more than three years later but failed to prove it was a part of

the agreement with the Browns, and made no other substantive challenge to the personal jurisdiction of Texas, which was established by the evidence as a matter of law.

ARGUMENT AND AUTHORITIES

I. Standard of Review.

With respect to the enforcement of forum selection clauses, Washington courts have been mixed in their application of the abuse of discretion standard or *de novo* standard (in certain aspects), and even have determined enforceability without determining the appropriate standard of review.¹²⁷ Because the only standard of review explicitly applied in situations involving forum selection clauses is the abuse of discretion standard,¹²⁸ a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.¹²⁹

¹²⁷ *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 933-34, 106 P.3d 841, 843-44 (2005), *affirmed by*, 160 Wn.2d 826, 161 P.3d 1016 (2007); *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 747-48, 33 P.3d 91, 93 (2001) (concluding the burden of proof was not met, regardless of the standard of review); *Voicelink Data Servs., Inc.*, 86 Wn. App. at 616-22, 937 P.2d at 1160-63 (enforcing an agreement to litigate in Nevada without discussing the standard of review); *Exum v. Vantage Press, Inc.*, 17 Wn. App. 477, 478-79, 563 P.2d 1314, 1315-16 (1977) (reviewing for an abuse of discretion, the trial court's decision not to enforce a contract provision naming New York as the forum state).

¹²⁸ *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009); *Chateau Des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003).

¹²⁹ *Dix*, 160 Wn.2d at 833.

However, courts review constitutional questions of law according to a *de novo* standard of review.¹³⁰ In light of the fact that Best Auto seeks to enforce a contractual defense that they clearly waived through inaction, and the Full Faith and Credit Clause of the United States Constitution has nevertheless been disregarded, a *de novo* review may be appropriate.¹³¹

II. Full Faith and Credit for Foreign Judgments and Collateral Attacks.

Under the Full Faith and Credit Clause of the United States Constitution, a judgment rendered by one State is generally entitled to full faith and credit in every other State.¹³² This rule “provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States.”¹³³ Washington codified this constitutional provision by adopting the

¹³⁰ *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571, 574 (2006).

¹³¹ See *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981, 986 fn. 4 (2008)(citing *Dix*, 161 P.3d at 1020)(“In *Dix* we held that ordinarily an abuse of discretion standard applies to a trial court's determination on the validity of a forum selection clause, but if a pure question of law is presented such as whether a forum selection clause is against public policy, the *de novo* review standard applies. Thus, not all issues relating to a forum selection clause are issues of law. We have indicated the standard of review for a particular issue where relevant.”)

¹³² See U.S. CONST. art. IV, § 1; *State v. Berry*, 141 Wn.2d 121, 127-28, 5 P.3d 658, 661-62 (2000).

¹³³ *Berry*, 141 Wn.2d at 127-28 (quoting *In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997)).

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT (“UEFJA”).¹³⁴ As with Washington, Texas respects the Full Faith and Credit Clause of the United States Constitution and also formally adopted the UEFJA.¹³⁵ Consistent with that mutual adoption of the UEFJA, Washington specifically recognizes the enforcement of valid and subsisting Texas judgments.¹³⁶

Under 28 U.S.C. § 1738, when a judgment of another state is properly authenticated and appears to be a record of a court of general jurisdiction, the court’s jurisdiction over the cause on the parties is presumed, unless disproved by extrinsic evidence or the record itself.¹³⁷ Likewise, under RCW 6.36.025, a foreign judgment that has been properly filed with a Washington superior court “has the same effect and is subject to the same procedures . . . as a judgment of a superior court of this state.”¹³⁸

¹³⁴ See RCW 6.36.910.

¹³⁵ See TEX. CIV. PRAC. & REM. CODE §§ 35.001 et seq.

¹³⁶ See e.g., *TCAP Corp. v. Gervin*, 163 Wn.2d 645, 651-53, 185 P.3d 589, 593-94 (2008).

