

No. 43899-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual,

Appellant,

vs.

ROBERT H. WAGNER, as an individual and as Trustee of THE
ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka
"THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through
50, Inclusive,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY, WASHINGTON

THE HONORABLE KEVIN D. HULL, JUDGE

RESPONDENT'S MOTION ON THE MERITS TO AFFIRM

ISAAC A. ANDERSON, WSBA #28186
of Law Office of Isaac A. Anderson, PS
Attorney for Respondent Robert H. Wagner

I. MOTION

COMES NOW the respondent, ROBERT H. WAGNER (“Wagner”), by and through his attorney ISAAC A. ANDERSON of LAW OFFICE OF ISAAC A. ANDERSON, and hereby brings this motion on the merits to affirm pursuant to RAP 18.14.

II. STATEMENT OF PERSON FILING MOTION

The name and designation of the person filing this motion is ISAAC A. ANDERSON, as attorney for ROBERT H. WAGNER.

III. STATEMENT OF RELIEF SOUGHT

Wagner seeks an order granting his motion on the merits and affirming the trial court pursuant to RAP 18.14. Wagner furthermore seeks an award of fees and expenses incurred in this appeal pursuant to RAP 18.1.

IV. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

A. SUMMARY

Pro se appellant MARK OLLA’s (“Olla’s”) appellate brief is clearly without merit. Olla’s sole argument is once again that the trial court lacked subject matter jurisdiction. Olla argues that because the trial

court lacked of subject matter jurisdiction, the trial court erred by denying his motion for reconsideration of the court's decision to deny Olla's motion to vacate the court's January 15, 2010 judgment.¹

This Court has already determined twice before that Olla's subject matter jurisdiction argument lacks merit. Olla now comes back for a third bite at the same apple. But Olla once again does not present a meritorious argument. His appeal should be summarily dismissed.

B. PROCEDURAL HISTORY

Olla filed suit against Wagner in Kitsap County Superior Court on June 29, 2009,² and thereafter Wagner filed counterclaims against Olla based on his breach of the parties' settlement agreement which, *inter alia*, waived all claims between the parties.³ On August 21, 2009, the trial court bifurcated Olla's claims and Wagner's counterclaims into two separate trials.⁴ The trial on Olla's claims came first. Olla lost on all counts and the trial court dismissed his claims on January 15, 2010.⁵ Olla then appealed, arguing, *inter alia*, lack of subject matter jurisdiction. This Court issued an unreported opinion affirming the trial court on September

¹ CP 2390.

² CP 2-145.

³ CP 232-255.

⁴ CP 314-15.

⁵ CP 1328-30.

13, 2011.⁶

On March 28, 2011, Wagner's counterclaims were tried. Afterwards, the trial court issued finding and conclusions, and rendered judgment against Olla in the amount of \$107,683.64.⁷ Olla promptly appealed for the second time, and again argued the trial court lacked subject matter jurisdiction. Following respondent's motion on the merits, this Court issued a ruling affirming the trial court, and specifically held as follows:

Olla argues: (1) the trial court lacked subject matter jurisdiction

As to issue (1), this court addressed and rejected Olla's argument in his first appeal, No. 40367-6-II. *His argument is therefore clearly without merit.*⁸

Hence, *this Court already summarily rejected Olla's subject matter jurisdiction argument and found the argument patently frivolous.* Olla remained undeterred. Following this ruling, Olla filed a motion to modify, which was in turn denied on March 19, 2012.⁹ Olla then filed a petition

⁶ Olla v. Wagner, 163 Wn. App. 1028 (2011).

⁷ CP 1595-99.

⁸ Olla v. Wagner, No. 42157-7-II, Ruling Granting Motion on the Merits to Affirm, filed January 6, 2012 (emphasis added).

⁹ Olla v. Wagner, No. 42157-7-II, Order Denying Motion to Modify, filed March 19, 2012.

for review, which was denied by the Supreme Court on August 7, 2012.¹⁰

Still undeterred, Olla then turned to the trial court for another bite at the apple. On July 13, 2012, Olla filed a motion seeking the vacation of the court's original January 15, 2010 judgment, again arguing the court lacked subject matter jurisdiction.¹¹ Olla also added 450 pages of exhibits in support of this motion.¹² Following an oral ruling denying the motion, Olla filed a motion for reconsideration. The trial court denied this motion on July 30, 2012,¹³ and on August 3, 2012, the trial court issued a judgment imposing sanctions against Olla.¹⁴

Olla then filed this appeal on September 4, 2012, arguing once again, without merit, that the trial court lacked subject matter jurisdiction.¹⁵

C. ARGUMENT

1. Res Judicata Applies because This Court has Already Rejected Olla's Subject Matter Jurisdiction Argument and Specifically Found that it Lacked Merit

¹⁰ Olla v. Wagner, 174 Wn.2d 1020 (2013).

