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No. 91998-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner

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

Defendants.

CORRECTED PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioner and Defendant Special Electric Company, a Wisconsin-based asbestos supplier, sold asbestos to a California manufacturer of asbestos-containing cement pipe. Plaintiff and Respondent Candace Noll claims that pipe containing asbestos supplied by Special Electric was sold by the manufacturer from California into Washington, and that exposure to that asbestos in Washington was a substantial contributing factor to the mesothelioma that caused the death of her husband, Donald Noll. Special Electric has no connection to that claimed exposure besides the alleged fact that a third party incorporated Special's asbestos into a product later sold into Washington and to which Mr. Noll was later exposed. The Nolls failed to offer any evidence that Special Electric was aware that any of the asbestos it supplied to the California manufacturer would later be sold into Washington as a component part of that manufacturer's final product.

Under a series of U.S. Supreme Court decisions, and this Court's recent decision in *LG Electronics*,¹ Washington courts cannot, as a matter of due process, exercise personal jurisdiction over a nonresident defendant that places component parts into the stream of commerce somewhere outside of Washington, without the plaintiff showing—at the very least—that the defendant was aware those parts would later be incorporated into a final product *and sold into Washington*. The Court of Appeals' aggressive approach to the stream-of-commerce doctrine for specific

¹ *State of Washington v. LG Electronics, Inc.*, 186 Wn.2d 169, 375 P.3d 1035 (2014), *petition for cert. docketed*, Oct. 19, 2016, No. 16-559.

personal jurisdiction over a nonresident defendant, which would allow the exercise of such jurisdiction absent such awareness, is inconsistent with *LG Electronics* and with the controlling U.S. Supreme Court precedents interpreted and applied by *LG Electronics*. Under those decisions, personal jurisdiction cannot properly be exercised over Special Electric. Accordingly, this Court should reverse the Court of Appeals and reinstate the trial court's dismissal order.

II. SUPPLEMENTAL STATEMENT OF THE CASE

In 2013, the Nolls sued various defendants, including Special Electric, in King County for personal injuries. Clerk's Papers (CP) 1. The Nolls alleged: Mr. Noll was exposed to asbestos-containing products; the defendants placed asbestos products "into the stream of commerce"; and the defendants "transacted business" in Washington. CP 2-3, 101. The Nolls' claims against Special Electric arose out of Mr. Noll's alleged exposure in Washington to asbestos from asbestos-cement pipe between 1977 and 1979. CP 101, 311. The Nolls did not allege Special Electric knew, expected, or was in any way aware that its asbestos would be incorporated into products that would later be sold into Washington. CP 1-5.

Special Electric was a Wisconsin corporation with its principal place of business in Wisconsin. CP 44, 218.² Special Electric had offices and staff in eight states, the majority of which were located east of

² Special Electric ceased operations after the events the Nolls allege gave rise to their cause of action against Special.

Wisconsin. CP 213. Special Electric never had an office, staff, or employees in Washington, never owned property or paid taxes in Washington, never had a registered agent in Washington, and never was licensed to do business in Washington. CP 45. Special Electric acted principally as a brokering firm, selling asbestos for several mining companies such as General Mining of South Africa and the Calaveras Asbestos Company of California. CP 227, 235.

The Nolls claimed Special Electric supplied asbestos to CertainTeed between 1975 and 1981. CP 101. CertainTeed had five asbestos-cement pipe manufacturing plants in the United States: Ambler, Pennsylvania; St. Louis, Missouri; Hillsboro, Texas; Santa Clara, California; and Riverside, California. CP 125, 141. Special Electric primarily supplied asbestos to CertainTeed's manufacturing plant in Santa Clara. CP 131-34, 144-68, 170-73. The Nolls failed to offer any evidence to show that Special Electric (1) knew the location of CertainTeed's plants, beyond those to which it sold its clients' asbestos; (2) knew the reach of any plant's zone of distribution; (3) knew about any CertainTeed-established channels of sales; (4) knew whether CertainTeed had a nationwide distribution network for asbestos-cement pipe; or (5) knew, expected or was aware either that CertainTeed was selling asbestos-cement pipe into Washington, or that such pipe contained asbestos supplied by Special Electric.

