No. 94746-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

AKER BIOMARINE ANTARCTIC AS, a Norwegian corporation, and AKER BIOMARINE ANTARCTIC II AS, a Norwegian corporation,

Petitioners,

and

MAREL SEATTLE, INC., a Washington State corporation,

Defendant.

RESPONDENTS' ANSWER TO MEMORANDUM OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITION FOR REVIEW

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A. INTRODUCTION

Washington Defense Trial Lawyers (WDTL) fail to demonstrate that review of Division I's jurisdictional decision is appropriate. First, this Court has already, in four recent cases, Swank v. Valley Christian Sch., 188 Wn.2d 663, 398 P.3d 1108 (2017); Noll v. Am. Biltrite, 188 Wn.2d 402, 395 P.3d 1021 (2017); State v. LG Elecs., 186 Wn.2d 169, 375 P.3d 1035 (2016); Pruczinski v. Ashby, 185 Wn.2d 492, 374 P.3d 102 (2016), taken time to interpret current U.S. Supreme Court precedent, and it has expansively and clearly set out Washington jurisdictional law. WDTL does not argue that this precedent is incorrect or that Division I incorrectly applied this precedent.

Second, contrary to WDTL's claim, the U.S. Supreme Court's recent decisions have not altered the traditional, well-established specific personal jurisdiction principles that Division I applied here. Indeed, the U.S. Supreme Court has explicitly made this clear in its decisions. Bristol-Myers Squibb v. Superior Court, __ U.S. __, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395 (2017) ("Our settled principles regarding specific jurisdiction control this case."); Walden v. Fiore, __ U.S. __, 134 S. Ct. 1115, 1126, 188 L. Ed. 2d 12 (2014) ("Well-established principles of personal jurisdiction are sufficient to decide this case."); Huynh v. AKAS, No. 74241-8, 2017 Wash. App. LEXIS 1219, at *24 (2017). WDTL fails to show that Division I's decision conflicts with these decisions or that the principles it used are contrary to law.

Finally, this Court should reject WDTL's attempt to infuse complex choice-of-law issues into the proceedings. Neither party briefed the issues to Division I or this Court, and the issues provide no basis to grant review here.

B. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4 sets forth the conditions under which this Court will review a Court of Appeals decision terminating review. Since WDTL fails to show Division I's decision conflicts with U.S. Supreme Court precedent—the only condition it argues warrants review—this Court should deny review.

1. Washington's but-for relatedness test does not conflict with *Bristol*.

Because specific personal jurisdiction requires that a suit arise out of or relate to the defendant's contacts with the forum, Bristol, 137 S. Ct. at 1780, the second prong of Washington's three-part jurisdictional test has long required that a plaintiff show that "the cause of action . . . [arose] from, or [is] connected with," a foreign entity's purposeful act or transaction in Washington. Tyee Constr. Co. v. Dulien Steel Prods., 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963). This Court also long ago adopted a "but-for" test for this relatedness prong: but for the intentional contacts, would the claim have arisen. Shute v. Carnival Cruise, 113 Wn.2d 763, 769-72, 783 P.2d 78 (1989). WDTL argues that by discussing interstate federalism in Bristol, the U.S. Supreme Court altered the traditional personal jurisdiction analysis by now requiring that courts specifically consider both interstate federalism

and international comity in deciding if personal jurisdiction exists. And, it argues, the but-for test fails to account for the considerations and should be rejected for a stricter test. This argument fails and does not warrant review.

"*Stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." State v. Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). This Court, thus, will not lightly set precedent aside; it requires a clear showing that the rule is both incorrect and harmful. Id. at 757; Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 381 P.3d 32 (2016). No such showing exists here.

First, nothing in Bristol's discussion of interstate federalism conflicts with the but-for test or demonstrates the test is incorrect. Indeed, federalism is not a new consideration. Rather, it is already part and parcel of, and is subsumed into, the Supreme Court's long-held requirement that a defendant must itself create purposeful contacts with the forum before the forum state may exercise personal jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (holding that jurisdiction is proper when defendant's purposeful acts create contacts with "a 'substantial connection' with the forum State").

Bristol itself illustrates such is the case. In its interstate federalism discussion, Bristol specifically cited to World-Wide Volkswagen Corp. v.

Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), which 37 years prior stated that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." Id. at 294. And, as World-Wide's discussion made clear immediately following that statement, specific personal jurisdiction's requirement that a defendant must itself create a substantial suit-related connection to the forum state accounted for the federalism issue. Id. at 295 (holding jurisdiction did not exist because Volkswagen had no connection to the forum state, Oklahoma, other than an automobile it sold in New York was later involved in a transient accident in Oklahoma). Indeed, as Bristol explained, jurisdiction failed in World-Wide because "defendant 'carr[ied] on no activity whatsoever in Oklahoma", and "the fortuitous circumstance that a single Audi automobile, sold [by the defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" was an "isolated occurrence". Bristol, 137 S. Ct. at 1782. In other words, the defendant had not itself created a suit-related connection to the forum state. Thus, the but-for test, which Washington adopted four years after Burger King and eight years after World-Wide, has long accounted for federalism concerns and is not incorrect.

Second, in previously rejecting WDTL's argument that the but-for test is subject to criticism, this Court explained:

> "The 'but for' test has been criticized. 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*'. While other tests or rules have been suggested, we do not consider them appropriate for adoption by this court."

Shute, 113 Wn.2d at 769-71 (emphasis added). In other words, the but-for test is tempered by the third prong of Washington's jurisdictional test—the reasonableness prong. And, this Court just reaffirmed that such is still the case in Ashby, 185 Wn.2d 492.

In Ashby this Court stated that, "[u]nder the principles expressed in Walden, personal jurisdiction turns on whether [a defendant's] intentional conduct created a significant connection with Washington. In determining this, we 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'", 185 Wn.2d at 501-02, *i.e.*, the Court considers the three-part test's third prong. Thus, the but-for test remains both intact and tempered by the reasonableness prong, and is not incorrect or harmful.

The U.S. Supreme Court in Bristol made clear that it was not altering the traditional personal jurisdiction analysis. 137 S. Ct. at 1781 ("Our settled principles regarding specific jurisdiction control this case.") Moreover, as Division I recognized here, this Court "has had multiple opportunities to

alter the Shute test post-Walden" and "has not done so." Huynh, 2017 Wash. App. LEXIS 1219, at *28. Division I properly considered AKAS and AKAS II's intentional and substantial insertion into Washington, and properly held under the traditional analysis that but for its conduct and its contacts, Huynh would not have been injured. Division I's decision does not conflict with Bristol and the but-for test is neither incorrect nor harmful.

2. Division I properly analyzed and applied *Walden*, which did not alter the traditional specific personal jurisdiction analysis.

This Court has just recently, on multiple occasions, taken the time to interpret recent U.S. Supreme Court precedent and has comprehensively set forth Washington's jurisdictional law. Swank, 188 Wn.2d 663; Noll, 188 Wn.2d 402; LG Elecs., 186 Wn.2d 169; Ashby, 185 Wn.2d 492. Indeed, all these decisions are post-Walden, which is the U.S. Supreme Court case upon which AKAS, AKAS II, and WDTL heavily rely. WDTL nonetheless argues that Walden "altered the specific personal jurisdiction landscape"—which this Court has not found—and that Division I therefore misapplied Walden. Specifically, it argues, Walden narrowed the Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), "effects test". WDTL's arguments fail for two reasons and do not warrant review.

First, the Walden Court explicitly states that the decision did not alter the traditional, well-established specific personal jurisdiction analysis. 134

S. Ct. at 1126 ("Well-established principles of personal jurisdiction are sufficient to decide this case."). Second, even had Walden altered the effects test, that test is an intentional tort jurisdictional test. Noll, 188 Wn.2d at 415 n.7; see also Walden, 134 S. Ct. at 1123-24. Because Huynh's action is not an intentional tort action, Division I properly did not apply the intentional tort effects test.

Rather, Division I "analyze[d] the connection among the defendant, the forum, and the litigation." Huynh, 2017 Wash. App. LEXIS 1219, at *25. This is the proper application of Walden under the facts and tort alleged here. In Walden, the U.S. Supreme Court, holding that jurisdiction did not exist, simply reaffirmed two well-established tenets. First, a defendant's own suit-related conduct must create the forum contacts. 134 S. Ct. at 1121-22. As the Court explained, this is so because "the relationship [between the defendant and the forum] must arise out of contacts the 'defendant *himself*' creates with the forum", id.—a principle the Court established 30 years prior in Burger King, 471 U.S. at 475.

