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No. 64318-5

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

ERNEST CASTRO
Appellant

vs.

HENSEN EQUIPMENT, LLC
Respondent

BRIEF OF APPELLANT ERNEST CASTRO

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ORIGINAL

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I. INTRODUCTION

This is an appeal from a Superior Court Order granting defendant Hensen Equipment, LLC's Motion For Summary Judgment and dismissing plaintiff's Complaint for Personal Injury.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

The trial court erred as a matter of law in granting the defendant Hensen Equipment, LLC's Motion for Summary Judgment and dismissing plaintiff's Complaint for Personal Injury.

B. Issue Pertaining to Assignments of Error

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

III. STATEMENT OF THE CASE

A. Procedural History

Ernest Castro sustained an industrial injury on November 28, 2005,

while adjusting the forks of a forklift repaired and maintained by a third party, Hensen Equipment, LLC. Mr. Castro filed a Complaint For Personal Injury in the King County Superior Court on November 25, 2008. CP#1. The Summons and Complaint were served upon the registered agent for Hensen Equipment, LLC on January 13, 2009 in Denver Colorado. CP#4. Hensen Equipment, LLC answered the Complaint on May 7, 2009. CP#7.

Hensen Equipment, LLC filed a Motion for Summary Judgment as well as a Declaration of Hensen Equipment on August 7th, 2009, claiming that court lacked personal jurisdiction over the defendant. CP#10; CP#11. Mr. Castro filed a response to the Motion for Summary Judgment along with a Declaration of Michael Costello and a Declaration of Michael Fallon on August 24, 2009. CP#12; CP#13; and CP#14. Hensen Equipment, LLC's filed a Reply on August 31, 2009. CP#16.

A hearing on the defendant's Motion for Summary Judgment was held on September 4, 2009. Judgment was reserved. On September 15, 2009, the court entered an Order granting Hensen Equipment, LLC's Motion For Summary Judgement. CP#18.

Ernest Castro timely filed this appeal on October 14, 2009. CP#28.

B. Statement of Facts

PCL Construction Services, Inc. (hereinafter PCL) is a business incorporated in Colorado and doing business in many states including Washington State. CP#14; DECLARATION OF MICHAEL J. FALLON (hereinafer FALLON), p.1, ln. 16-17. On March 9, 2005, PCL purchased a Gradall G9-43A forklift from Henson Equipment, LLC. CP#14; FALLON, p.1, ln. 18-20. Henson Equipment, LLC is a limited liability corporation under the laws of Colorado with its principal place of business in Henderson Colorado. CP#11; Declaration of Hensen Equipment, LLC Member And Manager Dennis Hensen (hereinafter DECLARATION OF HENSEN), p.1, ln. 19-21. Henson Equipment, LLC rents, sells and services large telescopic forklifts and aerial lifts used in the construction industry. CP#11; DECLARATION OF HENSEN, p.2, ln. 1-2.

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; FALLON, p.1, ln. 21-22. Hensen Equipment, LLC serviced the forklift at its yard. CP#14; FALLON, p.1, ln. 23. Among the items to be serviced included the replacement of a missing safety lock pin. CP#14; FALLON, p.1, ln.24-25. Hensen Equipment, LLC failed to replace the missing safety lock pin prior to

returning the forklift to PCL Construction on November 16, 2005. CP#14; FALLON, p.1, ln. 23 - p.2, ln. 1.

PCL shipped the forklift from its Colorado facility to its Tukwilla, Washington jobsite on November 18, 2005. CP#14; FALLON, p.2, ln. 2-3.

On November 28, 2005, Ernest Castro and Kalen Hancock, employees of PCL attempted to adjust one of the forks of the forklift. CP#14; FALLON, p.2, ln.4-6. The fork carriage detached from the boom, falling on Mr. Castro, injuring his left knee. CP#14; FALLON, p.2, ln. 6-7. Medical assistance arrived approximately three minutes later. CP#14; FALLON, p. 2, ln. 7. Upon investigation, PCL determined that the missing safety lock pin caused the accident. CP#14; FALLON, p.2, ln. 8.

Mr. Castro filed a Washington State workers' compensation claim on November 28, 2005, and received medical treatment. Mr. Castro missed work at PCL as a result of the injury. CP#14; FALLON, p.2, ln. 10-13.

V. ARGUMENT

The court has jurisdiction in this matter over defendant Hensen Equipment, LLC pursuant to the state's long arm statute, RCW 4.28.185. 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).

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.

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.

It cannot be said that assumption of jurisdiction in this state offends traditional notions of fair play and substantial justice. Hensen Equipment, LLC rents, sells and services heavy equipment. "It is not unforeseeable that a company using a large machine with a long-term useful life, will sell or transfer it to another company in an adjoining state." *Smith v. York Food Machinery Co.*, 81 Wn.2d 719, 724, 504 P.2d 782 (1972). In fact, the forklift in question had just returned from New Mexico a little more than a week prior to Hensen Equipment, LLC's warranty repair work, and was sent to Washington days later.

Hensen Equipment, LLC has sold and serviced equipment for PCL for years. Hensen Equipment, LLC is well aware that PCL is a large corporation

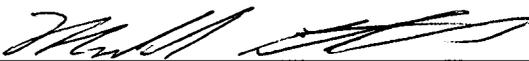
conducting business in many states. Hensen Equipment, LLC understands that the equipment it sells and services for PCL is used in a number of different states. As such, Hensen Equipment LLC is charged with knowledge that its conduct may have consequences in another state.

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. 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 29 day of December, 2009.

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



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

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

ERNEST CASTRO,)	
)	
Appellant,)	COURT OF APPEALS NO.: 64318-5-I
)	
v.)	DECLARATION OF SERVICE
)	APPELLANT'S BRIEF
)	
HENSEN EQUIPMENT, LLC,)	
)	
Respondent.)	
_____)	

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 December 28, 2009:

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VIA U.S. MAIL
 VIA HAND DELIVERY
 VIA FACSIMILE

SIGNED this 28th day of December, 2009.



Michael J. Costello