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Supreme Court No. 98979-6

(COA NO. 77888-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

CANDANCE NOLL, Individually and as Personal Representative
of the Estate of Donald Noll, Deceased,

Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Respondent-Petitioner,

American Biltrite, Inc., *et al.,*

Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Special Electric Company—Defendant below, Respondent in the Court of Appeals—petitions this Court to grant discretionary review of the decision reported at *Noll v. Special Electric Co.*, --Wn.App.--, 471 P.3d 247 (Div. 1 2020) (*Noll II (2020)*). Candance Noll—Plaintiff below, Appellant in the Court of Appeals—respectfully submits that said *Petition for Leave to Appeal* should be denied because none of the conditions in RAP 13.4(b) are met. Special does not contend that the appellate decision here conflicts with any other decision of the Court of Appeals or of this Court. It fails to show that this case involves any significant issue of public interest in need of clarification. Indeed, far from seeking to clarify unsettled law, Special’s *Petition* really asks this Court to change settled law by (1) imposing new procedures for how matters in which a successor judge participated should be reviewed and/or (2) adopting the previously and repeatedly rejected “targeting” standard for stream-of-commerce personal jurisdiction.

The appellate majority here acted well within the bounds of established law and procedure in reaching its decision. It reviewed the trial court’s findings of fact for substantial evidence, applied the more demanding “awareness / actual knowledge” standard to those facts, and correctly determined that Mrs. Noll proved that Special purposefully availed itself of the privileges and protections of Washington law. Special

does not raise as a basis for review (and has never asserted) that Judge Michael Scott's factual findings *as the trial court* are not supported by substantial evidence. In supplemental briefing to the Court of Appeals, Special even expressly conceded that those findings establish purposeful availment. *See* Noll Appx. 1, *SEC Suppl. Br.*, pp. 1–2.

Respectfully, there is no need to review this matter any further.

II. STATEMENT OF THE ISSUES

(1) Special asks this Court to overrule the line of decisions giving appellate courts the option to review findings of fact *de novo*, rather than for substantial evidence, where the record is entirely documentary. In the case at bar, the Court of Appeals acknowledged that such option existed but declined to exercise it. Any decision by this Court on that issue would have no effect on the outcome here and would be a mere advisory opinion.

(2) Special ostensibly seeks review of the proper method for reviewing a successor judge's factual findings. It actually wants this Court to adopt a curious method of review of Special's invention—which would involve rejecting successor Judge Scott's *findings* and then deferring to predecessor Judge Jeffrey Ramsdell's bare *decision* under some quasi-abuse-of-discretion standard of review. Adopting such unprecedented proposal would require multiple radical departures from settled law.

(3) Special’s only substantive point is its strained assertion that *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, -- U.S. --, 137 S.Ct. 1773 (2017) somehow revives “targeting” as the standard for proving purposeful availment in stream-of-commerce cases. *Bristol-Myers* was not a stream-of-commerce case, involved relatedness not purposeful availment, and does not use the term “targeting” anywhere. This Court has consistently rejected targeting as the standard including in its prior decision in this case.

III. STATEMENT OF THE CASE

On the first appeal, this Court returned the matter to the Superior Court for further consideration in light of *State v. LG Electronics, Inc.*, 186 Wn.2d 169 (2016) and because Plaintiff had not sufficiently “alleged” purposeful availment. *See Noll v. Amer. Biltrite Inc.*, 188 Wn.2d 402 (2017) (*Noll I*). It declined to “preclude the trial court from making its own finding of jurisdiction on remand depending on the allegations that plaintiff then raises.” *Id.* at 406. The parties agreed to have personal jurisdiction decided on the evidence rather than the pleadings. CP 1045. Following an evidentiary hearing, Judge Ramsdell again dismissed the case for lack of personal jurisdiction. CP 1704–05. Without making findings of fact or explaining his reasoning, Judge Ramsdell briefly stated: “The evidence presented by Plaintiff is insufficient to establish that Special to purposefully avail itself of the benefits and protections of the Washington market...” *Id.*

Mrs. Noll appealed again. CP 1706–10. “Because [it] ha[d] no reliable indication of the facts as the trial court understood them, [the Court of Appeals] remand[ed] this case for separate findings of fact,” directing “the trial court...to answer [specific] questions.” *Noll v. Special Electric Co.*, 9 Wn. App. 2d 317, 323–24, ¶¶ 10, 12, 13 (Div. 1 2019) (*Noll II (2019)*). The court rejected Mrs. Noll’s argument that, because there were no findings to review and the record was entirely documentary, it should determine the facts *de novo*. *See Id.* at 321, ¶ 7 (declining “act as initial fact-finders”). It also rejected Special’s invitation to speculate as to findings that Judge Ramsdell might have made or simply defer to his decision. *See id.* at 323, ¶ 12 (“[g]iven the record, we can only speculate as to what test the trial court decided to apply[;] [w]e will not infer facts based on speculation”). Neither party sought leave from this Court to appeal *Noll II (2019)*.

Because Judge Ramsdell had retired, the task of making findings on limited remand fell to his successor, Judge Scott. Special’s insistence that it did not know how Judge Scott intended to proceed until the September 2019 hearing is fiction. Judge Scott explained his understanding of his task at the July pre-hearing conference: “the [appellate] court has asked the trial court to act as the initial fact finder, which is what I intend to do based on the record that was submitted to Judge Ramsdell ... I’m not going to try to channel him ... I’m going to...make the factual findings that I think are

appropriate based on the record in front of me.” TR 24. Special understood well enough at that time to disagree with Judge Scott and threaten to “soon” file a motion with the Court of Appeals. TR 25–26.

Contrary to its claim that it acted “promptly” to seek intervention from the Court of Appeals (*PLA* at p. 7, n. 7), Special waited two months until after the hearing was held to do so. It then moved the Court of Appeals to either (1) compel appointing retired Judge Ramsdell to serve *pro tempore*, or (2) direct sitting Judge Scott to enter findings based on speculation as to what Judge Ramsdell might have done. Noll Appx. 2, *SEC Mot. for Clarif. of Remand Directive*. The Court of Appeals “denied [that motion] with prejudice” and directed the parties to submit supplemental briefs as to whether or not Judge Scott exceeded his authority. Noll Appx. 3, *Order of 10/11/2020*. Neither the majority nor the dissent concluded that Judge Scott did so or violated any that that court’s directives for the limited remand. *See Noll II (2020)*, 471 P.3d 247.

Judge Scott issued *Amended Draft Findings of Fact* on September 20, 2019. CP 1947–63. Special did not object that any finding or the findings as a whole were not supported by substantial evidence. CP 1971–75. Its only objection was that the court’s findings “undermine[d] Judge Ramsdell’s decision.” CP 1971. Judge Scott issued his final factual findings on October 7. CP 1978–95. Special subsequently conceded in its

supplemental brief to the Court of Appeals that those findings establish purposeful availment. Noll Appx. 1, pp. 1–2 (Judge Scott’s findings, if accepted, “compel the conclusion that [Mrs.] Noll did establish purposeful availment”).

