NO. 98979-6

(COA NO. 77888-9-I)

IN THE 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,

and

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

Defendants.

RESPONDENT SPECIAL ELECTRIC COMPANY, INC.'S PETITION FOR REVIEW

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I. INTRODUCTION

This Court previously reversed the Court of Appeals and upheld King County Superior Court Judge Jeffrey Ramsdell's dismissal for lack of personal jurisdiction over Special Electric Company, Inc. This Court remanded for the limited purpose of determining whether personal jurisdiction existed in light of *State v. LG Electronics, Inc.*, 186 Wn.2d 169, 375 P.3d 1035 (2016), and the recently disclosed evidence of Special Electric's contacts in Washington.

On remand, Judge Ramsdell again dismissed for lack of personal jurisdiction, but the Court of Appeals later remanded for entry of findings of fact to "support" his decision. By the time of that second remand, Judge Ramsdell had retired from the bench. The superior court's presiding judge denied the parties' request to appoint Judge Ramsdell as a judge pro tempore and instead assigned the case to Judge Michael Scott. Rather than enter findings supporting Judge Ramsdell's decision, Judge Scott entered findings supporting personal jurisdiction based on an independent review of the paper-only record.

A divided Court of Appeals then reversed Judge Ramsdell's decision. Resolving an issue left open by this Court, the court adopted the "awareness" test for purposeful availment to exercise personal jurisdiction in a stream-of-commerce case over an out-of-state defendant. The court was unanimous in its adoption of that test but disagreed on whether it was satisfied; the majority deferred to Judge Scott's findings and held that it was, while the dissenting judge reviewed the paper-only record de novo

and agreed with Judge Ramsdell's conclusion that personal jurisdiction did not exist. Neither opinion addressed whether it should defer to Judge Ramsdell's decision based on a substantial-evidence review, despite the absence of supporting findings.

This Court should grant review. This case raises issues of substantial public interest under RAP 13.4(b)(4) that this Court should decide about the appropriate standard of review of discretionary decisions and trial-court findings of fact based on paper-only records, as well as the proper scope of review where a replacement judge on remand has presumed to dispute the original judge's decision based on a different reading of the factual record, when the Court of Appeals did not remand for reconsideration of the original judge's decision and authorized only the entry of findings of fact explaining and supporting the original judge's decision. This case also raises a significant question of law under the United States Constitution about the proper test for purposeful availment to exercise personal jurisdiction over an out-of-state defendant. This question warrants review under RAP 13.4(b)(3) and 13.4(b)(4).

II. COURT OF APPEALS DECISION

Special Electric seeks review of the Court of Appeals' decision terminating review issued on July 13, 2020, and published on August 19 (the *Decision*) (attached as App. A).

III. ISSUES PRESENTED FOR REVIEW

1. **Standards of review for discretionary decisions and factual findings based on paper-only records**. Most discretionary decisions are made based on paper records, rather than live testimony.

Our appellate courts usually review those decisions under the deferential abuse-of-discretion standard, while reviewing findings of fact for substantial evidence. Even so, such decisions are sometimes subjected to de novo review on the basis that the appellate court is in as good a position as the trial court to review a paper record, and sometimes this rationale is extended to findings of fact based on paper-only records. Should this Court revisit the issue of the proper standard of review for discretionary decisions and factual findings based on paper-only records? *Yes.* RAP 13.4(b)(4).

2. **Scope of appellate review for a predecessor judge's decision**. Should this Court decide the proper scope of review where a replacement judge on remand has presumed to enter findings of fact that conflict with the legal conclusion of the original judge, even though the Court of Appeals did not remand the decision of the original judge for reconsideration and directed the entry of findings that would explain and support the reason for the original judge's decision? *Yes.* RAP 13.4(b)(4).

3. **Awareness versus targeting as the test to establish purposeful availment in a stream-of-commerce case**. The Court of Appeals adopted an awareness test for purposeful availment to exercise personal jurisdiction in a stream-of-commerce case over a nonresident defendant. That test is at odds with the U.S. Supreme Court's recent decision in *Bristol-Myers Squibb*, which revived federalism as a due-process limitation on state courts' exercising personal jurisdiction over nonresident defendants. Should this Court decide whether awareness or targeting is the proper test to be applied in stream-of-commerce cases to prove purposeful availment for personal jurisdiction? *Yes.* RAP 13.4(b)(3).

IV. STATEMENT OF THE CASE

The underlying facts are set forth in detail in several published decisions of the Washington appellate courts.[1] Special Electric discusses only those facts relevant to the issues raised in this petition.

[1] *Noll v. Am. Biltrite, Inc.*, 188 Wn. App. 572, 355 P.3d 279 (2015); *Noll v. Am. Biltrite Inc.*, 188 Wn.2d 402, 395 P.3d 1021 (2017); *Noll v. Special Elec. Co.*, 9 Wn. App. 2d 317, 444 P.3d 33 (2019); *Noll v. Special Elec. Co.*, ___ Wn. App. 2d ___, 471 P.3d 247 (2020).

A. After remand from this Court and following an evidentiary hearing, the trial court (Hon. Jeffrey Ramsdell, King County Superior Court) re-affirmed its prior dismissal of Noll's claims for lack of personal jurisdiction over Special Electric, concluding that Noll did not meet her burden to establish purposeful availment.

Candance Noll and her husband[2] sued over twenty defendants, including Special Electric, for injuries Mr. Noll sustained from asbestos exposure in Washington. CP 1-5. The trial court (Judge Ramsdell) granted Special Electric's motion to dismiss for lack of personal jurisdiction. CP 252-53, 408-09. After settling with the other defendants, Noll appealed the dismissal of the claims against Special Electric, and the Court of Appeals reversed. *Noll*, 188 Wn. App. at 583.

This Court granted review and reversed the Court of Appeals. It reinstated the dismissal but remanded to allow Noll to address whether personal jurisdiction existed under *LG Electronics* and recently disclosed evidence of Special Electric's contacts in Washington. *Noll*, 188 Wn.2d at 405, 416. On remand, the parties agreed that the trial court (still Judge Ramsdell) should hold an evidentiary hearing under CR 12(d). Noll submitted only documentary evidence to show purposeful availment.

