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Court of Appeals Cause No. 31977-6-III

No. _____

FILED

MAR 11 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

KAY L. PRUCZINSKI, a single person, and
RICKY BELL, a single person,

Respondents,

v.

ALLEN ASHBY and JENNIFER ASHBY, husband and wife,
and the marital community comprised thereof,

Petitioners.

PETITION FOR REVIEW

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APPENDIX

Appendix A - Decision of Court of Appeals in *Pruczinski v. Ashby*, 2015
WL 600325

I. IDENTITY OF PETITIONER

The Petitioner herein is Trooper Allen Ashby of the Idaho State Police (referred to as “Trooper Ashby” or “Ashby”). Ashby is the Respondent in the action filed in the Court of Appeals of the State of Washington, Division III, and the Defendant in the action filed in the Spokane County Superior Court.

II. DECISION OF THE COURT OF APPEALS

Trooper Ashby seeks review of the decision of Court of Appeals in *Pruczinski v. Ashby*, 2015 WL 600325, attached as Appendix A, and referred to herein as the “Opinion.” A divided court filed the opinion on February 12, 2015. Opinion, pg. 15 (Brown, J. dissenting).

III. ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Does the Court of Appeals decision conflict with the standards set forth by the Washington Supreme Court when it fails to determine whether Idaho State Police Trooper Ashby purposefully directed his activities at Washington such that he derived benefit therefrom?
2. Does the Court of Appeals decision that a stop of an Idaho-licensed car/driver by an Idaho State Police trooper for investigation of driving under the influence, a felony, on a road that straddles the Idaho/Washington border, in an area the trooper believed to be in Idaho, conflict with the Washington Supreme Court’s holding that there must be a substantial connection between the defendant and the State of Washington sufficient to extend jurisdiction under the long arm statute?

3. Does the Court of Appeals decision conflict with the due process elements adopted by the Washington Supreme Court when it based its finding of “purposeful minimum contacts” with the State of Washington upon Trooper Ashby’s interactions with Pruczinski rather than upon his contacts with the State of Washington?
4. Does the Court of Appeals decision extending Washington jurisdiction to an Idaho State Police trooper, who is an Idaho resident, conflict with and offend the traditional notions of fair play and substantial justice as articulated by the Washington Supreme Court?
5. Do Washington courts have subject matter jurisdiction to hear civil disputes brought by an Idaho resident against an Idaho resident/Idaho state employee for performing his duties as an Idaho State Police trooper on a road which straddles the Idaho/Washington border?
6. Does the Court of Appeals decision conflict with the recognized principles of comity followed by Washington courts?

IV. STATEMENT OF THE CASE

A. Factual Background

This action arises from a traffic stop by Idaho State Trooper Ashby of an Idaho-licensed car for suspicion of driving under the influence and the subsequent arrest of the driver. The stop occurred on North Idaho Road, which straddles the Idaho/Washington border. CP 23-24, 29, 31, 34, 35, 40-42, 47, 127-129, and Brief of Respondent, pp. 6-7 and Exhibit No. 1, filed in the Court of Appeals, Division III, on May 6, 2014.

On April 30, 2010, at approximately 11:45 p.m., Trooper Ashby was on patrol in a marked Idaho State Police patrol car equipped with overhead

patrol lights westbound on Interstate 90 in Idaho. CP 41. A few miles east of the Idaho border with Washington, near mile marker 2, he observed a vehicle bearing Idaho license plates¹ weaving back and forth in its lane in a construction zone. CP 41. He followed the vehicle and observed it take Exit 299 at the Idaho/Washington border without using a turn signal. CP 41. Exit 299 provides access to roads in both Idaho and Washington. Brief of Respondent, pp. 6-7, and Exhibit No. 1. After exiting, the vehicle turned south, swinging wide and driving across the fog line onto the shoulder. CP 41. As Trooper Ashby continued to follow the vehicle, it drifted across the double yellow line. CP 41. He also observed the car drift into the oncoming lane of travel on several occasions while navigating the corners of Spokane River Bridge Road. CP 41. Trooper Ashby then observed the Idaho vehicle turn onto North Idaho Road entering back into Idaho where it sped up to 44 m.p.h. in a posted 35 m.p.h. zone. CP 41. Trooper Ashby turned on his overhead patrol lights to stop the vehicle to investigate the operator² for

¹ The vehicle had an Idaho license plate, number K425660, and was later confirmed to belong to Idaho resident Ricky Bell (hereinafter "Bell"). CP 22-28, 163.

² The driver of the Idaho vehicle was later identified as Kay Pruczinski (hereinafter "Pruczinski") who resides at 2054 S. Stateline Road, Post Falls, Idaho. CP 22-28, 163.

impaired driving. CP 41. The vehicle pulled to the west shoulder of North Idaho Road. CP 41. Ashby suspected the driver was potentially driving under the influence because of the poor driving patterns he had observed. CP 41.

