

NO. 74241-8-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NAM CHUONG HUYNH and LIN R. BUI, husband and wife, and JO-  
HANNAH READ, as guardian ad litem for H.H. 1, H.H. 2, and H.H. 3,  
minors,

Appellant/Cross-Respondent,

v.

AKER BIOMARINE ANTARCTIC AS, a Norwegian corporation,

Respondent/Cross-Appellant

AKER BIOMARINE ANTARCTIC II AS, a Norwegian corporation,

Respondent/Cross-Appellant,

and MAREL SEATTLE, INC., a Washington State corporation,

Defendant.

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**RESPONDENT/CROSS-APPELLANT AKER BIOMARINE  
ANTARCTIC AS' ANSWERING BRIEF AND OPENING BRIEF  
ON CROSS-APPEAL**

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APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY  
NO. 14-2-31832-4 SEA

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## I. INTRODUCTION

A foreign defendant is not subject to specific jurisdiction in Washington unless its suit-related conduct created a substantial connection with this state. *Pruczinski v. Ashby*, \_\_\_ Wn.2d \_\_\_, 91466-4, 2016 WL 2586687, at \*3 (Wash. May 5, 2016) (citing *Walden v. Fiore*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)).

The U.S. Supreme Court has recently focused on personal jurisdiction. In *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, \_\_\_ U.S. \_\_\_ 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011), the Court revisited general jurisdiction jurisprudence over corporations, concluding that, except in an exceptional case, a corporation is ordinarily only subject to general jurisdiction in its formal place of incorporation or its principal place of business. *Daimler*, 134 S. Ct. at 761 n.19; *see also Goodyear*, 131 S. Ct. at 2853–54. In the context of product liability, the Court examined specific jurisdiction in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011), but was unable to produce a majority position. In *Walden v. Fiore*, a unanimous Court again turned its attention to specific jurisdiction and held: “For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” 134 S. Ct. at 1122. In so ruling, the Court examined the defendant’s “challenged conduct.” 134 S. Ct. at 1125. Legal scholars generally agree that beginning in 2011 with *Goodyear* and culminating in 2014 with

*Daimler and Walden*, the Supreme Court restricted general and specific jurisdiction over foreign corporations. *See, e.g., William V. Dorsaneo, III, Pennoyer Strikes Back: Personal Jurisdiction in A Global Age*, 3 Tex. A&M L. Rev. 1, 17 (2015) [hereafter “*Dorsaneo*”].

Appellants (collectively referred to as “Huynh”) allege that Mr. Huynh’s employer, Marel Seattle, Inc. (“Marel Seattle”); the vessel’s owner, Aker BioMarine Antarctic II AS (“AKAS II”); the vessel’s operator, Aker BioMarine Antarctic AS (“AKAS”);<sup>1</sup> or some combination of them, caused Mr. Huynh to sustain electric shock injuries while he was on the Norwegian vessel ANTARCTIC SEA, in Uruguay. CP 1-4; 1136.<sup>2</sup> Each negligent act or omission alleged against AKAS and AKAS II occurred, if at all, entirely within Uruguay. CP 3; 1136.

After an evidentiary hearing held pursuant to CR 12(d), the trial court found that neither AKAS nor AKAS II were subject to general jurisdiction. CP 1142. The trial court found that, separate from AKAS II, AKAS was not subject to specific jurisdiction. The court nevertheless determined that AKAS is subject to specific personal jurisdiction, but only

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<sup>1</sup> AKAS and AKAS II were sued as if they were separate, although since the date of the accident they have merged. In May, 2012, AKAS II sold the ANTARCTIC SEA to AKAS. In June, 2012, the two companies decided to merge. In August 2012 the merger was complete, leaving AKAS as the surviving company. CP 1140, *as amended by* CP 1217, 1303. Because they were separate at the time of the events giving rise to this case, unless otherwise indicated, we refer to each separately.

<sup>2</sup> CP 1133 –1148 is the trial court’s Order on Motion to Dismiss (“Order”). The Order was reconsidered and slightly revised twice on motion of the Aker defendants. *See* CP 1216-1217; 1302-1303.

as the corporate successor to AKAS II, whose contacts the court imputed to AKAS solely for the purpose of its potential liability as AKAS II's successor.

This case raises important questions about Washington's approach to specific jurisdiction in tort cases in the wake of *Walden*, while also raising significant questions of first impression in this state concerning the standard of review to be employed on appeal of a jurisdictional decision that involved fact finding after an evidentiary hearing held pursuant to CR 12(d).

## **II. ASSIGNMENTS OF ERROR**

### **A. Cross-Appeal Assignments of Error.**

1. The trial court erred in determining that AKAS II was subject to specific personal jurisdiction pursuant to RCW 4.28.185.

### **B. Issues Pertaining to Assignment of Error.**

1. Whether the trial court should have focused its jurisdictional inquiry on AKAS II's suit-related conduct under *Walden v. Fiore*.

2. Whether the trial court erroneously concluded that Huynh's negligence cause of action against AKAS II "arose from" AKAS II's contract with a business located in Washington.

3. Whether the trial court improperly relied upon dicta from *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991) in finding that Huynh's negligence cause of action against AKAS II "arose from" AKAS II's transaction of business in Washington.

4. Whether, under Washington’s current test for relatedness, the relationship between the ANTARCTIC SEA contract and Huynh’s negligence cause of action against AKAS II is too attenuated.

5. Whether the “but for” test as applied in Washington must be modified, re-focused or abandoned in light of *Walden v. Fiore*.

**C. Counter-Issues Pertaining to Huynh’s Appeal.**

1. Whether substantial evidence supports the trial court’s finding of fact that AKAS II was the only Aker entity that was a party to the ANTARCTIC SEA contract with Marel Seattle.

2. Whether a corporate predecessor’s jurisdictional contacts can be imputed to a successor for any purpose, not just for the successor’s potential liability for the predecessor’s actions.

3. Whether the trial court properly found that AKAS is not subject to specific personal jurisdiction pursuant to RCW 4.28.185.

4. Whether the federal doctrine of pendent personal jurisdiction is available in Washington state courts.

**III. STATEMENT/COUNTER-STATEMENT OF THE CASE**

The Aker BioMarine AS group of companies is engaged in the harvesting and processing of krill (small, shrimp-like crustaceans) in the waters of the Southern Ocean near Antarctica. CP 944 at ¶ 13.<sup>3</sup> AKAS was

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<sup>3</sup> Many facts were agreed by the parties. CP 942 – 954 is a pleading entitled “Statement of Undisputed Facts for Evidentiary Hearing on Personal Jurisdiction.” It was prepared jointly, agreed to by both Huynh and the Aker defendants and filed with the trial court with the intent that it be relied upon in the CR 12(d) hearing. The trial court accepted “those stipulated facts as verities for the purposes of” the Order. CP 1135-35.

formed in 2005. CP 944 at ¶ 14. On August 31, 2011, AKAS purchased a Norwegian company named “Startfase 465 AS,”<sup>4</sup> and subsequently changed the company’s name to AKAS II. CP 945 ¶ 17. AKAS II was a wholly owned subsidiary of AKAS. CP 945 ¶ 17.

On October 18, 2011, AKAS II purchased the ANTARCTIC SEA, a Norwegian-flagged vessel with its registered homeport in Svolvær, Norway. CP 945 ¶ 18. The vessel’s fish processing facilities needed refurbishment. CP 945 ¶¶ 18, 52. Marel Seattle, a wholly owned subsidiary of Icelandic corporation Marel hf, provided a quote for the refurbishment project. CP 942-43 ¶ 4-5; CP 950 ¶ 54; Ex. 3.

Marel Seattle’s quote was sent via e-mail from Henrik Rasmussen, Marel Seattle’s president, to Webjørn Eikrem, the Executive Vice President of AKAS and a member of the board of AKAS II. CP 943 ¶8; CP 945 ¶16; CP 947 ¶ 33. The quote was addressed to “Aker BioMarine. CP 950 ¶ 54. Mr. Eikrem accepted the quote on behalf of AKAS II. RP (8/17/2015) 96:10-97:20; 142:13-16.

On December 22, 2011, Marel Seattle CFO Kenneth Olsen e-mailed Mr. Eikrem several invoices for Marel Seattle’s work on the ANTARCTIC SEA.<sup>5</sup> RP (8/17/2015) 59:11-60:9 & Ex. 101. The invoices were directed to “Aker BioMarine Antarctic AS,” or AKAS. On January

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<sup>4</sup> Startfase 465 AS was what is known in Norway as a “shelf” corporation. CP 945 ¶ 17.

<sup>5</sup> This e-mail also included two invoices for work Marel Seattle had performed on a different vessel, the SAGA SEA. Those invoices were correctly directed to AKAS, the owner of that vessel. *See* RP (8/17/2015) 64:22-65:16 & Ex. 105.

2, 2012, Mr. Olsen e-mailed Mr. Eikrem an additional invoice, this time directed to “Ake (sic) Biomarine ASA.” RP (8/17/2015) 60:10-61:5 & Ex. 102.

Mr. Eikrem responded to the first e-mail on or about January 3, 2012. RP (8/17/2015) 61:12-19 & Ex. 103. He asked Mr. Olsen to “please change the invoices to be for Aker BioMarine Antarctic ii (sic), the owner of Antarctic Sea.” Ex. 103, *see also* RP (8/17/2015) 61:20-23. On the same date, Mr. Eikrem responded to the second email, again requesting a correction to Marel Seattle’s invoicing, stating: “All invoices to Antarctic Sea needs (sic) to be addressed to Aker BioMarine Antarctic II.” Ex. 104, *see also* RP (8/17/2015) 62:20-64:1.

