

NO. 68095-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court Cause No. 11-2-36782-7 SEA

WILLIAM S. BROWN AND JULIE C. BROWN,
husband and wife, and their marital community

Plaintiffs/Appellants,

v.

ROD J. GARRETT d/b/a/BEST AUTO LIMITED, and MARK A.
THOMPSON, d/b/a BEST AUTO,

Defendants/Respondents.

RESPONDENTS' BRIEF

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II. STATEMENT OF THE CASE

Defendants/Appellants Rod J. Garrett d/b/a Best Auto Limited and Mark A. Thompson, D/B/A Best Auto (hereinafter "Best Auto"), are Washington-based companies involved in the recovery and sale of automobiles. (CP 1, 38) In April 2008, Plaintiff/Appellant William S. Brown, a resident of Texas, contacted Best Auto regarding Best Auto's advertisement on eBay for the sale of a 2004 Mini Cooper automobile. (CP 38)

Besides a description of the vehicle, Best Auto's eBay listing also contained the following language:

The State of Washington shall have exclusive jurisdiction over all disputes. Venue shall be exclusively in King County. The final contract signed between both buyer and seller shall be binding. The final signed contract and terms thereof shall govern the sale. All disputes arising out of or relating to this auction, any negotiations, the signed agreement, or to the breach, enforcement or interpretation thereof, shall be resolved by binding arbitration in Washington in accordance with the terms contained in the final sale agreement and under the laws of the State of Washington.

(CP 109)

On April 30, 2008, Plaintiffs executed a two-sided Vehicle Purchase Order agreement under which Plaintiffs agreed to purchase the vehicle for \$11,250. (CP 38) Mr. Brown signed this Vehicle Purchase

Order. (CP 42) The back side of the Vehicle Purchase Order contains the following forum selection language:

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.

(CP 43)

The final line above Mr. Brown's signature certifies that "[p]urchaser by execution of this order certifies that he or she is of legal age and acknowledges that he or she has read its terms, conditions and attachments and has received a true copy of this order." (CP 42)

Prior to the sale, Mark Thompson of Best Auto drove the vehicle without any problems, and he accurately represented to the best of his knowledge the condition of the vehicle to Mr. Brown. (CP 39) He was unaware of any mechanical issues with the Mini Cooper prior to it being shipped to Texas. (CP 39)

The vehicle was sold "AS-IS". This was stated under the "Cash Price of Vehicle" section on the front page of the Vehicle Purchase Order. The Vehicle Purchase Order provided that, "Unless an express written warranty as to the condition and operation of the above vehicle is provided by Dealer, or unless a service contract is being purchased for the above

vehicle, the Dealer makes no, and DISCLAIMS any and all IMPLIED WARRANTIES of FITNESS and MERCHANTABILITY, and is selling the above vehicle AS IS, with all faults.” This paragraph of the Vehicle Purchase Order was initialed by Mr. Brown. (CP 42)

Mr. Brown and his wife were not satisfied with the vehicle, despite the fact that they bought it “as is” with no warranties. Notwithstanding the venue provisions of the Vehicle Purchase Order, Plaintiffs filed a complaint against Best Auto in the County Court at Law for Parker County, Texas, on August 6, 2008. (CP 88-102) The Texas court maintained that it had jurisdiction, and it entered a default judgment against Best Auto on September 25, 2008, in the amount of \$39,417, plus pre-judgment interest in the amount of \$442.76, plus attorney’s fees in the amount of \$7,593.75, and costs in the amount of \$699.00. (CP 192-194) The Browns took no further action for the next two and a half years. Then on January 14, 2011, the Browns filed the judgment with the King County District Court. On October 25, 2011, a Transcript of the Judgment was filed with the King County Superior Court.

