

NO. 43877-1 II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SHAOUL S. HAI,

Appellant,

v.

STL INTERNATIONAL, INC. and TSA STORES, INC.

Respondents.

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TSA STORES, INC. AND STL INTERNATIONAL, INC.

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I. SUMMARY OF ARGUMENT

Plaintiff, Shaoul Hai (“Hai”), is a resident of Texas, and he was injured in Texas when he tripped over a product that was on display in a Texas store. For reasons unknown, Hai waited more than two years to file suit to recover damages for his injuries, thus allowing Texas’s two-year statute of limitations to expire. Then, in a blatant attempt at forum shopping, Hai filed the instant lawsuit in Washington, arguing that Washington law, including its three-year statute of limitations, should apply to his claims.

As the trial court properly concluded, Hai cannot avoid Texas’s two-year statute of limitations by filing suit in Washington. Specifically, Washington law provides that if a claim is substantively based upon the law of another state, the limitation period of that state applies. Here, the trial court properly applied Texas law to Hai’s claim because Texas has the most significant relationship to the occurrence and the parties. Specifically, Hai was injured in Texas; most, if not all, of the conduct that allegedly caused Hai’s injuries occurred in Texas; and the parties’ relationship – to the extent one existed – was centered in Texas where Hai came into contact with the product. This Court should, therefore, affirm the trial court’s decision to apply Texas’s two-year statute of limitations to Hai’s claims.

Moreover, even if this Court determines that Washington law applies to Hai’s claims, TSA Stores, Inc. asserts that Washington courts

have no personal general jurisdiction over it.¹ This issue was fully briefed by the parties below but the trial court never ruled on it because it became unnecessary once it granted summary judgment to TSA Stores, Inc. on the choice of law issue.

II. RESTATEMENT OF ASSIGNMENT OF ERROR

1. After analyzing and balancing the contacts with Texas and Washington, the trial court correctly concluded that the most significant contacts are with Texas and therefore, the law of Texas applies to this personal injury action by a Texas plaintiff, injured in Texas.

2. Even if this Court determines that the law of Washington applies to this dispute, Washington courts have no personal general jurisdiction over TSA Stores, Inc. for this dispute.

III. STANDARD OF REVIEW

Assignment of Error No. 1: This Court reviews choice of law questions *de novo*. *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 690-91, 167 P.3d 1112 (2007).

Assignment of Error No. 2: The plaintiff has the burden of establishing that the court has personal jurisdiction. *Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 328, 803 P.2d 329 (1991). When, as here, the underlying facts are undisputed, the question of whether a court may

¹ STL International, Inc. takes no position with regard to whether Washington courts have personal jurisdiction of TSA Stores, Inc. Rather, STL International, Inc. joins this brief exclusively with respect to the choice-of-law issue decided by the trial court.

exercise personal jurisdiction is a question of law. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 595, 849 P.2d 669 (1993).

IV. RESTATEMENT OF THE CASE

Some of the “facts” alleged by Hai in his Opening Brief are not facts, but instead, are argument and assertions of counsel. *See*, citation to CP 29 at p. 3 of Opening Brief. Hai cannot prevail on this appeal from a grant of summary judgment by replacing sworn discovery responses with the arguments of its lawyer. The argument and statements of counsel "are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment." *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam); *Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593 (9th Cir. 2002). Therefore, TSA Stores, Inc. and STL International, Inc. restate the evidentiary facts below.

A. Procedural Background

Plaintiff/Appellant Shaoul Hai (“Hai”) filed this lawsuit against defendants/respondents STL International, Inc. (“STL”) and TSA Stores, Inc. (“TSA”) in Pierce County Superior Court on December 22, 2011. (CP:299-303). The Complaint asserts claims for premises liability against TSA, and for liability against TSA and STL under RCW 7.72.010 (the Washington Product Liability Act) (hereinafter “the Act”). (CP:299-303). In particular, Hai alleges that TSA is liable as a “product seller” under the

Act and that STL is liable as a “manufacturer” under the Act. (CP: 301-302).

There has been no resolution on the merits of Hai’s claims. (VRP: 28-33). Instead, the court entered summary judgment in favor of TSA and STL on the legal issue of choice of law. (CP: 280-284). The trial court found that the substantive law of Texas should apply to this dispute thereby granting the motions for summary judgment brought by both TSA and STL. (VRP: 28-33). The trial court dismissed Hai’s Complaint, with prejudice, because Hai filed his case beyond the two year statute of limitations in Texas. Tex. Civ. Prac. & Rem. Code § 16.003(a). (CP: 280-284).

