

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2018 FEB 10 PM 4:02 *E*

No. 64318-5

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

Ernest Castro,

Appellant

v.

Hensen Equipment, LLC

Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
Cause No. 08-2-40757-8 SEA

Respondent's counsel on appeal:

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. OPPOSITION TO ASSIGNMENTS OF ERROR AND ISSUES OF LAW 2

III. RESPONDENTS' STATEMENT OF THE CASE..... 3

A. STATEMENT OF FACTS..... 3

IV. AUTHORITY..... 4

A. THE STANDARD OF REVIEW IS *DE NOVO*..... 4

B. PERSONAL JURISDICTION CAN ONLY BE ESTABLISHED IF THE REQUIREMENTS OF DUE PROCESS UNDER THE U.S. CONSTITUTION ARE MET AND THE PLAINTIFF DEMONSTRATES THAT THE DEFENDANT HAS PURPOSEFULLY DIRECTED AN ACT TOWARDS WASHINGTON..... 5

C. HENSEN REQUESTS AN AWARD OF ATTORNEYS FEES IN ACCORDANCE WITH RCW 4.28.185 AND RAP 18.1 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<i>Asahi Metal Indus. Co. v. Superior Court</i> , [480 U.S. 102, 107 S.Ct. 1026 (1987)].....	10
<i>Bartusch v. Oregon State Board of Higher Educ.</i> , 131 Wn.App. 298, 126 P.3d 840 (2006).....	11
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 472-78, 105 S.Ct. 2174, 2181-85 (1985).....	2, 7, 10, 12
<i>Grange Ins. Ass'n v. State of Washington</i> , 110 Wn.2d 752, 758, 757 P.2d 933 (1988), <i>cert. denied</i> , 490 U.S. 1004, 109 S.Ct. 1638 (1989)1, 2, 5, 6, 7, 8, 9, 10, 12, 13	
<i>Hanson v. Denckla</i> , 357 U.S. 235, 253, 78 S.Ct. 1228, 1239 (1958)	6
<i>Hogan v. Johnson</i> , 39 Wn.. App. 96, 102-03, 692 P.2d 198 (1984).....	7, 8
<i>In re Miller</i> , 86 Wash.2d 712, 719, 548 P.2d 542 (1976).....	10
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 316, 55 S.Ct. 154, 158 (1945).....	5
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770, 774 (1984).....	7
<i>Kulko v. Superior Court</i> , 436 U.S. 84, 96 (1978).....	7
<i>Lewis v. Bours</i> , 119 Wn.2d 667, 669, 835 P.2d 221 (1992)	4, 5, 6
<i>MBM Fisheries, Inc., v. Bollinger Machine Shop and Shipyard, Inc.</i> , 60 Wn. App. 414, 418, 804 P.2d 627 (1991).....	4, 11, 12
<i>Oliver v. American Motors Corp.</i> , 70 Wn.2d 875, 889, 425 P.2d 647 (1967).....	7, 10
<i>Puget Sound Bulb Exch. v. Metal Bldgs. Insulation</i> , 9 Wn.App. 284, 513 P.2d 102 (1973).....	8

Scott Fetzer Co. v. Weeks, 114 Wn .2d 109, 786 P.2d 265 (1990)..... 13

See Stuart v. Spademan, 772 F.2d 1185, 1191-92 (5th Cir. 1985) 10

Smith v. York Food Machine Co., 81 Wn.2d 719, 722, 504 P.2d 782 (1972)..... 1, 8, 9, 14

Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 115-16, 381 P.2d 245 (1963)..... 6

Walker v. Bonney-Watson Co., 64 Wn. App. 27, 823 P.2d 518 (1992)5, 6, 8, 13

Statutes

RCW 4.28.185 i, 1, 3, 5, 8, 12

RCW 4.28.185 (1)(b)..... 4

RCW 4.28.185(5)..... 4

Rules

RAP 18.1..... i, 12, 13

I. INTRODUCTION

This is an appeal from a summary judgment order that dismissed the plaintiff's claims for lack of personal jurisdiction. Ernest Castro was injured in Washington, allegedly because a forklift was not properly serviced by the defendant, Hensen Equipment, LLC. Hensen is a Colorado company with its principal place of business in Colorado. It performed service work on the forklift in Colorado for PCL Construction Services, Inc., who owns the forklift and is also a Colorado corporation. After having the forklift serviced in Colorado, PCL moved the forklift to a jobsite in Washington, where its employee Mr. Castro was injured.

