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Division I  
State of Washington

No. 74241-8-I

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

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

*Appellants/Cross-Respondents,*

v.

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

*Respondents/Cross-Appellants,*

and

MAREL SEATTLE, INC., a Washington State corporation,

*Defendant.*

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BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR .....	2
	A.    Assignments of Error .....	2
	B.    Issues Pertaining to Assignments of Error .....	2
III.	STATEMENT OF THE CASE.....	3
	A.    AKAS and Marel’s long, continuous, and ongoing pre- <i>Antarctic Sea</i> course of dealing.....	4
	B.    The <i>Antarctic Sea</i> project.....	6
	C.    All contracts contained forum-selection clauses.....	8
	D.    Huynh’s injury .....	9
	E.    AKAS and AKAS II merged in May 2012.....	10
	F.    Procedural history of Huynh’s action .....	10
IV.	SUMMARY OF THE ARGUMENT .....	12
V.	ARGUMENT .....	13
	A.    The trial court incorrectly ordered that AKAS was not an <i>Antarctic Sea</i> contract party; because it was, personal jurisdiction exists over AKAS for its own direct negligence based on those contacts .....	13
	1.    Contract-interpretation principle demonstrate AKAS was a party to the <i>AntSea</i> contract .....	14
	2.    Apparent authority also demonstrates AKAS was a party .....	19
	B.    The trial court misinterpreted <i>Harbison v. Garden           Valley Outfitters</i> , which grants independent personal jurisdiction over AKAS for its direct liability based	

	on imputed contacts even had AKAS not been party to the <i>Antarctic Sea</i> contract .....	22
C.	The trial court failed to conduct a jurisdictional analysis of AKAS’ own independent, non-contract contacts, which establish that jurisdiction exists even had AKAS not been an <i>Antarctic Sea</i> contract party .....	25
	1. AKAS purposefully availed itself of Washington through its entire ongoing, nine-year relationship with Marel .....	27
	2. Huynh’s cause of action arises from AKAS’ contacts .....	34
	3. Washington is a reasonable forum .....	36
D.	The trial court failed to consider pendent personal jurisdiction, which Washington courts may exercise, and which permits jurisdiction here, even had AKAS not been an <i>Antarctic Sea</i> contract party .....	40
VI.	CONCLUSION .....	43

TABLE OF AUTHORITIES

**Washington State Cases**

*Axess Int’l v. Intercargo Ins.*,  
107 Wn. App. 713, 30 P.3d 1 (2001).....14 n.10

*Bort v. Parker*,  
110 Wn. App. 561, 42 P.3d 980 (2002).....13

*Byron Nelson Co. v. Orchard Corp.*,  
95 Wn. App. 462, 975 P.2d 555 (1999).....29, 33, 38

*Crown Controls, Inc. v. Smiley*,  
47 Wn. App. 832, 737 P.2d 709 (1987).....33

*Failla v. FixtureOne Corp.*,  
181 Wn.2d 642, 336 P.3d 1112 (2014).....25, 26

*Flight Options, LLC v. Dep’t of Rev.*,  
172 Wn.2d 487, 259 P.3d 234 (2011).....26 n.18

*Freestone Capital Partners, LP v. MKA Real Estate Opp. Fund I*,  
155 Wn. App. 643, 230 P.3d 625.....28, 28 n.19, 29

*FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings*,  
180 Wn.2d 954, 331 P.3d 29 (2014).....25, 37, 41

*Go2net, Inc. v. CI Host, Inc.*,  
115 Wn. App. 73, 60 P.3d 1245 (2003).....14, 15, 17

*Grange Ins. Assoc. v. State*,  
49 Wn. App. 551, 744 P.2d 366 (1987).....38

*Harbison v. Garden Valley Outfitters*,  
69 Wn. App. 590, 849 P.2d 669 (1993).....2, 11, 12, 22, 23, 24

*Hearst v. Commc’ns, Inc. v. Seattle Times*,  
154 Wn.2d 493, 115 P.3d 262 (2005).....15

<i>Hoglund v. Meeks</i> , 139 Wn. App. 854, 170 P.3d 37 (2007).....	19
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	15
<i>Kysar v. Lambert</i> , 76 Wn. App. 470, 887 P.2d 431 (1995).....	33
<i>Lamtec Corp. v. Dep't of Rev.</i> , 170 Wn.2d 838, 246 P.3d 788 (2011).....	26 n.18
<i>Maxey v. Dep't of Labor &amp; Indus.</i> , 114 Wn.2d 542 (1990).....	39
<i>McGill v. Hill</i> , 31 Wn. App. 542, 644 P.2d 680 (1982).....	14 n.10
<i>Newton Ins. Agency &amp; Brokerage v. Caledonian Ins. Grp.</i> , 114 Wn. App. 151, 52 P.3d 30 (2002).....	31 n.20
<i>Oltman v. Holland Am. Line USA</i> , 163 Wn.2d 236, 178 P.3d 981 (2008).....	11 n.8
<i>Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.</i> , 14 Wn. App. 527, 544 P.2d 30 (1975).....	28 n.19, 32, 33
<i>Precision Lab Plastics v. Micro Test</i> , 96 Wn. App. 721, 981 P.2d 454 (1999).....	37
<i>Rho v. Dep't of Revenue</i> , 113 Wn.2d 561, 782 P.2d 986 (1989).....	31 n.20
<i>Rice v. Dow Chem.</i> , 124 Wn.2d 205, 875 P.2d 1213 (1994).....	14 n.10
<i>Shute v. Carnival Cruise Lines</i> , 113 Wn.2d 763, 783 P.2d 78 (1989).....	34, 34 n.22, 35, 41
<i>Sorb Oil Corp. v. Batalla Corp.</i> , 32 Wn. App. 296, 647 P.2d 514 (1982).....	28 n.19, 32, 33

<i>Space Age Fuels, Inc. v. State</i> , 178 Wn. App. 756, 315 P.3d 604 (2013).....	26 n.18
<i>Spokane Cty. v. State</i> , 136 Wn.2d 644, 966 P.2d 305 (1998).....	13 n.9, 25 n.16
<i>State v. AU Optronics Corp.</i> , 180 Wn. App. 903, 328 P.3d 919 (2014).....	26, 27, 36
<i>State v. LG Elecs.</i> , 185 Wn. App. 394, 341 P.3d 346 (2015).....	25, 26, 36
<i>State v. Willis</i> , 151 Wn.2d 255, 87 P.3d 1164 (2004).....	22, 40 n.24
<i>Udall v. TD Escrow Servs.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	19, 20
<i>Viking Bank v. Firgrove Commons 3, LLC</i> , 183 Wn. App. 706, 334 P.3d 116 (2014).....	13 n.9, 25 n.16

**Federal Cases**

<i>Burger King v. Rudzewicz</i> , 471 U.S. 462 (1985).....	27, 28
<i>Daimler AG v. Bauman</i> , ___ U.S. ___, 134 S. Ct. 746 (2014).....	25 n.17, 29
<i>Fluke Elecs. Corp. v. CorDEX Instruments</i> , 2013 U.S. Dist. LEXIS 19540 (W.D. Wash. Feb. 13, 2013).42	n.27
<i>Goodyear Dunlop Tires Operations SA v. Brown</i> , 564 U.S. 915 (2011).....	27
<i>Huynh v. Aker BioMarine Antarctic</i> , 2014 U.S. Dist. LEXIS 103887 (W.D. Wash. July 29, 2014) .....	11
<i>Ratledge v. Norfolk S. Ry. Co.</i> , 958 F. Supp. 2d 827 (E.D. Tenn. 2013).....	36

<i>Ridemind v. S. China Ins.</i> , 2014 U.S. Dist. LEXIS 78314 (W.D. Wash. June 9, 2014)...	42 n.27
<i>Theunissen v. Matthews</i> , 935 F.2d 1454 (6th Cir. 1991) .....	35, 36
<i>T-Mobile USA, Inc. v. Huawei Device USA</i> , 115 F. Supp. 3d 1184 (W.D. Wash. 2015).....	42 n.27
<i>United States v. Botefuhr</i> , 309 F.3d 1263 (10th Cir. 2002) .....	40, 40 n.24
<i>Walden v. Fiore</i> , ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).....	26

**Other State Cases**

<i>Ex Parte Dill, Dill, Carr, Stonbraker &amp; Hutchings</i> , 866 So.2d 519 (Ala. Sup. Ct. 2003).....	42 n.26, 43
---	-------------

**Washington Statutes**

RCW 4.28.185 .....	25, 29, 41, 42
RCW 51.12.120 .....	39 n.23
RCW 51.24.030 .....	39
RCW 51.24.060 .....	39
RCW 51.24.080 .....	39
RCW 51.24.090 .....	39
RCW 62A.1-103 .....	14 n.10
RCW 62A.1-301 .....	14 n.10

**Washington Court Rules**

CR 2 .....	19 n. 13
------------	----------

CR 12(b)(2).....1, 11, 11 n.7

GR 14.1 .....11 n.8

**Federal Court Rules**

Fed. R. Civ. P. 12(b)(2).....10

Fed. R. App. P. 32.1 .....11 n.8

Fed. R. Civ. P. 41 .....11

**Other Authorities**

*Restatement (Second) of Agency*  
§ 1 (1958).....31 n.20

*Restatement (Second) of Agency*  
§ 8 (1958).....20 n.14

*Restatement (Second) of Agency*  
§ 15 (1958).....31 n.20

*Restatement (Second) of Agency*  
§ 27 (1958).....19, 20

*Restatement (Third) of Agency*  
§ 1.03 (2006).....19

*Restatement (Third) of Agency*  
§ 2.03 (2006).....19, 20

*Restatement (Second) of Contracts*  
§ 20 (1965).....18 n.12

Linda Sandstrom Sinar,  
*Exploring the Limits of Specific Personal Jurisdiction*,  
62 Ohio St. L.J. 1619 (2001) .....40, 41, 42

## I. INTRODUCTION

Nam Huynh, a long-term Washington resident, suffered a near-fatal, permanently disabling electric shock on January 6, 2012 while preparing to install krill-processing equipment aboard the factory trawler *Antarctic Sea*. His employer, Marel Seattle (“Marel”), a Washington corporation, designed and built the equipment in Seattle, then sent it, with Washington installers, to the vessel in Uruguay pursuant to a contract with the vessel’s Norwegian owner, Aker BioMarine Antarctic II AS (“AKAS II”), and its parent, Aker BioMarine Antarctic AS (“AKAS”). Both AKAS’ and AKAS II’s failures to make the vessel and its equipment safe caused the shock.

