102224-7

No. 83424-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MARCUS DUELL, an individual,

Respondent,

v.

PENINSULA AVIATION SERVICES, INC., doing business as PenAir, a Delaware corporation,

Petitioner,

and

ALASKA AIRLINES, INC., a Delaware corporation; and DOES 1-20,

Defendants.

ERIN OLTMAN, individually and as Personal Representative of the Estate of David Oltman, and on behalf of REECE OLTMAN and EVAN OLTMAN, minors,

Respondents,

v.

PENINSULA AVIATION SERVICES, INC., doing business as PenAir, a Delaware corporation,

Petitioner,

and

ALASKA AIRLINES GROUP, INC. and ALASKA AIRLINES, INC.,

Defendants.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Peninsula Aviation Services, Inc. d/b/a PenAir ("PenAir") asks this Court to accept review of the Court of Appeals decisions terminating review set forth in Part B.

B. COURT OF APPEALS DECISIONS TERMINATING REVIEW

Division I of the Court of Appeals filed its published opinion on June 12, 2023. A copy of that opinion is in the Appendix. That court also denied PenAir's timely motion for reconsideration on July 10, 2023. A copy of that order is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

> Where PenAir was a Delaware corporation and a regional air carrier headquartered in Alaska, that was not licensed to do business in Washington, paid no Washington taxes, owned no real or personal property in Washington, employed no one in Washington, and did not advertise in Washington, and an air crash occurred in Alaska, did the Court of Appeals err in concluding that the exercise of specific jurisdiction by Washington courts over litigation arising out of that crash did not offend due process principles under the long-arm statute, RCW 4.28.185, where the defendant's sole contact with Washington was an agreement to have Alaska Airlines

schedule and market its flights in Alaska and that agreement gave no control to Alaska over PenAir flight operations or maintenance?

D. STATEMENT OF THE CASE

Division I's published opinion sets forth a largely accurate, but cursory, recitation of the facts and procedure in the case. Op. at 2-3. PenAir supplements those facts and emphasizes certain points not addressed in detail by the Division I opinion.

First, the case came to Division I on discretionary review. The court's Commissioner granted review on the basis of RAP 2.3(b)(1), concluding that the trial court's decision on specific jurisdiction over PenAir was "obvious error" under that rule, noting as well that the issue was "a threshold issue over which two separate trial judges have reached opposition conclusions." Ruling on Review at 10.[1]

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[1] Judge Suzanne Parisien dismissed Duell's action against PenAir, citing Division I's decision in *Montgomery v. Air Serv. Corp., Inc.*, 9 Wn. App. 2d 532, 446 P.3d 659 (2019). Judge Douglass North denied PenAir's motion to dismiss when the Duell and Oltman actions were consolidated. CP 141. Commissioner Kanazawa was third judicial officer in this case.

Second, while the Division I opinion confirmed that the capacity purchase agreement ("CPA") governed the relationship between PenAir, a regional air carrier in Alaska, and Alaska Airlines, headquartered in Seattle, and that it contained a choice of law provision to apply Washington law. Op. at 2-3, 12-13. However, the CPA was confined to Alaska Airlines' marketing and scheduling PenAir-operated flights in Alaska. It disclaimed an agency or partnership relationship between PenAir and Alaska Airlines, and did not give the latter control over PenAir aircraft maintenance or flight operations. Rather, pertinent to the crash at issue here, PenAir had exclusive control over personnel (¶ 1.7), aircraft maintenance, safety, and flight operations.[2]

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[2] 1.7.1 PenAir shall hire, engage, employ and maintain a sufficient number of trained personnel and subcontractors, including, but not limited to pilots, flight attendants, customer service agents and maintenance personnel necessary to provide the Flight Services required by this CPA. Such pilots, flight attendants, customer service agents and maintenance personnel shall wear PenAir uniforms, and PenAir will be responsible for all recurrent training and expenses relating to such pilots, flight

Alaska's functions under the CPA were the pricing, marketing, and selling of tickets. ¶ 1.1 provided that Alaska set the schedule for PenAir flights "subject to the *reasonable approval of PenAir* to ensure safety and reliability into [Dutch Harbor] during challenging weather and minimal daylight conditions."[3] (emphasis added). *See* Appendix (CPA excerpts).

Third, PenAir sold the capacity of the flight at issue to Alaska Airlines. It had no interest in whether passengers on the flight had flown to Anchorage from Seattle or any other airport. The mere fact that Alaska Airlines happens to have sold a ticket

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> attendants, customer service agents and mechanics, including uniform allowances and cleaning in accordance with its internal policies.

CP 121.

[3] When Division I opined at 2-3 that Alaska "retained the right to control what safety standards PenAir was required to adhere to in the operation of the Dutch Harbor route" or at 12 that the CPA gave Alaska the right "to ensure safety and reliability of flights into Dutch Harbor during challenging weather or minimal daylight conditions," both statements are inaccurate.

to a Washington resident was fortuitous.

Finally, as to PenAir's connection to Washington, apart from Alaska Airlines' setting the schedule for its flights out of Seattle, there were virtually no connections to this state:

- PenAir was a Delaware corporation headquartered in Alaska;
- PenAir operated no flights to and from, or over, Washington, operating only in Alaska;
- PenAir did not advertise in Washington or solicit business in this state;
- PenAir did not have a UBI number with the Department of Revenue and paid no Washington taxes;
- PenAir had no bank accounts or other personal property in Washington;
- PenAir owned no buildings, leases, or other real property in Washington;
- PenAir did not employ any Washington residents;
- The injury at issue occurred in Dutch Harbor, Alaska.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is merited in this case under RAP 13.4(b)(1), (2),

and (4) because Division I's decision represents the most extreme application of specific jurisdiction in Washington case law that contradicts decisions on due process limitations to long arm jurisdiction under RCW 4.28.185 by this Court, Division I itself, and other divisions of our Court of Appeals. This Court should articulate the appropriate rules for specific jurisdiction, particularly given the ferment in the United States Supreme Court over the scope of such jurisdiction, consistent with due process principles.

(1) Background to Jurisdictional Analysis

This case arises under Washington's long arm statute, RCW 4.28.185(1). *See* Appendix. As Division I itself has correctly concluded, Washington courts have personal jurisdiction over nonresident defendants *only* for those causes of action arising from the acts listed in RCW 4.28.185(3). *Montgomery*, 9 Wn. App. 2d at 539.