TSA moved for summary judgment on the alternative basis that it was not subject to the personal general jurisdiction of the Washington courts. (CP: 1-16). Hai and TSA briefed this issue (CP: 1-16, 110-122, 246-255), but the trial court determined it was unnecessary to rule on this alternative basis for summary judgment since it found first that Texas law applied. (VRP: 9, 21, 32-33).

B. Facts Related to the Accident

On February 8, 2009, Hai was shopping for stationary bicycles in a TSA store in Texas. (CP: 51, 56, 58-59). In the area of the store where the stationary bicycles were located, TSA had put on display an inversion table distributed by STL, known as a “Teeter Hang-Up.” (*Id.*) While Hai had his back to a Teeter Hang-Up, and while moving to look at another

piece of equipment, Hai tripped on the Teeter Hang-up. (*Id.*) As Hai fell, the inversion table portion of the Teeter Hang-Up allegedly flipped up and injured Hai. (*Id.*)

C. Additional Facts Related to Choice of Law

TSA is a Delaware corporation headquartered in Colorado and doing business as “The Sports Authority” nationwide, including Washington and Texas. (CP: 299, 135).

STL is a Washington corporation that designs, in part, and distributes inversion tables under the trade name “Teeter Hang-Ups.” (CP: 127-128, 299-300). The design for the Teeter Hang-Up machine at issue in this case was conceptualized primarily, but not exclusively, in Washington. (CP: 84). Additional design conceptualization occurred in Taiwan. (*Id.*) Also, all of the engineering design work for the product occurred in Taiwan. (*Id.*) The Teeter Hang-Up machine was manufactured in China. (*Id.*) STL sold the machine to TSA under a contract that was negotiated in Colorado at TSA’s corporate headquarters. (*Id.*) The sales contract was signed by STL in Washington, and by TSA in Colorado. (*Id.*)

Once manufactured in China, the Teeter Hang-Up at issue in this lawsuit was shipped directly to TSA’s warehouse in California. (CP: 23). From California, the product was sent to a distribution center in Georgia. (*Id.*) From Georgia, the product was shipped to the TSA store in Texas

where Hai's injury occurred. (*Id.*) The product never entered the State of Washington. (*Id.*)

Hai is a resident of Texas. (CP: 52). Hai's injury took place at a Sports Authority store in Texas. (CP: 51, 56, 58-59). Hai has never been to a Sports Authority store in Washington. (CP: 52). Hai was treated for his injuries by physicians in Texas. (CP: 26, 39-40). All of Hai's treating physicians are located in Texas. (CP: 57-58). Any witnesses to the accident giving rise to Hai's claims live in Texas. (CP: 22, 57). Hai retained a lawyer to represent him in Texas. (CP: 28-29). The decision about where to place the Teeter Hang-Up that is the subject of this lawsuit was made by the Sports Authority Store Manager in Texas. (CP: 22).

V. ARGUMENT

A. It is Undisputed -- An Actual Conflict of Law Exists Between Texas and Washington Law

In their answers, TSA and STL asserted that Texas law should apply to this case. (TSA's Affirmative Defense No.'s 16 and 17) (CP: 139) (STL's Affirmative Defense Nos. 4.2, 4.3, and 4.4) (CP 130-131).² It is axiomatic that a choice of law determination is made only if there is an actual conflict between the laws or interests of Washington and the laws or

² TSA Stores, Inc. also brought a CR 12(b)(6) Motion to Dismiss which was denied because the trial court found that the Risk Management Officer for TSA Stores, Inc. lacked foundation to assert that the incident occurred in Texas. (CP: 164-173). It is now undisputed that the incident giving rise to Hai's Complaint occurred in Texas. (CP:51).

interests of another state.³ *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-101, 864 P.2d 937 (1994). With regard to the law applicable to Hai's claims, the laws of Washington and Texas differ in many and significant ways:

1. Statute of Limitations: Texas has a two-year statute of limitations to file suit for a personal injury claim. Tex. Civ. Prac. & Rem. Code § 16.003(a). Washington has a three-year statute of limitations for the same type of claim. RCW 4.16.080; 7.72.060(3).

