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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

*Respondents,*

v.

SPECIAL ELECTRIC COMPANY, INC.,

*Petitioner,*

and

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

*Defendants.*

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**PETITIONER SPECIAL ELECTRIC COMPANY, INC.'S ANSWER  
TO WDTL AMICUS CURIAE MEMORANDUM**

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## I. SUMMARY OF ANSWER

WDTL correctly highlights how the COVID-19 pandemic should affect this Court's consideration of Special Electric's first and second issues. As WDTL recognizes, the pandemic illuminates the importance of continuity in the civil-justice process. The Court of Appeals' majority failed to give due weight to that interest when it chose to defer to Judge Scott's factual findings and review them only for substantial evidence. As Judge Verellen recognized in his dissent, the King County Superior Court Presiding Department's mishandling of assigning the limited remand from the Court of Appeals opened the door to what actually unfolded—Judge Scott's disregarding the scope of that limited remand. This case presents an opportunity for this Court to underscore the importance of continuity of decision-making during the life of a case and the need for trial courts—and particularly the presiding judges of those courts—to use the tools made available by the Washington Constitution to maintain that continuity.

WDTL also correctly highlights the importance of giving due weight to the decisions of the Supreme Court of the United States in resolving the choice of the test for determining whether an out-of-state defendant has purposefully availed itself of the benefits of doing business in our state. That Court's decisions are the controlling authority in this area of the law, and that Court has been moving towards a showing requirement that would demand more than the mere fact that an out-of-

state defendant was aware that its products were being brought into a forum state by another party's unilateral actions (whether the plaintiff or some other party). Instead of pausing and awaiting the outcome of two pending cases that promised further elucidation on this subject by the Supreme Court of the United States, the Court of Appeals chose to embrace mere awareness as sufficient to establish purposeful availment. This Court should grant review so that our state's personal-jurisdiction jurisprudence takes full account of the latest word from the Supreme Court of the United States.

## II. ANSWER

### A. **The King County Presiding Department and the Court of Appeals' majority failed to give due weight to assuring continuity of decision-making.**

Judge Ramsdell had this case from its initial filing in February 2013. He presided over the disposition of the Nolls' claims against each of the 22 defendants named in their complaint. *See* CP 1-2 (Complaint caption naming 22 defendants). Judge Ramsdell granted Special Electric's motion to dismiss for lack of personal jurisdiction. He later presided over the December 2017 evidentiary hearing, following the remand from this Court, at which Mrs. Noll<sup>1</sup> attempted to meet her burden to prove that Special Electric had purposely availed itself of the benefits of doing business in Washington when it sold asbestos to co-defendant CertainTeed

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<sup>1</sup> By the time of the remand from this Court, Mr. Noll had passed and Mrs. Noll was proceeding both in her individual capacity and as the personal representative of her husband's estate.

in California, which CertainTeed used to make asbestos-cement pipe later sold by CertainTeed into Washington, and to which Mr. Noll was exposed when working with that CertainTeed pipe. After Judge Ramsdell ruled that Mrs. Noll had not met her burden to establish purposeful availment, he continued to exercise the jurisdiction that a trial judge retains under RAP 7.2 while Mrs. Noll appealed to the Court of Appeals.

Judge Ramsdell retired at the end of 2018, while that appeal was awaiting oral-argument setting. When the Court of Appeals issued its limited “record remand” decision in July 2019,<sup>2</sup> Judge Ramsdell was beginning work as a mediator and arbitrator with JAMS. This case had not been re-assigned. Judge Ramsdell had a constitutional right under article 4, section 7 of the Washington Constitution to retain the case as a judge pro tem and respond to the queries from the Court of Appeals. The parties jointly requested that the King County Presiding Department give Judge Ramsdell a pro tem appointment to give him the opportunity to explain to the Court of Appeals why he concluded that Mrs. Noll had failed to prove purposeful availment.

