

FILED
COURT OF APPEALS
DIVISION II

11 JUL 29 PM 2:01

STATE OF WASHINGTON
BY [Signature]

DEPUTY No. 41087-7-II
Jefferson County Case 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

RESPONDENTS' RESPONSE TO THE APPELLANTS' BRIEF

Stacie Foster, WSBA # 22397
Heather M. Morado, WSBA# 35135
Invicta Law Group, PLLC
1000 Second Avenue, Suite 3310
Seattle, WA 98104-1019
Attorneys for Respondents

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
I. INTRODUCTION.....	4
II. STATEMENT OF THE ISSUES.....	4
III. STATEMENT OF THE CASE.....	5
IV. ARGUMENT.....	10
A. The Trial Court did not abuse its discretion when it granted Respondent’s Motion for Reconsideration under CR 59.....	11
i. The Court retained jurisdiction pending determination of the motion for reconsideration.....	8
ii. The court did not abuse its discretion when it granted the Opackis' motion for reconsideration.....	10
B. The Superior Court did not err in exercising long-arm jurisdiction over the Opackis.	15
i. The court has jurisdiction over the Opackis under the long-arm statute because the Opackis transact business with Washington state residents.....	17
ii. The court correctly found that the Opackis have purposefully availed themselves of the privilege of doing business in Washington.....	20
iii. The cause of action arose out of the Opackis’ activities.....	22
iv. The court agreed that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.	23
v. The court properly ruled that it has jurisdiction under the long arm statute because the Opackis committed a tortious act that injured Washington state residents.....	24
C. The court did not err in denying the Opackis their attorney’s fees below, and attorney’s fees are not appropriate here.	25
V. CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>Action Tapes Inc., v. Weaver</i> , 2005 WL 3199706	18
<i>Aero Toy Store, LLC v. Grieves</i> , 279 Ga.App. 515 (2006)	19
<i>American Discount Corp. v. Saratoga West, Inc.</i> , 81 Wash.2d 34, 499 P.2d 869 (1972).....	13
<i>Attaway v. Omega</i> , 903 N.E.2d 73, 78.....	18
<i>Bartusch v. Oregon State Bd. of Higher Educ.</i> , 131 Wn.App. 298, 306-307, 126 P.3d 840 (2006).....	18
<i>Bowman v. Songer</i> , 820 P.2d 1110, 1113 (Colo. 1991).....	12
<i>Crummey v. Morgan</i> , 965 So.2d 497, 504 (1 st Cir. 2007).....	20, 25
<i>Dedvukaj v. Maloney</i> , 447 F.Supp. 2d 813, 821 (E.D. Mich. 2006).....	18
<i>Erwin v. Piscitello</i>	19, 25
<i>Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.</i> , 66 Wn.2d 469, 403 P.2d 1064 (1957).....	7, 9, 14
<i>Grange Ins. Ass’n v. State</i> , 110 Wn.2d 752, 757, 757 P.2d 933 (1988)	24
<i>Gullion v. Gullion</i> , 163 S.W.3d 888, 892 (Ky. 2005).....	12
<i>Hatch v. Princess Louise Corp.</i> , 13 Wn. App. 378, 534 P.2d 1036 (1975)..	7, 9, 14
<i>Holaday v. Merceri</i> , 49 Wn.App. 321, 324, 742 P.2d 127 (1987).....	10
<i>Hop Ranch, Inc. v. Velsicol Chem. Corp.</i> , 66 Wn.2d 469, 472, 403 P.2d 1064 (1957).....	7, 14
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997)	10
<i>Lian v. Stalick</i> , 106 Wn. App. 811, 823-24, 25 P.3d 467, 475 (2001).....	10
<i>MBM Fisheries, Inc. V. Bollinger Mach. Shop</i> , 60 Wn. App. 414, 418, 804 P.2d 627 (1991).....	16
<i>McCormick v. Allstate Ins. Co.</i> , 194 W. Va. 82, 83, 459 S.E.2d 359, 360 (1995) 12	12
<i>McGee v. U. S.</i> , 62 F.R.D. 205, 208 (E.D. Pa. 1972).....	12
<i>Moore v. Wentz</i> , 11 Wn. App. 796, 799, 525 P.2d 290 (1974).....	11
<i>Ness v. Eckerd Corp.</i> , 350 S.C. 399, 402, 566 S.E.2d 193, 195 (S.C. Ct. App. 2002)	12
<i>Portis v. Harris County, Tex.</i> , 632 F.2d 486, 487 (5th Cir. 1980).....	13
<i>Precision Laboratory Plastics, Inc. v. Micro Test, Inc.</i> , 96 Wn.App. 721, 725, 981 P.2d 454, 456 (1999).....	16
<i>Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.</i> , 9 Wn. App. 284, 513 P.2d 102 (1973).....	24
<i>Raymond v. Robinson</i> , 104 Wn.App. 627, 637, 15 P.3d 697 (2001).....	21,22

