

No. 64318-5

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

ERNEST CASTRO
Appellant

vs.

HENSEN EQUIPMENT, LLC
Respondent

REPLY BRIEF OF APPELLANT ERNEST CASTRO

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF ISSUES	1
ARGUMENT	1
A. Person jurisdiction is satisfied under RCW 4.28.185(1)(b) as the injury which is the subject of the suit occurred in this state caused by an act of the non-resident defendant Hensen Equipment, LLC	1
B. Minimum contacts are established as the defendant Hensen Equipment, LLC sold the forklift to PCL Construction, maintained and repaired the forklift for PCL Construction, knowing that PCL Construction is a large construction company doing business in many states, thus the defendant is charged with knowledge that their transactions might have consequences here, in Washington State, one of the many states in which PCL Construction conducts business	4
CONCLUSION	6

TABLE OF AUTHORITIES

STATUTES

RCW 4.28.185(1)(b) 1, 2, 6

CASES

Mahnkey v. King, 5 Wn. App. 555, 489 P.2d, 361 (1971) 2

Smith v. York Food Mach. Co., 81 Wn.2d 719, 504 P.2d 782
(1995) 2, 5,6

Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, 9 Wn. App.
284, 513 P.2d 102 (1973) 2, 3

Barer v. Goldberg, 20 Wn. App. 472, 582 P.2d 868 (1978) 3

Grange Insurance Association v. The State of Washington, 110
Wn.2d 752 (1988) 5, 6

Oliver v. American Motors Corp., 70 Wn. 2d 875 (1967) 5, 6

I. REPLY BRIEF ISSUE

Whether personal jurisdiction is established over the defendant based on RCW 4.28.185(1)(b), commission of a tortious act within the State of Washington.

II. ARGUMENT

A. Personal jurisdiction is satisfied under RCW 4.28.185(1)(b) as the injury which is the subject of the suit occurred in this state caused by an act of the non-resident defendant Henson, Equipment, LLC.

The text of the long arm statute is as follows:

RCW 4.28.185 Personal service out of state-Acts submitting person to jurisdiction of courts-Saving

(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 personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:

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

The intent of legislature in enacting this statute was to allow

Washington courts to assert jurisdiction over non-resident defendants to the full extent permitted by due process. *Mahnkey v. King*, 5 Wn. App. 555, 558, 489 P.2d 361 (1971).

Where damage results from a defendant's negligence, the injury which occurs in this state is an inseparable part of the "tortious act" as that term is used in the statute, and that act is deemed to have occurred in this state. *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972). Since the plaintiff's injury occurred in this state and since it is an inseparable part of the "tortious act", the "tortious act" is deemed to have occurred here.

In a tortious act case, RCW 4.28.185(1)(b) is satisfied whenever the person attempting to assert jurisdiction shows that the injury which is the subject of the suit occurred in this state and that it was caused by an act of the nonresident defendant outside this state. *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation*, 9 Wn. App. 284, 291, 513 P.2d 102 (1973). The injury which is the subject of this suit occurred in this state. It was caused by an act of the nonresident defendant outside this state. Pursuant to *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation*, RCW 4.28.185(1)(b) is satisfied. As far as RCW 4.28.185(1)(b) is concerned, it does not matter whether the defendant has transacted business in this state. *Puget Sound Bulb Exch. v. Metal Bldgs.*

Insulation, 9 Wn. App. 284, 291, 513 P.2d 102 (1973).

In determining whether long-arm jurisdiction should be exercised, the court should consider many factors including the interest of the State in providing a forum for its residents or in regulating the business involved, the relative availability of evidence and the burden of defense in one place rather than another, the ease of access to the alternative forum, the avoidance of a multiplicity of suits and conflicting adjudications, and the extent to which the cause of action arose out of the defendant's local activities. *Barer v. Goldberg*, 20 Wn. App. 472, 480-481, 582 P.2d 868 (1978). In the present case, the State has an interest in providing the forum for Mr. Castro and the Washington State Department of Labor and Industries. The accident occurred in Washington. The forklift is located in Washington. The witnesses to the accident are in Washington. All medical treatment was administered in Washington. The investigation was conducted in Washington by PCL. In short, nearly all evidence and all witnesses related to negligence and damages rest in Washington. The cost of presenting Mr. Castro's case elsewhere is prohibitive.