Mr. Eikrem asked that the invoices be directed to AKAS II because AKAS II owned the ANTARCTIC SEA, had the funds with which to engage Marel Seattle, and had the budget for the work that Marel Seattle and other vendors performed on the ANTARCTIC SEA. RP (8/17/2015) 141:25-143:18.

Pursuant to Mr. Eikrem’s request, Mr. Olson manually revised the invoices, directing them to AKAS II, and sent the revised invoices to Mr. Eikrem that same day, January 3, 2012. RP (8/17/2015) 65:14-25 & Ex. 105-107. Mr. Olson also changed the Marel Seattle billing system to create a new customer number unique to AKAS II. RP (8/17/2015) 76:16-25. Marel Seattle continued working on the ANTARCTIC SEA project, RP (8/17/2015) 145:8-146:7, and AKAS II paid for the work that had been invoiced. RP (8/17/2015) 143:4-6.

On January 6, 2012, Huynh, at the request of his employer, arrived in Montevideo, Uruguay, where the ANTARCTIC SEA was berthed. CP 951 ¶ 60. On that same date, Huynh boarded the ANTARCTIC SEA and began work. CP 951 ¶ 60. While performing this work, Huynh suffered an electrical shock. CP 951 ¶ 60.

On May 10, 2012, AKAS II sold ANTARCTIC SEA to AKAS. CP 954 ¶ 70. On June 1, 2012, the two companies decided to merge. RP (8/17/2015) 137:3-7. The entities then provided notice to creditors of the intended merger. RP (8/17/2015) 137:8-18. Notice of completion of the merger was filed on August 18, 2012. RP (8/17/2015) 141:17-19.

#### **IV. ARGUMENT**

##### **A. Standards of Review and Burden of Proof.**

In deciding a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction the trial court has discretion to rely on written submissions, or it may hold a full evidentiary hearing. The party asserting personal jurisdiction bears the burden of proof to establish its existence. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147, 152 (2013), *aff'd*, 181 Wn.2d 272, 333 P.3d 380 (2014) (footnotes omitted). The plaintiff must establish the jurisdictional facts by a preponderance of the evidence—just as the plaintiff would be required to do at trial—and the court makes limited factual findings as necessary to determine the issue. *See Data Disc, Inc. v. Sys. Tech. Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *see also Outsource Servs. Mgmt.*, 172 Wn. App. at 807 (citing James Wm. Moore, Moore's Federal Practice, §

12.31[5], at 12-55 (3d ed.2006)); 5 C. Wright & A. Miller, *Federal Practice and Procedure* s 1373, at pp. 714-15 (1969)).

Review of a trial court's determination of personal jurisdiction is reviewed *de novo* when the facts are undisputed. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112, 1116 (2014), *as amended* (Nov. 25, 2014), *reconsideration denied* (Nov. 25, 2014), *cert. denied sub nom. Schutz v. Failla*, 135 S. Ct. 1904, 191 L. Ed. 2d 765 (2015).

Where, however, the trial court exercises its discretion to hold a full evidentiary hearing under CR 12(d), its factual findings regarding jurisdiction are reviewed for clear error. *See Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1319-20 (9th Cir. 1998)<sup>6</sup> (citing *Adler v. Federal Rep. of Nig.*, 107 F.3d 720, 723 (9th Cir.1997)); *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 558 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2860 (2015) (appellate courts "review *de novo* a court's dismissal of an

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<sup>6</sup> The review standard to be employed after a trial court holds a full evidentiary hearing under CR 12(d) to resolve a CR 12(b)(2) motion appears to be one of first impression in Washington. Like most of Washington's civil rules, CR 12 is based on its federal counterpart, Federal Rule of Civil Procedure 12. *Sanderson v. Univ. Vill.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999); *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119 n.2, 147 P.3d 1275 (2006) (Madsen, J., concurring) ("Our version of CR 12(b) mirrors its federal counterpart."). When a Washington Court Rule is substantially similar to a federal rule, courts look to the interpretation of the corresponding federal rule for guidance. *Outsource Servs. Mgmt.*, 172 Wn. App. at 806. Here, although not mirror images of each other, Fed R.Civ. P. 12(i) and CR 12(d) are substantially similar: both provide that the defenses enumerated in Rule/CR 12 b(1)-(7) shall be heard and determined before trial, unless the trial court decides to delay the determination until trial. Thus, federal court interpretations of Rule 12(i) are persuasive when interpreting CR 12(d).

action for lack of personal jurisdiction, but we review for clear error the court's underlying factual findings"); *Philos Techs., Inc. v. Philos & D, Inc.*, 802 F.3d 905, 911 (7th Cir. 2015) ("Factual findings related to the personal-jurisdiction issue are reviewed for clear error."); *cf. State v. LG Elecs., Inc.*, 185 Wn. App. 394, 408, 341 P.3d 346, 354 (2015), *review granted*, 183 Wn.2d 1002, 349 P.3d 856 (2015) ("Following an evidentiary hearing, the plaintiff's burden is no longer that of a prima facie showing.").

The "clear error" test applied by federal courts is analogous to the "substantial evidence" test applied by Washington courts. *Steele v. Lundgren*, 85 Wn. App. 845, 850, 935 P.2d 671, 674 (1997). Substantial evidence is defined as "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). It is a deferential standard requiring that reasonable inferences be drawn in the light most favorable to the prevailing party. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341-42, 308 P.3d 791, 796 (2013). "The party challenging a finding of fact bears the burden of showing that the record does not support it." *Id.* Under the substantial evidence standard, the appellate court's role is to review factual findings supporting the conclusions the trial court *did* reach, not to look for evidence supporting an alternate conclusion the court *could* have reached. *Mueller v. Wells*, 185 Wn.2d 1, 15-16, 367 P.3d 580, 586 (2016). Likewise. "unchallenged findings of fact become verities on appeal."

*Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn.2d 662, 675, 295 P.3d 231, 237 (2013) (citing *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980)).

Consequently, the trial court's challenged factual findings are to be reviewed for substantial evidence, while "the application of the law to the facts is a question of law that this court reviews de novo." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116, 119 (2014) (citing *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008)). Here, because the parties have not challenged the findings of fact, they are verities on appeal.

**B. Cross-Appeal of AKAS II.**

AKAS does not challenge any of the trial court's findings of fact. AKAS only assigns error to the trial court's conclusions of law based upon those facts. Accordingly, AKAS' cross-appeal presents questions of law, that are subject to *de novo* review. *Viking Bank*, 183 Wn. App. at 712, 334 P.3d at 119.

**1. General Jurisdiction is Not Available, because the AKAS and AKAS II Are Not "At Home" in Washington.<sup>7</sup>**

*Goodyear* and *Daimler* restricted general jurisdiction over foreign corporations "to a very limited number of situations, including a foreign

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<sup>7</sup> Huynh contends the trial court should have concluded that AKAS is subject to general jurisdiction. App. Br. at 25–26, n.17. Yet, Huynh does not push the issue, saying "the Court need not address that more complex question because specific jurisdiction exists." Lacking a concession, the Aker defendants briefly address general jurisdiction.

corporation's state of incorporation and its principal place of business." *Dorsaneo* at 17. "Only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler*, 134 S. Ct. at 760. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Goodyear*, 131 S. Ct. at 2853–54. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. "Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Id.* For that reason, only in an "exceptional case" might "a corporation's operations in a forum other than its formal place of incorporation or principal place of business ... be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19. Writing for the majority in *Daimler*, Justice Ginsberg rejected as "unacceptably grasping" the formulation that a foreign corporation is subject to general jurisdiction wherever it "engages in a substantial, continuous, and systematic course of business." *Id.* at 761. Instead, the general jurisdiction test adopted by the Court in *Goodyear* and re-affirmed in *Daimler* is "whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* (quoting *Goodyear*, 131 S.Ct. at 2851).

In *Daimler*, the Supreme Court determined that Daimler AG, a foreign corporation with a wholly-owned U.S. subsidiary (a Delaware

limited liability corporation with a principal place of business in New Jersey) was not subject to general jurisdiction in California.<sup>8</sup> *Id.* at 760. The Court reached this conclusion despite the fact that the subsidiary: (1) had “multiple California-based facilities;” and (2) was “the largest supplier of luxury vehicles in California.” *Id.* at 753. The Court characterized these contacts as “slim,” and reasoned that Daimler’s contacts with California “hardly render it at home there.” *Id.* at 760. The Court ruled:

It was therefore error for the Ninth Circuit to conclude that Daimler, even with [the subsidiary’s] contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.

*Id.* at 762 (footnote omitted).