The fact dispute before Judge Ramsdell hinged on the scope of the "West Coast" or "West" market referenced in CertainTeed's corporate documents, which evidenced facts Special Electric knew about CertainTeed's business when Special Electric began selling asbestos for

[2] Mr. Noll was alive when the first appeal was filed. He later died, and his wife was substituted as the personal representative of his estate. In this petition, references to "Noll" encompass both Mrs. Noll's claims as the personal representative of her husband's estate's injuries and her claims as the estate's beneficiary.

CertainTeed to incorporate into asbestos-cement pipe at its Santa Clara, California plant. RP (12/11/17) 12-14, 16, 34-44, 58-59, 74, 78-79; CP 735, 1046-48, 1052, 1075-77, 1088-89, 1418-19. It was this pipe that CertainTeed distributed into Washington and that allegedly caused Mr. Noll's exposure to asbestos supplied by Special Electric.[3]

Based on the location of CertainTeed's plants and sales offices, Special Electric agreed that it knew about five CertainTeed regional markets for asbestos-cement pipe: a "West Coast" or "West" market (California, Arizona); a Southwest market (Texas, Louisiana); a Southeast market (Georgia); and Midwest and Mid-Atlantic markets (Missouri, Ohio, Pennsylvania). CP 1075-76. Special Electric argued that the evidence most reasonably showed that, when it began selling asbestos to the Santa Clara plant, the "West Coast" or the "West" market for CertainTeed's asbestos-cement pipe did not extend to Washington. RP (12/11/17) 34-44, 54-55, 74, 78-79; CP 735, 1075-76, 1089-90, 1094. Noll argued that the "West Coast" or the "West" market references in CertainTeed's documents necessarily extended to Washington. RP (12/11/17) 14, 16, 58-59; CP 735, 1046-48, 1052, 1418-19.

Judge Ramsdell concluded that Noll's evidence was insufficient to establish purposeful availment. CP 1709-10.[4]

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[3] As it has throughout this litigation, Special Electric concedes strictly for purposes of this personal-jurisdiction dispute that it, rather than separate corporate entities bearing the "Special" name, supplied the asbestos at issue here.

[4] Special Electric's counsel was not notified of this order until they were served with Noll's notice of appeal. CP 1889-98. By then, the fifteen-day period in which Special Electric could have proposed findings of fact had expired. *See* CR 52; CR 54(e).

B. The Court of Appeals remanded for the trial court to make findings supporting its conclusion of no purposeful availment.

The Court of Appeals determined that it could not review the merits of Judge Ramsdell's decision absent factual findings. Retaining jurisdiction, the court remanded for entry of factual findings to support the legal conclusion that Noll had failed to prove purposeful availment:

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

Noll, 9 Wn. App. 2d at 319, 323 (emphasis added).

The Court of Appeals plainly contemplated that Judge Ramsdell would provide the requested findings. Although Judge Ramsdell had since retired from the bench and become a private mediator and arbitrator, the Washington Constitution "entitled" him to resume his role as judge through a pro-tem appointment. Const. art. IV, § 7.

C. The Chief Civil Judge for King County Superior Court denied the parties' joint request to appoint Judge Ramsdell as a pro-tem judge to preside over the limited remand proceeding, choosing instead to assign the proceeding to Judge Ramsdell's successor, Judge Michael Scott.

After receiving the Court of Appeals' decision, the parties' counsel jointly wrote to both the chief civil judge for King County Superior Court

(Hon. Julie Spector) and Judge Ramsdell, requesting that Judge Ramsdell be appointed judge pro tempore to preside over the limited remand proceeding.[5] The chief civil judge instead assigned the matter to Judge Michael Scott, who had succeeded to Judge Ramsdell's department.[6]

D. Judge Scott concluded that the only reasonable reading of the evidence was that Special Electric knew that the asbestos it was selling to CertainTeed in California was ending up in asbestos-cement pipe that CertainTeed distributed into Washington.

Judge Scott stated at a pre-hearing conference that he "underst[oo]d" that his remand authority was limited to entering "findings of fact in support of the decision that was entered by Judge Ramsdell." CP 1886. But at that hearing, Judge Scott announced that he now believed he was free to independently review the paper record and determine whether it showed that Noll had established the facts necessary to exercise personal jurisdiction over Special Electric. RP (9/6/19) 31-34.[7]

The findings Judge Scott entered went so far as to attack the reasonableness of Judge Ramsdell's evaluation of the evidence.[8] CP 1994. He ultimately concluded that the record could reasonably be read only one way, and that this reading supported a conclusion—contrary to Judge

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[5] *Decl. of Michael B. King ISO Motion for Clarification of Remand Directive* (Court of Appeals file), Ex. A.

[6] A few days later, Judge Spector sua sponte entered an order stating, without explanation, that it would be "impractical and not possible for Judge Ramsdell to hear the matter." CP 1796-97.

[7] Special Electric promptly asked the Court of Appeals to clarify its remand directives and reassign the remand proceeding to Judge Ramsdell. That motion was denied.

[8] Judge Scott's findings were almost a verbatim cut-and-paste of Noll's proposed findings. *Compare* CP 1834-48 *with* CP 1978-95; *see also* App. A to Special Electric's Supp. Brief Following Limited Remand Proceeding (Court of Appeals file) (attaching an illustrative table comparing Noll's proposed findings with Judge Scott's findings).

Ramsdell's conclusion—that Special Electric purposefully availed itself of the benefits of doing business in Washington. CP 1990-91, 1994.

E. A divided Court of Appeals reversed Judge Ramsdell's dismissal order. The majority deferred to Judge Scott's findings of fact, concluding that they established the factual predicate for personal jurisdiction over Special Electric. The dissent (Hon. James Verellen) refused to defer to Judge Scott's findings and concluded, after a de novo review of the record that was before Judge Ramsdell, that Noll had failed to prove purposeful availment.

A bare majority of the Court of Appeals reversed Judge Ramsdell's dismissal order. The majority relied on Judge Scott's findings and applied a substantial-evidence review to conclude that personal jurisdiction exists over Special Electric. *Decision* at 6-7, 11-14. In doing so, it adopted for the first time in Washington an awareness test to establish purposeful availment in stream-of-commerce cases. *Id.* at 11.

