

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

APPELLANTS' BRIEF

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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A. INTRODUCTION

The Opackis appeal the trial court's Final Order Denying Defendants' Renewed Motion for Dismissal and Clarification of the Default Judgment Being Void, filed July 30, 2010 (CP II: 345-346); the Court's Order on Defendants' Motion for Reconsideration, filed July 14, 2010, (CP II: 218-220); Order on Motion for Reconsideration, filed June 21, 2010, (CP II: 200-201); and Order Vacating Default Judgment Against Defendant filed April 16, 2010, (CP I: 169-171). Each of these orders relates back to the Opackis' original Motion and Order to Show Cause on Defendants' Motion to Dismiss and Vacate per CR 60(b)(5) and for Lack of Jurisdiction under RCW 4.28.185 (CP I: 74-79).

In this case, there is no personal jurisdiction over the Opackis and the trial court should be reversed and the Opackis granted their attorney fees and costs per RCW 4.28.185(5) and RAP 18.1.

B. ASSIGNMENTS OF ERROR

1. Opacki assigns error to the Court accepting an affidavit required by RCW 4.28.185 when it had no personal jurisdiction in the case.

2. Opacki assigns error to the Court reversing its dismissal without prejudice entered on April 16, 2010.
3. Opacki assigns error to the Court vacating a judgment as void for lack of personal jurisdiction, but still finding personal jurisdiction existed in the case.
4. Opacki assigns error to the Court finding Washington Long Arm Jurisdiction statute applied to an eBay transaction in Michigan.
5. Opacki assigns error to the Court denying attorney fees authorized under RCW 4.28.185(5).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court commit an obvious error by permitting Respondent to cure a lack of personal jurisdiction by filing the appropriate affidavit under RCW 4.28.185(4) 10 days after dismissal? RAP 2.3 (b) 1 & 3.
2. Did the Superior Court commit an obvious error by granting Respondents' motion for reconsideration under CR 59, despite no authority to accept the late filing of the required affidavit under RCW 4.28.185(4)? RAP 2.3(b) (1) & (3).
3. Did the Superior Court commit an obvious error and depart from the normal course of judicial proceedings by reversing a dismissal and

allowing a complaint to “still stand” after holding a default judgment should be vacated for lack of personal jurisdiction (i.e. “void”)? RAP 2.3(b) (1) & (3).

4. Did the Opackis waive their objection to the lack of personal jurisdiction over them? CR 12(g) & (h).

5. Did the Superior Court commit an obvious error by extending Washington Long Arm Jurisdiction to an eBay transaction completed in Michigan State? RAP 2.3(b)(1).

6. Since the Superior Court has not obtained jurisdiction, should the Appellate Court dismiss the case pursuant to RAP 2.5?

7. Did the Superior Court commit an obvious error denying the Opackis’ request for attorney fees when they prevailed in the original dismissal for lack of personal jurisdiction, and are the Opackis entitled to attorney fees on appeal? RCW 4.28.185 & RAP 18.1.

D. STATEMENT OF THE CASE

On or about May 6, 2009, Appellants Opackis, residents of Michigan, were served in Michigan with an “unfiled” Complaint and Summons. No cause number was provided in the pleadings. The Opackis’ son, an attorney licensed in the State of Florida, contacted Respondents’ counsel and informed counsel that the Opackis would

challenge jurisdiction in the State of Washington if the case was ever filed. Unknown to the Opackis, it was subsequently filed and an Order of Default was presented and signed by Commissioner Peggy Ann Bierbaum and a Default Judgment entered against the Opackis in Jefferson County Superior Court (CP I: 80-83; I: 84-89; I: 90-97).

The Opackis then learned of this Default Judgment when enforcement proceedings were instituted against them in Michigan. They hired Washington counsel, who filed a notice of appearance and a Motion To Dismiss For Lack Of Jurisdiction and a Motion To Vacate Judgment on March 11, 2010 (CP I: 74-79). The Opackis then supported their motion with the Declarations of Adam Opacki (son) and Paul Opacki (Appellant) filed on April 1, 2010. On April 6, 2010, the Opackis noted the issue for a hearing. On the same day, the Opackis filed and served on Respondents a motion and order to show cause (CP I: 98-99) directing Respondents to appear on April 16, 2010 in Jefferson County Superior Court pursuant to the Opackis' Motion to Dismiss and Vacate per CR 60(b)(5) and for lack of jurisdiction under RCW 4.28.185 (CP I: 74-79). On April 14, 2010, Respondents filed their response contending jurisdiction existed under RCW 4.28.185 (CP I: 100-110). The Opackis reviewed Respondents' response and discovered that Respondents had failed to file an affidavit of service pursuant to RCW 4.28.185(4), which

the legislature requires as a condition that must be fulfilled *before* personal jurisdiction can be obtained over an out-of-state resident.