AKAS and AKAS II’s contacts with Washington are far less substantial, systematic or continuous than were Daimler’s “slim” contacts with California. Neither AKAS nor AKAS II is incorporated in Washington. CP 944-45 at ¶¶ 14, 17. Neither AKAS nor AKAS II has its principal place of business in Washington. CP 1233:4-6. Both were incorporated and have their principal place of business in Norway. CP 1233:4-6; CP 1-2 ¶¶ 1.4-1.5. AKAS and AKAS II have transacted

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<sup>8</sup> The Court assumed that the contacts of Daimler’s subsidiary could be attributed to Daimler. *Daimler*, 134 S. Ct. at 760. The Court, however, rejected the Ninth Circuit’s reasoning with respect to the relationship between parent and subsidiary, because it would “subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the “sprawling view of general jurisdiction” we rejected in *Goodyear*.” *Id.* at 760-61 (citation omitted).

business with Washington entities, purchasing goods and services from various fisheries industry suppliers based in the greater Seattle area,<sup>9</sup> but this is not enough to subject defendants to general jurisdiction in this forum. *See Daimler*, 134 S. Ct. at 761. Although AKAS has a U.S. subsidiary with a presence in Washington,<sup>10</sup> even if this subsidiary's contacts are imputed to AKAS—an approach which the Supreme Court rejected under similar facts in *Daimler*, 134 S. Ct. at 759-60—these contacts are not sufficient to support the exercise of general jurisdiction. *See Daimler*, 134 S. Ct. at 760. The subsidiary has but two employees in Washington, and their work is related to marketing products in Asia. Ex. 5 ¶ 19(b). The sale of krill oil by AKASUS to Washington customers

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<sup>9</sup> In connection with the operation of the ANTARCTIC SEA and SAGA SEA, AKAS purchased goods and services from Washington vendors for delivery to or use by vessels operating in the Southern Ocean and/or South America. CP 944 at ¶15, 952 at ¶ 65. These purchases typically included things such as marine electronics, IT consulting services, packaging supplies, transportation logistics, rubber belts and hoses, and insurance brokerage services. CP 945 at ¶ 65. Additionally, AKAS sometimes purchased consulting services from a separate entity named Aker Seafoods U.S., Inc. (hereinafter “Aker Seafoods”). CP 947 at ¶ 30. Aker Seafoods is a Washington corporation, and, like AKAS, is a wholly owned subsidiary of Aker BioMarine AS. *Id.* Finally, both entities have contracted with Marel Seattle: AKAS II in connection with the ANTARCTIC SEA factory conversion project, and AKAS in connection with separate projects aboard the SAGA SEA and ANTARCTIC NAVIGATOR. CP 948 ¶ 34 – 950 ¶ 47.

<sup>10</sup> International marketing and distribution of krill oil is carried out by regional subsidiaries of AKAS, which sold this product to manufacturers of nutritional supplements. Ex. 5 ¶ 19(a). The subsidiary responsible for marketing and distributing krill oil in the United States was Aker BioMarine Antarctic US, Inc. (hereinafter “AKASUS”). *Id.* AKASUS is a Delaware corporation. *Id.* AKASUS has a presence in Washington: it has a registered agent in the state, an office in Seattle with two employees, and also maintains an office space in Issaquah, although no employees were assigned to this location. Ex. 5. ¶¶ 19 (b) and (c). The two AKASUS employees in Seattle were: (1) a senior Vice President responsible for krill oil sales and marketing in Asia, and (2) an administrative assistant. *Id.*

accounts for less than 1% of United States krill oil sales, and a miniscule portion of global sales. *Id.* 19(e).

Neither AKAS nor AKAS II is “at home” in Washington. This is not the “exceptional case” in which a corporation’s operations are “so substantial and of such a nature as to render the corporation at home” in a place other than its place of incorporation or principal place of business. *See Daimler*, 134 S. Ct. at 761 n.19.<sup>11</sup> If the many California contacts attributed to Daimler AG were not sufficient to support general jurisdiction, then AKAS and AKAS II’s comparatively insubstantial contacts with Washington cannot possibly be sufficient. *See id.* at 762. The trial court’s conclusion that the courts of this State cannot exercise general jurisdiction over AKAS and AKAS II was correct and should be affirmed.

**2. AKAS II and Consequently AKAS Are Not Subject to Specific Personal Jurisdiction.**

“[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881, 131 S. Ct. 2780, 2787, 180 L. Ed. 2d 765 (2011) (Kennedy, J.). “Washington courts may assert personal jurisdiction over nonresident defendants to the extent

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<sup>11</sup> *See also U.S. ex rel. Imco Gen. Const., Inc. v. Ins. Co. of Pennsylvania*, No. C14-0752RSL, 2014 WL 4364854 (W.D. Wash. Sept. 3, 2014) (defendant insurer not subject to general jurisdiction despite being registered to do business in WA since 1909, having 217 agents registered to sell insurance in WA, earning over \$53 million in premiums from WA accounts over the prior 4 years, and defendant having sued and having been sued in WA during the preceding 10 years).

permitted by the federal due process clause.” *Pruczinski v. Ashby*, \_\_\_ Wn.2d \_\_\_, 91466-4, 2016 WL 2586687, at \*3 (Wash. May 5, 2016) (internal quotes omitted; citations omitted).

In order to establish personal jurisdiction, Washington’s long-arm statute, RCW 4.28.185, must also be satisfied. *Ashby*, 2016 WL 2586687, at \*3. It provides, in relevant 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 . . . 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[.]

\* \* \*

(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.

In Washington, the test for specific jurisdiction has traditionally been expressed as follows:

Three factors must coincide for the long-arm statute to apply: “(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 must not offend traditional notions of fair play and substantial justice, considering the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of state laws afforded the respective parties, and the basic equities of the situation.”

*Failla v. FixtureOne Corp.*, 181 Wn. 2d 642, 336 P.3d 1112 (2014), *as amended* (Nov. 25, 2014), *reconsideration denied* (Nov. 25, 2014)

(quoting *Shute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 767, 783 P.2d 78 (1989)). The Washington Supreme Court has recently ruled that for a Washington court to exercise specific jurisdiction over a foreign defendant “consistent with due process, his ‘suit-related conduct must create a substantial connection’ with this state.” *Ashby*, 2016 WL 258667 at \*3 (quoting *Walden*, 134 S. Ct. at 1121). In Huynh’s tort case, the trial court erred by focusing on the contract between AKAS II and Marel Seattle, —a company which happens to be located in Washington—rather than on AKAS II’s suit-related conduct. The trial court magnified that error by failing to consider whether AKAS II’s alleged tortious conduct created a substantial connection with Washington.

**a) The Purposeful Direction Test Applies in Tort Cases.**

“We often use the phrase “purposeful availment,” in shorthand fashion, to include both purposeful availment and purposeful direction, ... but availment and direction are, in fact, two distinct concepts.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citations omitted); *see also Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991). In specific jurisdiction cases “[i]t is important to distinguish contract from tort actions.” *Roth*, 942 F.2d at 621. Purposeful availment is generally more applicable to contract cases. *Schwarzenegger*, 374 F.3d at 802. Purposeful direction analysis “is most often used in suits sounding in tort.” *Id.* (citations omitted). Huynh’s are tort claims: he is not suing on a contract. *See* CP 3; 1136. Thus, the Court should look to AKAS II’s (and, for that matter, AKAS’s) alleged tortious conduct. The tortious

conduct occurred, if at all, entirely outside of Washington and was not directed towards Washington. The trial court nevertheless concluded, based on the fact that AKAS II hired Marel Seattle to perform the factory refit work on the ANTARCTIC SEA, that AKAS II (and therefore by succession, AKAS) was subject to personal jurisdiction in Washington. CP 1146–47. In doing so, the trial court overlooked the absence of any connection between the alleged tortious conduct and Washington, other than through the plaintiffs.<sup>12</sup> Thus, there is no evidence that AKAS II (or AKAS) purposefully directed their alleged tortious conduct at Washington.

**(1) No Tort Was Committed in Washington and No Tortious Conduct Was Directed Here.**

“[A] tortious act occurs in Washington when the injury occurs within our state.” *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 569, 226 P.3d 141 (2010). “An injury ‘occurs’ in Washington if the last event necessary to make the defendant liable for the alleged tort occurred in

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<sup>12</sup> This enabled the trial court to allow the plaintiff’s residence and the choices of third parties, rather than AKAS II’s own purposeful connections with Washington, or lack thereof, to drive the jurisdictional analysis. This is improper under *Walden*. See *Walden*, 134 S.Ct. at 1126. None of AKAS II’s alleged tortious conduct occurred in or was directed to Washington. The fact that its effects may be felt here is a function of the choice of the plaintiffs to live in Washington – not the result of conduct directed here by AKAS II. Similarly, the fact that Marel Seattle is in Washington is a result of Marel’s choice, not AKAS II’s. Marel Seattle would have been hired by AKAS II wherever it chose to locate itself. See Ex. 5 at ¶ 11(d). There is no evidence—and no finding—that AKAS II selected Marel Seattle because of its Washington location. “[M]inimum contacts analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.” *Walden*, 134 S.Ct. at 1122 (citation omitted).

Washington.” *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 425, 804 P.2d 627 (1991).

All of the alleged acts or omissions occurred, if at all, in Uruguay (or at sea) and not in Washington. *See* CP 3, 1136. Accordingly, because the last events necessary to render AKAS II liable for negligence occurred, if at all, outside of Washington, *see MBM Fisheries*, 60 Wn. App. at 425, AKAS II did not commit a tortious act in Washington and RCW 4.28.185(1)(b) is not satisfied. *See id.* There are no allegations, evidence or findings that Mr. Huynh’s injuries were the result of tortious conduct that AKAS II directed to Washington from outside of the state.<sup>13</sup>

Instead of focusing on AKAS II’s suit-related conduct and determining whether it created a substantial connection with the state, the trial court focused on AKAS II’s business interactions with Marel Seattle, a company located here. AKAS II hired Marel Seattle for its expertise. Ex. 5 ¶ 11.d. at 7:13-22.<sup>14</sup> The fact that Marel Seattle was situated in Washington was not a factor. *Id.* at 7:18-20. Marel Seattle’s location in Washington was obviously Marel Seattle’s choice, not AKAS II’s. The “unilateral activity of another party or a third person is not an appropriate

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<sup>13</sup> AKAS II’s contacts with Washington must be assessed in light of the plaintiffs’ claims, because it is for those claims that the plaintiffs are seeking an exception to the state’s lack of general all-purpose jurisdiction over AKAS II. This goes to the heart of *Walden’s* requirement that the defendant’s suit-related conduct create a substantial connection with the forum state.