Assertion of personal jurisdiction depends on two factors—(1) application of the state's long-arm statute, RCW 4.28.185, and (2) analysis of due process factors under the U.S. Constitution. *Grange Ins. Ass'n v. State of Washington*, 110 Wn.2d 752, 758, 757 P.2d 933 (1988), *cert. denied*, 490 U.S. 1004, 109 S.Ct. 1638 (1989). The Supreme Court in *Grange* explicitly rejected the argument that the location of an injury alone is sufficient to find personal jurisdiction. Instead, the Court applied U.S. Supreme Court authority and held that personal jurisdiction cannot be established when the defendant did not “purposefully do some act or consummate some transaction in the forum state.” *Id.* The facts here are undisputed: Hensen has not purposefully directed any actions to

Washington or its residents. Hensen conducts no business in Washington, did not interact with PCL in Washington, and has not purposefully performed an act or transaction in Washington.

The plaintiff does not dispute these facts. Instead, he relies on reasoning from 1970s cases that has been expressly rejected by the Washington Supreme Court and argues that the location of the injury alone confers jurisdiction over the defendant. The plaintiff completely ignores the Supreme Court's decision in *Grange* and the U.S. Supreme Court's application of due process principles to the exercise of personal jurisdiction. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S.Ct. 2174, 2181-85 (1985). Even though these authorities were cited by Hensen in the trial court, the plaintiff does not identify or even attempt to distinguish the black-letter law established in these cases.

In short, this Court should *deny* the plaintiff's appeal and *affirm* the decision of the trial court finding no personal jurisdiction over Hensen Equipment, LLC.

II. OPPOSITION TO ASSIGNMENTS OF ERROR AND ISSUES OF LAW

The trial court did not err in dismissing this case for lack of personal jurisdiction. Under Washington Supreme Court authority that is now more than twenty years old and that applied U.S. Supreme Court

authority on due process rights under the U.S. Constitution, personal jurisdiction can only be established if the defendant falls within the long-arm statute, RCW 4.28.185, and has purposefully directed an act or consummated a transaction in Washington.

III. RESPONDENTS' STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Hensen Equipment is a Colorado company with its principal place of business in Henderson, Colorado. CP 31. PCL Construction Services is a Colorado corporation, and it also operates a place of business in Henderson. CP 44, 32. In response to a request from PCL—made to Hensen in Colorado—Hensen provided repair and maintenance work to a forklift owned by PCL at Hensen's yard in Colorado. CP 32. After Hensen returned the forklift to PCL in Colorado, PCL later shipped the forklift to a worksite in Washington. CP 45. Ernest Castro, an employee of PCL, allegedly was injured by the forklift at the Washington jobsite. CP 4.

Hensen did not know that the forklift was going to be used in Washington. CP 32. Hensen has never conducted business in Washington; it has no offices or equipment here; it has no employees or agents here; it has not had customers in Washington, nor does it solicit

customers here; and it has no point of contact in Washington CP 32. Neither PCL nor the plaintiff dispute any of these facts. CP 41-42, 44-45.

After his injury, Mr. Castro applied to the Department of Labor and Industries for benefits and assigned his claims against Hensen to the Department. CP 41-42. The Department is thus the only plaintiff in fact.

Hensen moved for summary judgment based on lack of personal jurisdiction in the trial court. CP 16-30. In its opposition, the Department relied solely on application of RCW 4.28.185 (1)(b) to establish jurisdiction. CP 36-38. The trial court granted Hensen's motion and dismissed the claims against it for lack of personal jurisdiction. CP 53-54. The trial court also awarded Hensen its attorneys fees under RCW 4.28.185(5). This appeal followed.

IV. AUTHORITY

A. THE STANDARD OF REVIEW IS *DE NOVO*.

When the underlying facts are undisputed, a dismissal based on lack of personal jurisdiction is reviewed de novo. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992); *MBM Fisheries, Inc., v. Bollinger Machine Shop and Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

B. PERSONAL JURISDICTION CAN ONLY BE ESTABLISHED IF THE REQUIREMENTS OF DUE PROCESS UNDER THE U.S. CONSTITUTION ARE MET AND THE PLAINTIFF DEMONSTRATES THAT THE DEFENDANT HAS PURPOSEFULLY DIRECTED AN ACT TOWARDS WASHINGTON.