<i>Schell v. Tri State Irrigation</i> , 22 Wn. App. 788, 591 P.2d 1222 (1970).....	7, 9, 14
<i>Scott Fetzer Co. v. Weeks</i> , 114 Wn. 2d 109, 124, 786 P.2d 265 (1990).....	25
<i>Securities Corp. v. Hoang</i> , 137 Wn. App. 330, 337, 153 P.3d 222 (2007)	14
<i>Sharebuilder Sec. Corp. v. Hoang</i> , 137 Wn. App. 330, 153 P.3d 222 (2007)...	7, 9, 14

<i>Trundle v. Park</i> , 210 S.W.3d 575, 580 (Tenn. Ct. App. 2006).....	11
---	----

<i>Zippo Mfg. Co. v. Zippo Dot Com, Inc.</i> , 952 F.Supp. 1119 (W.D.Pa., 1997).....	18
--	----

Statutes

RCW 4.28.185(1).....	17, 24
----------------------	--------

RCW 4.28.185(4).....	passim
----------------------	--------

RCW 4.84.185	25
--------------------	----

Other Authorities

Moore, 11 Fed. Prac. & Proc. Civ.§ 2821(2d. Ed)	12
---	----

Rules

CR 59	passim
-------------	--------

CR 6(b).....	11
--------------	----

Rule 59(e).....	12, 13
-----------------	--------

I. INTRODUCTION.

Respondents Scott Davis and Eve Eves (“Davis”) respectfully request this Court to deny Appellants’ (the “Opackis”) Appeal. Despite the Opackis’ attempts to obfuscate the issues, there is only one issue properly before this Court: whether Judge Verser abused his discretion by granting Davis’ CR 59 motion for reconsideration and accepting Davis’ filing of the RCW 4.28.185(4) affidavit during the ten-day period for reconsideration, prior to entry of final judgment. Under CR 59, it is clear that Judge Verser retained jurisdiction, to modify his own erroneous ruling, for a ten day period after the case was improperly dismissed. When Davis filed the affidavit during the ten-day period of reconsideration, the court’s jurisdiction over the Opackis was perfected. After carefully considering the relevant case law, on two motions for reconsideration, Judge Verser correctly concluded that the court’s exercise of jurisdiction was proper. Accordingly, the Opackis’ appeal should be denied.

II. STATEMENT OF THE ISSUES.

- 1) Did the trial court abuse its discretion, when, on reconsideration under CR 59, it vacated its dismissal of the entire action and accepted the filing of the RCW 4.28.185(4) affidavit prior to final judgment in the case?
- 2) Did the trial court properly determine that it had personal jurisdiction over an out-of-state defendant based on defendant's eBay sales of defective merchandise to Washington residents, where evidence was alleged that the defendant transacted business in Washington, purposefully availed himself of the Washington forum, the cause of action arose out of the defendants' business in Washington, the exercise of jurisdiction comported with fair play and due process, and where defendants committed a tort in Washington?
- 3) Did the trial court abuse its discretion in denying attorney's fees to the defendant?

