

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER,  COLORADO  1437 Bannock Street,  Denver, CO 80202</p> <hr/> <p><b>Plaintiff:</b></p> <p>STEVEN MOORE</p> <p>v.</p> <p><b>Defendants:</b></p> <p>TODD BERTUZZI, BRAD MAY, MARC CRAWFORD,  BRIAN BURKE, ORCA BAY HOCKEY LIMITED  PARTNERSHIP, and ORCA BAY HOCKEY, INC., dba THE  VANCOUVER CANUCKS HOCKEY CLUB</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p>Case Number:  05CV1172</p> <p>Courtroom: 19</p>
<p><b>ORDER</b></p>	

The matter is before the Court on the Motions to Dismiss filed by Defendants Todd Bertuzzi, Marc Crawford, Brian Burke, Orca Bay Hockey Limited Partnership, and Orca Bay Hockey, Inc., dba The Vancouver Canucks Hockey Club. The Court, having reviewed the motions, the responsive pleadings, the Court’s file, and the applicable legal authorities, and having entertained testimony and oral argument, finds, concludes, and orders as follows:

**BACKGROUND**

For most of the 2003-2004 season, Steven Moore was a professional hockey player for the Colorado Avalanche Hockey Club of the National Hockey League. On March 8, 2004, in the final regular season game between the Vancouver Canucks Hockey Club and the Colorado Avalanche, in Vancouver, British Columbia, Moore suffered a broken neck, loss of consciousness, a concussion and other injuries. Moore alleges that these injuries occurred when Todd Bertuzzi, “in a completely unprovoked and unwarranted fashion and away from the puck, intentionally struck [him] from behind with his right fist, rendering him unconscious” and then “intentionally jumped on [his] back and rode [him] down as he was falling, driving his face into the ice.” Amended Complaint, ¶ 23.

Moore alleges that the attack by Bertuzzi was a payback by the Vancouver Canucks for a collision between Moore and Markus Naslund, a Canucks hockey player,

on February 16, 2004, in Denver, Colorado. Naslund was injured in that collision and was required to leave the game for treatment. Amended Complaint, ¶¶ 12 and 14. Moore states that, immediately after the collision, but while they were engaged in the game, Brad May, another Canucks hockey player, pursued him and then hit him improperly. Amended Complaint, ¶ 13. Moore further contends that, “following that game, but before leaving Denver, Colorado,” Bertuzzi, May, Marc Crawford (the coach of the Canucks) and Brian Burke (the general manager of the Canucks) “entered into an unlawful plan and agreement to assault, batter and injure [him] at a future date, in retaliation” for Naslund’s injuries. Amended Complaint, ¶ 14.

On February 15, 2005, Moore filed his Complaint against Bertuzzi, May, Crawford, Burke, Orca Bay Hockey, Inc. (“Orca Bay”), and Orca Bay Hockey Limited Partnership (“Orca Bay Partnership”). In that complaint, he asserts claims for civil conspiracy, assault, battery, negligence, and outrageous conduct. He alleges that each of the defendants is subject, pursuant to the Colorado Long-Arm Statute, § 13-1-124, C.R.S. (2005), to the jurisdiction of the Court. Moore filed an Amended Complaint on April 20, 2005. The Amended Complaint contains the same allegations and claims for relief as those asserted in the original Complaint.<sup>1</sup>

Defendants Bertuzzi, Crawford, Burke, Orca Bay and Orca Bay Partnership have moved to dismiss the case for lack of personal jurisdiction.<sup>2</sup> In the alternative, they argue that the matter must be dismissed pursuant to the recently enacted Colorado Citizens’ Access to Colorado Courts Act, §13-20-1001, *et seq.*

### **RESIDENCY OF DEFENDANTS**

Todd Bertuzzi, Brad May, and Marc Crawford are citizens and residents of Canada. Brian Burke is an American and Canadian citizen who resides in Canada. Orca Bay is a company incorporated pursuant to the laws of Canada and maintains its registered office in Vancouver, British Columbia. Orca Bay is the general partner of Orca Bay Partnership, the Canadian partnership that owns the Vancouver Canucks. Orca Bay and Orca Bay Partnership have their principal places of business, including relevant documents, in British Columbia.