The Browns obtained a Writ of Garnishment to Banner Bank on November 23, 2011, and served it on Banner Bank and Best Auto. As a result, Banner Bank held \$35,812.66. (CP 1-4) These were funds that were to be paid to Defendant Best Auto Limited’s lender, Dealer Services

Corporation (“DSC”). (CP 17-18) Not only were these funds received from customers of Best Auto Limited and earmarked to pay for cars that were purchased by them, but DSC has a perfected, security interest in the funds. *Id.* At the same time that the Browns had obtained their Writ of Garnishment, Best Auto was requesting that the King County District Court enter an order directing the Plaintiffs to show cause why the Default Judgment should not be vacated. (CP 34)

On December 14, 2011, the Superior Court heard argument on Best Auto’s motion to vacate the foreign judgment and quash the garnishment, and it ultimately ruled in Best Auto’s favor, stating the following:

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 contract must be 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 far as all the other portions of the judgment that was awarded in Texas, at this point in time, it seems to me that they are all at least somewhat related to the enforcement of the contract, and that’s the very first cause of action that is listed in the plaintiffs’ complaint in Texas. You know, I certainly could see a separate consumer protection action in Texas not having anything to do with enforcement of the contract. I could see, you know, a number of other kinds of lawsuits in Texas that probably

would be valid lawsuits, quite frankly, but they've all been kind of "mooshed" together, and I really don't know how the Court ruled or why they ruled a certain way that they did.

So my ruling is that any enforcement actions having to do with – or any actions having to do with enforcement of the contract, including valuation of the terms of the contract have to be brought in Washington, and any judgment in Texas on that cause of action is not enforceable in the state of Washington.

(RP 29-30)

I make no comment on the underlying merits of the case. My ruling only goes toward I believe that the laws of the state of Washington should have been controlling and that the Texas court didn't have jurisdiction to enter into the cause of action. So I make ruling on the cause of action.

(RP 32)

The Browns now appeal the trial court's ruling.

III. ARGUMENT

a. Standard of Review:

The Washington Supreme Court has stated that an "abuse of discretion" standard generally applies when reviewing decisions on the enforceability of forum selection clauses. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion. *Id.*; *State v.*

Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented, such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a de novo standard of review should be applied as to that question.

Dix v. ICT Group, 160 Wn.2d at 833-834.

In the present case, there were no arguments raised about whether the forum selection clause violated public policy. Rather, the Browns have argued that 1) Best Auto waived enforcement of the forum selection clause; 2) the forum selection clause was not an actual term included in the contract; and 3) the forum selection clause was not applicable to the Texas action because that action did not relate to enforcement of the Vehicle Purchase Order. These are fact questions, and under these circumstances, this Court should review the trial court's ruling only for an abuse of discretion.

b. Washington Is Not Required to Give Full Faith and Credit to A Foreign Judgment Where the Foreign Court Did Not Have Jurisdiction.

The Browns concede in their appellate brief that a foreign judgment may be collaterally attacked if the foreign court lacked jurisdiction to enter the judgment. (Appellate Brief, pp. 37-38). Washington's courts have routinely held that "this state need not extend

full faith and credit to a foreign judgment if the foreign court imposing that judgment did not have jurisdiction.” *SCM Group USA, Inc. v. Protek Machinery Co.*, 136 Wn. App. 569, 574, 150 P.3d 141 (2007). “Before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court’s decree.” *Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. And Health Ins. Guaranty Ass’n*, 455 U.S. 691, 705, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982).

Parties may challenge judgments entered pursuant to the Act by raising “defenses which destroy the full faith and credit obligation normally associated with sister state judgments.” *State Dept. of Health and Welfare, Bureau of Child Support Enforcement v. Holjeson*, 42 Wn. App. 69, 72, 708 P.2d 661 (1985). In this case, lack of jurisdiction is a sufficient defense to destroy the full faith and credit that would normally be extended to the Foreign Judgment obtained by the Plaintiffs.

c. Forum Selection Clauses are Presumed Valid.

In Washington, a forum selection clause in a contract is determinative of the parties’ consent to personal jurisdiction in the named forum. *Kysar v. Lambert*, 76 Wn. App. 470, 485, 887 P.2d 431 (1995) (“Speaking generally, a choice-of-forum clause shows consent to personal jurisdiction”). Enforcement of forum selection clauses “serves the salutary purpose of enhancing contractual predictability.” *Voicelink Data*

Servs., Inc., v. Datapulse, Inc., 86 Wn. App. 613, 617, 937 P.2d 1158 (1997).