Judge Scott did not, as Special inaccurately contends, “attack the reasonableness of Judge Ramsdell’s evaluation of the evidence.” *PLA* at p. 7. Indeed, Special’s accusations in that regard were so persistent that Judge Scott was compelled to respond in footnote 7 of his *Findings*:

Contrary to Special’s insinuations, the court has great respect for Judge Ramsdell and is proud to follow in his footsteps as a judge in Department 9... Not that Judge Ramsdell was careless—rather, as persuasive as Special’s so-called “deconstruction”...may have seemed at oral argument, it does not withstand scrutiny.

CP 1994.

Likewise, Judge Scott did not “conclude[] that the record could reasonably be read only one way.” *PLA* at p. 7. Indeed, he made clear that he could not approach the record in such manner because he was acting as a neutral fact finder, not ruling on a summary judgment. TR 33.¹ What Judge Scott addresses in ¶ 40 of the court’s *Findings* as “strained, not supported by any evidence, and unreasonable” are not implied findings by

¹ Because the matter before him was “not a summary judgment motion [but] an evidentiary hearing,” Judge Scott rejected Mrs. Noll’s position that he was to draw inferences in her favor. TR 33 (“my inferences, I believe, need to be neutral and reasonable...I’m taking a neutral and balanced view of the record”).

Judge Ramsdell, but Special’s assertion that CertainTeed’s ‘West Coast’ market was limited to California and Arizona:

Special takes a particularly strong exception to this finding...However, Special has not cited to *any* evidence in the record to support its vociferous contention that CertainTeed’s “West Coast” or “West” market was limited to California and Arizona. Instead, Special repeatedly cites to arguments of counsel... [which] are not evidence.

CP 1992.

IV. REASONS THAT REVIEW SHOULD BE DENIED

Atypical circumstances do not lend themselves to providing generally applicable guidance. The parties, the majority and the dissent agree that this case involves some unusual circumstances, which weighs against further review by this Court. That is especially true where, as here, Special seeks to change the law, not clarify it.

There was no single “required way” to handle the procedural situation here. There were options, and the path chosen by the Court of Appeals falls within allowable choices under established law. That court certainly had the option to direct the limited remand as it did. *See Garcia v. Henley*, 190 Wn.2d 539 (2018). Alternatively, it could have vacated Judge Ramsdell’s inadequately explained ruling and remanded for complete reconsideration. *See Old Windmill Ranch v. Smotherman*, 69 Wn.2d 383, 390–91 (1966). It might have reviewed the evidence *de novo* in the first place, although it

elected to not do so. At every step, the Court of Appeals employed the accepted standards and methods of review consistent with what was (or was not) before it. What that court could not do—and did not do—was speculate as to nonexistent factual findings by Judge Ramsdell or just defer to his unexplained, non-discretionary decision as Special would have it.

A. This Case Does Not Present the Issue of Whether an Appellate Court May Review De Novo a Discretionary Decision or Findings of Fact That were Made on a Documentary Record without Live Testimony

The issue of whether or not a paper-only record gives appellate courts the option to review findings of fact *de novo* is not presented here. The panel did not review any findings of fact *de novo* on that (or any other) basis. Mrs. Noll initially sought *de novo* review because there were no findings to review and the record was only documentary. The Court of Appeals, although acknowledging the option to do so, declined to act as the initial fact-finder. *See Noll II (2019)*, 9 Wn. App. 2d at 321, ¶ 7. Instead, it ordered the limited remand for the trial court to make findings. *See id.* at 323, ¶ 10. Following remand, the panel majority reviewed Judge Scott’s findings for substantial evidence, not *de novo*. *Noll II (2020)*, 417 P.3d at 255, ¶ 19.

This Court should not undertake to review the status of an option to substantial-evidence review that the Court of Appeals did not exercise. Mrs. Noll’s initial request for *de novo* review was based as much on the lack of any findings to be reviewed as it was upon the documentary nature of the

record. Thus, the issue for which Special seeks leave to appeal—whether a paper-only record by itself allows for *de novo* review—was neither relied-upon nor even clearly presented below. Whatever decision this Court might make would not change the outcome here. Abrogating the option to review facts *de novo* on a paper-only record would make no difference because the Court of Appeals did not do so. Upholding the viability of that exception would make no difference because (as it has been applied) the exception is optional not mandatory. This Court does “not give advisory opinions” simply to comment in the abstract on an appellate panel’s statement that it had the option to do something that it elected not to do. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn.2d 800, 805 (1961).

The question of how discretionary decisions may or must be reviewed on appeal is not and never has been presented in this case because the existence of personal jurisdiction is not a matter of discretion.² *See LG Electronics*, 186 Wn.2d at 176. Abuse-of-discretion (which applies to discretionary *decisions*) is not identical to substantial-evidence review (which applies to *findings of fact*). *See, e.g., Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir. 2001). The Court of Appeals consistently

² Conspicuously absent from Special’s string cite of cases involving abuse-of-discretion review in its Appx. B is any case involving personal jurisdiction.

and properly rejected Special’s insistence that it actually or tacitly review Judge Ramsdell’s decision merely for abuse of discretion.

B. The Court of Appeals Followed Settled Law When It Reviewed Judge Scott’s Findings for Substantial Evidence Then Reviewed the Decision on Personal Jurisdiction *De Novo*

Special wants this Court to adopt an unprecedented hybrid review procedure for situation where “a [so-called] replacement judge³ assigned on remand presumes to reweigh the evidence and find that no reasonable judge could conclude as the original judge did.” *PLA* at p. 9. The procedure proposed by Special would require “the reviewing court [to] reweigh the evidence de novo to determine if the record reasonably supports the original judge’s conclusion.” *Id.*

First, the premise as stated by Special is false. Judge Scott did not “presume” to do anything other than fulfill the task assigned to the *trial court* by the Court of Appeals—namely, find facts. The Court of Appeals expressly directed “the trial court [not a particular judge] to make findings on the [listed] issues in order to answer the questions presented.” *Noll II* (2019), 9 Wn. App. 2d at 323, ¶13. It did not limit such answers to only those ‘supporting’ the decision as Special inaccurately contends. *Id.* The

³ With all due respect to Judge Verellen, who uses the same term, referring to Judge Scott as a “replacement” is inaccurate and demeaning of the office. He was Judge Ramsdell’s successor in office just as Justices Montoya-Lewis and Whitener are the successors to Justices Fairhurst and Wiggins, not merely their replacements.

trial court, in the person of Judge Scott did exactly that—answered the questions posed by the appellate court and provided detailed findings in support of those answers based on the record. TR 32 (“The Court of Appeals has directed me to answer certain questions ... and I believe to show my work...there are no preordained answers”).