III. STATEMENT OF THE CASE.

This case arises out of the Opackis' fraudulent sale of an Airstream vehicle to Davis on the eBay website. The Opackis were served with Davis' summons and complaint on May 6, 2009. (CP: I: 15) On July 20, 2009, Davis filed its complaint with the Court, and the Opackis failed to answer. (CP I: 1-12). Accordingly, Davis obtained an order of default against the Opackis on

August 13, 2009, and final default judgment against the Opackis on September 22, 2009. (CP I: 55-56; 62-64). Davis then sought to execute on the judgment in Michigan, where the Opackis reside.

On March 11, 2010, the Opackis filed a motion to vacate the default judgment. (CP I: 74-75). For the first time, in their reply brief, only one day before the hearing on the motion, the Opackis argued that the court did not have jurisdiction because Davis had not yet filed the affidavit stating that the Opackis could not be served in the Washington state, as required under the long-arm statute, RCW 4.28.185(4). (CP I: 162-164). At the hearing on April 16, 2010, Davis moved to strike the Opackis' arguments based on the unfiled affidavit under the long-arm statute because the issues were raised for the first time on reply. (CP I: 167-168). The court acknowledged the lack of notice given to Davis on the issue, and offered Davis a continuance. (RP: 3:17-20). Davis declined the continuance, and instead argued that Davis had substantially complied with the requirements of the statute. (RP: 5, 6:1-13; 8:18-24).

The court did not find that Davis had substantially complied with the long-arm statute. (CP I: 169-171). Accordingly, the court granted the Opackis' motion to vacate the default judgment on the grounds that the

statutory affidavit had not yet been filed. *Id.* The court then entered an order presented by the Opackis. *Id.* The court's order contained language that both: 1) vacated the default judgment; and 2) dismissed the case in its entirety. *Id.* Davis then timely filed a motion for reconsideration under CR 59, attaching the statutory affidavit, and requesting that the court vacate the portion of its order that had improperly dismissed the case. (CP I: 172-175).

The court agreed that although the default judgment had been properly vacated, the case should not have been dismissed. Because Davis had filed the statutory affidavit, jurisdiction over the Opackis was perfected, prior to final judgment. (CP II: 200-201). On June 21, 2010, the court granted Davis' motion for reconsideration. *Id.* The court's order was based on a careful review of the following relevant case law on the filing of the RCW 4.28.185(4) affidavit: *Sharebuilder Sec. Corp. v. Hoang*, 137 Wn. App. 330, 153 P.3d 222 (2007); *Schell v. Tri State Irrigation*, 22 Wn. App. 788, 591 P.2d 1222 (1970); *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 534 P.2d 1036 (1975); and *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 403 P.2d 1064 (1957). *Id.* The court noted that none of the foregoing cases included an order dismissing the entire action based on a late

filing of the statutory affidavit. *Id.* The court found the following language in *Hatch*, quoting *Golden Gate*, *supra*, to be persuasive:

The statute [RCW 4.28.185(4)] does not provide that the affidavit must be filed *before* [Emphasis in original] the summons and complaint are served, but simply that the service will be valid *only when such affidavit is filed*. [Emphasis added]. Consequently, the service became valid when the affidavit was filed.

Id. Thus, although the court found that the default judgment was properly vacated, “[I]t appears to this court that...now that plaintiffs have filed the affidavit as required by RCW 4.28.185(4), the service is valid. Thus the court erred in dismissing the cause of action.” *Id.*

The Opackis then moved for reconsideration of the court’s order granting Davis’ motion for reconsideration. (CP II: 203-212). On July 14, 2010, the court carefully considered the issue again, and denied the Opackis’ motion. (CP II: 218-220). The court acknowledged that Davis had timely filed the affidavit with its motion for reconsideration, within ten days of the original order dismissing the case, and prior to final judgment. *Id.* The court also noted:

Plaintiffs could have received a one or two week continuance of the April 16, 2010 hearing in order to file the affidavit and prepare to argue the new issue. The entire issue was not raised in defendants’ original motion, but only in defendants’ reply to plaintiffs’ response, only a day before the hearing. Had the defendants raised this issue in the original

motion, the affidavit most assuredly would have been filed prior to any hearing on the motion. It certainly would not promote any interest to punish the plaintiffs for not seeking a continuance to respond to the new issue not raised by defendants until a day before the hearing, which would have necessarily increased litigation expenses for all parties.”

