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DIVISION III, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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SANDRA LYNNE DOWNING, individually and as Personal  
Representative of The Estate of Brian Downing, deceased,  
and on behalf of KRISTYL DOWNING and JAMES DOWNING,  
Death Beneficiaries of The Estate of Brian Downing,  
Respondents,

v.

BLAIR LOSVAR, Personal Representative of THE ESTATE OF  
ALBERT E. LOSVAR, deceased;  
Respondent,

LYCOMING, A DIVISION OF AVCO CORPORATION, a Delaware  
corporation and subsidiary of TEXTRON, INC., a foreign corporation;  
Defendant,

TEXTRON AVIATION, INC., a Kansas corporation, formerly  
CESSNA AIRCRAFT COMPANY,  
Appellant.

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ON APPEAL FROM OKANOGAN COUNTY SUPERIOR COURT  
No. 15-2-00516-4  
(Hon. Christopher Culp)

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**REPLY BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

In its opening brief, TAI showed that the trial court’s rationale for exercising specific personal jurisdiction over TAI—that TAI’s two Washington-based mechanics could have but did not perform service on the accident aircraft—was legally flawed because it did not meet the mandatory “but for” causation test. Respondents’ opposition briefs effectively concede this by making no effort to defend the trial court’s reasoning. Rather, Respondents switch gears and argue that jurisdiction exists because TAI sent routine safety bulletins about unrelated matters to Losvar and its other customers with reported addresses in Washington.

This argument should also be rejected. Numerous decisions correctly hold that “failure to warn” allegations cannot establish personal jurisdiction in every location where the defendant did not give a warning. Multiple decision also hold that, even if a failure to warn were a “but-for” cause, sending safety information to aircraft owners wherever they happen to live, as mandated by federal regulation, is jurisdictionally irrelevant because it is not a discretionary activity. Because Respondents cannot identify a voluntary, affirmative act by TAI directed at Washington that was a “but-for” cause of the crash, exercising personal jurisdiction over TAI is improper and violates due process. Thus, this Court should reverse

and remand with directions to dismiss TAI for lack of personal jurisdiction.

## **II. ARGUMENT**

### **A. The “But For” Causation Standard Governs Whether Respondents’ Claims “Arise Out of or Relate to” TAI’s Contacts With Washington.**

The Downing Respondents concede that the Washington Supreme Court has adopted a “but-for” causal standard to assess whether a claim meets the requirement that it “relates to or arises from” a contact with Washington State. *See* Downing Opp. at 11; *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 772 (1989). But the Downing Respondents incorrectly suggest this Court is free to apply a looser standard because the United States Supreme Court has not expressly adopted the “but-for” causal standard set out in *Shute*.

This court is bound by the Washington Supreme Court’s interpretation of the federal Due Process Clause absent an intervening decision by the United States Supreme Court. *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 630 (2016) (Court of Appeals is bound by Washington Supreme Court’s interpretations of federal law). The Washington Supreme Court can—and in *Shute*, did—determine that the United States Constitution requires a “but for” causal connection between a defendant’s contacts with Washington and the claims raised against it to

exercise jurisdiction. *Shute*, 113 Wn. 2d at 772; see *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 719, 919 P.2d 1243, 1253-54 (1996) (“Washington courts apply the ‘but for’ test. Jurisdiction is proper in Washington if the events giving rise to the claim would not have occurred ‘but for’” the defendant’s contacts in the state).

Ultimately, the Downing Respondents ask this Court to apply a looser standard because they cannot meet the stricter one. But the “but-for” test is binding on this Court and supported by post-*Shute* decisions of the United States Supreme Court.<sup>1</sup> See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (“What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”). That is the standard this Court must apply and, under that standard, TAI must be dismissed for lack of personal jurisdiction.

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<sup>1</sup> For her part, the Losvar Respondent suggests the Washington Supreme Court’s “but-for” causation test is inapplicable because this is “not a solicitation or transaction case; it is a jurisdictional tort case.” Losvar Opp. at 23. The Losvar Respondents provide no authority for the proposition that the Due Process Clause applies differently to defendants in a tort context, and overlooks that *Shute* was itself a tort case involving whether a tort defendant similar to TAI was subject to personal jurisdiction in the plaintiff’s personal injury claim. 113 Wn.2d at 772.