Washington adopted the Uniform Conflict of Laws-Limitations Act in 1983 ("the Limitations Act"). RCW 4.18 *et. seq.* This statute governs cases where the law of more than one state could apply, triggering a choice of law analysis, including application of the relevant statute of limitations. *Id.* The Limitations Act provides that if a claim is substantively based upon the law of another state, the limitation period of that state applies. RCW 4.18.020(1)(a). A determination of which state's law applies must be made before there is any consideration of which statute of limitations applies. RCW 4.18.010.

2. Product Liability Act: The Washington Product Liability Act ("WPLA") (RCW 7.72 *et. seq.*), is the exclusive remedy for product liability claims. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d

³ In his "Opening Brief," plaintiff Hai takes no position on whether there is an actual conflict between the laws or interests of Washington and the laws of interests of another state.

847, 853, 774 P.2d 1199 (1989). It eliminated common law remedies and provided a single cause of action for product-related harm with specified statutory requirements for proof. *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 71, 866 P.2d 15 (1993); *see also*, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) (stating that the WPLA creates a single cause of action for product-related claims and supplants previously existing common law remedies, including common law actions for negligence.).

By contrast, under the Texas Product Liability Act (Tex. Civ. Prac. & Rem. Code § 82 *et. seq.*), liability for personal injuries caused by product defects can be imposed under several different legal theories, among them negligence, breach of warranty, and strict products liability. *Hyundai Motor Co. v. Rodriguez ex. Rel. Rodriguez*, 995 S.W. 2d 661, 664 (Tex. 1999).

The relevant conflicts between the two jurisdictions' product liability laws for purposes of the present case include, without limitation, the following:

(i) Tests for Design Defect: Under Washington law, a plaintiff is not required to prove the availability of an alternative, safe design to recover under a design defect theory. *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 237, 241, 728 P.2d 585 (1986). Under Texas law, by contrast, to recover in strict liability based on a design defect, the plaintiff must prove that there is a "safer alternative design"

that (1) “would have prevented or significantly reduced the risk of ...injury...without substantially impairing the product’s utility,” and (2) “was economically and technologically feasible at the time the product left the seller’s or manufacturer’s control by the application of existing or reasonably achievable scientific knowledge”. Tex. Civ. Prac. & Rem. Code § 82.005(a)(1), (b).

(ii) Liability of Product Sellers: Generally, Washington law limits the liability of product sellers, other than manufacturers, to harm caused by common law negligence, breach of express warranty, or intentional misrepresentation or concealment. RCW 4.22.005. Under Texas law, by contrast, strict liability applies to any person in the chain of a product’s distribution. Tex. Civ. Prac. & Rem. Code Ann. § 82.001.

(iii) Comparative Fault: Washington law applies “pure” comparative fault, which means that the plaintiff’s contributory negligence, no matter how great, does not bar recovery, but instead merely reduces his or her recoverable damages. RCW 4.22.005. Texas law, by contrast, applies “modified” comparative fault, which means that a plaintiff is barred from recovering damages if his or her percentage of fault is greater than 50 percent. Tex. Civ. Prac. & Rem. Code § 33.001.

(iv) Joint & Several Liability: Washington abolished joint-and-several liability in cases where the plaintiff carries a share of the fault. RCW 4.22.070(1). Even if the plaintiff is blameless, the defendants

against whom judgment is entered are only jointly and severally liable “for the sum of their proportionate shares of the claimant[‘]s total damages.” RCW 4.22.070(1)(b). In Texas, by contrast, a defendant is jointly and severally liable any time its share of responsibility is greater than 50 percent. Tex. Civ. Prac & Rem. Code Ann § 33.013(a).

The parties do not dispute that the laws of Washington and Texas differ on the claims brought by Hai.

B. Each of the *Johnson v. Spider Staging Corp.* Factors Favor Application of Texas Law to This Lawsuit

Once it is determined that there is an actual conflict between the laws of Washington and Texas, this Court must determine which state has the most significant contacts with the parties and the issues in the case. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976). In that regard, the Washington Supreme Court has adopted the approach set forth in the Restatement (Second) of Conflict of Laws. *Id.* Under this approach, the court will apply the law of the state that “has the most significant relationship to the occurrence and the parties.” *Id.* (citing Restatement (Second) of Conflict of Laws § 145(1)). In making that determination, the court will take into account the following four contacts:

1. The place where the injury occurred;
2. The place where the conduct causing the injury occurred;
3. The domicile, residence, nationality, place of incorporation and place of business of the parties; and
4. The place where the relationship, if any, between the parties is centered.

