

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

**DIVISION II**

SCOTT DAVIS and EVE EVES,

Respondents,

v.

PAUL and JANE DOE OPACKI,

Petitioners,

No. 41087-7-II

UNPUBLISHED OPINION

Penoyar, J. — Michigan residents Paul and Jennifer Opacki appeal the trial court’s exercise of jurisdiction over them. In 2009, Scott Davis and Eve Eves brought a lawsuit in Jefferson County Superior Court against the Opackis, alleging multiple causes of action arising from an eBay transaction between the two parties.

The trial court dismissed the case without prejudice for Davis and Eves’s failure to file an affidavit in compliance with RCW 4.28.185(4).<sup>1</sup> Davis and Eves then moved for reconsideration, attaching their affidavit to their motion; the trial court reversed its dismissal. We granted discretionary review. The Opackis argue that the trial court erred by allowing Davis and Eves to file the affidavit after it had dismissed their case. The Opackis argue, in the alternative, that the trial court erred by exercising long-arm jurisdiction over them. Because the trial court (1) had jurisdiction to accept the affidavit Davis and Eves filed and (2) properly exercised long-arm jurisdiction over the Opackis, we affirm.

**FACTS**

On May 6, 2009, the Opackis were served with Davis and Eve’s summons and complaint,

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<sup>1</sup> RCW 4.28.185(4) reads: “Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.”

which alleged several claims, including breach of contract, violation of the Automobile Dealers Unfair Practices Act,<sup>2</sup> violation of the Consumer Protection Act,<sup>3</sup> breach of the implied warranty of merchantability, fraud, and negligent misrepresentation. According to the complaint, Davis and Eves entered into a purchase and sale transaction with Paul Opacki for an Airstream Classic travel trailer on eBay. Allegedly, Davis and Eves paid Opacki<sup>4</sup> through a bank wire transfer, received shipment of the trailer, and then noticed that the trailer was unusable due to damage from water leakage. The complaint alleged that Opacki “is engaged in interstate commerce and sells goods nationwide to the public via the website ebay.com.” Clerk’s Papers (CP) at 2.

On July 20, Davis and Eves filed their complaint in Jefferson County Superior Court. On July 27, Davis and Eves moved for entry of default on the basis that the Opackis had not answered or filed a responsive pleading within 60 days of being served with the summons and complaint. The trial court entered a default judgment against the Opackis.

Davis and Eves then sought enforcement of the judgment in Michigan. On March 11, 2010, the Opackis filed a motion, under CR 60(b)(5),<sup>5</sup> to vacate the default judgment for lack of jurisdiction. The Opackis argued that Davis and Eves had failed to establish that the Opackis were subject to RCW 4.28.185, the “Washington Long Arm Statute.” CP at 76.

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<sup>2</sup> RCW 46.70.180.

<sup>3</sup> Chapter 19.86 RCW.

<sup>4</sup> The lawsuit was filed against Paul Opacki, Jane Doe Opacki, and their marital community; however, the facts in the complaint only refer to Davis and Eves’s dealings with Paul Opacki. Accordingly, we refer to Paul Opacki as “Opacki” in the facts section but refer to the Opackis when discussing the legal issues.

<sup>5</sup> Under CR 60(b)(5), the court may relieve a party from a final judgment or order when the judgment is void.

The trial court found that Davis and Eves had

failed to establish by declaration valid service of process on an out of state resident cannot be made upon Defendant within the State. The long-arm statute, RCW[] 4.28.185, provides that when personal jurisdiction is predicated upon the long-arm statute, service of process outside the state shall be valid only when an affidavit (or declaration) is made and filed to the effect that service cannot be made within the state.

CP at 170. Accordingly, the trial court (1) vacated the default judgment for lack of personal jurisdiction and (2) dismissed the case without prejudice. The Opackis requested attorney fees but the trial court denied their request.

Davis and Eves moved for reconsideration under CR 59, attached the RCW 4.28.185(4) affidavit to their motion, and requested that the court vacate the portion of its order that had dismissed the case. The affidavit states, “Plaintiffs were unable to serve the Defendants in Washington because the Defendants are residents of Hudsonville, Michigan, and do business with Washington state residents via the eBay auction website.” CP at 184.