### **RESIDENCY OF STEVEN MOORE**

Steven Moore is a citizen of Canada. He was born and raised in Ontario, Canada, where he lived with his parents at 11 St. Andres Court, Thornhill, Ontario, Canada. In 1997, he was admitted to Harvard College in Cambridge, Massachusetts. While attending Harvard, in 1998, he was drafted by the Colorado Avalanche. Upon graduation, in the fall of 2001, Moore became a hockey player with the Hershey Bears, an affiliate of the Colorado Avalanche, and lived in Harrisburg, Pennsylvania.

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<sup>1</sup> In his Motion to File Amended Complaint, Moore represented that the Amended Complaint was filed to correct a typographical error in the original Complaint.

<sup>2</sup> Defendant Brad May was not served with the Amended Complaint until September 29, 2005, and thus has not joined in the motion.

During the 2003-2004 season, Moore became a hockey player with the Colorado Avalanche. In January, 2004, he moved from Harrisburg to Denver. In Denver, he first resided in a hotel and then signed a three-month lease at an apartment complex at 4400 South Monaco Street. Shortly after he sustained his injuries on March 8, 2004, he returned to Denver, cancelled his lease on Monaco Street, and moved into an apartment complex at 4550 Cherry Creek Drive South. He remained at the Cherry Creek Drive South complex until June, 2004. He left Colorado that summer.

Moore paid Colorado state income taxes for the years 2002, 2003, and 2004. He indicated on his 2003 and 2004 income tax returns that he was a full year resident. He was issued a temporary Colorado driver's license on April 16, 2004, which expired on October 1, 2004, the date of the expiration of his work visa. On April 20, 2004, Moore registered his automobile in Colorado. He also obtained automobile insurance in Colorado.

On September 15, 2004, the National Hockey League announced that it would not play until it had a new collective bargaining agreement with its players. Because of the lockout, after the summer of 2004, Moore did not return to Colorado. At the present time, he is an unrestricted free agent who is not under contract with any hockey team.

Since June, 2004, Moore has resided with his parents in Ontario, Canada or his girlfriend in Boston and New York City. On November 10, 2004, he renewed his Ontario driver's license. On that license, he indicated that his address was 11 S. Andres, Thornhill, Ontario, Canada. He has visited Colorado on only one occasion in 2005. That visit corresponded with the October 3, 2005 hearing in the instant case. Moreover, in his original Complaint, as required by C.R.C.P. 11, Moore represented that his address was 11 St. Andres Court, Thornhill, Ontario Canada.<sup>3</sup>

## PERSONAL JURISDICTION

A court's determination of whether it may exercise personal jurisdiction over a non-resident defendant is a question of law. In making that determination, the court must examine if it has statutory and constitutional authority to exercise such jurisdiction. *In re the Marriage of Malwitz*, 99 P.3d 56, 59 (Colo. 2004). Thus, a court must determine, first, whether the defendant's activities are sufficient to make jurisdiction statutorily appropriate and, second, whether the exercise of jurisdiction over the defendant comports with due process. *In re the Marriage of Malwitz*, 99 P.2d at 59.

The General Assembly adopted the Colorado long-arm statute, §13-1-124(1), C.R.S. (2005), "to extend the personal jurisdiction of Colorado courts to their maximum limits permissible under the United States and Colorado Constitutions." *Scheuer v. District Court*, 684 P.2d 249, 250 (Colo. 1984). "With regard to the kinds of acts described in the statute, [t]his interpretation obviates the need for statutory analysis

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<sup>3</sup> On April 20, 2005, when Moore filed the Amended Complaint, he omitted all statements regarding his address.

separate from the due process inquiry required by *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny.” *Keefe v. Kirschenbaum & Kirschenbaum*, 40 P.3d 1267, 1270 (Colo. 2002) (quoting *C.F.H. Enter., Inc. v. Heatcool*, 538 F.Supp. 774, 775 (D.Colo. 1982)). Thus, the “constitutional touchstone” is whether the defendant purposefully established “minimum contacts” within the forum state. *Keefe*, 40 P.3d at 1270-71.