Forum selection clauses are prima facie valid. *Dix v. ICT Group, Inc., et al.*, 160 Wn.2d 826, 834, 161 P.3d 1016 (2007). Therefore, Washington courts will enforce a forum selection clause unless it is “unreasonable and unjust.” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513 (1972)). A party contesting the validity of a forum selection clause has “a heavy burden of proof” to show that it should not be enforced. *Id.* As discussed below, the Browns failed to meet this heavy burden at the trial court, and the trial court ruling should be affirmed.

d. The Evidence Presented to the Trial Court Supported Enforcement of the Forum Selection Clause.

Despite the fact that the Browns had the burden of proof regarding the forum selection clause, they argue repeatedly in their brief that Best Auto somehow failed to meet its burden at the trial court. Under any scenario, however, Best Auto presented substantial evidence to support its position, and the trial court ruled correctly.

In the Declaration of Mark A. Thompson in Support of Motion to Vacate (CP 37-43), the owner of Best Auto testified based upon personal

knowledge that on April 30, 2008, the Browns¹ entered into a Vehicle Purchase Order agreement under which they agreed to purchase the vehicle for \$11,250. (CP 38 - ¶ 3). Mr. Thompson then confirmed that attachment “A” to his Declaration, was a true and correct copy of that two-sided Vehicle Purchase Order. *Id.* Nowhere in any declaration submitted by Mr. or Mrs. Brown is there any suggestion that they failed to receive both pages of the Vehicle Purchase Order. In fact, neither Mr. nor Mrs. Brown submitted any affidavit or declaration in opposition to the motion to vacate the Texas judgment.

The only declaration submitted on behalf of the Browns was that of their Texas attorney, Paul J. Vitanza, discussing his communications about the forum selection clause with Best Auto’s attorney, Brian King. (CP 71-73). Mr. Vitanza testified that, after Mr. King pointed out the forum selection clause, “I reviewed it as it was the first time that either the Browns or I had seen it.” (CP 72 - ¶ 3) This is complete hearsay as to the Browns. Mr. Vitanza easily could have obtained a declaration from his clients stating that they had never received the second/back page of the

¹ The Browns argue in their brief that the forum selection clause should not be binding on Mrs. Brown, since she did not personally sign the Vehicle Purchase Order. This argument ignores the fact that, like Washington, Texas is a community property state. Mr. Brown had the authority to, and did, bind the community with his signature on the Vehicle Purchase Order. As Mrs. Brown is claiming to be a judgment creditor under the purported Texas judgment based upon her husband’s dealings with Best Auto, she cannot disavow the effect of the forum selection clause that he accepted. See also, *Accelerated Christian Education, Inc., v. Oracle Corporation and Brady*, 925 S.W.2d 66 (Tex.App. 1996)(holding that a valid forum selection clause applies to all transaction participants.)

Vehicle Purchase Order, but he did not. Thus, the testimony of Mr. Thompson that the two-page Vehicle Purchase Order was what was executed by Mr. Brown was uncontroverted. The trial court rightly relied on this evidence.

The Vehicle Purchase Order clearly shows Mr. Brown's signature on the first/front page. He has not disputed that it is his signature. This signature is directly below the following language:

Purchaser agrees that (1) this order includes all the terms and conditions on the face of this form, and reverse side, together with any attachments referenced herein. (2) This order cancels and supercedes any prior arrangement and as of the date herein comprises the complete and exclusive statement of the terms of this agreement relating to the subject matter covered hereby. (3) This order shall not become binding until accepted by Dealer or an authorized representative and in the event of a time sale, dealer shall not be obligated to sell until approval of the terms hereof is given by a Bank or Financial Institution willing to purchase a time sales agreement between the parties hereto based on such terms. (4) Purchaser by execution of this order certifies that he or she is of legal age and acknowledges that he or she has read its terms, conditions and attachments and has received a true copy of this order. READ THIS ENTIRE DOCUMENT BEFORE SIGNING, IT INCLUDES MANY IMPORTANT AND BINDING PROVISIONS.