If Judge Scott had strayed from the assigned task, the tribunal that made the assignment would be in the best position to make that determination. Neither the majority nor the dissent found that Judge Scott varied from what that court expected the trial court to do on the limited remand. Special did not seek review of the limited remand decision and does not now assert that the Court of Appeals erred as to the scope of the assigned task. Special could have sought clarification from the Court of Appeals as to the effects of Judge Ramsdell’s retirement in July 2019 but waited until after the September hearing to do so (which was denied). Noll Appx. 2 & 3.

As a matter of long-settled law, the appellate standard of review does not change simply because some determinations were made by a successor judge. “Trial court” means the office, not the individual sitting on the bench at any given point in time. *See Shephard v. Gove*, 26 Wn. 452, 454 (1901) (“succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance”). In

Carkonen v. Columbia & P.S.R. Co., this Court expressly rejected the argument that the decision at issue was not entitled to the usual review because it had been made by a successor judge. *See* 102 Wn. 11, 13 (1918) (“judicial powers are vested in the court rather than the individual exercising functions as a judge”) (*citing Shephard*, 26 Wn. 452); *see also Teter v. Dick*, 174 Wn.2d 207, 216, n. 7 (2012) (rejecting the defendant’s argument that it “was not within [the successor judge’s] purview” to effectively “reverse” his predecessor’s decision).

Judge Scott did not do what Special accuses him of having done—determine whether there was or was not a singularly reasonable view of the evidence. TR 33 (“I’m taking a neutral and balanced view of the record”). Nor could he have done what Special advocated—make only supportive findings based on guessing what Judge Ramsdell was thinking or might have done. *See DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933 (1999) (successor judge prohibited from making findings based upon what the predecessor might have—or, even, likely would have—done).

Second, the review procedure proposed by Special—*de novo* review of the evidence to determine whether a non-discretionary decision is reasonable—is contradictory. “*De novo* review [means] review without deference.” *Zervos*, 252 F.3d at 168. Yet, what Special really wants is deference, albeit to Judge Ramsdell’s conclusions not Judge Scott’s factual

findings. In that regard, Special’s proposed methodology stands the review process on its head. The proper method of review, when a decision on personal jurisdiction is made on a CR 12(d) hearing, is substantial evidence review of factual findings and *de novo* review of the legal conclusions—exactly what Court of Appeals majority did here and the opposite of what Special proposes. *See Noll II (2020)*, 417 P.3d at 251, ¶ 8 (“[w]e review factual findings following a preliminary hearing for substantial evidence and questions of law *de novo*”).⁴

Special’s attempts to align its proposal with the dissent are unavailing. Although Mrs. Noll disagrees with his results, Judge Verellen did undertake true *de novo* review of both the facts and conclusions, showing no deference to either Judge Scott or Judge Ramsdell. Tellingly, the line of cases, which he cites as authority, is the precedent that Special would have this Court abrogate per its first reason for review. *See Noll II (2020)*, 417 P.3d at 255, ¶ 20, n. 23; 417 P.3d at 256, ¶ 22 (Verellen, J. *dissenting*) (“complexity of specific jurisdiction jurisprudence does not compel deference to factual findings by a judicial officer with no greater insight into the undisputed

⁴ Special accuses the majority of “blindly” deferring to Judge Scott’s findings, which is false. Substantial-evidence review, although deferential, is not “blind.” Blind deference would be deferring to Judge Ramsdell’s nonexistent findings.

evidence than we have”). Judge Verellen is unclear as to whether or not he would as *require de novo* review or simply prefers that option here.

The most obvious flaw in Special’s arguments is that it is functionally impossible to determine whether Judge Ramsdell’s ultimate holding was reasonable or not because, in addition to not making findings, he omitted to state what test he applied or to explain his reasoning. *See Noll II (2020)*, 417 P.3d at 249, ¶ 1 (“[w]e ordered remand because neither the trial court’s reasoning nor the underlying facts supporting its decision that it lacked personal jurisdiction over Special Company could be discerned from the original record on appeal”). Judge Ramsdell might have found some, most or even all of the facts in accordance with Plaintiff’s view but applied the wrong test. He might have believed that the lack of a ‘smoking-gun’ piece of evidence was fatal to proving jurisdiction. No one knows.

An evidentiary hearing on personal jurisdiction presents a mixed question of law and fact calling for a non-discretionary decision. As the Court of Appeals has observed, without trial-court findings and an explanation of its reasoning, a reviewing court can review everything *de novo*, vacate the decision and fully remand, or remand for findings. That court chose the last option. There is no precedent for just deferring to the conclusion or reviewing the matter for abuse of discretion.

Peoples Bank & Trust Co. v. Carlson, 195 Wn. 285 (1938), the only authority cited by Special in support of its novel appellate review theories, is not supportive nor even on point. That decision does not hold that a reviewing court assumes that a trial court properly discharged its duties in the absence of factual findings. Rather, it held that “[i]n the absence of findings of fact *and a statement of facts* [i.e. the equivalent of the record today], the judgment of the trial court is presumed to be correct.” *Id.* at 287 (*emphasis added*). Basically, that appellant effectively waived review by “fail[ing] to bring the full record to [the] court.” *Id.*⁵

C. Targeting Is Not The Standard

The Court of Appeals applied the highest possibly-accepted standard, awareness / actual knowledge.⁶ There is no reason for this Court to grant leave to appeal to simply confirm again that targeting is *not* the standard.

Special’s reliance on *Bristol-Myers* is misplaced. As this Court previously observed, *Bristol-Myers* is about “relatedness”—an element among the jurisdictional contacts that ties together the defendant, the forum, and the claim. *See Noll I*, 188 Wn.2d at 412, ¶13. Targeting would go to

⁵ Additionally, it is not clear from the very brief opinion what issue was under review in *Carlson* or exactly what type of proceeding had been conducted below.

⁶ Even if that standard is higher than what this Court might consider, further review is still unwarranted. Mrs. Noll is not aggrieved because she was able to meet it. Special seeks to raise the standard further, not lower it.

purposeful availment, not relatedness. Special does not seek review on relatedness nor has it even ever challenged relatedness here. *Bristol-Myers* was not a stream-of-commerce case and does not mention “targeting.”

The argument that *Bristol-Myers* narrows specific jurisdiction in new ways has been consistently rejected by courts considering such point, including the federal court for the Western District of Washington. *See Thomas v. Kellogg Co.*, 2017 WL 5256634, *1 (W.D. Wash. Oct. 17, 2017); *see also Lindsley v. American Honda Motor Co.*, 2017 WL 3217140, *2 (E.D. Pa., July 28, 2017) (*Bristol-Myers* does not restrict forum residents, injured in forum, from asserting stream-of-commerce jurisdiction); *Tarver v. Ford Motor Co.*, 2017 WL 3527710, *3 (W.D. Okla. Aug. 16, 2017); *Thomas v. Ford Motor Co.*, 289 F.Supp.3d 941, 946 (E.D. Wis. 2017).