Huynh filed the current action on November 25, 2014. AKAS and AKAS II then filed a joint CR 12(b)(2) motion to dismiss. On October 15, 2015, after an evidentiary hearing, the trial court entered an order denying AKAS II’s motion and AKAS’ motion in part. This Court granted AKAS, AKAS II, and Huynh discretionary review. The ultimate issue in the parties’ collective appeals is whether personal jurisdiction exists over a foreign entity that injures a Washington worker, covered by Washington industrial insurance, outside the State when the entity initiates extensive, intentional, ongoing contacts with the worker’s Washington employer, and the contacts require that the employer conduct significant work in Washington and send Washington workers to the entity’s location where the worker is injured.

The trial court determined that AKAS II's *Antarctic Sea* contract contacts provided for jurisdiction. It also concluded that jurisdiction exists over AKAS for the contacts and negligence AKAS II imputed to AKAS in a post-injury merger under *Harbison v. Garden Valley Outfitters*, 69 Wn. App. 590, 849 P.2d 669 (1993). However, the trial court further ordered that AKAS was not a party to the *Antarctic Sea* contract, and the court thus lacked jurisdiction over AKAS for Huynh's direct liability claims. This part of the order was in error based on the four discrete issues detailed in Part II, and should be reversed.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error.

1. The trial court erred in its October 15, 2015 Order on Motion to Dismiss when it concluded it could not exercise personal jurisdiction over AKAS for claims based on AKAS' direct negligence.

### B. Issues Pertaining to Assignments of Error.

1. Did the trial court err in its interpretation and application of contract case law when it determined AKAS was not a party to the *Antarctic Sea* contract and not subject to jurisdiction for claims based on its own direct negligence? (Assignment of Error 1).

2. Did the trial court err in interpreting and applying *Harbison* when it failed to consider AKAS' jurisdictional contacts, as well as contacts AKAS II imputed to AKAS in their merger, to establish jurisdiction over AKAS for claims based on its direct negligence? (Assignment of Error 1).

3. Did the trial court err by dismissing AKAS for claims based on its direct negligence when the trial court failed to consider AKAS' own numerous, ongoing, non-contract contacts under an independent personal-jurisdiction analysis? (Assignment of Error 1).

4. Did the trial court err by failing to apply pendent personal jurisdiction to exercise personal jurisdiction over AKAS for claims based on its direct negligence? (Assignment of Error 1).

### III. STATEMENT OF THE CASE

Nam Huynh, born in Vietnam in 1971, moved to the United States in 1993 and to Washington in 1995. CP 942. He was naturalized in 1999. *Id.* He and his wife, Lin Bui, have lived in Washington throughout their 17-year marriage and currently reside with their three children in Seatac in a home he built. *Id.* He worked steadily as a certified welder, mostly in ship repair and installation, from 1997 until his 2012 electrical injury. *Id.*

Marel is a Washington corporation that designs, manufactures, and installs seafood processing systems onboard its customers' vessels. CP 943. It employed Huynh full time from 2003 until his 2012 electrical shock. CP 151-52. It is headquartered in Seattle, has no offices outside Washington, and pays Washington industrial insurance premiums for Huynh. CP 943, 177, 122-25. It builds about 70 percent of the equipment it sells in Seattle, and roughly 140 of its 150 employees are Washington residents. CP 943. Nearly all of the installers it sends to install its equipment around the world are Washington residents. CP 166, 943.

A. AKAS and Marel’s long, continuous, and ongoing pre-Antarctic Sea course of dealing.

AKAS, incorporated in June 2005, is a Norwegian corporation that harvests and processes krill in the Southern Ocean.<sup>1</sup> CP 944-45. In 2006, through its Washington sister company and agent, Aker Seafoods US, *see, e.g.*, CP 241-46, 947, it solicited Marel to design, fabricate, and install krill processing factory components for AKAS’ first vessel, *Saga Sea* (“*Saga*”), located in Chile. CP 181-82, 168-69. On AKAS’ behalf, Aker Seafoods US’ president, Sverre Johansen, himself a Washington resident, visited Marel’s president, Henrik Rasmussen, at Rasmussen’s Seattle office to discuss the project. CP 948, 952, 808, 181-82.

Marel began *Saga* work on Johansen’s go ahead in 2006. CP 183, 168-69. Throughout the project, Marel remained in extensive contact with *Saga*’s chief engineer, Sindre Skjong—an AKAS employee—concerning technical and engineering issues, and it designed and built equipment in Seattle and sent it from Washington, with Washington installers, including Huynh, to Chile for installation. CP 169-70, 193-95, 199, 948-49. Huynh made numerous trips to South America, traveling one or more times per year, sometimes alone, and always as lead welder. CP 310-11, 152-53, 408-

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<sup>1</sup> AKAS has extensive historical Washington contacts. *See, e.g.*, CP 132-36, 944-47.

15, 948-49. The project was ultimately worth over \$1 million, and Marel still conducts ongoing *Saga* work.<sup>2</sup> CP 170, 174, 42, 949.

In 2007, AKAS' parent, Aker BioMarine ASA, required that Marel execute a "Secrecy Agreement" on behalf of Aker BioMarine ASA and its "affiliates," including AKAS. CP 394-97. The 20-year agreement severely limited Marel's ability to perform work for other krill processors, CP 205, 394-97, and stated that AKAS would own any of Marel's AKAS-project-related discoveries or inventions. CP 394-97, 293-94. In exchange, Marel, which was not compensated for the agreement, executed the agreement on its understanding the agreement would form a long-term relationship. CP 205-06. By separate agreement, Marel also became a preferred provider. CP 394. Webjørn Eikrem—an AKAS director, its executive vice president, and its official in charge of AKAS' vessel operations—negotiated and entered the agreements with Marel, via Rasmussen, on AKAS' behalf. CP 394-97.

AKAS again contacted Marel in 2008 to request that it design, build, and install equipment on a second ship—*Antarctic Navigator* ("Navigator"). CP 949, 42-43. Skjong was again significantly involved in the project, now as AKAS' project technical team leader. CP 418. Eikrem headed the project from its initial stages and stayed in contact, as an AKAS representative, with

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<sup>2</sup> In 2007, AKAS appointed Aker Seafoods US as *Saga*'s operational manager. CP 241-46, 948. Thus, Johansen, based out of Washington, started out and remained Marel's contact on all *Saga* projects. CP 180. He continues to act in this regard. CP 181, 948.

Rasmussen as the project progressed. *E.g.*, CP 387-92. Marel engaged in installation design, and Eikrem appointed Rasmussen, and Aker Seafoods president, Johansen, to the *Navigator* project team. CP 206, 417-22, 949-50.

Though AKAS terminated the project before equipment installation, Marel completed roughly \$7 million of work, including vessel design work and around \$4 million of manufacturing, in Seattle. CP 949. Because Marel did not install the equipment, CP 184, 948, it stored much of it in Seattle, CP 186, 202, which it later used on the *Antarctic Sea* project. *E.g.*, RP 109-11 (Aug. 17, 2015); CP 949. AKAS still owns hundreds of thousands of dollars of equipment stored at Marel's Seattle facility. CP 184-86, 202, 404.

B. The *Antarctic Sea* project.

AKAS, through Skjong, again contacted Marel in July 2011, prior to buying its third vessel, *Antarctic Sea*, to request that, upon purchase, Marel perform that vessel's factory design, construction, and installation. CP 189-90, 192, 950. However, unlike the two prior projects, unbeknownst to Marel, it then bought a new, wholly owned subsidiary, which it renamed AKAS II, to buy, own, and convert the vessel for krill operations. CP 40, 945. AKAS II officially became an Aker entity on August 31, 2011, and the same people that comprised AKAS' board of directors, including Eikrem, also comprised AKAS II's board. CP 945, 947.