None of the statutory provisions in RCW 4.28.185(1) apply here, except potentially (a) relating to the transaction of

business in Washington by PenAir, a foreign corporation, incorporated in Delaware and headquartered and transacting business only in Alaska.

As for that statutory provision, Washington courts' jurisdiction is limited only by principles of due process as established by the federal courts, *Noll v. American Biltrite, Inc.*, 188 Wn.2d 402, 411, 395 P.3d 1021 (2017), specifically, whether such foreign corporations are transacting business in Washington; this Court analyzes whether Washington has general or specific jurisdiction over the corporation. *Id.* at 412.

General jurisdiction arises when a foreign corporation's contacts with the forum state are sufficiently "'continuous and systematic' as to render [the defendant] essentially at home in the forum state." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). That analysis looks to a defendant's contacts with the forum state, "regardless of their relationship to the claims at issue," *Noll*, 188 Wn.2d at 412, and the contacts with the forum state

must be extensive and systematic. *Goodyear*, 564 U.S. at 919. The trial court did not find it had general personal jurisdiction over PenAir, CP 141, and respondents did not argue below that general jurisdiction exists as to PenAir.[4]

With regard to specific jurisdiction, a foreign corporation may be subject to a state's authority if it has the requisite nexus with the forum state. "For a state court to exercise specific jurisdiction, there must be a connection between the forum state and the controversy." *Montgomery*, 9 Wn. App. 2d at 540; *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco County*, 582 U.S. 255, 264, 137 S. Ct. 1773, 198 L.

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[4] Nor could they in light of United States Supreme Court precedents severely *retrenching* such jurisdiction under the 14th Amendment's Due Process Clause. *See Goodyear*, *supra*; *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014). *See also*, *Bradley v. Globus Medical, Inc.*, 22 Wn. App. 2d 1041, 2022 WL 2373441 (2022) at *2 (registration under Washington's corporate law not enough to subject foreign corporation to Washington's authority under general jurisdiction principles, noting that the U.S. Supreme Court has "dramatically reined in general jurisdiction over corporations.").

Ed. 2d 395 (2017). In *Bristol-Myers Squibb*, the Court held that due process did not permit the exercise of specific jurisdiction by a California court over the defendant pharmaceutical company for claims relating to its drug Plavix. The defendant was incorporated in Delaware and headquartered in New York with operations New York and New Jersey. While it sold Plavix in California, conclusive for the Court as to persons who were not injured in California was the fact that Bristol-Myers Squibb did not develop Plavix in California, create a California marketing for the drug, or manufacture, label, package, or work on regulatory approval for the drug in that state. *Id.* at 259. Moreover, critical to this case, the Court rejected the theory that a contract between the corporation and a California corporation to market Plavix nationally resulted in satisfied specific jurisdiction principles. *Id.* at 268 ("The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the state.").

In *Ford Motor Co. v. Montana Eighth Jud. Dist.*, __ U.S.

__, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021), the Court concluded that specific jurisdiction was present in Montana state courts for product liability actions arising out of defects in Ford vehicles where the manufacturer continuously and deliberately exploited the Montana market by advertising and selling its vehicles in Montana through multiple dealerships, and servicing defective vehicles there. *Id.* at 1028. Moreover, such activities were connected to the basis for the lawsuits in Montana, unlike the situation in *Bristol-Myers Squibb* where the Court observed: "What is needed – and what is missing here – is a connection between the forum and the specific claims at issue." 582 U.S. at 265.

Thus, specific jurisdiction, a plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum. "In other words, there must be 'an affiliation between the forum and the underlying controversy, principally [an] activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Bristol-Myers Squibb*, 582

U.S. at 264 (quoting *Goodyear*, 564 U.S. at 919). The relationship must arise from contacts the *defendant* creates with the forum state. *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

As will be noted in detail, *infra*, Division I's extreme interpretation of specific jurisdiction in its published opinion is inconsistent with United States Supreme Court precedent, this Court's decisions, and decisions of other divisions of the Court of Appeals.

(2) Division I's Published Opinion Contravenes United States Supreme Court and This Court's Precedents on Specific Jurisdiction

The jurisprudence of the United States Supreme Court on specific jurisdiction has undergone significant development in recent years, limiting its reach. For example, the Court's plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011), was eroded by *Ford*. The *Ford* court, however, reiterated that a defendant's contacts with the forum "must be the defendant's own choice and

not 'random, isolated, or fortuitous.'" *Id.* at 1025.

Moreover, what remains unambiguous under United States Supreme Court's precedent is that a contract between a defendant and a third party in the forum state has never been sufficient to sustain an exercise of specific personal jurisdiction. As the Supreme Court made clear in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), "[i]f the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." 471 U.S. at 462, 478 (1985).[5] *See also*, *Bristol-Myers Squibb*, 582 U.S. at 269. The *Montgomery* court further stated: "The Estate asserts that ABM purposefully availed itself of the privilege of doing business in Washington by entering into contracts with airlines to provide

[5] *Accord*, *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008), *cert. denied*, 555 U.S. 1171 (2009) ("a contract alone does not automatically establish minimum contacts in the plaintiff's home forum.").

wheelchair services to Washington residents in Texas. This is not sufficient to establish case-linked personal jurisdiction. Providing services in Texas does not manifest an intention to submit to the jurisdiction of Washington courts." 9 Wn. App. 2d at 545. But the mere existence of a contract between ABM and Alaska Airlines for ABM to perform wheelchair services in Texas for Alaska customers traveling in Texas was not sufficient to allow a Washington court to assert jurisdiction over ABM for negligent acts and resulting injuries occurring in Texas. The same is true here as to PenAir.

This Court's last major specific jurisdiction cases, *Noll*, *supra*, and *State v. LG Electronics*, 186 Wn.2d 169, 375 P.3d 1035 (2016), did not have the benefit of the United States Supreme Court's analysis in *Bristol-Myers Squibb*, *supra*, or *Ford*. In *Noll*, this Court concluded that specific jurisdiction was not present for a Wisconsin corporation that provided asbestos to a manufacturer of asbestos cement pipes in California who then sold those pipes in Washington. The corporation had no

knowledge that the asbestos-containing pipes would be sold in Washington. The Court rejected the application of *J. McIntyre*. 188 Wn.2d at 416.

In *LG Electronics*, this Court concluded on review of CR 12 motion to dismiss that Washington appropriately exercised antitrust claims against out-of-state manufacturers of cathode ray tubes because the manufacturers conspired to raise prices for those tubes and such tubes were sold in large quantities in our state. The manufacturers' sales in Washington were not an isolated occurrence but rather they placed the tubes into the stream of commerce knowing they would be incorporated into televisions sold in Washington. *Id.* at 178.