Special tries to extrapolate *Bristol-Myers*’ discussion of federalism into adopting “targeting” as the test for purposeful availment in stream-of-commerce cases (notwithstanding *Bristol-Myers* did not involve stream of commerce and does not mention “targeting”). Predictably, the Court in *Bristol-Myers* discusses federalism in the context of relatedness not purposeful availment. *See* 137 S.Ct. at 1780–81 (“there must be ‘an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation’”) (*internal quotation omitted*).

Basically—as the *Bristol-Myers* Court actually held—federalism forbids a State from asserting personal jurisdiction where *no occurrence whatsoever* relevant to the controversy occurred within its territorial limits. Mr. Noll was exposed to Special’s asbestos within Washington’s territorial limits.

No court, including in the three cases cited by Special, has “interpreted [*Bristol-Myers*] as requiring targeting to satisfy purposeful availment.” *PLA* at p. 19. The cited cases do reference *Bristol-Myers*, but only as to relatedness and in no manner connected to targeting. All three cases also discuss targeting in some manner—separate from *Bristol-Myers* and not in any way that is applicable or persuasive here.

Fidrych v. Marriott International, Inc., 952 F.3d 124 (4th Cir. 2020) and *XMission, L.C. v. Fluent LLC*, 955 F.3d 833 (10th Cir. 2020) involved internet marketing, which has become a niche area of personal jurisdiction law. The plaintiff in *Fidrych* was injured at a hotel in Italy but tried to file suit in South Carolina because she had made her reservations on-line from her home. Mr. Noll was injured here in Washington. The court in *XMission*, simply stated that “[p]urposeful direction *may* ... be established ... when an out-of-state defendant’s intentional conduct targets and has substantial harmful effects in the forum state.” 955 F.3d at 841 (*emphasis added*) (*quoting Old Republic Ins. Co. v. Continental Motors, Inc.*, 877 F.3d 895, 907 (10th Cir. 2017)). It did not hold that targeting is required.

In *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760 (3rd Cir. 2018), plaintiffs sued the manufacturer and its parent company for a defective hip replacement device. That court inaccurately states that a plurality of the U.S. Supreme Court “has twice rejected the stream-of-commerce theory.” 885 F.3d at 780 (referring to *J. McIntyre* and *Asahi*,⁷ which, more precisely, merely held that stream-of-commerce had not been established rather than rejecting the doctrine). Special is not seeking to abrogate stream-of-commerce jurisdiction, and a case that does not recognize the doctrine provides questionable precedent for what that standard should be. *Shuker* is of further limited precedential value because it provides no information as to relevant facts. Other than a bare statement that the defendant “sold its products through [a subsidiary] in Pennsylvania,” no facts are provided nor are they contained in the underlying district court orders. 885 F.3d at 780.

Special makes the conclusory assertion, in one of its excessive footnotes, that a decision in two cases pending before the U.S. Supreme Court would be dispositive here. See PLA at p. 20, n. 21 (referencing *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, cert. granted 2020 WL 254155 (U.S. S.Ct. 1/17/2020) and *Ford Motor Co. v. Bandemer*, cert. granted 2020 WL 254152 (U.S. S.Ct. 1/17/2020)). That assertion is false.

⁷ *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

Both of those matters involved vehicles that were newly purchased years earlier in States other than where the accidents occurred and the suits were filed—i.e. *used* vehicles brought into the forums after having exited the stream of commerce well prior to the injury-causing incidents. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 443 P.3d 407, 411 (Mont. 2019) (2015 accident; 1996 vehicle); *Bandemer, Pet. for Writ of Cert.*, 2019 WL 4569599, **4-5 (2015 accident; 1994 vehicle driven by fifth owner).

Those cases involve whether the aftermarket for used goods is part of the stream of commerce for purposes of the relatedness requirement. The case at bar involves whether an ingredient / component supplier, whose material undeniably came to Washington as part of the stream of commerce, was sufficiently aware of the manufacturer's market here to meet the purposeful availment requirement. Neither of the pending *Ford* matters involves targeting, which is the point on which Special seeks leave to appeal.

After *J. McIntyre* (the only U.S. Supreme Court decision discussing targeting), Washington courts have consistently held that targeting is not the standard for purposeful availment in stream-of-commerce cases—including this Court in *LG Electronics* and *Noll I*. Special has failed to show any past or pending change in the law that would justify revisiting that issue now.

///

V. CONCLUSION

For the reasons herein stated, Respondent (in this Court) Candance Noll respectfully requests that Petitioner Special Electric Company's *Petition for Leave to Appeal* be denied.

DATED this 18th day of November 2020.

Respectfully submitted,

WEINSTEIN CAGGIANO PLLC

Brian D. Weinstein, WSBA #24497
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(Plaintiff-Appellant below)*

Noll Appendix 1

NO. 77888-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CANDANCE NOLL, individually and as Personal
Representative of the Estate of Donald Noll, Deceased,

Plaintiff-Appellant,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Defendant-Respondent,

and

AMERICAN BILTRITE, INC., *et al.*,

Defendants.

**SPECIAL ELECTRIC COMPANY, INC.'S SUPPLEMENTAL
BRIEF FOLLOWING LIMITED REMAND PROCEEDING**

Michael B. King, WSBA No. 14405
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Electric Company, Inc.*

I. INTRODUCTION

This Court's remand directives to the trial court could not have been clearer:

Because we cannot discern the reasoning or underlying facts supporting the decision to deny personal jurisdiction against Special Electric, we remand this case for findings of fact. *Noll v. Special Elec. Co., Inc.*, 9 Wn. App. 2d 317, 320, 444 P.3d 33 (2019).

Decisions from the highest courts in the land contain significant disagreement as to how courts should test evidence of personal jurisdiction. Given the record, we can only speculate as to what test the trial court decided to apply. *Id.* at 323.

Because we have no reliable indication of the facts as the trial court understood them, we remand this case for separate findings of fact. *Id.*

[W]e direct the trial court to make findings on the following issues in order to answer the questions presented in *LG Electronics* and *Noll*, as well as any other findings of fact that support its decision[.] *Id.*

This court will retain jurisdiction over the appeal. *Id.* at 324.

Despite these clear, specific remand directives, the trial court (J. Scott) erroneously claimed a right to review anew the evidentiary record with no deference to Judge Ramsdell's decision.¹ Judge Ramsdell concluded that Candance Noll had failed to establish purposeful availment. Judge Scott adopted virtually verbatim Noll's proposed findings; if accepted, those findings would compel the conclusion that

¹ This Court plainly contemplated that the "trial court" that would carry out these directives would be Judge Ramsdell, *id.* at 323, who although retired had a constitutional right to re-enter the case as a pro tem judge. CONST. art. IV, § 7. For purposes of the analysis in this brief only, Special Electric accepts that Judge Ramsdell was unavailable to re-enter the case.

