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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 319776-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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KAY L. PRUCZINSKI and RICKY BELL, Appellants,

v.

ALLEN ASHBY, Respondent.

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BRIEF OF APPELLANT

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### ASSIGNMENTS OF ERROR

1. The trial court erred in granting Mr. Ashby's motion to dismiss for lack of personal jurisdiction when it made said decision on choice of law grounds.
2. The trial court erred in granting Mr. Ashby's motion to dismiss for lack of personal jurisdiction.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court improperly dismiss Ms. Pruczinski's case for lack of personal jurisdiction, when the court's basis for doing so is that there exists a choice of law issue that would require application of Idaho law?
2. Did the Superior Court err in dismissing Ms. Pruczinski's case for lack of personal jurisdiction where she made a prima facie showing that Mr. Ashby's intentional acts were expressly aimed at the forum state, caused harm in the forum state, and that traditional notions of fair play and substantial justice would not be offended by assumption of jurisdiction over Mr. Ashby?

## STATEMENT OF THE CASE

On or about April 30, 2010, Mr. Allen Ashby, an Idaho State Trooper, followed Ms. Pruczinski, who was driving Ricky Bell's vehicle, over the Spokane River, and into the State of Washington. CP at 23-24. He followed Ms. Pruczinski as she exited the I-90 at exit 299, travelled onto Idaho Road (located entirely within the State of Washington), and proceeded to pull her over for minor traffic violations. *Id.* at 128. Upon Mr. Ashby's initial contact with her, Ms. Pruczinski became concerned regarding his demeanor, actions and intentions. *Id.* at 24. She requested that a female law enforcement officer be called to the scene. *Id.* at 128. Rather than comply with her request, Mr. Ashby demanded she get out of the vehicle. *See id.* When Ms. Pruczinski continued to beg for a female officer, Ms. Ashby became visibly aggressive and hostile.

Mr. Ashby then bashed in the driver's side window with his asp, spraying Ms. Pruczinski with broken glass in the process. *Id.* at 24. Amid Ms. Pruczinski's screams of terror, Ms. Ashby reached into the vehicle, and attempted to pull her out through the jagged, broken window. *Id.* He then finally used some measure of common sense, and unlocked the door and pulled her out of the vehicle. Mr. Ashby then "searched" Ms. Pruczinski several times, offensively running his hands up and down her body, all the while ignoring her pleas for a female officer, as well as her

tearful requests to stop. *Id.* at 25. After completing some on-scene investigation with back up officers, Mr. Ashby drove back across the border, taking Ms. Pruczinski to jail in the state of Idaho. *Id.* at 26.

On August 30, 2013, the Superior Court of Spokane County granted the defendant's motion to dismiss for lack of personal jurisdiction. VRP at 28.

## ARGUMENT

### Standard of Review

Challenges brought under CR 12(b)(1) and (2) represent challenges to the court's personal and subject matter jurisdiction over the case. *See* CR 12(b)(1),(2). Because this civil rule in Washington is substantially similar to its federal counterpart, this Court may look to interpretation of the federal rule for guidance. *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992). Under federal law, a trial court's rulings on subject matter and personal jurisdiction, when based on the pleadings and undisputed facts before it, are questions of law, reviewed de novo. *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996).

Furthermore, while it is the plaintiff's duty to establish the existence of jurisdiction, only a prima facie showing of jurisdiction is required. *MBM Fisheries, Inc. v. Bollinger Machine Shop and Shipyard*,

*Inc.*, 60 Wn.App. 414, 418, 804 P.2d 627 (1991) (citing *Pedersen Fisheries, Inc. v. Patti Indus., Inc.*, 563 F.Supp. 72, 74 (W.D.Wash.1983)). For purposes of appeal, the allegations in the plaintiff's complaint must be accepted as correct. *MBM Fisheries* at 418, 804 P.2d 627 (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir.1988) *rev'd on other grounds*, *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)).

**I. The trial court's decision to dismiss for lack of personal jurisdiction was erroneously decided on choice of law grounds**

Jurisdiction and choice of law are two separate legal concepts, and involve separate analysis. *See generally Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107,134, 744 P.2d 1032 (1987) (noting that issue before them was which state's law applied in a case involving out of state parties which the Washington court had jurisdiction over). It is axiomatic that a court may properly exercise personal jurisdiction over nonresidents, yet apply another state's law to the case, or specific issues within the case. *See id.* at 134, 744 P.2d 1032.