Id. The court then reconsidered the same cases it had previously – *Sharebuilder, Schell, Hatch, and Golden Gate. Id.* Again, the court concluded that although the statutory affidavit had been filed late, it was timely filed on a motion for reconsideration, thus perfecting jurisdiction over the Opackis. *Id.* Once Davis had filed the affidavit, the court had proper jurisdiction over the Opackis:

While it is an admittedly close question, this court reads the language in Golden Gate, as quoted in Hatch, to state that once a 4.28.185(4) affidavit is filed the service becomes valid, and thus the court has jurisdiction over the parties who were personally served outside of this State. Thus dismissal for failure to timely file the required affidavit is not appropriate, at least ‘...where it appears that no injury was done to the Appellant as a result of the late filing.’”

Id. In its July 14th order, the court also clarified that it had not yet ruled on the separate issue of long arm jurisdiction arising from Appellant’s eBay sales to Washington residents. *Id.* Accordingly, the Opackis brought a renewed motion for dismissal on July 14, 2010. (CP II: 222-230). On July 30, 2010, after thorough briefing and argument, the Court denied the Opackis’ motion,

finding that the court did have personal jurisdiction over the Opackis based on the Opackis' eBay sales to Washington residents. (CP II: 345-346).

On January 28, 2011, Commissioner Skerlec granted the Opackis' Motion for Discretionary Review. The Opackis assign error to a number of issues which are not properly on review, pursuant to the Ruling granting discretionary review. That Ruling stated that the Opackis had requested "review of a Jefferson County superior court order granting a motion for reconsideration and reversing its earlier decision to dismiss the cause of action for lack of personal jurisdiction".

IV. ARGUMENT.

A trial court's decision whether to grant or deny a CR 59(a) motion for reconsideration is reviewed under an abuse of discretion standard. *Lian v. Stalick*, 106 Wn. App. 811, 823-24, 25 P.3d 467, 475 (2001). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Holaday v. Merceri*, 49 Wn.App. 321, 324, 742 P.2d 127 (1987).

A) The trial court did not abuse its discretion when it granted the Opackis' motion for reconsideration under CR 59.

- i) The Court retained jurisdiction pending determination of the motion for reconsideration.

CR 59(a) allows a party to request that the court reconsider and vacate all or a portion of a verdict or order:

- (a) Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted.

Under CR 59(b), a motion for reconsideration must be filed within ten days after the entry of the judgment, order, or other decision. The time for filing a motion for reconsideration may not be extended under any circumstances. CR 6(b); *Moore v. Wentz*, 11 Wn. App. 796, 799, 525 P.2d 290 (1974).

It is axiomatic that the Civil Rules would not allow a period for a court to reconsider an erroneous decision under CR 59, if the court did not *retain jurisdiction* to hear the motion to reconsider its own ruling. Although there is no Washington case directly on point, this principle is well-established in case law from numerous jurisdictions. *See, e.g., CR 59; Trundle v. Park*, 210