Noll did establish purposeful availment.² Judge Scott also made clear that, in his view, no reasonable judge could find facts supporting Judge Ramsdell's legal conclusion.

Judge Scott exceeded his remand charge. So long as a reasonable reading of the evidence could factually support Judge Ramsdell's legal conclusion of no purposeful availment, Judge Scott should have entered findings in accord with that reading. To be sure, a successor judge is not obligated to make findings that the successor judge concludes are not supported by a reasonable reading of the evidence. But the issue whether the evidence before a trial court can reasonably support only one of two competing factual readings is a question of law this Court decides *de novo*. This Court owes no deference to Judge Scott's conclusion that the evidence can reasonably be read only to support a conclusion that Special Electric purposefully availed itself of the benefits of doing business in Washington, when it sold asbestos to CertainTeed in California.

The dispositive question now is whether Judge Scott erred as a matter of law when he concluded that the evidence could only be read to support findings that establish purposeful availment. Judge Scott did err. Judge Ramsdell could have found, from a reasonable reading of the evidence, that Special Electric was not aware that CertainTeed was selling asbestos-cement pipe from its Santa Clara plant into Washington, and also that Special Electric was not targeting the Washington asbestos-cement-

² To illustrate, Special Electric prepared a table comparing and quoting Noll's proposed findings with Judge Scott's findings. That table is attached as Appendix A to this supplemental brief.


Judge Ramsdell could reasonably have concluded that Noll failed to establish purposeful availment under the awareness test. And her having failed to satisfy that test, there can be no reasonable basis for concluding that Noll somehow satisfied the more demanding targeting test.

IV. CONCLUSION

This Court should affirm Judge Ramsdell's decision concluding that Noll's evidence was insufficient to establish purposeful availment for specific jurisdiction, and uphold the dismissal of Noll's case against Special Electric for lack of specific jurisdiction.

Respectfully submitted: November 8, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 
Michael B. King, WSBA No. 14405
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Attorneys for Special Electric Company, Inc.

cement pipe "without any" crocidolite, and some of CertainTeed's asbestos-cement pipes did not even contain crocidolite. CP 307, 1812. As for chrysotile asbestos, Special Electric supplied only 13, 20, and 15 percent of the total chrysotile asbestos to that plant during Mr. Noll's exposure years. CP 292-96, 359, 1747-48.

Noll Appendix 2

NO. 77888-9

DIVISION ONE, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CANDANCE NOLL, individually and as Personal
Representative of the Estate of Donald Noll, Deceased,

Plaintiff-Appellant,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Defendant-Respondent,

and,

AMERICAN BILTRITE, INC., *et al.*,

Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Hon. Jeffrey Ramsdell

**RESPONDENT SPECIAL ELECTRIC COMPANY, INC.'S
MOTION FOR CLARIFICATION OF REMAND DIRECTIVE
UNDER RAP 8.3 AND RAP 7.3**

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RESPONDENT SPECIAL ELECTRIC
COMPANY, INC.'S MOTION FOR
CLARIFICATION OF REMAND
DIRECTIVE UNDER RAP 8.3 and RAP
7.3 – 1

I. IDENTITY OF MOVING PARTY

Respondent Special Electric Company, Inc. requests the relief set forth in Section II below.

II. STATEMENT OF RELIEF REQUESTED

Special Electric requests that this Court clarify its direction for the ongoing remand, so that the trial judge to whom the remand proceeding has been assigned (Hon. Michael Scott) does not presume to engage in independent fact-finding but instead adheres to providing this Court with findings that explain and support the December 2017 conclusion of Judge Ramsdell that Noll failed to prove Special Electric purposefully availed itself of the benefits of doing business in Washington.

Special Electric further requests that this Court consider whether, to assure compliance with its remand directive, it should direct that the assignment of the remand matter to Judge Scott be withdrawn and that this Court should request that Judge Ramsdell accept a *pro tem* assignment in order to complete the remand process by making the requested findings and conclusions, including the answers to the five questions posed by this Court.

III. STATEMENT OF MATERIAL FACTS

Special Electric brings this motion due to an unusual series of procedural events that culminated last Friday (September 6) during a hearing on the parties' proposed findings of fact and conclusions of law.

- A. After this Court’s remand, the King County Chief Civil Judge refused to appoint Judge Jeffrey Ramsdell to conduct the remand proceeding, instead assigning the matter to Judge Michael Scott.**

This Court’s published decision issued on July 1, 2019, did not vacate King County Superior Court Judge Jeffrey Ramsdell’s December 2017 decision and did not remand the case for further proceedings. This Court expressly retained plenary jurisdiction over the case, and specifically over Judge Ramsdell’s decision—again dismissing Noll’s case against Special Electric for lack of personal jurisdiction. *Slip op.* at 7.

On remand from the Supreme Court, Judge Ramsdell had conducted an evidentiary hearing under CR 12(d) and concluded that Noll had failed to meet her burden on the merits to prove Special Electric had purposefully availed itself of the benefits of doing business in Washington when Special sold asbestos to CertainTeed’s Santa Clara asbestos-cement-pipe plant, some of which ended up in asbestos-cement pipe sold from that plant into

Washington. But Judge Ramsdell did not enter findings of fact and conclusions of law explaining the factual or legal basis for this conclusion.¹

This Court thus remanded for the limited purpose of having the trial court provide this Court with findings that would explain and support the factual basis for Judge Ramsdell’s conclusion that Noll had failed to prove purposeful avilment:

- “Because we cannot discern the reasoning or underlying facts *supporting the decision* to deny personal jurisdiction against Special Electric, we remand this case for findings of fact.” *Slip op.* at 2 (emphasis added).
- “Because we have no reliable indication of the facts *as the trial court understood them*, we remand this case for separate findings of fact.” *Id.* at 7 (emphasis added).
- “On remand, we direct the trial court to make findings on the following issues in order to answer the questions presented in LG Electronics and Noll, as well as any other *findings of fact that support its decision*[.]” *Id.* (emphasis added).