<sup>14</sup> Although Webjorn Eikrem also testified live via video feed at the CR 12(d) evidentiary hearing, plaintiff offered his declaration and attachments into evidence. They were admitted as Exhibit 5. RP (June 26, 2015) at 63:1-18; 64:25-22.

consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873, 80 L. Ed. 2d 404 (1984). Nothing about AKAS II’s decision to hire Marel Seattle created a substantial connection with Washington and nothing about hiring Marel Seattle had anything to do with AKAS II’s allegedly tortious conduct that later occurred in Uruguay. By conflating tort and contract jurisdictional concepts, the trial court has erroneously subjected AKAS II to personal jurisdiction in Washington<sup>15</sup> based upon AKAS II’s decision to enter into a contract with a company that happened to be situated in the state. *See, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528 (1985) (“[A]n individual’s contract with an out-of-state party *alone*... [cannot] establish sufficient minimum contacts in the other party’s home forum....”); *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 711, 919 P.2d 1243, 1250 (1996) *modified*, 932 P.2d 664 (1997).<sup>16</sup>

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<sup>15</sup> Injuries resulting from torts do not “arise from” a contract for services for the purpose of specific jurisdiction. *See Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 27-28 (D.D.C. 2014); *Collazo v. Enter. Holdings, Inc.*, 823 F.Supp.2d 865, 873 (N.D.Ind.2011); *Martino-Valdez v. Renaissance Hotel Mgmt. Co.*, No. 10-1278, 2011 WL 5075658, at \*3 (D.P.R. Aug. 25, 2011); *Gonzalez v. Internacional De Elevadores, S.A.*, 891 A.2d 227, 236 (D.C. 2006).

<sup>16</sup> There was no prior course of dealing between AKAS II and Marel Seattle. Ex. 5 ¶ 11(d). AKAS II had been formed only a few months prior, and the ANTARCTIC SEA project was the first opportunity AKAS II had to engage the services of a company like Marel Seattle. *Id.*; CP 1137:16-1139:6. The initial negotiations for the M/V ANTARCTIC SEA conversion project were conducted via e-mail, and consisted primarily of communications in the Norwegian and/or Danish language. Ex. 5 ¶ 12. Marel Seattle’s President, Henrik Rasmussen, subsequently travelled to Uruguay to

Instead, as *Walden* made clear, and as *Ashby* echoes, the focus must be on the foreign defendant's *suit-related conduct*: "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." 134 S. Ct. at 1121; *see also Ashby*, 91466-4, 2016 WL 2586687, at \*3. This requirement impacts not only on the purposeful direction prong, but also relatedness.

**b) Under *Walden v. Fiore*, and its Progeny, Huynh's Cause of Action Does Not Arise out of AKAS II's Washington Contacts.**

The trial court concluded that "but for" AKAS II's contract with Marel Seattle, Huynh would not have been sent to Uruguay where his accident occurred. CP 1147. In so doing the trial court failed to focus on the alleged tortious conduct and, therefore, failed to determine if *that* conduct created the required substantial relationship with Washington. Had it done so, the trial court would have been forced to confront the reality that AKAS II did not commit a tort in this state, and did not direct any tortious conduct at Washington. Because the court focused on the wrong conduct in the first prong, it necessarily applied the relatedness test wrongly.<sup>17</sup> Consideration of relatedness and purposefulness in light of

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inspect the vessel in Uruguay and assess the scope of work and technical details of the project. *Id.* at ¶ 11. Mr. Rasmussen then made a second trip to Uruguay to finalize the terms of the contract and begin planning. *Id.* At no point did any officer or representative of AKAS II travel to Washington to negotiate or discuss the project. *Id.* Other than this single contract, there was no course of dealing between Marel Seattle and AKAS II.

<sup>17</sup> Much could be said, and perhaps should be said about the "but for" test for relatedness employed in Washington. After *Walden* and now *Ashby*, the continued viability of that test in Washington is in doubt. The "but for" test is employed by a minority of courts in

*Walden* and *Ashby* requires a closer examination of *Walden* and its progeny.

In *Walden*, the defendant law enforcement officer seized a large amount of cash from the plaintiffs at a Georgia airport and allegedly filed a false and misleading affidavit in support of forfeiture. 134 S. Ct. at 1120-21. The plaintiffs, who had residences in California and Nevada, filed suit in Nevada. *Id.* at 1121. The trial court dismissed the suit for lack of personal jurisdiction. *Id.* at 1120. The Ninth Circuit reversed, holding that under the so-called “effects test” the defendant officer’s false affidavit was sufficient to establish personal jurisdiction in Nevada, because he knew the plaintiffs had a residence there and, therefore “aimed” the affidavit at that state. *Id.*

The Court reversed the Ninth Circuit, holding that it erroneously focused its analysis not just on the defendant’s contacts with the forum, but also on his contacts with the plaintiffs. *Id.* at 1124-25. “[The Ninth Circuit’s] approach to the ‘minimum contacts’ analysis impermissibly

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the United States and has come under considerable criticism. See *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) (“But-for causation cannot be the sole measure of relatedness because it is vastly over inclusive...”); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (“A ‘but for’ requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.”); Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 Temp. L. Rev. 627, 656 (2009) (“The but for test of personal jurisdiction swings the courthouse door open far too wide...”). In this case, the trial court should not have applied the “but for” test to the contract between AKAS II and Marel Seattle because that contract is jurisdictionally irrelevant – it does not constitute any part of AKAS II’s challenged conduct. Here, the suit-related conduct was not directed at Washington and did not occur within the state. If the but-for test was correctly applied to the Marel Seattle contract, then the test violates due process according to the plain language of *Walden* and *Ashby*.

allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." *Id.* The *Walden* Court noted, instead, that personal jurisdiction "must arise out of contacts that the 'defendant himself' creates with the forum State" and "the plaintiff cannot be the only link between the defendant and the forum." *Id.* at 1122. The Supreme Court has "consistently rejected attempts to satisfy the defendant focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* (citing *Helicopteros*, 466 U.S. at 417). "[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123.

The Court crystallized its holding: "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121-22. Later in the opinion the Court clarified that "suit-related conduct" means the defendant's "challenged conduct"—conduct that establishes the necessary connection to the forum state. *See Id.* at 1125 ("[The Ninth Circuit's approach] also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself."). Although *Walden* involved intentional tort claims, the principles it set forth apply to all tort claims: "These same principles apply when intentional torts are involved." *Id.* at 1123. Examination of a defendant's challenged conduct is therefore essential to both purposeful direction and relatedness. The defendant's challenged conduct, i.e., its suit-related conduct, is what must create a substantial connection with the forum, or

else the courts of this state cannot exercise specific personal jurisdiction over the defendant. *Ashby*, 2016 WL 258667 at \*3.

In the two years since *Walden*, many other courts have interpreted and applied the decision as AKAS II urges it should be applied in this case. In *Picot v. Weston*, 780 F.3d 1206, 1214 (9th Cir. 2015), the Ninth Circuit examined the defendant's suit-related conduct, i.e., the allegations against him, in concluding that the trial court lacked jurisdiction over plaintiff's allegations of tortious interference by a Michigan resident, saying:

Weston's allegedly tortious conduct consists of making statements to Coats (an Ohio resident) that caused HMR (a Delaware corporation with offices in Ohio) to cease making payments into two trusts (in Wyoming and Australia). Weston did all this from his residence in Michigan, without entering California, contacting any person in California, or otherwise reaching out to California. In short, "none of [Weston's] challenged conduct had anything to do with [California] itself."

*Id.* at 1215 (quoting *Walden* 134 S. Ct at 1125).<sup>18</sup> Likewise, in this case the "suit-related conduct" is the alleged tortious acts/omissions that Huynh claims caused him injury in Uruguay.

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<sup>18</sup> Lower courts have followed suit: "The suit-related conduct in a patent case is the alleged infringing activity." *Presby Patent Trust v. Infiltrator Sys., Inc.*, 14-CV-542-JL, 2015 WL 3506517, at \*3 (D.N.H. June 3, 2015). Similarly, the suit-related conduct in a trademark infringement case is the alleged infringing activity, not the defendant's unrelated activity within the forum that preceded the alleged infringing activity. *See, e.g., Pub. Impact, LLC v. Boston Consulting Grp., Inc.*, 117 F. Supp. 3d 732, 742 (M.D.N.C. 2015). The suit-related conduct in a contract case is the formation and execution of the contract. *See, e.g. Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 n.2 (5th Cir. 2014) (noting that "suit-related" conduct in the context of third-party complaint for breach of contract "would be the formation and execution of [plaintiff's] account contract").