When Trooper Ashby approached the vehicle, which had dark, tinted windows, he noted the female driver was wearing sunglasses although it was almost midnight. CP 41. This raised his suspicions that she did not want him to see her eyes. CP 41. Despite several requests from Ashby, Pruczinski refused to roll her window down more than an inch, precluding Trooper Ashby from seeing completely into the vehicle. CP 41. Pruczinski refused repeated requests to roll down her window or to step out of the vehicle. CP 41. From his years of experience, Ashby believed this behavior to be common to alcohol-impaired drivers trying to conceal the odor of alcohol. CP 41.

At this time Pruczinski was acting hysterical, yelling and demanding a female officer. CP 42. Ashby saw Pruczinski reach to her right for something but was unable to see what she was reaching for and he took cover behind the "A" pillar of her vehicle. CP 42. As he shined his flashlight through the windshield, he saw Pruczinski reach into a purse in a furtive manner and feared she was retrieving a weapon. CP 42. He again ordered her out of the vehicle, but she refused. CP 42. He then broke out the driver's side window with his asp and secured her left arm. CP 42. She continued to refuse

to get out of the vehicle, so he unlocked the door, reached in to unclasp her seatbelt, opened her door, and removed her from the vehicle. CP 42.

Because Pruczinski continued to resist once Trooper Ashby removed her from the vehicle, he handcuffed her, patted her down, and placed her in his patrol car. CP 42. He then transported her to Kootenai County Jail where she was booked into custody. CP 42.

B. Procedural History

Plaintiffs,³ Idaho residents Pruczinski and Bell, filed this action for alleged injuries and property damage against Idaho State Police Trooper Allen Ashby and his wife, Jennifer Ashby, both of whom are Idaho residents, in Spokane County Superior Court on April 26, 2012. CP 3-9. An Amended Complaint was filed on June 13, 2012. CP 22-28. The Ashbys filed a motion to dismiss pursuant to CR 12(b)(1) and CR 12(b)(2) contending that the Washington courts lacked subject matter and personal jurisdiction over them. CP 39. In the alternative, the Ashbys requested that Washington decline jurisdiction based on the principles of comity. Mrs. Ashby, who was a named defendant in the action, filed a motion to dismiss the complaint as to her pursuant to CR 12(b)(6). CP 39. Pruczinski stipulated to this dismissal and

³ Plaintiffs are collectively referred to herein as “Pruczinski.”

an order dismissing her was entered on September 11, 2013. CP 220-221. The trial court then dismissed the case against Trooper Ashby pursuant to CR 12(b)(2), ruling that Washington jurisdiction would not comport with due process. RP, pg. 27, CP 222-223.

Pruczinski appealed this dismissal on September 27, 2013. CP 226. The Court of Appeals scheduled the matter for consideration without oral argument on October 21, 2014, and the published opinion (Brown, J. dissenting) was issued on February 12, 2015. A divided Court of Appeals reversed the trial court's dismissal and remanded the issue of comity to the trial court for further proceedings consistent with the Court of Appeals' opinion on that issue. Opinion, pg.13-14. Trooper Ashby now petitions this Court for review in accordance with RAP 13.4(b).

V. ARGUMENT

A. Summary of Argument in Support of Review of the Court of Appeals Decision.

This is not a case where the defendant, Trooper Ashby, intentionally reached out beyond the borders of his state, Idaho, to purposefully derive benefit from his alleged interstate activities with Washington. Nor is this a case where Trooper Ashby purposefully directed his alleged activities at the state of Washington or its residents. Pruczinski and Bell, both residents of

Idaho, did not meet their burden of establishing the requisite elements to impose long-arm jurisdiction over Idaho employee and resident Ashby. In addition, the Court of Appeals impermissibly relied upon Pruczinski's allegation that she was on a portion of North Idaho Road in Washington to extend jurisdiction and in doing so misapplied the law.

B. Review of the Court of Appeals Decision Should be Granted under RAP 13.4(b)(1), (2), (3) and (4).

This case presents the unique situation of meeting all four of the criteria for review of the Court of Appeals' decision. RAP 13.4(b) identifies the criteria for acceptance of review by the Washington Supreme Court:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals' decision conflicts with the Washington Supreme Court's decision in *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 757 P.2d 933 (1988), and the ruling of the Court of Appeals, Division III, in *Does 1-9 v. CompCare, Inc.*, 52 Wn. App. 688, 763 P.2d 1237 (1988). The Court of Appeals also erred when it applied a constitutional analysis of due process

which has been rejected by the U.S. Supreme Court in *Walden v. Fiore*, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014).

In addition to the conflicts with established Washington law, the Court of Appeals' decision raises significant questions regarding due process under the constitutions of the State of Washington and the United States. The Court of Appeals' decision creates confusion as to how an Idaho officer, observing a potentially intoxicated driver of an Idaho vehicle in Idaho and then later on a road which straddles the Idaho/Washington border, is to structure his conduct such that he does not unintentionally subject himself to the long-arm jurisdiction of Washington courts. Confusion will also arise for any Washington police officer faced with the same situation in enforcing the laws on Washington roads which straddle and intertwine with the Idaho/Washington border, including North Idaho Road, where this stop occurred.

Furthermore, the jurisdictional issues which arise in this action have not previously been addressed by the courts of this State and are issues of substantial public interest. Indeed, Ashby has not located an analogous case in any other jurisdiction with similar facts.