S.W.3d 575, 580 (Tenn. Ct. App. 2006) (“When a party files a timely Rule 59 motion, the trial court retains jurisdiction over the matter until it enters an order granting or denying the motion”); *Ness v. Eckerd Corp.*, 350 S.C. 399, 402, 566 S.E.2d 193, 195 (S.C. Ct. App. 2002) (Trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a timely Rule 59 motion is filed); *McCormick v. Allstate Ins. Co.*, 194 W. Va. 82, 83, 459 S.E.2d 359, 360 (1995) (“A motion made pursuant to Rule 59...and filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal”); *Gullion v. Gullion*, 163 S.W.3d 888, 892 (Ky. 2005) (CR 59 permits the trial court to continue jurisdiction over its orders while the motion is pending); *Bowman v. Songer*, 820 P.2d 1110, 1113 (Colo. 1991) (Until a final judgment is entered, a trial court has jurisdiction to hear [a] motion to reconsider...subject to the time constraints of Rule 59”).

Federal courts agree: Once a motion for reconsideration is timely made, a “judgment” is no longer “final”. *Portis v. Harris County, Tex.*, 632 F.2d 486, 487 (5th Cir. 1980). (“When the Rule 59(e) motion was timely filed, the judgment of the district court was no longer a final judgment. The judgment became final only after the disposition of the Rule 59(e) motion.”) See,

Moore, 11 Fed. Prac. & Proc. Civ. § 2821(2d. Ed) (“If a timely motion under Rule 59 has been made and not disposed of, the case lacks finality”). This Court may look to decisions and analysis of the federal rule for guidance. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wash.2d 34, 499 P.2d 869 (1972).

In this case, Davis timely filed a motion for reconsideration of a portion of the Court’s April 16, 2010 order that improperly dismissed the case. 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. The court did not “resurrect” the case as Opackis claim – the court never lost jurisdiction in the first place. The Opackis’ argument that the court did not retain jurisdiction under CR 59 to reverse its erroneous decision is contrary to the Civil Rules, to established authority, and to common sense, and it should be disregarded.

- ii) The court did not abuse its discretion when it granted Opackis’ motion for reconsideration.

RCW 4.28.185(4), the Washington long-arm statute, states that “Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.” In

short, proper filing of the affidavit validates the service of process, so long as it is filed at any time prior to final judgment. See *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 1064 (1957). The statute does *not* require that the affidavit be filed concurrently with the service of the summons and complaint; but simply that the service (and thus the court's jurisdiction) will be valid only when such an affidavit is subsequently filed. Clearly, filing the affidavit validates service, and thus the court's jurisdiction, and the affidavit can be filed (and service perfected) at any time prior to final judgment.

In this case, the dismissal was not yet final because Davis filed a timely motion for reconsideration. After careful consideration of the relevant case law, the court concluded that the late filing of the affidavit did not necessitate dismissal of the entire action. See *Sharebuilder Securities Corp. v. Hoang*, 137 Wn. App. 330, 337, 153 P.3d 222 (2007); *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1970); *Hatch v. Princess Louise Corp.*, 13 Wn.App. 378, 534 P.2d 1036 (1975); and *Golden Gate*, *supra*. Although the affidavit was filed with Davis' motion for reconsideration, jurisdiction by virtue of proper service was established once the affidavit was filed. The court retained jurisdiction under CR 59 for ten days after the dismissal, and within

that time period, Davis filed the affidavit. The court's decision was not manifestly unreasonable, or based on untenable grounds, when it concluded that dismissal of the entire action was inappropriate, especially "where it appears that no injury was done to the defendants as a result of the late filing." (CP II: 218-220).

B) The Superior Court did not err in exercising long-arm jurisdiction over the Opackis.

A trial court's ruling on personal jurisdiction is a question of law reviewable de novo when the underlying facts are undisputed. *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 725, 981 P.2d 454, 456 (1999). If the trial court's ruling is based on affidavits and discovery, "only a prima facie showing of jurisdiction is required." *MBM Fisheries, Inc. V. Bollinger Mach. Shop*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991). Thus, although Davis has the burden of demonstrating jurisdiction, the allegations in the complaint are considered substantiated for purposes of appeal. See *MBM Fisheries*, 60 Wn. App. at 418. Here, since the finding of jurisdiction was based on affidavits, and not a full trial, de novo review is appropriate.