Judge Verellen dissented. Under the "unusual circumstances" presented, he independently reviewed the paper record de novo and did not defer to Judge Scott's findings. *Id.* at 15, 18 (citing the "long line of cases" permitting "de novo review of documentary evidence . . . even where a trial court has made findings"). He concluded that the evidence does not show Special Electric was aware its asbestos was being used by CertainTeed to construct pipe for distribution in Washington. *Id.* at 19.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review to decide three issues.

First, this Court should grant review to resolve conflicting lines of authority and declare a standard of review of discretionary decisions and

findings of fact under which the mere fact that the trial court made its decision on a paper record makes no difference. Absent special circumstances, those decisions should receive deference under the abuse-of-discretion and substantial-evidence standards of review.

Second, this Court should grant review to recognize that one of the special circumstances where deference is inappropriate is when a replacement judge assigned on remand has presumed to reweigh the evidence and find that no reasonable judge could conclude as the original judge did. Under these special circumstances, this Court should hold that the reviewing court should reweigh the evidence de novo to determine if the record reasonably supports the original judge's conclusion.

Third, this Court should grant review to decide the proper standard for establishing purposeful availment in light of *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, ___ U.S. ___, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), which was issued after this Court decided both *LG Electronics* and *Noll*. In *Bristol-Myers Squibb*, the Supreme Court of the United States squarely revived federalism as a due-process limitation on a state court's exercise of personal jurisdiction over a nonresident defendant. This limitation compels the conclusion that a nonresident defendant must target the forum state to satisfy purposeful availment. Because Noll has not shown that Special Electric targeted Washington as a market for its asbestos, this Court ultimately should reinstate the dismissal of Noll's claims.

A. This Court should grant review to decide whether an appellate court may review a discretionary decision or a finding of fact de novo, merely because the decision was made on a paper-only record without hearing live testimony.

Standards of review are fundamental to the relationship between appellate and trial courts. They are best understood as allocations of decisional authority between trial and appellate courts. HARRY T. EDWARDS & LINDA A. ELLIOT, FEDERAL COURTS STANDARDS OF REVIEW 3-4 (2007). The particular standard reflects the degree of deference afforded a trial-court decision. Sound principles of institutional policy dictate deferential review of discretionary decisions. J. Jonas Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151, 157 (2014). Trial courts are in a better position to make the discretionary decisions involved in resolving fact-bound disputes. It is thus appropriate that appellate courts presumptively defer to these decisions.

Most trial-court decisions will ineluctably be based on a so-called "paper only" record for the simple, pragmatic reason that they do not require and rarely involve live testimony. Washington appellate courts regularly review these decisions under the deferential abuse-of-discretion standard.[9] All of these decisions are committed to a trial court's discretion because they do not involve a single right or wrong answer. *See Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

[9] *See* App. B (listing discretionary decisions based on a paper record that have been reviewed only for abuse of discretion).

The trial court is thus empowered to make a decision that falls within a range of "acceptable choices." *Sisouvanh*, 175 Wn.2d at 623.

Even so, Washington appellate courts will sometimes presume to review discretionary decisions de novo—merely because the decision was based on a paper record. *See Eussen v. Parker*, No. 49722-1, 2018 WL 333317, at *3 (2018) (unpublished, nonbinding authority under GR 14.1) ("This rule has led *some courts to state* that '[d]ecisions based on declarations, affidavits, and written documents are reviewed de novo.'") (emphasis added).[10] De novo review of discretionary decisions based on paper records can be traced back to this Court's decision in *State ex rel. Pacific Fruit & Produce Co. v. Superior Court*, 22 Wn.2d 327, 331-32, 155 P.2d 1005 (1945) (reviewing de novo a trial court's decision denying a motion to dismiss for want of prosecution). Similarly, and despite this Court's landmark decision in *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959), which should have consigned de novo review of findings of fact to the judicial graveyard, the mantra about de novo review of a decision because the record is "paper only" has also from time to time been applied to review of findings of fact.[11]

Within the last decade, this Court created an exception to de novo review of findings of fact based on paper-only records for cases involving

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[10] *See, e.g.*, *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222-23, 829 P.2d 1099 (1992); *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Carlson v. City of Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968).

[11] *See, e.g.*, *Service Employees International Union Local 925 v. Univ. of Wash.*, 193 Wn.2d 860, 866, 447 P.3d 534 (2019); *State v. Thetford*, 109 Wn.2d 392, 396-97, 745 P.2d 496 (1987); *Jenkins v. Snohomish Cty. Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986).

what this Court called "voluminous" or "complex" paper records. *Dolan v. King County*, 172 Wn.2d 299, 310-11, 258 P.3d 20 (2011). Some Washington appellate courts have since applied *Dolan* to review discretionary decisions for an abuse of discretion.[12] Yet determining when a record is sufficiently "complex" or "voluminous" to affect the standard of review has led to ad-hoc applications of the standards of review, with no organizing principle that guides our courts in making these choices.[13]

Nearly twenty years ago, the Second Circuit rejected a decades-old line of authority in which the court had authorized de novo review of a trial court's factual determinations based on a paper-only record. *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168-72 (2001) (discussing *Orvis v. Higgins*, 180 F.2d 537 (2d Cir. 1950) (Frank, J.)). The rationale for the so-called *Orvis* rule was that when a trial judge's factual determinations are based entirely on documentary evidence, the appellate court can evaluate the written record as well as the trial judge. *Id.* at 170. The *Orvis*

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[12] *See, e.g.*, *City of Bellevue v. Pine Forest Props., Inc.*, 185 Wn. App. 244, 264, 340 P.3d 938 (2014); *Eussen*, 2018 WL 333317, at *3; *Denny v. Ohana Fiduciary Corp.*, No. 69117-1, 2016 WL 4081150, at *7 n.11 (2016) (unpublished, nonbinding authority under GR 14.1).