The Court of Appeals misapplied the standards established by the Washington Supreme Court, issued a decision which conflicts with a prior

decision of the Division III Court of Appeals, and wrongly applied an analytical framework rejected by the U.S. Supreme Court. The issues raised by the facts of this case are of substantial importance in guiding law enforcement agencies in both Idaho and Washington in structuring their conduct when performing their duties in areas and roadways encompassing the state line so that they are not haled into a foreign court based on an unintentional incursion across an unmarked border. Because the issues of law in this case meet the requisite criteria of RAP 13.4(b), discretionary review should be granted.

C. The Court of Appeals Decision Conflicts with Prior Decisions of the Washington Supreme Court and the Court of Appeals.

In *Grange*, the Court of Appeals reversed the trial court's dismissal of the State of Idaho on jurisdictional grounds when it concluded that the injury occurred in Washington thereby satisfying the statutory requirement that a tortious act occur in Washington. *Grange*, 110 Wn.2d at 757. On appeal, Idaho did not challenge this conclusion but instead argued that the Court of Appeals erred in its constitutional analysis. *Grange*, 110 Wn.2d at 757.

In *Grange*, this Court detailed the process by which a court should analyze the due process test. Most importantly, this Court held that to meet

the due process element of “purposeful minimum contacts” with Washington, the Court of Appeals must engage in a defendant-focused inquiry. *Grange*, 110 Wn.2d at 760. This would require the court to determine whether Trooper Ashby “purposefully directed his activities towards this state [Washington]”, such that he “‘purposefully derive[d] benefit’ from [his] interstate activities.” *Grange*, 110 Wn.2d at 760. Nowhere did the Court of Appeals address what benefit Trooper Ashby may have purposefully derived from his stop of an Idaho vehicle on an Idaho/Washington border road to investigate a suspected impaired driver that he had initially encountered in Idaho.

Furthermore, the Court of Appeals overlooked the requirement of a substantial contact by Trooper Ashby with the State of Washington. *SeaHAVN, Ltd., v. Glitnir Bank*, 154 Wn. App. 550, 564, 226 P.3d 141 (2010). Instead the Court of Appeals relied on Pruczinski’s allegation that a tortious act occurred in Washington. *See* Opinion, pg. 7. This analysis utilized a process which satisfied only the statutory element of long-arm jurisdiction and failed to address the requisite due process element. As this Court held in *Oliver v. Am. Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647, 655 (1967):

The present problem is whether the jurisdiction over the person can constitutionally be acquired where, although the state of Washington is the place of tort, **the out-of-state actor has no other contacts with this state and particularly has done nothing 'purposeful' looking toward the projection of the consequences of his act into the territory of the state of Washington. The term 'purposeful' we use, of course, in the sense that the actor intended or at least could be charged with knowledge that his conduct might have consequences in another state.**

Oliver, 70 Wn.2d at 887 (emphasis added).

In addition, the Court of Appeals failed to apply case law which it previously adopted. The Division III Court of Appeals held in *CompCare*:

An objective test is used to determine jurisdiction: Should the defendant, based upon his contact with the forum state, reasonably anticipate being haled into court there? *Huebner v. Sales Promotion, Inc.*, 38 Wash.App. 66, 684 P.2d 752 (1984), review denied, 103 Wash.2d 1018, cert. denied, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985). A nonresident defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). **Stated another way, there must exist a substantial connection between the defendant and the forum state which comes about by an action of the defendant purposefully directed toward the forum state.** *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987).

...

The issue is whether the contacts were purposefully directed toward the forum and whether the defendant benefited thereby. *Grange Ins. Ass'n v. State, supra*.

CompCare, 52 Wn. App. at 696-698 (emphasis added).

This standard was upheld by the U.S. Supreme Court in *Walden*: “For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden*, 134 S. Ct. at 1121-22.

Had the Court of Appeals applied this test, it would have affirmed the trial court’s dismissal. In short, the Court of Appeals failed to utilize the appropriate analysis in reaching its decision to reverse the trial court.

D. The Court of Appeals Opinion Conflicts with Prior Opinions of the U. S. Supreme Court.

Rather than engaging in the analyses set forth in *Grange* and *CompCare*, the Court of Appeals relied upon Pruczinski’s allegations that the alleged tortious act occurred in Washington and that she suffered harm in Washington. Opinion, pg. 7. This approach was rejected by the U.S. Supreme Court in *Walden*.

In *Walden*, the U.S. Supreme Court held that a Covington, Georgia, city police officer did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Here, Ashby had even less knowledge than the Georgia officer. In fact, Ashby had no such knowledge – he pulled over an Idaho car

on North Idaho Road in an area of the road he believed to be in Idaho after encountering the vehicle on Interstate 90 in Idaho. Nothing in the record supports the allegation that Trooper Ashby had any other activity in Washington beyond his interaction with Pruczinski and, in fact, the critical events from which this traffic stop stem arose in Idaho when Trooper Ashby first observed an Idaho vehicle weaving in its lane on Interstate 90. “[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Walden*, 134 S. Ct. at 1122-23 (internal citations omitted).