A court may exercise authority over a nonresident defendant by virtue of either general or specific jurisdiction. *In re the Parental Responsibilities of H.Z.G.*, 77 P.3d 848, 851 (Colo. 2003). General jurisdiction exists when the activities of the defendant in the forum state are “continuous and systematic, of a general business nature.” *Keefe*, 40 P.3d at 1271. Specific jurisdiction exists when the “litigation results from alleged injuries that ‘arise out of or relate to’ activities that are significant and purposely directed by the defendant at residents of the forum [state].” *Keefe*, 40 P.3d at 1271 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). “Once it has been decided that a defendant purposefully established minimum contacts within the forum [s]tate, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

In seeking relief under the Colorado long-arm statute, a plaintiff must allege sufficient facts to support a reasonable inference that the nonresident defendant has engaged in conduct prescribed by the statute which subjects the nonresident defendant to the court’s personal jurisdiction. *Keefe*, 40 P.3d at 1272; *Texair Flyers, Inc. v. District Court*, 180 Colo. 432, 436, 506 P.2d 367, 369 (1973). “A prima facie showing of threshold jurisdiction is sufficient, and this may be determined from the allegations of the complaint.” *Texair Flyers*, 180 Colo. at 436, 506 P.2d at 369.

Here, Moore argues that he has met the threshold for specific jurisdiction by demonstrating sufficient facts that each of the defendants engaged in tortious conduct in Colorado.<sup>4</sup> First, he alleges that “defendants Bertuzzi, May, Crawford and Burke while

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<sup>4</sup> At the oral argument, Moore stated that he was not asserting that there were sufficient contacts to satisfy the “continuous and systematic” threshold for general jurisdiction. Indeed, many jurisdictions have held that participation in occasional athletic events in a state do not rise to the level of “continuous and systematic” contacts with that state to establish general jurisdiction. *See, e.g., Morel v. Estate of Davidson*, 148 F.Supp.2d 161 (D.R.I. 2001) (where basketball coach came to Rhode Island on occasion to advertise the team and recruit players for the team, plaintiff failed to meet the constitutionally required standard of “continuous and systematic” contacts); *Ross v. Creighton University*, 740 F.Supp. 1319, 1324 (N.D. Ill. 1990), *rev’d in part on other grounds*, 957 F.2d 410 (7th Cir. 1992) (“[p]articipating in a handful of athletic contests each year does not rise to the level of constructive presence in Illinois, because the contacts, though regular from year to year, are simply too few in number to be considered permanent and continuous”); *A.C.K. Sports v. Doug Wilson Enterprises, Inc.*, 661 F.Supp. 386 (S.D.N.Y. 1987) (professional hockey player’s appearance in New York on seventeen occasions pursuant to his player contract did not qualify as “doing business” in New York for purposes of conferring jurisdiction); *Collyard v. Washington Capitals*, 477 F.Supp. 1247 (D. Minn. 1979) (Plaintiff failed to demonstrate “continuous and systematic” contacts where Defendants’ only contacts with Minnesota constituted occasional scouting trips and hockey games);

in Colorado entered into an illegal and tortuous conspiracy to assault and batter him [.]” “that, while in Colorado, those same defendants performed acts in furtherance of their conspiracy,” that “these defendants’ tortious assault was imputed to the remaining non-individual defendants, and that these non-individual defendants directed the torts of negligence and outrageous conduct at him while in Colorado.” Plaintiff’s Combined Response to Defendants’ Motions to Dismiss, at page 16. He thus asserts that specific jurisdiction lies over the defendants based on this alleged conspiracy.