The parties appeared on April 16, 2010, at which time Respondents objected to the Opackis raising the case *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334-335, 153 P.3d 222, 224 (2007) in their timely filed rebuttal brief (CP –I: 162-164). At oral argument, the Opackis contended that the trial court lacked personal jurisdiction over them per CR 60(b)(5), as set forth in the motion filed March 11, 2010, as well as per Respondents’ failure to properly file the affidavit in accordance with RCW 4.28.185(4), as was noted in the rebuttal brief filed April 15, 2010¹ (CP I: 162-164). There is no dispute that this affidavit was not filed at the time the Opackis requested the trial court dismiss the case for lack of personal jurisdiction, and despite this fact the trial court gave Respondents an option to continue the hearing in order to respond to the issue under subsection (4) of RCW 4.28.185. Respondents declined and proceeded with the hearing, contending substantial compliance.

¹ Opackis’ arguments were grounded in lack of personal jurisdiction. In the March 11, 2010 motion Opackis contended that “Plaintiffs failed to establish through pleadings that Defendants are subject to the Washington Long Arm Statute RCW 4.28.185” (CP I:76). Opackis then contended that there was an insufficient nexus. Respondents replied that the trial court did have personal jurisdiction per RCW 4.28.185. Opackis rebutted (CP I: 162-164) that the court did not have personal jurisdiction under RCW 4.28.185 for failure to file the affidavit. The issue turns on personal jurisdiction per RCW 4.28.185 and Opackis did not raise a “new” argument, they only brought to the attention of the trial court that if Respondents’ claim jurisdiction was proper under RCW 4.28.185, the failure to comply with subsection (4) of that statute negated their argument and Opackis were entitled to immediate dismissal.

The Honorable Judge Craddock Verser at first properly granted the Opackis' request and an order vacating the judgment and dismissing the case *without prejudice* was signed by the trial court on April 16, 2010 (CP I: 169-171). The Opackis' request for attorney fees was denied. The trial court struck the language in the proposed order finding that the judgment was "void," but set aside the default for lack of personal jurisdiction (CP I: 169-171).

Respondents moved per CR 59 for reconsideration of the trial court's order on April 26, 2010. Coupled with the motion for reconsideration, Respondents finally filed the required affidavit under RCW 4.28.185(4), **10 days after the case was dismissed for lack of personal jurisdiction.** Respondent Plaintiffs contended that:

"The proper ruling in this case should be that the order of default against Defendants is vacated as void², based on Plaintiffs' non-compliance with the affidavit requirements of RCW 4.28.185(4). After the judgment is vacated, Plaintiffs' original Complaint still stands.

(CP I: 172-175).

The Opackis responded that the default judgment is "void" for lack of personal jurisdiction and contended that Judge Verser should not reverse himself, finding that dismissal *without prejudice* was the proper

² Plaintiff Respondents appear to initially have agreed that the proper ruling is to vacate the judgment as void, however the legal effect of the motion for reconsideration and the trial court's ultimate ruling has made the judgment "voidable," not "void." Regardless, Respondents now concede the judgment is "void."

remedy. (CP I: 190-194.) The Opackis further contended that Respondents could not cure the lack of personal jurisdiction by a late filing of the required affidavit under RCW 4.28.185, because the trial court did not have *de facto* personal jurisdiction 10 days after dismissal to accept an affidavit (CP *id*). Respondents offered no authority that the trial court could resurrect the case after dismissal, despite their contention that their “Complaint still stands.” The trial court filed an order on June 21, 2010 reversing itself in regard to the case being dismissed, and vacating that portion of the April 16, 2010 order (CP II: 200-201).