The trial court concluded that “now that Plaintiffs have filed the affidavit as required by RCW 4.28.185(4) the service is valid. Thus the Court erred in dismissing the cause of action,” granted Davis and Eves’s motion for reconsideration, and again denied the Opackis’ motion for attorney fees. CP at 201.

The Opackis moved for reconsideration of the trial court’s order. The trial court denied the Opackis’ motion. The trial court reasoned, in part:

Plaintiffs could have received a one or two week continuance of the April 16, 2010 hearing in order to file the affidavit and prepare to argue the new issue. The entire issue was not raised in defendants’ original motion but only in defendants’ reply to plaintiffs’ response, only a day before the hearing. Had the defendants raised this issue in the original motion, the affidavit most assuredly would have been filed prior to any hearing on the motion. It certainly would not promote any interest to punish the plaintiffs for not seeking a continuance to respond to this new issue not

raised by defendants until a day before the hearing, which would have necessarily increased litigation expenses for all parties.

CP at 218.

The Opackis then moved for dismissal under RCW 4.28.185 and “clarification of the default judgment being ‘void.’” CP at 222. The Opackis argued that “there still remains a lack of personal jurisdiction in this case, and therefore dismissal with prejudice is warranted” because Davis and Eves “do not meet the burden of proof establishing jurisdiction over Michigan residents for an [eBay] transaction that took place in Michigan.” CP at 224. The trial court denied the motion. The Opackis moved for discretionary review of the trial court’s (1) order denying their motion for dismissal and clarification of the default judgment being void, (2) order denying their motion for reconsideration, (3) order granting Davis and Eves’s motion for reconsideration, and (4) order vacating the default judgment. We granted discretionary review.

#### ANALYSIS

##### I. Personal Jurisdiction: Service of Process

First, the Opackis argue that Davis and Eves’s “failure to follow RCW 4.28.185(4) resulted in no personal jurisdiction over the Opackis.” Appellants’ Br. at 16. Thus, they contend, the trial court could only dismiss their case without prejudice and erred when it allowed Davis and Eves to file the necessary affidavit after it had already dismissed the case. We conclude that the trial court properly allowed Davis and Eves to file the necessary affidavit.

Whether a court has jurisdiction is a question of law subject to de novo review. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). “Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party, and a judgment entered

without such jurisdiction is void.” *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994). “If the court had not acquired jurisdiction over the person of the defendant, she would ordinarily be entitled to immediate dismissal.” *Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970); *see also Mendoza v. Neudorfer Eng’rs, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008).

“Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.” RCW 4.28.185(4). The affidavit must be filed before judgment and should describe the circumstances that prevent in-state service. *Sharebuilder Secs., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007). “The statute [RCW 4.28.185(4)] does not provide that the affidavit must be filed before the summons and complaint are served, but simply that the service will be valid only when such an affidavit is filed. Consequently, the service became valid when the affidavit was filed.” *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 380, 534 P.2d 1036 (1975) (quoting *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 351 (1965)).

If a plaintiff has not complied with RCW 4.28.185(4), then there is no personal jurisdiction and the judgment is void. In *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 790, 591 P.2d 1222 (1979), the plaintiff filed the required affidavit a day after the trial court entered a default judgment against the defendants. The court held that the late filing did not constitute substantial compliance with RCW 4.28.185(4) and concluded that the default judgment was void. *Schell*, 22 Wn. App. at 791-92. In *Sharebuilder Securities*, the court vacated a default judgment when the affidavit filed did not describe the circumstances that prevented in-state service. 137 Wn. App. at 334-35.

The Opackis argue that dismissal wiped the legal slate clean, that the order of dismissal meant the case ceased to exist. Davis and Eves contend that “[a]lthough the affidavit was filed with Davis’ motion for reconsideration, jurisdiction by virtue of proper service was established once the affidavit was filed.” Resp’ts’ Br. at 11. They contend that the trial court “did not ‘resurrect’ the case as [the] Opackis claim—the court never lost jurisdiction in the first place.” Resp’ts’ Br. at 10.