Special Electric moved to dismiss under CR 12(b)(2), and supported that motion with evidentiary materials outside the pleadings.

CP 12–83. The Nolls did not request the opportunity to conduct jurisdictional discovery before the court ruled on Special Electric’s motion, and did not argue that general personal jurisdiction could be exercised; instead, the Nolls presented evidence they claimed showed facts sufficient to establish specific personal jurisdiction over Special Electric. CP 100–242. The trial court granted Special Electric’s motion and dismissed for lack of personal jurisdiction. CP 252–54.³

The Court of Appeals reversed. Despite recognizing that “the record does not prove Special [Electric] had actual knowledge that CertainTeed distributed its pipe outside California,” and that Special Electric “may not have actually known that its asbestos was ending up in Washington as a component of pipe,” the Court of Appeals held that Special Electric purposefully directed its activities at Washington. *Noll v. Am. Biltrite, Inc.*, 188 Wn. App. 572, 575–76, 585, 355 P.3d 279 (2015). The Court of Appeals relied principally on two factors: (1) its characterization of Special Electric’s product as a “known hazardous material,” and (2) CertainTeed’s regular shipments of pipe to Washington

³ After the trial court granted Special Electric’s motion, and as part of their reply in support of a motion for reconsideration, the Nolls requested permission to conduct “limited” discovery on two specific issues—the “specific totals” of the amount of CertainTeed asbestos-cement pipe delivered to Washington and “the total financial benefit to Special Electric” resulting from such sales—but only if the trial court believed those points relevant to resolving the personal jurisdiction issue. CP 339. The trial court did not grant the request before denying reconsideration, and the Nolls did not assign error to the trial court not granting the request. The Nolls never requested discovery on the issue whether Special Electric was aware that CertainTeed was selling pipe containing asbestos supplied by Special Electric into Washington.

allegedly containing asbestos supplied by Special Electric. *Id.* at 575–76, 583, 587.

Special Electric petitioned for review. This Court held Special Electric’s petition pending this Court’s decision in *LG Electronics*. After this Court decided *LG Electronics*, this Court granted review.

III. SUPPLEMENTAL STATEMENT OF ISSUES

1. Purposeful Availment and the “Stream of Commerce.”

Does the federal due process clause permit a forum state to exercise specific personal jurisdiction over a nonresident defendant based solely on that defendant’s placing component parts into the “stream of commerce” by selling them to third parties who make finished products that later enter the forum state, when the nonresident defendant is not aware that its products are entering the forum state?⁴

2. CR 12(b)(2) Motions to Dismiss. Absent a request for jurisdictional discovery by the plaintiff, may a trial court consider matters outside the pleadings offered in support of a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction that controvert the plaintiff’s jurisdictional allegations?

⁴ Special Electric reads the majority opinion in *LG Electronics* as rejecting the “plus factor” approach of Justice O’Conner’s plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), which was embraced by Justice Kennedy’s plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). *See State of Washington v. LG Electronics, Inc.*, 186 Wn.2d 169, 376 P.3d 1035 (2016) (majority opinion per Gonzales, J.). Whether this Court erred in that rejection is the central focus of the petition for writ of certiorari that has been filed seeking review of this Court’s decision by the U.S. Supreme Court. Special Electric would argue for upholding the trial court based on the more restrictive “plus factor” approach, but recognizes it is presently foreclosed from doing so by this Court’s decision in *LG Electronics*.

IV. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals' expansive interpretation of the stream-of-commerce doctrine eviscerates meaningful constitutional limits on specific personal jurisdiction in products-liability cases.

