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

DANJEL ENTERPRISES, LLC,
a Washington State limited liability company,

Plaintiff/Respondent,

v.

FIDELITY NATIONAL TITLE COMPANY OF WASHINGTON, INC.,
a Washington corporation; and RUDOLPH I. VALDEZ and
JANE DOE VALDEZ, husband and wife
and the marital community composed thereof;

Defendants/Petitioners.

**BRIEF OF PETITIONER FIDELITY NATIONAL TITLE
COMPANY OF WASHINGTON, INC.**

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I. INTRODUCTION

The issue before the court is as simple as it is profound: does a trial court have authority to summarily order a defendant to deposit funds in which it claims a right into the registry of the court? The legislature, this court, and every other jurisdiction of which counsel is aware have already answered this question unequivocally – no. Nevertheless, this is exactly what the trial court did when it ordered Petitioner Fidelity to deposit \$150,000 that Fidelity claims as its own into the court's registry, where it presumably will be held until a jury decides the merits of Respondent's claims at trial.

In *Rainier Nat'l Bank v. McCracken*, , this court held:

A party who claims title or right to funds in his or her possession cannot be compelled to pay such funds into the registry of the court in a summary manner, or be held in contempt for the failure to do so.¹

Fidelity asks the court to reaffirm this decision and reverse the trial court's order.

¹ 26 Wn. App. 498, 508-511, 615 P.2d 469 (1980).

II. ASSIGNMENT OF ERROR

A. Assignment of Error.

The trial court erred when it summarily ordered Fidelity to deposit \$150,000, plus pre-judgment interest, into the registry of the court. CP 146-148.

B. Issues Pertaining to Assignment of Error.

1. Where a party to a dispute denies holding funds that belong to another party and claims right to funds in its possession, does a trial court have authority to compel the party to pay such funds into the registry of the court pending a determination on the merits?

2. Is a party in contempt for failing to deposit its own funds into the registry of the court where the trial court lacks authority to order such a deposit?

III. STATEMENT OF THE CASE

A. Statement of Facts.

Respondent Danjel Enterprises, LLC (“Danjel”), owns a parcel of real property at 16006 - 75th Avenue West, Edmonds, Snohomish County, Washington. CP 208. Danjel has two members, Vladan Milosavljevic and Lari-Anne Milosavljevic. CP 179, 205. On May 15, 2007, Mr. Milosavljevic and Rudolph Valdez

negotiated and signed a purchase and sale agreement for the sale of the parcel. CP 208. The stated purchase price was \$3,380,000, and the closing date for the transaction was June 29, 2007. *Id.*

The purchase and sale agreement required Mr. Valdez to deposit \$150,000 in earnest money once the inspection contingency was satisfied. CP 214. On June 6, 2007, Fidelity sent Danjel a number of documents necessary to set up the escrow for the transaction. CP 228. The Closing Agreement and Escrow Instructions, if signed by the parties and approved and accepted by Fidelity, would have appointed Fidelity National Title Company of Washington, Inc. as the closing and escrow agent for the transaction, and established its obligations and rights with respect to the proposed Danjel-Valdez transaction. CP 230-234. However, neither party to the transaction ever signed or returned the documents, no escrow terms were set, and no escrow agreement was consummated. *Id.*; CP 143-144.

With the inspection contingency waived and the Valdez earnest money due pursuant to the contract, Fidelity began looking for incoming wire transfers of \$150,000. CP 263-264. When a wire transfer of \$150,000.00 arrived the following Monday, June 11, 2007 (CP 264), Fidelity prepared an Incoming Wire/Direct Deposit

Confirmation, faxing it to Danjel's and Valdez's real estate brokers on June 12. CP 266-267.

That a \$150,000 wire had arrived as anticipated in the exact amount expected caused Fidelity's closing team to believe erroneously that the wire was from Valdez. It was not, however, but rather was related to a completely unrelated transaction. CP 263, 269. Valdez never deposited funds with Fidelity, and Fidelity never received any funds associated with the transaction. CP 269, 271-272.