**B. The Service Bulletins Sent to Losvar Regarding the Aircraft’s Fuel Pump Cannot Support Personal Jurisdiction.**

**1. TAI’s alleged failure to send an adequate warning to Losvar cannot support personal jurisdiction.**

To meet their jurisdictional burden, Respondents must show that TAI “availed itself” of the protection of Washington law through an affirmative, voluntary contact with Washington that was a but-for cause of their claims. Respondents’ theory of the accident, described in the operative complaints, is that the aircraft’s fuel selector valve was partially obstructed and may have prevented fuel from properly flowing from the right fuel tank. (*See* CP 136-148 (Downing Amended Complaint) ¶¶ 4.6; 7.5; CP 229-239 (Losvar Answer and Cross-Claims) ¶¶ 13.1, 13.2 (adopting Downing claims); Downing Opp. at 14 (explaining theory); Losvar Opp. at 1 (same).)<sup>2</sup> Based on these factual allegations, Respondents assert two types of claims against TAI—a variety of torts premised on a design or manufacturing defect that resulted in the obstruction, and a products liability claim premised on a “failure to warn.” (Downing Opp. at 15.)

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<sup>2</sup> TAI disputes this causation theory because (1) the material found in the fuel selector valve most likely came from gaskets in the valve itself that melted in the post crash fire, and (2) the blockage theory does not explain the accident because the engine would still have been getting an adequate supply of fuel from the left fuel tank.

Departing from the flawed reasoning of the trial court,<sup>3</sup> the Downing Respondents hang their jurisdictional hat on service bulletins TAI sent to its customers (including Losvar), and specifically a March 2014 Service Letter and Owner Advisory (SEL-73-02) regarding fuel pumps installed on certain TAI aircraft. (CP 618-631.) That bulletin advised recipients that aircraft within a certain serial number range that contained a particular brand of fuel pump could experience fuel leakage and require replacement of the pump. (*Id.*)

Respondents do not assert that SEL-73-02's warning regarding potentially leaking engine-driven fuel pumps was a but-for cause of the accident. Indeed, while both the warning and Respondents' theory use the word "fuel," the fuel pump issue is completely unrelated to their liability theory against TAI. Apparently recognizing the lack of any causal connection between SEL-73-02 and the accident, Respondents posit that this service bulletin indirectly satisfies the but-for causation requirement by speculating that after reading SEL-73-02, Losvar "may have" relied on TAI notices to guide his general decisions about maintenance of his aircraft. Thus, they contend, "[b]ut for TAI's failure to adequately warn

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<sup>3</sup> Neither respondent attempts to defend the trial court's reasoning that the mere presence of TAI maintenance services in Washington that Losvar could have used (but did not) was a sufficient "but for" connection to support personal jurisdiction. In not doing so, they concede the error in the reasoning of the trial court's decision below.

Mr. Losvar” of the alleged problem with the fuel selector valve, the accident may have not occurred. Downing Opp. at 14-15. While creative, this new theory cannot support jurisdiction.

Numerous courts have considered whether a product manufacturer’s *failure* to provide a warning creates jurisdiction in places where the warning was not given, and have universally held that the absence of a warning is not a “contact” with a forum state for personal jurisdiction purposes. Because a defendant “fails to act” in every place where it is not acting, these courts recognize that adopting this theory as a basis for personal jurisdiction would eviscerate due process protections and lead to universal jurisdiction. *See Carty v. Beech*, 679 F.2d 1051, 1061 n.10 (3d Cir. 1982) (“Since almost every products liability case has a potential issue of failure to warn, grounding jurisdiction solely on allegation of such an omission might remove any limitation upon a state’s assertion of personal jurisdiction”); *see also Chlebda v. H.E. Fortna and Bro., Inc.*, 609 F.2d 1022 (1st Cir. 1979) (rejecting failure to act as basis for jurisdiction); *Sulak v. Am. Eurocopter Corp.*, No. 1:09-cv-00135 DAE-KSC, 2009 WL 2849136 (D. Haw. Aug. 26, 2009) (same).