The trial court held that because Respondents had finally filed the affidavit as required by RCW 4.28.185(4) (although 10 days post-dismissal), the service became valid and the trial court erred in dismissing the cause of action *without prejudice*. The trial court held the default judgment should still remain vacated, but did not specify the reason. The Opackis were then instructed in the June 21, 2010 order that they had 60 days from the date the affidavit of service was filed, April 26, 2010, to file an answer: No later than June, 25, 2010³ (CP II: 200-201).

The Opackis timely moved the trial court for reconsideration per CR 59 (CP II: 203-212). The Opackis contended the original decision on April 16, 2010 dismissing the case was proper and in accordance with the

³ The effect of this ruling gave Appellants only 4 days to file an answer.

law. At the time the order was signed on April 16, 2010, the trial court did not have personal jurisdiction over the Opackis because Respondents had not filed the affidavit required by RCW 4.28.185(4). *The April 16, 2010 order was proper on its face and therefore no error of law was made by the trial court.* Respondents' motion for reconsideration under CR 59 should not have been granted, as they failed to offer any authority that would allow the court *de facto* jurisdiction after dismissal.

The Opackis also requested clarification of the April 16, 2010 order so that it stated the default judgment was "void" in accordance with the law and per Appellants' original motion made under CR 60(b)(5). A proposed order was filed with Opackis' motion for reconsideration (CP II: 213-215).

The trial court denied the Opackis' motion for reconsideration on July 14, 2010 (CP II: 218-220). Again, Opackis' request for attorney fees was denied. However, the court noted that it had not ruled on the issue of long-arm jurisdiction arising from the eBay transaction, raised in Opackis' original motion filed on March 11, 2010 (CP I: 74-79), but invited the parties to re-note the issue. The order was silent as to the requested clarification by the Opackis that the trial court's order state clearly that the default judgment was "void," not "voidable" (CP II: 218-220).

In accordance with the trial court's ruling, the Opackis re-noted their original argument regarding a lack of sufficient facts to establish long-arm jurisdiction under RCW 4.28.185. Opackis also requested once again that the trial court clarify the language regarding whether or not the default judgment was "void," rather than "voidable" (CP II: 222-230). On July 30, 2010 the trial court denied Opackis' motion and did not clarify whether the judgment was "void" or "voidable" (CP II: 345-346). The Opackis timely filed their notice of appeal on August 10, 2010.

Respondents moved for a dismissal of the appeal contending that the Opackis incorrectly designated their appeal as a matter of right under RAP 2.2. Respondents contended that this matter is one for discretionary review under RAP 2.3. Opackis responded that the appeal was proper under RAP 2.2 (10), or in the alternative, the Court should hear the appeal as the trial court's ruling conflicts with relevant case law, departs from the normal course of judicial proceedings, and is an obvious error. Commissioner Skerlec denied Respondents' motion to dismiss and directed Appellants to file a motion for discretionary review.

On January 11, 2011 Commissioner Skerlec granted the Opackis' motion for discretionary review. The Opackis now request this Court hold that there is no personal jurisdiction over them in this case.

E. ARGUMENT

Standard of Review

If the underlying facts are undisputed, the trial court's assertion of personal jurisdiction is a question of law reviewable de novo. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627, 630 (1991) (discretionary review granted of a denial of motion for summary judgment for lack of jurisdiction).

Issue 1: The Court did not have personal jurisdiction, therefore a dismissal was the only course of action. Allowing the case to go forward is an obvious error and departs from the accepted and usual course of judicial proceedings. RAP 2.3 (b) (1) & (3).

The trial court permitting Respondents to file the necessary affidavit per RCW 4.28.185(4) after it had already dismissed the case is an obvious error because it *de facto* extended jurisdiction where none existed and without lawful authority. Opackis contend that this clearly departs from the accepted legal standard, and since there never was, is, or can be jurisdiction in this case under this cause number⁴, all proceedings going forward would be useless. The trial court exceeded its authority by accepting the affidavit of service. *Judici officium suum excendenti non*

⁴ Nothing precluded Plaintiff from starting over and properly serving and filing the affidavit under a new cause number.

paretur- No obedience is to be given a judge exceeding his jurisdiction. Every order the trial court issues is “void” and would neither be obeyed nor enforced in Michigan, since there is no personal jurisdiction over the Opackis in these proceedings.