The Opackis provide no support for their contention that the court did not have long-arm jurisdiction other than the vague assertions that "there is no

case law in Washington addressing this type of transaction” and that the public needs a “clear rule.” To the contrary, the court carefully considered the facts and circumstances and held that the exercise of jurisdiction over the Opackis was proper, since the Opackis both transacted business with Washington state residents and committed a tortious act in Washington. (CP II: 233-251).

The Opackis are sophisticated eBay sellers that have engaged in 887 confirmed eBay auction sales. (CP II: 253-329). At least nine of those confirmed sales have been with Washington state residents, although this number is likely far greater. *Id.* The Opackis knowingly transacted business with Washington state residents, and have purposefully availed themselves of the benefits of doing business in Washington by actively soliciting Washington residents through eBay. *Id.* In addition, the Opackis engaged in a tortious act, fraudulent misrepresentation, which injured Washington residents. Washington state has a strong interest in protecting its consumers from unscrupulous, fraudulent eBay sellers.

- i) The court has jurisdiction over the Opackis under the long-arm statute because the Opackis transact business with Washington state residents.

RCW 4.28.185(1) grants Washington courts long-arm jurisdiction over out of state parties when:

Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

The transaction of any business within this state;

The commission of a tortious act within this state.

To evaluate whether long-arm jurisdiction exists, courts examine three factors: (1) whether the party purposefully committed some act or consummated some transaction in the state; (2) whether the cause of action arose from, or was connected with, the act or transaction; and (3) whether the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Bartusch v. Oregon State Bd. of Higher Educ.*, 131 Wn. App. 298, 306-307, 126 P.3d 840 (2006).

Although Washington state courts have not addressed the issue of whether an eBay seller is amenable to personal jurisdiction, the decisions of other courts are instructive. Most courts in internet jurisdiction cases have traditionally applied the “sliding scale” test (known as the “*Zippo*” test) which seeks to distinguish between “interactive” and “passive” websites. However, courts considering jurisdiction based on eBay sales have either declined to apply, or modified, this standard. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,

952 F. Supp. 1119 (W.D. Pa., 1997); *Attaway v. Omega*, 903 N.E.2d 73, 78 (declining to apply *Zippo*); *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 821 (E.D. Mich. 2006) (applying a modified *Zippo* analysis that focuses on the sophistication of the seller). Courts have reasoned that the *Zippo* mode of analysis makes little sense in the eBay context since eBay, and not the seller, controls the interactivity and marketing efforts of the website. *Attaway*, 903 N.E. 2d at 78. Further, the ultimate issue is whether the court has jurisdiction over the eBay *seller*, not the eBay auction website. Thus, courts in eBay jurisdiction cases have applied a jurisdictional analysis which focuses on the sophistication and purposeful activity of the eBay seller. *Id.*

In *Dedvukaj v. Maloney*, a Michigan court held that it had personal jurisdiction over a New York eBay seller accused of breach of contract, fraud, and misrepresentation. 447 F.Supp. 2d 813 (E.D. Mich. 2006). The court noted that the defendant's auction listing stated he would ship paintings anywhere in the United States. Because the defendant did not forbid buyers from Michigan from participating in his auction and displayed a willingness to communicate with buyers from any state, the court concluded that the defendant had purposefully availed himself of the benefits of conducting business in Michigan. *Id.* at 821-23.

In a case with strikingly similar facts to the one at issue here, *Erwin v. Piscitello*, the defendant sold a vehicle to plaintiffs through eBay, and made false representations to plaintiff regarding the condition of the vehicle. 627 F.Supp. 2d 855 (2007). Defendant argued that the court could not exercise jurisdiction because defendant had “sold” the vehicle to plaintiff in Texas, and that plaintiff arranged for shipment of the vehicle to Tennessee. The Court firmly rejected this argument, finding that defendant knowingly interacted with a Tennessee resident, tortiously misrepresented the vehicle’s condition, which caused foreseeable ill effects in the state of Tennessee. *Id.* at 861.

