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STATE OF WASHINGTON
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No. 36568-5-II

**IN THE COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

JAVIER QUIROZ CRUZ, Defendant,

FAIRMONT SPECIALTY INSURANCE, Respondent,

METRO CITY BONDS, LLC, Appellant,

MELISSA J. MCLACHLAN, Appellant.

BRIEF OF APPELLANTS

Melissa J. McLachlan

Personally, and on behalf of Metro City Bonds, LLC

Pro se appellant

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State ex rel Smith v. Superior Court

38 Wn.sd 352, 229 P.2nd 518 (1951) page 5, line 8

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WAC 308.19.030(17) page 2, line 21

Rules of Professional Conduct 1.9 page 8, line 26-27

RCW 10.19.090 page 5, line 19

RCW 10.19.140 page 5, line 22

RCW 19.72.020 page 5, line 28

RCW 25.15.125 page 7, line 33

CrR 3.2 page 5, line 18

I. ASSIGNMENTS OF ERROR

Assignments of Error

- A. The Superior Court erred by ordering Appellant McLachlan to pay money into the court on May 23, 2007.

- B. The Superior Court erred in denying Appellant's motion for reconsideration on June 20, 2007.

Issues Pertaining to Both Assignments of Error

- 1. The Superior Court lacked subject matter jurisdiction to enter orders in a criminal case purporting to adjudicate contract rights between non-parties.
- 2. The Superior Court lacked jurisdiction over the person of Melissa McLachlan who was not served with legal process prior to the court proceeding.
- 3. The Superior Court erred in seeking to recreate a status quo which had ceased to exist months before.
- 4. The Superior Court erred in hearing a civil dispute in the context of a criminal case, with total disregard for any rules of civil procedure.
- 5. The Superior Court erred in refusing to disqualify Mr. Cain from the matter.

II. STATEMENT OF THE CASE

A. Factual Background

Metro City Bonds, LLC is a defunct limited liability company, previously doing business as a licensed bail bond company in the State of Washington. Metro City Bonds, LLC was the surety on the bail bond at issue in this case. (Report of Proceedings – 5/23/07, page 4, line 20-23). The LLC was dissolved in 2006. Melissa McLachlan, a resident of Clark County, Washington, was the sole proprietor of the LLC during its existence. (Report of Proceedings – 5/23/07, page 4, line 24–25) (Clerk’s papers – 6/4/07 Declaration of Melissa McLachlan, page 4, line 20-32). Fairmont Specialty Insurance is a corporate surety underwriter, headquartered in Houston, Texas. Fairmont was the underwriter on the bail bond in the amount of \$50,000.00 issued by Metro City Bonds, LLC on May 4, 2006 to secure the release of the defendant, Javier Quiroz Cruz on a criminal matter then pending in Pierce County Superior Court. On May 17, 2006 defendant Quiroz Cruz failed to appear for a required court hearing, and his bail was subsequently forfeited. The forfeiture was paid by United States Fire Insurance Company of Morristown, New Jersey from the “build-up fund” of Metro City Bonds, LLC. (Report of Proceedings – 5/23/07, page 4, line 5-6) (Clerk’s papers – 6/4/07 Declaration of Melissa McLachlan, page 3, line 1-18).

The build-up fund is money which belongs to the bail bond agency but is held in trust by the corporate surety underwriter. WAC 308.19.030(17). (Clerk's papers – 6/4/07 Declaration of Melissa McLachlan, page 3 line 1-18). The build-up fund is funded from moneys received by the bail bond company from premiums paid to the bail bond company by persons seeking to be released from jail on a bail bond. These monies are separate and apart from the premiums paid by the bail bond company to the corporate surety underwriter. (Report of Proceedings – 6/20/07, page 3, line 23 – page 4, line 6).

Fugitive recovery agents and Metro City Bonds, LLC were able, at significant cost, to recapture defendant Quiroz Cruz and return him to custody. This act entitled Metro City Bonds, LLC to return of the forfeited bail.

(RCW 10.19.140).

On August 24, 2006 the Superior Court signed an order directing the clerk of court to issue a check to Metro City Bonds, LLC as a refund for the previously forfeited bail. The clerk issued a check payable to Metro City Bonds, LLC. The check was never in the possession of Appellant McLachlan. The check was negotiated and the proceeds thereof disbursed in the normal course of Metro City Bonds, LLC then ongoing business. (Report of Proceedings – 6/20/07, page 5, line 17-20)

Metro City Bonds, LLC went out of business before 2007 and its corporate registrations and professional licenses were not renewed for that year. At that time, Fairmont was still and continues to hold the build-up fund of Metro City Bonds, LLC and has since refused to account for or tender such funds to Metro City Bonds, LLC. Fairmont currently owes these funds to Metro City Bonds, LLC. (Clerk's papers – 6/4/07 Declaration of Melissa McLachlan).