In *Sutcliffe v. Honeywell Int'l, Inc.*, CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015), the plaintiffs were pilots and crew seriously injured or killed when a failed engine caused their plane to crash on final approach in Saskatchewan, Canada. *Id.* at \*1. The plaintiffs brought suit in Arizona against the plane's manufacturer, EADS Construcciones Aeronáuticas, S.A. ("EADS CASA"), a Spanish corporation with its principal place of business in Spain. *Id.* at \*2. Plaintiffs alleged that EADS CASA was negligent in manufacturing the plane and/or failing to warn of various possible dangers. *Id.* EADS CASA moved to dismiss for lack of personal jurisdiction. *Id.* Plaintiffs argued that EADS CASA was subject to specific jurisdiction in Arizona because it had purchased the engine that failed—along with many other engines over a long course of dealing—in Arizona from Honeywell. *Id.* at \*4. Plaintiffs contended that "'but for' EADS CASA's purchase of engines from Honeywell, there would be no action against EADS CASA in Arizona." *Id.* at \*7. The court was "unpersuaded" by this argument, characterizing it as a "simplistic and sweeping approach." *Id.* at \*8. Instead, the court held that "[t]he causation element requires a more direct relationship between the relevant forum contact, the mere purchase of the engines, and the actual negligence claim brought against the moving defendants." *Id.* The court reached this conclusion because "the plaintiffs do not allege that the purchase of the engines in Arizona constituted a negligent act on the defendants' part, nor do they allege that any of the specific acts of negligence raised against the defendants in [the complaint]

occurred in Arizona.” *Id.* Like purchasing engines, contracting with Marel Seattle is not the tortious act that caused Huynh’s injuries. Hence, application of the “but for” test to the jurisdictionally irrelevant contract between AKAS II and Marel Seattle is a non-sequitur that impermissibly broadens the “but for” test beyond the strictures of due process.

All courts applying *Walden* have similarly concluded that the foreign defendant’s challenged conduct must itself create a substantial connection with the forum state, or else the exercise of specific jurisdiction is improper.<sup>19</sup> This significant and growing body of case law stands for the logical proposition that a defendant whose suit-related conduct has not created a substantial relationship with the forum is not subject to specific personal jurisdiction there. The near universal understanding of “suit-related conduct” is the defendant’s “challenged

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<sup>19</sup> The following are some examples. See *Cole v. Capital One*, GJH-15-1121, 2016 WL 2621950, at \*3 (D. Md. May 5, 2016) (none of the defendants’ challenged conduct had anything to do with Maryland itself); *Eclipse Aerospace, Inc. v. Star 7, LLC*, 15 C 1820, 2016 WL 901297, at \*4 (N.D. Ill. Mar. 3, 2016) (“In order to warrant the exercise of specific personal jurisdiction, the defendant’s contacts with the forum state must directly relate to the challenged conduct or transaction.”); *Priority Envtl. Sols., Inc. v. Stevens Co. Ltd.*, 15-CV-871-JPS, 2015 WL 9274016, at \*5 (E.D. Wis. Dec. 18, 2015) (“To support an exercise of specific personal jurisdiction, the defendant’s contacts with the forum state must directly relate to the challenged conduct or transaction.”); *Zellerino v. Roosen*, 118 F. Supp. 3d 946, 952 (E.D. Mich. 2015) (“None of the defendants’ challenged conduct had anything to do with Michigan itself.”); *Michael v. New Century Fin. Servs.*, 13-CV-03892-BLF, 2015 WL 1404939, at \*5 (N.D. Cal. Mar. 30, 2015) (“Defendants’ actions were expressly aimed at New Jersey, not California.”); *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269 (Utah 2016) (“Ultimately, [defendant’s] conduct had little to do with Utah, even though it had a lot to do with [plaintiff, a Utah corporation].”); *Anaqua, Inc. v. Bullard*, SUCV201401491BLS1, 2014 WL 10542986, at \*8 (Mass. Super. July 24, 2014), *aff’d*, 88 Mass. App. Ct. 1103, 36 N.E.3d 79 (2015) (“it is the defendant’s suit-related conduct, not other, unrelated conduct or contacts, that must make the connection with the forum.”).

conduct.” In this case, while it is true that AKAS II hired Marel Seattle to do a job on the ANTARCTIC SEA and that Marel Seattle sent Huynh to Uruguay to perform part of that job, AKAS II’s *challenged conduct* occurred entirely outside of Washington in Uruguay. The only connection between that conduct and Washington is that the plaintiffs reside here. “But the plaintiff cannot be the only link between the defendant and the forum.” *Walden*, 134 S. Ct. at 1122. Consequently, the second prong, properly applied to the relevant jurisdictional inquiry, does not support specific jurisdiction over AKAS II.<sup>20</sup>

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<sup>20</sup> The trial court relied upon, and Huynh argues that this Court should be persuaded by, *dicta* from the pre-*Walden* decision in *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991). This was improper. In that case, the plaintiff was from Michigan and was sent by his Michigan employer across the border to Matthews Lumber Yard in Windsor Ontario to pick up a load of lumber. While there plaintiff was injured due to the alleged negligence of Matthews. Plaintiff sued in Michigan and defendant moved to dismiss for lack of personal jurisdiction. The District Court granted the motion without an evidentiary hearing and an appeal was filed. The narrow question before the Sixth Circuit in *Theunissen* was “whether the court below improperly decided disputed questions of fact based upon the affidavits alone.” 935 F.2d at 1455-56. The Sixth Circuit determined that the district court had erred, and reversed and remanded for an evidentiary hearing. *Id.* at 1464-65. In so doing, the Sixth Circuit addressed but did not decide the jurisdictional issues, concluding as a matter of *dicta* that if the facts as found at the evidentiary hearing supported it: “Appellant’s cause of action—his injured hand—resulted from the conduct of Matthews’ employee while Appellant was present at his place of business pursuant to what Appellant alleges was a contract for carriage that Matthews had executed with Direct Transit. Thus, but for Matthews’ alleged business contacts with his employer, Theunissen would have sustained no injury.” *Id.* at 1461. However, following remand and a subsequent appeal, the Sixth Circuit ultimately determined that Matthews was *not* subject to jurisdiction: “Mr. Theunissen has not proven that his claim arose out of the ‘transaction of any business’ in Michigan by Matthews ..., or out of a ‘contract for services to be rendered or for materials to be furnished in the state by Matthews. .... We therefore hold that the Michigan long-arm statute would not reach the defendant even if the constitutional concerns were to prove nonexistent.” *Theunissen v. Matthews*, 992 F.2d 1217 (6th Cir. 1993) (citations omitted). Thus, the trial court’s reliance on *Theunissen*—and corresponding disregard of *Walden* and its progeny—was erroneous.

**c) The Court's Exercise of Jurisdiction over AKAS II Would Be Unreasonable and Offend Traditional Notions of Fair Play and Substantial Justice.**

“Due process requires that a defendant be haled into court in a forum state based on his own affiliation with the state, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.” *Walden*, 134 S. Ct. at 1123. The third prong is particularly important in Washington because, according to the Washington Supreme Court in *Shute*, the acknowledged risk that the “but for” test would be over inclusive is supposed to be offset by careful scrutiny under the fairness prong. The Washington Supreme Court said:

The “but for” test has been criticized. [Citations omitted] However, any criticism that the “test” reaches too far is answered by the federal court’s tempering of its “but for” test with an additional consideration. “If the connection between the defendant’s forum related activities [and the claim] is ‘too attenuated,’ the exercise of jurisdiction would be unreasonable.”

*Shute*, 113 Wn.2d at 769-70 (quoting *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989). When the Ninth Circuit adopted the “but for” test, it considered that the third prong of the specific jurisdiction analysis provided protection against the potential breadth of the “but for” test: “If the connection between the defendant's forum related activities is “too attenuated,” the exercise of jurisdiction would be unreasonable, and therefore in violation of due process.” *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir. 1988), *opinion withdrawn*, 872 F.2d 930 (9th Cir. 1989), *certified question answered*, 113 Wn.2d 763, 783 P.2d 78 (1989), and *opinion amended and*

*superseded*, 897 F.2d 377 (9th Cir. 1990).<sup>21</sup> Here, the “but-for” causal link drawn between the contract with Marel Seattle and Huynh’s injuries has resulted in a violation of AKAS II’s due process rights because the specific exception Huynh is asking the courts to make to AKAS II’s right not to be haled into Washington has been disconnected from the very conduct that is supposed to be the focus of that exception, i.e., the alleged suit-related conduct that is challenged by Huynh in his complaint.

When evaluating traditional notions of fair play and substantial justice, Washington courts also consider “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.” *Tyee Const. Co.*

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<sup>21</sup> Despite, and in part because of, the “but for” test’s reliance on the fairness prong as protection against its own excesses, the test remains the subject of strong judicial criticism:

Indeed, even courts that embrace the but-for test recognize its over inclusiveness. *See, e.g., Shute*, 897 F.2d at 385. These courts fall back on the third step of the analysis—whether jurisdiction is otherwise fair and reasonable—to protect against the but-for test’s causative excesses. *See id.* But-for causation, however, may have more holes than the third step can plug. Once the plaintiff proves minimum contacts, the court may consider whether the defendant has “present[ed] a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable.” *See Burger King*, 471 U.S. at 477, 105 S.Ct. 2174 (emphasis added); *see also Richman, supra*, 25 Ariz. St. L.J. at 634 (“[T]he contacts step is by far the more important; the fairness inquiry plays a subsidiary role.”). Moreover, even if the third step is up to the task, courts cannot elide relatedness simply because the jurisdictional inquiry has a third component. *See Burger King*, 471 U.S. at 476–77, 105 S.Ct. 2174; *Miller Yacht*, 384 F.3d at 96–97. Relatedness is an independent constitutional mandate, and some but-for causes do not relate to their effects in a jurisdictionally significant way.