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); *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). See also *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974), *overruled on other grounds* (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. Citing to 21 C.J.S. Courts s 118 (1940)); *In re Marriage of Powell*, 84 Wn. App. 432, 438, 927 P.2d 1154, 1157 (1996) (When a court lacks jurisdiction over a party, any orders beyond those changing the legal marital status are not binding.); *Marley v. Dep't of Labor & Indus. of State*, 125 Wn. 2d 533, 541, 886 P.2d 189, 194 (1994) (Court concludes that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim); *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). (Lack of jurisdiction “renders the superior court powerless to pass on the merits of the case.” In this circumstance, dismissal without prejudice is the limit of what a court may do.); *State v. Nw. Magnesite Co.*, 28 Wn. 2d 1, 42, 182 P.2d 643, 664 (1947) (trial court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, had no power to pass upon the merits of the case. Dismissal without prejudice was the only option.)

Respondents’ failure to follow RCW 4.28.185(4) resulted in no personal jurisdiction over the Opackis. In the case of *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 591 P.2d 1222 (1979), an appeal was taken directly from an order denying a motion to vacate a default judgment for failure to follow RCW 4.28.185(4). The *Schell* case was reversed, *not* remanded, for further proceedings to allow the Plaintiff to file the affidavit under RCW 4.28.185(4) and permit the complaint to “stand.”

In another case on point, *Hatch v. Princess Louise Corp.*, 13 Wn.App. 378, 534 P.2d 1036 (1975), the Appellants appealed a default judgment that was entered where the affidavit required under RCW 4.28.185 was filed several months after the default judgment was obtained. The *Hatch* Court stated:

The controlling question in this case is whether the trial court had personam jurisdiction of the Princess Louise Corporation when a default judgment was entered against it. **We hold that the court did not.** [emphasis added].

Id. at 379. In *Hatch*, the judgment was vacated due to lack of in personam jurisdiction and the trial court was reversed; the case was *not* remanded back to vacate the default judgment as “voidable” and allow the late filing of the affidavit to relate back to the original service.

In *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 153 P.3d 222, 224 (2007), when the trial court refused to vacate the default judgment, finding jurisdiction over the defendant, despite the plaintiff’s failure to comply with RCW 4.28.185, the defendant appealed. Again, the result was a reversal of the trial court, not a remand back with the complaint still standing.

Commissioner Skerlec noted in her ruling that the trial court relied upon the holding in *Golden Gate Hop Ranch Inc. v. Velsicol Chem Corp.*, 66 Wn.2d 469 472, 403 P.2d 351 (1965) where Judge Verser held that no Washington Court had vacated the default judgment *and* dismissed the cause of action. However in each of the above cases, *Schell*, *Hatch* and *Sharebuilders*, each decision was a reversal from a denial to vacate the default judgment, effectively terminating the case for lack of personal jurisdiction. That was not the result in our case. Rather the trial court

vacated the default judgment for lack of personal jurisdiction, at first dismissing the case, but then accepted the affidavit 10 days later, resurrecting the case, and relating jurisdiction back to the original service.

Further, the trial court misapplied *Golden Gate's* holding, relying upon the similar rule set forth in *Ryland v. Universal Oil Co., Goodman Div.*, 8 Wn. App. 43, 504 P.2d 1171 (1972) that substantial compliance, and not strict compliance, is required where personal service is made and where no injury results to defendant by late filing of an affidavit averring that service cannot be made within state. Our case however has facts distinguishable from *Ryland* and *Golden Gate*. In fact, that difference is set forth in *Schell* where Division III stated the affidavit required under RCW 4.28.185(4) – although not required to be filed simultaneously with the summons and complaint – must precede judgment. *Schell* 22 Wn.App at 790-791. Whether strict compliance as set forth in *Schell, Id.* and *Hatch*, 13 Wn.App at 379, or substantial compliance as set forth in *Golden Gate* and *Ryland*, 8 Wn.App at 45 applies appears to turn on whether the late filing prejudices or injures the defendant. There can be no real dispute that an unknown default judgment of \$68,774.43, bearing interest at 12% per annum has the capacity to substantially prejudice and injure the Opackis (CP I: 62-64; I: 71-73). *Schell* had similar facts, where two months after default, the defendant moved to set aside the judgment for

lack of compliance with RCW 4.28.185(4). The plaintiff filed the affidavit the next day, and the trial court erroneously found this to be substantial compliance. In reversing the trial court, the *Schell* Court held:

A judgment entered without valid personal jurisdiction over the defendant violates due process. *Hatch v. Princess Louise Corp.* (citation omitted), is directly on point and we adopt the ratio decidendi thereof.