B. Procedural History Relative to the Orders under Appeal

On April 30, 2007, John Cain, formerly an attorney for Metro City Bonds, LLC but now representing Fairmont, sought and obtained an “Order to Show Cause” from the Superior Court, ex parte, with no attempt to give notice to Metro City Bonds, LLC nor Appellant McLachlan, requiring McLachlan to appear in Pierce County Superior Court on a criminal motion docket to answer to a demand that she personally, pay \$49,250 to Fairmont. The “Order to Show Cause” was obtained under the authority of the criminal case involving defendant Quiroz Cruz. (Clerk’s Papers – 4/30/07 Order for hearing).

Attorney Cain mailed the Order to Show Cause to McLachlan at her workplace in Clark County, Washington, 130 miles from the Pierce County courthouse. The order was received by her mere days before the scheduled hearing. No legal process of any type was personally served on Appellant McLachlan until after the time and place of the hearing on May 23, 2007. (Clerk’s Papers – 6/4/07 Declaration of Melissa McLachlan, page 2, line 6-7).

At the hearing on May 23, 2007, the Superior Court issued an Order, hand written by Mr. Cain, directing that Metro City Bail (sic) Bonds and or Melissa J. McLachlan ordered (sic) to deposit with the clerk of the court forty (sic) – nine thousand two hundred fifty dollars (\$49,250) within ten days of this order...” (Clerk’s papers -5/23/07 Order re deposit of funds). McLachlan objected to entry of the order on the basis that the court lacked jurisdiction in a criminal case to issue such an order. (Report of Proceedings – 5/23/07, page 10, line 14-23).

Appellant McLachlan timely moved for reconsideration, which was denied by the court on June 20, 2007. (Clerk’s papers – 6/4/07 Motion for reconsideration). Mr. Cain argued against reconsideration, and requested in his responsive pleading that McLachlan “remain in custody in the Pierce County jail until such time as \$49,250 is deposited into the Court Registry under the above referenced cause number.”

This appeal followed. Appellants are not seeking to persuade the Appellate Court on the merits relating to the civil dispute between Fairmont and Metro City Bonds, LLC and McLachlan, Appellants are simply attempting to have the dispute litigated in the proper forum, a request denied by the Superior Court. (Report of Proceedings – 6/20/07, line 7, line 1-4).

III. ARGUMENT

1. **The Superior Court lacked subject matter jurisdiction to enter the orders in this case.**

Subject matter jurisdiction is the power to hear and adjudicate certain types of cases. State ex rel Smith v. Superior Court. There certainly is no doubt that the Superior Court has jurisdiction to hear and decide criminal cases between the State of Washington and named defendants, and that the Superior Court has subject matter jurisdiction to hear and decide civil disputes between private parties. The civil jurisdiction, however, cannot be exercised in a criminal case. To do so is an egregious violation of due process, as is clearly shown by the bizarre events in this case.

In a criminal case, the court has certain, very limited powers relating to bail bonds. The court can require the posting of bail, or as it is often referred to recognizance CrR 3.2, the court can order forfeiture of bail if the defendant fails to appear as required RCW 10.19.090. The court can order the exoneration and return of previously forfeited bail to a bail bond company (surety) which recaptures and produces a fugitive bail jumper before the court,

RCW 10.19.140. This is what happened in this case. Fairmont may claim that it is the “surety” to whom the forfeited bail should have been returned, RCW 10.19.140 however contemplates that the surety to receive the refund is the entity which returns the absconder to custody, in this case Metro City Bonds, LLC. Further, Fairmont does not qualify as a surety on a bond in Washington because Fairmont is not a resident of Washington.

RCW 19.72.020.

There simply is, however, no Constitutional provision, statute, court rule, nor any other type of procedural basis for a criminal judge in a criminal case to adjudicate the rights of competing claimants in a civil, contractual dispute and therefore no subject matter jurisdiction.

An order issued by a court lacking subject matter jurisdiction is void from the beginning. It is a nullity, having no legal effect whatsoever. Both of the courts orders purporting to require Appellant McLachlan to pay monetary damages into court were void, unenforceable orders.

2. The Superior Court lacked jurisdiction over the person Melissa McLachlan.

Arguably, the criminal judge had limited jurisdiction over Metro City Bonds, LLC, as that entity did business with Pierce County by posting the bail bond, and by statute, subjected itself to the authority of the court. Melissa McLachlan, however, did neither. She was a member of an LLC, and not a party to these proceedings in any way. Jurisdiction over her person was never obtained. Neither Summons nor Complaint was ever filed by Mr. Cain, much less served upon her. Legally, she was, and is a stranger to these proceedings, and the court had no authority to compel her attendance, or to demand money from her, or to enforce any void order against her.