And this Court's analysis in *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989), upon which Division I relied, op. at 9-10, has been overshadowed by more recent federal precedent referenced *supra*. Moreover, in *Shute*, the specific activities of the defendant cruise line directed toward the plaintiffs attracted those plaintiffs to the cruise where they were

injured. Carnival advertised its cruises in Washington newspapers, provided brochures to Washington travel agents, and periodically conducted seminars for travel agents in Washington to promote its cruises. PenAir did nothing to induce Oltman in Washington to cause him to book the flight at issue. Oltman did not purchase a ticket from PenAir. Rather, Alaska Airlines had bought all the seats and sold all the tickets for the flight.

Nor did this Court in *LG Electronics* or *Noll* have the benefit of recent Ninth Circuit jurisprudence applying those decisions. In *Yamashita v. LG Chem Ltd.*, 62 F.4th 496 (9th Cir. 2023), the court applied *Ford* and *J. McIntyre*, ruling that specific jurisdiction did not exist in Hawaii in a case involving an exploding lithium-ion battery in an electronic cigarette brought against a Delaware corporation with its principal place of business in Georgia that was a wholly-owned *marketing* subsidiary of a South Korean distributor of batteries to manufacturers, but not to consumers. The court concluded that

under a stream of commerce analysis, the defendants had contacts with Hawaii, but that those contacts lacked the requisite nexus to the cause of action. Unlike the facts of *Ford*, where the manufacturer aggressively marketed cars to consumers, the defendants did not do so and the plaintiff's injury from the exploding battery had no connection to the defendants' alleged contacts with Hawaii ports or the solar battery market in that state. The court specifically noted the "consideration confusion" in the district courts as to *Ford*'s application. *Id.* at 506 n.1.

Division I's opinion also makes reference to the fact that the CPA contained a choice of law provision. Op. at 3. Division I cites no decision of this Court discussing the significance of such a provision for this Court's due process analysis. However, Division I concluded that such a provision was extremely important to the issue of whether PenAir availed itself of Washington law's benefits and protections. Op. at 11-13. But Division I's analysis is flawed factually and legally. Factually, Division I's analysis of the provision distorts its effect. The

parties agreed that Washington law governs the CPA's performance, *not* PenAir's operations generally, as the court implies. Op. at 12. Choice of law had *nothing* to do with PenAir's flight operations, the gravamen of the negligence/product liability action here, as the CPA itself stated.

Moreover, while that choice of law provision is a factor for a court's due process analysis, it is *far* from conclusive. The United States Supreme Court in *Burger King* said it was *a* factor that shouldn't be ignored, but, standing alone, it does not confer specific jurisdiction upon forum courts. 471 U.S. at 481-82.

But what also cannot be ignored, as Division I plainly did in its analysis, is the absence of a forum selection clause in the CPA. Such provisions are common. *See generally*, David DeWolf, Keller Allen, Darlene Caruso, 25 *Wash. Prac., Contract Law & Practice* § 9.21 (3d ed.). If the parties had intended by the CPA to subject PenAir to Washington courts' jurisdiction, they would have said so. They didn't. The absence of such a provision carries significant weight.

In sum, Division I's opinion contravenes cases like *Bristol-Meyers Squibb* and *Ford* that require a defendant to engage in significant contacts with the forum state to be subject to specific jurisdiction. A contract with a third party located in Washington, absent such significant contacts, is not eligible. Indeed, that is plain here where the contract between PenAir and Alaska Airlines was for the scheduling and marketing of flights, and had nothing to do with flight operations, the gravamen of the respondents' complaint, as *Bristol-Meyers Squibb* requires. Given that this Court applies federal due process precedents on specific jurisdiction, and such precedents evidence a more restrictive sense on specific jurisdiction over foreign corporations, review of Division I's published opinion that fails to faithfully apply those federal standards is merited. RAP 13.4(b)(1).

(3) Division I's Published Opinion Contravenes Court of Appeals Precedents on Specific Jurisdiction

Division I's opinion is not only inconsistent with opinions

of other divisions of the Court of Appeals, it is inconsistent with its own decisions in cases like *Montgomery*, meriting review. RAP 13.4(b)(2); *State v. Cornwell*, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018) (ongoing split in Court of Appeals on the lawfulness of a search required Supreme Court review).

Division I relegates the facts in *Montgomery*, a published decision whose analysis is at odds with Division I's analysis here, to a footnote, op. at 7 n.4, but the facts in that case are revealing. There, a Washington resident attempted to sue the Georgia incorporated and headquartered company, ABM Aviation Inc. ("ABM"), in Washington state court based solely on certain "contracts" between ABM and "airlines," including Washington-based Alaska Airlines, to "perform janitorial, cabin cleaning, and baggage services at SeaTac [International Airport]" in Washington. ABM contracted to provide wheelchair services in Texas. *Montgomery*, 9 Wn. App. 2d at 542. In holding that ABM's contract with Alaska Airlines could not support the exercise of specific personal jurisdiction by a

Washington court over an injury that occurred in Texas, this Court placed primary emphasis on the principle that specific jurisdiction requires contacts that "the defendant *himself* creates with the forum State." *Montgomery*, 9 Wn. App. 2d at 541 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). Since it was only Alaska Airlines, and not the defendant itself, that had a connection to Washington with respect to a Texas injury, Division I held this too "fortuitous" and "attenuated" to give rise to specific personal jurisdiction. *Montgomery*, 9 Wn. App. 2d at 544-45.

Like ABM, PenAir did not provide any of the services at issue in this litigation in Washington; instead, PenAir's services allegedly leading to the accident were provided in a different state. Thus, as in *Montgomery*, the only potential basis for jurisdiction in Washington is a contract between PenAir and Alaska Airlines to provide services in another state. The only relevant distinction between *Montgomery* and the present case is that ABM conducted some operations at SeaTac (albeit ones

unrelated to the facts of the lawsuit). Of course, PenAir provided no similar services at Sea-Tac or anywhere else in Washington.