The Court should reject the Downing Respondents’ new argument for the additional reason that it does not meet the “but for” causation requirement. Essentially, the Downing Respondents argue that because

TAI sent service bulletins to Losvar (which *were not* but-for causes of the accident), the Court can combine those contacts with its failure-to-warn allegation (which allegations, if proven, might meet the but-for causation test but do not support jurisdiction) to pass constitutional muster.<sup>4</sup> It cannot. “For personal jurisdiction to comply with due process \* \* \* (1) purposeful minimum contacts must exist between the defendant and the forum state, [and] (2) the plaintiff’s injuries must arise out of or relate to *those minimum contacts.*” *State v. LG Elecs.*, 186 Wn.2d 169, 176-77 (2016) (quotation marks omitted, emphasis added). Accordingly, to support jurisdiction, the *same contact* with Washington must both meet the “minimum contact” standard and be a but-for cause of the crash. *See Folweiler Chiropractic, PS v. Fair Health, Inc.*, 4 Wn. App. 2d 1001, 2018 WL 2684374, \*3 (2018) (unpublished) (holding that while defendant had minimum contacts with Washington, “they are not sufficiently connected to the claims made in this lawsuit to make the exercise of specific personal jurisdiction appropriate.”). Indeed, the Downing

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<sup>4</sup> The Downing Respondents’ attempt to distinguish TAI’s cases by arguing that in those cases, the defendant companies did not “initiate[] contact with” owners of their aircraft. But as discussed in more detail below, this is no distinction—in *every case* in which a manufacturer is aware of an owner of its aircraft in a given jurisdiction, it will send safety information there, because manufacturers have no choice in providing owners of their aircraft with such information. *See* II.B.2 *infra*. And several of the cited cases acknowledge that safety information reached aircraft owners. *See Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1059 n.9 (3d Cir. 1982); *Sulak v. Am. Eurocopter Corp.*, No. 1:09-cv-00135 DAE-KSC, 2009 WL 2849136, \*7 n.6 (D. Haw. 2009). That the other cases do not discuss safety materials indicates only the jurisdictional irrelevance of such contacts.

Respondents’ argument asks this Court to adopt the “sliding scale” approach to jurisdiction that the U.S. Supreme Court explicitly rejected in *Bristol-Myers* as a “loose and spurious form of general jurisdiction” that does not meet minimum due process requirements.<sup>5</sup> 137 S. Ct. at 1781.

The Losvar Respondent commits the bulk of her brief to advocate for a point not at issue—that TAI has contacts with Washington State—and fails to identify any affirmative contact between TAI and Washington specific to its theory of the crash that meets the required “but-for” analysis. For the reasons stated above, these arguments are not helpful to resolve the personal jurisdiction before the Court.

Respondents cannot point to any affirmative contact between TAI and Washington that both (1) shows purposefully availment of Washington law and (2) was an alleged but-for cause of the crash. TAI’s alleged “failure to warn” is not a constitutionally adequate contact, and the service bulletins it sent to Losvar are likewise inadequate because they address issues unrelated to the accident. Nor can the two – both inadequate to create jurisdiction in their own right – be mixed and

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<sup>5</sup> Likewise, the Losvar Respondent asserts the “but-for” causal test is met simply because aircraft “can and do crash” and this one crashed in Washington. Losvar Opp. at 19-20. Losvar’s argument strays far afield from any modern personal jurisdiction cases, and is undermined by the many decisions in which an in-state crash was *not* sufficient to create jurisdiction. *See, e.g., D’Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 97–98, 100 (3d Cir. 2009); *Hinkle v. Continental Motors, Inc.*, No. 9:16-3707-RMG, 2017 WL 4574794 (D.S.C. Oct. 12, 2017); *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018).

matched to avoid the clear due process requirements imposed by the Washington Supreme Court and the U.S. Supreme Court. Accordingly, Washington courts lack personal jurisdiction over TAI in this case.