Id. (citing Restatement (Second) of Conflict of Laws § 145(2)).

Significantly, under this approach, the court should not merely count contacts. *Johnson v. Spider Staging Corp.*, 87 Wn.2d at 581. Instead, the court must consider “which contacts are most significant and...determine where these contacts are found.” *Id.*

In an action for personal injury, courts generally consider the place where the injury occurred to be of paramount importance. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 214-15, 875 P.2d 1213 (1994). Indeed, in such an action, “the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship.” *Bush v. O’Connor*, 58 Wn. App. 138, 144, 791 P.2d 915 (1990) (quoting Restatement (Second) of Conflict of Laws § 146). Typically, a state other than the state in which the injury occurred will have the most significant relationship only “in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties.” Restatement (Second) of Conflict of Laws §146 cmt. c. This rule “furthers the choice-of-law values of certainty, predictability, and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law.” *Id.*

Consequently, when the injury and the conduct that caused it occur in the same state, the law of that state will usually be applied to determine

most issues involving the tort. Restatement (Second) of Conflict of Laws §146 cmt. d. Further, even where the injury and the conduct causing it occur in different states, the law of the state where the injury occurred will still generally apply. Restatement (Second) of Conflict of Laws §146 cmt. d. *See also Rice*, 124 Wn.2d at 216 (observing that, in cases “where the negligent act (for example, negligent manufacturing) took place out of state, but the product arrived in Washington and caused personal injury here, it follows that the place of the tort is Washington”).

In this case, as discussed in further detail below, the State of Texas, where Hai’s injury occurred and most, if not all, of the injury-causing conduct occurred, has the most significant relationship to the occurrence and the parties. Accordingly, the trial court properly applied Texas law to Hai’s claims and dismissed them under Texas’s two-year statute of limitations.

1. The injury occurred in Texas.

First, and most importantly, Hai was injured in Texas. (CP: 51, 56, 58-59). Specifically, Hai was shopping at a TSA store in Texas. (*Id.*) He had his back to the Teeter Hang-Up machine and was moving to look at another piece of equipment when he tripped over the bottom bar of the Teeter Hang-Up. (*Id.*) Hai claims that, when he tripped on the Teeter Hang-Up, the inversion table flipped up and injured him. (*Id.*)

2. The conduct allegedly causing injury occurred primarily, if not exclusively, in Texas.

The conduct that allegedly caused Hai's injury also occurred primarily, if not exclusively, in Texas. In that regard, Hai alleges that TSA caused his injury by: (1) positioning the product in such a way that a consumer might trip on it; (2) failing to utilize the lock supplied by STL for the product, which would have prevented it from flipping after Hai tripped on it; and (3) failing to provide adequate warnings as to the dangers presented by the product. (CP: 302).

In each instance, the conduct alleged to have caused Hai's injuries occurred in Texas, not in Washington. The product was displayed in Texas. (CP: 51, 56, 58-59). The decision about where to place the product in the store was made in Texas. (CP: 22, 47, 75-79). The decision not to utilize the lock on the product occurred in Texas. (*Id.*) Finally, the warnings that were posted outside the exercise equipment area were in Texas (*Id.*)

Hai asserts that TSA's decision about "how, where and when to display the product at issue in its stores was made at its corporate headquarters in Colorado. CP at 144-146." These are not the facts (and the citation to CP: 144-146 is incorrect, in any event). Instead, the decision about where to place the Teeter Hang-Up in the Texas Sports Authority store was made in Texas. (CP: 22, 47, 75-79). The only decision made by TSA in Colorado was whether the Teeter Hang-up should be displayed with other fitness equipment at the Sports Authority

stores, or whether it should be placed in some other area of the Sports Authority stores. (CP: 143). There is no connection to Washington for this factor with respect to TSA, and Hai concedes this point. *See*, Opening Brief at p. 17-18.

As to STL, Hai generally claims that the product was defective because it was not equipped with a built-in lock and, instead, was supplied to retailers with an external lock that could be removed from the product. (CP: 159-162; *see also* Hai's "Opening Brief" at 6). Hai thus argues that, since the product's design was conceptualized primarily in Washington, Washington is the place where the "injury causing conduct" occurred.