¹³⁷ See *Cook v. Cook*, 342 U.S. 126, 128 (1951); *Adam v. Saenger*, 303 U.S. 59, 62 (1938); *A & S Distrib. Co. v. Providence Pile Fabric Corp.*, 563 S.W.2d 281, 283 (Tex. App. 1977); *First Nat’l Bank of Libby, Montana v. Rector*, 710 S.W.2d 100, 103 (Tex. App. 1986).

¹³⁸ RCW 6.36.025(1); *In re Estate of Tolson*, 89 Wn. App. 21, 31-34, 947 P.2d 1242, 1248-49 (1997). A foreign judgment “controls in other states to the same extent as it does in the state where rendered.” *Lee v. Ferryman*, 88 Wn. App. 613, 620, 945 P.2d 1159, 1163 (1997) (citing *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942)). Accordingly, a foreign judgment is entitled to full faith and credit in Washington when it

However, once a properly authenticated copy of the judgment is introduced, a foreign judgment may be collaterally attacked if the foreign court (1) lacked jurisdiction or (2) violated a constitutional right, such as the due process right to notice and an adequate opportunity to be heard.¹³⁹ The burden rests upon the judgment debtor to prove any defenses to the judgment, such as lack of jurisdiction, faulty service, lack of finality, etc.¹⁴⁰ Absent these grounds, a Washington court must give full faith and credit to a Texas judgment.¹⁴¹

III. Forum Selection Clauses.

A nonresident may challenge a another State's personal jurisdiction (general or specific) over that nonresident by calling into question the minimum contacts with that State, or by asserting the governance of a contractual forum selection clause. This dispute involves only the latter argument offered by Best Auto.¹⁴²

is a valid final judgment under the laws of the rendering state. *See Larsen v. Farmers Ins. Co.*, 80 Wn. App. 259, 262-63, 909 P.2d 935, 937 (1996); RESTATEMENT (2D) CONFLICT OF LAWS § 107 (1971).

¹³⁹ *See Griffin v. Griffin*, 327 U.S. 220 (1945); *Perry v. Perry*, 51 Wn.2d 358, 318 P.2d 968 (1957); *Berry* 141 Wn.2d at 127-28; *State ex rel. Eaglin v. Vestal*, 43 Wn. App. 663, 666-68, 719 P.2d 163, 165 (1986).

¹⁴⁰ *Minuteman Press Intern., Inc.*, 782 S.W.2d 339, 342 (Tex. App. 1989); *First Nat'l Bank of Libby, Montana*, 710 S.W.2d at 103; *Schwartz v. F.M.I. Properties Corp.*, 714 S.W.2d 97, 100 (Tex. App. 1986); *Starzl v. Starzl*, 686 S.W.2d 203, 205 (Tex. App. 1984); *A & S* 563 S.W.2d at 283.

¹⁴¹ *See Berry*, 141 Wn.2d at 127-28; *Lee*, 88 Wn. App. at 620.

¹⁴² CP at 5-15. Best Auto did not challenge the personal jurisdiction of Texas other than through enforcement of the purported forum selection clause, the only "issue" they

A motion to dismiss is a proper procedural mechanism for enforcing a forum selection clause when a party to the agreement has violated the agreement by filing suit in a non-conforming forum.¹⁴³ Only after the nonresident proves, through a motion to dismiss, that the forum selection clause is a part of a written agreement between the parties and that its terms govern the proceeding in the foreign State – only then – does the burden shift to the party challenging the forum selection clause to show why it should not be enforced.

However, a forum selection clause does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter into the contract, where construction of the parties' rights and liabilities under the contract is not involved.¹⁴⁴ Where the wrongs arise from misrepresentations inducing a party to execute the contract, and not from breach of the contract, remedies and limitations specified by the contract

presented to the Superior Court. Nonetheless, Best Auto's express statement that it "Sells" to all of North America, including Texas, telephonic agreement to sell to the Browns in Texas, solicitation of payment from the Browns, documentation in its own Vehicle Purchase Order that they were selling to a "Non-Resident", repeated communications with the Browns in Texas, and direction to the Browns that they use ADESA Auction in Texas, all support the fact that Best Auto purposefully availed itself to the benefits of conducting business in Texas and consequent personal jurisdiction in Texas.