Nine days later, on June 21, 2007 Valdez apparently decided not to go through with the purchase and signed a Rescission of Purchase and Sale Agreement. CP 274. Mr. Milosavljevic's attorney Thomas Hansen sent a letter to Fidelity's closer on June 28, 2007 – the day before the scheduled closing – instructing Fidelity to hold the earnest money, and stating that Danjel was prepared to proceed with the transaction. CP 276. Fidelity had still not received a signed escrow agreement or instructions from any party.

On June 29, the original closing date, Valdez signed an Extension of Closing Date Addendum extending the closing date to July 31. CP 278. Mr. Milosavljevic signed the Extension on July 9,

and inserted language indicating that earnest money was to be applied to the purchase price at closing. *Id.* Valdez did not sign this added language. *Id.*

On July 19, 2007, Mr. Hansen sent a letter to Fidelity demanding immediate payment of \$150,000.00 by check payable to Danjel Enterprises. CP 280. Fidelity, whose closing team had not yet realized its clerical error, reiterated that it could not disburse any earnest money funds without a written and agreed instruction from all parties. CP 282. After further investigation, Fidelity realized its mistake regarding the wire transfer, and advised Danjel that Valdez had never deposited the earnest money.

B. Procedural History.

On February 13, 2008, Danjel filed a complaint against Valdez and Fidelity. CP 359-385. Danjel sued Valdez for breach of contract for failing to deposit the earnest money into escrow. *Id.* Danjel sued Fidelity for negligent misrepresentation, violation of the Consumer Protection Act, and specific performance. *Id.* Danjel was apparently unable to find Mr. Valdez and successfully moved for default judgment against him. CP 329-330.

1. Danjel files motion for summary judgment requesting interpleader of funds.

On January 13, 2009, Danjel moved for summary judgment against Fidelity, asking the court to order Fidelity to interplead \$150,000 into the registry of the court with prejudgment interest, and to find that Fidelity's error violated Washington's Consumer Protection Act. CP 316-328. On February 13, 2009, the trial court granted in part Danjel's motion, and ordered Fidelity to pay \$150,000 into the registry of the court, with prejudgment interest dating back to June 21, 2007. CP 146-148. The court's order did not specify whether it required Fidelity to immediately interplead the Valdez funds when received from Valdez or whether the court intended Fidelity to pay its own funds into the court registry on some unspecified ground. *Id.* It was also unclear as to whether the court had made any factual findings upon which to base its decision.

Due to the confusion of the order, Fidelity moved for reconsideration (CP 126-142), which the court denied without clarification. CP 113-116. Given the lingering ambiguity, Fidelity filed a motion for discretionary review on April 16, 2009.

2. Danjel files motion for contempt against Fidelity.

On April 20, 2009, Danjel brought a motion for contempt against Fidelity, arguing that Fidelity had failed to comply with the court's order to pay the funds into the court's registry. CP 94-101. At the contempt hearing on May 7, 2009, Commissioner Lester Stewart asked whether the trial court had found that Fidelity had indeed received the earnest money from Valdez, and therefore interpleader was appropriate, or whether the order was intended to direct Fidelity to interplead the earnest money once Fidelity receives it from Valdez. CP 48. Commissioner Stewart subsequently continued the hearing to afford Fidelity the opportunity to take these issues back to the trial court for clarification and/or resolution.

3. Fidelity files CR 60 motion to vacate, modify, or stay.

On May 11, 2009, Fidelity filed a CR 60 motion asking the trial court to either 1) vacate its summary judgment order as void, 2) modify its order to require Fidelity to deposit the funds once it receives them from Valdez, or 3) stay enforcement of the order pending discretionary review. CP 69-70. The only verified evidence before the trial court as to whether Fidelity actually received the funds from Valdez is Fidelity's declaration

demonstrating that no money was received and Fidelity made a clerical error. CP 143-144. Nevertheless, the trial court denied Fidelity's motion, and ordered Fidelity to post a bond for \$150,000 pending review of its summary judgment order by this court. CP 27-28. The trial court also confirmed that the only issue it had resolved on summary judgment was that Fidelity must pay \$150,000 into the registry of the court. RP 15.