(CP 42)

There are a couple of points in this paragraph worth noting. First, subsection (1) references both the face of the form *and* the reverse side. The clear language shows that this is a two-page document. The final

sentence, in all caps, warns Mr. Brown to read the entire document before signing it, and subsection (4) confirms that Mr. Brown did read the entire document and received a true copy of it. Mr. Brown never complained that he didn't receive the second page, and the trial court could only proceed on the un-rebutted evidence that Mr. Brown had in fact read and agreed to the entire document.

The Browns attempt to muddy this argument by pointing to some issues that arose during argument. First, counsel for Best Auto mentioned in passing that Mr. Brown had initialed the "as is" portion of the contract. Based upon this, the Browns claim that counsel made "false assertions that the Browns had initialed the forum selection clause of the Vehicle Purchase Order...." (Appellate Brief, p. 24). They then cherry-pick limited portions of the verbatim report to make it seem as if Best Auto's counsel was not forthcoming with the trial court. However, the actual exchange included the following. It started with counsel merely giving a recitation of the case history:

Mr. Marston: They signed – in the agreement, under their signatures, it said: "Purchaser by execution of this order certifies that he or she is of legal age and acknowledges that he or she has read its terms, conditions, and attachments and had received a true copy of this order."

Under the vehicle sales order, there was also an as is disclaimer and a disclaimer of warranties that they

initialed. This – the as is disclaimer stated that they are purchasing the vehicle as is, and there was no express or implied warranties with respect to the purchase of the vehicle. They signed that. They transferred the money to Mr. Thompson.

(RP 7)

When it was his turn to argue, counsel for the Browns completely misstated Mr. Marston's earlier comments:

Mr. Paine: On the front side, the – you do see our clients' signature, and then on the back side there is all these terms and conditions.

Now, there is no evidence in the records that our client actually ever received any of these terms and conditions applicable to the sale. They talked about how our clients initialed the terms and conditions.

If the Court looks at what was submitted by the defendants themselves, there is no initialing anywhere on the terms and conditions that they rely upon.

(RP 18-19)

It is only at this point that the language cited by the Browns in their brief occurred, along with the continuation of that discussion:

Judge McDermott: No, I want you to respond [sic] what he said. There is no evidence of initialing, and did you 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?

Mr. Marston: It's right here on the front page, your honor.

Judge McDermott: May I see it, please?

Mr. Marston: Yes, hold on one second. So on the front page – and that wasn't a reference to the language concerning the venue provision, Your Honor. It's in reference to the as is language, but there is also language at the bottom of the page indicating that they've read both sides of it, and I'd also like to point out that we don't have any declaration or affidavit from the plaintiffs disputing my client's position on the matter.

(RP 20-21)

After pointing out this exchange and incorrectly attempting to paint Best Auto's counsel as misleading the Court, the Browns then go on in their brief to suggest that the back page of the Vehicle Purchase Order should be disregarded because counsel did not have the original document with him at court. (Appellate Brief, p. 25). Notwithstanding the fact that this argument had not been raised in any of the Browns' pleadings to that point and was not at issue; and further notwithstanding ER 1003, which allows admission of a duplicate of a document; the Browns argue that counsel's personal statements in court regarding the document were somehow relevant:

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 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. 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.

(Appellate Brief, pp. 25-26).

The Browns imply that the statements of Mr. Marston - which demonstrate only his lack of personal knowledge about an issue being raised for the very first time at argument – somehow contradict or refute the testimony provided under oath by Mr. Thompson. Mr. Thompson clearly testified that the two page document attached to his declaration was the Vehicle Purchase Order entered into (i.e., signed) by Mr. Brown. As an aside, it is irrelevant whether this document was on two separate pages or printed back to back, since Mr. Thompson confirmed that both pages (in whatever form) constituted the agreement signed by Mr. Brown, and Mr. Brown's signature confirmed that he had reviewed both pages. Again, the Browns provided absolutely no evidence or testimony to rebut this. All Mr. Brown would have had to say to create an issue of fact was, "I only received the front/first page of the document." He did not do this. He cannot now attempt to create confusion and ask this Court to infer evidence that does not exist.

The evidence presented to the trial court all supported the finding that the forum selection clause contained in the Vehicle Purchase Order was valid and should be enforced. The trial court's ruling on this should be affirmed.

e. In Light of a Valid Forum Selection Clause, the Texas Court Had No Jurisdiction to Enter Judgment Against Best Auto.