In its opinion, Division I cites with approval recent Court of Appeals decisions like *Downing v. Losvar*, 21 Wn. App. 2d 635, 507 P.3d 894, *review denied*, 200 Wn.2d 1004 (2022) (Division III) and *Sandhu Farm, Inc. v. A&P Fruit Growers, Ltd.*, 25 Wn. App. 2d 577, 524 P.3d 209 (2023) (Division I), that are readily distinguishable,[6] but, inexplicably, fails to cite other recent Court of Appeals decisions more like *Montgomery* that

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[6] In *Downing*, Division III concluded that specific jurisdiction existed in Washington over a Cessna successor corporation in a product liability case arising out of an Okanogan County air crash because the corporation like Ford was a global manufacturer of aircraft and aggressively marketed, sold, and serviced Cessna aircraft in Washington. The sheer intensity of the corporation's activities purposefully availing itself of the Washington market stands in stark contrast to PenAir's relationship to Washington. In *Sandhu*, Division I concluded that Washington had specific jurisdiction over a Canadian blueberry processor where that processor received berries from Washington growers and then packed, processed, and resold four million pounds of them in Washington. The processor also owned a Whatcom County berry farm that served as a receiving facility for the Canadian processor.

reject specific jurisdiction over a defendant.

For example, in *Wash. State Housing Finance Comm'n v. Nat'l Homebuyers Fund, Inc.*, 14 Wn. App. 2d 1015, 2020 WL 4747650 (2020), Division I held that the trial court erred in failing to dismiss the Rural County Representatives of California ("RCRC") and Golden State Finance Authority ("GSFA") in an action in which the Washington Commission asserted that the defendant, a nonprofit corporation assisting low income homebuyers, for which RCRC/GSFA were partner lenders, illicitly invoked governmental authority, thereby interfering with the Commission's housing programs. Division I rejected specific jurisdiction over RCRC/GSFA because neither had a Washington connection, despite the Commission's argument that they were not separate from the defendant but were the California non-profit's alter ego. *Id.* at *4. Similarly, in *Great American Ins. Co. v. 1914 Commerce Leasing, LLC*, 22 Wn. App. 2d 1020, 2022 WL 2047235 (2022), Division III distinguished its *Losvar* opinion, applying *Ford*, to conclude specific jurisdiction did not

exist where a Georgia corporation leased property in Chattanooga, Tennessee to a Delaware corporation based in Spokane. The latter allegedly breached the lease as to the Tennessee property for which the insurer had issued a lease guaranty bond. Division III readily concluded that Washington did not have sufficient connection to the Georgia corporation to find specific jurisdiction over that corporation, despite its lease with the Spokane-based corporation.

In sum, Court of Appeals decisions on specific jurisdiction are all over the map, but most pointedly, Division I's published decision here cannot be squared with *Montgomery*, another published Division I decision. Review is merited. RAP 13.4(b)(2).

(4) Given the Constitutional Dimension to Due Process Limitations on Long Arm Jurisdiction under RCW 4.28.185, This Case Presents an Issue of Substantial Public Interest This Court Should Decide

Finally, review is merited under RAP 13.4(b)(4) here on Division I's *published* opinion where there are major public

ramifications of the issue, particularly where this Court is presented with issues having a constitutional dimension. "Both history and uncontradicted authority make it clear that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 21 L. Ed. 60 (1803); *League of Educ. Voters v. State*, 176 Wn.2d 808, 828, 295 P.3d 743 (2013).

In *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), for example, where a prosecutor issued a memorandum announcing a policy not to recommend a drug offender sentencing alternative due to problems with the program, the Court granted review because the Court of Appeals ruling concluding that the memo was an *ex parte* communication with the trial court had the potential to affect every sentencing in Pierce County in which the sentencing alternative might be at

issue. *Id*. at 577. As in *Watson*, Division I's published opinion will carry consequences beyond the parties.

Out of state corporations and their counsel, as well as the Washington bar generally, should have clear guidance from this Court as to the ground rules for subjecting themselves to Washington courts' jurisdiction. Under Division I's extreme analysis, defendants with essentially no Washington connection, except perhaps a contract with a Washington entity to provide service to that entity's customers in Alaska, can be hauled into court to defend against actions more appropriately brought where such foreign corporations actually transact business.[7] That offends the fair play and substantial justice policy of due process. *Noll*, 188 Wn.2d at 412. Review is merited. RAP 13.4(b)(4).

(5) PenAir Is Entitled to Its Fees on Appeal

RCW 4.28.185(5) provides that a defendant that defeats

[7] This result is not harsh. Oltman has filed an action in Alaska courts, which is moving forward toward a 2024 trial; the witnesses pertinent to the accident are located in Alaska.

long arm jurisdiction may be awarded its fees both at trial and on appeal limited to the amount necessary for compensating that foreign defendant for litigating in Washington. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 120, 786 P.2d 265 (1990); *Payne v. Sabenhagen Holdings, Inc.*, 147 Wn. App. 17, 36, 190 P.3d 102 (2008). PenAir is entitled to such fees. RAP 18.1(a).

F. CONCLUSION

This is an important case testing the outer boundaries of due process as to specific jurisdiction, where United States Supreme Court precedent has shifted on that doctrine, meriting review under RAP 13.4(b)(1), (2), and (4). PenAir had very limited contacts with Washington; its contract with Alaska Airlines was not enough to confer specific jurisdiction over it in Washington, particularly where the contract had nothing to do with flight operations, the gravamen of the Duell/Oltman complaints.

This Court should reverse the trial court's order denying PenAir's motion to dismiss and remand the case with directions

to enter a judgment dismissing Duell and Oltman's actions. Costs on appeal, including reasonable attorney fees under RCW 4.28.185(5), should be awarded to PenAir.

This document contains 4,476 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of July, 2023.

Respectfully submitted,

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APPENDIX

RCW 4.28.185(1):

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

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

CAPACITY PURCHASE AGREEMENT

This Capacity Purchase Agreement (together with all Schedules and Exhibits hereto, this "CPA") is made and entered into as of December 21, 2018 ("Effective Date"), by and between ALASKA AIRLINES, INC., an Alaska corporation, having its headquarters at 19300 International Blvd, Seattle, WA 98188 ("Alaska Airlines"), and PENINSULA AVIATION SERVICES, INC., a Delaware corporation, having its headquarters at 6100 Boeing Drive, Anchorage, AK 99502 ("PenAir").

RECITALS

A. Alaska Airlines and PenAir are also parties to that certain Codesharing Agreement dated on or about the Effective Date, and any successor contract that may replace such agreement (the "Codesharing Agreement").

B. Alaska Airlines and PenAir desire to enter into this CPA whereby PenAir will provide certain flight and other services to Alaska Airlines between Anchorage ("ANC") and Dutch Harbor ("DUT") as mutually agreed from time to time, on terms and conditions more particularly set forth in this CPA.