AKAS II purchased *Thorshovdi*, which it renamed *Antarctic Sea*, in October 2011. CP 191, 387-92, 950. But because it had no employees, CP 40, AKAS managed and operated the project and vessel as AKAS II's agent. CP 23-24; *see also* 40. Eikrem was again involved in contract and project negotiations with Marel, through Rasmussen, and Skjong, AKAS' technical manager, was again Marel's project contact. CP 950-51. Yet, despite the fact Eikrem and Skjong had always represented AKAS on prior projects, and the *Antarctic Sea* project was substantively identical to AKAS' two prior vessel projects, neither Eikrem, Skjong, nor any other AKAS employee told Marel, until well after contract formation, that Eikrem now represented AKAS II or that AKAS II even existed. RP 48, 49-50 (June 26, 2015); CP 811-12.<sup>3</sup>

Eikrem knew, from the negotiation's initial stages, that Marel would build equipment in Seattle and ship it, along with AKAS' stored *Navigator* equipment, from Washington to the vessel. CP 951. Contact between Marel and AKAS, much of which went through Skjong, made it even more evident that Marel was building equipment in its Seattle facility. CP 951, 210, 215.

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<sup>3</sup> In fact, Eikrem did not even inform Skjong that Skjong was acting for AKAS II or that AKAS II existed. RP 100-01 (Aug. 17, 2015). Moreover, Eikrem himself did not originally differentiate between AKAS and AKAS II. CP 365. He stated in a second declaration in the prior federal action, *see discussion infra* Part III.F (discussing that the current action follows from a federal action Huynh dismissed to file in state court to include Marel as a defendant), that "[t]here is little practical purpose herein for a distinction between AKAS and AKAS II, and I often refer to them collectively as AKAS, unless some distinction is necessary." CP 365; *see also* RP 107 (Aug. 17, 2015). At his April 25, 2014 deposition, Eikrem testified that AKAS was the party to the *Antarctic Sea* contract with Marel. RP 68-70 (June 26, 2015).

Moreover, prior to sending Huynh and its other workers to Uruguay, Marel told AKAS that, as with the prior projects, Americans were again coming down. CP 221-39, 463-81. And, in response to AKAS' requirement that Marel send its industrial insurance information prior to sending workers, CP 483-96, Marel told AKAS that Washington industrial insurance applied. *Id.*

Marel again provided layout design/engineering. CP 951. Because Eikrem made it clear Marel should use as much of AKAS' stored *Navigator* equipment in the project as possible, CP 951, 813, Rasmussen incorporated the stored equipment into the design; Marel fabricated roughly \$3 million of equipment in Seattle and installed both newly built equipment and AKAS' stored *Navigator* equipment.<sup>4</sup> CP 173, 187-88, 192, 302-04, 404, 951. The project was ultimately worth \$5 million, CP 175, 951, and at one point, two-thirds of Marel's Seattle manufacturing facility was involved. CP 208-09. Like *Saga*, Marel's *Antarctic Sea* work remains ongoing, CP 175, 952, 46, and AKAS intends to use Marel for future projects and repairs. CP 952.

C. All contracts contained choice of law/forum selection clauses.

Marel provided quotes for all of its work, which formed the various contracts; these contracts, including the *Antarctic Sea* contract, contained

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<sup>4</sup> Marel used \$4,289,066.17 worth of the AKAS-owned *Navigator* equipment in AKAS II's vessel. RP 108-11 (Aug. 17, 2015). The only written authority Marel had to use AKAS' equipment on AKAS II's vessel was Eikrem's acceptance of Quote 12631, which formed the contract and was addressed to "Aker BioMarine". RP 73-74, 111 (June 26, 2015).

choice of law and forum selection clauses, which were integral parts of the contracts. CP 176. Article 19.1 of the contract provides:

All legal relationships between Seller and Customer shall be governed and interpreted solely in accordance with the laws that apply in the country/state in which Seller has its registered offices.

CP 429. Article 19.2's clause provides similarly:

The seat of arbitration and place of the hearings shall be the place where Seller has its registered offices. . . . The Seller may also start legal action before the competent courts in the place where Seller or Customer has its office or where the Equipment is located.

*Id.* Marel, the Seller, has its registered offices in Seattle. CP 177-78. AKAS and AKAS II knew, understood, and agreed to these clauses. CP 331-32.

D. Huynh's injury.

In January 2012, Huynh flew from Washington to Uruguay to install the equipment Marel built in Seattle on *Antarctic Sea*. CP 464. To assist with its ongoing work for AKAS, Marel left tools, including a portable welding machine, from prior installation work on AKAS' vessels in South America. CP 951. The welding machine was moved to *Antarctic Sea*.<sup>5</sup>

One of AKAS' personnel or crew connected power from the vessel to the machine. *See* CP 214, 406. On January 6, 2012, Huynh reported to the vessel and prepared to work. CP 436-37, 951. While doing so, he contacted the machine and suffered a severe, near-fatal electrical shock. *E.g.*, CP 436-

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<sup>5</sup> Huynh does not yet know who moved the welding machine, as AKAS and AKAS II have blocked efforts to conduct substantive discovery. *See* CP 100.

37, 951. He received limited initial treatment in Uruguay before returning to Washington for definitive care. *E.g.*, CP 153. The Department of Labor and Industries has paid at least \$256,948 towards Huynh's claim for time-loss and medical benefits and has set a reserve at \$1,896,259. CP 123.

E. AKAS and AKAS II merged in May 2012.

On May 10, 2012, AKAS II sold *Antarctic Sea* to AKAS, and in June 2012, the two entities merged, leaving AKAS the surviving entity. *E.g.*, CP 41, 954. AKAS II transferred all of its assets and liabilities to AKAS in the merger, CP 954, and the parties selected January 1, 2012 as the merger's effective date for tax and accounting purposes. RP 80-81 (June 26, 2015).

F. Procedural history of Huynh's action.

Huynh and his family first filed a complaint in King County Superior Court against Aker Biomarine ASA, Aker Biomarine Antarctic US, and *Antarctic Sea*. CP 693, 804. Those defendants removed the action to the US District Court for the Western District of Washington and then stipulated<sup>6</sup> to Huynh amending the complaint to substitute AKAS/AKAS II as defendants. *See* CP 93-94, 694-95, 804-05.

On March 27, 2014, AKAS/AKAS II filed a joint Fed. R. Civ. P. 12(b)(2) motion to dismiss, which superseded a prior, withdrawn motion.

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<sup>6</sup> As a part of this stipulation, AKAS' counsel represented that AKAS was not only a party to the *Antarctic Sea* contract, but that it was the only party to the contract. CP 711-12.

CP 131.<sup>7</sup> The parties agreed to stay substantive discovery but did conduct jurisdictional discovery. *See* CP 130-31. Judge Robert S. Lasnik denied the motion. *Huynh v. AKAS*, No. C13-0723, 2014 U.S. Dist. LEXIS 103887 (W.D. Wash. July 29, 2014).<sup>8</sup> Huynh then voluntarily dismissed the action pursuant to Fed. R. Civ. P. 41 and filed the current action in order to include Marel as a defendant. CP 94, 805.

AKAS/AKAS II filed a CR 12(b)(2) motion. CP 11. The trial court held a motion hearing on April 17, 2015 and an evidentiary hearing on June 26, August 17, and August 18, 2015. On October 15, 2015, it denied AKAS II's motion. CP 1133-48. It correctly concluded that AKAS II was a party to the *Antarctic Sea* contract and, through the contract-related contacts, it is subject to personal jurisdiction. It also denied AKAS' motion in part. It correctly ordered, per *Harbison*, 69 Wn. App. 590, that AKAS II's contacts and negligence be imputed to AKAS due to their post-injury merger; thus,

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<sup>7</sup> Eikrem submitted a declaration to the federal court in support of AKAS/AKAS II's initial motion to dismiss. *Id.* When they withdrew that motion and submitted another on March 27, 2014, he submitted a new declaration, in part to avoid representations from his first declaration that he stated "could unintentionally mislead the Court." CP 251-52, 362. He was deposed in the federal action on April 25, 2014. *See* CP 248. Despite his stated intent not to mislead the court, material inconsistencies and omissions abound throughout his three federal sworn statements and a state-court declaration. *See* CP 399-406. Huynh submitted a table to the state trial court in the current action laying out inconsistencies and omissions. CP 399-406. Eikrem was later deposed in the current state action and provided testimony at the evidentiary hearing on AKAS/AKAS II's CR 12(b)(2) motion. *See, e.g.*, RP 4 (June 26, 2015). His testimony again changed. *See, e.g.*, RP 141-42 (Aug. 17, 2015).

<sup>8</sup> The trial court did not consider Judge Lasnik's order. CP 1291. While Huynh noted below that Judge Lasnik's order is not binding, CP 94, Washington law makes clear that trial courts can rely on unpublished federal and state trial court orders. *Oltman v. Holland Am. Line USA*, 163 Wn.2d 236, 247, 178 P.3d 981 (2008); GR 14.1(b); Fed. R. App. P. 32.1.

personal jurisdiction exists over AKAS based on the contacts, and for the negligence, imputed to AKAS.

However, the trial court also concluded that AKAS was not a party to the *Antarctic Sea* contract, lacked those contacts as independent contacts, and in a footnote, it granted AKAS' motion to the extent that Huynh alleges claims against AKAS based on AKAS' direct negligence.

#### IV. SUMMARY OF THE ARGUMENT

The trial court's October 15, 2015 order incorrectly dismissed AKAS for lack of personal jurisdiction for Huynh's direct liability claims. Four grounds establish that this was error. First, the court failed to properly apply contract interpretation law when it concluded AKAS was not a party to the *Antarctic Sea* contract. It improperly credited AKAS and Eikrem's alleged subjective intent to bind only AKAS II to the contract and failed to account for their objective manifestations, all of which show AKAS was also a party. Because it was a party, it is, like AKAS II, subject to personal jurisdiction.