The Browns raise several other arguments regarding why the Texas judgment should be upheld, regardless of the existence and applicability of the forum selection clause. None of these arguments supports reversal of the trial court, however.

i. Best Auto Did Not Waive Enforcement of the Forum Selection Clause.

The Browns argue that Best Auto waived any alleged contractual defense arising out of the forum selection clause by failing to raise it before the Texas courts. However, where the Texas courts did not have jurisdiction over the dispute, there was no obligation imposed on Best Auto to appear before the Texas courts to raise the defense. The cases cited by the Browns in support of their position appear to all involve cases where the defendants voluntarily and formally appeared in the lawsuits and failed to timely raise the challenge to jurisdiction after having formally appeared in the actual lawsuit.

In contrast, Best Auto notified the Browns' counsel of the forum selection clause and that the Browns did not have a right to proceed forward in Texas. (CP 49-58, 79) Despite receiving this notice, the Browns decided to ignore the forum selection clause and proceeded forward with obtaining a default judgment without providing any further notice to Best Auto. (CP 71-73)

In fact, in response to the email correspondence Best Auto's Washington counsel sent to the Browns' Texas counsel, their Texas counsel responded via email with the following:

Brian, 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 entitled "Attorney's Fees and Costs," a heading that in no way relates to the 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 [is] going to enforce this hidden provision."

I hope your clients will reconsider. If they challenge jurisdiction and lose, I doubt my clients will be as willing to resolve this matter for much less than the triple damages they will be entitled to under Texas law. Please let me know anything changes.

(CP 159) (Emphasis Added)

Despite this language, it appears that the Texas court that entered the default judgment was not informed of the forum selection clause or that counsel for Best Auto had notified the Browns of its position that the

claims should be brought in Washington. *Id.* The Browns then waited approximately three years to transfer the judgment to Washington State and did not notify Best Auto or its counsel of the judgment in Texas until it was transferred to Washington. Upon learning of the judgment, Best Auto's counsel then informed the Browns' local counsel of the forum selection clause and, again, requested that the Browns voluntarily vacate the domesticated judgment. (CP 56-57) As set forth above, Best Auto then moved to vacate the judgment as void under CR 60. (CP 5-15)

Best Auto acted appropriately in timely informing Browns' counsel of the forum selection clause and diligently in moving to have the judgment vacated upon it being transferred to Washington State. Even setting aside who or who did not act timely or diligently, the fact of the matter remains that the judgment is void and can be vacated at any time. *See, e.g., Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 326-27, 877 P.2d 724 (1994) (A default judgment entered without proper jurisdiction is void, and "the trial court must vacate that judgment and has no discretion to do otherwise"). In *Wampler v. Wampler*, 25 Wn.2d 258, 263, 170 P.2d 316 (1946), the court stated that:

A decree of a sister state or a foreign court, void for want of jurisdiction over the subject matter of the action or the parties to the action, may be collaterally attacked in the courts of this state in any proceeding instituted in this state. The record of a judgment rendered in another state may be contradicted as to the facts

necessary to give the court jurisdiction. If it be affirmatively shown that such facts did not exist, the record will be a nullity notwithstanding the recital that they did exist.

Id. at 263. Once it was transferred to Washington, Best Auto was and is entitled to collaterally attack the judgment based on jurisdictional grounds and the forum selection clause.

In *Thos P. Gonzalez Corporation v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247 (9th Cir. 1980), the defendant, a foreign entity, was served with a summons and complaint filed by the plaintiff in California. The defendant failed to timely answer the complaint and a default judgment was entered against the defendant. The defendant moved under Fed.R.Civ.P. 60(b)(4), which is similar to Washington's CR 60, to vacate the default judgment on the grounds that (1) the Federal District court in California did not have jurisdiction over it and (2) for relief from the default judgment due to mistake, inadvertence, surprise and excusable neglect. *Id.* at 1250.

In affirming the District Court's order vacating the default judgment, the *Consejo* court found that the District Court lacked jurisdiction over the defendant, so the default judgment was void, and the District Court had no choice to vacate the judgment. *Id.* at 1256. In doing so, it reaffirmed the legal principle that a judgment entered without

jurisdiction over the parties is void. *See, Id.*, at 1255. It further stated that:

“Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60B9). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.”

