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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31977-6-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

Kay L. Pruczinski and Ricky Bell,
Appellant

v.

Allen Ashby,
Respondent

Appeal from the Superior Court of Spokane County

REPLY BRIEF OF APPELLANT

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I. ISSUES ON REPLY

1. The trial court's ruling on personal jurisdiction was erroneously based on choice of law grounds instead of jurisdictional factors.
2. The trial court had subject matter jurisdiction over this matter.
3. The trial court had personal jurisdiction over Mr. Ashby.
4. Dismissing this action based on principles of comity would be inappropriate.

II. ARGUMENT ON REPLY

- 1. The trial court's ruling on personal jurisdiction was erroneously based on choice of law grounds instead of jurisdictional factors.**

Mr. Ashby argues that no determination was made by the trial court as to which state's law applies in this action. However, the court's statement that Mr. Ashby's actions "clearly [were] Washington state actions" combined with its sole analysis on ruling that:

"the key element or one of the very key elements of the case would be whether or not this defendant – Trooper Ashby right now, not Mr. Ashby – was within the scope of his employment...because we do have a question of Idaho law...it would not be fair for Washington to exercise personal jurisdiction over this individual."

VRP at 27.

The trial court is effectively making a choice of law determination here in stating that Idaho law applies to even a part of this action. Utilizing that analysis in lieu of a true personal jurisdiction analysis creates an erroneous ruling. *See generally Hope's Windows, Inc. v. McClain*, 394 S.W.3d 478, 483 (2013). *Hope's Windows, Inc.* involves a contract case where a forum selection clause and a choice of law clause both applied. In the court's ruling, one statement in particular sheds light on the interrelationship or lack thereof between choice of law and personal jurisdiction:

“Here, the circuit court’s judgment extensively evaluated McClain’s contacts with New York to determine whether the New York court had personal jurisdiction over McClain under New York’s long-arm statute and whether the New York court complied with due process requirements in rendering judgment against McClain. While this analysis would have been proper in the face of a simple choice-of-law clause, it was wholly unnecessary in light of the forum selection clause contained in the contract...”

Id.

The court here was careful to distinguish between analyses of choice of law and personal jurisdiction. The jurisdictional analysis stems specifically from the long-arm statute, and more importantly, even where choice of law is clear (in *Hope's Windows, Inc.*, via a choice-of-law clause), the jurisdictional analysis must be completed. This illustrates that the analyses for choice of law and for personal jurisdiction are separate issues. Those issues being separate, a court may properly exercise personal jurisdiction over a nonresident and still apply another state's law to the case or a part thereof.

In the instant case, the court clearly conflated the two issues by using choice of law as a reason to dismiss on jurisdictional grounds, rather than engaging in any meaningful jurisdictional analysis. Hence, the decision to dismiss was erroneous.

2. The trial court had subject matter jurisdiction over this matter.

While the trial court stated its ruling was pursuant to CR 12(b)(2), Mr. Ashby also argues a lack of subject matter jurisdiction under CR 12(b)(1). The argument is based on Washington State's directive that "the superior court shall also have original jurisdiction in all cases and of all

proceedings in which jurisdiction shall not have been by law vested exclusively in some other court". Wash. CONST. art. IV, § 6.

Mr. Ashby goes on to argue that claims against the State of Idaho and its employees should be tried in the District Courts of the State of Idaho. Ms. Pruczinski concedes that said courts have jurisdiction over claims against the State of Idaho pursuant to Idaho Code § 6-914, however, for this to apply to tort claims against state employees as well, the state employee's tortious act would have to have occurred within the State of Idaho.

Here, Ms. Pruczinski is not alleging any wrongdoing on the part of the State of Idaho. This action was brought against Mr. Ashby for his tortious acts. The fact that he was on duty on April 30, 2012 is not wholly determinative of his scope of employment, nor is the fact that he initiated a traffic stop. Effectively, this subject matter jurisdiction argument relies entirely on an assumption that Mr. Ashby was within the scope of employment. The scope of Mr. Ashby's employment, Ms. Pruczinski contends, would certainly not include the tortious acts he committed against her in the State of Washington. Additionally, Mr. Ashby did concede that "the traffic stop when the vehicle is finally stopped was in Washington," which would weigh heavily against Mr. Ashby being within the scope of employment. VRP 6. Any challenge to subject matter

jurisdiction on the basis of exclusive jurisdiction in another court would have to occur after a final determination of Mr. Ashby's scope of employment in committing tortious acts in the State of Washington. Allowing a dismissal based on subject matter jurisdiction while the basis for the argument remains at issue would be erroneous.