Some courts have recognized a conspiracy theory of personal jurisdiction. See *American Land Program, Inc. v. Bonaventura Uitgevers Matschappi, N.V.*, 710 F.2d 1449 (10th Cir. 1983); *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 131 N.M. 772, 42 P.3d 1221 (2001).<sup>5</sup> In those cases, the courts often conclude “that knowledge of and voluntary participation in a conspiracy with other individuals who have physical, in-state presence does not offend due process and allows the court to extend personal jurisdiction over a non-resident who may lack specific, individualized contacts with the forum state.” *Santa Fe Technologies, Inc.*, 131 N.M. at 784, 42 P.3d at 1233. However, in those cases, “something more has been shown than the mere presence of one of the conspirators in the forum state.” As the First Circuit noted:

It is true that some courts have recognized a “conspiracy theory of personal jurisdiction,” whereby jurisdiction can be obtained over out-of-state defendants who have conspired with in-state defendants. . . . But, to sustain jurisdiction over an out-of-state co-conspirator these courts require something more than the presence of a co-conspirator within the forum state, such as substantial acts performed there in furtherance of the conspiracy and of which the out-of-state co-conspirator was or should have been aware.

*Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980) (citations omitted).

Here, the gravamen of Moore’s conspiracy theory is that Bertuzzi, May, Crawford, Burke and others made threatening statements in Colorado. In a civil action, however, the elements of a conspiracy claim “require that the underlying acts be unlawful and create an independent cause of action.” *Double Oak Construction, L.L.C. v. Cornerstone Development Int’l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003). Indeed, “the essence of a civil conspiracy is not the conspiracy itself, but the actual damages resulting from the acts done in furtherance of the conspiracy.” *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1055 (Colo. 1995). The statements allegedly made by the defendants in Colorado do not rise to the level of tortious or unlawful acts and, thus, even if Colorado recognized a conspiracy theory of personal jurisdiction, they cannot form the basis for the Court to exercise specific jurisdiction over the defendants.

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<sup>5</sup> As the New Mexico Court of Appeals recognized in *Santa Fe Technologies, Inc.*, 131 N.M. at 784, 42 P.3d at 1233, at least three other states, California, Texas and Washington, have rejected this theory. The Colorado appellate courts have not addressed the issue of conspiracy as a basis for personal jurisdiction.

Second, Moore appears to assert that specific jurisdiction can be conferred on the defendants because the alleged tortious conduct caused injury in Colorado. The facts presented in the Amended Complaint indicate that the tortious act at issue occurred in Vancouver, British Columbia. Although Moore may have received medical treatment in Colorado and was unable to return to his employment in Colorado, “these facts are the results of the tortious act . . . and are not sufficient to confer jurisdiction on a Colorado court when not only the negligent conduct but also the injury occurred in another [country].” *McAvoy v. District Court*, 757 P.2d 633, 636 (Colo. 1988). *See also Amax Potash v. Trans-Resources*, 817 P.2d 598, 600 (Colo. App. 1991) (“the injury in the forum state must be direct, not consequential or remote” and thus, economic consequences are insufficient to confer jurisdiction on a Colorado court).

The Court concludes that Moore has failed to set forth sufficient facts to support a reasonable inference that any of the defendants engaged in conduct under the Colorado long-arm statute which subjects them to the personal jurisdiction of the Court. Accordingly, the Court grants Defendants’ motions to dismiss.

### **FORUM NON CONVENIENS**

Each of the defendants alternatively seeks, pursuant to the Colorado Citizens’ Access to Colorado Courts Act (“Act”), § 13-20-1001, *et seq.*, C.R.S. (2005), for dismissal of this action. Defendants argue that dismissal is mandated by the language of the Act. This Court agrees.