In *Walden*, the U.S. Supreme Court stated: “The Court of Appeals reached a contrary conclusion by shifting the analytical focus from petitioner’s contacts with the forum to his contacts with respondents.” *Walden*, 134 S. Ct. at 1124. This “approach to the ‘minimum contacts’ analysis impermissibly allows a plaintiff’s contacts with the defendant and the forum to drive the jurisdictional analysis.” *Walden*, 134 S. Ct. at 1125. “We have consistently rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. *Walden*, 134 S. Ct. at 1122.

As the was the case in *Walden*, the Court of Appeals here also misapplied *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). The U.S. Supreme Court in *Walden* noted that when addressing the defendant's contacts:

Relying on *Calder*, respondents emphasize that they suffered the "injury" caused by petitioner's allegedly tortious conduct ... while they were residing in the forum. Brief for Respondents 14. **This emphasis is likewise misplaced.** As previously noted, *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.

Walden, 134 S.Ct. at 1125 (emphasis added).

Finally, the Court of Appeals impermissibly relied upon the alleged geographic locus of the alleged harm and failed to pay proper attention to whether Trooper Ashby intentionally reached out beyond the borders of Idaho to purposefully direct his actions at Washington or its residents and thus derived benefit therefrom. Clearly, nothing done by Trooper Ashby was directed at a resident of Washington. As articulated by the U.S. Supreme Court, "A defendant's contacts with the forum State may be intertwined with his interactions with the plaintiff, but that standing alone is an insufficient

basis for jurisdiction.” *Walden*, 134 S.Ct. at 1122-1123 citing *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980). “Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.” *Walden*, 134 S.Ct. at 1122-23, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (internal quotation marks omitted).

E. The Court of Appeals Failed to Follow the Appropriate Standard of Review in Determining that Washington Courts Had Subject Matter Jurisdiction.

Unlike the strict limitations involved in a Rule 12(b)(6) motion, a Rule 12(b)(1) motion is considered a “speaking motion” and can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion. “Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in doing so rely on affidavits or any other evidence properly before the court.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Thus, the existence of disputed material facts will not preclude a trial court from evaluating for itself the merits of jurisdictional claims. *Id.* In fact, a court may consider extrinsic evidence to determine

whether subject matter jurisdiction exists and may resolve factual disputes if necessary. *Thornhill Publishing Co. v. General Tel & Elect.*, 594 F.2d 730, 733 (9th Cir. 1979); *see also* FRCP 12(b)(1). More importantly, because a plaintiff bears the burden of establishing subject matter jurisdiction, no presumption of truthfulness attaches to the allegations of the complaint and a court must presume it lacks jurisdiction until the plaintiff establishes jurisdiction. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Where subject matter jurisdiction is lacking, dismissal under Rule 12(b)(1) is mandated. *Mendoza v. Neudorfer Eng'rs, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008).

Ashby was an Idaho state employee, specifically an Idaho State Police trooper, on duty on April 30, 2012. He stopped Pruczinski, an Idaho resident, who was driving an Idaho-licensed vehicle, on North Idaho Road, which straddles the Idaho/Washington border, to investigate her impaired driving. Regardless of how Pruczinski couches the complaint allegations, this is a civil dispute between residents of the State of Idaho arising from a traffic stop by an Idaho State Police trooper on a road straddling the Idaho/Washington border. Subject matter jurisdiction lies with the courts in Idaho.

F. Under the Principles of Comity Recognized in Washington, the Dismissal Should Have Been Affirmed.

In *Fernandez v. State, ex rel. Dep't of Highways*, 49 Wn. App. 28, 741 P.2d 1010 (1987), Division II of the Court of Appeals articulated circumstances under which comity should be applied. Viewing the principles enunciated in *Fernandez*, there exists a clear basis for the application of comity here where an Idaho resident is suing an Idaho State Police trooper, who stopped an Idaho-licensed vehicle, on a road which straddles the border, based in part on his observations of the Idaho vehicle when he first encountered it on Interstate 90 in Idaho.

The trial court did not address the issue of comity in its decision because its ruling was based on jurisdiction. The Court of Appeals did not address the application of comity in its decision and instead remanded that issue for consideration by the trial court. While it is not uncommon for an appellate court to remand on an issue not decided by the trial court, the Court of Appeals went one step further and in essence suggested that the trial court carefully consider comity because its application would leave Pruzinski without a remedy when it stated: "However, comity, being a discretionary doctrine, should not be exercised in such a way to leave the plaintiff without a remedy. We note that the facts giving rise to the complaint occurred more

than four years ago. We encourage the trial court to exercise its discretion in such a manner that would not cause Ms. Pruczinski's claim to be time barred." Opinion, pp. 13-14. In substance, the Court of Appeals directed the trial court on remand not to apply comity to this action.

In *Grange*, this Court also rejected Grange's argument that it had no alternative forum except Washington to pursue its remedy against Idaho. *Grange*, 110 Wn.2d at 764-765. However, this Court clearly stated in *Grange* that, "Nevertheless, the availability of an alternative forum, although important to analysis of the 'fair play and substantial justice' under the third due process element, is irrelevant to analysis of the first element. If the first element's requirement of purposeful minimum contacts is not met, then jurisdiction cannot be maintained here, regardless of the plaintiff's interest in obtaining relief." *Grange*, 110 Wn.2d at 765.