Id., at 1256, *citing, Wright & Miller*, Federal Practice & Procedure: Civil § 2862, at 197. There was no requirement that the defendant had to appear, answer, and move for the court to address the jurisdictional issue first. If there were such a requirement, then the *Consejo* court would have had to determine whether the defendant was entitled to relief from the default judgment due to mistake, inadvertence, surprise and excusable neglect, not because of the lack of jurisdiction.

Likewise, Best Auto did not need to formally appear, answer, and move the Texas courts to render a decision on the enforceability of the forum selection clause and whether or not the Texas courts had jurisdiction over it. It was and is entitled to attack the judgment here in Washington based on the judgment being void in the first place. As explained herein, the forum selection clause was and is enforceable, and the Texas courts lacked jurisdiction over Best Auto to enter a default

judgment against it. Best Auto properly moved under CR 60 to have the judgment vacated because it was void, there was no waiver, and the trial court properly vacated the judgment.

ii. The Forum Selection Clause is Applicable to All of The Browns' Claims.

The Browns argue that because they had more than just breach of contract claims in their Texas complaint, the forum selection clause did not apply, since the other claims did not involve “proceedings relating to the enforcement” of the contract, as stated in the Vehicle Purchase Order. Instead, the Browns claim that the judgment was entered on claims completely separate from enforcement of the Vehicle Purchase Order, including fraud/misrepresentation claims and violation of the Texas Deceptive Trade Practices Act (“DPTA”). Not even Texas case law supports this position:

When a party contractually consents to a particular state’s jurisdiction, that state has jurisdiction over the party if the state will enforce the type of forum selection clause signed by the parties. See *Barnette*, 823 S.W. 2d at 370; see also *Greenwood*, 857 S.W.2d at 656. Pleading alternate noncontractual theories of recovery will not alone avoid a forum selection clause if those alternate claims arise out of the contractual relations and implicate the contract’s terms. See *Barnette*, 823 S.W.2d at 370; see also *Cal-State Business Prods. & Servs., Inc., v. Ricoh*, 12 Cal.App.4th 1666, 16 Cal.Rptr.2d 417, 423 (1993) (concluding that forum selection clause encompasses all causes of action arising from or relating to agreement regardless of how claims are characterized).

Accelerated Christian Education, Inc v. Oracle Corp., 925 SW2d 66, 72 (Tex. App 1996), overruled in part on other grounds by *In Re Tyco Electronics Power Systems, Inc.*, 2005 Tex. App. LEXIS 819 (Tex. App. 2005)

In *Accelerated Christian*, plaintiff purchased educational software and services from defendants. Plaintiff ultimately sued defendants for breach of contract, violations of the DPTA, negligent misrepresentation, breach of warranty, fraud, promissory estoppels, and gross negligence. The contract entered into contained a forum selection clause regarding “any legal action relating to this Agreement”, mandating that such action be brought in California. The Texas court held that the forum clause controlled as to all of the causes of action.

In making its ruling, the *Accelerated Christian* court discussed another Texas case, *Hoffman v. Burroughs Corp.*, 571 F.Supp 545 (N.D.Tex 1982), that was almost directly on point:

There, the plaintiffs sued Computax and Burroughs for violations of the DTPA, fraudulent misrepresentation, and breach of implied warranties. The plaintiffs alleged the defendants misrepresented certain facts to induce them to purchase the defendants’ computer system and related services. The defendants moved to transfer the case to California because of a contractual forum selection clause in the parties agreement which stated that “any action relating to this License Agreement shall be instituted and prosecuted in the Courts of San Diego County, California.” The court concluded the action was “related to” the agreement. In reaching its decision, the court specifically stated that the plaintiffs’ claims for “fraudulent inducement

into contract and breached of warranties implied made upon entering [the] agreement [were] undoubtedly related to that agreement.” See *Id.*, We reach a similar conclusion in this case.

Id., at 72.

