

Appeal Case No. 68095-1-I

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

WILLIAM S. BROWN and JULIE C. BROWN,
Appellants

v.

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

APPELLANTS' REPLY BRIEF

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

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Oral Argument Requested

ORIGINAL

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ARGUMENT

In reply to Best Auto's Brief, the Browns primarily refer the Court to their initial Brief, which disposes of most of Best Auto's arguments. However, without conceding any point not addressed herein, the Browns briefly address a few issues raised by Best Auto, including some inappropriately asserted for the first time on appeal.

As set forth below, Best Auto failed to carry its burden to prove that the purported forum selection clause on the back page of the Vehicle Purchase Order was included in the facsimile sent to the Browns, or that it was made a part of the agreement before the Browns performed by wiring the purchase funds at Best Auto's directions. At any rate, the forum selection clause is not enforceable due, in part, to its hidden and inconspicuous nature. Best Auto is also prohibited from grasping at straws by arguing the merits of the underlying dispute or otherwise presenting new jurisdictional allegations on appeal that were not presented to the Superior Court, as the Superior Court did not consider them in its ruling. Those matters are not available to Best Auto in this appeal; nonetheless, the Browns' evidence incidentally disproves Best Auto's novel arguments.

A. The Forum Selection Clause Was Not Part of the Parties' Agreement and Is Not Enforceable as Written.

The Browns refer the Court to their initial Brief for their argument on this point.¹ However, in reply to Best Auto's Brief, it is worth restating that the controlling issues on appeal are two-fold: (1) was the purported forum selection clause made a part of the agreement between the Browns and Best Auto; and (2) if so, is it enforceable? The Superior Court relied upon and ruled only on these issues.² Though the Court need not even answer the second question, the answer to both questions is a resounding "No."

1. Best Auto Presented No Evidence that the Parties Incorporated the Forum Selection Clause into their Agreement.

Before the Superior Court and in its Brief on appeal, Best Auto relies solely on the Thompson Declaration to argue that it sent the Browns the page containing the forum selection clause.³ However, the Thompson Declaration does not state that the second page containing the hidden forum selection clause was sent to the Browns. It states, in pertinent part, the following:

¹ Appellants' Brief, pp. 8-9, 16-18, 43-44, 47-48.

² Appellants' Brief, pp. 33-34; *Order Granting Defendants' Motion to Vacate Foreign Judgment and Quashing Writ of Garnishment*. Clerk's Papers at 184-86 (hereafter cited as "CP at ___").

³ CP at 37-43; Respondents' Brief, pp. 2, 8-9.

On April 20, 2008, Plaintiffs entered into a Vehicle Purchase Order agreement under which Plaintiffs agreed to purchase the vehicle for \$11,250. Attached hereto as Exhibit A is a true and correct copy of the Vehicle Purchase Order.⁴

Nowhere in the Thompson Declaration does it state how he transmitted the Vehicle Purchase Order to the Browns, or that he sent both pages to the Browns.⁵ While the second page (or back page) may be a part of the Vehicle Purchase Order as held in the hands of Mr. Thompson, the Thompson Declaration does not convey that Best Auto faxed both sides/pages to the Browns. The Browns received and signed only one page – their version clearly shows that Best Auto sent them the Vehicle Purchase Order via facsimile transmission.⁶ If, as Best Auto states in its Brief,⁷ the second page is truly the reverse side of the Vehicle Purchase Order, then that explains why the facsimile transmission to the Browns did not include the reverse side of the Vehicle Purchase Order. It was not

⁴ *Id.*

⁵ *Id.* The Thompson Declaration is written in a manner that Mr. Thompson subsequently could disavow any claim that he sent both pages to the Browns. In addition, it remains unclear whether the second page containing the purported forum selection clause is the content referenced on the reverse side of the signature page or an entirely separate second page. Best Auto has never produced an original of the form used or the original executed version upon which it relies, and it could not explain or answer these questions before the Superior Court. It is also dubious that Best Auto's version of the Vehicle Purchase Order is materially different than the actual one sent to the Browns as attached to the Vitanza Declaration (i.e., facsimile data on the top of the page, and oddly different alleged handwriting of Dr. Brown while Mr. Thompson's handwriting is identical between the two versions). CP at 136.

⁶ *Id.*

⁷ Respondents' Brief p. 10.

included in the facsimile transmission because it was on the reverse side of the only page that was transmitted.⁸

Not only does the Thompson Declaration not state that both sides/pages of the Vehicle Purchase Order were faxed to the Browns, but Best Auto's interpretation of the Thompson Declaration is completely at odds with its King Declaration.⁹ The King Declaration presented the Vehicle Purchase Order without any back page or second page containing the hidden forum selection clause.¹⁰ Which is it? The position taken by the Browns and Best Auto in its King Declaration and before the Superior Court, or Best Auto's strained effort to interpret the Thompson Declaration on appeal? The only evidence before the Superior Court clearly established that the Browns did not receive any second/back page containing the forum selection clause.¹¹ Because Best Auto failed to prove that a forum selection clause was included in the agreement between the Browns and Best Auto (the evidence conclusively proved otherwise),

⁸ CP at 136. Best Auto argues that the signature page's reference to the reverse side (that was not sent) inherently binds the Browns to all unknown terms present on the unprovided reverse side. Obviously, this desperate contention is unsupported by Washington law, equity, and/or common sense.