In the present case, however, the Superior Court conflated the two issues in making its ruling. Specifically the court stated that Mr. Ashby's actions "clearly [were] Washington state actions [,]" but dismissed the case for lack of personal jurisdiction because:



the key element or one of the very key elements of the case would be whether or not this defendant—Trooper Ashby right now, not Mr. Ashby—was within the scope of his employment...because we do have a question of Idaho law...it would not be fair for Washington to exercise personal jurisdiction over this individual.

VRP at 27.

This ruling is erroneous, as the court ostensibly dismissed the case for lack of personal jurisdiction, but in fact dismissed the case based on choice of law grounds. *Id.* Furthermore, dismissing the case because there Idaho law applies to the question of Trooper Ashby's scope of employment is nonsensical. It would be far easier and less burdensome for a Washington court to review Idaho agency law and make a determination that Trooper Ashby was outside the scope of his employment (especially given his stipulation to the fact that the acts occurred in Washington), than it would be for Idaho to make the same threshold determination and then have to apply Washington tort law to the rest of the case.

## **II. Washington has personal jurisdiction over Mr. Ashby**

Washington's long-arm statute extends specific personal jurisdiction over nonresident defendants "to the extent permitted by the due process clause of the United States Constitution", except where otherwise limited by the statute's own terms. *MBM Fisheries* at 423, 804

P.2d 627; RCW 4.28.185. The statute itself holds, in pertinent part, that nonresident defendants submit to personal jurisdiction in Washington when they commit “a tortious act within this state”. *See* RCW 4.28.185(1)(b). “A tortious act occurs in Washington when the injury occurs within our state.” *SeaHAVN, Ltd. v. Glitner Bank*, 154 Wn.App. 550, 569, 226 P.3d 141 (2010) (citing *Grange Ins. Ass'n v. State*, 110 Wash.2d 752, 757, 757 P.2d 933 (1988)). For purposes of RCW 4.28.185, an injury “occurs” in Washington, “if the last event necessary to make the defendant liable for the alleged tort occurred in Washington.” *SeaHAVN* at 550 (citing *MBM Fisheries* at 425, 804 P.2d 627).

In addition to the tortious act, three factors must co-exist for specific personal jurisdiction to be proper under the long-arm statute:

(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.

*Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989).

A. **Mr. Ashby tortious acts rise to the level of “purposeful availment” because they were intentional, expressly aimed at Washington, and caused harm in Washington**

In the context of tort claims, the “purposeful availment analysis...permits the exercise of jurisdiction when the claimant makes a prima facie showing that an out-of-state party's intentional actions were expressly aimed at the forum state and caused harm in the forum state.” *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn.App. 840, 891, 309 P.3d 555 (2013). Washington case law does not define “intentional act” or “expressly aimed” in the context of personal jurisdiction analysis in a tort case. However, Ninth Circuit case law is particularly instructive on the issue, as the above rule in *FutureSelect* is adopted from the identical federal “effects” rule.<sup>1</sup>

Specifically, in *Schwarzenegger v. Martin*, the Court defined an “intentional act” as “an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.” *Schwarzenegger v. Martin*, 374

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<sup>1</sup>“the ‘effects’ test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004) (citing *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)).

F.3d 797, 806 (9th Cir. 2004). The “expressly aimed” requirement is met where there has been an “individual targeting” of a forum resident or person with strong forum connections. *Fiore v. Walden*, 688 F.3d 558, 577 (9th Cir. 2011). Mere foreseeability of impact on individuals in the forum is insufficient; however, where the intended impact is “targeted at a known individual who has a substantial, ongoing connection to the forum,” the “expressly aimed requirement is met.” *See id.* at 577-78 (internal citations omitted).

The issue of harm caused is one for trial, and is not a subject of this appeal. However, for purposes of “purposeful availment” analysis, this Court must determine whether harm was caused in the forum. *See FutureSelect* at 891, 309 P.3d 555 (2013). Because the allegations in the plaintiff’s complaint must be accepted as correct in a personal jurisdiction analysis, Ms. Pruczinski’s allegations of harm occurring in Washington are sufficient. *See MBM Fisheries* at 418, 804 P.2d 627 (citing *Shute* at 380 (9th Cir.1988) *rev’d on other grounds, Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)).