These two cases are almost identical to the present matter. All of the Browns’ claims, including fraud/misrepresentation, and the resultant DTPA claims, “relate” to the purchase of the vehicle and the Vehicle Purchase Order. Since the forum selection clause mandates Washington jurisdiction, all of the claims in the Texas complaint should have been brought here. The Browns’ argument on this must fail.

iii. The Texas Long Arm Statute Did Not Confer Jurisdiction, Because Best Auto Did Not Have Sufficient Contacts with Texas.

The Browns have argued that the Texas long-arm statute allowed them to have personal jurisdiction over Best Auto. But the fact that the parties had contractually agreed that any suit would be brought in Washington expressly outweighs long-arm jurisdiction:

Ordinarily the starting point of an analysis of personal jurisdiction involving an out-of-state defendant is the familiar due process "minimum contacts" inquiry. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1168-69 (9th Cir. 2006) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). **However, parties may consent to the jurisdiction of a particular court through the use of a forum-selection clause in a contract, regardless of minimum contacts.** See *Burger King Corp.*, 471 U.S. at 473, n. 14 ("[B]ecause

the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court"). Where a forum selection provision has been obtained through a "freely negotiated" agreement and is not "unreasonable and unjust," *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), its enforcement does not offend due process. *Burger King Corp.*, 471 U.S. at 473, n. 14.

RAHCO Int'l, Inc. v. Laird Elec., Inc., 502 F. Supp. 2d 1118, 1122 (E.D. Wash. 2006)(emphasis added).

The language of the forum selection clause outweighs the long arm statute jurisdiction. Even if it did not, the Texas long-arm does not provide for either general or specific jurisdiction over Best Auto under these circumstances.

The Browns cite to the Texas long-arm statute and argue that Best Auto conducted business in Texas, but the Best Auto did *not* conduct business in Texas. The advertisement for the vehicle was placed on eBay, not a Texas newspaper, etc. The Plaintiffs responded to the advertisement and inquired to Best Auto, not the other way around. Best Auto did not contact the Browns directly to induce them to purchase the vehicle. The Browns paid to have the vehicle shipped to Texas, not Best Auto.

A Fifth Circuit case out of Texas supports the argument that Texas did not have general jurisdiction over Best Auto. In *Mink v. AAAA Development, L.L.C.* 190 F.3d 333 (5th Cir. 1999), the Circuit Court applied a sliding scale "spectrum" test to decide if a non-resident defendant's internet activity would establish general jurisdiction. At one

end were cases where a defendant clearly was subject to jurisdiction for repeatedly entering into contracts with residents of other states solely via the internet which involved multiple transmissions of computer data electronically. At the other end were defendants with passive web sites that did nothing more than advertise on the internet; there was no jurisdiction in these cases. In the middle were defendants that had websites that allowed a user to exchange information with a host computer. These cases were controlled by the level of interactivity and commercial nature of the exchanges. *Mink* involved such a site. There, the court held that the defendant's website was passive even though the site contained an e-mail link to an order form. There was no general jurisdiction.

In the present matter, we are not even dealing with a website operated by Best Auto. Instead, Best Auto simply listed a vehicle on eBay, a site owned and operated by a third party. Best Auto had no control over who was able to see this listing, and it took no steps to affirmatively engage the Browns. Best Auto clearly had insufficient contacts with Texas to warrant general jurisdiction.

These same factors also demonstrate that Texas had no specific jurisdiction over Best Auto. For specific jurisdiction, courts "look only to the contact out of which the cause of action arises." *Revel v. Lidov*, 317 F.3d 467, 472 (5th Circuit, 2002). Here, the only contact from Best Auto

was its eBay listing.² From that, Mr. Brown contacted Mr. Thompson directly, and any further communications occurred via telephone or facsimile. Best Auto made no attempts to avail itself of the laws of Texas. Completely to the contrary, Best Auto made it very clear both on its eBay listing and on its Vehicle Purchase Order, that any disputes were to be resolved in Washington, under Washington law. Thus, Texas did not have specific jurisdiction.

Simply put, Best Auto did not have sufficient contacts in Texas to invoke the Texas long-arm statute, and the default judgment should not have been entered against it. Even if Best Auto did have sufficient contacts, though, the Browns were contractually obligated to assert their claims here in Washington.³

iv. Enforcement of the Forum Selection Clause Is Not Unreasonable or Unjust.