⁹ CP at 49-58.

¹⁰ *Id.*

¹¹ Best Auto failed to meet its burden and provide evidence that it sent to the Browns the page containing forum selection clause. Contrary to Best Auto's complaint on appeal, the Vitanza Declaration was accepted into evidence without any objection or ruling thereon, so Best Auto's hearsay objection is tardy, not to mention factually incorrect.

this Court must close its inquiry and reverse and render in favor of the Browns.

2. Even if Evidence Existed to Support a Finding that the Parties Incorporated the Forum Selection Clause into its Agreement, it is Unenforceable.

In the Browns' Brief, they described the forum selection clause as follows:

the purported forum selection clause is buried in fine print under a misleading heading entitled 'Attorney's Fees and Costs' and meets the very definition of an inconspicuous, stealth inclusion of a term that was not negotiated or otherwise brought to the attention of the Browns. It is not under a heading entitled 'Jurisdiction or Venue.' It is not bolded, underlined, or highlighted. There is nothing that stands out other than what appears to be an intentional effort to misrepresent that the paragraph is solely a section dealing with 'Attorney's Fees and Costs' – matters which have nothing to do with jurisdiction or venue. None of these facts has been or can be contested.¹²

In Best Auto's Brief, it does not contest any of these facts. Instead, assuming the Browns actually received the second/back page, Best Auto contends that it is unreasonable for Mr. Brown to argue that the provision was inconspicuous.¹³ The actual paragraph 7 on the second/back page of the Vehicle Purchase Order in question reads as follows:

¹² Appellants' Brief, pp. 46-47.

¹³ Respondents' Brief, pp. 25-26.

* * *

Attorney's Fees and Costs. If this contract is placed in the hands of an attorney by reason of Purchaser's default or to enforce any of the provisions of this contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs. The parties agree that the venue for any suit, action, or proceeding relating to the enforcement of this contract shall be in the county in which the Dealer's principal place of business is located within the State of Washington. The laws of the State of Washington shall be applied in the interpretation and construction of this Agreement.¹⁴

* * *

If a party chose to draft a document and intentionally hide a forum selection clause, it would look exactly like the form prepared by Best Auto. If the Court finds this forum selection clause to be conspicuous, then it will set an unfortunate precedent that will weaken consumer protection laws and enable future fraud against consumers both within and outside the State of Washington. Best Auto could have taken a good faith and conspicuous approach and separated the paragraph so that it reads as follows:

* * *

Attorney's Fees and Costs. If this contract is placed in the hands of an attorney by reason of Purchaser's default or to enforce any of the provisions of this contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

Jurisdiction and Venue. 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.

* * *

¹⁴ CP at 43.

Best Auto did not do that. This Court must take into account this kind of trickery in evaluating the enforceability of a forum selection clause. *See Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 242, 122 P.3d 729, 732 (2005) (discussing consideration of conspicuous presence of forum selection clause in determining enforceability).

3. Best Auto Waived Any Contractual Forum Selection Clause Defense.

On the waiver issue, Best Auto responded by citing inapplicable case law. Best Auto fails to appreciate that it is relying upon a contractual defense to Texas jurisdiction; instead it cites case law dealing with extra-contractual jurisdictional issues.¹⁵ As stated in the Browns' Brief, a forum selection clause is a contractual term that requires a special appearance or similar motion to dismiss based on contractual grounds.¹⁶ Best Auto made an affirmative error in judgment when it *knowingly* decided to ignore the

¹⁵ Respondents' Brief, p. 17 (*Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 326-27, 877 P.2d 724 (1994) (“[Defendant] never received service of process and had no knowledge of [Plaintiff’s] proceedings against him until after the default judgment was entered.”); p. 17 (*Wampler v. Wampler*, 25 Wn.2d 258, 263, 170 P.2d 316 (1946) (“decree of divorce entered by the Idaho court is void, hence is subject to collateral attack in the courts of this state, for the reason that the Idaho court did not have jurisdiction to grant a divorce in the action instituted by her, in that neither appellant nor respondent was ever a resident of Idaho.”); p. 18 (*Thos P. Gonzalez Corporation v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (analysis of the minimum contacts standard as applied to foreign states/entities).

¹⁶ Appellants' Brief, pp. 41-43.

Texas lawsuit and raise a purported contractual defense long after the Texas Judgment became final.¹⁷

B. Best Auto's New Defenses Raised On Appeal.

Best Auto did not raise, and the Superior Court did not rely or rule upon, any claim of a forum selection clause in the eBay advertisement or a claim that Best Auto did not maintain sufficient minimum contacts with the State of Texas.¹⁸ Had Best Auto presented those issues to the Superior Court, then the Browns would have responded accordingly before the Superior Court. Instead, Best Auto chose to not raise those alleged defenses before the Superior Court, thereby waiving them. Best Auto waited to present them for the first time in this appeal.¹⁹ Consequently, this Court should not consider those alleged defenses in this appeal.