¹⁴³ See *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007); *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys.*, 177 S.W.3d 605, 610 (Tex. App. 2005); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App. 1996).

¹⁴⁴ See *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 813 (Tex. App. 1995).

do not apply.¹⁴⁵ Moreover, Texas courts are not bound by the parties' selection of a forum with regard to any cause of action if the interests of the public and potential witnesses strongly favor jurisdiction in a forum other than the forum the parties selected.¹⁴⁶

IV. The Superior Court Abused its Discretion, if Any, and a De Novo Review Requires This Court to Reverse the Order of the Superior Court.

Judge McDermott clearly abused any discretion he possessed by enforcing the purported forum selection clause against the Browns and vacating the Texas Judgment, previously domesticated in Washington. Specifically, (A) Best Auto waived any defense arising out of the purported forum selection clause by failing to raise the contractual defense in the Texas court via a motion to dismiss; (B) even then, Best Auto failed to prove that the purported forum selection clause was ever sent to and made a part of the agreement with the Browns; (C) Best Auto failed to provide any document signed by judgment creditor Julie Brown which purports to impose upon her any forum selection clause; and (D) enforcement of the forum selection clause under these circumstances would be unreasonable and/or unjust and without any support in state or federal constitutional or statutory law. In each of these respects, the

¹⁴⁵ *Id.*

¹⁴⁶ *My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864-65 (Tex. App. 2003).

Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

A. Best Auto waived any alleged contractual defense arising out of the purported forum selection clause.

Again, a motion to dismiss is a proper procedural mechanism for enforcing a forum selection clause when a party to the agreement has violated the agreement by filing suit in a non-conforming forum.¹⁴⁷ Just as personal jurisdiction is a waivable right, so is a contractual provision regarding the same.¹⁴⁸ More specifically, a forum selection clause may be waived just as any other contractual right.¹⁴⁹ The Supreme Court of Washington discussed various aspects of these principles in *Oltman v. Holland America Line USA, Inc.*,¹⁵⁰ wherein it discussed circumstances in which a party waives a contractual defense of forum selection clause by raising it before the court in the pending proceeding.¹⁵¹

¹⁴⁷ See *Deep Water Slender Wells, Ltd.*, 234 S.W.3d at 687; *Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d at 610; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 70.

¹⁴⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985) (“the personal jurisdiction requirement is a waivable right”).

¹⁴⁹ See *Dart v. Balaam*, 953 S.W.2d 478, 482 (Tex. App. 1997); see also *Euler-Siac S.P.A. v. Drama Marble Co., Inc.*, 617 S.E.2d 203, 205-06 (Ga.App. 2005); *Conseco Finance Servicing Corp. v. Hill*, 556 S.E.2d 468, 473-74 (2001).

¹⁵⁰ See *Oltman*, 163 Wn.2d 236, 243-46, 178 P.3d 981, 986-88 (2008).

¹⁵¹ *Id.*

In this case, Best Auto knowingly sat on their alleged contractual rights for more than three (3) years and never raised them in the Texas Lawsuit via a motion to dismiss as required under Texas (and Washington) law. In fact, upon the September 2, 2008 communication from Best Auto's counsel regarding the Vehicle Purchase Order, it appeared that Best Auto would follow the appropriate procedure. Best Auto's legal counsel stated that "[m]y client has contacted an attorney in Texas to seek a dismissal of this action." However, Best Auto failed to take any action to do so. In other words, Best Auto had their chance to present those contractual arguments to the Texas trial court, but they knowingly refused with conscious indifference. Best Auto, therefore, waived any such defense as to contractual forum selection.

Now, more than three years after the deadline, Best Auto seeks to backtrack and attempt to enforce a purported contractual right that they waived through their own inaction and lack of diligence. No Texas or Washington legal authority allows a judgment debtor to raise a waived contractual forum selection clause for the first time after a judgment is entered and made final, in particular, after stating they would make an appearance, not doing so, and then waiting more than three years to act. In fact, all authorities cited by the Debtors in their motion to vacate involve diligent defendants who timely raised the issue before the trial

court.¹⁵² Due to Best Auto's waiver, the Superior Court abused its discretion, if any, and a *de novo* review of this pertinent question of law requires this Court to reverse the Order of the Superior Court.