In making that argument, however, Hai ignores the fact that, even if the decision to include an external lock with the product rather than equip it with a built-in lock was made in Washington (a fact not established in the record), the decision not to *use* the lock was made by TSA in Texas. (CP: 22, 47, 75-79). Indeed, even if STL had equipped the product with a built-in lock, a person in Texas would still have been responsible for employing it while the product was being displayed in the TSA store. (CP: 22). Further, Hai ignores the facts, stated above, that the decision regarding where and how to display the product, and the alleged failure to warn of its dangers, occurred at the TSA store in Texas.

Hai also ignores his own conduct as a cause of his injury. As Hai admits in his complaint, he was not looking where he was going when he tripped over the Teeter Hang-Up. (CP: 299-203). Instead, he had his back

to the machine and was moving to look at another piece of equipment when he tripped. (*Id.*) Thus, Hai's own failure to watch where he was going was a primary cause of his injury, and that conduct, like TSA's, occurred exclusively in Texas.

Finally, Hai also suggests that additional injury-causing conduct occurred in Washington because STL allegedly issued defective warnings for the product in Washington. But the warnings that STL issued concerning the product's use are irrelevant to this case because Hai was not using the product when he was injured. Indeed, as explained above, he was not even looking at the product when he was hurt. (*Id.*)

For all of these reasons, the conduct that allegedly caused Hai's injury occurred primarily, if not exclusively, in Texas.

3. The Domicile, Residence, Nationality, Place of Incorporation and Place of Business of the Parties Point to Texas

Hai resides in Texas. (CP: 52). TSA is incorporated in Colorado but does business throughout the country, including in Washington. (CP: 299, 135). STL is incorporated in Washington. (CP: 127-128). The importance of these contacts, however, depends largely upon the extent to which they are grouped with other contacts:

The fact, for example, that one of the parties is domiciled or does business in a given state will usually carry little weight of itself. The state where these contacts are grouped is particularly likely to be the state of the applicable law if either the defendant's conduct or the plaintiff's injury occurred there.

Restatement (Second) of Conflict of Laws § 145 comment “e” (1971) emphasis added). The contacts in this instance all are grouped in Texas. Hai, a Texas resident, allegedly came into contact with the Teeter Hang-Up at a TSA store in Texas, due to a TSA’s employee’s decision to place it on display in the store and alleged failure to either lock the device or warn about the dangers of tripping over the device in that Texas store. (CP: 51-52, 56, 58-59). The fact that STL is domiciled in Washington carries little weight. Indeed, the Washington Supreme Court held that “residence in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.” *Rice*, 124 Wn.2d at 216; *Polygon Northwest Co. v. Nat’l Fire & Marine Ins. Co.*, 2011 U.S. Dist. LEXIS 56408, 18-19 (W.D. Wash. May 24, 2011).

4. The Place Where the Relationship, if Any, Between the Parties is Centered is Not Applicable Here

There is no legal or contractual relationship between Hai and either TSA or STL. Hai concedes that this factor is not applicable here because the parties do not have a “relationship” that is centered in any given location. *See*, Opening Brief at p. 19. To the extent there is a place where the relationship between these parties is centered, it must be Texas. Hai resided in Texas (CP: 52), and he was shopping at a TSA store in Texas when he (literally) came into contact with STL’s product (CP: 51), thereby creating the only “relationship” between the parties.

In light of these facts, the trial court concluded that all four choice-of-law factors favor Texas. For the reasons stated above, the trial court's conclusion was correct. Accordingly, this Court should affirm the trial court's application of Texas law to Hai's claim.

C. This Court Need Not Address Policy Interests

Only when the factors set forth above are evenly balanced should a court turn to policy to resolve the issue (i.e., which state has the greater interest in applying its laws to the matter). Balance is not determined by merely counting contacts, but rather by considering which contacts are most significant and to determine where these contacts are found. *Caswell v. Olympic Pipeline Co.*, 2010 U.S. Dist. LEXIS 73955, 7-8 (W.D. Wash. July 22, 2011) (internal citations omitted). As set forth above, the most significant contacts are by far centered in Texas and, therefore, this Court need not address Hai's public policy arguments. *See, Aiello, et. al. v. FKI Industries, Inc., et. al.*, 2006 U.S. Dist. LEXIS 70226 (W. D. Wash. 2006) ("Because the contacts are not "evenly balanced," the Court does not need to reach the second "interests" prong of the choice of law analysis.")