*O’Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322–23 (3d Cir. 2007).

*v. Dulien Steel Products, Inc., of Wash.*, 62 Wn. 2d 106, 116, 381 P.2d 245 (1963).

AKAS II merely purchased some goods and services from Washington vendors for the ANTARCTIC SEA, a vessel operating thousands of miles away in the Southern Ocean. CP 945 ¶ 20; *see also* CP 952 ¶ 65; Ex. 5 ¶ 17. AKAS II's purchases from Washington-based vendors were modest and required little to no performance in Washington. AKAS II's involvement with Washington businesses was minimal. This factor, therefore, tips in favor of the AKAS and AKAS II.

Although modern technology and travel may ease the burden of defending a lawsuit in a foreign country to some degree, they do not change the fact that if litigation proceeds, AKAS II (through AKAS) would be forced to send representatives and witnesses great distances from Norway and Uruguay, likely for extended periods of time and on more than one occasion. This will result in disruption to defendants' business and inconvenience for the individuals who must travel here, as well as possible disruption of vessel schedules. Ex. 5 at ¶ 22.

As to the third factor, it is important to note that the contract between AKAS II and Marel Seattle does not allow AKAS II to initiate suit in a Washington court and permits Marel Seattle to initiate a lawsuit or other proceeding in multiple locations and subject to other law. CP 953 ¶ 67; *see also* Ex. 3. Accordingly, the contract should not be construed as a purposeful availment by AKAS II of the benefits and protections of

Washington law, although Washington law and forum was a possibility in a claim pursued by Marel Seattle.

Finally, the basic equities of the situation favor dismissal. Huynh is seeking a “specific” jurisdictional exception so that he can proceed in Washington against a Norwegian company for assertedly negligent conduct that it allegedly committed entirely outside of Washington and that was not directed at the state. In order to gain this exception he is asking the courts to rely upon the fact that AKAS II hired the company that later sent Huynh to Uruguay. In other words, he is attempting to sidestep the due process requirement set forth in *Walden* and, now, *Ashby* that “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden*, 134 S. Ct. at 1122; *Ashby*, 2016 WL 258667 at \*3. That both violates controlling case law and is unfair. Moreover, the relationship between the Marel Seattle contract and Huynh’s injuries is too attenuated. Marel Seattle happens to be a Seattle company with a particular expertise that AKAS II was seeking; the fact that it is a Washington company had nothing to do with the decision to hire Marel Seattle. Marel Seattle controlled who was sent to Uruguay on the project, not AKAS II. CP 1139 In. 7-8. It is impossible to say that Huynh’s injuries would not have occurred if he had not been sent by Marel Seattle to Uruguay, because at the time of his injury he was using a welder owned by his employer, CP 951 ¶ 60, and that welder could have been anywhere.

Taking these factors together, the exercise of jurisdiction over AKAS II would not comport with fair play and substantial justice. There has been little to no purposeful interjection into the state by AKAS II. AKAS II's contract with Marel Seattle is the only one remotely connected to Huynh's accident. All of AKAS II's Washington-related business dealings are not contacts with the state; they are contacts with vendors who happen to be located within the state for services or supplies to be provided to a vessel thousands of miles away. There is no direct connection between Huynh and AKAS II; rather, Huynh's assignment to the ANTARCTIC SEA project is solely attributable the unilateral decision of Marel Seattle, his employer.

The trial court should have found that AKAS II is not subject to jurisdiction in Washington, and, necessarily, therefore, neither is AKAS.

### **C. Response to Huynh's Appeal**

#### **1. The trial court correctly dismissed AKAS for lack of personal jurisdiction and should be affirmed.**

Huynh contends the trial court's finding that AKAS was not a party to the ANTARCTIC SEA contract is erroneous, because the trial court "misapplied contract law to the undisputed and/or established facts." App. Br. 13 n.9. Huynh urges *de novo* review. Because the trial court weighed evidence and made a factual finding as to the identity of the parties to the ANTARCTIC SEA contract, the "substantial evidence"

standard applies.<sup>23</sup> The trial court’s finding that AKAS was not a party to this contract is supported by substantial evidence, and therefore the finding should be sustained.

**a) The Identity of the Parties to the ANTARCTIC SEA Contract Was Disputed, and the Credibility of the Aker Defendants’ Evidence On This Issue Was Challenged.**

Who contracted with Marel Seattle to refit the ANTARCTIC SEA was a factual issue subject to significant disagreement below. Huynh contended that both AKAS and AKAS II were parties to the contract, CP 2 at ¶ 3.3; the Aker defendants contended that AKAS II was the only Aker entity which was party to this contract. CP 14 ln. 5-10.

This factual dispute was “the focal point of contention for the evidentiary hearing.” CP 844-45; *see also* CP 955. As a result, much of the evidence presented at the evidentiary hearing related to who were the parties to this contract. *See* RP (6/26/2015) 14:12-13.

Huynh contended that the Aker defendants’ witnesses—particularly Mr. Eikrem—were not credible. CP 919 ln. 20-23. For that reason, Huynh urged the trial court to give greater weight to other evidence, such as the deposition testimony of Henrik Rasmussen. *See id.*

**b) Because the Trial Court Weighed The Evidence, the “Substantial Evidence” Standard of Review Applies.**

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<sup>23</sup> *See* discussion of standard of review at 7-10, *supra*. Note, for technical reasons that we do not understand, there is no footnote 22.

The trial court considered 89 documentary exhibits and testimony from three witnesses. CP 1133. The evidence relating to the ANTARCTIC SEA contract was conflicting.

On one hand, the trial court noted that the evidence showed a prior course of dealing between AKAS and Marel Seattle, and, in addition, the correspondence between the persons involved in the formation of the ANTARCTIC SEA contract did not discuss the identity of the specific parties to the contract. CP 1141. Huynh argues that these facts support his contention that AKAS was a party to the contract<sup>25</sup>. App. Br.15-18.

On the other hand, the trial court noted, that “the dispositive evidence regarding the parties’ intent with respect to the contracting entities” was Marel Seattle’s subsequent correction of invoices to list AKAS II as the contracting party “rather than AKAS or any other Aker entity.”<sup>26</sup> CP 1142. The trial court reasoned that although Marel Seattle initially “mistook the entities with which it was dealing,” subsequent acts by AKAS II and Marel Seattle “confirmed their intentions regarding the proper contracting entities.” *Id.* Based on this reasoning, the trial court found that the parties to the ANTARCTIC SEA contract were AKAS II and Marel Seattle. CP 1142.

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<sup>25</sup> Huynh also argues that these facts support his apparent authority argument. *See* App. Br. 19-22. The existence of apparent authority is a question of fact for the trial court, and on appeal, the substantial evidence standard applies. *Smith v. Hansen*, 63 Wn. App. 355, 363 818 P.2d 1127 (1991).

<sup>26</sup> This evidence is discussed in detail at 5-6, *supra*.

Huynh urges this Court to disregard the trial court's findings of fact, and conduct a *de novo* review of the evidence. App. Br. at 13, n.9. It is well established, however, that “[w]here there is conflicting evidence, it is not the role of the appellate court to weigh and evaluate the evidence.” *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 526, 832 P.2d 537, 547 (1992). Instead, “[t]he appellate function should, and does, begin and end with ascertaining whether or not there is substantial evidence supporting the facts as found.” *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727, 731 (1963).

**c) Substantial Evidence Supports the Trial Court's Finding that AKAS II and Marel Seattle Were the Parties to the Antarctic Sea Contract.**

The substantial evidence standard is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369, 372 (2003). “If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.” *Id.* In addition, an appellate court defers to the trial court “on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence.” *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

Here, two witnesses—Mr. Olson, Vice President and CFO of Marel Seattle during the relevant time period, *see* RP (8/17/2015) 58:17-19, and Mr. Eikrem, board member of both AKAS and AKAS II. *see* CP 945 at ¶¶ 16, 33—offered testimony regarding the communications

relating to the ANTARCTIC SEA contract. In addition, the communications themselves were admitted as Exhibits 101-107. The trial court found this testimony and related exhibits to be “the dispositive evidence regarding the parties’ intent with respect to the contracting entities.” CP 1142. This evidence, which shows that Marel Seattle directed its invoicing for the ANTARCTIC SEA project to AKAS II (as opposed to AKAS or some other Aker BioMarine entity), provides a quantum of evidence sufficient to persuade a rational fair-minded person that AKAS II and Marel Seattle were the parties to the ANTARCTIC SEA contract. This is sufficient to sustain the trial court’s ruling. Even if the Court of Appeals would have weighed the evidence differently, “the proper function of an appellate court is to consider whether there was substantial evidence to support the findings of the trial court.” *St. Regis Paper Co. v. Wicklund*, 93 Wn.2d 497, 503, 610 P.2d 903, 906 (1980); *accord Stieneke v. Russi*, 145 Wn. App. 544, 566, 190 P.3d 60, 71 (2008).