Personal jurisdiction is subject to the due process requirements of the Fourteenth Amendment of the U.S. Constitution. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 55 S.Ct. 154, 158 (1945). The Washington Supreme Court has outlined a two-prong test for establishing jurisdiction: (1) Does the statutory language of RCW 4.28.185, the long arm statute, purport to extend jurisdiction, and (2) would imposing jurisdiction violate due process under the U.S. Constitution? *Grange Ins. Ass'n v. State of Washington*, 110 Wn.2d 752, 758, 757 P.2d 933 (1988), *cert. denied*, 490 U.S. 1004, 109 S.Ct. 1638 (1989); *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 823 P.2d 518 (1992).

RCW 4.28.185(1)(b) states that a non-resident of the state “submits” to the jurisdiction of this state if it commits “a tortious act within this state.” A tortious act is deemed to have occurred in this state when the injury occurs here. *Grange*, 110 Wn.2d at 757; *Walker*, 84 Wn. App. at 33, *but see Lewis v. Bours*, 119 Wn.2d at 672-74 (in professional malpractice case, tortious act occurs where malpractice occurred, not where injury manifests itself, as distinct from a case in which a product or

instrumentality injures the plaintiff).¹ There is no dispute that Mr. Castro was injured in Washington, and no dispute that any deficiency in the maintenance and repair work occurred in Colorado.

Under the second prong of the test for personal jurisdiction, due process is analyzed under a three-element standard:

(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.

Walker, 64 Wn. App. at 33, citing *Tyee Construction Co. v. Dullen Steel Products, Inc.*, 62 Wn. 2d 106, 115-16, 381 P.2d 245 (1963); *Grange*, 110 Wn.2d at 758 (also quoting the same provision in *Tyee*).

Under the first element of this standard, the non-resident defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its

¹ Under the holding in *Lewis*, Hensen's maintenance and repair work on the forklift is more like a "service" than analogous to a product. Hensen did not engage in "voluntary interstate economic activity, directed at the forum state's economic markets, [but instead to] the provision of [] services outside of the forum state where the provider has not solicited clientele" *Grange*, 110 Wn.2d at 763. Under this analysis, the tortious act did not occur in Washington and this provides a separate basis to affirm the decision of the trial court.

laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239 (1958). If a defendant directs his activities at residents in the forum, or “purposefully derives benefit” from interstate activities involving the forum, the first element may be established. *Burger King*, 471 U.S. at 472-74, 105 S.Ct. at 2182-83, citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978). A retailer who merely places a product into the stream of interstate commerce, and has no specific knowledge of its consequences in Washington, has not “purposefully” availed itself of the jurisdiction, and thus the sale is not sufficient to meet the first element of the due process test. *Grange*, 110 Wn.2d at 761-62, citing *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 889, 425 P.2d 647 (1967).

Similarly, the rendition of services is more personal than the sale of goods, such that “the location where the services are performed is of greater jurisdictional importance than is the location where a product is bought.” *Grange*, 110 Wn.2d at 763; *Hogan v. Johnson*, 39 Wn. App. 96, 102-03, 692 P.2d 198 (1984). In *Grange*, the defendant state of Idaho tested cattle for disease for Washington purchasers. Even though Idaho knew who the buyers were, it did not “purposefully” direct its work to Washington or derive benefit from the jurisdiction. Although the cattle were found to have disease in Washington, the Supreme Court held that

Idaho did not submit to Washington jurisdiction. Under the same reasoning, in *Hogan*, the plaintiff was treated by a doctor in California, then moved to Washington and discovered that she was injured by the doctor's treatment. The doctor did not purposefully avail himself of Washington and the court refused to find jurisdiction.

The record in this case contains no evidence that Hensen has directed any efforts to Washington. Hensen performed a service—repair work—for a Colorado corporation in Colorado. Hensen did not know that the repaired forklift was going to be shipped to Washington. CP 32:10. Hensen does not solicit business in Washington or conduct business here. Under the holdings in *Grange*, *Walker*, and *Hogan*, the plaintiff has failed to establish the first element of due process for application of personal jurisdiction.