This Court’s remand directive plainly contemplated that Judge Ramsdell would provide this Court with the requested findings. And those findings

¹ Judge Ramsdell would have been able to do so, had Noll’s counsel adhered to the long-standing King County Superior Court protocol, and forwarded a copy of Judge Ramsdell’s dismissal order to Special Electric’s counsel. Noll’s counsel evidently did not notice that the e-mail transmitting the order to them did not also transmit the order to Special Electric’s counsel. As a result, Special was not aware of the order until after the 15-day period had passed for Special Electric to present prevailing party findings of fact and conclusions of law under CR 54(e). Special Electric’s counsel first received notice of the order when Special Electric was served with Noll’s notice of appeal. Special Electric previously brought these facts to this Court’s attention in support of a motion for reconsideration, which this Court denied. Special Electric now incorporates by reference the supporting declaration of Michael B. King setting forth the evidence establishing these facts. Special Electric notes that Noll does not dispute these facts, and these facts have also been submitted to the trial court during the pending remand proceeding.

would set forth *Judge Ramsdell's* “understanding” (*slip op.* at 2, 6) of the facts as *he* “understood them” (*slip op.* at 7) in December 2017, and *his* reasons for why he concluded those facts did not establish that Special Electric had purposefully availed itself of the benefits of doing business in Washington—the legal *sine qua non* for exercising personal jurisdiction over Special Electric. While Judge Ramsdell had retired from the Superior Court bench in March 2018, Article IV, Section 7 of the Washington State Constitution assured that he would be able to step back into his role as judge through a *pro tem* appointment and carry out this Court’s directive.

Noll and Special Electric also contemplated that Judge Ramsdell would be doing precisely that, and indeed both parties wished for Judge Ramsdell to step back into the case to fulfill this Court’s directive. One week after this Court issued its opinion, they sent a joint letter (attaching a proposed order) to King County Chief Civil Judge Julie Spector and Judge Ramsdell, requesting that Judge Ramsdell be appointed judge *pro tem* so he could carry out this Court’s directive.²

That did not happen. Judge Spector instead assigned the matter to Judge Michael Scott. Judge Spector did not wait to hear whether Judge Ramsdell was willing to accept a *pro tem* appointment. Saying nothing

² Ex. A to Declaration of Michael B. King in support of Motion for Clarification (“King Declaration”) (copy of the parties’ joint letter and proposed order).

about the limited nature of this Court’s remand, or about Judge Ramsdell’s constitutional right to step back into the case, Judge Spector denied Special Electric’s and Noll’s request to have the remand matter assigned to Judge Ramsdell.³ Judge Spector said only that Judge Scott now occupied Judge Ramsdell’s Department, and therefore the matter was being reassigned to Judge Scott. In the face of Judge Spector’s refusal to appoint him, Judge Ramsdell declined to request a *pro tem* appointment.⁴

A few days later, Judge Spector *sua sponte* entered another order stating that it would be “impractical and not possible for Judge Ramsdell to hear the matter.”⁵ Judge Spector did not explain why it would be “impractical and not possible” for Judge Ramsdell—who is presently working as a mediator and arbitrator at JAMS—to accept an appointment as a *pro tem* judge and integrate that work into his mediation and arbitration matters.

³ Ex. B to King Declaration (e-mail with attached order from Judge Spector, dated Tuesday, July 9, 2019, at 1:43 p.m., denying the parties’ joint request to transfer this limited remand proceeding to Judge Ramsdell and reassigning it to Judge Scott). Judge Spector later characterized the request as coming from only Special Electric’s lead counsel. *See* Ex. C to King Declaration (e-mail from Judge Spector, dated July 16, 2019, at 12:47 p.m., with attached order dated July 12). But the request was made by both Special Electric’s and Noll’s counsel.

⁴ Ex. C to King Declaration (e-mail from Judge Ramsdell, declining the parties’ request to serve as a *pro tem* judge in this limited remand proceeding).

⁵ Ex. D to King Declaration (“Chief Civil Order,” dated July 12, 2019, that was not sent to the parties until July 16). This matter unfolded through a series of letters and e-mails, over the course of July 8 through July 10. Copies of these letters and e-mails (including Judge Spector’s e-mail ruling of July 9, and her subsequent order of July 12 restating that ruling) are attached in chronological order as Exhibits A-D to the King Declaration.

- B. At that hearing on the parties' proposed findings last week, Judge Scott stated he did not believe he was bound to enter findings supporting Judge Ramsdell's decision but would instead independently review the record that had been before Judge Ramsdell, and make his own factual determinations based on that review.**

Noll and Special Electric were left in a quandary by this outcome. They both reached out to Judge Scott, who responded with alacrity to the remand assignment by setting a status conference. In letters submitted to Judge Scott, Noll and Special Electric both expressed concern as to how Judge Scott could fulfill this Court's remand directive.⁶ At the status conference, Judge Scott stated his understanding about the scope of his limited remand authority:

I understand that this [case] has not been remanded to me for a redo of the Rule 12 motion. It has been remanded to me for findings of fact in support of the decision that was entered by Judge Ramsdell. I understand that. All right. . . . Now, I will continue to refine my understanding of the task based on the briefing that each of you submits and the proposed findings that you submit, but that's how I see it at this juncture.⁷

⁶ See Exs. E and F to King Declaration (pre-status conference letters of Special Electric and Noll to Judge Scott).

⁷ Ex. G to King Declaration, at 26 (transcript of the July 12, 2019 telephonic status conference before Judge Scott).

After the status conference, Noll and Special Electric prepared and submitted proposed findings of fact. The parties proceeded to a hearing on their proposed findings.

At that hearing last week, contrary to his earlier understanding of his remand task at the status conference two months ago, Judge Scott stated he did not need to find facts supporting Judge Ramsdell's decision.⁸ He stated that the facts he ultimately finds need only answer the questions posed by this Court, but not necessarily support Judge Ramsdell's decision.⁹ Yet this Court plainly required the trial court on remand to find facts "*supporting* the decision to deny personal jurisdiction against Special Electric." *Slip op.* at 2 (emphasis added); *see also id.* at 7 ("On remand, we direct the trial court to make . . . findings of fact that *support* [Judge Ramsdell's] decision." (emphasis added)).

Judge Scott intends to circulate his proposed findings of fact on Friday, September 20.¹⁰

⁸ Ex. H to King Declaration, at 5 (transcript from the September 6, 2019 hearing on the parties' proposed findings of fact and conclusions).

⁹ *Id.* at 14.

¹⁰ Special Electric had to await the preparation of the transcript of the September 6 hearing before it could complete and submit this motion. That transcript became available shortly before noon yesterday.

IV. ARGUMENT

A. The trial court will exceed its limited remand authority by issuing findings of fact that do not explain and support Judge Ramsdell’s December 2017 decision.

This Court may issue orders, before or after acceptance of review, “to insure effective and equitable review, including authority to grant injunctive or other relief to a party.” RAP 8.3. It also may “perform all acts necessary or appropriate to secure the fair and orderly review of a case.” RAP 7.3.

This Court retained plenary jurisdiction over this case, including specifically over Judge Ramsdell’s decision. It remanded for the entry of findings of fact to aid this Court’s appellate review of Judge Ramsdell’s decision concluding that Noll had failed to prove purposeful availment.