Second, a defendant must establish connections with the forum, not just a plaintiff. Walden, 134 S. Ct. at 1122. It then reiterated another 30-year-old principle: a defendant can create the required connections by "purposefully reach[ing] out beyond [its] State and into another by, for example, entering a contractual relationship that 'envisioned continuing and

wide-reaching contacts in the forum State." Id. at 1122-23 (internal quote marks omitted) (quoting Burger King, 471 U.S. at 479-80). It further stated that these tenets also apply to intentional torts, which is where the Court then discussed the effects test. Id.

As Division I properly held, AKAS II intentionally reached into Washington to enter the ANTARCTIC SEA contract, and by that contract—which AKAS II knew would require Huynh's employer, Marel Seattle, Inc., to construct millions of dollars of equipment in Seattle and send equipment and Washington workers covered by State industrial insurance to Uruguay—AKAS II purposely established a substantial relationship with Washington. CP 951-52; Exs. 6, 18-24. Contrary to WDTL's argument, the ANTARCTIC SEA contract is jurisdictionally relevant, Burger King, 471 U.S. at 479-80, and minimum contacts exist under Walden and Burger King. See id. at 1122-23. Huynh's action also arises directly out of those contacts. Division I's decision does not conflict with Walden and does not warrant review.

3. The complex maritime law choice-of-law issues only WDTL argues do not warrant review.

As the Court has stated, it need not consider an issue that only amicus curiae raises to the Court. Ruff v. Cty. of King, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995). WDTL's complex maritime choice-of-law issue is such an

issue, should not be considered, and does not provide a basis upon which this Court should grant review.

A conflict analysis' purpose "'is to balance the interests of the nations whose law might apply.'" Warn v. M/Y Maridome, 169 F.3d 625, 628 (9th Cir. 1999) (quoting Bilyk v. Vessel Nair, 754 F.2d 1541, 1543 (9th Cir. 1985)). "[F]ederal admiralty courts recognize the 'greatest interest' rule in deciding which state's or nation's law is to be applied where interests of more than one state or nation is involved, and applies the rule of the state or nation with the greatest interest in the case." Charles Davis, Maritime Law Deskbook 126 (2016) (citing Coats v. Penrod Drilling, 5 F.3d 877, 841-42 (5th Cir. 1993)). The U.S. Supreme Court has devised several *non-exclusive*, non-mechanical factors a court may consider in conducting the analysis: (1) the place of the wrongful act; (2) the law of the flag; (3) the injured person's allegiance or domicile; (4) the shipowner's allegiance; (5) the place of the contract; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970).

As is clear from the information and arguments the parties would be required to provide to properly present the conflicts issue to the Court, it would not be appropriate to grant review based on a complex issue that the parties have not briefed and which will require evidentiary submissions that

have not been made. And, while WDTL argued in responding to Huynh's objection to WDTL filing an amicus brief that the choice-of-law issue had been raised, it is clear from WDTL's cites that AKAS II only briefly raised the issue to the Court of Appeals in a footnote, see AKAS/AKAS II Reply Brief at 23 n.12. That is clearly insufficient to provide the Court of Appeals or this Court any reasonable, informed basis upon which to decide such an issue. Indeed, it is telling that WDTL's cursory "analysis" omitted any discussions of whether U.S. maritime law would in fact apply—it discusses only Washington, Uruguay, and Norway.[1] WDTL's choice-of-law issue also does not provide a basis on which this Court should grant review.

C. CONCLUSION

For the foregoing reasons, this Court should deny AKAS and AKAS II's petition for review.

Respectfully submitted this 13th day of October, 2017.

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[1] WDTL misstates Ashby's import when it claims that this Court has "emphasized the importance of a choice-of-law analysis as a factor in determining if specific personal jurisdiction exists." Indeed, Ashby noted that choice-of-law was not an issue in that case, and it did not decide that issue. 185 Wn.2d at 503 n.7.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing Answer to Memo. of Amicus Curiae Washington Defense Trial Lawyers on the following:

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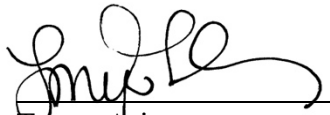
SIGNED at Bellevue, Washington this 13th day of October, 2017.



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