The cases the parties cited—*Schell*, *Hatch*, *Golden Gate Hop Ranch*, and *Sharebuilder Securities*—all address the dismissal of a default judgment and not the dismissal of a case in its entirety. The dismissal of the case was not at issue in those cases. Those cases do indicate, however, that when a plaintiff has not complied with RCW 4.28.185(4), the court does not have personal jurisdiction. See *Sharebuilder Secs.*, 137 Wn. App. at 335; *Hatch*, 13 Wn. App. at 380. Here, the trial court properly and immediately vacated the default judgment and dismissed the case without prejudice for lack of jurisdiction over the Opackis. Thus, the dispositive issue is the jurisdictional status of the case after the trial court entered the dismissal order.

“Jurisdiction means the power to hear and determine.” *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996) (quoting *State ex rel. McGlothern v. Superior Court*, 112 Wash. 501, 505, 192 P. 937 (1920)). Jurisdiction “is commonly divided for analytical purposes into jurisdiction over the parties, and jurisdiction over the subject matter. Jurisdiction over the subject matter can be further subdivided into jurisdiction over things, and jurisdiction to entertain a particular type of case, as granted by the Constitution or the legislature.” 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 2.1, at 9 (2d ed. 2009). When this case was filed, the court had jurisdiction over the subject matter of the action but not personal jurisdiction over the

Opackis. This is a common situation because many, perhaps most, lawsuits are filed before they are served.

The question here is whether jurisdiction over the case and the subject matter ended when the order of dismissal was entered; did that order deprive the court of jurisdiction over the case and the subject matter? We conclude that it did not. We reach this conclusion because a court's jurisdiction is a creature of constitutional and statutory law, not of the court's actions. In other words, a court may make a legal determination of whether it has jurisdiction but it cannot create or destroy that jurisdiction. Thus, the entry of the order of dismissal did not end the court's jurisdiction over the case and the subject matter. The trial court had, as it would in any other case, authority to consider a motion for reconsideration under CR 59 or a motion for relief from judgment under CR 60. The availability of these procedures confirms the trial court's jurisdiction even after the entry of a dismissal order.

Since the trial court here had jurisdiction over the subject matter before it entered the dismissal order, it had continuing jurisdiction to determine any lawfully authorized motions after it entered the dismissal order. We conclude that the trial court did not err by (1) allowing Davis and Eves to file an RCW 4.28.185(4) affidavit after it had already dismissed the case for lack of personal jurisdiction and then (2) granting their motion for reconsideration upon the filing of the required affidavit.

## II. Jurisdiction over eBay Transaction

The Opackis argue, in the alternative, that the "trial court erred in exercising long arm jurisdiction to this single eBay transaction that occurred in Michigan." Appellants' Reply Br. at 10. Because the Opackis acted purposefully, the cause of action arises from that action, and the

assumption of jurisdiction by Washington does not offend traditional notions of fair play and substantial justice, we disagree.

The plaintiff has the burden of establishing jurisdiction. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 563, 226 P.3d 141 (2010). Only a prima facie showing of jurisdiction is required. *MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991). We treat the allegations of the complaint as true. *MBM Fisheries, Inc.*, 60 Wn. App. at 418.

RCW 4.28.185 states, in part:

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

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;

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(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section.

To satisfy the requirements of due process, a Washington court properly exercises specific personal jurisdiction over a foreign defendant when the following factors are satisfied:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

*Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App.



643, 652-53, 230 P.3d 625 (2010) (quoting *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989)). “RCW 4.28.185 extends personal jurisdiction over out-of-state defendants to the full limit of federal due process.” *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 726, 981 P.2d 454 (1999).<sup>6</sup>

We first consider whether the Opackis purposefully did some act or consummated some transaction in the forum state. “The mere execution of a contract with a state resident is not enough to fulfill the purposeful act requirement.” *Bartusch v. Or. State Bd. of Higher Educ.*, 131 Wn. App. 298, 307, 126 P.3d 840 (2006). We review the nature of the contractual relationship and consider factors such as:

[P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing [to determine] whether the defendant purposefully established minimum contacts within the forum.