¹¹ CP 1771-98.

¹² CP 1799-2250.

¹³ CP 2384-86.

¹⁴ CP 2387-88.

¹⁵ CP 2389-95.

As discussed above, Olla has made multiple attempts to argue that the trial court lacked subject matter jurisdiction in rendering its underlying judgment. On all attempts, Olla has failed. Olla's first appeal presented the same issue and that issue was determined to be without merit by this court.¹⁶ Olla's second appeal, following judgment for the respondent on the counterclaims, Olla again raises the issue of subject matter jurisdiction. Again, Olla's theory was rejected. And it bears repeating again that this Court already held as follows:

Olla argues: (1) the trial court lacked subject matter jurisdiction

As to issue (1), this court addressed and rejected Olla's argument in his first appeal, No. 40367-6-II. *His argument is therefore clearly without merit.*¹⁷

Olla simply complains that the court should not have denied his motions for relief but his argument is only that the trial court lacked subject matter jurisdiction, which is a patently failed argument. His present argument offers nothing new and should likewise be summarily denied under the principal of *res judicata*.

Res judicata ensures finality of a decision and applies to prevent

¹⁶ Olla v. Wagner, 163 Wn. App. 1028 (2011)

¹⁷ Olla v. Wagner, No. 42157-7-II, Ruling Granting Motion on the Merits to Affirm, filed January 6, 2012 (emphasis added).

the re-litigation of the same claim or cause of action. Courts have held that res judicata is applicable where there is a final judgment on the merits and the first and second proceedings are identical in (1) subject matter, (2) claim or cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.¹⁸

There has been final judgment on the merits¹⁹ and even affirmation on appeal of the very issue Olla attempts to raise once more. There is absolutely no difference in the subject matter, claims, persons or parties or quality of persons for or against whom the claim is made. Simply because it is a different trial court ruling from which Olla appeals this time,²⁰ does not change any of the underlying facts essential to the application of res judicata. To allow Olla's claims to proceed is to disregard the principal of res judicata and deny the respondent's finality of a matter which has been tried and tried again.

2. Olla has Failed to Comply with the *Brown* Test, Which is Required when Seeking to Vacate a Judgment for Lack of Subject Matter Jurisdiction

Hypothetically, even if there was a lack of subject matter

¹⁸ Pederson v. Potter, 103 Wash.App 62, 67, 11 P.3d 833, 835 (2000).

¹⁹ CP 1328-30.

²⁰ Olla is appealing the denials of his motions for relief from the January 15, 2010 judgment as opposed to the judgment itself, which has already been upheld on appeal.

jurisdiction, the trial court's order denying Olla's motion to vacate must stand because Olla has failed to satisfy the three part test established in Matter of Marriage of Brown, 98 Wn. 2d 46, 653 P.2d 602 (1982). In general, Washington courts prefer to uphold a previously entered judgment even when there was a lack of subject matter jurisdiction because "in the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity."²¹ In fact, Washington courts will not reverse the trial court's denial of a motion to vacate on the basis of a lack of subject matter jurisdiction unless the party seeking to vacate demonstrates the following:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.²²

Olla has failed to address, much less demonstrate, any of these factors. In his brief, Olla admits that it is the "propriety of the denial, not the impropriety of the underlying judgment" which is before this Court to

²¹ Id. at 49, 653 P.2d at 603.

²² Id. at 50, 653 P.2d at 604.

address.²³ But yet Olla completely skirts this central issue in the remainder of his brief. He offers no legal authority nor does he point to anything on the record that would indicate any of these three factors have been met. All his brief does is simply rehash the same argument of lack of subject matter jurisdiction which this Court has already ruled on, presuming incorrectly that the lack of such jurisdiction automatically means the trial court erred in denying his motion to vacate.

In desperation Olla may seek to argue the second prong of the Brown test is satisfied because that the trial court “substantially infringed” on the authority of the parallel California court. But the record does not support this-- in fact it’s clear the California court allowed the Kitsap County Superior Court to take the lead in making factual and legal determinations, and has given the judgments of the Kitsap County Superior Court full faith and credit.²⁴

For this reason, Olla’s appeal wholly lacks merit and the trial court should be summarily affirmed.

3. Olla’s Subject Matter Jurisdiction Argument Fails on the Merits

Again, Olla’s claim that the trial court lacked subject matter jurisdiction has been rejected twice by this court, and furthermore Olla has

²³ Brief of Appellant at 26.

