

No. 41087-7-II

Jefferson County Cause No. 09-2-00293-1

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

PAUL AND JANE DOE OPACKI

Appellants

v.

SCOTT DAVIS and EVE EVES

Respondents

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STATE OF WASHINGTON
BY [Signature]
MURPHY

COURT OF APPEALS
DIVISION II

APPELLANTS' REPLY BRIEF

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A. INTRODUCTION

The Opackis respectfully request their appeal be granted and the trial court reversed. The case should be dismissed for a lack of personal jurisdiction and attorney fees awarded to the Opackis.

B. APPELLANT'S REPLY ARGUMENT

A. Reply to First Argument (Sec. A(i)): The trial court cannot retain jurisdiction under CR 59 if it has not first obtained jurisdiction .

In reply to the first responsive argument raised by Respondents, Opackis contend that the analysis offered by Respondents is not on point. They offer several persuasive cases from other jurisdictions. Although these cases offer credible authority that a trial court retains jurisdiction for 10 days post dismissal pursuant to CR 59 to correct legal errors, these cases – and Respondents – fail to address a fundamental point raised in the appeal: Because the trial court had not obtained jurisdiction in the first place, there was nothing to extend (or retain) between April 16, 2010 and April 26, 2010. The trial court *did* abuse its discretion because it did not have jurisdiction to accept the late filed affidavit to thereby create jurisdiction that had not previously existed.

In the responsive brief, Respondent neither addressed nor distinguished the rule that a court only has authorization to hear and determine a cause or proceeding if it has jurisdiction over the parties and the subject matter. Absent proper jurisdiction, a court may do nothing more than enter an order of dismissal. Mendoza v. Neudorfer Engineers, Inc., 145 Wn. App. 146, 149, 185 P.3d 1204, 1206 (2008); See also Bethel v. Sturmer, 3 Wn. App. 862, 479 P.2d 131 (1970) (if court has not acquired jurisdiction over person of defendant, defendant is entitled to immediate dismissal). The rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal. See Deschenes v. King County, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974); In re Marriage of Powell, 84 Wn. App. 432, 438, 927 P.2d 1154, 1157 (1996); Marley v. Dep't of Labor & Indus. of State, 125 Wn. 2d 533, 541, 886 P.2d 189, 194 (1994); Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, 850, 226 P.3d 222, 226 (2010) *review denied*, 169 Wn. 2d 1022, 238 P.3d 503 (2010); and State v. Nw. Magnesite Co., 28 Wn. 2d 1, 42, 182 P.2d 643, 664 (1947).

Despite this clearly articulated rule, Respondent claims there was no error. It is Respondents' position that:

“The judgment of dismissal was not yet a final order, and the trial court retained jurisdiction under CR 59 for ten days after the dismissal because Davis timely filed a motion for reconsideration.

erroneously contended that Golden Gate Hop Ranch Inc. v. Velsicol Chem Corp., 66 Wn.2d 469, 403 P.2d 351 (1965), controls here, in that filing a late affidavit is permissible. But the trial court, and Respondent, misread Golden Gate. Late filing is permissible, so long as it precedes judgment (which did not happen here) and since filing of the affidavit is a prerequisite to establishing jurisdiction, the fact that Respondent failed to comply with RCW 4.28.185(4) entitled the Opackis to immediate dismissal. Here there wasn't even partial compliance; there was no compliance with RCW 4.28.185(4) until 10 days after the court properly dismissed the case for lack of personal jurisdiction.

Notwithstanding the highly prejudicial effect of the default judgment, Respondents have failed to show any legal authority that allows a trial court lacking personal jurisdiction to create *de facto* personal jurisdiction thereby permitting it to continue to administer the case and make decisions such as granting reconsideration or accepting the affidavit of service. The lack of legal authority leaves only the court's equitable powers as a means to create jurisdiction. Yet, even equitable reasons such as advocated here have been rejected. See In re Estate of Kordon, 157 Wn. 2d 206, 214, 137 P.3d 16, 20 (2006) (A court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute; neither does a court of equity have power to entertain such

jurisdiction.) It is a violation of due process for a court, in exercising its equitable powers, to create personal jurisdiction over a defendant when there has been no compliance with the long arm statute by filing the affidavit per RCW 4.28.185(4). The trial court should be reversed.

C. Reply to First Argument (Sec. A. i & ii): The trial court abused its discretion because a default judgment cannot be void for lack of jurisdiction while simultaneously finding personal jurisdiction exists.

Respondents concede that the judgment is in fact “void.” See *Plaintiffs’ Response to Motion for Discretionary Review*, page 18. Yet, despite this concession, Respondents fail to address the problem created by the trial court in vacating the judgment as void, but concurrently finding the complaint “still stands.” Personal jurisdiction either exists or it doesn’t exist; it cannot start and stop and start again. A court cannot retain jurisdiction without first obtaining jurisdiction. Therefore, jurisdiction could not be validated by filing the affidavit after the case was properly dismissed for lack of personal jurisdiction, nor could it relate back to the original complaint. The trial court abused its discretion as there is no authority that permits both a lack of jurisdiction to void a judgment while simultaneously allowing a court in equity to establish jurisdiction to save the Respondent from having to file a new cause of action.