Schell, 22 Wn.App at 791. Clearly, if entry of a judgment without valid personal jurisdiction violates due process, then so does extending de facto jurisdiction to file the affidavit under RCW 4.28.185(4) to allow a complaint to “still stand.”

Regardless, even if the Opackis had appeared before judgment, by law they were entitled to immediate dismissal, as noted by Commissioner Skerlec and based upon the holdings in *Mendoza, supra*; *Hous. Auth. of City of Everett, supra*; and *Bethel, supra*: If the trial court has not acquired jurisdiction over person of defendant, the defendant is entitled to immediate dismissal. Therefore, the April 16, 2010 dismissal was the only course of action available to the trial court. The Opackis request this case be dismissed.

Issue 2: The Court committed an error by granting the motion for reconsideration per CR 59 without any authority to do so.

The trial court held that it could have granted a continuance at the hearing on Appellants' motion to dismiss because of an alleged new issue raised by Appellants in the reply brief⁵ and still allowed the Respondents to file the required affidavit under RCW 4.28.185(4) (CP I: 200). The Opackis contend that Respondents waived the Court's offer to continue (RP 3-5), but *regardless*, the trial court had no jurisdiction to even grant a continuance. All it could do was to immediately dismiss the case.

Under what authority can a trial court simply resurrect a case, ignoring constitutional due process requirements, after a dismissal? Respondent offered none and the Court cited to none that would permit it to accept the affidavit 10 days after dismissal, resurrecting the case and somehow perfecting jurisdiction. Both *Schell* and *Hatch* indicate that due process is paramount when obtaining jurisdiction over out-of-state residents. The granting of the Respondents' CR 59 motion for reconsideration must be based upon some legal principle that permitted the Court to extend jurisdiction post-dismissal to allow the filing of the

⁵ Appellants Opackis did not raise a "new issue" in the reply brief as the original motion was to dismiss under RCW 4.28.185. Opackis simply brought to the Court's attention in the reply brief the lack of personal jurisdiction created by Respondents' failure to follow the statute; the basis for the original motion. The trial court offered to allow a continuance. Respondents refused and went forward with the hearing.

affidavit. CR 59 sets forth nine specific reasons why a court may grant reconsideration: None of these apply. Respondents failed to show any authority that allowed the trial court to accept the late filed affidavit post-dismissal, extending *de facto* personal jurisdiction and resurrecting the case.

No authority was given that post-dismissal filing of the affidavit of service related back to the original complaint. In fact, it has been held that amendments per CR 15 may be made only so long as the superior court retains jurisdiction. *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn. 2d 690, 695, 658 P.2d 648, 651 (1983). The Opackis contend that CR 15 relation back doctrine does not apply in this case. Regardless, even analogizing the facts to the relation back doctrine, the superior court must show a substantial reason to extend jurisdiction post dismissal, otherwise constitutional due process is violated. Since no jurisdiction existed on April 16, 2010, there was nothing to extend.

Respondents appear to contend that the trial court, under CR 59, retains some jurisdiction of the case after the dismissal to correct legal errors. There does not appear to be any Washington case under CR 59 supporting this proposed rule. Nonetheless, the application of post-dismissal jurisdiction advanced by Respondents is overly broad and unnecessary when applied to these facts. *De facto* jurisdiction post-

dismissal could theoretically apply under CR 59 to correct clear legal errors by the trial court, but as noted above, Opackis strongly contend that there should be a **substantial** reason to do so as not to violate constitutional due process. What those reasons may be is not before this court, as this case can be decided on much narrower grounds. Clearly there was no error in law by the trial court in granting the dismissal without prejudice on April 16, 2010 when reviewing *Mendoza* and *Bethel* and the other cited cases (immediate dismissal) in conjunction with *Schell*, *Hatch*, and *Sharebuilders* (strict compliance). Yet, Respondents contend that post-dismissal *de facto* jurisdiction applies so that a party can correct procedural errors created by that party; such as filing the required affidavit after the Opackis challenged the lack of personal jurisdiction due to Respondents' non-compliance. This type of "do over" rule clearly contradicts the "strict compliance" requirement above. Such an erroneously proposed rule clearly chills constitutional due process requirements as set forth in RCW 4.28.185 and in *Schell*, *Hatch*, and *Sharebuilders*. There was no error of law: The Respondents did not meet the burden of proof under CR 59 and therefore, the April 16, 2010 dismissal is valid. The Opackis request this case be dismissed for lack of personal jurisdiction.