The federal due process clause sets the outer limits of a state court's authority to exercise jurisdiction over a nonresident defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). Because our long-arm statute reaches no further than what the federal due process clause allows, *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766, 783 P.2d 78 (1989), the U.S. Supreme Court's decisions interpreting the allowable scope of personal jurisdiction under the federal due process clause control. *State of Washington v. AU Optronics*, 180 Wn. App. 903, 928, 328 P.3d 919 (2014) ("Because this case requires us to apply federal constitutional law, we look to these more recent United States Supreme Court decisions for guidance.") (applying *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)); see also *Sutherland v. Brennan*, 321 Or. 520, 901 P.2d 240, 244–45 (1995) (stating that because Oregon courts have "jurisdiction to the limits of due process . . .[,] those limits 'are an issue of federal law to be decided pursuant to the controlling decisions of the United States Supreme Court.'" (internal citation omitted)).

Two bases for the exercise of personal jurisdiction have been recognized by the U.S. Supreme Court: general and specific. *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 754–55, 187 L. Ed. 2d 624 (2014). Both types depend on the defendant’s contacts with the forum. General jurisdiction is not at issue. Report of Proceedings (May 10, 2013) at 3–4. The Nolls did not allege or attempt to establish that Special Electric’s affiliations with Washington were “so continuous and systematic” that it was essentially at home in Washington. *Goodyear*, 564 U.S. at 919. Instead, the Nolls relied on specific jurisdiction, which turns on Special Electric’s affiliation with Washington and the litigation. *McIntyre*, 564 U.S. at 881; *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Specific jurisdiction can be exercised only when the claim arises out of or relates to the defendant’s contacts with the forum. *Goodyear*, 564 U.S. at 923–24.⁵

The federal due process clause requires sufficient *purposeful* “minimum contacts” between the defendant and the forum to support specific personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quoting *Int’l Shoe*,

⁵ This case does not present the nationwide coordinated marketing effort present in *Bristol-Meyers Squibb Co. v. Superior Court*, 1 Cal. 5th 783, 377 P.3d 874, 888 (2016). Unlike in *Bristol-Meyers*, Special Electric was only generally prepared to sell its asbestos “throughout the United States.” CP 235–36. No evidence shows Special Electric advertised or otherwise engaged in marketing efforts on a national scale or engaged in any sort of coordinated effort with CertainTeed to promote the sale of CertainTeed’s cement-pipe product that CertainTeed later sold from its Santa Clara plant into Washington. A mere willingness to sell asbestos into Washington did not harm Mr. Noll and cannot be a proper basis for finding that the requirements of specific personal jurisdiction have been established.

326 U.S. at 316). A nonresident defendant should be able to “‘reasonably anticipate’” being drawn into litigation in the forum based on its contacts with that forum. *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). There must be “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law.” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Minimum contacts are established when the defendant has “purposefully directed” his activities at the forum. *Burger King*, 471 U.S. at 472. The “purposeful availment” requirement ensures that the defendant will not be “haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.” *Id.* at 475 (internal quotation marks and citations omitted). Jurisdiction is proper when “the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.” *Id.* (internal citations omitted; emphasis in original). To evaluate the sufficiency of “minimum contacts,” the U.S. Supreme Court has applied the “stream of commerce” test derived from its decision in *World-Wide Volkswagen*—requiring that the nonresident defendant either know, expect, or be aware that the products it delivers into the stream of commerce will be purchased by consumers in the forum state. *World-Wide Volkswagen*, 444 U.S. at 297–98; *LG Electronics*, 395 P.3d at 1052 (Gordon-McCloud, J., concurring in part and dissenting in part) (“*World-Wide Volkswagen* thus seems to be

the only controlling Supreme Court authority on ‘stream of commerce’ analysis even after *Asahi* and *J. McIntyre*.”).