The trial court also misinterpreted *Harbison*. Though it correctly imputed AKAS II's *Antarctic Sea* contract contacts to AKAS to establish jurisdiction over AKAS for the negligence AKAS II imputed to AKAS, it misconstrued *Harbison* when it determined it could not consider those same imputed contacts to exercise jurisdiction over AKAS for direct negligence.

The trial court further failed, after improperly deciding AKAS was not an *Antarctic Sea* contract party, to conduct an independent jurisdictional analysis of AKAS' numerous other contacts. That analysis demonstrates that, even had AKAS not been a contract party, Washington jurisdiction over AKAS exists.

Finally, the trial court failed to apply pendent personal jurisdiction, which allows a court with jurisdiction over an entity for one claim to exercise jurisdiction over the entity for other claims that arise from a common nucleus of facts. Because the trial court correctly held jurisdiction exists over AKAS for claims based on imputed negligence, jurisdiction also exists for claims based on direct negligence, which arise from the same injury.

## V. ARGUMENT

A. The trial court incorrectly ordered that AKAS was not an *Antarctic Sea* contract party; because it was, personal jurisdiction exists over AKAS for its own direct negligence based on those contacts.<sup>9</sup>

AKAS and AKAS II admit a valid *Antarctic Sea* contract existed. *E.g.*, CP 45. Thus, the question is one of contract interpretation: which Aker entities were also party to the contract. *See Bort v. Parker*, 110 Wn. App.

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<sup>9</sup> The trial court misapplied contract law to the undisputed and/or established facts. “The application of the law to the facts is a question of law”, *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014), and “[a]n error of law is ‘an error in applying the law to the facts as pleaded and established’”. *Spokane v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 302, 885 P.2d 827 (1995)). Thus, this is a question of law, and *de novo* review is proper. *Viking*, 183 Wn. App. at 712.

561, 572-73, 581, 42 P.3d 980 (2002) (applying “context rule” of contract interpretation to determine identity of contract party), *review denied*, 147 Wn.2d 1013, 56 P.3d 565 (2002).

1. Contract law demonstrates AKAS was a party.

“The touchstone of contract interpretation is the parties’ intent.”  
*Go2net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 83-84, 60 P.3d 1245 (2003)  
(quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). Washington<sup>10</sup> follows the “context rule” of contract interpretation:

[T]he intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from “viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”

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<sup>10</sup> The *Antarctic Sea* contract contains a choice of law provision that dictates Washington law applies. CP 429. Thus, Washington law applies to determine the contract’s parties. *E.g.*, RCW 62A.1-301(a); *McGill v. Hill*, 31 Wn. App. 542, 547-48, 644 P.2d 680 (1982). It is not necessary to determine whether Washington’s UCC or common law applies to this interpretation question. RCW 62A.1-103 provides that common-law contract principles apply to Article 2 if not displaced by Article 2. RCW 62A does not contain a specific provision displacing common-law principles of interpretation applicable here. Thus, even if RCW 62A applies, common law supplements. Nor is it necessary to determine if federal maritime law or the Convention on Contracts for the International Sale of Goods (“CISG”) applies for this interpretation issue, as AKAS and AKAS II did not argue below that there exists, nor does there exist, a conflict with Washington law. *E.g.*, *Axess Int’l v. Intercargo Ins.*, 107 Wn. App. 713, 722-23, 30 P.3d 1 (2001); CISG art. 7-9, *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3; *Rice v. Dow Chem.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994) (“Where there is no conflict between the laws or interests of two states, the presumptive local law is applied.”).

*Go2net*, 115 Wn. App. at 84 (quoting *Scott Galvanizing v. Nw. Enviro Servs.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993)).

A court must focus on “objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst Commc’ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). It “may look to extrinsic evidence to discern the meaning or intent of words or terms used by contracting parties, even when the parties’ words appear to the court to be clear and unambiguous.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 668-69, 801 P.2d 222 (1990)). Such extrinsic evidence is admissible and may be used to aid ““in the interpretation of what is in the instrument””, *Go2net*, 115 Wn. App. at 84 (quoting *Berg*, 115 Wn.2d at 669), but not to show unilateral or subjective intent. *Hollis*, 137 Wn.2d at 695.

Decisions that resolve ambiguities should only be made in light of the parties’ relations and the ““subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.”” *Go2net*, 115 Wn. App. at 84 (quoting *Berg*, 115 Wn.2d at 667).

The *Antarctic Sea* contract, Quote 12631, CP 424-29, uses the terms seller and buyer and was generically addressed to “Aker BioMarine”. CP 427. Despite AKAS II’s argument that only it was a party to the contract as

a buyer, AKAS' five-year course of dealing and performance with Marel prior to the *Antarctic Sea* contract, the substantively identical nature of the contract and its negotiations with the prior vessel contracts, and AKAS' objective manifestations, demonstrate it is also a party.

AKAS has had a continuous relationship with Marel, which AKAS initiated, since 2006. Between 2006 and 2011, AKAS, not AKAS II, entered two large-scale contracts with Marel for the vessels *Saga* and *Navigator*. Marel maintained extensive contact with AKAS' chief engineer and project lead, Skjong, through both projects, and Eikrem negotiated, for AKAS, the *Navigator* contract with Rasmussen and headed that vessel project. Eikrem also negotiated and entered a 20-year secrecy agreement and a preferred provider agreement with Marel.

However, when Eikrem negotiated the *Antarctic Sea* contract with Rasmussen, neither he, Skjong, nor any other AKAS director, officer, or employee, told Marel that either Eikrem or Skjong represented AKAS II, that AKAS II, and not AKAS, intended to enter the contract, or that AKAS II even existed.<sup>11</sup> Thus, Rasmussen and Marel had no way of knowing that AKAS II, rather than AKAS, was entering the contract, and could not have intended to enter the contract with AKAS II, rather than AKAS. Instead, the

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<sup>11</sup> AKAS II did not in fact exist when AKAS' employee Skjong first approached Marel concerning the *Antarctic Sea* contract.

relations of the parties, preliminary negotiations, and prior course of dealing between the parties clearly demonstrate that Marel intended to contract with AKAS, and that AKAS is a party.

Moreover, the *Antarctic Sea* contract's subject matter and objective were substantively identical to all prior contracts: it involved refitting a vessel for krill harvesting, building equipment, and sending workers abroad to install the equipment. It also called for Marel to incorporate unused equipment from the prior project, *Navigator*, which AKAS, not AKAS II, owned, and which Marel stored for AKAS, to complete the project. Marel sent the *Antarctic Sea* contract to Eikrem, consistent with their prior course of dealing, and addressed the contract to "Aker BioMarine." It also sent its initial invoices to AKAS per Skjong's instruction to "to invoice the usual way." *E.g.*, RP 73-74 (Aug. 17, 2015); *Go2net*, 115 Wn. App. at 84 (noting a party's subsequent acts are relevant).

All of AKAS and AKAS II's objective manifestations demonstrate AKAS was entering the contract, as it had in the past. Indeed that is the only interpretation Marel could draw; AKAS chose not to tell Marel that AKAS II even existed. RP 48, 49-50 (June 26, 2015). Marel intended to contract with the same "customer" it always had, and it believed it was doing so. AKAS' claim that AKAS II was the only contract party is the product of an

unexpressed, subjective intent that is wholly at odds with the parties' prior course of dealing and AKAS and its agents' objective manifestations.<sup>12</sup>

Moreover, along with failing to properly credit AKAS and Eikrem's objective manifestations rather than subjective intent, the trial court also failed to account for AKAS and Eikrem's later admissions. Eikrem testified at his deposition that AKAS was the party to the *Antarctic Sea* contract. RP 68-70 (June 26, 2015). Further, in a letter AKAS' counsel sent to Huynh's counsel in the prior federal action, AKAS' counsel stated that, in exchange for Huynh amending the complaint to dismiss the original defendants, substitute AKAS as defendant, and withdraw a motion to remand to state court, AKAS would

formally identify and stipulate to the identity of the vessel's owner, the vessel's operator/manager and the Aker entity contracting with Marel. As we note above, a single Norwegian company is the appropriate entity for all three interests.

CP 711 (referring to AKAS). AKAS further agreed to

stipulate that [Huynh] be allowed to amend [his] complaint to name the ship owning/operating entity – AKAS – as defendant. In that event, we will enter an appearance on behalf of that [entity], reserving all defenses. We will also stipulate that during the course of the litigation we will not take an adverse position to the above representations concerning ownership or management of the vessel. Specifically, we will not later assert that the incorrect entity has been

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<sup>12</sup> *Cf. Restatement (Second) of Contracts* § 20(2)(b) (1965) (“The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.”).

sued for purposes of vessel ownership, operation or contracting with Marel.

CP 712.<sup>13</sup> These admissions further clearly demonstrate AKAS was in fact a party to the contract. The trial court erred in deciding otherwise.