**d) Even if a *De Novo* Standard Was Applicable, The Evidence Shows That AKAS II and Marel Seattle Were the Parties to the ANTARCTIC SEA Contract.**

Even if this Court conducted a *de novo* review of the contracting issues, the result is still the same. The email exchange evidenced in Exhibits 101-107 constituted a part of the contract.<sup>27</sup> Mr. Eikrem clarified

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<sup>27</sup> Moreover, the exchange of e-mails was a contemporaneous manifestation of the mutual intent of the contracting parties as to who hired Marel Seattle and would pay Marel Seattle’s invoices. Rather than accepting the contemporaneous pre-injury acknowledgement by the actual parties to the contract as to who hired Marel Seattle, Hyunh would have this Court transform the contract to comport with an initial mistaken understanding on the part of Marel Seattle. Hyunh’s argument is both legally and

for both Mr. Olsen and Mr. Rasmussen that AKAS II was the entity which owned the vessel and, thus, was the entity to be invoiced, that is, the contracting party. Mr. Olsen's action in correcting the invoices and continuing work on the project in exchange for the agreed upon consideration constituted an objective assent to and manifestation of the agreement that AKAS II, as the entity which owned the vessel, the entity to which invoices were sent, and the entity from which payment was to be received, was the contracting party. As the Washington Supreme Court has stated:

The principle is quite simple. Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions. "[T]he relevant intention of a party is that manifested by him rather than any different undisclosed intention."

*Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn. 2d 678, 684, 871 P.2d 146, 149 (1994) (citing *Watkins v. Restorative Care Ctr., Inc.*, 66 Wn. App. 178, 192, 831 P.2d 1085, *review denied*, 120 Wn. 2d 1007, 841 P.2d 47 (1992)); quoting Restatement (Second) of Contracts § 212, comment *a* (1965)). Here, the two parties to the contract mutually and objectively expressed their understanding that Marel Seattle was working on the ANTARCTIC SEA project for the vessel's owner, AKAS II.<sup>28</sup> This manifestation of intent occurred, importantly, before Huynh's accident and was, thus, not influenced by the potential for liability that this

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factually incorrect.

<sup>28</sup> Huynh's argument relating to apparent authority disregards this manifestation of intent, focusing instead upon the parties' earlier communications and prior course of dealing. App. Br. 19-22.

lawsuit represents. The email exchange constitutes either a mutually agreed clarification or a separately agreed express term, either of which trumps all other forms of interpretive aids, including the parties' course of dealing. Any misunderstanding on Mr. Rasmussen's part (if there was a misunderstanding, as opposed to indifference) prior to the email exchange is irrelevant; he and Marel Seattle clearly understood who their customer was after January 3, 2012. Huynh is attempting to use a subordinate interpretive aid to retroactively change the express terms of an otherwise valid, enforceable and completed contract. In doing so, they seek to impose their own desires and to supplant the objectively manifested assent of the two actual contracting parties.

Finally, even if Marel Seattle's prior course of dealing with AKAS was relevant for determining the identity of the Aker entity that was party to the ANTARCTIC SEA contract, such course of dealing in fact indicates that AKAS II was the contracting party. The course of dealing discussed by the Plaintiffs merely shows that prior similar contracts regarding particular vessels were between Marel Seattle and *the owner of the particular vessel* that was the subject of the contract:

Q. [Mr. Nicoll] I'm going to ask you to look at the invoices that are attached to Exhibit 105. You notice the first invoice, it's in the amount of what, 27,376, yes?

A. [Mr. Olsen] Yes.

Q. Was that an Antarctic Sea invoice?

A. No

Q. Which project was that for?

- A. The Saga Sea
- Q. Was it your understanding that Aker BioMarine Antarctic II AS did not own the Saga Sea?
- A. Yes.
- Q. So that particular invoice didn't need to be changed?
- A. Correct.

RP (8/17/2015) at 64:22-65:10; *see also id.* at 146:20-147:3 (discussing who owned the SAGA SEA, the ANTARCTIC NAVIGATOR, and the ANTARCTIC SEA). AKAS II owned the ANTARCTIC SEA. Even based on a prior course of dealing, therefore, AKAS II, the undisputed owner of the ANTARCTIC SEA, was the party that contracted with Marel Seattle for the ANTARCTIC SEA refitting project.

**2. The Trial Court Correctly Interpreted and Applied *Harbison v. Garden Valley Outfitters*.**

Huynh contends that *Harbison v. Garden Valley Outfitters*, 69 Wn. App. 590, 849 P.2d 669 (1993), holds that a predecessor's contacts can be attributed to a successor for any purpose, not just for those claims predicated upon the successor's liability for the predecessor's actions. App. Br. 23-24. Huynh is mistaken.

*Harbison* did not address the successor's<sup>29</sup> individual liability. Instead, the issue in *Harbison* was whether the predecessor's<sup>30</sup> contacts could be attributed to the successor for liability stemming from the

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<sup>29</sup> Garden Valley, who Huynh refers to as "Idaho 1."

<sup>30</sup> Bear Valley, who Huynh refers to as "Idaho 2."

predecessor's acts or omissions.

This posture is evident from the facts of *Harbison*. The cause of action at issue in *Harbison* arose from the predecessor's activities in Washington. *Harbison*, 69 Wn. App. at 600, 849 P.2d at 675. (noting that “[t]he alleged misrepresentations at the trade show and in a promotional videotape sent to plaintiff in this state are the basis of the cause of action,” and further noting that those activities were performed by the predecessor, “Bear Valley” who “purposefully attended the sports show and solicited Washington clients (including plaintiff), deriving economic benefit.”) Thus, there is nothing in the facts of *Harbison* that would have allowed the *Harbison* court to consider whether the predecessor's forum contacts could form the basis for specific personal jurisdiction over the successor for claims arising from the *successor's* actions; that issue was not present in the case.<sup>31</sup> *Id.*

Additionally, this Court has previously considered *Harbison* and determined that the case arises in the context of successor liability. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 892, 309 P.3d 555, 581 (2013) (“In *Harbison v. Garden Valley Outfitters, Inc.*, the court considered the successor liability of one

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<sup>31</sup> The same principle is applicable to the authority considered and relied upon by the *Harbison* court. *Harbison* relied heavily on *Simmers v. American Cyanamid Corp.*, 576 A.2d 376 (Pa. Super. 1990). *Simmers* considered successor liability; the case did not consider whether it was appropriate to impute a predecessor's contacts to a successor for the successor's own separate acts or omissions. *See id.*

corporation for the acts of another when deciding whether to impute the predecessor's contacts to the successor for purposes of long-arm jurisdiction.”)

*Harbison* is the sole authority cited by Huynh in support of his argument that AKAS II's contacts can be imputed to AKAS in order to establish jurisdiction over AKAS for its own acts or omissions. This, however, is not what *Harbison* holds, and this proposition is contrary the well-established principle that personal jurisdiction must be established for each individual claim asserted against a defendant. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (citing *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004)). Washington law is in accord. The long-arm statute mandates that “[o]nly causes of action arising from acts enumerated [within the section] may be asserted against a defendant in an action in which jurisdiction over him ... is based upon this section.” RCW 4.28.185 (3). Hence, pursuant to the long-arm statute, each cause of action alleged in an action must independently satisfy due process. Application of *Harbison* as urged by Huynh would subject AKAS to jurisdiction in Washington for its own out-of-state conduct based upon the imputed contacts of a third party. Doing so would violate both due process and the long arm statute. In sum, Huynh's proposed aggregation of contacts is a novel departure from established personal jurisdiction principles, and is not consistent with due process.

**3. The Trial Court Analyzed AKAS' Jurisdictional Contacts, and Properly Found that AKAS was not Subject to Specific Personal Jurisdiction.**

**a) The Trial Court Considered and Analyzed all Evidence Relating to AKAS that was Properly before the Court.**

Huynh's contention that the trial court "failed to analyze" AKAS' jurisdictional contacts, App. Br. at 25, is contrary to the record. The trial court stated that it would review and analyze all evidence admitted in the course of the evidentiary hearing: "If [the documentary exhibits] are admitted, I'm reading them, and that's my style." RP (8/18/2015) 4:5-6; *see also* 29:21-22 ("I'm reading everything you offer, so if it's important for me to read the difference, I will."). The trial court explained that it was necessary to read all of the documentary exhibits, because, "that's what's required of me, before I make the decision [on the Aker defendant's Motion to Dismiss]." RP (8/18/2015) 4:6-7. The trial court also noted that it "was well apprised of the parties factual and legal positions," because "the issues have been well briefed by highly competent and thorough counsel." CP 1129. Finally, the trial court's Order notes that the trial court "carefully considered" all of the materials properly before it, all of which are set out in detail. CP 1133-1135.

In sum, the record shows that the trial court considered and analyzed all of the evidence and argument properly before it. There is no support for Huynh's contention that the trial court failed to analyze AKAS' jurisdictional contacts.

**b) The Trial Court Properly Applied Law to Fact, and Found that AKAS Was Not Subject to Either General or Specific Personal Jurisdiction.**

Although Huynh contends that the trial court “failed to apply the law to the facts” with respect to AKAS, App. Br. at 25, the record shows otherwise.

Regarding general jurisdiction, the trial court determined that AKAS’ contacts with Washington were not “so substantial and continuous’ to establish general jurisdiction over AKAS. CP 112 (citing RCW 4.28.080(10) and *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 54, 558 P.2d 764 (1977)). The trial court’s conclusion of law is proper, and, more importantly, is the finding required by controlling precedent. *See* discussion *supra* at 10-14.