Distinct from a “case remand,” which restores the trial court’s full jurisdiction for all purposes and allows the trial court to revisit its underlying decision, this Court issued a limited “record remand.” *Jung v. Jung*, 844 A.2d 1099, 1107 n.7 (D.C. 2004) (citing *Bell v. United States*, 676 A.2d 37, 41 (D.C. 1996)). In a record remand, the appellate court “retains jurisdiction over the case, and the trial court may take no action . . . other than that specified in the record remand order.” *Id.* The “scope of the trial court’s authority on remand is necessarily limited by [the appellate court’s] jurisdiction and instructions.” *Id.* The trial court’s duty

in a limited remand is to “comply strictly” with the intent and meaning of the directions given by the appellate court. *People v. Bellanca*, 204 N.W.2d 547, 579 (Mich. Ct. App. 1972). When the appellate court remands a matter with specific instructions, the trial court cannot exceed the scope of the remand instructions. *People v. Russell*, 825 N.W.2d 623, 628 (Mich. Ct. App. 2012).

On record remands, the appellate court may direct the trial court to make additional findings and to explain a ruling. *Bell*, 676 A.2d at 41; *slip op.* at 2 (remanding for “additional findings” to explain “the reasoning” “supporting” Judge Ramsdell’s “decision to deny personal jurisdiction against Special Electric”). But the trial court does not have the authority to modify or reverse the ruling still on appeal. *Bell*, 676 A.2d at 41.

Special Electric simply asks that this Court clarify what it has tasked the trial court with doing. This Court was within its rightful authority in issuing a limited record remand that mandated the trial court’s task, explicitly retained jurisdiction over the case, and preserved Judge Ramsdell’s decision.

The situation here is distinguishable from the “limited” remand in *State v. Bliss*, where Division Two ordered a new suppression hearing at which both parties could present additional evidence. 153 Wn. App. 197, 200, 208, 222 P.3d 107 (2009). This Court did not order a new evidentiary

hearing; did not vacate Judge Ramsdell's decision; and did not permit the parties to present additional evidence on remand. It instead specifically tasked the trial court with entering findings that could have reasonably supported Judge Ramsdell's legal conclusion that personal jurisdiction could not be exercised against Special Electric. If the trial court finds that Judge Ramsdell could reasonably have made the same findings as those proposed by Special Electric, then Special Electric's proposed findings should be entered on remand.¹¹

Judge Scott's statements at the hearing on September 6 conflict with the clear directives given by this Court and the limited nature of this record remand.¹² Special Electric urges this Court to step in and confirm that Judge Scott has departed from the narrow scope set out in this Court's explicit remand directive. If Special Electric's proposed findings could reasonably be found to have supported Judge Ramsdell's decision, the trial court must ensure those findings are entered. Judge Scott's new thinking and broader view of what he believes he's free to do seriously risks undermining Judge Ramsdell's decision—a decision over which this Court has retained plenary

¹¹ Ex. I to King Declaration (Special Electric's proposed findings of fact and conclusions of law); Ex. J to King Declaration (Special Electric's briefing in support of its proposed findings and conclusions filed in the trial court, including its response to Noll's objections to Special Electric's proposed findings); Ex. K to King Declaration (Noll's proposed findings of fact); Ex. L (Noll's briefing in support of her proposed findings, including her objections to Special Electric's proposed findings).

¹² Ex. H to King Declaration, at 5, 14.

jurisdiction. The trial court will have exceeded its limited authority if it makes findings that are inconsistent with what Judge Ramsdell could have reasonably found based on the evidentiary record established in December 2017.

Special Electric must therefore make this motion for clarification because Judge Scott has made his position abundantly clear at the most recent hearing. Special Electric does not presume to know which way Judge Scott will go on the central fact issues that are the subject of the parties' proposed findings of fact:

- Should Special Electric have known that the asbestos it sold to CertainTeed's Santa Clara plant was ending up in asbestos-cement pipe and being sold by CertainTeed into Washington?
- Did Special Electric actually know that the asbestos it sold to CertainTeed's Santa Clara plant was ending up in asbestos-cement pipe and being sold by CertainTeed into Washington?
- Did Special Electric, in conjunction with CertainTeed, "target" the Washington market?

Judge Scott may ultimately resolve all of these fact questions in Special Electric's favor. But there is a risk that Judge Scott will feel free to resolve these fact issues against Special Electric because Judge Scott now believes he's entitled to independently evaluate the evidence and make findings based on this independent evaluation. If Judge Scott does so, he will

undermine Judge Ramsdell's December 2017 decision. But this Court did not intend to, nor did it grant, Judge Scott that authority.¹³

This Court's remand directive did not permit Judge Scott to make his own factual determinations based on his independent review of the record. If this Court had wished to grant Judge Scott that authority, it would have expressly chosen to remand and vacate the order, as well as renounced its jurisdiction. *E.g.*, *City of Seattle v. Silverman*, 35 Wn.2d 574, 578, 214 P.2d 180 (1950); *Bay v. Jensen*, 147 Wn. App. 641, 659-61, 196 P.3d 753 (2008); *General Ins. Co. of Am. v. Int'l Sales Corp.*, 18 Wn. App. 180, 191, 566 P.2d 966 (1977). But that was not the case here. Because this Court did not vacate Judge Ramsdell's decision and did not terminate review in this case, the trial court's findings on remand must support and explain why Judge Ramsdell concluded no personal jurisdiction could be exercised against Special Electric. *Slip op.* at 2, 7. Those findings may not directly or indirectly undermine Judge Ramsdell's legal conclusion.

¹³ At one point during the hearing, Judge Scott mused aloud about whether Judge Ramsdell would be entitled to make findings that undermined his prior decision. Ex. H to King Declaration, at 16. The short answer is that Judge Ramsdell would not be entitled to do so. Nor is there any reason to believe that Judge Ramsdell would even consider doing so. Judge Ramsdell had the same record before him in December 2017. He did his job. He studied that record. He weighed the evidence. He came to factual conclusions that informed his ultimate legal conclusion that Noll failed to prove purposeful availment, and therefore failed to establish a proper basis for personal jurisdiction over Special Electric. The only thing missing is a written memorialization of those thought-processes. That is what this limited remand proceeding is supposed to provide this Court. Judge Scott is presuming to go down a path that could deprive this Court of what it needs and what it directed the trial court to provide.

Judge Scott would be exceeding the limited authority granted to him by this Court if he were allowed such free rein in his review of the record. This Court's remand directive did not state that the trial court on remand should find facts anew based on its subjective understanding of the record. To the contrary, this Court explicitly directed that it wanted the trial court to enter findings of fact based on the facts as Judge Ramsdell "understood them." *Slip op.* at 7. This clear directive shows that this Court did not intend Judge Scott to be a "free agent" and to review the record anew.