The plaintiff does not acknowledge the two-pronged test in *Grange* or that application of RCW 4.28.185 is a separate question from whether due process will allow assertion of jurisdiction. The plaintiff relies solely on the location of injury to establish jurisdiction, relying on *Smith v. York Food Machine Co.*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972) and *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation*, 9 Wn.App. 284, 513 P.2d 102 (1973). In doing so, the plaintiff ignores the Court's decision in *Grange*, which explicitly overrules the reasoning behind *Smith* and *Puget*

Sound Bulb. The trial court in *Grange* denied jurisdiction. The Court of Appeals reversed that decision and found jurisdiction based solely on the location of the injury (*i.e.*, sick cows in Washington). In reversing the Court of Appeals decision and reinstating the trial court's dismissal of jurisdiction, the Supreme Court held that finding a "tortious act" under the long arm statute cannot be conflated with finding "purposefulness" under the first element of due process:

Despite the language of these tests, the Court of Appeals concluded that the first element [of due process] could be satisfied without any analysis of the purposefulness of Idaho's actions. The court stated that this first due process element was based only on the long-arm statute, requiring no more than the commission of a tortious act within this state. *Grange [Ins. Ass'n v. State]*, 49 Wn.App. [551], 555-56, 744 P.2d 366 [(1987)]. Accordingly, the court relegated its analysis of "purposefulness" to the third prong of due process. *Grange*, at 557-59, 744 P.2d 366. This difference is important. **If "purposefulness" is analyzed under the first requirement, then a lack of "purposefulness" would preclude jurisdiction. If, however, it is analyzed under the third requirement, "purposefulness" would be merely one of a number of factors to be balanced in determining if jurisdiction is reasonable and fair and, therefore, an absence of that factor would not necessarily be fatal to jurisdiction.**

The Court of Appeals was not without support in its conclusion that evaluation of the first due process element need not include analysis of "purposefulness". See *Smith v. York Food Mach. Co.*, 81 Wash.2d 719, 722, 504 P.2d 782 (1972). However, other cases from this court suggest that this statutory analysis is only the starting point for proper determination of the first element, in that purposefulness must still be addressed. See *Oliver v. American Motors*

Corp., 70 Wash.2d 875, 884-89, 425 P.2d 647 (1967); *In re Miller*, 86 Wash.2d 712, 719, 548 P.2d 542 (1976).

The cases relied upon by the Court of Appeals were decided at a time when the United States Supreme Court had not clearly established that **the purposeful nature of minimum contacts is a separate requirement from the balancing test of the third element**. However, two recent opinions from the Supreme Court indicate unambiguously that the requirements are indeed separate. *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184 (“Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction [would be justified under the third element]”); *Asahi Metal Indus. Co. v. Superior Court*, [480 U.S. 102, 107 S.Ct. 1026 (1987)]. **Accordingly, there is no longer any doubt that a party asserting long-arm jurisdiction must show “purposefulness” as part of the first due process element. Absent this showing, jurisdiction cannot be imposed.** See *Stuart v. Spademan*, 772 F.2d 1185, 1191-92 (5th Cir. 1985) (“the fairness factors [of the third due process element] cannot of themselves invest the court with jurisdiction over a nonresident when the minimum-contacts analysis weighs against the exercise of jurisdiction”).

Grange, 110 Wn.2d at 758-59 (emphasis added, some internal citations omitted). While lengthy, the excerpt demonstrates that the Supreme Court has already rejected the analysis on which the plaintiff now relies to establish both a “tortious act” and purposefulness.

A consistent line of appeal decisions from the courts of appeals have routinely held that jurisdiction cannot be established when the defendant has not directed any acts towards Washington. In *Bartusch v.*

Oregon State Board of Higher Educ., 131 Wn.App. 298, 126 P.3d 840 (2006), for instance, the plaintiff, a Washington resident, sought veterinary care from an Oregon resident. The court examined “the entire business transaction, including the negotiations, contemplated future consequences, the terms, and the parties’ course of dealing to determine whether the purposeful act requirement” was met. *Id.* at 306-07. The only evidence in the record was that the defendant solicited and accepted referrals from Washington veterinarians. The court held that this was legally insufficient to find “purposefulness.”