Despite no evidence that Special Electric (1) was aware of the reach of CertainTeed’s distribution system for its asbestos-cement pipe; (2) actually knew that “its asbestos was ending up in Washington as a component of a pipe”; or (3) “had actual knowledge that CertainTeed distributed its pipe outside Washington,” the Court of Appeals held personal jurisdiction existed over Special Electric in Washington. *Noll*, 188 Wn. App. at 575–76. Under the Court of Appeals’ view, a Washington court may exercise personal jurisdiction over a nonresident components-parts supplier if two conditions are met: the product placed into the stream of commerce is a “known hazardous material” and the nonresident defendant supplies components for the manufacture of products that in turn “move into Washington through established channels of sale” for the product into which the component parts have been incorporated. *Id.* at 578, 583. But this view of the stream-of-commerce doctrine is inconsistent with *World-Wide Volkswagen*, *Asahi*, and *McIntyre*, and this Court’s decision in *LG Electronics* interpreting and applying those decisions.

- 1. The Court of Appeals improperly relied on an outdated, out-of-state case that articulated an expansive form of the stream-of-commerce doctrine but which has since been abandoned by that state's high court and effectively overruled by *World-Wide Volkswagen* and its progeny.**

The stream-of-commerce doctrine for personal jurisdiction in products-liability cases originated with the Illinois Supreme Court's decision in *Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). In *Gray*, a defendant manufactured a safety valve in Ohio that was incorporated into a defective water heater in Pennsylvania. *Id.* at 764. That water heater was later sold to a consumer in Illinois, who was injured when the water heater exploded. *Id.* at 762. The Illinois Supreme Court in *Gray* took an expansive view of the stream-of-commerce doctrine to conclude that sufficient minimum contacts existed—even though no evidence supported that the nonresident defendant knew, expected, or was aware that its safety valves would end up in Illinois. *Id.* at 766–67 (relying on a series of presumptions and reasonable inferences to support exercise of personal jurisdiction).

Nineteen years later the U.S. Supreme Court in *World-Wide Volkswagen* qualified its adoption of the stream-of-commerce doctrine, approving its use only when the nonresident defendant “delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State.” *World-Wide Volkswagen*, 444 U.S. at 298 (emphasis added). The Court of Appeals here ignored that limitation and instead expressly relied on *Gray* to support its expansive

interpretation of the stream-of-commerce doctrine. This reliance impermissibly sets Washington law back decades to a time before *World-Wide Volkswagen*.⁶ Washington courts cannot exercise personal jurisdiction over Special Electric when there is no evidence that Special Electric was aware that a regular flow of commerce would carry CertainTeed's asbestos-cement pipe into Washington. *Asahi*, 480 U.S. at 111–12 (O'Connor plurality) (requiring “aware[ness]” that the product enters the forum state and “something more” to support exercise of personal jurisdiction consistent with due process); *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) (requiring “aware[ness] that the final product is being marketed in the forum State”); *World-Wide Volkswagen*, 444 U.S. at 298 (requiring “expectation” that product will end up in forum state).

To the extent *Gray* supports that no awareness is required to find purposeful availment, *Gray* is no longer even the controlling authority in Illinois. See *Russell v. SNFA*, ___ Ill.2d ___, 987 N.E.2d 778, 788 n.2, 790, 793 (2013). As the Illinois Supreme Court recently recognized, *Asahi* requires “at a *minimum*[] that the alien defendant is *aware* that the final product is being marketed in the forum state.” *Id.* at 793 (internal citations omitted) (declining to apply *Gray*) (holding that personal jurisdiction over a nonresident defendant did not exist when no evidence

⁶ As the Court of Appeals recognized in *AU Optronics*, *World-Wide Volkswagen*, *Asahi*, and *McIntyre* have superseded earlier Washington case law cited for the proposition that “merely placing goods into a broad stream of commerce can constitute purposeful minimum contacts.” See *AU Optronics*, 180 Wn. App. at 921–22 (internal citations omitted).

supported that the defendant was aware that its product would end up in Illinois). More importantly, *Gray* and its expansive approach to the stream-of-commerce doctrine—holding that a component-parts supplier’s placement of products into the stream of commerce with nothing more satisfies the federal due process clause—no longer survives under any view taken by a majority of the Justices of the U.S. Supreme Court.⁷ The Court of Appeals erred in relying on *Gray*, which, if not yet formerly repudiated by the U.S. Supreme Court, has been reduced to a “derelict on the face of the waters of the law.” *Cf. Lambert v. California*, 355 U.S. 225, 232, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1958) (Frankfurter, J., dissenting) (“I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law.”).