In 2004, upon finding that the Colorado courts were overworked and subject to overloaded dockets, that Colorado citizens constitutionally were guaranteed access to Colorado courts, and that cases filed by nonresidents of Colorado and having no meaningful relationship to Colorado were clogging the dockets of the courts, the General Assembly enacted the Colorado Citizens’ Access to Colorado Courts Act. § 13-20-1002(1). The General Assembly declared that the purpose of the Act was (1) to ensure Colorado citizens access to Colorado courts and (2) to avoid burdening Colorado courts with cases involving injuries suffered outside of Colorado that could be resolved elsewhere. § 13-20-1002(2).

Under the Act, a court is mandated to dismiss an action, without prejudice, if:

- (a) The claimant or claimants named in the motion are not residents of the state of Colorado;
- (b) An alternative forum exists;
- (c) The injury or damage alleged to have been suffered occurred outside of the state of Colorado;
- (d) A substantial portion of the witnesses and evidence is outside the state of Colorado; and
- (e) There is a significant possibility that Colorado law will not apply to some or all of the claims.

Section 13-20-1004(1). Applying these factors, the Court finds that, even if the action otherwise was filed properly in Colorado, dismissal without prejudice is mandated by that Act.

First, at the time of the filing of the original Complaint, Moore was not a resident<sup>6</sup> of the state of Colorado, but, as he stated in the Complaint, a resident of Thornhill, Ontario, Canada.<sup>7</sup> Indeed, as he candidly admitted in his testimony, in 2005, he only visited the state of Colorado in the days preceding the October 3, 2005 hearing.

Second, an alternative forum exists in British Columbia. Moore does not dispute that he will lose no legitimate claims or rights by filing this action in British Columbia. Further, each defendant has waived, through counsel, all defenses that the statute of limitation in British Columbia has expired.<sup>8</sup>

Third, as noted above, Moore's alleged injuries and damages occurred in Vancouver, British Columbia. Fourth, the vast majority of the witnesses to the alleged assault and battery, including all of the named parties, as well as relevant documents are located in Canada.

Fifth and finally, it is highly likely that Colorado law will not apply to most, if not all, of Moore's claims. In its resolution of choice of law issues in tort actions, Colorado follows the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws (1971). *Hawks v. Agri Sales, Inc.*, 60 P.3d 714, 715 (Colo. App. 2001). Under the most significant relationship test, courts must evaluate "the various contact, such as the place where the injury occurred, the residence of the parties, and the place where the parties, relationship is centered, as well as the policies of the interested states." *Hawk*, 60 P.3d at 714. Applying those factors, British Columbia bears the most significant relationship to Moore's claims.

## CONCLUSION

Accordingly, the Court grants the Motions to Dismiss filed by Defendants Bertuzzi, Crawford, Burke, Orca Bay, and Orca Bay Partnership.

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<sup>6</sup> "Resident" is defined as "a resident of the state of Colorado or a person who intends to return to Colorado despite establishing temporary residency elsewhere or despite a temporary absence from Colorado, without regard to the person's country or citizenship or national origin." §13-20-1003(3).

<sup>7</sup> Although the Act does not specifically provide that the operative date for determining residency is the date of filing, the other provisions of the Act clearly support that conclusion. For example, the Act was necessitated by "[c]ases filed by nonresidents of Colorado." §13-20-1002(1)(c). Additionally, the General Assembly, in its definition of "resident," noted that a person could not adopt a residence in Colorado in order to avoid application of the Act. §13-20-1003(3). Moreover, in applying the factors, the Court first has to find that the action was "otherwise properly filed" in Colorado.

<sup>8</sup> Section 13-20-1004(4)(b) provides that "the court shall grant a dismissal under this section only if each defendant waives all defenses that the statute of limitation in the alternative forum has expired."

DATED: October 12, 2005

BY THE COURT:

/s/ Shelley I. Gilman

Shelley I. Gilman  
District Court Judge

cc: e-file to all counsel of record