B. Minimum contacts are established as the defendant Hensen Equipment sold the forklift to PCL Construction, maintained and repaired the forklift for

PCL Construction, knowing that PCL Construction is a large construction company doing business in many states, thus the defendant is charged with knowledge that their transactions might have consequences here, in Washington State, one of the many states in which PCL Construction conducts business.

PCL Construction Services, Inc. (hereinafter PCL) is a business incorporated in Colorado and doing business in many states including Washington State. CP 14. Hensen Equipment, LLC rents, sells and services large telescopic forklifts and aerial lifts used in the construction industry. CP 11. On March 9, 2005, PCL purchased a Gradall G9-43A forklift from Hensen Equipment, LLC. CP 14.

On November 7, 2005, the forklift was transferred from a New Mexico work site to Denver. The forklift was then taken to Hensen Equipment, LLC for warranty repair work. CP 14. Following the warranty repair work, PCL shipped the forklift from its Colorado facility to its Tukwilla, Washington jobsite on November 18, 2005. CP 14. This is where the injury occurred.

When an out-of-state manufacturer places its products in the stream of interstate commerce, it is fair to charge the manufacturer with knowledge

that its conduct may have consequences in another state. *Grange Insurance Association v. The State of Washington*, 110 Wn.2d 752, 761 (1988) (citing *Smith v. York Food Mach. Co.*, 81 Wn.2d 719,723 (1972)). Additionally, out-of-state retailers can be subject to jurisdiction here if they can be charged with knowledge that their transactions might have consequences here. *Grange*, at 761 (citing *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 889 (1967); *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 724 (1972)).

Hensen Equipment, LLC has sold and serviced equipment for PCL for years. Hensen Equipment, LLC is well aware that PCL is a large corporation conducting business in many states. Hensen Equipment, LLC understands that the equipment it sells and services for PCL is used in a number of different states. Hensen Equipment, LLC sold the forklift in question to PCL Construction. Hensen Equipment, LLC serviced the same forklift after it was returned from PCL Construction's jobsite in New Mexico. The forklift was then shipped to PCL Construction's jobsite in Washington where the accident occurred. Hensen Equipment, LLC is well aware that the forklift it sold and serviced could be used in any state that PCL Construction conducts business, including Washington State.

Pursuant to *Grange Insurance Association v. The State of*

Washington, Oliver v. American Motors Corp, and *Smith v. York Food Mach*, Hensen Equipment, LLC is subject to Washington State jurisdiction as an out-of-state retailer as it is charged with knowledge that its transactions with PCL Construction might have consequences here, in Washington State. Minimum contacts have been satisfied.

III. CONCLUSION

Personal jurisdiction is satisfied under the long arm statute, RCW 4.28.185(1)(b), as the tortious act occurred within the State of Washington, and minimum contacts have been satisfied. Ernest Castro respectfully requests the Court of Appeals to find that the trial court erred in granting defendant Hensen Equipment, LLC's Motion For Summary Judgment and dismissing plaintiff's Complaint for Personal Injury, that the State of Washington has jurisdiction over the defendant Hensen Equipment, LLC, and to remand to the trial court for further proceedings.

DATED this 12th day of March, 2010.

WALTHER, THOMPSON, KINDRED,
COSTELLO & WINEMILLER, P.S.



By Michael J. Costello, WSBA # 26437
Attorney for Claimant

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 HENSEN EQUIPMENT, LLC,)
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 Respondent.)
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**DECLARATION OF SERVICE
APPELLANT'S REPLY BRIEF**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the BRIEF OF APPELLANT to be served on the following individuals in the manner indicated on March 12, 2010:

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VIA U.S. MAIL
 VIA HAND DELIVERY
 VIA FACSIMILE

SIGNED this 12th day of March, 2010.



Michael J. Costello

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