3. The trial court had personal jurisdiction over Mr. Ashby.

Mr. Ashby uses a fairly clear summation of the requirements for personal jurisdiction over a nonresident set out by statute and common law. These are: "(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." *Tyee Construction Company v. Dulien Steel Products, Inc., of Washington*, 62 Wn.2d 106, 115-116 (1963).

The first criterion is that of conduct purposefully aimed at Washington or its residents. Mr. Ashby concedes that the traffic stop occurred within Washington, and the trial court also states that “the action of stop and the incidents that took place at the car took place in Washington. VRP 6, 9. Mr. Ashby argues that his ties to Idaho, including observation of Ms. Pruczinski’s vehicle on westbound I-90 within Idaho, and observations of alleged traffic violations by Ms. Pruczinski within Idaho, make any conduct within Washington “too attenuated to establish personal jurisdiction.” Respondent’s Brief, pg. 23. However, Mr. Ashby’s sole observation within Idaho was that of a vehicle in front of him weaving back and forth in its lane. CP 41, 63. In Idaho, “A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.” Idaho Code § 49-637. Weaving within a lane is not a traffic violation. No alleged traffic violations were observed until Mr. Ashby had already followed Ms. Pruczinski into Washington. Once within Washington, he states that he observed Ms. Pruczinski take Exit 299 off I-90. Any alleged traffic violations at that time and thereafter were wholly within Washington, out of Mr. Ashby’s jurisdiction, and he nevertheless continued to follow her, within Washington the entire time, and finally stop her within Washington. Not

only the stop but Mr. Ashby's conduct leading up to the stop indicate conduct purposefully aimed at Washington. There can be no doubt that he knew he had entered Washington at Exit 299, long after having passed the last Idaho stop at Exit 2. Taking that exit (entering Washington State) in and of itself may not constitute conduct purposefully aimed at Washington, but combined with continuing to follow a vehicle that had not committed any traffic violations until taking that very same exit within Washington, and then stopping that vehicle on a road that is located within Washington. His use of Washington roadways to this extent meets the requirement of a purposeful act.

The second criterion requires that the cause of action arise from the tortious act within the forum state. In this case, Mr. Ashby's tortious conduct occurred entirely within Washington and is the sole source of Ms. Pruczinski's injury and hence, claim. This requirement is clearly fulfilled.

The third and final criterion takes multiple factors into account. In considering whether traditional notions of fair play and substantial justice would be violated, courts look to: "(1) the quality, nature, and extent of the activity in the forum state; (2) the relative convenience of the parties; (3) the benefits and protection of the laws of the forum state afforded the respective parties; and (4) the basic equities of the situation." *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767 (1989). Mr. Ashby elaborates

with the seven factors laid out by the Ninth Circuit in determining reasonableness of exercising jurisdiction. *See Mattel, Inc. v. Greiner and Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). One may examine those seven factors in turn.

First, look to the extent of Mr. Ashby's purposeful interjection into the forum state's affairs. Mr. Ashby claims his contact with Washington was unintentional and did not constitute a fair warning that he was subjecting himself to Washington jurisdiction. Even before the traffic stop, which has been repeatedly demonstrated and conceded to have occurred in Washington (VRP 6, 9), Mr. Ashby had availed himself of roadways within Washington, entering the state on Washington roadways and continuing to drive on them. His contention that "he took the first exit available west of Exit 2 in Idaho (Respondent's Brief pg. 29)," as accurate as that technically is, it puts him squarely within Washington. He took that exit specifically to follow Ms. Pruczinski on Washington roadways. Had he hit her with his car, he would similarly be within Washington's jurisdiction. He knowingly drove on Washington roads, and committed tortious acts on those roads. That constitutes fair warning that he could be subjected to personal jurisdiction within Washington.