²⁴ CP 2270-77.

failed to demonstrate compliance with any of the three Brown factors discussed above. In addition, Olla's subject matter jurisdiction argument fails on the merits. Whether a court has subject matter jurisdiction is not dependent on the facts of a particular case, but rather the type of controversy involved. The claims, or "type of controversy", alleged by Olla in his complaint consisted of fraud, duress, unfair business acts or practices and concealment, among other things, all undisputedly well within the "type of controversy" properly before a Washington Superior Court. Olla patently confuses the section of the Washington Constitution, Art IV § 6 which states that "[t]he superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court", and errantly takes this to mean that simply because he filed an action earlier in "some other court", that the trial court here lacked subject matter jurisdiction. Yet Olla concedes that the trial court has jurisdiction over the "type of controversy" at issue.²⁵ Hence, this argument is simply without merit.²⁶

Olla's argument is essentially the same as in his first and second appeals. He argues that the trial court lacked subject matter jurisdiction

²⁵ CP 2375, Lines 15-17.

²⁶ See Shoop v. Kittitas County, 108 Wash. App. 388, 394, 30 P.3d 529, 533 (2001) (warning against loosely construing the term "subject matter jurisdiction" to be dependent on the facts of the case as opposed to the type of controversy, as intended by the constitution).

because (1) the “subject” loans were “all done in California” and were “made on California Department of Real Estate forms.”,²⁷ (2) the loans pertained to real property located in and out of the state of Washington, and (3) the appellant had filed an earlier action in a California court.²⁸

On this first point, the fact that the loans which ultimately led the parties to execute their settlement agreement, the validity of which was the central issue at trial, were made in California is of no consequence to the issue of subject matter jurisdiction. Olla signed a settlement agreement in Washington which released all claims Olla had against Wagner arising out of the loans.²⁹

On the second point, again, the loans were not addressed in the January 15, 2010 judgment because the settlement agreement superseded the loan terms.³⁰

Finally, on the third point, Olla offers no legal authority that would support the proposition that filing of a similar lawsuit in two different states would preclude the second state from adjudicating the type of subject matter typically handled by a Washington Superior Court.

Plainly Olla didn’t “get the message” after his first appeal, nor did

²⁷ Brief of Appellant at 6.

²⁸ Brief of Appellant at 11.

²⁹ CP 1326 at ¶7.

³⁰ CP 1326 at ¶7.

he get the message, after his second appeal, and yet is still incessantly advancing the same failed argument. RAP 18.14(e)(1) provides that a motion on the merits to affirm should be granted whenever the issues “are clearly controlled by settled law.” There can be no doubt that this applies in this case.

4. Olla Again Has Failed to Follow the Rule of Appellate Procedure

Olla’s brief also fails to comply with applicable court rules, rendering his brief practically unintelligible. First, as he did in his first and second appeals, Olla failed to reference, along with each assignment of error, each specific finding of fact that he contends was improperly made, as required by RAP 10.3(g).

Second, Olla fails to make a single citation to the trial court record as it pertains to the denial of his motion to vacate, as required by RAP 10.3(a)(6).

This Court need not and should not to go on a hunting expedition to parse through Olla’s poorly articulated legal arguments, or to determine whether his factual assertions are supported by the trial court record. It is Olla’s burden to demonstrate error, and he has failed to meet that burden. As RAP 10.3(g) states, “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.”

Clearly Olla has not learned his lesson. For these reasons, Olla's appeal should be summarily rejected.

5. Wagner Is Entitled to an Award of Attorney's Fees and Costs.

There are two reasons why Wagner is entitled to attorney's fees and expenses incurred in this appeal pursuant to RAP 18.1. First, the parties' settlement agreement states that "[i]f legal action is required to enforce the provisions of this agreement, the prevailing party is entitled to recover its attorneys' fees and costs from the nonprevailing [sic] party."³¹ Second, attorney's fees and costs are allowed pursuant to CR 11 and RCW 4.84.185 because Olla's claims are frivolous in nature, as reasonably determined by the trial court,³² and as supported by the evidence discussed above.

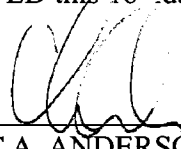
V. CONCLUSION

For the reasons explained above, Wagner respectfully requests that this Court grant his motion on the merits and affirm the trial court, and award his attorney's fees and costs incurred in this appeal.

³¹ CP at 253.

³² CP at 1326-27.

RESPECTFULLY SUBMITTED this 16th day of May, 2013.



ISAAC A. ANDERSON, WSBA #28186
Of Law Office of Isaac A. Anderson, PS
Attorney for Respondent Wagner

DECLARATION OF SERVICE

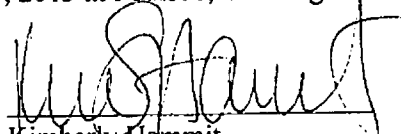
Kimberly Hammit declares and states as follows:

1. On the 16th day of May, 2013, I caused to be served or filed true and correct copies of the respondent's motion on the merits to the following recipients by mailing the same to the following recipients:

Mark Olla, Appellant (Pro Se)
PO Box 1213
Newport, OR 98365

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

SIGNED this 16th day of May, 2013 in Poulsbo, Washington.



Kimberly Hammit