However, to the extent that this Court does address policy arguments, Washington has no significant public policy interest in applying its law to this personal injury lawsuit by a Texas resident alleging premises liability and products liability for an accident that occurred in Texas. While application of Washington law may be necessary for Hai in order to avoid dismissal of his claim, it would also act to defeat the

reasonable expectations of any other Teeter Hang-Up purchasers under the laws of the states where they reside. Hai had ample time to file his lawsuit in Texas. He retained a lawyer in Texas within months of his injury, yet, for reasons that Hai does not explain, he waited until after the Texas Statute of Limitations expired before filing.

Along these lines, it is clear that Hai is blatantly forum shopping⁴, which Washington law specifically prohibits:

When the cause of action has arisen in another state, territory or country between nonresidents of this state, and by the laws of the state, territory or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.

RCW 4.16.290. *See also Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 492, 260 P.3d 915 (2011) (observing that “the purpose of a borrowing statute, as adopted by almost every state, is to prevent forum shopping by imposing the shortest applicable statute of limitations”). Moreover, the policy in Washington behind the Products Liability Act, RCW 7.72 *et. seq.*, will not be advanced by application to Hai’s claim. The Act specifically provides that it is “. . . the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and

⁴ Black’s Law Dictionary defines “forum-shopping” as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” Black’s Law Dictionary 726 (9th ed. 2009). *Arras v. McCabe*, 2012 Wash. App. LEXIS 2586 (Wash. Ct. App. Nov. 5, 2012).

unwarranted exposure to product liability litigation.” RCW 7.72 preamble, 1981 c. 27. Finally, applying Texas law achieves a uniform result for injuries caused by products marketed to consumers in the state of Texas and predictability for manufacturers whose products are marketed for sale to consumers in Texas. *Rice*, 124 Wn.2d at 516 (emphasizing the uniformity of result achieved by applying the law of the state where a product causes injury, even if the product was manufactured or designed elsewhere).

D. Case Law Does Not Favor Application of Washington Law

Hai relies primarily on two Washington cases to support his argument, *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 555 P.2d 997 (1976) and *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 115 P.3d 1017 (2005). Both cases are, however, inapposite.

First, in both cases, the relative contacts among the competing states were “evenly balanced,” thus necessitating an inquiry into the states’ relative interests and public policies. Here, as previously explained, the contacts are not “evenly balanced”; rather, Texas clearly has the most significant relationship to the occurrence and the parties.

Second, in both cases, the plaintiffs were injured while actually *using* the product at issue. Thus, Washington’s interest in encouraging the product’s manufacturers “to make safe products for [their] customers” was brought into play. *Johnson*, 87 Wn.2d. at 583; *Zenaida-Garcia*, 128 Wn. App. at 264-65. Here, by contrast, Hai was not using the Teeter Hang-Up

when he was injured. Rather, he had his back to the product and was moving to inspect another product when he tripped over the Teeter Hang-Up. Thus, the same policy considerations in encouraging manufacturers “to make safe products for [their] customers” are not implicated in this case. Rather, if any interest is implicated, it is the interest that Texas may have in regulating the conduct of its retailers, including the precautions they must take to ensure that consumers do not inadvertently come into contact with equipment that is on display.

E. **Hai Has Not Met His Burden of Proving That Washington Should Exercise General Personal Jurisdiction Over Defendant TSA**

TSA moved for summary judgment on the alternative basis that it was not subject to personal jurisdiction by Washington courts for this lawsuit. The issue was fully briefed and the trial court was prepared to rule on it but determined that it was unnecessary to do so because it decided that Texas law applied. (VRP: 9, 21, 32-33). Only if this Court determines to reverse the trial court’s decision on choice of law, TSA asserts that this Court should determine that Hai has not met his burden of proving that Washington should exercise general personal jurisdiction over TSA.

1. **Washington Should Not Exercise General Personal Jurisdiction Over Defendant TSA**

Under Washington law, a state court may exercise either general or specific personal jurisdiction over a non-resident defendant. *Hein v. Taco*

Bell, Inc., 60 Wn. App. 325, 328, 803 P.2d 329 (1991). TSA is a non-resident defendant. It is headquartered in Colorado. Specific jurisdiction is appropriate when a cause of action arises out of, or is related to, the corporation's specific activities in the state. There is no question that Washington has no specific personal jurisdiction over TSA for the incident giving rise to this lawsuit.

The only question for this Court is whether Washington should exercise its general personal jurisdiction over TSA for this lawsuit. It has been held that RCW 4.28.080(10) authorizes a court to exercise general jurisdiction over a nonresident defendant if the defendant is transacting substantial and continuous business within this state, and this activity is of such character as to give rise to a legal obligation. *Croze v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 54, 558 P.2d 764 (1977).