[13] *Compare Robinson v. Am. Legion Dep't of Wash., Inc.*, 11 Wn. App. 2d 274, 286, 286 n.4, 452 P.3d 1254 (2019) (citing *Dolan* and applying a substantial-evidence review to a paper record), *with Nw. Alloys, Inc. v. Dep't of Nat. Res.*, 10 Wn. App. 2d 169, 181-83, 447 P.3d 620 (2019) (citing *Dolan* and concluding that, "although the superior court reviewed a large agency record," de novo review was appropriate), *and Habu v. Topacio*, No. 79152-4, 2020 WL 533947, at *3 (2020) (unpublished, nonbinding authority under GR 14.1) (citing *Dolan* and concluding that, despite that an evidentiary hearing occurred on a paper record, de novo review was appropriate). This ad-hoc decision-making was extended to the Court of Appeals' published decision here too, and with no more illumination for determining just what constitutes a sufficiently "complex" or "voluminous" paper-only record to warrant deference—in this case—by applying a substantial-evidence standard of review. *Noll*, 9 Wn. App. 2d at 321.

rule was later extended to a decision on a preliminary-injunction motion based on a paper record. *Id.* The Second Circuit held in *Zervos* that the decision to grant or deny a preliminary injunction should be reviewed only for an abuse of discretion: "there is no exception to this rule for cases in which the district court heard no live testimony." *Id.* at 171.

This Court should accept review to determine whether to follow the Second Circuit's lead in *Zervos*. As the Second Circuit recognized, whether a reviewing court applies a deferential standard of review should not depend on whether a party happens to have called a witness to testify in the proceeding below. It should instead be driven by the institutional relationship between the trial and appellate courts. And in Washington, this point is driven home—or should have been decades ago—by this Court's decision in *Thorndike*.

Trial courts make the vast majority of their decisions, including those supported by factual findings, without hearing live testimony. Subjecting those decisions to de novo review merely because the resulting record is "paper only" is inappropriate. As this Court has observed, trial courts are "better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence." *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003); *see also Sisouvanh*, 175 Wn.2d at 621 (observing that the abuse-of-discretion standard of review is "appropriate" when the "trial court is generally in a better position than the appellate court to make a given determination"). If the trial court's resolution of a matter involves the exercise of discretion, then

the appellate court should defer to that decision under the abuse-of-discretion standard of review. Similarly, when a trial court makes a finding of fact, which necessarily involves the weighing of evidence (a specific form of exercising discretion), that finding should be reviewed only for whether it is supported by substantial evidence. Whether a court heard live testimony in either of these circumstances should make no difference. This Court should grant review and so hold.

B. This Court should grant review to determine the proper standard for reviewing a replacement judge's findings of fact on remand, when the Court of Appeals did not authorize reconsideration of the original judge's decision and called for the entry of findings of fact supporting that decision, but the replacement judge nonetheless presumed to enter findings of fact that contradict that decision.

This Court should grant review to determine which judge's determinations are entitled to deference in circumstances such as these: those of the original judge whose decision on the merits is under review, or those of a replacement judge who was not authorized to reconsider the original judge's decision but only to enter findings of fact supporting that decision, but who nevertheless chose to independently review the record on remand and reject the original judge's determinations.

The issue is not which of Judge Ramsdell's or Judge Scott's clearly competing and conflicting readings of the record is "correct," in some abstract who-got-it-right sense. The issue is instead whether Judge Ramsdell could reasonably read the record consistent with his ultimate conclusion that purposeful availment was not shown. This must be the

dispositive question; to conclude otherwise would contradict the Court of Appeals' prior holding that Judge Ramsdell's decision is entitled to deferential substantial-evidence review. *See Noll*, 9 Wn. App. 2d at 321.

The dissenting judge correctly rejected Judge Scott's conclusion that the record could be read only one way. The record on remand consisted mainly of CertainTeed's corporate documents that informed Special Electric about the nature and scope of CertainTeed's asbestos-cement-pipe business. Judge Ramsdell could reasonably conclude from that evidence that Special Electric learned about a prospective customer with an asbestos-cement-pipe business that was not national but only regional in scope, serving five distinct regional markets—none of which included the Pacific Northwest.[14] CP 1805-07. Noll admitted that no evidence supports that Special Electric had access to or knowledge of CertainTeed's invoices for its sales of asbestos-cement pipe. CP 1938-39. The documents to which Special Electric did have access and knowledge, viewed within the broader context of CertainTeed's various product markets, showed CertainTeed was serving different regions and not a single nationwide market. CP 1805-07. The regions served by CertainTeed's shelter-product line, for example, differed markedly from the regions served by its asbestos-cement-pipe product lines. CP 1805-07. And these same documents also showed that CertainTeed had a

[14] Special Electric's proposed findings were drafted consistent with how Special Electric opposed Noll's motion to establish personal jurisdiction before Judge Ramsdell. *Compare* CP 1074-94 (citing the evidentiary record), *with* CP 1802-16 (citing the evidentiary record, with the benefit of record references to the clerk's papers).

"nationwide" pipe presence only when taking together the markets served by all of its pipe products. CP 1807-08.[15]

The majority offered no response to the dissenting judge's analysis. Nor did Special Electric ever ask the court of appeals "to ignore the [replacement] court's findings." *Decision* at 7. The majority missed the procedural boat by blindly deferring to the replacement judge's findings, instead of asking itself—based on the "unusual circumstances" presented (*Decision* at 16, 18)—whether Judge Ramsdell could have reasonably concluded that Noll had failed to prove purposeful availment.[16]

Absent findings of fact, this Court presumes that a trial court has properly discharged its duties. *Peoples Bank & Trust Co. v. Carlson*, 195

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[15] When this case first went up the appellate ladder, there was confusion about whether Special Electric supplied 90 or 95 percent of the total asbestos to CertainTeed's Santa Clara plant. *See Noll*, 188 Wn. App. at 577 (stating that Special Electric supplied 95 percent of the asbestos); *Noll*, 188 Wn.2d at 420 (concurring opinion) (stating that Special Electric supplied 90 percent of the asbestos). In fact, the record conclusively established that, during the years when Mr. Noll claimed exposure to asbestos from CertainTeed's asbestos-cement pipe, Special Electric supplied only 90 percent of the crocidolite (blue) asbestos used at the plant; the percentage of the asbestos supplied by Special Electric, both crocidolite and chrysotile, never reached 50 percent of all the asbestos supplied to the Santa Clara plant during any of the claimed exposure years. *See* 1747-48 (illustrative chart); *see also* CP 292-96, 359 (foundation) (all attached as App. C). Moreover, CertainTeed did not use crocidolite in all of the pipe it manufactured at the Santa Clara plant, preferring not to use it whenever practicable (presumably because it was the most expensive kind of asbestos); the percentages of crocidolite in pipe manufactured at the Santa Clara plant ranged from zero to 25 percent of the total asbestos content. CP 307-08, 792-97, 891, 980.