Pruczinski chose the Washington forum. Pruczinski had two years to file an action in Idaho where she and Trooper Ashby resided. Neither the Court of Appeals nor the trial court should ignore the sound principles behind comity merely because a party purposefully and knowingly chose an improper forum.

VI. CONCLUSION

After first encountering Pruczinski on Interstate 90 in Idaho, Trooper Ashby stopped a driver he suspected of driving under the influence on North Idaho Road, which straddles the border of Idaho and Washington. There is no mark on this road which indicates which portions of it are in Idaho and which are in Washington. It merely travels south straddling the state line. Trooper Ashby believed he was on a part of the road in Idaho when he stopped Pruczinski. He did not intentionally and expressly aim his activities at the State of Washington or its residents. Pruczinski was not even a resident of Washington. Trooper Ashby did not derive any benefit from his activities. As an employee of the Idaho State Police, an Idaho governmental agency, he was performing a service for the benefit of others who could be at risk because of a potentially impaired driver. The logical consequence of extending jurisdiction over an Idaho State Police trooper based on the happenstance of an unseeable, unmarked and unknowable state line on a road which straddles an invisible state line, engenders an unjust and oppressive extension of jurisdiction. In conclusion, Ashby respectfully submits that the Court of Appeals should have affirmed the trial court's decision.

DATED this 11th day of March, 2015.

JOHNSON LAW GROUP

By: 

PETER J. JOHNSON, WSBA # 6195

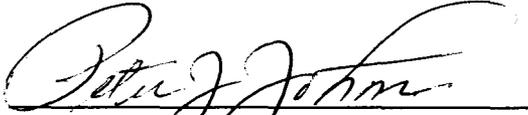
Attorney for Allen Ashby

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 11th day of March, 2015, a true and correct copy of the foregoing Petition for Review was caused to be served to the following by the method below:

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- U.S. Mail
- Hand Delivery
- Facsimile
- Federal Express
- Email



PETER J. JOHNSON

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APPENDIX A

FILED
FEBRUARY 12, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

KAY L. PRUCZINSKI, a single person,)	No. 31977-6-III
and RICKY BELL, a single person,)	
)	
Appellants,)	
)	
v.)	
)	PUBLISHED OPINION
ALLEN ASHBY and JENNIFER)	
ASHBY, husband and wife and the marital)	
community comprised thereof,)	
)	
Respondents.)	
)	

LAWRENCE-BERREY, J. — At issue is whether Washington State has personal jurisdiction and subject matter jurisdiction over an Idaho police officer who allegedly assaulted an Idaho resident just within this state’s border. The trial court ruled that Washington State lacked personal jurisdiction over Allen Ashby. Given the facts alleged, we hold that Washington has both personal jurisdiction and subject matter jurisdiction. Also at issue is whether Washington should decline jurisdiction on the basis of comity. We hold that the record is insufficient for us to decide this issue. In summary, we reverse the order of dismissal and remand this matter to the trial court for it to exercise its

discretion on whether to decline jurisdiction on the basis of comity.

FACTS

Kay Pruczinski, a resident of Idaho, and Ricky Bell filed a complaint in Spokane County Superior Court against Allen Ashby, an Idaho state trooper, alleging that she sustained injuries and property damage during his arrest of her in Washington. The complaint specifically alleged that Trooper Ashby followed Ms. Pruczinski from the Idaho border into Washington, stopped her, ordered her out of Mr. Bell's car, broke the driver's side window, and attempted to drag her through the window after she refused to exit the car. She also alleged that during the search incident to arrest, Trooper Ashby "offensively touch[ed]" her in a "menacing and sexual manner." Clerk's Papers (CP) at 25. The amended complaint included causes of action for injury to property, intentional and negligent infliction of emotion distress, assault, battery, unlawful imprisonment, and civil rights violations under chapter 49.60 RCW.

Trooper Ashby moved to dismiss the complaint under CR 12(b)(1) and (2), claiming that Washington lacked both subject matter and personal jurisdiction over him because the allegations were based on his acts as an Idaho state employee in the performance of his duties. Specific to subject matter jurisdiction, he argued, as he does on appeal, that Idaho district courts have exclusive jurisdiction over tort claims against

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the State of Idaho and its employees under Idaho law. As to personal jurisdiction, Trooper Ashby argued that even though the conduct at issue occurred in Washington, nothing in the complaint established that Trooper Ashby made any purposeful act toward the forum state, and that “[t]he basic equities of the facts of this case mandate Idaho as the most suitable forum.” CP at 56. Ms. Pruczinski countered that Washington has jurisdiction under our long-arm statute, RCW 4.28.185(1)(b), because the alleged tortious conduct occurred in this state.