Issue 3: The trial court committed an obvious error and departed from the normal course of judicial proceedings by reversing a dismissal after holding a default judgment should be vacated for lack of personal jurisdiction (i.e. “void”).

The trial court permitting the complaint to still stand and the service to relate back has, in effect, made the judgment “voidable,” not “void,” contrary to the motion made under CR 60 (b)(5). The ruling we have in this case per the April 16, 2010 Order (CP I: 169-171) is:

“The Order of Default against Defendant is set aside for lack of personal jurisdiction over the Defendants.”

However, the case is *not* dismissed per the June 21, 2010 Order (CP II: 200-201), as the trial court ruled:

“Thus it appears to this court that while the default must be vacated, now that Plaintiffs have filed the affidavit as required by RCW 4.28.185(4) the service is valid...That portion of the April 16, 2010 Order which dismissed the action is VACATED.”

Despite Appellants repeated request for the Court to clarify the reason for vacating the default judgment, the trial court declined to do so. Therefore, it appears that the trial court never overruled itself on the issue of setting aside the default for lack of personal jurisdiction. The only logical conclusion that can be drawn from this set of facts is that the default judgment is “**void**:”

[a] void judgment should be clearly distinguished from one which is merely erroneous or voidable. ... Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. This is true even if there is a fundamental error of law appearing upon the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid.

Dike v. Dike, 75 Wn. 2d 1, 8, 448 P.2d 490, 494 (1968). The trial court's order on April 16, 2010 vacated the default judgment for lack of personal jurisdiction, but did not specifically say it was "void." The Washington Practice series gives guidance on this issue:

The definition of void has occasionally been troublesome. A void judgment should not be confused with a voidable judgment—normally meaning a judgment that is vulnerable to attack under CR 60 for some reason other than being void. Attacks upon judgments that are merely voidable, rather than void, are not governed by CR 60(b)(5) and must be based upon some other provision in CR 60, and are subject to any applicable time limits imposed by CR 60.

4 Wash. Prac., *Rules Practice CR 60* (5th ed.).

Throughout the subsequent proceedings in the trial court, the Opackis repeatedly requested of Judge Verser that he clarify the issue of whether or not the order vacating the judgment was "void" (vacated for lack of personal jurisdiction) or "voidable" (vacated for some other reason

such as irregularities or errors of law). No authority was advanced by Respondents regarding how and under what rule or circumstances the trial could convert the vacated judgment to “voidable,” to allow the complaint to “still stand.” This now appears to be a moot point because, before this Court, the Respondents now concede that the judgment is in fact “void.” See *Plaintiffs’ Response to Motion for Discretionary Review*, page 18. What then does the “void” judgment mean?

This Court may ask whether this inconsistency is merely trivial; the existence of a “void” judgment for lack of personal jurisdiction, but allowing a complaint to still stand, i.e personal jurisdiction to remain. This is exactly what Respondents contend. In rebuttal, the Opackis contend it is contrary to law, as again, the analysis turns on whether or not there has been adequate constitutional due process. In order for Respondents’ theory of the case to be correct, personal jurisdiction must have been created *de facto* after dismissal⁶, related back to the original complaint,⁷ stopped, and then started again.⁸ The Summons and Complaint were filed on July 20, 2009, the default judgment entered on September 22, 2009, and the Motion to Dismiss/Vacate was heard on

⁶ Presumably under CR 59

⁷ Opackis contend there is no rule or authority that would allow this.

⁸ Opackis strenuously contend there is no rule or authority that allows this, but even assuming *arguendo* one may exist when applying these facts, it grossly violates constitutional due process.