C. In consideration of the premises, covenants, representations and warranties hereinafter set forth, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Alaska Airlines and PenAir agree as set forth below.

D. Certain capitalized terms not otherwise defined herein will have the meanings ascribed to them in Schedule A, Certain Defined Terms.

E. This CPA is conditioned upon PenAir's closing of its acquisition of substantially all assets of Peninsula Airways, Inc.

AGREEMENT

As of the Implementation Date, the Parties hereto agree as follows:

1. Rights, Responsibilities and Obligations of PenAir.

   1.1 Flight Services. During the Term, PenAir will operate the Flights on the routes specified on Exhibit 1 hereof and provide the Related Services (collectively, the "Flight Services") based upon the Schedule established from time to time by Alaska Airlines and provided to PenAir (as described in Section 2.1), subject to the reasonable approval of PenAir to ensure safety and reliability into DUT during challenging weather and minimal daylight conditions. The Flight Services will be marketed and sold exclusively as "AS*"-coded Alaska Airlines flights.

1.6.2. Alaska Airlines Marketing of Flight Services. Alaska Airlines will be solely responsible for pricing, marketing and selling the Flights. The Flights will be marketed exclusively under the AS* code and not under KS or any other airline designator code. Passengers traveling on the Flights will be subject to Alaska Airlines' tariffs and conditions of contract (baggage limits, standby priority, etc.), and will be eligible to participate in the Alaska Airlines Mileage Plan™ frequent traveler program ("Mileage Plan").

1.6A Inflight Food, Beverages and Supplies. Unless otherwise mutually agreed, PenAir will provide and store the following Inflight Amenities at PenAir's expense: water and/or other non-alcoholic beverages and a light snack, consistent with historical standards of items previously provided for the ANC-DUT route by Peninsula Airways, Inc. If Alaska Airlines requests additional Inflight Amenities, PenAir has the right to agree or reject such request, and if accepted, Alaska Airlines will bear the cost of PenAir acquiring and storing such additional Inflight Amenities. PenAir shall be solely responsible for maintaining all licenses necessary for the carrying and/or serving of in-flight food and beverages, in each case, on Flights and for the provision of crew meals. PenAir may be asked to administer Alaska Airlines' buy-on-board meal program on designated Flights. In this case, Alaska Airlines shall provide at its cost and expense all necessary training and equipment required to administer such program.

1.7 Personnel and Training.

1.7.1 PenAir shall hire, engage, employ and maintain a sufficient number of trained personnel and subcontractors, including, but not limited to pilots, flight attendants, customer service agents and maintenance personnel necessary to provide the Flight Services required by this CPA. Such pilots, flight attendants, customer service agents and maintenance personnel shall wear PenAir uniforms, and PenAir will be responsible for all recurrent training and expenses relating to such pilots, flight attendants, customer service agents and mechanics, including uniform allowances and cleaning in accordance with its internal policies.

1.7.2 Training costs for procedures or systems (e.g., IMAGE and CargoSpot) that are specific to Alaska Airlines shall be allocated as follows: (a) if Alaska Airlines implements new or materially changed systems that require retraining for PenAir employees working Flights under this CPA and using existing Alaska Airlines systems, Alaska Airlines shall reimburse PenAir for all reasonable expenses related to training of PenAir employees on such systems, or (b) to the extent new or existing PenAir employees working Flights under this CPA require training on existing Alaska Airlines systems, Alaska Airlines shall permit PenAir employees to attend Alaska Airlines' training classes. Such classes shall be at no charge to PenAir, except that PenAir shall be responsible for all wage, per diem, travel and other expenses

14. Miscellaneous Provisions

14.1 Notices. All notices, consents, approvals or other instruments required or permitted to be given by either Party pursuant to this CPA shall be in writing and given by: (i) hand delivery; (ii) facsimile; (iii) express overnight delivery service; or (iv) certified or registered mail, postage prepaid, return receipt requested. Notices shall be provided to the Parties at the addresses (or facsimile numbers, as applicable) specified below and shall be effective upon receipt of such delivery, except if delivered by facsimile outside of business hours in which case they shall be effective on the next succeeding business day:

If to Alaska Airlines:

Alaska Airlines, Inc.
19300 International Blvd.
Seattle, WA 98188
Attn: Executive VP & Chief Commercial Officer
REDACTED

If to PenAir:

Peninsula Aviation Services, Inc.
4700 Old International Airport Road
Anchorage, AK 99502
Attn: Dave Pflieger, Chief Executive Officer
Phone: REDACTED

14.2 Waiver and Amendment. No provisions of this CPA shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the Party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion.

14.3 Captions. Captions are used throughout this CPA for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.

14.4 Entire Agreement. This CPA, including all attached Exhibits and Schedules referred to herein, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior agreements, whether written or oral, with respect to such matters, and there are no other representations, warranties or agreements, written or oral, between Alaska Airlines and PenAir with respect to the subject matter of this CPA other than as set forth herein.

14.5 Choice of Law. This CPA shall be governed by and interpreted in accordance with the laws of the State of Washington (without regard to principles of conflicts of law) including all matters of construction, validity and performance.

IN WITNESS WHEREOF, the Parties executed and deliver this CPA as of the date first written above.

ALASKA AIRLINES, INC.
an Alaska corporation

By:_ Andrew Harrison

Andrew Harrison
Executive VP & Chief Commercial Officer

PENINSULA AVIATION SERVICES, INC.
a Delaware corporation

By: _____

Name: David H. Pflieger

Title: CEO

FILED
6/12/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARCUS DUELL, an individual,

Plaintiff,

v.

ALASKA AIRLINES, INC., a Delaware Corporation; PENINSULA AVIATION SERVICES, INC., doing business as PenAir, a Delaware corporation;

Petitioners,

DOES 1 through 20,

Defendants,

ERIN OLTMAN, individually and as Personal Representative of the ESTATE OF DAVID OLTMAN, and on behalf of REECE OLTMAN and EVAN OLTMAN,

Respondents,

v.

ALASKA AIR GROUP, INC., and ALASKA AIRLINES, INC.,

Petitioners.