Fidelity purchased the bond as ordered by the trial court and amended its motion for discretionary review. CP 7-10 (bond).

C. Commissioner's Ruling Granting Discretionary Review.

On September 15, 2009 Commissioner William H. Ellis Jr., granted Fidelity's motion seeking discretionary review.² Commissioner Ellis ruled that 1) there has been no judgment against Fidelity and no pre-judgment attachment hearings; 2) RCW 4.44.480 does not apply because Fidelity claims right to the funds; and 3) the trial court's decision is contrary to controlling precedent.³

IV. SUMMARY OF ARGUMENT

The trial court's order directing Fidelity to deposit funds into the registry of the court pending adjudication of plaintiff's claims is

² See Commissioner's Ruling Granting Discretionary Review.

³ *Id.* at 4.

void on its face: Fidelity cannot interplead funds it does not possess, and the trial court lacks authority to compel Fidelity to pay its own money into the registry of the court. Fidelity has suffered irreparable harm by virtue of the trial court's decision, namely the expense of the bond erroneously ordered. The trial court's refusal to apply Washington's deposits in court statute, rejection of binding precedent under *McCracken*, and reliance on plainly inapposite precedent constitute error and its order on summary judgment should be reversed.

V. ARGUMENT

A. **Fidelity Never Received the Valdez Earnest Money and Therefore Cannot Be Obligated to Interplead the Funds.**

Valdez never deposited – and Fidelity never received – the \$150,000 in earnest money. Nevertheless, the trial court's summary judgment order obliges Fidelity to interplead that same earnest money deposit. As this court is aware, interpleader is a statutory device that provides a means to secure funds, the rightful ownership of which is in dispute, that are held by an entity that has no claim to the funds. *See, e.g.*, RCW 4.44.480; CR 22. The classical example is where a trustee holds funds in which two or more parties claim an interest.

Here, Fidelity holds no funds from either Valdez or Danjel, and therefore cannot interplead funds that it in fact does not possess. If Fidelity were ever to receive the Valdez funds, it would not have any claim to such funds; under such circumstances, Fidelity would promptly interplead the funds into the court registry. Since Fidelity has not received the funds, however, the order requires Fidelity to take an impossible action and is therefore void on its face.

B. The Trial Court Lacks Authority to Compel Fidelity to Pay Its Own Money into the Court's Registry.

1. Washington's deposits in court statute, RCW 4.44.480, does not support the trial court's order.

Generally, "there is no judicial authority for an order requiring deposit of the amount in controversy into the court registry, or indeed for any restraint upon the use of the defendant's unrestricted assets prior to entry of judgment." 26B C.J.S. Deposits in Court § 4. In Washington, a trial court's authority to require a party to pay money into the registry of the court during the pendency of litigation is governed by statute:

Deposits in Court – Order. When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money, or other thing capable of delivery, which being the subject of

the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in the court, or delivered to such party, with or without security, subject to further direction of the court.

RCW 4.44.480. Accordingly, a court can only order a party to deposit funds into the court registry if the party admits it holds or controls funds that belong to another party. *Accord* 26B C.J.S. Deposits in Court § 4 (“A party cannot be compelled to deposit a fund which he or she has never possessed.”).

Courts have long recognized the significant harm that could result from a court ordering a party to pay funds into the court registry where the holding party’s right to the funds is still at issue in the litigation:

If money is ordered to be brought in, which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterward be told that his view of the case was correct.