3. The Superior Court erred in attempting to recreate a *status quo* relating to funds not in Appellant's possession.

The refund check from the County Clerk was issued to Metro City Bonds, LLC, not Melissa McLachlan. The check was negotiated and the proceeds spent. The res, or subject matter of the dispute, is not, and was not on May 23 or June 20, 2007, in the possession of McLachlan. Fairmont waited seven months, until Metro City Bonds, LLC had gone out of business, to seek to require McLachlan to “pay the money into court...”. The court’s attempt to preserve a status quo was misguided. There was no longer any status quo to preserve. Time had passed and people and businesses had moved on. Metro City Bonds, LLC and McLachlan are fully amenable to submit to the proper jurisdiction of a civil lawsuit, so that Metro City Bonds, LLC’s counterclaim against Fairmont and other individuals can be litigated as well. The court’s orders, however, to the extent they seek to maintain a status quo which does not exist are impossible to comply with, yet attorney Cain demands that McLachlan be imprisoned, apparently until she dies, due to her inability to comply with a void, impossible order.

It is a blatant abuse of authority, rather than discretion for the court to issue an order which is incapable of being complied with, upon the threat of imprisonment. Here, the err is compounded immeasurably by the fact that the order is void to begin with. It is not an abuse of discretion, because the court had no discretion in the matter.

4. The Superior Court's orders were obtained by Mr. Cain in blatant disregard for the Rules of Civil Procedure.

As characterized by Mark Von Wahlde the deputy prosecuting attorney for Pierce County who opposed the motion brought by Mr. Cain, Mr. Cain was "trying to do it on the cheap." (Report of Proceedings - May 23, 2007, page 6, line 23-24).

Mr. Cain's novel, yet bizarre "Show Cause" procedure deprived Appellant of the panoply of due process and procedural rights afforded to civil litigants in Washington, and everywhere else, and saved Fairmont the pesky expenses and risks of fair and honest litigation. Mr. Cain's short-cutting saved the expenses of:

- Drafting a complaint
- Drafting a summons
- Paying a filing fee
- Serving process on McLachlan or Metro City Bonds, LLC
- Waiting 20 days for an answer
- Litigating the civil dispute in the appropriate venue
- Affording discovery

- Mandatory arbitration and/or jury trial
- Being subjected to meritorious counterclaims
- Facing CR 11 sanctions for seeking damages personally from a member of an LLC, for an obligation, which if it exists, is that of the company, and not the individual RCW 25.15.125

No wonder that the inventive Mr. Cain forsook the appropriate forum, a civil lawsuit, and misled the Superior Court into entering void orders, while seeking to unconstitutionally deprive McLachlan of due process, and threatening her with debtor's prison. If Mr. Cain has sued McLachlan appropriately, under no circumstances would he be entitled to the relief he sought. He made no showing sufficient for a prejudgment attachment, and in any event there was no property to be attached, nor did he have to post a bond such as would be required for such an attachment. Likewise, there is absolutely no authority nor procedure in civil jurisdiction which can be used to require a litigant to pay the alleged damages into court pending litigation, upon pain of incarceration. Should Mr. Cain argue that the court has "inherent power" or "contempt power" to order pre-judgment payment of

damages between civil litigants, or payment into court thereof, the appellate court should seriously consider the imposition of sanctions for presentation of a patently frivolous argument. Appellant is confident that Mr. Cain, as is the case throughout these proceedings, will be unable to present any such legal authority to justify his trampling upon Appellants' rights.

5. **The Superior Court erred in refusing to disqualify Mr. Cain from the matter.**

Attorney John Cain previously represented Metro City Bonds, LLC on several legal matters involving the issuance of bail bonds. Having done so, he was privy to confidential communications from Metro City Bonds, LLC and its members and officers. Under Rules of Professional Conduct 1.9 he should not have represented Fairmont against his former client, and the court was obligated to disqualify him from doing so.

IV. CONCLUSION

Based on the foregoing arguments and authorities, the Superior Court's orders directing Melissa McLachlan and/or Metro City Bonds, LLC to pay non-existent funds into the court, should be reversed, and remanded to the trial court for dismissal of Fairmont's motion, with costs and appropriate sanctions against Fairmont and its attorney.

V. **RESERVATION OF MOTION ON THE MERITS**

Pursuant to RAP 18.14 Appellant reserves the right to present a Motion on the Merits after filing of Respondent's brief, if any, and alternatively requests that the Appellate Court consider such resolution on its own motion.

DATED this 12th day of November, 2007.


MELISSA J. MCLACHLAN, pro se