[16] Contrary to the majority's analysis, it did not previously remand because it "had an insufficient factual record to affirm the [original] court's order of dismissal." *Decision* at 7. Because Noll had the burden to establish personal jurisdiction, an insufficient factual record would have doomed Noll's case, and the court of appeals would have been compelled to affirm Judge Ramsdell's decision. The court of appeals remanded because it could not "discern the reasoning or underlying facts supporting the decision to deny personal jurisdiction against Special Electric." *Noll*, 9 Wn. App. 2d at 319. And its initial decision to remand for findings certainly does not compel the majority's blind deference to the replacement judgement's findings, as made clear by the dissenting judge.

Wash. 285, 287, 80 P.2d 812 (1938). It would thus be appropriate to presume that Judge Ramsdell properly discharged his duties by considering and independently weighing all the evidence that was before him to determine if Noll had met her burden to prove purposeful availment. Judge Ramsdell concluded that Noll's evidence was insufficient to establish purposeful availment. Because he could reasonably have reached that conclusion under either the awareness or targeting tests for specific jurisdiction, this Court should grant review, reverse the majority's decision, and remand with instructions to reinstate the dismissal of Noll's claims against Special Electric.

C. This Court should adopt targeting as the test to establish purposeful availment for specific jurisdiction in stream-of-commerce cases.

Five years ago, the Court of Appeals concluded that personal jurisdiction could be exercised over Special Electric because it placed a "known hazardous material" into the stream of commerce. *Noll*, 188 Wn. App. at 583. This Court rejected that approach, but ultimately remanded to the trial court because the parties lacked the benefit of *LG Electronics* and recently disclosed evidence of Special Electric's unrelated contacts in Washington. *Noll*, 188 Wn.2d at 406, 416-17 (declining to decide "if showing actual knowledge or awareness is necessary, or sufficient, to finding specific jurisdiction in stream of commerce cases"). After an evidentiary hearing and an order dismissing Noll's claims for the second time, the Court of Appeals held for the first time in Washington that actual awareness must be shown to prove purposeful availment. *Decision* at 11.

Absent from the U.S. Supreme Court's decisions in *Asahi* and *J. McIntyre*—and from this Court's decisions in *LG Electronics* and *Noll*—was any analysis of the relationship between federalism and due-process limitations on personal jurisdiction.[17] But this silence ended with the U.S. Supreme Court's decision in *Bristol-Myers Squibb*.

Bristol-Myers Squibb expressly revived federalism as a restriction on the exercise of personal jurisdiction over a nonresident defendant.[18] 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] 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

[17] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

[18] At least one state has recognized that *Bristol-Myers Squibb* has indeed changed the landscape. Before *Bristol-Myers Squibb* came down, the Arkansas Court of Appeals reversed a trial court's decision dismissing a case of lack of personal jurisdiction against 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).

> 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 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).[19]

Bristol-Myers Squibb's focus on interstate federalism as a limitation on personal jurisdiction supports that a nonresident defendant must target the forum to satisfy purposeful availment. Requiring targeting gives independent substance to federalism and state-sovereignty limitations, separate from convenience, fairness, and reasonableness concerns. 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 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).[20]

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[19] Justice Alito's opinion for the seven-justice majority in *Bristol-Myers Squibb* stated 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 (*e.g.*, the Arkansas Court of Appeals, in the decision discussed in footnote 18).

[20] These courts' conclusion is also supported by the plain meaning of "purposeful availment," which Chief Justice Warren presumably had in mind when he authored the Supreme Court's opinion in *Hanson v. Denckla*, which first announced that constitutional

While the Court of Appeals unanimously adopted awareness as the controlling test for purposeful availment in Washington, awareness alone cannot satisfy the true meaning of purposeful availment. Certainly the U.S. Supreme Court must have considered these concepts when it first adopted purposeful availment as a limitation on what could otherwise have been the freewheeling scope of personal jurisdiction in the wake of *International Shoe*. *See Hanson*, 357 U.S. at 253. Federalism can be vindicated only if "purposefulness" is given its ordinary meaning—to act with an intent to benefit—which in turn means requiring targeting.[21]

VI. CONCLUSION

This Court should grant review, reverse the court of appeals majority's decision, and reinstate the dismissal of Noll's claims against Special Electric.

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requirement. "Purposeful" means an act "done with a specific purpose in mind; deliberate." BLACK'S LAW DICTIONARY 1431 (10th ed. 2014). "Availment" means the "act of making use or taking advantage of something for oneself" or to "profit, advantage, or benefit." *Id.* at 162. Purposeful availment thus means, as a matter of plain English, that the defendant has acted with the specific purpose of benefiting from its suit-related conduct that has created a substantial relationship between the defendant and the forum—in other words, targeting the forum.

[21] On October 7, 2020, the U.S. Supreme Court heard oral argument in two consolidated specific-jurisdiction cases, *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). 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. A decision in Ford's favor will hold that, for specific jurisdiction, the Due Process Clause under the Fourteenth Amendment requires a causal connection between the defendant's forum contacts and the plaintiff's claims. That holding would bar the exercise of specific jurisdiction over Special Electric in Washington and compel reinstatement of Judge Ramsdell's dismissal ruling. The briefing in these cases can be found on the SCOTUSBLOG website. (Special Electric has attached a printout of that page, current as of the date of the filing of this petition, as App. D.)

Respectfully submitted: October 19, 2020.

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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: October 19, 2020

S:/ Patti Saiden
Patti Saiden, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CANDACE NOLL, Individually and as Personal Representative of the Estate of Donald Noll, Deceased, Appellant, v. SPECIAL ELECTRIC COMPANY, INC., 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.;	)	No. 77888-9-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

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.	)

Howard Goodfriend, not a party to this action, filed a motion to publish the court's July 13, 2020 opinion. The respondents filed a response. The majority of the panel having determined that the motion should be granted; now, therefore, it is hereby

ORDERED that Howard Goodfriend's motion to publish is granted.