McCracken, 26 Wn.App. at 509, *citing Green v. Duvergey*, 146 Cal. 379, 80 P.234, 237 (1905). The *McCracken Court* emphasized that a party to a controversy involving the right to a sum of money cannot be required to deposit that money into the court unless the party has clearly admitted it has no right to retain it. *Id.*; *see also Borders Electronic Co., Inc. v. Whirlpool Inc.*, 531 F.Supp. 125, 128

(D.C.N.Y. 1982) (plaintiff must clearly establish that defendant is trustee of plaintiff's property or holds property belonging to plaintiff).

The *McCracken* case is remarkably similar to this case. There the bank had obtained a pre-trial order that required a party to an underlying real estate transaction to deposit more than \$43,000 in proceeds from that transaction into the court registry. That party, however, claimed right to the funds; who was actually entitled to the funds had not been determined at the time of the order. *Id.*, 510. The party holding the funds refused to pay; the trial court found the party in contempt and fined it \$100 a day to coerce compliance with the order.

Upon review, this court held the order requiring the deposit invalid. *Id.* Citing RCW 4.44.480, the Court of Appeals framed the issue concisely:

ISSUE THREE: Did the trial court err in entering a pretrial order requiring that the contested funds be paid into the registry of the court pending the outcome of this litigation and in then finding the possessors of such funds in contempt of court when they refused to obey such order?

CONCLUSION: A party who claims title or right to funds in his or her possession cannot be compelled to pay such funds into the registry of the court in a summary manner, or be held in contempt for the failure to do so.

Id. at 6, 9. Indeed, the court went into great detail about the obvious evils that would accompany such an order:

A party to a controversy involving a right to a certain sum of money or thing cannot be required to deposit that money or thing in court unless it is either clearly admitted in his pleadings or shown in some proceeding in the cause that he has himself no right to retain it and that the other party to the action is entitled to it If the party alleged to hold as trustee claims title or right to all or part of the funds in his possession, the court is without jurisdiction to compel him to surrender them by ordering a deposit to the court, since that constitutes an issue which should not be tried in this summary manner, but one which requires a judicial determination, on the hearing of all the facts, that he has no right to the funds The statute does not authorize an order unless it is shown that a party to an action actually has a fund or property in his possession or under his control.

Id. at 510, citing *In re Elias*, 209 Cal. App. 2d 262, 25 Cal. Rptr. 739, 747-48 (1962).

The court went on to note that since the party that held the funds at all times claimed title and right to the funds, and since the issue had not been judicially determined, the order requiring them to pay the funds into the court registry was invalid, as was the contempt order and fine. *Id.* at 510-511.

This case presents the same scenario, and *McCracken* unequivocally establishes the lack of validity of the trial court's summary judgment order. Fidelity claims a right to the funds in its

possession and does not admit that it holds funds belonging to Danjel. Therefore, the trial court's order is contrary to *McCracken* and not otherwise permitted under RCW 4.44.480.

2. No other authority permits the trial court to compel Fidelity to deposit \$150,000 into the court's registry.

Notably, at oral argument the trial court commented that RCW 4.44.480 does not "necessarily" control here, and suggested instead that the court has an inherent right to compel a party to pay its funds into the court. CP 21-22. The trial court cited *First Nat'l Bank v. Baker*, 141 Wn. 672, 252 P. 105 (1927), for this proposition, though conceded it did not have "the time to do an exhaustive search on this" issue. *Id.* In *Baker*, the Court ordered a lumber company to interplead funds to which plaintiff bank and defendant administratrix both claimed rights. The Court stated:

We see no good reason, nor is any suggested, why the court hasn't the power to require a fund over which there is a controversy to be paid into court where one of the parties to that controversy is an administratrix as much so as it has in any other kind of a case.

Id. at 674.

However, *Baker* presents a classical and proper example of interpleader as now codified at RCW 4.44.480: the lumber company did not dispute that the funds belonged to another party,

and therefore interpleader of the funds was appropriate. Here, Fidelity does not possess the funds that Danjel seeks, and in fact disputes that it owes any amount to Danjel. Consequently, the trial court's order is not supported by *Baker*.