2. Apparent authority also demonstrates AKAS was a party.

“Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” *Restatement (Third) of Agency* § 2.03 (2006) (“*Agency (3d)*”); *Udall v. TD Escrow Serv.*, 159 Wn.2d 903, 154 P.3d 882 (2007). It does not require or “presuppose[s] the present or prior existence of an agency relationship”, and it “applies to actors who appear to be agents but are not.” *Agency (3d)* § 2.03 cmt. a.

“A person manifests assent or intention through written or spoken words or other conduct.” *Id.* § 1.03; *Restatement (Second) of Agency* § 27 (“*Agency (2d)*”); *Hoglund v. Meeks*, 139 Wn. App. 854, 869, 170 P.3d 37 (2007). “A third party’s reasonable understanding of the principal’s conduct will reflect general business customs as well as usage that is particular to

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<sup>13</sup> In fact, Huynh argued below, as a motion *in limine*, that the letter constituted a binding CR 2A agreement and an admission by a party opponent. CP 682-90, 785-89. The trial court denied the motion. Huynh then offered the letter at the evidentiary hearing. The trial court reserved ruling on its admission and, to Huynh’s knowledge, made no further rulings on its admission. CP 990, 1044.

the principal's industry and prior dealings between the parties." *Agency (3d)* § 2.03 cmt. c; *see also Agency (2d)* § 27 cmt. a. It exists to the extent the apparent principal objectively manifests to a third party an apparent agent has authority to act on the apparent principal's behalf, the manifestations cause the third party to believe as such, and that belief is reasonable. *Udall*, 159 Wn.2d at 913.<sup>14</sup>

AKAS held Eikrem out as an officer and director since 2007. It installed him as its representative to negotiate contracts, monitor contract performance, head vessel projects, and engage in business dealings with Marel. During Marel and AKAS' five-year pre-*Antarctic Sea* relationship and course of dealing, Eikrem communicated with Marel and Rasmussen as an AKAS representative, discussed, negotiated, and entered the *Navigator* contract with Rasmussen and Marel on AKAS' behalf, led the *Navigator* project on AKAS' behalf, and discussed, negotiated, and entered the 20-year secrecy agreement and preferred supplier agreement with Rasmussen and Marel on AKAS' behalf. Yet, when Eikrem discussed and negotiated the *Antarctic Sea* contract with Rasmussen, neither he nor any other AKAS

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<sup>14</sup> Apparent authority is based upon the objective theory of contracts. *Agency (2d)* § 8 cmt. d. Thus, "when one tells a third person that another is authorized to make a contract of a certain sort, and the other, on behalf of the principal, enters into such a contract with the third person the principal becomes immediately a contracting party, with both rights and liabilities to the third person, irrespective of the fact that he did not intend to contract or that he had directed the 'agent' not to contract, and without reference to any change of position by the third party." *Id.*

or AKAS II representative, told Rasmussen or Marel that AKAS II existed or that Eikrem now represented AKAS II, not AKAS.

AKAS also held Skjong out as its representative since at least 2006. He acted as *Saga*'s chief engineer and remained in consistent contact with Marel, on AKAS' behalf, throughout the *Saga* project. AKAS then installed Skjong as its technical project lead for the *Navigator* project, where he was again, on AKAS' behalf, Marel's chief point of contact. Skjong, on AKAS' behalf, also contacted Marel about the *Antarctic Sea* project in July 2011, prior to AKAS II's existence, to discuss the project. But, like Eikrem, during *Antarctic Sea* project preparation, he never told Marel that AKAS II existed or that he represented AKAS II. Indeed, Eikrem never even told Skjong that Skjong was acting on AKAS II's behalf. RP 100-01 (Aug. 17, 2015).

AKAS' objective manifestations—holding Eikrem and Skjong out as agents and failing to inform Marel it was not party to the *Antarctic Sea* contract or that Eikrem and Skjong were not acting on its behalf—led Marel to believe it was contracting with the same entity it always had, *i.e.*, AKAS, through the same persons it always had. Based on those manifestations, Marel's belief was also reasonable. AKAS not only indicated Eikrem and Skjong were authorized to act on its behalf, it objectively manifested that they were, in fact, acting as its agents in the *Antarctic Sea* contract. Because

Marel did not know AKAS II existed, it could only believe Eikrem and Skjong were still acting on AKAS' behalf.

- B. The trial court misinterpreted and misapplied *Harbison v. Garden Valley Outfitters*, which grants independent personal jurisdiction over AKAS for its direct liability based on imputed contacts even had AKAS not been party to the *Antarctic Sea* contract.<sup>15</sup>

The trial court correctly imputed AKAS II's *Antarctic Sea* contract contacts to AKAS to exercise jurisdiction over AKAS for claims based on imputed negligence. *Harbison*, 69 Wn. App. 590. It misapplied *Harbison*, however, when it found it could not consider the same imputed contacts to establish jurisdiction over AKAS for claims based on its direct negligence.

In *Harbison*, an Idaho entity (Idaho 1), which provides Idaho hunting expeditions, sold its assets to a second Idaho entity (Idaho 2), which also provides Idaho expeditions. Idaho 2 advertised at a booth in Seattle where the plaintiff purchased Idaho 2's expedition. 69 Wn. App. at 592. After the plaintiff purchased the expedition, Idaho 2 "return[ed] the business" to Idaho 1. *Id.* Idaho 1 assumed Idaho 2's obligations, including plaintiff's contract. *Id.* Plaintiff was displeased with the trip and sued Idaho 1 in Washington, and Idaho 1 moved to dismiss for lack of jurisdiction. *Id.* at 593.

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<sup>15</sup> Case law interpretation is a question of law. *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). Because the trial court misinterpreted *Harbison*, the issue is a question of law. *Id.* *De novo* review is proper. *Id.*

The threshold jurisdictional question was “whether in evaluating the contacts of [Idaho 1], the acts of [its predecessor, Idaho 2,] may also be considered.” *Id.* at 598. The Court first noted that an entity that purchases the assets of another is liable for the latter’s obligations under successor liability principles when “(1) there is an agreement to assume the [other’s] debts or obligations, (2) the circumstances warrant a finding that there has been a consolidation or merger, (3) the transaction works a fraud on the creditors of the seller, *or* (4) the purchasing company is a mere continuation of the selling company.” *Id.* (citing *Cashar v. Redford*, 28 Wn. App. 394, 396, 624 P.2d 194 (1981)). The Court found that prong (1) of the *Cashar* test was satisfied. It then held that “[t]he rationale of substantive successor liability is equally applicable to the question of personal jurisdiction.” *Id.* at 599. It thus imputed Idaho 2’s Washington contacts to Idaho 1. *Id.*

The trial court, per *Harbison*, properly imputed AKAS II’s contacts and negligence to AKAS; the entities merged and AKAS II transferred all of its obligations and liabilities to AKAS. CP 41, 954. However, the trial court only considered the imputed contacts to establish jurisdiction over AKAS for claims based on imputed negligence. But *Harbison* did not limit its holding to imputing a predecessor’s contacts to the successor only to establish jurisdiction for the predecessor’s imputed liability.

First, *Harbison*'s language makes clear that the court considered both the successor's direct and imputed contacts in establishing jurisdiction existed over the successor. *Id.* at 598 (reviewing whether the predecessor's contacts may also be considered to establish jurisdiction), 600 n.4 (finding that because the predecessor's contacts satisfied the test, the court did not need to "address whether the letter written by [the successor post-merger] would alone be a sufficient contact"). The trial court should have considered both AKAS' direct and imputed contacts.

Moreover, rather than limiting the use of imputed contacts to only establish jurisdiction over the successor for imputed negligence, the court stated it instead simply looked to successor liability's rationale when it held that the forum-related contacts should be attributed to the successor. *Id.* at 599. Because the successor assumed all debts and obligations and liability transferred, under that rationale, contacts transfer as well. The court in fact noted the tort in *Harbison* was not complete until after the merger. *Id.* at 597-98. Idaho 2 had no liability to transfer; the tort was not complete until Idaho 1 failed, through its own direct actions, to provide the expedition the predecessor had represented. *Id.*

*Harbison* allowed the trial court to consider imputed contacts for both imputed and direct liability. The trial court should have considered both AKAS' direct and imputed jurisdictional contacts, and it should have

considered those contacts to establish jurisdiction for claims based on both direct and imputed negligence.

- C. The trial court failed to conduct a jurisdictional analysis of AKAS' independent, non-contract contacts, which establish that jurisdiction exists even had AKAS not been an *Antarctic Sea* contract party.<sup>16</sup>

A defendant is subject to personal jurisdiction if (1) a state's long-arm statute permits jurisdiction and (2) exercising jurisdiction comports with due process. *FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014). RCW 4.28.185 extends jurisdiction to due process limits; thus, the analysis focuses on due process. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649-50, 336 P.3d 1112 (2014).

Due process permits jurisdiction if a defendant has certain minimum contacts with a state such that maintaining the suit does not offend traditional notions of fair play and substantial justice. *Id.* Personal jurisdiction may be specific or general. *State v. LG Elecs.*, 185 Wn. App. 394, 411, 341 P.3d 346 (2015), *review granted*, 183 Wn.2d 1002, 349 P.3d 856 (2015).