As an initial matter, the trial court accepted the defense’s concession that the stop occurred in Washington, noting, “[f]or purposes of our hearing today, . . . the defense concedes . . . that the [tortious conduct] took place . . . in Washington.” Report of Proceedings (RP) at 9. However, the court granted Trooper Ashby’s motion to dismiss, finding it would violate due process to subject Trooper Ashby to Washington’s jurisdiction when one of the key elements of the case was whether Trooper Ashby was acting within the scope of his employment as an Idaho state employee. The court reasoned:

And because we do have Idaho residents, because we do have a question of Idaho law and not only Idaho law but Idaho administrative determinations as to what is the scope of duty of an Idaho State Trooper in the Idaho State Patrol, it would not be fair for Washington to exercise personal jurisdiction over this individual.

This is all state line type of circumstances that, quite frankly, absent this question of scope of employment, would be more likely to be assumable, jurisdictionally assumable, in either state.

However, because of this clear question that stands in the way of determining whether an individual in this set of circumstances can be held personally liable, Idaho is by far the fairer jurisdiction to answer those questions.

RP at 27-28. The court's order clarified its basis of dismissal was under CR 12(b)(2), lack of personal jurisdiction over Trooper Ashby.

Ms. Pruczinski appeals.

ANALYSIS

A. *Whether Washington has personal jurisdiction*

Ms. Pruczinski contends that the trial court erred in granting Trooper Ashby's motion to dismiss for lack of personal jurisdiction because the tortious conduct at issue occurred in this state. She also asserts that Washington's jurisdiction comports with due process under our long-arm statute because (1) the brunt of the harm caused by Trooper Ashby's acts occurred in Washington, and (2) Washington's assumption of jurisdiction does not violate traditional notions of fair play and substantial justice. A trial court's ruling on personal jurisdiction is a question of law we review de novo. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992) (quoting *MBM Fisheries, Inc., v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991)).

A court's exercise of personal jurisdiction must satisfy Washington's long-arm statute, RCW 4.28.185, and satisfy constitutionally mandated requirements of due process of law. *In re Marriage of Yocum*, 73 Wn. App. 699, 702, 870 P.2d 1033 (1994).

RCW 4.28.185 provides in pertinent part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

....

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

For purposes of determining jurisdiction under RCW 4.28.185(1)(b), the plaintiff need only show by prima facie evidence that the defendant committed a tort in the forum state; whether a tort was actually committed must be determined by a trier of fact. *Lewis*, 119 Wn.2d at 670 (quoting *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972)). Thus, for purposes of determining jurisdiction, we treat the allegations in the complaint as established. *Id.* (citing *MBM Fisheries*, 60 Wn. App. at 418.

To satisfy the requirements of due process, a Washington court may exercise personal jurisdiction over a nonresident only when the following elements are satisfied:

(1) the nonresident defendant must purposefully do some act in Washington, (2) the cause of action must arise from or be connected with that act, and (3) the assumption of

jurisdiction must not offend traditional notions of fair play and substantial justice.

Yocum, 73 Wn. App. at 703 (quoting *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963)).

1. *Purposeful act*

“The purposeful availment analysis in the tort context permits the exercise of jurisdiction when the claimant makes a prima facie showing that an out-of-state party’s intentional actions were expressly aimed at the forum state and caused harm in the forum state.” *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 891, 309 P.3d 555 (2013), *aff’d*, 180 Wn.2d 954, 331 P.3d 29 (2014). This requirement ensures that a defendant will not be “haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts.” *Gorden v. Lloyd Ward & Assocs., PC*, 180 Wn. App. 552, 568, 323 P.3d 1074 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Citing *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), Trooper Ashby argues his conduct was not purposefully aimed at Washington because he was “on patrol in Idaho on Idaho roads to ensure the safety of travelers in Idaho and to enforce Idaho laws.” Br. of Resp’ts at 26. However, *Calder* does not help him. There, the United States Supreme Court held that in evaluating whether a foreign act in a forum

state satisfies the purposeful act prong, a court should consider whether the “brunt of the harm” was suffered in the forum state. *Calder*, 465 U.S. at 789. Here, as detailed above, Washington was the focal point of Trooper Ashby’s intentional actions and of the harm suffered. He followed a car driven by Ms. Pruczinski from the Idaho border into Washington, stopped the car, allegedly broke the window, dragged her from the car, and searched her in an offensive manner. These intentional acts were sufficiently aimed at our state.

2. *Cause of action connected with act*

The second prong—that the plaintiff’s cause of action must arise out of the defendant’s act—is met. Our Supreme Court has held many times “that when an injury occurs in Washington, it is an inseparable part of the ‘tortious act’ and that act is deemed to have occurred in this state for purposes of the long-arm statute.” *Grange Ins. Ass’n v. State*, 110 Wn.2d 752, 757, 757 P.2d 933 (1988) (citing *Smith*, 81 Wn.2d at 722; *Bowen v. Bateman*, 76 Wn.2d 567, 575, 458 P.2d 269 (1969)). An injury “occurs” in Washington for purposes of the long-arm statute, “if the last event necessary to make the defendant liable for the alleged tort occurred in Washington.” *MBM Fisheries*, 60 Wn. App. at 425. Here, all of the acts giving rise to Ms. Pruczinski’s claim occurred in Washington.