Refusing the parties’ request, the Presiding Judge instead appointed Judge Scott, who had succeeded to Judge Ramsdell’s position on the King County Superior Court bench. The Presiding Judge would

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<sup>2</sup> The record is clear that the Court of Appeals remand was a limited “record remand.” WDTL has laid out the case law identifying this distinctive form of remand procedure and how the Court of Appeals’ remand fell squarely within its contours. *See WDTL Amicus Curiae Mem.* 4-5 (citing and discussing *Jung v. Jung*, 844 A.2d 1099, 1107 (D.C. 2004) and related authority).

later state that Judge Ramsdell was unavailable, but there is no evidence that the Presiding Judge contacted Judge Ramsdell before disregarding the parties' request and assigning the case to Judge Scott.<sup>3</sup> Plainly, the Presiding Department simply failed to recognize that the Court of Appeals had not remanded the case for further proceedings following the issuance of a mandate, but instead had only made a limited "record remand" for the purpose of getting an explanation that only Judge Ramsdell could provide. Judge Scott compounded the problem by presuming to go beyond the scope of the Court of Appeals' charge and engage in a wholesale reweighing of the evidence.

The Court of Appeals' majority then erred when it mechanically gave Judge Scott's findings the benefit of a deferential substantial-evidence review. No such deference should have been given. Instead, either (1) the evidence should have been reviewed de novo to determine whether Mrs. Noll had met her burden to show purposeful availment (as Judge Verellen did), or (2) Judge Scott's finding of awareness should have been upheld only if every reasonable judge would read the evidence as Judge Scott did.

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<sup>3</sup> By the time the Presiding Judge issued the order stating that Judge Ramsdell was "unavailable," the Presiding Judge had been confronted by a challenge by Special Electric—this time not joined by Mrs. Noll—to the decision to assign the case to Judge Scott (a challenge that included pointing out that the Presiding Judge had apparently acted without first contacting Judge Ramsdell, despite Judge Ramsdell's constitutional right to retain the case under article 4, section 7). No doubt Judge Ramsdell would have been reluctant to insert himself into what had become a dispute challenging the normal authority of the Presiding Judge to assign cases that have returned to King County Superior Court from the Court of Appeals for further proceedings.



The path taken by the majority failed to give due weight to the constitutional preference for continuity in civil proceedings.<sup>4</sup> This Court should grant review to clarify the importance of assuring that continuity, by employing the tools for doing so provided by article 4, section 7.

**B. Washington State’s personal-jurisdiction jurisprudence should be fully aligned with the controlling rules established by the Supreme Court of the United States.**

The Court of Appeals did not wait for the impending decisions in the *Ford Motor Company* cases, which have been argued and are under submission to the Supreme Court of the United States. As Special Electric pointed out to the Court of Appeals in a motion to stay proceedings to await the outcome in the *Ford Motor Company* cases, the resolution of those cases will provide further insight into the direction being taken by the Supreme Court of the United States in the precise area of personal-jurisdiction law controlling the outcome in this case.<sup>5</sup> Instead, the Court

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<sup>4</sup> The Court of Appeals’ majority failed to address any of these—undisputed—procedural facts underlying the Presiding Judge’s failure to honor the mandate of article 4, section 7. Instead the majority stated that it had remanded because of what is now described as an insufficient record. *See* Decision at 7. But if the Court of Appeals had concluded that the record was insufficient, it would have remanded the case for further development of the record, and not—as it actually did—retain jurisdiction over Judge Ramsdell’s decision and remand only so Judge Ramsdell could explain why he read the *existing* record as failing to support Mrs. Noll’s claim of purposeful availment. (The majority also appears to have overlooked that the record conclusively established that there was *no more evidence to be submitted by either party*—an error akin to the confusion about whether the record showed that Special Electric supplied 90 percent of all asbestos used by CertainTeed’s Santa Clara plant to manufacture asbestos-cement pipe, or only 90 percent of *one kind of asbestos* used to manufacture that pipe.)

<sup>5</sup> After a delay induced by the COVID-19 pandemic, on October 7, 2020, the Supreme Court heard oral argument in *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 444 P.3d 389 (Mont. 2019), *cert. granted*, 2020 WL 254155 (Jan. 17, 2020) (No. 19-368), and *Ford Motor Co. v. Bandemer*, 931 N.W.2d 744 (Minn. 2019), *cert. granted*, 2020 WL 254152 (Jan. 17, 2020) (No. 19-369). As Special Electric noted in its Petition,

of Appeals denied Special Electric’s motion for a stay to await the outcome in the *Ford Motor Company* cases and proceeded to issue its decision in which the majority concluded—over Judge Verellen’s dissent—that specific jurisdiction could be exercised over Special Electric based on its (supposed) awareness that the asbestos it sold to CertainTeed in California was ending up in CertainTeed asbestos-cement pipe sold into Washington.