Finally, the Browns argue that the forum selection clause should not be enforced because it would be unjust. They first argue that the clause is inconspicuous and hidden under a misleading heading. A review of the document, however, shows that the provisions on the second/back page of the document, which contains the Terms and Conditions Applicable to All Sales, are in the same size print as most of the

² The Browns included a screenshot of Best Auto's web page in its motion materials below (CP 135). However, there is no testimony that they relied upon or even viewed this website before purchasing the vehicle from Best Auto. The only "contact" relied upon was the eBay listing.

³ It should be noted that personal service was never obtained on Best Auto. Instead, the Browns served Best Auto through the Texas Secretary of State's Office.

provisions on the first page, and they are clearly readable and in no way hidden. The paragraph containing the forum selection clause, which is headed as “Attorney’s Fees and Costs”, is only five lines long, and the venue provisions begin at the end of the second line. (CP 43) As Mr. Brown attested by his signature that he had read the entire document, and he was warned that the document “includes many important and binding provisions”, it is not reasonable for him to argue that he was not aware of the forum selection clause provision because it was hidden from him.

The Browns also argue that the Vehicle Purchase Order was signed only after the Browns wired funds to pay for the vehicle. Their position is that the Vehicle Purchase Order is therefore invalid and was a mere formality. Again, though, above Mr. Brown’s signature, he clearly agrees that the Vehicle Purchase Order (1) includes all of the terms and condition, and (2) cancels and supercedes any prior agreement. The fact that the Browns may have wired funds before signing the Vehicle Purchase Order does not invalidate Mr. Brown’s consent to the forum selection clause.

Moreover, it appears that the Browns were not unsophisticated buyers, and they indicated as much in their email correspondence to Best Auto in which they that that, “. . . but I have spoken with my attorney who I use on other business matters, and he has already provided me a detailed

explanation of my rights.” (CP 150) It is also interesting to note that in a follow up email correspondence, Mr. Brown stated that, “If you will not agree to this by 10:00 am (central time) Monday morning on June 23, 2008, then I will have my attorney (website: www.bgsfirm.com) *proceed in whatever state we need to proceed.*” (CP 151) (Emphasis Added) Finally, it is unknown what the Browns did with the automobile, but they did not return it to Best Auto. Now, they are trying to collect on a judgment in excess of \$50,000, including interest, (CP 192-194), that is far in excess of the \$11,250.00 purchase price of the vehicle. Under these circumstances, not enforcing the forum selection clause would actually be unreasonable and unjust against Best Auto.

The Browns next appear to take a *forum non conveniens* position by arguing that most of whom they feel are key witnesses reside in Texas. This has no merit:

When the parties have selected a forum, the court does not engage in a balancing test under RCW 4.12.030. RCW 4.12.080. Further, inconvenience foreseeable by the parties at the time they entered the contract cannot render a forum selection unenforceable.

Keystone Masonry v. Garco Constr., 135 Wn. App. 927, 933-934, 147 P.3d 610 (2006). *See also, Bank of America, N.A. v. Miller*, 108 Wn. App. 745, 747, 33 P.3d 91 (2001), *citing M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

It was clearly foreseeable that if Mr. and Mrs. Brown were forced to bring suit in Washington, this would involve inconvenience not only in terms of their having to arrange for local counsel, but also necessitating travel for themselves and perhaps even for other witnesses. This is the risk they assumed by agreeing to the forum selection clause.

IV. CONCLUSION

For the reasons argued above, the December 14, 2011, order of the trial court to vacate the Foreign Judgment and quash the garnishment was correct. Defendants/Appellants Appellants Rod J. Garrett d/b/a Best Auto Limited and Mark A. Thompson, D/B/A Best Auto respectfully request that this Court affirm that order. In addition, they respectfully request an award of their reasonable attorney's fees and costs pursuant to the contract between the parties and RAP 14.1 and 18.1 et al., and/or request that the matter be remanded to the trial court to determine an award of reasonable attorney's fees and costs in favor of Best Auto for having to move to vacate the void judgment.

RESPECTFULLY SUBMITTED this 30th day of May, 2012.

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