April 16, 2010. Since the inception of the case and during the next 10 months, no personal jurisdiction existed due to failure to file the affidavit. Then, on April 26, 2010 — 10 days after dismissal — jurisdiction was created by the trial court in order to allow the affidavit, thereby extending jurisdiction and relating it back to July 20, 2009, when the original complaint was filed. But to be consistent with the finding that the default judgment entered on September 22, 2009 was vacated as “void,” personal jurisdiction **could not** have existed on that date. So going forward from July 20, 2009, personal jurisdiction allegedly existed over the Opackis until some undetermined point in time in September 22, 2009, when it ceased to exist (thus “void), but then personal jurisdiction popped back up and “restarted” sometime after that date, existing once again to allow the court to accept the late filed affidavit on April 26, 2010. No explanation is offered to explain how this is possible.

Clearly this scenario must violate due process; either personal jurisdiction exists or it doesn't, it cannot start and stop and start again unless proper procedures are followed. The trial court should have simply upheld its original dismissal on April 16, 2010, and the Respondents would then have had the option to start the case again, this time properly following constitutional procedural safeguards and avoiding the need to craft rules in order to “plug” the above-described disastrous situation.

Issue 4: The Court did not have Long Arm Jurisdiction over an eBay transaction in Michigan State.

When the dismissal was entered, there existed no case law in Washington specifically addressing this type of transaction. In a world of growing e-commerce, it is incumbent on the Court of Appeals to give the public clear direction as to the rule in Washington for such scenarios. Due to the importance to the public, and the need for a clear rule, Appellants contend that there is no personal jurisdiction over them due to insufficient contacts with Washington State, and that extending jurisdiction in this case violates notions of fair play and substantial justice. However, this issue only becomes relevant at this time, if the Court determines that in fact personal jurisdiction has been obtained over the Opackis.

Issue 5: Opackis did not waive their argument concerning a lack of personal jurisdiction.

Respondents raised for the first time in oral argument before Commissioner Skerlec that Opackis have waived their right to challenge jurisdiction. Opackis contend that this new issue is untimely.

Regardless, there is no waiver here under CR 12(g). A defense for lack of personal jurisdiction is waived if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by

motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a). CR 12(h)(1). The Opackis urge this Court adopt the analysis of Commissioner Skerlec in regard to the waiver issue. See *Ruling Granting Review*, page 4.

Further, as outlined above, the Opackis original and subsequent arguments always concerned a lack of personal jurisdiction over them. Noted by this Court in *In re Marriage of Steele*, 90 Wn. App. 992, 998, 957 P.2d 247, 250 (1998), if a party wishes to claim lack of personal jurisdiction, he or she must do so (a) as soon as reasonably practicable and (b) consistently. Each and every hearing prior to this appeal had some component of challenging personal jurisdiction. In the March 11, 2010 motion, the Opackis contended that “Plaintiffs failed to establish through pleadings that Defendants are subject to the Washington Long Arm Statute RCW 4.28.185 (CP I: 76). It was not until April 6, 2010 that the Opackis noted the issue for a hearing and served notice on Respondents, directing Respondents to appear on April 16, 2010 (CP- I: 74-79). On April 14, 2010, Respondents filed their response contending compliance with RCW 4.28.185, and that the long arm statute extended jurisdiction under the facts (CP I: 100-110). Opackis reviewed the response and discovered that Respondents had failed to file an affidavit of service pursuant to RCW 4.28.185(4) and stated as such in their rebuttal brief on April 15, 2010 (CP

I: 162-164). Respondents claimed compliance with RCW 4.28.185, relying on one subsection of the statute, and Opackis rebutted by showing a failure to follow another subsection. However, the entire argument was concerning whether or not personal jurisdiction under the Washington Long Arm Statute existed. At the hearing, Respondents declined a continuance. The Opackis asked for an immediate dismissal upon finding the lack of jurisdiction for failure to follow RCW 4.28.185(4). The Opackis did not engage in defending the merits of the case. Instead they challenged personal jurisdiction from the beginning, arguing in the same motion process portions of RCW 4.28.185. Clearly there was no waiver in this case.

Issue 6: The Court of Appeals should reverse the trial court and dismiss.

Jurisdiction can be raised at any time and appellate jurisdiction is derived from RCW 2.06.030 and Wash. Const. art. IV, § 30. The rules allow a party to raise lack of jurisdiction at any time. RAP 2.5(a). See *Bour v. Johnson*, 80 Wn. App. 643, 646-47, 910 P.2d 548, 550 (1996). A party may raise a trial court's lack of jurisdiction for the first time on appeal. *Klickitat County v. Beck*, 104 Wnh. App. 453, 458, 16 P.3d 692, 695 (2001). A party may raise at any time the question of appellate court jurisdiction. RAP 2.5. Since the trial court lacked personal jurisdiction over the Opackis, then in accordance with *Sharebuilders*, *Schell*, and

Hatch, the Opackis request this Court reverse the trial court's decision and dismiss the case, not remand it, as there still is no personal jurisdiction over the Opackis that would allow the trial court to hear the case on the merits.