⁷ See, e.g., *McIntyre*, 564 U.S. at 882 (Kennedy plurality) (holding that the “defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”); *Id.* at 890 (Breyer, J., concurring) (stating that “resolving this case requires no more than adhering to our precedents.”); *Asahi*, 480 U.S. at 112 (O’Connor plurality) (holding that merely putting a product into the stream of commerce is insufficient for forum state’s exercise of personal jurisdiction without “additional conduct”); *Id.* at 117 (Brennan, J., concurring) (requiring awareness and expectation by the defendant that its product will end up in the forum state before that state’s courts can exercise personal jurisdiction over nonresident defendant); *World-Wide Volkswagen*, 444 U.S. at 297–98 (holding that nonresident defendant must have an “expectation” that its product will be purchased by consumers in the forum state.”).

2. The Court of Appeals improperly relied on the “hazardous character” of asbestos, and the volume of CertainTeed’s business with Washington, to find purposeful availment by Special Electric.

World-Wide Volkswagen and *Asahi* make clear that Washington may not exercise personal jurisdiction over a nonresident defendant when there is no evidence the defendant was aware that a regular flow of commerce would carry its products into Washington. Acknowledging the lack of such evidence in the record, the Court of Appeals presumed to disregard this deficiency on two grounds.

First, the Court of Appeals invoked the “hazardous character” factor from Justice Stevens’ failed attempt in *Asahi* to establish a multi-factor test for purposeful availment. *Noll*, 188 Wn. App. at 585. Under Stevens’ test, courts evaluate “the volume, the value, and the hazardous character of the components.” *Asahi*, 480 U.S. at 122 (Stevens, J., concurring). But Justice Stevens failed to garner a majority for his approach in *Asahi*, and the approach has *never* been endorsed by a majority of the Justices of the U.S. Supreme Court. *See World-Wide Volkswagen*, 444 U.S. at 296 n.11 (rejecting the “hazardous character” of a product as a factor supporting personal jurisdiction) (“The ‘dangerous instrumentality’ concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.”).

Second, the Court of Appeals relied on the “volume of Special’s shipments of asbestos to CertainTeed’s Santa Clara manufacturing plant” and “the volume of finished pipe distributed into Washington by CertainTeed” to conclude Special Electric “purposefully availed itself of the protection of Washington law.” *Noll*, 188 Wn. App. at 585. The Court of Appeals effectively imputed CertainTeed’s conduct, in purposefully availing *itself* of the benefits of regularly selling asbestos-containing cement pipe in Washington, to Special Electric. *See id.* at 575, 583, 587. But under the U.S. Supreme Court’s stream-of-commerce decisions, the proper focus must be on the defendant’s actions and knowledge of the forum-directed consequences of those actions—not those of some third party. *Burger King*, 471 U.S. at 475 (stating that the minimum contacts must result from actions “by the defendant *himself* that create a ‘substantial connection’ with the forum State.” (internal citations omitted; emphasis in original)).

3. The Court of Appeals failed to adhere to *McIntyre* and prior U.S. Supreme Court precedent.

The Court of Appeals’ holding is also inconsistent with Justice Breyer’s controlling opinion in *McIntyre*. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (holding that a fragmented Court’s holding may be viewed as that position taken by those members who concurred on the narrowest grounds). While Justice Breyer held that the nonresident distributor’s sale of one machine into New Jersey was insufficient to establish personal jurisdiction, his concurrence did not

hold that a regular flow of sales would have been sufficient absent a defendant's awareness that its products would end up in the forum state. Justice Breyer noted that the plaintiff failed to show the defendant "purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users." *McIntyre*, 564 U.S. at 889 (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98 (internal quotation marks omitted; alterations in original)). Just as *McIntyre* required no more than adherence to prior U.S. Supreme Court precedent, so too should the Court of Appeals have adhered to *Asahi* and *World-Wide Volkswagen*. *Id.* at 890.