Specific jurisdiction exists if the suit arises out of or relates to the defendant's contacts with the forum. *Id.*<sup>17</sup> The analysis focuses on the

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<sup>16</sup> Though the court held an evidentiary hearing, it failed to analyze AKAS' own numerous, non-contract contacts under the well-established personal jurisdiction framework, and it failed to apply the law to the facts. "The application of the law to the facts is a question of law", *Viking*, 183 Wn. App. at 712, and "[a]n error of law is 'an error in applying the law to the facts as pleaded and established'". *Spokane*, 136 Wn.2d at 649. As this is a question of law, *de novo* review is proper. *Viking*, 183 Wn. App. at 712.

<sup>17</sup> General jurisdiction exists over a foreign corporation when "the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it]

relationship among the defendant, the forum, and the litigation, *Failla*, 181 Wn.2d at 650, which must arise out of contacts the defendant himself creates with the forum. *Walden v. Fiore*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12 (2014). Jurisdiction lies if a defendant’s conduct and connection with the forum “are such that he should reasonably anticipate being haled into court there.” *LG Elecs.*, 185 Wn. App. at 412. A three-part test applies to determine if jurisdiction exists under the long-arm statute:

“(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to 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.”

*Failla*, 181 Wn.2d at 650.<sup>18</sup> A plaintiff bears the burden of satisfying the first two prongs. *State v. AU Optronics Corp.*, 180 Wn. App. 903, 914-15,

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essentially at home in the forum State.” *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 751, 187 L. Ed. 2d 624 (2014). Huynh submits that the facts surrounding AKAS’ long and intimate general business relationship with Washington, which are voluminous, CP 132-36, establish general jurisdiction. But the Court need not address that more complex question because specific jurisdiction exists.

<sup>18</sup> The jurisdictional test looks largely to the nexus between a defendant’s activities and Washington. Washington has taken a broad view of constitutional nexus requirements. *See, e.g., Lamtec Corp. v. Dep’t of Rev.*, 170 Wn.2d 838, 246 P.3d 788 (2011), *cert. denied*, 132 S. Ct. 95 (2011) (finding a sufficient nexus between Washington and a New Jersey company that sells insulation into Washington, under the dormant commerce clause, to permit the State to levy a B&O tax, despite the fact the New Jersey company had no permanent facilities, offices, addresses, phone numbers, or employees in Washington, based on its sending employees, who did not solicit business, to Washington 50-70 times in a six-year period); *Space Age Fuels, Inc. v. State*, 178 Wn. App. 756, 315 P.3d 604

328 P.3d 919 (2014). A defendant then must present “a compelling case” that jurisdiction is unreasonable. *Id.*

1. AKAS purposefully availed itself of Washington.

The test’s first prong is satisfied if a defendant’s activities constitute “purposeful availment” of Washington’s law. *AU Optronics*, 180 Wn. App. at 915. The inquiry is “whether there was some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities in [Washington], thus invoking the benefits and protections of its laws.” *Goodyear Tire Dunlop Ops., SA v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011).

The United States Supreme Court has “emphasized that parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities.” *Burger*

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(2013), *review denied*, 180 Wn.2d 1010 (2014) (finding a sufficient nexus between Washington and an Oregon corporation that sold and transported fuel into Washington to permit the State to levy a B&O tax, despite the fact the Oregon corporation only sold and delivered fuel upon Washington customer request, it made no effort to secure new customers in Washington, no employees visited Washington to solicit sales, and it neither leased nor owned property in Washington and had no Washington employees). Indeed, Washington’s B&O cases are instructive as to Washington policy here because the dormant commerce clause analysis encompasses the minimum contact analysis: “a finding that the imposition of tax does not violate the dormant commerce clause is sufficient to establish that the imposition also does not violate the due process clause . . . .” *Flight Options, LLC v. Dep’t of Rev.*, 172 Wn.2d 487, 498-99, 259 P.3d 234 (2011).

*King v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[W]here the defendant “deliberately” has engaged in significant activities within a State or has created “continuing obligations” between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by “the benefits and protections” of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

*Id.* at 475-76 (citations omitted). “[P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing” must be evaluated to determine if the defendant purposefully established minimum contacts. *Freestone Capital Partners, LP v. MKA Real Estate Opp. Fund I, LLC*, 155 Wn. App. 643, 653, 230 P.3d 625 (2010) (quoting *Burger King*, 471 U.S. at 479).

Purposeful availment exists here and is extensive. AKAS initiated its relationship with Marel in 2006 when it, through Johansen, president of AKAS’ Washington sister company, Aker Seafoods US, personally visited Marel’s president in Seattle. CP 181-82.<sup>19</sup> From that visit, AKAS hired Marel to design, specially fabricate, and install equipment on *Saga*. Huynh,

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<sup>19</sup> Because “prior negotiations and contemplated future consequences, along with the terms of the contract and parties’ actual course of dealing” are to be considered as a whole to determine if a defendant has established minimum contacts with the forum, *Freestone*, 155 Wn. App. at 653, AKAS’ entire 9-year relationship with Marel is relevant. *See Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 300, 647 P.2d 514 (1982) (involving 20-month relationship); *Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 528, 544 P.2d 30 (1975) (involving 15-month relationship).

on Marel's behalf, spent 81 days in 2006 in Chile to perform on this contract worth \$1 million. CP 181-82, 168-69, 174, 152, 408-15; *see also Byron Nelson v. Orchard*, 95 Wn. App. 462, 465, 975 P.2d 555 (1999) ("The fact a foreign corporation makes initial contact for the purpose of soliciting a business connection in Washington is significant.").

Moreover, AKAS has continuously conducted "business with Marel for spare parts, fabrications, installations, service and maintenance" on *Saga*, CP 42, and it expects to do so into the future. CP 952. It also still uses its Seattle-based agent, Aker Seafoods, as Marel's *Saga* contact, maintaining a physical Washington contact for this vessel. CP 181; *see also Daimler*, 134 S. Ct. at 759 n.13 ("[A] corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there."); RCW 4.28.185 (providing personal jurisdiction through acts of agent).

AKAS again contacted Marel in 2008 to design, specially build, and install equipment on *Navigator*. By the time AKAS terminated the project, Marel had built around \$4 million of equipment in Seattle. CP 185. Marel also stored, and still stores, *Navigator* equipment at its Seattle facility. CP 186, 184-85; 202. Further, as with *Antarctic Sea*, though work was to occur abroad for both *Saga* and *Navigator*, it was not focused abroad—significant work was always to occur in Washington. *Freestone*, 155 Wn. App. at 655 ("The link connecting [defendant] to Washington may consist of affirmative

acts outside of Washington in contemplation that some phase of the contract will take place in Washington.”).

The 2007 Secrecy Agreement further solidifies the parties’ intent to ensure future consequences. CP 395-97. Marel’s president testified that the 20-year agreement limits its ability to work for other krill processors, CP 205, and states that Aker BioMarine owns any invention Marel develops. CP 396. Thus, Marel could not use its creations to service other customers in or out of Washington. In exchange, Marel, which was not compensated for the agreement, signed the agreement on its understanding it would form a long-term relationship with a loyal customer. CP 205-06. The Secrecy Agreement clearly contemplates a 20-year relationship that has over a decade remaining.

Then in 2011, AKAS itself, through Skjong, again contacted Marel, without solicitation and prior to AKAS II’s formation, CP 945, to perform *Antarctic Sea* work. The project contemplated—and ultimately involved—significant, foreseeable, specialty design and fabrication work occurring in Washington, Washington workers traveling to Uruguay to install equipment, continuing payments and orders into Washington until project completion, and Marel’s currently continuing work on *Antarctic Sea*. Marel, in fact, built about \$3 million of equipment in its Seattle factory destined for *Antarctic Sea*, CP 187-88, and at one point, two-thirds of its staff and manufacturing facility was working on the project. CP 208-09. AKAS’ five-year course of

dealing with Marel and its contacting Marel about the *Antarctic Sea* project directly led to this work occurring.

AKAS also knew from the start that Marel would build equipment in Seattle. CP 951, 210, 215. It knew Marel would ship the equipment, with AKAS' stored *Navigator* equipment, from Washington to the vessel. *Id.* And it knew, prior to Huynh's injury, Marel was sending Washington personnel, covered by Washington State industrial insurance to Uruguay. CP 483-96. Huynh and other Washington residents had been down to work on the prior *Saga* project in Chile. Huynh repeatedly traveled to South America for *Saga* work over the entire period of the business relationship. Prior to sending Huynh and other workers to Uruguay for the *Antarctic Sea* install, Marel informed AKAS, which was acting as AKAS II's agent on overseeing the *Antarctic Sea* project, CP 23-24, 40,<sup>20</sup> that Americans were again coming

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<sup>20</sup> "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Agency 2d* § 1. Such relationship exists "if there has been a manifestation by the principal to the agent that the agent may act on his account and consent by the agent so to act." *Id.* § 15. "The requisite consent need not be expressed between the parties, but can be implied from their actions." *Rho v. Dep't of Rev.*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989). Whether an agency relationship exists "does not depend upon the intent of the parties to create it, nor their belief that they have done so." *Id.* (quoting *Agency 2d* § 1 cmt. b). If agency exists, "[a] principal is liable for the acts of his or her agent committed while the agent is acting with the scope of the agency."