In reaching this conclusion, the majority said *nothing* about the decision of the Supreme Court of the United States in *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cnty.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017). Yet *Bristol-Myers Squibb* expressly revived federalism as a restriction on the exercise of personal jurisdiction over a nonresident defendant. The Court made clear that due-process limitations on a state court’s power to exercise personal jurisdiction over a nonresident defendant go beyond issues of convenience to embrace the imperatives of our federal system:

[R]estrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. [T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s]

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the result that Ford Motor Company seeks in the consolidated cases will *fundamentally reshape* one of the due-process requirements for specific jurisdiction at issue in this case. If Ford prevails on that issue, the Due Process Clause under the Fourteenth Amendment will require a causal connection between the defendant’s forum contacts and the plaintiff’s claims, and applying that standard would bar the exercise of specific jurisdiction over Special Electric in Washington and compel reinstatement of Judge Ramsdell’s dismissal ruling.

a limitation on the sovereignty of all its sister States. And at times, this federalism interest may be decisive. . . . [E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

137 S. Ct. at 1780-81; *see also id.* at 1788 (Sotomayor, J., dissenting) (“The majority’s animating concern, in the end, appears to be federalism[.]”). The Court thus reinvigorated the purposeful-availment requirement first announced in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), and reiterated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).<sup>6</sup>

*Bristol-Myers Squibb*’s focus on interstate federalism as a limitation on personal jurisdiction supports that a nonresident defendant must be shown to have *targeted* the forum to satisfy purposeful availment. Requiring proof of targeting gives independent substance to federalism and state-sovereignty limitations, separate from convenience, fairness, and reasonableness concerns. And at least three federal circuit courts have interpreted *Bristol-Myers Squibb* as requiring targeting to satisfy purposeful availment. *See, e.g., Fidrych v. Marriott Int’l, Inc.*, 952 F.3d

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<sup>6</sup> Justice Alito’s opinion for the seven-justice majority in *Bristol-Myers Squibb* did state that “settled principles regarding specific jurisdiction control this case.” *See* 137 S. Ct. at 1780-81. The problem, of course, is that far too many courts had been failing to adhere to those principles, and specifically to the federalism concerns announced in *Hanson v. Denckla*, 357 U.S. at 253, and reiterated in *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

124, 140-41 (4th Cir. 2020); *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 840-41 (10th Cir. 2020); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 780 (3d Cir. 2018).<sup>7</sup>

The Court of Appeals’ majority’s failure to say one word about *Bristol-Myers Squibb* and its federalism concerns leaves Washington’s specific-jurisdiction jurisprudence dangerously incomplete. This Court should grant review to address that gap.

### III. CONCLUSION

This Court should grant review, reverse the Court of Appeals, and reinstate the dismissal of Noll’s claims against Special Electric.

Respectfully submitted: January 12, 2021.

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<sup>7</sup> At least one state high court has also recognized that *Bristol-Myers Squibb* has changed the landscape. Before *Bristol-Myers Squibb* came down, the Arkansas Court of Appeals reversed a trial court’s decision dismissing a case for lack of personal jurisdiction over a nonresident defendant. *Lawson v. Simmons Sporting Goods, Inc.*, 511 S.W.3d 883, 889 (Ark. Ct. App. 2017), *cert. granted and judgment vacated*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 237, 199 L. Ed. 2d 2 (2017). The U.S. Supreme Court granted a writ of certiorari, vacated the judgment, and remanded the case “for further consideration in light of *Bristol-Myers Squibb* . . . .” *Simmons Sporting Goods*, 138 S. Ct. at 237-38. On remand, based on *Bristol-Myers Squibb*, the Arkansas Supreme Court affirmed the trial court’s order dismissing the case for lack of personal jurisdiction. *See Lawson v. Simmons Sporting Goods, Inc.*, 569 S.W.3d 865, 871-72 (Ark. 2019).

## 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: January 12, 2021

S:/ Patti Saiden

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