Issue 7: Opackis request that their attorney fees be granted.

Pursuant to RCW 4.28.185(5) and RAP 18.1, the Opackis respectfully request their attorney fees and costs be awarded. The Court may award reasonable attorney fees to a foreign defendant who prevails in an action on the basis that the court lacked personal jurisdiction under the long-arm statute. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 722, 919 P.2d 1243, 1255 (1996) *modified*, 932 P.2d 664 (1997).

Respondents' failure to comply with RCW 4.28.185(4) necessitated this appeal. See *Sharebuilder*, 137 Wn. App. at 33. However, it is not just the cost of the appeal that the Opackis have borne: Each subsequent hearing in the trial court after the April 16, 2010 dismissal was caused by the Respondents' refusal to start over properly by filing the cause of action again and correctly following statutory procedures. Instead, Respondents filed the motion for reconsideration on April 26, 2010. This required a written brief and another oral argument. The trial court's erroneous ruling reversing itself on June 21, 2010 resulted

in the Opackis moving for their own reconsideration urging the trial court to reinstate its original April 16, 2010 order of dismissal without prejudice. Again, briefs were written and oral argument was scheduled. On July 14, 2010 the trial court erroneously upheld its June 21, 2010 decision, but invited the parties to re-note an issue concerning personal jurisdiction that the Opackis originally raised in the first March 11, 2010 motion, but that was not ruled upon by the trial court. The Opackis consistently continued to challenge jurisdiction, so again, asserting the lack of personal jurisdiction, they briefed the issue and appeared before the trial court on July 30, 2010, where again the Opackis' motion was denied and the trial court failed to clarify whether the judgment was "void" or "voidable." Each time, the Opackis' request for attorney fees under RCW 4.28.185(5) was denied. Yet each time the Opackis attempted to challenge jurisdiction, Respondents demanded that their attorney fees should be paid (CP I: 111-161; I; 176-186; II 252-329).

In the Court of Appeals, Respondents moved for a dismissal of the appeal, incorrectly relying upon RAP 18.9, which was subsequently denied. The Opackis had to respond to that motion. In this case, significant time and costs have been incurred because of a failure on Respondents' part. Yet, should the Opackis reasonably be required to bear the burden for merely asking that they be afforded constitutional due

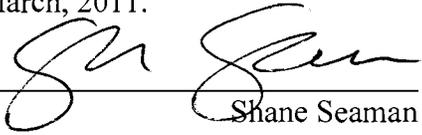
process? It was not their procedural mistake that created this problem. They respectfully request their attorney fees be awarded and will submit the appropriate cost bill if so granted.

F. CONCLUSION

There is no personal jurisdiction over the Opackis. The trial court committed an obvious error that would render further proceedings useless, as the law clearly holds that the only action a trial court may take when it lacks personal jurisdiction in a case is dismissal. This did not occur. The trial court departed from the accepted and usual course of judicial proceedings when it created *de facto* jurisdiction after a dismissal to allow Respondents to cure a violation of RCW 4.28.185(4). The trial court did not have this authority. It did not have personal jurisdiction. Respondents did not meet the requisite burden of proof under CR 59 demonstrating an error with the April 16, 2010 order of dismissal, therefore, the trial court erred by granting Respondents' motion for reconsideration. If Respondents concede the judgment is "void" for lack of personal jurisdiction, then it is a violation of constitutional due process in this case for jurisdiction to be created post-dismissal, relate back, start, stop, and start again. The Opackis did not waive their defense of lack of personal

jurisdiction. The Opackis request their attorney fees and costs. The Opackis respectfully request that this case be dismissed.

Respectfully submitted this 29 day of March, 2011.



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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 MAILING

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' Brief
- Declaration of Mailing

| 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 type="checkbox"/> E-mail |

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 29th day of March, 2011.

[Signature]
 Brandy Boyd
 Paralegal to Knauss & Seaman PLLC