AKAS and AKAS II state AKAS II was formed specifically to purchase and hold ownership of *Antarctic Sea* and to convert "it into a vessel for catching and processing krill." CP 40. However, "[a]s AKAS II had no employees of its own, [*Antarctic Sea*] was managed and operated by AKAS." CP 40, 12, 24. AKAS and AKAS II's statements and conduct demonstrate an agency relationship existed. And because AKAS was acting as AKAS II's agent when it injured Huynh, its negligence imputed to AKAS II. *Newton Ins. Agency & Brokerage v. Caledonian Ins. Grp.*, 114 Wn. App. 151, 159-60, 52 P.3d 30 (2002).

down. Pursuant to AKAS' requests for Marel's employee insurance information, which came in part through Skjong, Marel informed AKAS that the workers were covered by Washington industrial insurance. CP 483-96. That insurance now pays for Huynh's injuries, and will likely pay an estimated \$1,800,000 for his care and support. *E.g.*, CP 123.

AKAS' continuous, ongoing contacts with Marel, which resulted in Marel's extensive equipment design and fabrication over extended periods and multiple vessel projects, and which led to Washington workers covered by Washington industrial insurance traveling abroad—which AKAS knew would occur—far exceed the showing necessary to demonstrate purposeful availment. *Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 544 P.2d 30 (1975) (holding that a New Jersey defendant's purposefully initiating telephone contact with a Washington seafood seller, continuing to send purchase orders into Washington to buy \$440,000 of seafood over a year period, inspection of plaintiff's processing facility, and the delivery of goods "FOB Seattle,"<sup>21</sup> constituted purposeful availment); *Sorb Oil Corp v. Batalla Corp.*, 32 Wn. App. 296, 299, 647 P.2d 514 (1982) (holding that a Texas defendant's ongoing telephone orders to a Washington plaintiff to purchase products over a 20-month period constituted purposeful availment,

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<sup>21</sup> Marel's quotes state that delivery is Free Carrier at its premises, and its invoices provide for payment into a Seattle bank account. *See, e.g.*, CP 209, 427, 521-30.

despite the fact it did not initiate contact, no single contract required that any orders be made, the goods were shipped from Indiana, not Washington, and the levels of orders made did not rise to those present in *Peter Pan*); *Crown Controls, Inc. v. Smiley*, 47 Wn. App. 832, 737 P.2d 709 (1987), *remanded on other grounds*, 110 Wn.2d 695 (1988) (holding that an Oregon defendant purposefully contacting a Washington plaintiff, making several phone calls into the State, making several equipment purchases, and the fact that an order was sent FOB Bellevue, met purposeful availment); *Kysar v. Lambert*, 76 Wn. App. 470, 887 P.2d 431 (1995), *review denied*, 126 Wn.2d 1019 (holding that a Massachusetts defendant that “purposefully and knowingly” ordered Christmas trees, seasonally, from a Washington plaintiff over a three-year period, purposefully availed itself of Washington, despite the fact the parties contested who made first contact); *Byron Nelson*, 95 Wn. App. 462 (holding that a Virginia defendant’s contacting a Washington plaintiff and entering a contract that required the plaintiff to act as defendant’s broker to sell some equipment, which required work in Washington, established purposeful availment).

AKAS’ purposeful actions and intended contacts, all detailed above, far surpass those the Court found satisfied the purposeful availment prong in *Peter Pan*, *Sorb Oil*, *Crown Controls*, *Kysar*, or *Byron*. AKAS initiated contact with Marel through physical contact in 2006, solicited Marel for all

three vessel contracts, and carried on a now nine-year, continuous course of dealing. That course of dealing, and AKAS' contacting Marel again in 2011, directly led to the *Antarctic Sea* contract. Through the relationship, AKAS knew it was dealing with a Washington corporation with its own production facility in Washington. *See, e.g.*, CP 951-52. Moreover, all of the vessel projects, specifically including *Antarctic Sea*, for which AKAS made initial contact, contemplated that Marel would design equipment in Seattle, build significant amounts of equipment in Seattle, and send Washington workers to install equipment at the vessel locations abroad. *E.g., id.* Marel has in fact built millions of dollars of equipment in Seattle. To date, the total paid for work on all three vessels is well over \$10 million, CP 185, 187-88, 205-06, and likely exceeds \$24 million. CP 345-59. Purposeful availment is present.

2. Huynh's cause of action arises from AKAS' contacts.

The second prong is a "but for" test, which is satisfied if the plaintiff would not have suffered an injury but for the defendants' forum-related contacts. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 769-70, 772, 783 P.2d 78 (1989).<sup>22</sup> It makes "no difference where the cause of action matured,

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<sup>22</sup> AKAS/AKAS II argued below that the "but for" test is inappropriate. That argument was already dismissed by the Washington Supreme Court: "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. The "but for" test is Washington law.

so long as it could not have arisen but for the activities of the nonresident firm in the forum where it is ultimately sued.” *Id.* The test is easily met here.

AKAS approached Marel through a five-year period to perform work on three vessels. These projects contemplated workers would be sent abroad to install equipment Marel built. They also contemplated continuing work, which remains ongoing with *Saga* and *Antarctic Sea*, now nine years after AKAS first reached out to Marel in Washington. The *Antarctic Sea* contract would not have occurred but for AKAS and Marel’s prior course of dealing with *Saga* and *Navigator*, including AKAS itself first approaching Marel for *Antarctic Sea* work. Under that contract, Marel sent Washington workers, including Huynh, to Uruguay to complete the contracted work. And, while in Uruguay performing the very work contemplated, Huynh was shocked through AKAS and AKAS II’s negligence; AKAS, in fact, admits, through Eikrem, as it must, that Huynh would not have been injured aboard the vessel in Uruguay but for the agreement with Marel. CP 311-12.

The Sixth Circuit in *Theunissen v. Matthews*, 935 F.2d 1454, 1461 (6th Cir. 1991), found but for causation on indistinguishable facts. There, an Ontario, Canada lumber yard entered a contract for carriage with a Michigan entity requiring that the Michigan entity send a truck to load and transport lumber from the yard. *Id.* at 1461. The Michigan entity sent its Michigan driver. *Id.* While the driver was at the lumber yard, the Canadian entity’s

employee negligently injured the Michigan truck driver’s hand. *Id.* The court held that “[plaintiff’s] cause of action—his injured hand—resulted from the conduct of [defendant’s] employee while [plaintiff] was present at his place of business pursuant to what [plaintiff] alleges was a contract for carriage [defendant] executed with [plaintiff’s Michigan employer]. Thus, but for [defendant’s] alleged business contacts with his employer, [plaintiff] would have sustained no injury.” *Id.*; see also *Ratledge v. Norfolk S. Ry. Co.*, 958 F. Supp. 2d 827, 833-37 (E.D. Tenn. 2013) (finding a Tennessee worker’s claim arose from a Georgia company’s contacts with Tennessee when the Georgia company requested that the Tennessee company send a worker and the worker was injured in Georgia). The same holds true here. Huynh’s claim arises from AKAS’ contacts.

3. Washington is a Reasonable Forum.

Because Huynh established that jurisdiction is proper, AKAS must make a compelling case that jurisdiction is unreasonable. *Optronics*, 180 Wn. App. at 914-15. Courts should consider “the quality, nature, and extent of the defendant’s activity in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington’s laws afforded the parties, and the basic equities of the situation.” *LG*, 185 Wn. App. at 424. AKAS must show that the exercise of jurisdiction in Washington would make litigation “so gravely

difficult and inconvenient’ that it unfairly [places AKAS] at a ‘severe disadvantage’ in comparison to [its] opponent.” *FutureSelect*, 175 Wn. App. at 893-94 (quoting *Burger King*, 471 U.S. at 478). It failed to do so.

AKAS’ nine-year, ongoing, and expected future purposeful injection into Washington State is detailed above and extensive. Its relationship with Marel led directly to Huynh and other Washington residents traveling abroad for extended work periods, Marel’s specially building millions of dollars of equipment in Seattle, continued payments and equipment requests into Washington, and *Antarctic Sea* contract formation. AKAS itself reached into Washington and formed the relationship. In *Precision Lab. Plastics v. Micro Test*, 96 Wn. App. 721, 981 P.2d 454 (1999), the Court held that a defendant that contacted a Washington entity and asked that it specially manufacture specific vials over a three-year period had purposefully availed itself of Washington and that it was thus reasonable to exercise jurisdiction. *Id.* at 726-27, 728-29. The same holds true here.

Washington is also the most convenient forum. Most witnesses are from Washington. Huynh and his family are in Washington. Pertinent Marel employees are in Washington. Pertinent Aker Seafoods US representatives, including Johansen, are in Washington. Other than emergency care in Uruguay, Huynh received all of his medical care in Washington; all 21 medical providers are in Washington. *See* CP 439-47. All of the general

damages lay witnesses are in Washington. The welding machine that caused the shock is also in Washington. Thus, while *Antarctic Sea* is in Uruguay (which would pose a hardship if the case were tried in Norway), the majority of witnesses are in Washington or not in Norway.

Further, Washington State afforded AKAS benefits and protections. “By purposefully availing itself of the privilege of conducting business in Washington, a foreign corporation acquires the benefits and protections of Washington law.” *Byron Nelson*, 95 Wn. App. at 465. For example, AKAS would have been entitled to initiate an action against Marel and/or Huynh in Washington if either caused damage to AKAS’ equipment or other interests during the project, and Washington laws provided AKAS recourse in the event Marel breached its contract.