Although the Order does not expressly set forth the court’s analysis for why it concluded AKAS was not subject to specific personal jurisdiction, *see generally* CP 1133-48, the trial court’s reasoning is nonetheless evident from the Order.<sup>32</sup> The trial court concluded, in a decision that AKAS is appealing, that Huynh’s injury arose out of the ANTARCTIC SEA contract, and also found that AKAS was not a party to that contract. CP 1146-47, 1141-42. None of the other “contacts” discussed by Huynh were found by the trial court to have given rise to his

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<sup>32</sup> Furthermore, the absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue. *State v. Haydel*, 122 Wash. App. 365, 95 P.3d 760 (2004). Hence, the trial court implicitly found that Huynh failed to prove that their causes of action arose out of any of AKAS’ activities in the state.

injury.

Moreover, regardless of what the trial court found, “an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, 1031 (1989). Here, even if this Court is not inclined to affirm the trial court’s decision based on its apparent reasoning, the record shows that every element required to establish specific jurisdiction over AKAS is lacking.

Here, as explained at pages 17-20, *supra*, no tort was committed in Washington. Thus, the predicate for jurisdiction over AKAS pursuant to the long-arm statute must be AKAS’ transaction of business in the state, or that AKAS directed its allegedly tortious conduct at the state.

Although AKAS concedes that it did business with businesses located in Washington,<sup>33</sup> its business transactions did not give rise to plaintiffs’ cause of action, and are irrelevant to the first two prongs of the specific jurisdiction inquiry in any event. Plaintiffs’ cause of action is for negligence allegedly related to the condition of the ANTARCTIC SEA and/or a failure to warn of dangerous conditions aboard the vessel. AKAS’ purchases of marine electronics, IT consulting services, packaging supplies, transportation logistics, rubber belts and hoses, and insurance

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<sup>33</sup> Although AKAS conceded below that it transacted business in Washington. *see* CP 22, it did not concede that this transaction of business constituted purposeful availment and/or direction.

brokerage services from Washington suppliers has no relation to the mechanism of Huynh's alleged injury (an electric shock imparted by welding equipment). *See, e.g., Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 272 (9th Cir. 1995) (holding that claims of Washington resident injured aboard fishing vessel in international waters did not "arise out of" Norwegian corporation's purchase and installation of electronics and nets from Washington vendors, because those forum-related activities "had nothing to do" with the mechanism of plaintiff's injury, and plaintiff "would have suffered the same injury even if none of the Washington contacts had taken place").

The contract between AKAS II and Marel Seattle for the ANTARCTIC SEA conversion project is the only Washington-related activity of either AKAS or AKAS II that has any conceivable, albeit extremely attenuated connection to Huynh's cause of action. AKAS' transactions in Washington had nothing to do with AKAS II contracting with Marel Seattle or Mr. Huynh traveling to Uruguay to work on the ANTARCTIC SEA. The evidence properly before the Court shows that AKAS II selected Marel Seattle for the project not due to anything AKAS had done—rather, AKAS II selected Marel Seattle because "[b]ased on the expertise and technical proficiency of Marel Seattle regarding krill processing, Marel was a logical candidate for AKAS II to consider for the new project in Uruguay." Ex. 5 ¶11(d). It was for that reason that AKAS II elected to approach Marel Seattle regarding the ANTARCTIC SEA project. *Id.* Even if AKAS had not previously contracted with Marel

Seattle, it was the logical choice for refurbishing the fish processing equipment on the ANTARCTIC SEA: the company “designs, manufactures, and installs seafood processing equipment,” and does so “around the world.” CP 1141. In sum, Huynh’s injury did not arise out of AKAS’ transaction of business, even if this Court is willing to entertain Huynh’s attenuated (and incorrect) theory that AKAS II would not have entered the ANTARCTIC SEA contract “but for” AKAS’ dealings the company.<sup>34</sup>

**4. The Trial Court Properly Declined to Utilize the Doctrine of Pendent Personal Jurisdiction.**

Pendent personal jurisdiction has not been recognized by any Washington court (or any state court<sup>35</sup>). Moreover, review of the pendent personal jurisdiction jurisprudence does not reveal any cases in which pendent personal jurisdiction was considered where the “anchor claim” was successor liability.

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<sup>34</sup> It is important to note the attenuated nature of Huynh’s theory. He reaches the conclusion that his causes of action against AKAS arise out of AKAS’ Washington contacts through the following convoluted series of “but for” assumptions: (1) but for AKAS’ dealings with Marel Seattle, AKAS II would not have entered into the ANTARCTIC SEA contract; (2) but for the ANTARCTIC SEA contract, Marel Seattle would not have sent Mr. Huynh to Uruguay; (3) but for Marel Seattle’s unilateral decision to send Huynh to Uruguay to perform work on the ANTARCTIC SEA contract, he would not have been aboard the vessel; and (4) but for Mr. Huynh’s presence aboard the ANTARCTIC SEA in Uruguay, he would not have been injured by AKAS’ alleged negligence. Moreover, as with AKAS II, none of AKAS’ alleged tortious conduct created a substantial connection with Washington. *See 14-31, supra*.

<sup>35</sup> “[T]here does not appear to be any state court opinion that ever has articulated a pendent personal jurisdiction policy.” 4A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1069.7 (2014) (3d ed.); *see also* App. Br. p. 40-41 (acknowledging that “whether state courts may also exercise pendent personal jurisdiction is an issue of first impression—both in Washington and other state courts”).

Huynh contends that Washington's long-arm statute does not preclude pendent personal jurisdiction. App. Br. 41. The primary source of authority for Huynh's argument, however, recognizes that in order for a state to adopt pendent personal jurisdiction, "the exercise of jurisdiction must meet the standards prescribed in the state long-arm statute." Linda S. Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. 1619, 1661 n.198 (2001). *Id.*

Pendent personal jurisdiction is not permissible under the Washington long arm statute.<sup>36</sup> "The long-arm statute provides that only causes of action arising from the acts mentioned in the statute may be asserted against a defendant in an action in which jurisdiction over him is based upon the provisions of the statute." 14 Wash. Prac., Civil Procedure § 4:35 (2d ed.); RCW 4.28.185(3). "Thus, the plaintiff would seemingly be precluded from joining other causes of action against the same defendant if the other causes of action are unrelated to the defendant's activities giving rise to long-arm jurisdiction." 14 Wash. Prac., Civil Procedure § 4:35.

The long-arm statute cannot possibly be construed as authorizing pendent personal jurisdiction: it requires the same causal nexus between

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<sup>36</sup> Huynh suggests that analysis of the long-arm statute is not necessary. App. Br. 25 This is incorrect. In a unanimous opinion, the Washington Supreme Court recently highlighted the importance of analyzing the requirements of the long-arm statute. *Ashby*, \_\_\_ Wn.2d \_\_\_, 91466-4, 2016 WL 2586687, at \*3 (Holding "in addition to satisfying constitutional due process requirements, our long-arm statute, RCW 4.28.185, must also be satisfied," and conducting a detailed analysis of the application of subsection (1)(b)).

the defendant's forum contacts and the plaintiff's cause of action that is required for the exercise of "direct" personal jurisdiction. If a cause of action does not arise from one of the activities specified in the long-arm statute, then the exercise of personal jurisdiction is impermissible, regardless of whether it arises from a common nucleus of operative fact and regardless of judicial economy, convenience, and fairness to the parties. *See* RCW 4.28.185(3).

Moreover, in order to comport with due process, the court must have jurisdiction over at least one claim against the defendant in order to compel that defendant to answer a "pendent" claim. *Poor Boy Prods. v. Fogerty*, 3:14-CV-00633-RCJ, 2015 WL 5057221, at \*6 (D. Nev. Aug. 26, 2015) ("[E]very reported case the Court has been able to find from the other courts of appeals to use the phrase "pendent personal jurisdiction" has applied the doctrine only to pendent claims where personal jurisdiction existed as to an original jurisdiction claim . . ."). Applying the doctrine of pendent personal jurisdiction against a defendant appearing only in the limited capacity as successor to the liability of another party would therefore violate due process, because there is no independent basis for the exercise of jurisdiction against that defendant. Here, because AKAS is not subject to personal jurisdiction for its own direct liability (stated differently, because there is no "anchor claim" against AKAS), due process precludes the application of pendent personal jurisdiction.

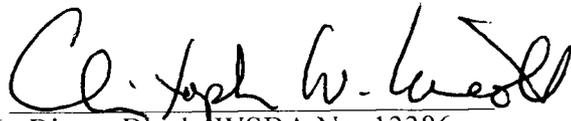
In sum, even if pendent personal jurisdiction has any place outside of its federal context, it cannot be applied here.

## V. CONCLUSION

After conducting a probing and thorough CR 12(d) evidentiary hearing, the trial court entered findings of fact. Those findings cannot be disturbed on appeal because they are supported by evidence in the record. Applying the law to those facts, the trial court correctly ruled that it lacked general jurisdiction over the Aker defendants and lacked specific jurisdiction over AKAS. The court, moreover, correctly declined to apply the federal doctrine of pendent jurisdiction outside of its federal context, and properly declined to impute the jurisdiction contacts of AKAS II to AKAS for anything other than AKAS' liability as successor to AKAS II. The trial court, however, erred when concluding, based solely upon its contract with Marel Seattle, that AKAS II is subject to specific jurisdiction in Washington. Because AKAS II's suit-related conduct did not create a substantial connection with this state, AKAS II is not subject to jurisdiction here.

Respectfully submitted this 18th day of July, 2016.

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