B. Best Auto failed to prove that the purported forum selection clause was made a part of the agreement with the Browns.

The Browns and their counsel have consistently stated that none of them had seen the purported forum selection clause until Best Auto's counsel emailed it to them in September 2008 – long after the transaction and dispute had unfolded. Despite the Browns refutation of the allegation that the purported forum selection clause was part of their agreement, Best Auto wholly failed in meeting their burden to prove that an unsigned page containing the purported forum selection clause was made a part of the agreement with both or either of the Browns. Best Auto could not even identify the location of the forum selection clause – whether it was on the back of the first page, or on a second page altogether. Even their Declarations in support failed to provide a consistent version of the Vehicle Purchase Order, and none of them directly stated that they sent the

¹⁵² Best Auto had actual notice of the Texas proceedings, so their failure to respond or specially appear and challenge lack of personal jurisdiction within the appropriate time period would even constitute waiver of defense under CR 12(h)(1). See *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614, 616 (1979) (defense counsel's dilatory and inconsistent acts can constitute waiver of the defense of insufficient service of process); *Northwest Administrators, Inc. v. Roundy*, 42 Wn. App. 771, 774-76, 713 P.2d 1127, 1130 (1986) (a party may waive personal jurisdiction by failure to comply with CR 12(h)(1)). Here, Best Auto waived the defense of lack of personal jurisdiction by failing to challenge the Texas court's personal jurisdiction when they had notice of the action against them.

second page to the Browns. Due to Best Auto's failure to satisfy their burden of proving that the purported forum selection clause is a part of the agreement with the Browns, the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

C. Best Auto failed to prove the applicability of the purported forum selection clause to judgment creditor Julie Brown.

Even if Best Auto had presented any evidence that the purported forum selection clause was sent to both or either of the Browns, they failed to establish that Julie Brown executed or otherwise agreed to it. A forum selection clause is not binding on a third party who did not agree to the contract in which the clause is found.¹⁵³ Julie Brown is a judgment creditor under the Texas Judgment. There is no purported forum selection clause on any document that bears her signature. Due to the absence of Julie Brown's signature on any document even arguably containing the purported forum selection, the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

¹⁵³ *Oltman*, 163 Wn.2d at 249-50; *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 321-23, 796 P.2d 1276, 1283-84 (1990); *State ex rel. Elec. Prods. Consol. v. Superior Court*, 11 Wn.2d 678, 679, 120 P.2d 484, 484-85 (1941); *State ex rel. Lund v. Superior Court*, 173 Wn. 556, 557-58, 24 P.2d 79, 79-80 (1933).

D. Enforcement of the purported forum selection clause would be unreasonable or unjust.

A court may deny enforcement of such a clause upon a clear showing that, in the particular circumstances, enforcement would be unreasonable, such as when adoption of the forum selection clause was procured by fraud or overreaching.¹⁵⁴

Assuming, *arguendo*, that Best Auto did not waive the purported forum selection clause, actually sent it to and obtained execution from both of the Browns, it would remain unreasonable and manifestly unjust to enforce it against them under the circumstances of this case. The purported forum selection clause is inconspicuous and hidden under a misleading heading, and it does not govern any claim asserted in the Texas Lawsuit or made the basis of the Texas Judgment. Due to the circumstances surrounding the purported forum selection clause, the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

¹⁵⁴ *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 462-63 (1997) (discussing *Bremen, Carnival Cruise Lines*, and their progeny).

1. The Forum Selection Clause Was Signed *After* the Browns Paid.

The purported forum selection clause amounted to new terms thrust upon the Browns after they had complied with their payment obligation at Best Auto's request that they wire the \$11,500 to Best Auto's bank in Washington. Best Auto already had the Browns' money and provided no new consideration to support the imposition of the purported forum selection clause. There was no warning, notice, or further negotiation. The Browns were consumers. Best Auto was a used car dealer. The Browns paid, then the used car dealer allegedly tried to change or add terms. Under these circumstances, enforcement of a forum selection clause requiring the Browns to litigate in Washington would be unreasonable and manifestly unjust, and the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