To the extent the trial court believes *Baker* gives it *carte blanche* to order defendants to pay disputed sums to the court prior to the adjudication of plaintiffs' claims, this court has already foreclosed this interpretation:

We do not consider [*Baker*] controlling here because on the face of that ruling, and from the lack of any authority cited in the opinion to support it, it seems obvious that the deposits in court statute (the predecessor to RCW 4.44.480 set out above) was not cited to the court and was therefore overlooked.

McCracken, 26 Wn.App. at 510.

C. The Trial Court's Order Deprived Fidelity of Its Right to Due Process.

More fundamentally, the trial court's order requiring Fidelity to deposit its own money prior to an adjudication on the merits violates due process of law. It is well established that an individual may not be deprived of his property without due process.⁴ Due process requires a judicial determination on the merits of the

⁴ See Fourth Amendment to the United States Constitution and Article One, § 3 of the Washington State Constitution.

underlying claims. *E.g.*, *Van Blaricom v. Kronenberg*, 112 Wn.App. 501, 508, 50 P.3d 266, 270 (2002) *citing Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (“Due process requires, at a minimum, that deprivation of property be preceded by notice and opportunity for a hearing appropriate to the case.”); *accord McCracken, supra; cf. RCW 4.44.480 and CR 67.*

Here, the trial court’s order is in fact an attachment of Fidelity’s property. However, the legislature has painstakingly laid out the due process requirements for a prejudgment attachment. See RCW Chapter 6.25. That chapter contains numerous protections to guard against improper prejudgment attachments, none of which were applied in this case. *Cf. Borders*, 531 F.Supp. at 125, 128 (applying deposits statute where funds are disputed “would, in effect, be giving the plaintiffs in advance of judgment the benefit of an attachment”). The trial court erroneously substituted its own idea of due process – essentially none – for that required by statute.

At oral argument on Fidelity’s CR 60 motion, the trial court justified the attachment by stating that “The Court is not requiring you to pay the money yet ... the Court is only ordering the money

be paid into the Court registry pending the outcome.” CP 15. Fidelity respectfully suggests the trial court misses the point; in either scenario Fidelity is being compelled to surrender funds that it claims as its own.

Simply put, Danjel did not seek a writ of attachment; rather, it moved the trial court to summarily compel Fidelity to deposit its funds with the court. The trial court made no findings of fact – it could not, as all relevant facts were disputed – but granted Danjel’s motion notwithstanding. By failing to follow the prejudgment attachment requirements of RCW 6.25, the court deprived Fidelity of due process.

D. Fidelity Is Not In Contempt for Failing to Deposit the Funds.

As previously stated, a party that claims right to funds in its possession “cannot be compelled to pay such funds into the registry of the court in a summary manner, or be held in contempt for the failure to do so.” *McCracken*, 26 Wn.App. at 508 (*emphasis added*); see also Order Granting Review, p. 4. Because the trial court lacked jurisdiction to compel Fidelity to deposit \$150,000 into the registry of the court, Fidelity was not in contempt for failing to do so. Although no decision has yet been entered on Danjel’s motion

for contempt yet (the hearing has been continued), Fidelity respectfully asks this court to reaffirm its holding under *McCracken* that a party in these circumstances is not in contempt for failing to deposit funds into the registry of the court.

VI. CONCLUSION

Fidelity does not possess the funds at issue, and denies it owes Danjel any money on any theory of liability. The trial court's order requiring Fidelity to interplead its own funds violates state law, both statutory and precedent. Fidelity respectfully asks the court to reverse the trial court's order requiring Fidelity to pay \$150,000 into the registry of the court with prejudgment interest.

Dated this 14th day of January, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of *Petitioner's Opening Brief* on the following individuals:

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VIA FIRST CLASS MAIL
 VIA ELECTRONIC MAIL
(Per Agreement)

VIA MESSENGER

Dated this 14th day of January, 2010, at Seattle,
Washington.



Lisa L. Smith