**2. Sending safety communications to the owners of aircraft is not a “contact” that can support jurisdiction.**

Even if Respondents could identify a direct “but for” connection between TAI’s service bulletins and the accident, Washington courts still could not exercise personal jurisdiction over TAI in this case. As several courts have held in near-identical situations, service bulletins do not create jurisdiction because (1) TAI *is required* to send safety-related communications to owners of its aircraft and (2) TAI sent Losvar such communications in Washington solely because he reported a Washington address.

Personal jurisdiction can only rest on contacts that the “defendant himself” creates with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Thus, the “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Walden v. Fiore*, 571 U.S. 277, 284 (2014). The Supreme Court has emphasized that “the plaintiff cannot be the only link between the defendant and the forum.” *Id.* at 285. “Due process

requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts ... with other persons affiliated with the State.” *Id.*

The Western District of Washington’s recent decision in *Olympic Air, Inc. v. Helicopter Tech. Co.* illustrates the point. Case No. 2:17-cv-1257-RSL, 2019 WL 2288044 (W.D. Wash. May 29, 2019). There, plaintiffs in a helicopter crash suit asserted that defendant helicopter manufacturer MDHI had sufficient contacts to support personal jurisdiction because it sold operating manuals and sent “instructions, guidelines, warnings, cautions and service information” to plaintiff, a helicopter operator located in Washington. *Id.* at \*3. MDHI also maintained a website owners of its helicopters could access to receive maintenance information, “routinely” mailed plaintiff service bulletins and letters, and contacted plaintiff every six months to confirm plaintiff still owned MDHI aircraft. *Id.* at \*3-4.

MDHI argued that because it could not choose to whom or where to send safety communications, such communications were “geographically agnostic” and “jurisdictionally irrelevant.” *Id.* at \*2.

Judge Lasnik agreed and dismissed MDHI, holding:

MDHI did not purposefully avail itself of the privilege of conducting activities in the forum or direct its activities at the State of Washington. It sent manuals and service bulletins to Washington because Olympic Air was in Washington. As defense

counsel pointed out . . . , had Olympic Air been located elsewhere, the materials would have been sent elsewhere.

*Id.* at \*4. The *Olympic Air* decision accords with a recent decision from the Tenth Circuit, which likewise held that service bulletins were insufficient to establish personal jurisdiction. *See Old Republic Ins. Co. v. Continental Motors, Inc.*, 877 F.3d 895, 918 (10th Cir. 2017) (sending service manuals and allowing access to website containing maintenance and safety materials was not a cognizable “contact” with Colorado).

Here, TAI is required by regulation to send updated safety information such as the service bulletins referenced by Respondents to owners of its aircraft. 14 C.F.R. § 21.50. Just as in *Olympic Air* and *Old Republic*, TAI has no control over where the owners of TAI aircraft might move to; it simply complies with the regulation by sending the required information to each owner’s last reported address. As a result, the “contact” of sending a service bulletin to any given owner in any given state is the type of “random, fortuitous, or attenuated” contact that cannot support personal jurisdiction. Thus, even if TAI had sent service bulletins to Losvar in Washington that could meet the “but for” causation test, the act of sending these bulletins is still not jurisdictionally relevant and cannot create specific personal jurisdiction over TAI in this case.

### **III. CONCLUSION**

Respondents cannot show TAI made an affirmative, voluntary contact with Washington that was a “but-for” cause of the accident at issue. TAI is subject to both general and specific jurisdiction in Kansas, and Respondents have already filed suit there to pursue the same claims they raise here. Because Washington courts cannot exercise jurisdiction over TAI in this case consistent with due process, the Court must reverse the Superior Court and remand with directions to dismiss TAI for lack of personal jurisdiction.

RESPECTFULLY SUBMITTED this 17th day of July, 2019.

LANE POWELL PC

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the within and foregoing document upon the following persons:

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DATED this 17th day of July, 2019, at Seattle, Washington.

*s/ Lou Rosenkranz*  
Lou Rosenkranz, Legal Assistant

**LANE POWELL PC**

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