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Davis and Eves contend that the following supports their contention that their act was purposeful: (1) the Opackis solicited business from all United States residents through their eBay

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<sup>6</sup> Davis and Eves cite several cases from other jurisdictions as persuasive authority for their contention that the trial court properly exercised long-arm jurisdiction. *See Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 823-24 (E.D. Mich. 2006) (finding personal jurisdiction when defendants’ use of eBay was regular and systemic); *Erwin v. Piscitello*, 627 F. Supp. 2d 855 (E.D. Tenn. 2007) (concluding that the defendant, who sold the plaintiff a car through eBay, purposely availed himself of the forum of Tennessee when he knowingly interacted with a Tennessee resident, convinced the plaintiff that the vehicle was in mint condition, arranged the vehicle’s transport to Tennessee, and misrepresented the vehicle’s condition); *Aero Toy Store, LLC v. Grieves*, 631 S.E.2d 734, 740-41 (GA. App. 2006) (holding that the plaintiff had established sufficient minimum contacts with the State of Georgia to warrant exercise of personal jurisdiction over its case when the defendant, who sold plaintiff a car through an eBay car auction, regularly solicited business in Georgia through the Internet and the defendant made substantial revenue from shipping cars to Georgia residents). We agree that these cases are persuasive.

advertisements; (2) the Opackis have participated in over 800 eBay transactions since April 2000;<sup>7</sup> and (3) the Opackis coordinated and paid for the shipment of the travel trailer to Washington. While this specific contract did not create ongoing obligations between the Opackis and Davis and Eves, the facts, as alleged, indicate that the Opackis use of eBay was systemic and regular. Their participation in over 800 eBay transactions since April 2000 demonstrates that the Opackis used eBay as a means for establishing regular business. Accordingly, we conclude that the Opackis purposefully established minimum contacts within the forum state.

Next, we apply a “but for” test to determine whether a claim against a nonresident defendant arises from, or is connected with, its solicitation of business within the state; this factor is established if the events giving rise to the claim would not have occurred “but for” the business’s solicitation within Washington. *Raymond v. Robinson*, 104 Wn. App. 627, 640, 15 P.3d 697 (2001). We conclude that this factor is established: “but for” the Opackis’ eBay listing, Davis and Eves would not have purchased the trailer and would not have been harmed.

Finally, in determining the final factor, whether the trial court’s exercise of jurisdiction violates traditional notions of fair play and substantial justice, we consider “the quality, nature, and extent of the defendant’s activity in the state; the relative convenience of the parties; the benefits and protection of the laws afforded the respective parties; and the basic equities of the

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<sup>7</sup> The Opackis argue, for the first time in their reply brief, that the trial court erred by considering a printout, attached to Davis and Eves’s response to the Opackis’ renewed motion for dismissal, of Opackis’ eBay profile. According to the printout, Paul Opacki has been a member since April 2000 and has received feedback on his participation, as both a buyer and a seller, in 887 eBay transactions. The Opackis assert that the evidence is inadmissible under ER 901, lacks foundation, contains hearsay, and is not admissible under ER 802. Because an issue raised and argued for the first time in a reply brief is too late to warrant consideration, we decline to consider this argument. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

situation.” *Raymond*, 104 Wn. App. at 641. The Opackis have allegedly engaged in over 800 eBay transactions. In this case, the Opackis knew they were soliciting business from this state and arranged to ship the trailer to Washington. We conclude that this prong has been met. We reject the Opackis’ assertion that the trial court erred by exercising long-arm jurisdiction over them.

### III. Attorney Fees

The Opackis argue that the trial court erred by failing to award them attorney fees. They also request attorney fees and costs under RCW 4.28.185(5) and RAP 18.1. We review a trial court’s decision regarding attorney fees to determine whether the decision is manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Tribble v. Allstate Prop. & Cas. Ins. Co.*, 134 Wn. App. 163, 170, 139 P.3d 373 (2006). “In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys’ fees.” RCW 4.28.185(5). “RCW 4.28.185(5) authorizes an award of attorney fees when a foreign defendant, sued under the long-arm statute, obtains a dismissal for want of personal jurisdiction.” *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990).

Here, the statute authorizes an award of attorney fees when a defendant obtains a dismissal for lack of personal jurisdiction; we conclude that the trial court properly declined to award attorney fees to the Opackis. Because the Opackis do not prevail on this appeal, we also decline to award the Opackis attorney fees on appeal.

41087-7-II

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.