The Court of Appeals' holding comports more with the New Jersey Supreme Court's approach to personal jurisdiction that was rejected in *McIntyre*. The New Jersey Supreme Court in *McIntyre* held that New Jersey "can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer 'knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'" *McIntyre*, 564 U.S. at 877 (internal citation omitted). The Court of Appeals here implicitly determined Special Electric should have known its products would end up in Washington because its asbestos was "distributed through existing channels of interstate commerce." *Noll*, 188 Wn. App. at 583. Such an approach eviscerates national boundaries and effectively subjects a nonresident defendant to the personal jurisdiction of

any state any time its component parts are incorporated into final products that are later placed into the stream of commerce. But national boundaries remain relevant and vitally important for the “concept of minimum contacts.” *World-Wide Volkswagen*, 444 U.S. at 292 (ensuring that “the States through their courts[] do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”); *see also McIntyre*, 564 U.S. at 882 (Kennedy plurality) (“The principal inquiry . . . is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”).

Special Electric never expected that by delivering asbestos into the stream of commerce, its products would be purchased by consumers in Washington. *World-Wide Volkswagen*, 444 U.S. at 297–98. Special Electric was not aware that the stream of commerce would eventually “sweep” the product it sold to CertainTeed into Washington, much less engaged in “additional conduct” directed at Washington by which brought Special Electric’s product into contact with Mr. Noll. *Asahi*, 480 U.S. at 112 (O’Connor plurality) (requiring “something more” than simply placing “a product into the stream of commerce,” even if defendant is “awar[e]” that the stream “may or will sweep the product into the forum State”); *id.* at 117 (Brennan, J., concurring) (requiring that the nonresident be “aware” the “final product is being marketed in the forum State.”). Special Electric’s contacts do not constitute the kind of minimum contacts necessary to satisfy the purposeful availment requirement of due process for the exercise of specific personal jurisdiction by Washington under any

of the U.S. Supreme Court's stream-of-commerce decisions. The Court of Appeals' conclusion to the contrary should be rejected by this Court.

B. Requiring a plaintiff to show that a nonresident defendant components-parts supplier knew, expected, or was aware that its component parts will end up in the forum state to establish personal jurisdiction under the stream-of-commerce doctrine is consistent with *LG Electronics*.

In holding that specific personal jurisdiction existed over nonresident supplier defendants, the majority in *LG Electronics* embraced *awareness* as the critical factor for purposeful availment under the stream-of-commerce doctrine. *LG Electronics*, 375 P.3d at 1038–39, 1040, 1042 (majority opinion per Gonzales, J.) (relying on the fact that the defendants “intend[ed]” and “knew or expected” that their products would be sold “in large quantities in Washington”); *see id.* at 1047–48 (Gordon-McCloud, J., concurring in part and dissenting in part) (concluding that the majority adopted and applied “the bulk of Justice Brennan’s *Asahi* concurrence (without saying so).”). This Court clearly applied Justice Brennan’s approach in *Asahi*—the same approach advocated by Special Electric but rejected by the Court of Appeals—that a nonresident defendant must at least be *aware* its product will enter the forum state.

No evidence here supports a finding that Special Electric was aware its product was reaching Washington through CertainTeed’s pipe sales. The only demonstrated connection between Special Electric and Washington stemmed from CertainTeed’s unilateral activities in incorporating Special Electric’s asbestos into final products for sale in

Washington; no evidence was introduced to show that Special Electric was aware of CertainTeed's sales into Washington. Special Electric did not purposefully avail itself of the benefits of doing business in Washington, as required under this Court's decision in *LG Electronics* interpreting and applying the U.S. Supreme Court's stream-of-commerce decisions.