For the Court:

Judge

FILED
7/13/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellant,

v.

SPECIAL ELECTRIC COMPANY, INC.,

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;

No. 77888-9-I

DIVISION ONE

UNPUBLISHED OPINION

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

HAZELRIGG, J. — This case returns following entry of findings of fact on remand as directed by our opinion in Noll v. Special Electric Company, Inc., 9 Wn. App. 2d 317, 444 P.3d 33 (2019). We ordered this remand because neither the trial court's reasoning nor the underlying facts supporting its decision that it lacked personal jurisdiction over Special Electric Company could be discerned from the original record on appeal. We remanded for the trial court to return to the documentary evidence previously submitted by the parties, determine whether Special Electric purposefully availed itself of the privilege of doing business in Washington, and provide us with the record necessary to engage in our analysis of the issues raised by appellant Noll. We retained jurisdiction for subsequent review. On remand, a different judge reviewed the record and issued findings of fact. This trial court's findings support the conclusion that personal jurisdiction exists over Special Electric. Accordingly, we reverse the dismissal of Noll's lawsuit against Special Electric.

FACTS

The trial court dismissed Donald Noll's asbestos claims against Special Electric Company (Special Electric) for lack of personal jurisdiction.[1] Noll appealed and the Washington Supreme Court remanded to the trial court to reconsider its

[1] The facts are set forth in detail in this court's opinion in Noll v. Special Electric Company, Inc., 9 Wn. App. 2d 317, 444 P.3d 33 (2019). We repeat only those facts necessary to resolve the issues before us now.

ruling in light of State v. LG Electronics, Inc., 186 Wn.2d 169, 375 P.3d 1035 (2016). Noll v. Am. Biltrite Inc., 188 Wn.2d 402, 416, 395 P.3d 1021 (2017) (Noll I). The court concluded that Noll did not allege sufficient facts for Washington to exercise specific personal jurisdiction over Special Electric. But the court also indicated that it did not intend to preclude the trial court from making its own finding of jurisdiction on remand "depending on the allegations that the plaintiff then raises." Noll I, 188 Wn.2d at 406. Because "Noll failed to allege *any* action taken by Special to purposefully avail itself of the benefits and protections of the Washington market," the court declined to decide "if showing actual knowledge or awareness is necessary, or sufficient, to finding specific personal jurisdiction in stream of commerce cases." Noll I, 188 Wn.2d at 416.

On remand, Noll presented a new motion to establish specific jurisdiction with additional evidence. After conducting a preliminary hearing based solely on documentary evidence, the trial court denied Noll's motion to establish personal jurisdiction over Special Electric. The trial court did not enter findings of fact or conclusions of law, entering only the following order denying the motion:

> The evidence presented by Plaintiff is insufficient to establish that Special [Electric] to [sic] purposely avail[ed] itself of the benefits and protections of the Washington market, thus conferring specific jurisdiction in this matter. Special [Electric]'s other unrelated contacts with two Washington State companies are not relevant to [the] issue of specific jurisdiction which is the only basis that is asserted.

Noll appealed. Noll v. Special Elec. Co., 9 Wn. App. 2d 317, 444 P.3d 33 (2019) (Noll II). We held that it was appropriate to apply the "usual standards of review in Washington," i.e., de novo for conclusions of law and substantial

evidence review for findings of fact. Noll II, 9 Wn. App. 2d at 321. While acknowledging that case law permits Washington courts to review documentary evidence de novo, we also recognized our authority to defer to the trial court's findings in cases where the evidence was voluminous and complex. Noll II, 9 Wn. App. 2d at 321 (citing Dolan v. King County, 172 Wn.2d 299, 310-11, 258 P.3d 20 (2011)). Because the evidence here "involves a number of complex questions, including the meanings of corporate documents, abbreviations, figures, and percentages," we held "it appropriate to defer to the trial court as to the facts in these circumstances." Noll II, 9 Wn. App. 2d at 321.

We rejected Special Electric's invitation to rely on implied findings of fact based on the trial court's decision, noting that Special Electric failed to prepare a formal order or request findings of fact and this court was "not inclined to speculate on findings beneficial to the party that failed to procure them." Noll II, 9 Wn. App. 2d at 323. We further acknowledged that "the subject of specific jurisdiction is not well-settled law," noting a "significant disagreement" among courts about how to test evidence of personal jurisdiction. Id.

We then remanded for the trial court to make specific factual findings in support of its ruling "[b]ecause we cannot discern the reasoning or underlying facts supporting the decision to deny personal jurisdiction against Special Electric," and "[b]ecause we have no reliable indication of the facts as the trial court understood them." Noll II, 9 Wn. App. 2d at 319, 323. Specifically, we asked the trial court to answer the following questions "as well as any other findings of fact that support its decision":

1. Did Special Electric control a significant share of the United States market for asbestos?
2. Did Special Electric intend for its asbestos to be incorporated into products sold across the United States and in Washington?
3. Was a substantial volume of CertainTeed asbestos-cement pipe containing Special Electric's asbestos sold in Washington as part of the regular flow of commerce?
4. Did Special Electric know that CertainTeed sold asbestos-cement pipe in Washington?
5. Should Special Electric have known that CertainTeed sold asbestos-cement pipe in Washington?

Noll II, 9 Wn. App. 2d at 323-24.

The trial judge who made the ruling underlying this appeal retired prior to our remand and the case was ultimately reassigned to another.[6] As we instructed, the trial court reviewed the evidence, clarifying that "[t]his court's role is *not* limited to finding only facts that support the trial court's prior decision to dismiss for lack of jurisdiction," and "acts as a neutral fact finder – it does not view the facts in a light favorable to one side or the other, and will only make reasonable inferences based on the evidence in the record." The court made extensive findings of fact and the following findings in answer to our questions on remand:

> There is insufficient evidence in the record to determine Special Electric's volume share of the total United States market for all types of asbestos during the relevant time period. However, based on the findings set forth above, the court finds that, by 1977-79, when Mr. Noll worked on construction in Washington cutting asbestos-cement pipe manufactured by CertainTeed, Special Electric controlled a very substantial share of the United States market for crocidolite (blue) asbestos, and Special Electric's volume share of the overall United States market for asbestos of all types was not insignificant.