Consistent with this Court's remand directive, Judge Scott must enter findings either supporting what Judge Ramsdell would have reasonably found (based on Judge Ramsdell's questions as reflected in the transcript and his ultimate legal conclusion of no purposeful availment) or what no reasonable trier of fact could have found based on the record developed in December 2017. All of Judge Scott's findings must reasonably support Judge Ramsdell's decision denying Noll's motion to establish personal jurisdiction. *Slip op.* at 2, 7.

B. To ensure the fair, effective, and equitable review of this limited remand proceeding, this Court should consider directing that this case be re-assigned back to Judge Ramsdell for him to enter findings consistent with this Court's remand directive and based on the facts as he "understood them" in December 2017.

This Court's published opinion contemplated that Judge Ramsdell would undertake this Court's remand directive to provide it with the

requested findings to explain *Judge Ramsdell's* decision—based on the facts “as [he] understood them” in December 2017. Indeed, after this Court issued its decision, both parties also believed that this Court intended to have Judge Ramsdell exercise his constitutional right to fulfill this Court’s remand directive.¹⁴

But Judge Spector did not give Judge Ramsdell a fair chance to exercise his constitutional right to step back into this case. No evidence shows that Judge Spector consulted with Judge Ramsdell before summarily denying the parties’ joint request for him to accept a *pro tem* appointment. Judge Spector did issue an after-the-fact order asserting that it would be “impractical and not impossible” for Judge Ramsdell to accept a *pro tem* appointment and to carry out this Court’s directives. Judge Spector did not explain why she believed this to be so.

This Court, and the rest of the Seattle legal community, is aware that Judge Ramsdell is working as an arbitrator and mediator as part of the private dispute-resolution group JAMS. There is no reason to think that Judge Ramsdell could not fit into his duties at JAMS the additional responsibility of providing this Court with the findings it has requested. Indeed, at this point, the task would be far easier, as Judge Ramsdell need

¹⁴ Ex. A to King Declaration (copy of the parties’ joint letter to Judge Ramsdell and Judge Spector).

only review the parties' briefing, their proposed findings, and the transcript of the hearing before Judge Scott—and then prepare findings based on a record with which he is already familiar. Further, what Judge Ramsdell would be doing is reducing to writing the thought-processes he had about the facts when this matter was before him in December 2017. It is inexplicable why Judge Spector would think that carrying out this task is something beyond Judge Ramsdell's present abilities.

Special Electric is not asking this Court to remove Judge Scott from his present position of responsibility in this remand proceeding. If this Court is satisfied that clarifying its directive will be sufficient to put the matter on track, then this Court need not take the more drastic step of removing Judge Scott and requesting Judge Ramsdell to accept a *pro tem* appointment. But if this Court is convinced that its precise needs can only be met by having Judge Ramsdell carry out its directives, then this Court should not hesitate to exercise its authority to put in place the judge both Special Electric and Noll expected would handle this limited remand.

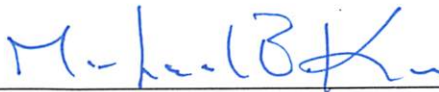
V. CONCLUSION

This Court should clarify its directive to the trial court in this ongoing remand proceeding. This Court should clarify that the trial court must enter findings supporting Judge Ramsdell's December 2017 decision denying Noll's motion to establish personal jurisdiction for lack of

purposeful availment. This Court should clarify that as long as Special Electric's proposed findings could reasonably be found to have supported Judge Ramsdell's decision, the trial court must enter those findings. This Court should also consider re-assigning this limited remand proceeding back to Judge Ramsdell, if this Court concludes that the better course that will assure this Court's directives are fully carried out is to have Judge Ramsdell provide this Court with the requested findings of fact.

Respectfully submitted: September 12, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED: September 12, 2019.



Patti Saidu, Legal Assistant

RESPONDENT SPECIAL ELECTRIC
COMPANY, INC.'S MOTION FOR
CLARIFICATION OF REMAND
DIRECTIVE UNDER RAP 8.3 and RAP
7.3 – 18

CARNEY BADLEY SPELLMAN

September 12, 2019 - 11:00 AM

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Noll Appendix 3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CANDACE NOLL, Individually and as Personal Representative of the Estate of Donald Noll, Deceased,)	No. 77888-9-1
)	
)	DIVISION ONE
Appellant,)	
)	ORDER DENYING MOTION
v.)	FOR CLARIFICATION OF
)	REMAND DIRECTIVE UNDER
SPECIAL ELECTRIC COMPANY, INC.,)	RAP 8.3 AND RAP 7.3
)	
Respondent,)	
)	
and)	
)	
AMERICAN BILTRITE, INC.;)	
AMETEK INC.;)	
BIRD INCORPORATED;)	
BORGWARNER MORSE TEC INC. as)	
successor-by-merger to BORG-)	
WARNER CORPORATION;)	
CBS CORPORATION, a Delaware)	
Corporation, f/k/a VIACOM INC.,)	
successor by merger to CBS)	
CORPORATION, a Pennsylvania)	
Corporation, f/k/a WESTINGHOUSE)	
ELECTRIC CORPORATION;)	
CERTAIN TEED CORPORATION;)	
CONWED CORPORATION;)	
DOMCO PRODUCTS TEXAS INC;)	
FORD MOTOR COMPANY;)	
GENERAL ELECTRIC COMPANY;)	
GEORGIA-PACIFIC LLC;)	
HERCULES INCORPORATED;)	
HONEWELL INTERNATIONAL INC.;)	
INDUSTRIAL HOLDINGS)	
CORPORATION f/k/a THE)	
CARBORUNDUM COMPANY;)	
INGERSOLL-RAND COMPANY;)	
)	


J-M MANUFACTURING COMPANY)
INC.;)
KAISER GYPSUM COMPANY INC.;)
KELLY MOORE PAINT COMPANY)
INC.,)
Defendants.)

The respondent, Special Electric Company Inc., filed a motion for clarification of the July 1, 2019 remand directive under RAP 8.3 and RAP 7.3; requesting that the assignment of the remand matter to Hon. Michael Scott be withdrawn and the court request Hon. Jeffrey M. Ramsdell (Ret.) to accept a *pro tem* assignment in order to complete the remand process by making the requested findings and conclusions, including the answer to the five questions posted by the court. The appellant filed a response.

We have considered the motion under RAP 8.3 and RAP 7.3 and have determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion to clarify is denied with prejudice to any relief that this court request retired Judge Ramsdell to accept a *pro tem* assignment, but without prejudice to the submission of additional briefing whether Judge Scott has exceeded the scope of the order on remand. Special Electric shall submit its additional briefing not to exceed 20 pages by October 25, 2019. Noll shall submit her supplemental briefing not to exceed 20 pages by November 8, 2019. Special Electric may file a reply not to exceed 10 pages by November 21, 2019.

FOR THE COURT:



Judge

WEINSTEIN CAGGIANO PLLC

November 18, 2020 - 11:11 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98979-6
Appellate Court Case Title: Candace Noll v. Special Electric Company, Inc.

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