Second, look to the burden on Mr. Ashby of defending himself in this forum. Here, rather than engaging in analysis of the actual burden on

Mr. Ashby, he restates his argument that the State of Idaho is effectively a party. He cites, “However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power of him.” *Hansen v. Denkla*, 357 U.S. 235, 251 (1958). This is not relevant here. It is not even an analysis of what would be too high a burden. It makes minimal contacts the threshold issue, before burden may be argued. Here, minimal contacts have been established. Furthermore, Mr. Ashby has thus far not been sufficiently burdened by litigating this action to justify a refusal to exercise jurisdiction. Appellants’ Brief, pgs. 16-17.

Third and fourth, one looks to the extent of conflict with the sovereignty of Mr. Ashby’s home state, Idaho and to the forum state’s interest in adjudicating the dispute. Again Mr. Ashby refers to this as an action against a state employee. Can one then assume a state employee could leave Idaho while on duty, go any distance into neighboring states, commit various tortious acts, and a plaintiff’s only redress would be via Idaho law? This is properly a subject matter jurisdiction analysis which has been covered. If Ms. Pruczinski were arguing that the Idaho State Police or the State of Idaho were at fault, then Idaho’s interest in adjudicating this dispute would be greater and have more weight. As it is,

Ms. Pruczinski is arguing that this man committed tortious acts against her within Washington. Washington's interest in ensuring that not only its citizens, but nonresidents who avail themselves of our roadways, such as both Ms. Pruczinski and Mr. Ashby, are able to litigate disputes regarding tortious acts that occur on those roads or as a direct result of conduct on those roads, outweighs Idaho's interest.

Fifth, the most efficient judicial resolution of the controversy must be analyzed. While the parties are Idaho residents, causing some slight additional travel time to come to court in Washington, some 33 miles from court in Idaho, the acts did in fact occur in Washington. If the acts occurred in Washington, properly Washington law would apply. If Washington law applies, a Washington court would be the most efficient in resolving the dispute.

Sixth, one looks at the importance of the forum to Ms. Pruczinski's interest in convenient and effective relief. This particular forum is no more or less convenient to Ms. Pruczinski than any other. Ms. Pruczinski's sole desire is redress for torts committed against her in Washington by Mr. Ashby. It was to that end alone that Ms. Pruczinski selected this forum.

Lastly, courts examine the existence of an alternate forum. While this could have been litigated in Idaho, the acts occurred in Washington;

Idaho would not have been an efficient forum for litigating those acts. The fact that Mr. Ashby is a state employee does not mandate Idaho as a forum for his acts within the state of Washington. Idaho, if chosen as a forum, would properly decline to adjudicate this as the acts occurred in Washington and the application of Washington law would be inefficient. Therefore, the existence of an alternate forum is negligible at best.

Examining these seven factors, together with the other two criteria, it is apparent that exercising jurisdiction over Mr. Ashby is not only reasonable, but serves the interest of both states and all parties. Ms. Pruczinski requires some forum for her grievances to be heard.

4. Dismissing this action based on principles of comity would be inappropriate.

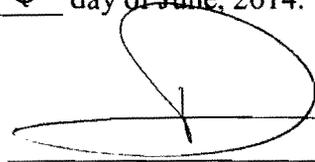
Mr. Ashby argues that even if subject matter jurisdiction and personal jurisdiction are both proper in this case, Washington should still decline jurisdiction “in order to promote friendly relations and a mutual desire to do justice.” Respondent’s Brief, pg. 35. Mr. Ashby’s further discussion of the laws allowing for mutual cooperation and enforcement (Respondent’s Brief pg. 36) are not convincing here, as the tortious acts were outside the bounds of law enforcement activities and Mr. Ashby was certainly not in fresh pursuit of a felon. In this situation, denying Ms.

Pruczinski, an Idaho resident, a forum for the tortious acts committed against her within Washington would in itself violate the principle of comity. Additionally, Ms. Pruczinski would be denied the protections of Washington State law and the Washington State Constitution if this court were to dismiss this action, resulting in a great injustice.

III. CONCLUSION

Mr. Ashby rests entirely on his employment as an Idaho State Police trooper in order to avoid responsibility for his tortious acts committed as an individual within Washington, outside his jurisdiction and the scope of his employment and authority. Allowing him to do so would be improper, denying Ms. Pruczinski the protections of Washington laws. The trial court's dismissal should properly be reversed and remanded to Superior Court for further proceedings.

Respectfully submitted this 6 day of ~~June~~, 2014.



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