No. 83424-0-I

DIVISION ONE

PUBLISHED OPINION

COBURN, J. — The issue before us is whether a Washington court can exercise personal jurisdiction over Peninsula Airways, Inc. (PenAir), a Delaware corporation

headquartered in Alaska. PenAir depended exclusively on Alaska Airlines, Inc. (Alaska Airlines), a Washington based corporation, to market and sell seats on PenAir flights between Anchorage and Dutch Harbor, Alaska. David Oltman purchased from Alaska Airlines a trip from Wenatchee, Washington to Dutch Harbor. On the third leg of his trip, the PenAir flight crashed while landing, causing his injuries and eventual death. His family sued PenAir in King County Superior Court alleging wrongful death. The court denied PenAir's motion to dismiss for lack of personal jurisdiction. We affirm.

FACTS

Alaska Airlines' corporate headquarters and principal place of business is in SeaTac, Washington. PenAir[1] was a Delaware corporation headquartered in Anchorage. It did not own any property in Washington or operate any flights to or from Washington. In December 2018, PenAir and Alaska Airlines entered into a capacity purchase agreement (CPA). Under the CPA, PenAir operated flights between Anchorage and Dutch Harbor as "Alaska Airlines" flights. All of the flights were exclusively marketed and sold by Alaska Airlines and the purchase confirmation indicated that all flights were Alaska Airlines flight numbers. The CPA provided Alaska Airlines with a detailed level of control over the operations of PenAir, the pricing and marketing of the flights, the schedule of the flights, the use of Alaska Airlines branded passenger/cargo materials, and the rights to approve the selection of executive level employees of PenAir. Alaska Airlines also retained the right to control what safety

[1] Similar to the trial court, we do not consider a declaration from Orin Seybert, former president of Peninsula Airways, Inc. That company went bankrupt in 2018 and was a different legal entity from PenAir, which incorporated in 2018 and purchased Peninsula Airways' assets.

standards PenAir was required to adhere to in the operation of the Dutch Harbor route. The CPA also had a choice of law provision:

> This CPA shall be governed by and interpreted in accordance with the laws of the State of Washington (without regard to principles of conflicts of law) including all matters of construction, validity and performance.

In October 2019, Oltman, a Washington resident, purchased from Alaska Airlines a trip from Wenatchee, Washington to Dutch Harbor, Alaska. Oltman purchased his tickets through Alaska Airlines' website directly from the airline. The trip had three legs. The first was from Wenatchee to Seattle, the second was from Seattle to Anchorage, and the third was from Anchorage to Dutch Harbor, a flight operated by PenAir. While landing in Dutch Harbor, the pilot was unable to stop on the runway, crashing into ballast rocks at the edge of the harbor. The left propeller struck one of the ballast rocks and sheared off, sending pieces and shrapnel into the fuselage. One or more of the propellers and/or the destroyed fuselage struck Oltman, causing injuries that eventually resulted in his death.

Oltman's family and estate (collectively the Oltmans) initially sued Alaska Airlines and later amended their complaint adding PenAir as a defendant. PenAir filed a CR 12(b)(2) motion to dismiss asserting that the trial court lacked personal jurisdiction over PenAir. The trial court denied the motion after hearing oral argument and considering pleadings without holding an evidentiary hearing. A commissioner of this court granted PenAir's request for discretionary review.[2]

[2] The Oltmans' case had been consolidated below with a complaint filed by Marcus Duell. While this appeal was pending as to both plaintiffs, a panel of this court granted PenAir's motion to voluntarily withdraw review as to Duell.

DISCUSSION

This court reviews the denial of a motion to dismiss for lack of personal jurisdiction de novo. Sandhu Farm Inc., v. A&P Fruit Growers Ltd., No 83866-1-I, slip op. at 3 (Wash. Ct. App. Feb. 13, 2023), www.courts.wa.gov/opinions/pdf/838661.pdf. When a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing, the plaintiff's burden is only that of a prima facie showing of jurisdiction. State v. LG Elecs., Inc., 186 Wn.2d 169, 176, 375 P.3d 1035 (2016). This court treats the allegations in the complaint as established for purposes of determining jurisdiction. Montgomery v. Air Serv. Corp., 9 Wn. App. 2d 532, 538, 446 P.3d 659 (2019) (citations omitted).

"A court's exercise of personal jurisdiction over a nonresident defendant requires compliance with both the relevant state long-arm statute and the Fourteenth Amendment's due process clause." Downing v. Losvar, 21 Wn. App. 2d 635, 653, 507 P.3d 894 (2022) (citing Daimler AG v. Bauman, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)). "Because a state court's assertion of jurisdiction exposes defendants to the state's coercive power, personal jurisdiction falls within the parameters of the clause." Downing, 21 Wn. App. 2d at 655. The relevant portion of Washington's "long-arm" statute permits jurisdiction over:

> (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 said acts:
>
> (a) The transaction of any business within this state[.]

RCW 4.28.185(1)(a). "The Washington Supreme Court has consistently held that the state long-arm statute permits jurisdiction over foreign corporations to the extent permitted by the due process clause of the United States Constitution." Sandhu Farm, slip op. at 4 (citing Downing, 21 Wn. App. 2d at 654); Noll v. Am. Biltrite Inc., 188 Wn.2d 402, 411, 395 P.3d 1021 (2017); Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989)).

The Fourteenth Amendment's due process clause limits a state court's power to exercise jurisdiction over a defendant. Ford Motor Co. v. Montana Eighth Jud. Dist., 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021) (citing Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). "The canonical decision in this area remains International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)." Ford, 141 S. Ct. at 1024.

> There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice." In giving content to that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State."

Id. (quoting Int'l Shoe, 326 U.S. at 316-17); Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 256, 262, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017).

Courts recognize two kinds of personal jurisdiction: general and specific. Ford, 141 S. Ct. at 1024. "A state court has general jurisdiction to decide any claim against a defendant corporation when the corporation's contacts with the state are so substantial that it is essentially at home in the forum state." Montgomery, 9 Wn. App. 2d at 539 (citing Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 919, 131 S. Ct.

2846, 180 L. Ed. 2d 796 (2011)). A corporation is at home in its place of incorporation and its principal place of business. Ford, 141 S. Ct. at 1024; Daimler, 571 U.S. at 137. The Oltmans assert that Washington has specific jurisdiction over PenAir. Specific jurisdiction covers a narrower class of claims when a defendant maintains a less intimate connection with a state. Downing, 21 Wn. App. 2d at 657 (citing Ford, 141 S. Ct. at 1024).