In another similar case, *Aero Toy Store, LLC v. Grieves*, plaintiffs purchased a BMW from defendant through eBay, in reliance on defendant’s misrepresentations about the condition of the vehicle. 279 Ga. App. 515 (2006). Defendant, a resident of Florida, challenged the exercise of jurisdiction by the Georgia court. Defendant claimed it had only completed two sales to Georgia residents through eBay. In denying defendant’s motion to dismiss, the court found that defendant’s sale of automobiles worth thousands of dollars that were shipped to and intended to be operated in Georgia established the requisite minimum contacts to authorize Georgia’s exercise of personal jurisdiction over defendant. *Id.* at 740-741.

In yet another analogous case, *Crummey v. Morgan*, a Louisiana court held that the exercise of personal jurisdiction was proper over an eBay seller that engaged in a variety of efforts to “advertise, puff, negotiate, and accept payment” for a vehicle directed to a Louisiana consumer. 965 So. 2d 497, 504 (1st Cir. 2007). The court held that sufficient minimum contacts, effectuated by electronic communications, had been established to maintain personal jurisdiction. *Id.* at 504.

- ii) The court correctly found that the Opackis have purposefully availed themselves of the privilege of doing business in Washington.

To establish the requisite minimal contacts under the first factor, there must be evidence that the defendant purposefully did some act or consummated some transaction in Washington. *Raymond v. Robinson*, 104 Wn.App. 627, 637, 15 P.3d 697 (2001). The focus is on the quality and nature of the act occurring within the forum state, rather than the number of acts within the state or some other mechanical standard. *Id.* A Court may properly exercise long-arm jurisdiction when the defendant has purposefully availed itself of the state's markets, invoking the benefits and protections of the state laws, and derived a financial benefit. *Id.*

In this case, the court heard that the Opackis actively solicit business from all U.S. residents, including Washington state residents, through their eBay advertisements. The Opackis offer to assist buyers with shipment arrangements, and coordinated and paid for the shipment of the Airstream vehicle to Plaintiffs in this case. The Opackis are sophisticated eBay sellers, with 887 confirmed transactions. Of these 887 transactions, nine have been with Washington state residents. However, it is likely that the Opackis have completed far more sales to Washington residents, since the 887 transactions listed on the Opackis' eBay profile only list eBay users that have left feedback regarding their completed transactions with the Opackis.

The Opackis offer to have their products shipped anywhere in the United States, and do nothing to limit buyers from Washington state from participating in the Opackis' eBay auctions. In addition, the Opackis derived an economic benefit by selling their products to Washington state residents, invoking the benefits and protections of Washington state laws. Far from being a one-time seller, the Opackis' use of eBay is regular and systematic.

Clearly, the court understood, and agreed, that the Opackis are professional, sophisticated sellers that have completed at least nine transactions, but likely many more, with residents of Washington state. The court, by finding personal jurisdiction, acknowledged that the sellers in the

instant case are sophisticated sellers of an expensive product meant to be operated in the state of Washington, and foreseeably causing ill effects in Washington. Thus, after hearing the facts, the court properly decided that the Opackis purposefully availed themselves of the benefits of conducting business in Washington, and that decision was not obvious error.

iii) The cause of action arose out of the Opackis' activities.

Courts apply a “but for” test to determine whether a claim against a nonresident defendant arises from, or is connected with, its solicitation of business within the state. *Raymond*, 104 W. App at 640. In this case, Plaintiffs would not have purchased the travel trailer “but for” the Opackis’ fraudulent misrepresentations in their eBay auction listing. Thus, the cause of action arose out of the Opackis’ solicitation of business on the eBay website.

iv). The court agreed that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

Finally, the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice in light of the quality, nature, and extent of the defendant’s activity in the state; the relative convenience of the parties; the benefits and protection of the laws afforded the respective parties; and the basic equities of the situation. *Raymond*, 104 W. App at 641.