[6] The superior court denied Special Electric's request to assign the case to Judge Ramsdell as a Judge Pro Tempore. This court denied Special Electric's request to "direct that the assignment of the remand matter to Judge Scott be withdrawn" and "request Hon. Judge Jeffrey M. Ramsdell (Ret.) to accept a *pro tem* assignment in order to complete the remand process." Respondent's Motion For Clarification of Remand Directive, filed September 12, 2019; Order Denying Motion for Clarification of Remand Directive, filed October 11, 2019.

> Furthermore, considering facts other than just volume market share, Special Electric was an active and significant participant in the overall United States markets for asbestos, and sought to stay well-informed of and involved in the markets for asbestos.
>
> Based on the findings set forth above, as well as on additional facts set forth below, the court finds that Special Electric intended for its asbestos to be incorporated into products sold across the United States, including in Washington.
>
> Based on the forgoing facts, a substantial volume of CertainTeed asbestos-cement pipe containing Special Electric's asbestos was sold in Washington as part of the regular flow of commerce.
>
> Based on the substantial circumstantial evidence described above, the court finds that Special Electric knew CertainTeed sold asbestos-cement pipe in Washington.
>
> Based on the findings set forth above, and *a fortiori*, Special Electric should have known that CertainTeed sold asbestos-cement pipe in Washington.

DISCUSSION

We review factual findings following a preliminary hearing for substantial evidence and questions of law de novo. Noll II, 9 Wn. App. 2d at 320-21. We defer to the trial court as the fact finder to weigh the evidence and draw reasonable inferences therefrom. State v. Perebeynos, 121 Wn. App. 189, 196, 87 P.3d 1216 (2004). As noted above, we held it appropriate to defer to the trial court to make factual findings rather than act as initial fact finders, due to the complexity of the factual issues raised in this case. Noll II, 9 Wn. App. 2d at 321.

We remanded for the trial court to enter findings because we did not have sufficient information to review the court's ruling on personal jurisdiction. As the trial court indicated on remand, the task before it was to review the record, find the facts, and answer the questions set out in our first opinion. The parties agreed

that all the evidence to be considered on remand was properly before the court. Now having before us the relevant findings, our task is to determine whether those findings support the exercise of personal jurisdiction over Special Electric.

Special Electric contends that the trial court exceeded the scope of remand. Because the first judge concluded there was no personal jurisdiction over Special Electric and the second judge concluded the very opposite, Special Electric asks this court to ignore the court's findings and affirm the first judge's order of dismissal. We decline to do so. Because we had an insufficient factual record to affirm the court's order of dismissal, our only alternative would have been to reverse the order of dismissal in its entirety and allow Special Electric to refile the jurisdictional motion to dismiss on remand. Had we done so, Special Electric would have been reassigned to a new judge and would be in the exact same position it finds itself in now. And we would be reviewing the same trial court's findings of fact and conclusions of law as we now undertake in this opinion.

These findings support a conclusion that haling Special Electric into a Washington court does not violate its due process rights. The due process clause requires "that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" LG Elecs., 186 Wn.2d at 176 (alteration in original) (internal quotation marks omitted) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). Washington's long arm statute, RCW 4.28.185, confers specific personal jurisdiction over nonresident defendants so long as the exercise of jurisdiction complies with federal due process. Noll I, 188 Wn.2d at 411 (citing Shute v.

Carnival Cruise Lines, 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989)). Due process requires that: (1) purposeful minimum contacts exist between the defendant and the forum state, (2) the plaintiff's injuries arise out of or relate to those minimum contacts, and (3) the exercise of jurisdiction is reasonable, consistent with notions of fair play and substantial justice. Grange Ins. Ass'n v. State, 110 Wn.2d 752, 758, 757 P.2d 933 (1988). Here, the focus of the parties' dispute is whether Noll established that Special Electric had purposeful minimum contacts with Washington.

"To establish purposeful minimum contacts, 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 laws.'" LG Elecs., 186 Wn.2d at 177 (quoting Burger King, 471 U.S. at 475). "A foreign manufacturer or distributor does not purposefully avail itself of a forum when the sale of its products there is an 'isolated occurrence' or when the unilateral act of a consumer or other third party brings the product into the forum state." LG Elecs., 186 Wn.2d at 177 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). But purposeful availment may be established when a foreign manufacturer seeks to serve the forum state's market and places goods into the stream of commerce with intent that they will be purchased by that state's consumers. LG Elecs., 186 Wn.2d at 177-78 (citing J. McIntyre Mach., Ltd., v. Nicastro, 564 U.S. 873, 881-82, 888-89, 131 S. Ct. 2780, 180 L.Ed.2d 765 (2011); Asahi Metal Indus. Co v. Superior Court, 480 U.S. 102, 109-13, 117-21, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); World-

Wide Volkswagen, 444 U.S. at 295-97; Grange Ins. Ass'n, 110 Wn.2d at 761-62). Jurisdiction cannot be based on mere foreseeability that a product may end up in the forum state. Rather, "the defendant's conduct and connection with the state must be such that it should reasonably anticipate being haled into court there." LG Elecs., 186 Wn.2d at 178.

In LG Electronics, the court held that the State's complaint against companies who manufactured cathode ray tubes (CRTs) was sufficient to establish a prima facie case of purposeful minimum contacts where the State alleged that the defendant companies: (1) dominated the global market, (2) sold CRTs into international streams of commerce with the intent that the CRTs would be incorporated into millions of CRT products sold across the United States and in large quantities in Washington, and (3) intended for their price-fixing activities to elevate the price of CRT products purchased by Washington consumers. 186 Wn.2d at 182. The court agreed with the State that the "presence of millions of CRTs in Washington was not the result of chance or the random acts of third parties, but a fundamental attribute of [the Companies'] businesses." Id.

In so holding, the court cited Justice Breyer's concurring opinion in J. McIntyre, as representing the holding of the Court:

> Under J. McIntyre, a foreign manufacturer's sale of products through an independent nationwide distribution system is not sufficient, absent something more, for a State to assert personal jurisdiction over a manufacturer when only one product enters a state and causes injury. Id. at 888-89, 131 S. Ct. 2780 (Breyer, J., concurring). J. McIntyre did not foreclose an exercise of personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce.