C. Absent a request for pertinent jurisdictional discovery, a trial court presented with a motion to dismiss under CR 12(b)(2) need not accept a plaintiff's jurisdictional allegations as verities when they are controverted by matters outside the pleadings.

Several Court of Appeals decisions conflict about the proper procedure to be followed when a party moves under CR 12(b)(2) to dismiss for lack of personal jurisdiction. The Court of Appeals acknowledged this conflict in its decision in *LG Electronics, State of Washington v. LG Electronics, Inc.*, 185 Wn. App. 394, 406 n.14, 341 P.3d 346 (2015) (opinion per Dwyer, J.) (acknowledging conflict with two decisions from "the typewriter era"). This Court chose not to resolve that conflict, nor need it have done so, because the State had requested what this Court described as appropriate jurisdictional discovery before the trial court's decision on whether to grant the motion to dismiss. *See LG Electronics*, 186 Wn.2d at 184 n.6.

Ms. Noll did not request review of this issue. Nor was it preserved before the trial court or the Court of Appeals. The Nolls' complaint alleged only that the defendants placed their products "into the stream of commerce"; they did not allege, as the State did in *LG Electronics*, that the

defendants were aware that their products were ending up in Washington. CP 2. The Nolls did not dispute the propriety of Special Electric's submission of evidentiary materials outside the pleadings to demonstrate the lack of personal jurisdiction; instead, they chose to meet "fire with fire" by submitting their own evidentiary materials (and supplementing that submission when they moved for reconsideration). The Nolls did not request any jurisdictional discovery until their *reply* in support of their motion for reconsideration of the trial court's dismissal order, and even then the discovery they requested was not pertinent to the awareness issue. *See* CP 339. The Nolls also did not assign error to the denial of this discovery, did not state an issue concerning it, and did not argue the point in their briefing to the Court of Appeals.

The Court of Appeals in *LG Electronics* insisted, based on a line of decisions of that court originating with *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 804 P.2d 627 (1991), that a party moving to dismiss for lack of personal jurisdiction must accept the complaint's jurisdictional allegations as verities, and may not controvert those allegations with matters outside the pleadings. The court disparaged conflicting decisions pre-dating *MBM Fisheries* as the product of "the typewriter era." But a close reading of those decisions⁸ reveals that they got the procedure right and the court in *MBM Fisheries*—and subsequent

⁸ *Access Rd. Builders v. Christenson Elec. Contracting Eng'g Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978); *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, Inc.*, 9 Wn. App. 284, 288–89, 513 P.2d 102 (1973).

decisions relying on *MBM Fisheries*—got the procedure wrong.⁹ This Court in *LG Electronics* opted to leave the matter for now to the trial courts' discretion. No pertinent jurisdictional discovery was ever requested here. The trial court, under *LG Electronics*, was therefore entitled to base its decision on matters outside the pleadings.

V. CONCLUSION

This Court should reverse the Court of Appeals and reinstate the trial court's dismissal order.

Respectfully submitted this 18th day of November, 2016.

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⁹ The court in *MBM Fisheries* based its statement that all allegations in a plaintiff's complaint "must be taken as correct," *MBM Fisheries*, 60 Wn. App. at 418, on its reading of the Ninth Circuit's decision in *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L. Ed. 2d 622 (1991) (which the court misdated as issuing in 1988). The court in *MBM* misread *Shute*, which actually held only that, on a motion to dismiss under the comparable federal rule (Fed. R. Civ. Pro. 12(b)(2)), factual disputes must be resolved in the plaintiff's favor—not that the allegations of the complaint must be taken as correct and cannot be controverted by materials outside the pleadings. *See Shute*, 897 F.2d at 380 (citing *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986) (citing *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985) (stating that a trial court analyzes a motion to dismiss for lack of personal jurisdiction by "resolving all factual disputes in the plaintiff's favor."))).

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 this 13th day of November, 2016.


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November 18, 2016 - 3:27 PM

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