Since Int'l Shoe, the United States Supreme Court has revisited the contours of how specific jurisdiction can be met—most recently in its decision in Ford. Ford, 141 S. Ct. at 1024; see Bristol-Myers Squibb, 137 S. Ct. at 1779; J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (plurality opinion); Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 109-13, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Additionally, following Int'l Shoe, our state Supreme Court and this court have also had opportunities to apply the most recent decision from the United States Supreme Court at that time. See, e.g., LG Elecs., 186 Wn.2d at 176; Shute, 113 Wn.2d at 764; Montgomery, 9 Wn. App. 2d at 535. Following Ford, this court has twice analyzed specific personal jurisdiction. Sandhu Farm, slip op. at 1; Downing, 21 Wn. App. 2d at 678.

The parties attempt to frame this case as whether the facts more closely align with the facts in Shute[3] or Montgomery.[4] However, in Shute, decided 34 years ago, the court adopted a "but for" test that has since been clarified by the United States Supreme Court. Shute, 113 Wn.2d at 770; see Ford, 141 S. Ct. at 1026 (recognizing that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do"). Though Montgomery was more recently decided, its holding was based on a premise in McIntyre, a plurality decision. McIntyre, 564 U.S. at 882. That plurality opinion held that the principal inquiry for whether a corporation has purposefully availed itself of the privilege of conducting business activities in the forum state was "whether the defendant's activities manifest an

---

[3] In Shute, a Washington resident was injured on a cruise ship in international waters and brought suit against the cruise operator, a Panamanian corporation with its principal place of business in Florida. Shute, 113 Wn.2d at 764. The ship embarked from Los Angeles to Mexico. Id. at 765. Carnival's only contacts with Washington were advertisements in Washington newspapers, promotional materials provided to Washington travel agencies, and seminars conducted by Carnival's personnel for travel agencies in promotion of its cruises. Id. at 766. The tickets issued by Carnival contained contract clauses designating Florida as the forum for any litigation. Id. at 766. The Washington State Supreme Court held that "Carnival's solicitation of business in this state was purposefully directed at Washington residents." Id. at 768.

[4] Montgomery involved a wrongful death suit filed in Washington against Air Serv Corporation and ABM Aviation Inc. (collectively ABM), a Georgia-based corporation. Montgomery, 9 Wn. App. 2d at 535. ABM offered a variety of airport services, including wheelchair assistance, by contracting with airlines and airports. Id. Montgomery's daughter purchased a ticket from Alaska Airlines for Montgomery to travel from SeaTac airport to Dallas using Alaska Airlines' website, checking a box for wheelchair assistance in SeaTac and Dallas. Id. at 535-36. The website did not note what company would provide the wheelchair assistance. Id. ABM did not provide wheelchair assistance services in SeaTac airport, but only provided janitorial, cabin cleaning, and baggage services. Id. at 535. After missing her Alaska Airlines flight, Montgomery flew on American Airlines to Dallas, where ABM provided Montgomery with wheelchair assistance services resulting in injuries leading to her death. Id. at 535 n.3. This court held that "a contract to provide services in Texas" was "not sufficient to establish case-linked personal jurisdiction," reasoning that "[p]roviding services in Texas does not manifest an intention to submit to the jurisdiction of Washington courts." Id. at 544-45.

intention to submit to the power of a sovereign." Montgomery, 9 Wn. App. 2d at 544 (quoting McIntyre, 564 U.S. at 882).

As the Washington Supreme Court observed in LG Electronics, the United States Supreme Court issued fractured opinions in McIntyre in its attempt to clarify the fractured opinions from its earlier decision in Asahi regarding a stream of commerce theory as applied to a minimum contacts analysis. LG Elecs., 186 Wn.2d at 178-80. Notably, neither McIntyre nor the "stream of commerce theory" is mentioned in Ford. And as we noted in Sandhu Farm, the Washington Supreme Court has not addressed personal jurisdiction since Ford was decided. Sandhu Farm, slip op. at 1.

Because we look to federal law to determine personal jurisdiction, we review this case in light of Ford. Sandhu Farm, slip op. at 6; Downing, 21 Wn. App. 2d at 678. Under Ford, for specific jurisdiction, the defendant must (1) purposefully avail itself of the privilege of conducting activities within the forum state, and (2) the plaintiff's claims must arise out of or relate to the defendant's contacts with the forum. Sandhu Farm, slip op. at 5 (citing Ford, 141 S. Ct. at 1024-25).

Division Three in Downing also considered the "fairness and reasonableness" of the assertion of personal jurisdiction as a third "element." Downing, 21 Wn. App. 2d at 659 (citing Burger King, 471 U.S. at 476). In Downing, Textron Aviation argued that because the parties were pursuing their claims in courts that had uncontested general jurisdiction over the company, Washington should not exercise jurisdiction as it would not be reasonable. Downing, 21 Wn. App. 2d at 679-80. However, the Ford court does not present the analysis for specific jurisdiction as a three-part test or a three-element analysis. Instead, it observed that the specific jurisdiction "rules" "reflect two sets of

values—treating defendants fairly and protecting 'interstate federalism.'" 141 S. Ct. at 1025 (citing World-Wide Volkswagen, 444 U. S. at 293). The Ford Court discussed principles of "interstate federalism" in response to Ford proposing a rule that would make the States of first sale the most likely forum in a product-liability case involving automobiles. Id. at 1030. Regardless, in the instant case neither party in their briefs raised or argued fairness and reasonableness or interstate federalism as a separate issue not already reflected in the specific jurisdiction analysis. "We will not consider an inadequately briefed argument." Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). Because the parties did not raise a separate concern outside of whether PenAir purposefully availed itself of the privilege of conducting activities within Washington and whether the Oltmans' claims arise out of or relate to PenAir's contacts with Washington, we restrict our review to matters raised and briefed.

PenAir maintains that it did not purposefully avail itself because it did not own any property in Washington, employ any of its citizens, did not operate any flights to or from Washington, and did not conduct any operations in Washington. It also contends it took no actions directed toward Washington and that any actions directed toward Washington residents occurred within Alaska. It argues there is no evidence that it advertised in Washington or otherwise solicited business from Washington residents. It also argues that it was Alaska Airlines, not PenAir, that sold tickets for the flights from Anchorage to Dutch Harbor, and that PenAir merely operated the flights under Alaska Airlines flight numbers.

The Oltmans counter that PenAir purposefully availed itself of the privilege of conducting activities within Washington by contracting with Alaska Airlines to exclusively price, market, and sell its flights from Anchorage to Dutch Harbor on behalf of PenAir. The Oltmans further argue that PenAir's negotiation of the CPA choosing Washington law is direct evidence that it availed itself of Washington law and can reasonably expect to be haled into court here.

We agree with the Oltmans.

The defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." Ford, 141 S. Ct. at 1024 (alteration in original) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). The contacts between the non-resident defendant and the forum state must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. Ford, 141 S. Ct. at 1025 (alteration in original) (quoting Walden v. Fiore, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)). The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." Ford, 141 S. Ct. at 1025 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)). Jurisdiction may not be avoided merely because the defendant did not physically enter the forum state.

> Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents

> of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (quoting Keeton, 465 U.S. at 774).

PenAir does not dispute the terms of the CPA, but ignores the fact that through the CPA it reached beyond its home of Alaska to exploit a market in Washington by relying on Washington-based Alaska Airlines to exclusively market and sell PenAir's flights to Dutch Harbor. PenAir fails to explain how the CPA that provides for Alaska Airlines to market on behalf of PenAir is materially different than PenAir marketing in Washington itself. PenAir relied on Alaska Airlines' marketing to fill its flights to Dutch Harbor with the understanding that Alaska Airlines is a Washington corporation with its principal place of business in Washington.

PenAir also contends that the choice-of-law provision is not relevant because it is not a forum-selection clause and applies to disputes between itself and Alaska Airlines, not third parties.

In Burger King, the United States Supreme Court criticized the Court of Appeals for giving insufficient weight to a choice-of-law provision which stated,

> This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida.

Burger King, 471 U.S. at 481. The United States Supreme Court noted that the Court of Appeals in Burger King reasoned that "choice-of-law provisions are irrelevant to the question of personal jurisdiction, relying on Hanson for the proposition that 'the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction.'" Burger King, 471 U.S. at 481 (quoting Burger King Corp. v.

MacShara, 724 F.2d 1505, 1511-1512, n.10 (1984)). The United States Supreme Court observed that Hanson and subsequent cases have "emphasized that choice-of-law analysis—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum." Burger King, 471 U.S. at 481-82 (citing Hanson, 357 U.S. at 253-54). However, the Burger King Court explained that "[n]othing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes." Id. The court acknowledged that "such a provision standing alone would be insufficient to confer jurisdiction," but "when combined with the 20-year interdependent relationship [defendant] established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." Id.

In the instant case, the choice-of-law provision indicated that Washington law would govern all matters of construction, validity and *performance*. The CPA established that PenAir would operate flights based upon the schedule established from time to time by Alaska Airlines and provided to PenAir subject to reasonable approval of PenAir to ensure safety and reliability of flights into Dutch Harbor during challenging weather and minimal daylight conditions. The Oltmans allege in their complaint that, on approach to the airport, PenAir pilots encountered tailwinds that exceeded the performance of the aircraft, but that the crew attempted to land regardless.

The consideration of the choice-of-law provision under the circumstances of this case is an example of an act by which PenAir invoked the benefits and protections of Washington law to govern its agreement and have Alaska Airlines exclusively market and sell its flights to Dutch Harbor. By focusing on the fact that the CPA is between PenAir and Alaska Airlines and not PenAir and Oltman, PenAir conflates the secondary inquiry related to the connection between the plaintiffs' claims and PenAir's contacts with the first inquiry of whether PenAir purposefully availed itself by examining its own conduct in making contacts with Washington.

While the choice-of-law provision standing alone would be insufficient to establish specific personal jurisdiction, when combined with PenAir's agreement to operate flights sold exclusively by Washington-based Alaska Airlines, PenAir's choice of Washington law to govern the CPA supports that it purposefully availed itself of the privilege of conducting activities within Washington.

When a company exercises the privilege of conducting activities in a state, thus enjoying the benefits and protection of its laws, the state is able to then hold the company accountable for related misconduct. Ford, 141 S. Ct. at 1025 (citing Int'l Shoe, 326 U.S. at 319).

We next examine whether the Oltmans' claims arise out of or relate to PenAir's contacts with Washington.

Even when a defendant has minimal contacts with the forum state, the plaintiff's claims must arise out of or relate to the defendant's contacts with the forum. Sandhu Farm, slip op. at 5 (citing Ford, 141 S. Ct. at 1024-25); see Downing, 21 Wn. App. 2d at 674-75. "Even regularly occurring sales of a product in a state do not justify the

exercise of jurisdiction over a claim unrelated to those sales." Id. at 673 (citing Bristol-Myers Squibb, 137 S. Ct. at 1781).

The Ford Court explained the difference between the "must arise out of" and "relate to" standard:

> The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.

Ford, 141 S. Ct. at 1026.

PenAir provides little argument other than a conclusory statement that any suggested link between the claims and the CPA is too attenuated. We disagree. Oltman purchased his trip from Alaska Airlines. His flights were all under the name of Alaska Airlines, but Oltman ended up on the PenAir flight because of PenAir's CPA with Alaska Airlines. This is the same CPA, governed by Washington law, in which Alaska Airlines retained the right to control what safety standards PenAir was required to adhere to in the operation of the Dutch Harbor route, and in which Alaska Airlines established the flight schedule subject to PenAir's reasonable approval to ensure safety and reliability of flights into Dutch Harbor during challenging weather and minimal

daylight conditions. The Oltmans' claims relate to PenAir's contacts with Washington.

We affirm.

Coleman, J.

WE CONCUR:

Cheung, J.

Hazelrigg, ACJ

FILED
7/10/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARCUS DUELL, an individual,

Plaintiff,

v.

ALASKA AIRLINES, INC., a Delaware Corporation; PENINSULA AVIATION SERVICES, INC., doing business as PenAir, a Delaware corporation;

Petitioners,

DOES 1 through 20,

Defendants,

ERIN OLTMAN, individually and as Personal Representative of the ESTATE OF DAVID OLTMAN, and on behalf of REECE OLTMAN and EVAN OLTMAN,

Respondents,

v.

ALASKA AIR GROUP, INC., and ALASKA AIRLINES, INC.,

Petitioners.

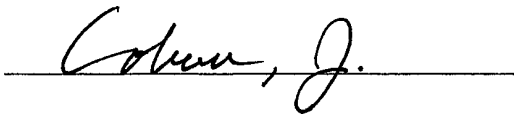
No. 83424-0-I

ORDER DENYING MOTION FOR RECONSIDERATION

The petitioner, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 83424-0-I to the following parties:

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Original electronically delivered by appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 27, 2023, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

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Transmittal Information

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Appellate Court Case Number:	83424-0
Appellate Court Case Title:	Peninsula Aviation Services, Inc., Petitioner v. Erin Oltman, Respondent

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Comments:

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