Even if this Court chose to review those matters, and assumed the Superior Court considered them despite any such evidence, it would clearly have be an abuse of discretion. With respect to the purported forum selection clause in the eBay advertisement, it is undisputed that the Browns did not purchase the vehicle through eBay. The Browns contacted

¹⁷ *Id.*

¹⁸ See R.A.P. 2.5; see also *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (defendant has burden of demonstrating why argument can be raised for the first time on appeal).

¹⁹ Respondents' Brief, pp. 22-25.

Best Auto by telephone and discussed the vehicle.²⁰ Best Auto chose to cancel the eBay auction and sell the vehicle to the Browns outside of the eBay marketplace.²¹ The eBay advertisement's purported forum selection clause was not incorporated into any written agreement between the Browns and Best Auto. Regarding minimum contacts, Best Auto's own eBay advertisement states that it sells worldwide, including Texas which is part of North America.²² This advertisement conclusively establishes Best Auto's sufficient minimum contacts with the State of Texas in order to establish personal jurisdiction. Furthermore, Best Auto knowingly agreed to sell to a Texas resident.²³ It also coordinated the transaction, and efforts to auction the vehicle to another consumer, in Texas.²⁴ There is nothing to support Best Auto's position that it did not avail itself to Texas. It is an undisputed fact that Best Auto sought and chose to do business with a Texas resident.²⁵

²⁰ CP at 92.

²¹ *Id.*

²² CP at 88.

²³ CP at 88-89.

²⁴ *Id.*

²⁵ *Id.*

C. Best Auto's Improper and Baseless Arguments Regarding the Underlying Merits.

The only issue on appeal is whether the forum selection clause was incorporated into the consumer transaction between the Browns and Best Auto, whether it is enforceable, and whether Best Auto waived it. However, Best Auto repeatedly attempts to argue the merits of the underlying lawsuit, despite its knowing refusal to participate in the underlying lawsuit and the absence of any direct relevance to this appeal, other than to provide background facts.

That stated, the evidence is clear that Best Auto lied to the consuming public, including the Browns, by claiming that the 2004 Mini Cooper had been extensively driven and tested. The vehicle title, related documents, and condition of the vehicle upon receipt, all conclusively show Best Auto's representation to be false. Even on appeal, Best Auto tries to hide behind an "as-is" sale despite its affirmative representations which remain unexcused under either Texas or Washington law.²⁶ An "as-is" sale does not allow a seller to then make unbridled affirmative misrepresentations and engage in fraudulent conduct. As the documents show and as found by the Texas trial court, Best Auto knowingly

²⁶ Respondents' Brief at 2-3.

committed fraud against the Browns.²⁷ No matter what Best Auto claims, that much is evident by reviewing the only evidence presented by either party.

CONCLUSION

The bottom line is that Best Auto preyed upon the Browns. The Browns wanted a used 2004 Mini Cooper for \$11,250. Best Auto took the Browns' money, then sloppily attempted to obtain execution of a Vehicle Purchase Order (but omitted the purported forum selection clause), and then sent the Browns a piece of junk.²⁸ The Browns asked for their money to be returned.²⁹ Best Auto refused.³⁰ The Browns sent a demand letter.³¹ Best Auto ignored it. The Browns filed a lawsuit in Texas.³² Best Auto said it would appear in Texas but never did.³³ A default judgment was properly entered in Texas.³⁴ Upon domestication in Washington, Best Auto continued to refuse responsibility for its fraudulent conduct and argued that the amount of the Texas judgment was excessive, even though

²⁷ CP at 192-93.

²⁸ CP at 92.

²⁹ CP at 94.

³⁰ *Id.*

³¹ CP at 153-57.

³² CP at 88-102.

³³ CP at 159.

³⁴ CP at 192-94.

the damages model was repeatedly explained to Best Auto before a default judgment was entered and is allowed under Texas law. The underlying merits are clear. Consumer protection laws in both Texas and Washington were designed with unscrupulous sellers like Best Auto in mind.

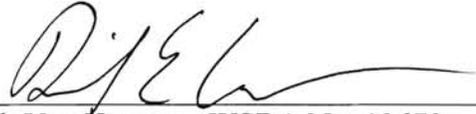
The Superior Court clearly abused its discretion. There is no point to consumer protection laws or fairness in contract if the Court affirms the Superior Court. A forum selection clause cannot control when (1) there is no evidence that it was made a component of the agreement between the parties, (2) the clause itself is hidden and inconspicuous, almost to the point that it appears intentional, and (3) the defendant who seeks to enforce a contractual defense knowingly refuses to do so until after a judgment is entered upon the merits. The Browns respectfully request that this Court reverse and render in their favor.

PRAYER

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

DATED this 29th day of June, 2012.

ROHDE & VAN KAMPEN PLLC

A handwritten signature in black ink, appearing to read 'Al Van Kampen', written over a horizontal line.

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