**i. Mr. Ashby's actions were intentional**

It is undeniable from the allegations in the complaint that Mr. Ashby performed several intentional acts. He intentionally followed Ms. Pruczinski's car westbound on I-90 to Exit 299, located in Washington, and continued to follow her along Idaho Road, also located in Washington. He intentionally stopped her vehicle, approached, and seized her person. He intentionally demanded her exit from the car, ignored her requests for a female officer, and alarmingly, within 90 seconds of coming up to Ms. Pruczinski's window, intentionally smashed in her driver's side window, spraying her with glass in the process. Immediately thereafter, he intentionally attempted to drag her out of the vehicle through the destroyed window, jagged with shattered glass. He then intentionally placed her under arrest (without authority of law), searched her person several times, and intentionally removed her back to the state of Idaho. All of Mr. Ashby's actions that night were intentional. Despite Mr. Ashby's highly suspect claim that he did not know that he was in Washington State, he cannot deny that he intended to and did perform "actual, physical acts in the real world." *Schwarzenegger*, 374 F.3d at 806.

**ii. Mr. Ashby's intentional acts were expressly aimed at Washington**

The “expressly aimed” requirement of the analysis announced in *Calder* focuses on where the harm and injuries were felt. *See generally Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). In *Calder*, this requirement was met where defendants (Florida residents) prepared a libelous story from that locale about actress Shirley Jones, who lived and worked in California. *See generally id.* The defendant’s sources were from California, and “impugned the professionalism of an entertainer whose television career was centered in California.” *Id.* at 789, 104 S.Ct. 1482, 79 L.Ed.2d 804. The Court held that the defendants had expressly aimed their allegedly tortious conduct at California because the “brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California[,]” and because they had made California “the focal point both of the story and of the harm suffered.” *Id.*

In the instant case, the “brunt of the harm” perpetrated by Mr. Ashby against Ms. Pruczinski occurred in Washington. *Id.* Indeed, all contact between the parties occurred in Washington,

except for Ms. Pruczinski's transport to Idaho. It is clear that Mr. Ashby "expressly aimed" his intentional acts at Washington because he followed a vehicle into Washington State, where he had no jurisdiction, proceeded to stop and seize both Ms. Pruczinski and her vehicle, and assault her, as described above. The injuries thus occurred in Washington, and the "brunt of the harm" was clearly felt within Washington's borders. *Id.*

**iii. Mr. Ashby's intentional actions, expressly aimed at Washington, caused harm in Washington**

See explanation on the issue of harm *supra* at Part II-A.

**B. Ms. Pruczinski's causes of action arise from Mr. Ashby's conduct in Washington**

The second prong of the *Shute* test requires "a nexus between the cause of action and the defendant's activities in the forum state." *SeaHAVN* at 570-71 (citing *Raymond v. Robinson*, 104 Wn.App. 627, 640, 15 P.3d 697 (2001)). "Washington courts use the 'but for' test to determine whether a cause of action against a nonresident defendant arises from, or is connected with, the defendant's acts in the forum state." *SeaHAVN* at 571.

It is clear that the required connection exists between Ms. Pruczinski's causes of action and Mr. Ashby's actions in Washington. As

previously stated, Ms. Pruczinski's causes of action arise from the actions of Mr. Ashby which took place almost entirely within Washington.

**C. Washington's assumption of jurisdiction over Mr. Ashby would not offend traditional notions of fair play and substantial justice**

In determining whether the assumption of specific personal jurisdiction over a defendant violates traditional notions of fair play and substantial justice, Washington courts "consider the quality, nature, and extent of the defendant's activity in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington's laws afforded the parties, and the basic equities of the situation." *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn.App. 699, 721, 19 P.2d 1243 (1996).

**i. The quality, nature, and extent of Mr. Ashby's activity in Washington weighs in favor of exercising personal jurisdiction over him**

In determining whether the quality, nature, and extent of a defendant's contacts with the forum state weigh in favor of exercising personal jurisdiction, it is the quality and nature which determine the sufficiency of such contacts—not some mechanical formula nor a counting-up of the number of acts which occurred. *See Perry v. Hamilton*, 51 Wn.App. 936, 940, 756 P.2d 150 (1988). "The focus should be on the relationship between the defendant, the forum, and the



litigation.” *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)).