In order to determine whether TSA should be subjected to the jurisdiction of Washington courts for this particular case, this court should look to five factors: (1) the interest of Washington in providing a forum for its residents, (2) the ease with which the plaintiff could access another jurisdiction, (3) the amount, kind, and continuity of activities by TSA in Washington, (4) the significance of the economic benefits flowing from TSA's activities in Washington, and (5) the foreseeability of injury resulting from the use of TSA's products. *Croze*, 558 P.2d at 768;

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1169 (9th Cir. 2006).

As applied to this case, the *Croze* factors show that Washington is no more a proper jurisdiction for this action than is New York or Florida. First, Washington has no interest in providing a forum for Hai since Hai is resident of Texas and he has no connection with Washington. And TSA is headquartered in Colorado, not Washington. Second, it is undisputed that Hai could have brought his action in Texas where the injury occurred. Hai retained a lawyer in Texas within three months of his injury. (CP: 28). Third, even though the Sports Authority *does* operate stores in Washington, TSA derives no more economic benefit from operating its stores in Washington than it does from any other state in the country. And fourth, the fact that TSA operates stores in Washington does not make it reasonable to subject TSA to the jurisdiction of Washington courts for a lawsuit brought by a Texas plaintiff concerning an accident that happened in a Texas Sports Authority store. *Perkins v. Benguet Cosol. Mining Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 72 S. Ct. 413 (1952) (The amount and kind of activities which must be carried on by the foreign corporation in the forum state must be such that it is reasonable and just to subject the corporation to the jurisdiction of that state.) The more reasonable course is to apply the law of place of injury in order to comport with the reasonable expectations of any other Teeter Hang-Up purchasers who would naturally understand that any tort claim against TSA would be

determined under the laws of the states where they reside. *Croze* Factor No. 5 does not apply here since the Teeter Hang-Up is not TSA's product. In addition, Hai was not injured from using a product. He backed up and tripped over the Teeter Hang-Up.

This Court should dismiss Hai's action against TSA because Hai has not met his burden of establishing that a Washington court should exercise general jurisdiction over TSA.

2. Defendant TSA Timely Raises the Issue of Personal Jurisdiction

In the event that Hai asserts the issue of personal jurisdiction is untimely made, TSA asserts the following in anticipation. Washington courts recognize a party "is not precluded from asserting [lack of personal jurisdiction] by proceeding with discovery." *French v. Gabriel*, 116 Wn.2d 584, 594, 806 P.2d 1234 (1991) (citing *Crouch v. Friedman*, 51 Wn. App. 731, 735, 754 P.2d 1299 (1988)). "This is so even if the discovery is unrelated to the service of process defense." *Davidheiser v. Pierce County*, 92 Wn. App. 146, 156, 960 P.2d 998 (1998) (*see also*, *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 626, 937 P.2d 1158 (1997)).

VI. CONCLUSION

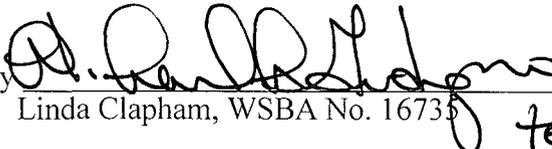
The trial court's dismissal of plaintiff's claims should be affirmed. As the trial court properly concluded, Hai cannot avoid Texas's two-year statute of limitations by filing suit in Washington. Washington law

provides that if a claim is substantively based upon the law of another state, the limitation period of that state applies. Here, the trial court properly applied Texas law to Hai's claim because Texas has the most significant relationship to the occurrence and the parties. This Court should, therefore, affirm the trial court's decision to apply Texas's two-year statute of limitations to Hai's claims.

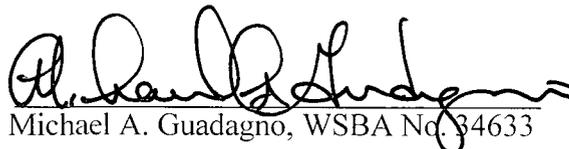
Moreover, TSA Stores, Inc. asserts that Washington courts have no personal general jurisdiction over it. Here, Washington courts lack personal general jurisdiction over TSA, because the defendant is not transacting substantial and continuous business within this state.

DATED this 28th day of February, 2013.

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