2. The Forum Selection Clause Is Inconspicuous and Hidden.

Second, the purported forum selection clause is buried in fine print under a misleading heading entitled "Attorney's Fees and Costs" and meets the very definition of an inconspicuous, stealth inclusion of a term that was not negotiated or otherwise brought to the attention of the Browns. It is not under a heading entitled "Jurisdiction or Venue." It is

not bolded, underlined, or highlighted. There is nothing that stands out other than what appears to be an intentional effort to misrepresent that the paragraph is solely a section dealing with “Attorney’s Fees and Costs” – matters which have nothing to do with jurisdiction or venue. None of these facts has been or can be contested. Even in a commercial context, this arguably would be unenforceable. In a consumer contest, it must especially be so. Under these circumstances, enforcement of a hidden forum selection clause which the parties did not discuss or negotiate would be unreasonable and manifestly unjust, and the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

3. The Texas Lawsuit Did Not Relate to “Enforcement” of the Vehicle Purchase Order.

Third, the purported forum selection clause only allows for venue for any “proceeding relating to the **enforcement** of this [Vehicle Purchase Order]” (emphasis added). Again, the Vehicle Purchase Order was executed after the Browns and Best Auto agreed to the terms of the transaction and after the Browns wired the entire purchase funds to Best Auto, fully meeting their obligation under the parties’ oral agreement. The Vehicle Purchase Order was sent *after* those events, and contains

none of the eBay and oral representations upon which the Browns ultimately filed their Texas Lawsuit. In other words, as reflected by the absence of any reference to the Vehicle Purchase Order in any cause of action set forth in their Texas Lawsuit, the Browns did not seek any determination or remedy related to the “enforcement” of the Vehicle Purchase Order. In fact, the Texas Lawsuit and Texas Judgment were not contingent upon the existence of, and in no way addressed or affected the enforceability of, the Vehicle Purchase Order. The Vehicle Purchase Order had no bearing on the dispute set forth in the Texas Lawsuit and resolved by the Texas Judgment. None of these facts have been or can be contested. Under these circumstances, enforcement of an inapplicable forum selection clause would be unreasonable and manifestly unjust, and the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

4. Most, if not all, of the key witnesses reside in Texas.

Finally, only the Best Auto parties reside in Washington. Their misrepresentations can be litigated in Texas. The Browns reside in Texas, as do all of the witnesses privy to the poor performance of the vehicle, including the mechanics and auctioneer suggested by Best Auto. Under these circumstances, enforcement of a forum selection clause requiring the

Browns to travel to Washington to assert their rights under consumer protection laws would be unreasonable and manifestly unjust, and the Superior Court abused its discretion, if any, and a *de novo* review of the pertinent questions of law requires this Court to reverse the Order of the Superior Court.

CONCLUSION

Based on the foregoing, the Superior Court erred in vacating the domestication of the Texas Judgment in Washington. Appellees knowingly and voluntarily waived their right to appear in Texas and assert their alleged contractual defense of a forum selection clause. Three years after a Texas court entered judgment in favor of Appellants, the Appellees first raised the forum selection clause long after they waived it. Even then, they could not prove it was a part of the agreement with either of the Browns. Assuming any evidence existed in that regard, the forum selection clause itself does not provide language that encompassed the dispute as alleged by Appellants and, in any event, the it would be unreasonable and unjust to enforce it in light of its inconspicuous and hidden nature and the parties respective roles as used car salesmen and consumer.

The Full Faith and Credit Clause and UEFJA exist for a reason. If a defendant, three years after their deadline to answer a lawsuit, is allowed

to first raise and rely upon a contractual defense arising out of a term not made a part of the agreement, then the Full Faith and Credit Clause and UEFJA serve no purpose.

PRAYER

WHEREFORE PREMISES CONSIDERED, Appellants William S. Brown and Julie C. Brown respectfully request this Court to reverse the Superior Court's Order Vacating the Foreign Judgment, render judgment in favor of Appellants William S. Brown and Julie C. Brown, and grant Appellants William S. Brown and Julie C. Brown such other and further relief to which they are entitled.

DATED this 2nd day of April, 2012.

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