In the present case, no cause of action would have arisen, no contact would have occurred, and no injury would have come to Ms. Pruczinski, had Mr. Ashby not followed her into Washington State, stopped and seized her person and vehicle without authority of law, bashed in her window, assaulted her, and falsely arrested her. The “relationship between the defendant, the forum, and the litigation” could not be stronger; Washington is the focal point, indeed the only point, of actionable contact between the parties. *See id.* Idaho has nothing to do with this litigation, regardless of the fact that Mr. Ashby is an employee of that state, and both parties are residents there. By acting entirely outside the scope of his authority and jurisdiction, Mr. Ashby ceased being an employee of Idaho for the purposes of this litigation. All harmful contact occurred in Washington, and the quality of that contact was egregious, heinous, and tortious in nature.

ii. **Mr. Ashby is not sufficiently burdened by litigating this case in Washington to justify the Superior Court’s decision to refuse to exercise jurisdiction over him**

Weighing the relative convenience of the parties is clearly a factual determination. ‘While inconvenience to the defendant is an important factor to be considered, there is no constitutional requirement that the

hardship of litigating in a distant state need always be borne by the plaintiff.” *Nixon v. Cohn*, 62 Wn.2d 987, 998, 385 P.2d 305 (1963) (internal citations omitted). In the present case, neither Ms. Pruczinski nor Mr. Ashby would be required to litigate in a “distant state”. Both of them live in Idaho, but near the Washington border, and both have obviously had success in obtaining Washington counsel, and litigating this action up to this point has not presented great difficulty. There has been no argument by Ms. Ashby that litigating in Washington would present great difficulty—simply that Idaho would be a more fair forum given the question of law regarding Mr. Ashby’s scope of employment. Not only is this contention false, but it has no bearing on whether or not Washington would be an inconvenient forum.

**iii. Ms. Pruczinski and Mr. Bell are entitled to the benefits and protections of the laws of the State of Washington and the basic equities of the situation require that Washington assume jurisdiction**

“The Fourth Amendment and Article I, Section 7 of the Washington State Constitution require a police officer to act under lawful authority.” *State v. Plaggemeier*, 93 Wn.App. 472, 476, 969 P.2d 519 (1999) (citing *City of Wenatchee v. Durham*, 43 Wash.App. 547, 549-50, 718 P.2d 819 (1986)). “An arrest made beyond an arresting officer's

jurisdiction is equivalent to an arrest without probable cause.”

*Plaggemeier* at 476, 969 P.2d 519.

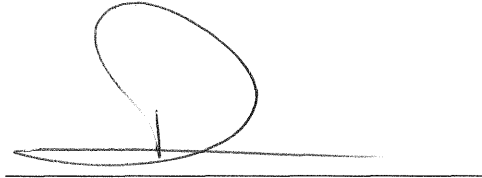
Here, Ms. Pruczinski is entitled to the protections of Article 1, section 7 of the Washington State constitution, which require that a police officer must act with lawful authority in order to search, seize, or arrest an individual in Washington. *See id.* Mr. Ashby had no such authority when he left the boundaries of Idaho, and committed several tortious acts against Ms. Pruczinski and Mr. Bell.

Furthermore, the State of Washington has an interest in protecting individuals, both residents and nonresidents alike, from, among other things, invasions of privacy occurring within the state. Otherwise, Washington’s constitutional protections under Article 1, section 7, which holds that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law”, becomes nothing more than an empty promise—a shadow of the once great protection afforded to any “person” within Washington state. Const.art.1 §7. This Court should absolutely not endorse the message that out-of-state police may come into Washington State, hunt down a person merely traveling along Washington’s roads, stop them, seize them, assault them, inflict emotion distress, damage their property, and unlawfully arrest them, all with no consequences under Washington law.


CONCLUSION

Based on the above, Ms. Pruczinski and Mr. Bell respectfully request that this Court reverse the decision of the Superior Court below, and remand for trial.

DATED this 10 day of March, 2014

A handwritten signature in black ink, appearing to read 'Douglas D. Phelps', is written above a horizontal line.

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