The equities clearly favor Washington as well. Huynh and his family, unlike AKAS, are not multinational corporations. Their expenses, if forced to litigate in Norway or Uruguay would be insurmountable. AKAS has litigated cases in, has a presence in, and has hired attorneys in the United States. *See, e.g.*, CP 532-55. Huynh has no knowledge of the Norwegian or Uruguayan justice systems and has no presence in either country.

Washington also has a strong interest in providing a forum. While it “obviously has an interest in protecting its citizens against the tortious conduct of others, including negligence”, *Grange Ins. Assoc. v. State*, 49

Wn. App. 551, 561, 744 P.2d 366 (1987), *rev'd on other grounds*, 110 Wn.2d 752 (1988), it significantly has a direct pecuniary interest, highly protected by state law. RCW 51.24.060.

Washington aggressively protects its worker's compensation fund. *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 547, 789 P.2d 75 (1990). In third-party claims, an injured worker must give notice of an election to seek damages and provide the Department with a copy of any complaint. RCW 51.24.030(2); .060; .080(1). If the Department files notice of statutory lien, as it has here, CP 644-47, parties must serve all motions and pleadings on the Department. RCW 51.24.030(2). The Department may intervene as a party to protect its interest. *Id.* Moreover, any compromise for less than the entitlement without authorization is void; if so voided, the Department may seek a court order assigning the action to the Department. RCW 51.24.090.<sup>23</sup>

The Department has spent \$256,948 for Huynh's injuries so far, and has set its claim reserve at \$1,896,259. CP 123. If the claim were dismissed

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<sup>23</sup> The Legislature also mandated that the industrial insurance program maintain a broad geographic reach and encompass out-of-state employers. RCW 51.12.120 (extraterritorial coverage). Workers injured outside Washington are covered if employment is principally located in the state, a contract of hire was made in the state for work not principally located in any state or principally located outside of the United States, or a contract of hire was made in Washington for employment in another state if that state does not require coverage. *Id.* (1). Further, the Department has jurisdiction over an out-of-state employer that has an employee injured within the State, and if the out-of-state employer is not covered under another state and has not qualified as a self-insurer, the out-of-state employer is subject to the same penalties as other employers for failing to comply. *Id.* (4)(b).

and Huynh was for practical reasons unable to bring suit in Norway, it is likely the Department will never recover. *Id.*

D. The trial court failed to consider pendent personal jurisdiction, which Washington courts may exercise, and which permits jurisdiction here, even had AKAS not been an *Antarctic Sea* contract party.<sup>24</sup>

The trial court properly found that personal jurisdiction exists over AKAS for its imputed negligence. But it failed to consider pendent personal jurisdiction when it dismissed AKAS for claims based on direct negligence. Because the doctrine applies, the trial court's order should be reversed.

Pendent personal jurisdiction is, to date, a federal case law doctrine.

Linda S. Sinard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. 1619 (2001).

[It] exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim.

*United States v. Botefuhr*, 309 F.3d at 1272-73 (10th Cir. 2002). Although federal circuit courts have unanimously upheld the doctrine's efficacy, *id.*, whether state courts may also exercise such jurisdiction is an issue of first

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<sup>24</sup> Pendent personal jurisdiction is a case law doctrine. *United States v. Botefuhr*, 309 F.3d at 1272-73 & n.7 (10th Cir. 2002). Because case law interpretation is a question of law, *Willis*, 151 Wn.2d at 261, this is an issue of law reviewed *de novo*. *See id.*

impression—both in Washington and in other state courts.<sup>25</sup> Nevertheless, because state court use of the doctrine would satisfy both basic jurisdictional requirements—that the long-arm statute and due process permit jurisdiction, *FutureSelect*, 180 Wn.2d at 963—the doctrine is available for Washington state court use.

First, the long-arm statute, RCW 4.28.185, provides no barrier to the doctrine’s use. Through the statute, our Legislature established a policy of broad jurisdiction; the statute extends Washington’s jurisdictional reach to the full extent of due process. *Shute*, 113 Wn.2d at 768, 771. Thus, whether Washington courts can exercise pendent personal jurisdiction focuses solely on the second requirement—due process. *Sinard*, *supra*, at 1661 n.198 (positing that state courts may exercise such jurisdiction and noting due process long-arm statutes “obviate the need for a specific analysis of the long-arm.”).

Though pendent personal jurisdiction generally arises in cases where a federal court is exercising personal jurisdiction over a claim under a federal statute that authorizes nationwide service of process, the issue often arises in state-law-only diversity cases as well. *Sinard*, *supra*, at 1627-32. The issue in the latter cases, as it is here, is whether a court that exercises jurisdiction

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<sup>25</sup> A case that may reach the issue is pending in the California Supreme Court. *See Bristol-Myers Squibb Co. v. Superior Court*, 337 P.3d 1158, 180 Cal. Rptr. 3d 99 (2014).

over a state law claim (that the long-arm statute authorizes and that meets minimum contacts standards) can also, consistent with due process, exercise pendent personal jurisdiction over other state-law claims that do not meet minimum contacts standards.

Numerous federal courts that have confronted the above issue have concluded they can exercise jurisdiction,<sup>26</sup> including courts applying RCW 4.28.185.<sup>27</sup> All of these federal cases hold, explicitly or implicitly, that exercising jurisdiction complies with due process. Indeed, former Suffolk University School of Law Dean and current Professor, Linda Sandstrom Sinard, has undertaken an in-depth analysis of the issue and has agreed, persuasively arguing at length that pendent personal jurisdiction complies with due process. Sinard, *supra*, at 1654-61. In fact, she has taken the next step, stating also that there exists “no theoretical obstacle that would preclude a state court[, and especially one applying a due process long-arm statute,] from adopting the doctrine”. *Id.* at 1661 n.198, 1662 n.199.

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<sup>26</sup> See *Ex Parte Dill, Dill, Carr, Stonbraker & Hutchings*, 866 So.2d 519, 545 (Ala. 2003) (See, J., dissenting) (“[F]ederal district courts have freely exercised pendent personal jurisdiction under state long-arm statutes.” (citing *Salpoglou v. Widder*, 899 F. Supp. 835 (D. Mass 1995); *Miller v. SMS Schloemann-Siemag, Inc.*, 203 F. Supp. 2d 633 (S.D. W. Va. 2002)), *cert. denied sub nom. Austin v. Dill, Dill, Carr, Stonbraker & Hutchings, PC*, 540 U.S. 949, 124 S. Ct. 416, 157 L. Ed. 2d 281 (2003)).

<sup>27</sup> *E.g.*, *T-Mobile USA, Inc. v. Huawei Device USA*, 115 F. Supp. 3d 1184, 1202 n.8 (W.D. Wash. 2015); *Ridemind v. S. China Ins.*, No. 14-489, 2014 U.S. Dist. LEXIS 78314, at \*14-15 (W.D. Wash. June 9, 2014); *Fluke Elecs. v. CorDEX Instr.*, No. C12-2082, 2013 U.S. Dist. LEXIS 19540, at \*31 (W.D. Wash. Feb. 13, 2013).

Moreover, though no published state court opinion has addressed the issue, former Alabama State Supreme Court Justice Harold See, in a well-reasoned dissent, agreed with Professor Sinard. *Ex Parte Dill, Dill, Carr, Stonbraker & Hutchings*, 866 So.2d 519, 544-47 (Ala. 2003) (See, J., dissenting), *cert. denied sub nom. Austin v. Dill, Dill, Carr, Stonbraker & Hutchings, PC*, 540 U.S. 949, 124 S. Ct. 416, 157 L. Ed. 2d 281 (2003). Relying on the same analysis as above, he argued that, had the majority found jurisdiction existed over Colorado defendants for claims initiated by Alabama residents, the Alabama court could also have, consistent with due process, exercised pendent personal jurisdiction over those same defendants for claims brought by out-of-state residents against the same defendants.<sup>28</sup>

## VI. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order dismissing AKAS for claims based on its own direct negligence. Costs on appeal should be awarded to Huynh.

Respectfully submitted this 16th day of June, 2016.

/s/ Philip A. Talmadge  
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/s/ C. Steven Fury  
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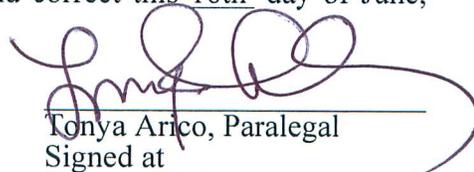
<sup>28</sup> Because the Alabama Supreme Court determined it did not have personal jurisdiction over the defendants at all, it neither considered nor rejected pendent personal jurisdiction. Nor has research produced any state appellate cases that have refused to apply the doctrine.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

W.L Rivers Black III, WSBA 13386 Christopher W. Nicoll, WSBA 20771 Nicoll Black & Feig 1325 4 <sup>th</sup> Ave., Suite 1650 Seattle, WA 98101 Fax: (206) 838-7515 Defendant Aker BioMarine AS	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail
Jennifer K. Sheffield, WSBA 41929 Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98111-9402 Fax: (206) 223-7107 <a href="mailto:SheffieldJ@lanepowell.com">SheffieldJ@lanepowell.com</a> Defendant Marel Seattle, Inc.	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail
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Michael Patjens Department of Labor and Industries Third Party Section P.O. Box 44288 Olympia, WA 98504 <a href="mailto:patj235@lni.wa.gov">patj235@lni.wa.gov</a>	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 16th day of June, 2016.

  
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Tonya Arico, Paralegal  
Signed at  
Seattle, Washington