3. *Fair play and substantial justice*

Finally, the third requirement is that the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. *Yocum*, 73 Wn. App. at 703 (quoting *Tyee*, 62 Wn.2d at 115-16). This requires consideration of the (1) quality, nature, and extent of Trooper Ashby's activities in Washington, (2) the convenience of the parties, (3) the benefits and protections of the laws of the forum state afforded the parties, and (4) the "basic equities" of the situation. *DiBernardo-Wallace v. Gullo*, 34 Wn. App. 362, 366, 661 P.2d 991 (1983); *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 301, 647 P.2d 514 (1982).

Trooper Ashby contends that his contact with Washington was "unintentional and did not constitute a fair warning that he was subjecting himself to Washington jurisdiction." Resp't's Br. at 29. He contends that the sole fact that he stopped Ms. Pruczinski in Washington does not establish that he was directing his actions at Washington. He also maintains that it is burdensome to defend the action in Washington when all of the parties are Idaho residents. His arguments are not persuasive. In view of the allegations that Trooper Ashby followed Ms. Pruczinski into Washington and committed the tortious acts here, it does not offend notions of fair play to subject him to the jurisdiction of this state. As Ms. Pruczinski points out, "no cause of action would

have arisen, no contact would have occurred, and no injury would have come to Ms. Pruczinski, had Mr. Ashby not followed her into Washington State.” Appellant’s Br. at 16. It should come as no surprise to Trooper Ashby that his conduct in our state could subject him to Washington jurisdiction.

As to the convenience of the parties, neither party would be required to litigate in a “distant state.” *Nixon v. Cohn*, 62 Wn.2d 987, 998, 385 P.2d 305 (1963). While we consider the inconvenience to the defendant, there is no constitutional requirement that the plaintiff must bear the hardship of litigating in a distant state. *Id.* The record shows that Trooper Ashby lives close to the Washington border in Coeur d’Alene, Idaho. Considering the totality of Trooper Ashby’s acts within the state and the “basic equities” of the situation, the assumption of Washington jurisdiction over Trooper Ashby does not offend traditional notions of fair play and substantial justice. We conclude that the trial court erred in dismissing Ms. Pruczinski’s complaint based on a lack of personal jurisdiction over Trooper Ashby.

B. *Whether Washington has subject matter jurisdiction*

Ms. Pruczinski contends that Washington Constitution article IV, section 6 confers upon Washington subject matter jurisdiction over her action. The question of subject matter jurisdiction is a question of law that we review de novo. *Lewis*, 119 Wn.2d at 669

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(quoting *MBM Fisheries*, 60 Wn. App. at 418).

In establishing subject matter jurisdiction, we focus on the “type of controversy.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 542-43, 886 P.2d 189 (1994). The type of controversy over which a court has subject matter jurisdiction refers to the category of controversies it has authority to decide. *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). ““If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.’” *Marley*, 125 Wn.2d at 539 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, B.Y.U. L. REV. 1, 28 (1988)). The superior courts of Washington State have subject matter jurisdiction over tort actions. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

Trooper Ashby cites Idaho code (I.C.) section 6-914 for the proposition that Idaho courts have exclusive jurisdiction over tort actions against Idaho state employees. Section 6 of the Idaho code concerns tort actions brought against Idaho and its employees. The cited section provides: “The district court shall have jurisdiction over any action brought under this act and such actions shall be governed by Idaho rules of civil procedure insofar as they are consistent with this act.” I.C. § 6-914. We first note that nothing in that

section vests Idaho courts with *exclusive* jurisdiction over tort actions against Idaho employees. We further note that the section does not assert exclusive jurisdiction over torts committed outside of Idaho by Idaho employees, nor do we construe that section as doing so. We, therefore, hold that Washington courts have subject matter jurisdiction over an alleged tort committed in Washington by an Idaho employee.

C. *Whether Washington should decline jurisdiction under the doctrine of comity*

Trooper Ashby, somewhat perfunctorily, raised the issue of comity at the trial court level and also here. In *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 160, 744 P.2d 1032, 750 P.2d 254 (1987), the court explained “the doctrine of comity is not a rule of law, but one of practice, convenience and expediency.” “[C]omity is properly exercised when the assumption of jurisdiction would not promote cooperative efforts between states.” *Glover v. Alaska*, 142 Wn. App. 442, 447, 174 P.3d 1246 (2008) (quoting *Carrigan v. California Horse Racing Bd.*, 60 Wn. App. 79, 85, 802 P.2d 813 (1990)). Whether to invoke comity is within the court’s discretion. *Haberman*, 109 Wn.2d at 161. Trooper Ashby argues, “Washington and Idaho have codified the intent of both states to cooperate in the enforcement of traffic and criminal laws by enacting laws allowing for mutual cooperation and enforcement. . . . Imposing Washington jurisdiction on an Idaho state employee does not foster the cooperative

endeavors between Washington and Idaho evidenced by the laws of both states and jurisdiction should be declined in this action.” Br. of Resp’ts at 36.

The trial court would be well within its discretion to decline jurisdiction if the evidence establishes that Trooper Ashby was operating within the parameters of this agreement and Washington law, i.e., that he had authority to arrest in Washington, and that his arrest of Ms. Pruczinski was lawful. Conversely, comity should not be extended when an out-of-state officer had no authority to arrest in Washington, or when the arrest was not lawful. We examine our statutes to determine whether Trooper Ashby was both qualified to arrest in Washington, and whether his arrest of Ms. Pruczinski was lawful.