The product at the heart of this dispute, an Airstream travel trailer, is an automobile that was intended to be delivered to and driven in the recipient state, Washington. The Opackis advertised the Airstream trailer on eBay and made fraudulent representations to the Davis as to the trailer's condition. Washington state has a strong interest in protecting its consumers against fraudulent business transactions. Further, the Opackis actively solicit and negotiate with Washington state residents, and do nothing to limit sales to Washington state residents. It was foreseeable that the Opackis could be haled into an out-of-state forum arising out of an eBay transaction. Thus, the court properly ruled that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

v.) The court properly ruled that it has jurisdiction under the long arm statute because the Opackis committed a tortious act that injured Washington state residents.

Under RCW 4.28.185(1)(b), a Washington court may also assert long-arm jurisdiction over a nonresident defendant that commits a tortious act within the state. A tortious act is deemed to have occurred in Washington for purposes of the long-arm statute if the *injury* occurred in Washington, because the injury is considered inseparable from the tortious act. *Grange Ins. Ass'n v.*

State, 110 Wn.2d 752, 757, 757 P.2d 933 (1988) (emphasis added). When a plaintiff shows that the injury occurred in Washington and that it was caused by an act of the nonresident defendant outside Washington, it is not necessary for the nonresident defendant to have transacted business in the state. *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.*, 9 Wn. App. 284, 513 P.2d 102 (1973).

In this case, the court properly asserted jurisdiction over the Opackis on two separate grounds: 1) the Opackis have transacted business with Washington state residents; and 2) the Opackis made fraudulent misrepresentations which caused injury to Davis that occurred in Washington. Although the Opackis argued that the tort occurred in Michigan, this argument was legally incorrect because in Washington, the rule is clear that the tortious act is inseparable from the injury to Davis. In this case, the Opackis made fraudulent misrepresentations that injured Plaintiffs in Washington when the Airstream was delivered. See also *Erwin v. Piscitello*, *supra* (Defendant's fraudulent misrepresentations on eBay caused foreseeable ill-effects that justified the exercise of jurisdiction); *Crummey v. Morgan*, *supra*, (exercise of jurisdiction was proper because Opackis had both transacted business and committed tortious injury by making false representations on eBay that injured

Plaintiffs). Thus, the court also properly asserted jurisdiction over the Opackis in this case arising out of their tortious conduct.

C. The court did not err in denying the Opackis their attorney's fees below, and attorney's fees are not appropriate here.

The trial court has discretion to grant a request for attorney's fees under RCW 4.84.185, and its decision is reviewable for abuse of discretion. *Scott Fetzer Co. v. Weeks*, 114 Wn. 2d 109, 124, 786 P.2d 265 (1990). Here, Judge Verser considered, and rejected, the Opackis' request for fees below. There was no abuse of discretion. Fees were not appropriate below, and an award of fees is not appropriate before this Court, pursuant to RAP 18.1. The Opackis' request should be denied.

V. CONCLUSION.

The trial court did not abuse its discretion when, on reconsideration, it accepted the affidavit of out of state service required by RCW 4.28.185(4), prior to final judgment, and ruled that it had personal jurisdiction over the Opackis. As a result, Davis respectfully requests this Court to deny Opackis' Appeal.

DATED this 28th day of July, 2011.

INVICTA LAW GROUP, PLLC

By 
Heather M. Morado, WSBA 35135
Stacie Foster, WSBA 23397
1000 Second Avenue, Suite 3310
Seattle, WA 98104-1019
Telephone: (206) 903-6364
Attorneys for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

VIA EMAIL: shane@knaussandseaman.com
AND FIRST CLASS U.S. MAIL

Mr. Shane Seaman
KNAUSS & SEAMAN PLLC
203A W. Patison Street
Port Hadlock, WA 98339

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

Signed at Seattle, Washington this 28th day of July, 2011.


Katy M. Albritton
Legal Assistant