In a similar vein, Division One of this Court held that the defendant did not act purposefully in this state when the plaintiff, a Washington resident, brought his boat to the defendant, a Louisiana resident located in Louisiana, for repairs. *MBM Fisheries, Inc. v. Bollinger Machine Shop and Shipyard*, 60 Wn.App. 414, 425-26, 804 P.2d 627 (1991). The defendant did not have offices in Washington and did not conduct business here, but it advertised in a trade publication which may have been sold here and had done business with four other Washington residents.

MBM’s defendant had far more contacts with Washington than does Hensen, and it was still found not to have purposefully directed any acts towards the state sufficient to establish personal jurisdiction. This

Court should apply the reasoning in *MBM Fisheries* and hold that Hensen has not purposefully directed its work towards any Washington resident. Examining Hensen's entire business transaction with PCL, there is no evidence that Hensen sought any benefit from Washington.

Under the U.S. Supreme Court's analysis of due process in *Burger King*, and the Washington Supreme Court's decision in *Grange*, the plaintiff has failed to establish personal jurisdiction over Hensen. Accordingly, the trial court's decision dismissing the claims should be affirmed.

C. HENSEN REQUESTS AN AWARD OF ATTORNEYS' FEES IN ACCORDANCE WITH RCW 4.28.185 AND RAP 18.1.

RCW 4.28.185(5) allows the defendant to recover attorneys' fees when personal jurisdiction is not established:

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.

The Washington Supreme Court has authorized an award of attorneys' fees to a non-resident defendant who obtains a dismissal for lack of personal jurisdiction. *Scott Fetzer Co. v. Weeks*, 114 Wn .2d 109, 786 P.2d 265 (1990); *Walker, supra*. The trial court awarded Hensen its

attorneys fees under this rule. CP 54:10-12. The plaintiff has not appealed the award of attorneys' fees. See Order on Motion for Attorneys Fees, attached as Appendix A and identified in the Defendant's Supplemental Clerk's Papers filed today. Under RAP 18.1, Hensen requests an award of its reasonable and necessary attorneys' fees in defending against this appeal.

V. CONCLUSION

The trial court dismissed the claims against Hensen for lack of personal jurisdiction. Hensen is a Colorado company that has not conducted business in Washington, has not sought business in Washington, and has no Washington customers. In accordance with the holdings in *Grange* and its progeny, Hensen's due process rights under the U.S. Constitution preclude the assertion of personal jurisdiction against it in Washington. The trial court's decision should be *affirmed*, the claims against Hensen *dismissed*, and Hensen be *awarded* its reasonable attorneys' fees for this appeal.

///

///

DATED this 10th day of February, 2010.

By 

Counsel for Respondent Hensen Equipment, LLC

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DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

Michael Costello
Walthew, Thompson, Kindred, Costello & Winemiller, PS
123 Third Avenue South
Seattle, WA 98104

DATED at Seattle, Washington this 10th day of February, 2010.


Jennifer Hickman

Appendix A

FILED
KING COUNTY, WASHINGTON

JUDGE JIM ROGERS

OCT 12 2009

SUPERIOR COURT CLERK
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ERNEST CASTRO,

Plaintiff,

vs.

HENSEN EQUIPMENT, LLC,

Defendant.

No. 08-2-40757-8 SEA

ORDER ON DEFENDANT HENSEN
EQUIPMENT, LLC'S MOTION FOR
AWARD OF ATTORNEYS' FEES

[PROPOSED] — ✓

This matter having come before the court on Defendant Hensen Equipment, LLC's Motion for Award of Attorneys' Fees; and the court having considered the pleadings and materials on file in this matter, including the following:

1. Defendant Hensen Equipment, LLC's Motion for Award of Attorneys' Fees Pursuant to RCW 4.28.185(5);
2. Defendant's Cost Bill;
3. Declaration of Counsel for Hensen Equipment, LLC In Support of Cost Bill and Application for Attorneys' Fees;

4. *Response by Castro* ✓
5. *Reply by Hensen Equipment*

ORDER ON DEF'S MTN FOR ATTORNEY'S
FEES AND COSTS - 1
RGG6546.008/394317

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5.

IT IS HEREBY ORDERED that defendant Hensen Equipment, LLC is awarded its attorneys fees incurred herein in the amount of \$~~10,306.00~~^{8,242.00}. *Q*

DATED this 12 day of July, 2009.

The Honorable James E. Rogers

Presented by:

WILSON SMITH COCHRAN DICKERSON

By _____

Whitney L. Smith, WSBA #21159
Of Attorneys for Defendant