Authority to arrest. The authority of an out-of-state police officer to arrest in Washington is defined by statutes, including the Washington mutual aid peace officer powers act of 1985, chapter 10.93 RCW, and the uniform act on fresh pursuit, chapter 10.89 RCW. RCW 10.93.020(5) defines a specially commissioned Washington peace officer as including a fully commissioned Idaho peace officer. RCW 10.93.090 authorizes a specially commissioned peace officer to make arrests in Washington, provided that such officer has successfully completed a course of basic training prescribed or approved by the Washington state criminal justice training commission. Here, there is no evidence whether Trooper Ashby was a fully commissioned peace

officer in Idaho or whether he had the requisite training.

Lawful arrest. Assuming that Trooper Ashby can demonstrate that he had authority to make an arrest in Washington, he must also demonstrate that his arrest of Ms. Pruczinski was lawful.

At common law an officer outside his or her jurisdiction did not acquire authority to arrest merely because probable cause existed.

RCW 10.31.100 . . . provides that officers may effect warrantless arrests when the officer has probable cause to believe the person has committed or is committing a felony, and may make warrantless arrests for misdemeanors committed in the officer's presence. It also provides that an officer having probable cause that a person has committed or is committing certain misdemeanors or gross misdemeanors has the authority to make a warrantless arrest. The statute lists other circumstances where warrantless arrests may be made, RCW 10.31.100(2), and also provides for warrantless arrests for certain violations of the traffic laws, RCW 10.31.100(3).

State v. Barker, 143 Wn.2d 915, 921-22, 25 P.3d 423 (2001) (footnote omitted).

Although Trooper Ashby attached the police report to his memorandum in support of his motion to dismiss, Ms. Pruczinski moved to strike the hearsay report, and the motion to strike was granted. Therefore, we are without a factual basis to determine whether Trooper Ashby's arrest of Ms. Pruczinski was lawful under Washington law.

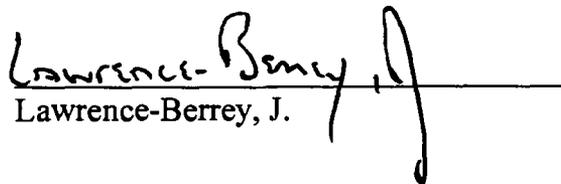
We do not foreclose Trooper Ashby from raising the issue of comity below with an appropriate record. However, comity, being a discretionary doctrine, should not be exercised in such a way to leave the plaintiff without a remedy. We note that the facts

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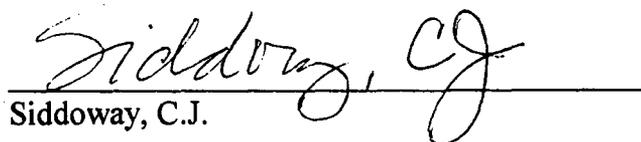
giving rise to the complaint occurred more than four years ago. We encourage the trial court to exercise its discretion in such a manner that would not cause Ms. Pruczinski's claim to be time barred.

CONCLUSION

We reverse the trial court's order of dismissal, and remand for further proceedings consistent with this opinion.


Lawrence-Berrey, J.

I CONCUR:


Siddoway, C.J.

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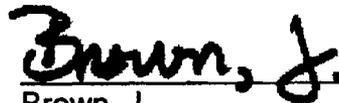
BROWN, J. (dissenting) — In my view, the trial court correctly declined to assert Washington jurisdiction. Idaho State Trooper and Idaho resident Allen Ashby, while performing his law enforcement duties for Idaho State in a marked Idaho patrol car, pursued Idaho residents Kay Pruczinski (the driver) and Ricky Bell (her passenger) driving in an Idaho licensed car from Idaho into Washington State to resolve his suspicions of Idaho impaired driving. When Trooper Ashby stopped Ms. Pruczinski just inside Washington, she obstructed his investigation and was injured while resisting arrest. Idaho State will inevitably be drawn into this dispute as Trooper Ashby's employer. The trial court correctly reasoned, "Idaho is by far the fairer jurisdiction to answer [any] question of Idaho law and Idaho administrative determinations as to what is the scope of duty of an Idaho State Trooper." Report of Proceedings (RP) at 27-28.

While Trooper Ashby purposefully acted in Washington, the critical chain of events started in Idaho; and, assuming jurisdiction in Washington offends traditional notions of fair play and substantial justice. *In re Marriage of Yocum*, 73 Wn. App. 699, 703, 870 P.2d 1033 (1994) (quoting *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963)). Trooper Ashby did not direct his actions at

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Washington State when he pursued Ms. Pruczinski into Washington to investigate her impaired driving in Idaho. The convenience of the parties and witnesses is certainly in Idaho. Finally, Washington, like Idaho, has an equal interest in protecting its citizens from impaired drivers. In the end, the trial court granted Trooper Ashby's CR 12(b)(2) dismissal motion for lack of personal jurisdiction, clearly doing so as a matter of comity and fundamental fairness.

I would affirm. Accordingly, I respectfully dissent.



Brown, J.