The Respondents remedy was to refile the complaint and make service in compliance with RCW 4.28.185(4). This is what should have occurred. It has in fact finally happened. On March 10, 2011, Respondents filed a new, **identical** lawsuit in Jefferson County Superior Court, under cause number 11-2-00057-4. There is no need to create a rule that allows a complaint to still stand while simultaneously holding a default judgment is vacated as void for lack of jurisdiction. The trial court should be reversed.

D. Reply to Second Argument (Sec. B): The trial court erred in exercising long arm jurisdiction to this single eBay transaction that occurred in Michigan.

The eBay issue is moot if the Court decides the case on narrower grounds; the lack of personal jurisdiction for failure to comply with RCW 4.28.185(4). Nonetheless, the Opackis are not subject to long arm jurisdiction. The standard in Washington is to consider the sufficiency of the contacts by the quality and nature of the defendant's activities, not the number of acts or mechanical standards. CTVC of Hawaii, Co., Ltd. v. Shinawatra, 82 Wn.App. 699, 710, 919 P.2d 1243 (1996). Evidence introduced by Respondents to prove the sufficiency of contacts was objected to by the Opackis as not admissible under ER 901, lacking

foundation, containing hearsay, and not admissible under ER 802. (CP II: 336-344). The trial court erred in considering this evidence to find, as advocated by Respondents, that Opacki is a “sophisticated seller” targeting Washington residents.

Respondents rely upon several cases that are distinguishable from Washington law. Each of the different states from which these cases originate has a dissimilar test than Washington and should not apply. Dedvukaj v. Maloney, 447 F.Supp.2d 813 (E.D. Mich. 2006) (transaction of any business required for limited personal jurisdiction is satisfied by the slightest act of business in Michigan”); Erwin v. Piscitello, 627 F.Supp.2d (2007) (a single act can support finding minimum contacts). Washington law requires looking at the nature and quality of the acts, not the numbers.

In Aero Toy Store, LLC v. Grieves, 279 Ga.App. 515 (2006) the court noted that “[i]n Georgia, a defendant who files a motion to dismiss for lack of personal jurisdiction has the burden of proving lack of jurisdiction.” In Washington, “The burden rests on the party asserting jurisdiction.” Bartusch v. Oregon State Bd. of Higher Educ., 131 Wn.App. 298, 306, 126 P.3d 840 (2006). The cases offered by Respondents are not persuasive and not the law in Washington.

The formation of the contract, offer, acceptance, and consideration all occurred while the personal property was located in Michigan. (CP

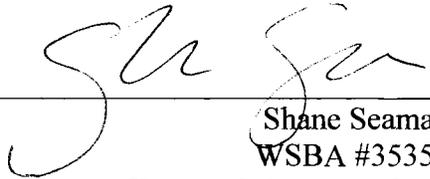
I:84-89). The transaction occurred in Michigan, not Washington. There wasn't any prima facie evidence of fraudulent misrepresentation beyond Respondents' bare allegations. In fact, the evidence before the trial court was the purported eBay listing, Exhibit A to the Complaint. It listed facts about the travel trailer. It stated the condition as "used." (CP I; 1-12). Respondents in their response brief consistently allege that the Opackis misrepresented something about the travel trailer, but totally failed to cite to any portion of the record in support of their argument. However, even looking to the record, Respondent Eves Eves never states that the Opackis made a fraudulent representation to her. (CP II, 330-335). The trial court erred in finding long arm jurisdiction in this case.

E. Reply to Third Argument (Sec. C): The trial court erred by failing to grant Opackis' attorney fees.

Respondents' failure to comply with RCW 4.28.185(4) is the reason this appeal was filed. When the trial court dismissed the case on April 16, 2010, without prejudice, Respondents' remedy was to refile the complaint and make service in compliance with RCW 4.28.185(4). Instead, Respondents moved for reconsideration resulting in the plethora of briefs and arguments in this case. Most recently, Respondents filed an **identical** lawsuit in Jefferson County Superior Court, cause number 11-2-

00057-4 on March 10, 2011, to create “mootness” as a means to dismiss this appeal. RCW 4.28.185(5) authorizes attorney fees. Respectfully, the Opackis request their attorney fees.

Respectfully submitted this 31 day of August, 2011.



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 STATE OF WASHINGTON
 BY [Signature]
 DEPUTY

COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

PAUL J. OPACKI and JENNIFER J. OPACKI, and their marital community,
Appellant. NO. 41087-7-II
Vs. Superior Court Cause No.: 09-2-00293-1
 SCOTT DAVIS and EVE EVES, individuals,
Respondent DECLARATION OF SERVICE

On the date stated below, I caused a copy of the following documents to be served on the parties listed below by the method(s) indicated:

- Appellants' Reply Brief
- Declaration of Service

Party/Counsel	Additional Information	Method of Service
Heather Morado Invicta Law Group PLLC 1000 Second Ave Suite 3310 Seattle WA 98104-1019	Attorney for Plaintiffs WSBA # 35135 Tel: 206/903-6364 Fax: 206/903-6365	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Fed-Ex/ overnight delivery <input type="checkbox"/> Personal delivery
Washington State Court of Appeals Division II David Ponzoha, Clerk 950 Broadway Suite 300 Tacoma WA 98402-4454	Court of Appeals	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Fed-Ex/ overnight delivery <input type="checkbox"/> Personal delivery <input checked="" type="checkbox"/> E-file: coa2filings@courts.wa.gov

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Port Hadlock, Washington this 2nd day of September 2011.

[Signature]
 Brandy Boyd