LG Elecs., 186 Wn.2d at 181. The court concluded that "[a]n exercise of jurisdiction based on the allegations in the State's complaint is not foreclosed by J. McIntyre" and the State made a prima facie showing of purposeful minimum contacts. LG Elecs., 186 Wn.2d at 183, 185.

Justice Breyer's concurrence in J. McIntyre stated that New Jersey courts could not establish specific jurisdiction based on a "single isolated sale" even if accompanied by a national sales effort. 564 U.S. at 888. The concurrence noted the facts showed no regular flow or regular course of sales in the state, "there is no 'something more,' such as special state-related design, advertising, advice, marketing, or anything else," and the plaintiff did not introduce a list of potential New Jersey customers who might have regularly attended trade shows or otherwise show that the defendant manufacturer delivered its goods in the stream of commerce with the expectation that they would be purchased by New Jersey consumers. J. McIntyre, 564 U.S. at 889.

As noted above, in Noll I, the court declined to decide "if showing actual knowledge or awareness is necessary, or sufficient, to finding specific personal jurisdiction in stream of commerce cases" because "Noll failed to allege *any* action taken by Special to purposefully avail itself of the benefits and protections of the Washington market." 188 Wn.2d at 416. The court noted that "[t]he only connection to Washington that Noll alleged was the unilateral act of an out-of-state third party, Certain-Teed," and Noll did not allege that Special was aware of CertainTeed's connection to Washington or that Special was aware that CertainTeed delivered any of its pipes outside of California. Id.

We hold that establishing purposeful availment for the exercise of personal jurisdiction in stream of commerce cases in Washington State requires a showing of actual awareness. See LG Elecs., 186 Wn.2d at 182 (finding purposeful availment where defendants sold product "with intent" it would be incorporated in products "sold across the United States and in large quantities in Washington"). Special Electric contends that Noll failed to establish purposeful availment under this test. We disagree.

The trial court engaged in an analysis of the evidence on remand and found that it demonstrated actual awareness. Specifically the court found:

> 37. There is no direct evidence that Special Electric knew of specific sales by Certain-Teed in Washington. However, substantial circumstantial evidence supports that Special Electric knew CertainTeed sold asbestos-cement pipe nationwide, including in Washington.
>
> 38. CertainTeed's 1971 Annual Report stated that it acquired its asbestos-cement pipe business from Keasby & Mattison as part of its expansion program, and it "operated five asbestos cement pipe plants coast to coast." CP 683-84, 688. Special Electric has admitted that CertainTeed's annual reports were materials that it would have reviewed to determine "who are we dealing with and what are their markets and what [was] the scope of their sales." TR 36. Special Electric also acknowledged that [it] would be reasonable to presume that Special Electric did its due diligence on CertainTeed and CertainTeed's markets. TR 32. A reasonable commercial actor such as Special Electric would have understood "coast to coast" to mean "throughout the United States," including Washington. The 1971 annual report also conveyed that CertainTeed was a large industrial manufacturer, with a "nationwide network of research, production, sales and distribution facilities," and over a hundred facilities throughout the country.
>
> 39. CertainTeed's 1977 Annual Report stated that it "ranks among the nation's top 300 industrial companies," and that it "distributes piping system components nationwide." CP 732-

34. The 1977 Annual Report reports a 20% increase in asbestos-cement pipe sales, attributable primarily to sales in the Southwest and West. CP 735. The 1977 report stated that demand for pipe system components, including asbestos-cement pipe, "was strong on the West Coast."

40. The court takes judicial notice that "the West Coast" is commonly understood to include Washington. No evidence in the record before this court suggests that the term "the West Coast" as used by Special Electric or CertainTeed has any other meaning. Special Electric's contention that CertainTeed's "West Coast" market was limited to California and Arizona (Dkt. Sub 388, Defendant's Proposed Findings at ¶¶ 12, 14, 20), is strained, not supported by any evidence, and unreasonable. A reasonable commercial actor in Special Electric's position would have reasonably known that CertainTeed's strong West Coast sales included sales in Washington.

41. Referring specifically to asbestos-cement pipe, CertainTeed's 1977 annual report further stated that increased construction activity "contributed to the recovery of the asbestos - cement pipe market with particular momentum gained in the West and Southwest." CP 735. The "West" is commonly understood to include Washington, and the Court finds that a reasonable commercial actor such as Special Electric would have reasonably understood that CertainTeed's market for asbestos-cement pipe in the West included Washington.

42. CertainTeed's 1978 Annual Report stated that "A/C pipe" was "used in one out of three municipalities in the United States." CP 722-23, 727. Although this reference did not specify which municipalities were using asbestos-cement pipe made by CertainTeed (as opposed to other manufacturers), the report would have further informed Special Electric as to the extent of the United States market for asbestos-cement pipe, and it knew that CertainTeed was serving the entire market. Other information available to Special Electric indicated that as much as 79% of the communities in Pacific states, specifically including Washington, used asbestos-cement pipe.

43. Special Electric kept informed as to CertainTeed's needs and product specifications. CP 890-95. Mr. Wareham visited CertainTeed on several occasions. CP 885-89. Mr. Wareham took executives from CertainTeed on trips to South Africa to visit the Gefco mine as a means, among other reasons, of

learning more about CertainTeed's needs and business. CP 896-910. This evidence shows a close working relationship between Special Electric and CertainTeed and supports a reasonable inference that Special Electric understood the scope of CertainTeed's market for asbestos-cement pipe, which included substantial sales into Washington.

44. CertainTeed's sales of asbestos-cement pipe into Washington were regular and substantial during the time period in question. CP 1428-64, 174-204. See Paragraphs 35 and 36 above. Although there is no evidence that Special Electric ever reviewed CertainTeed's actual invoices, the fact that such sales occurred, and that there were regular and substantial increases in sales, supports the likelihood that Special Electric, as an active and informed participant in the asbestos-cement pipe market, would have been aware that CertainTeed was selling asbestos-cement pipe in Washington.

45. Special Electric's major asbestos-cement pipe industry customers, including CertainTeed, were – like Special Electric – members of the AIA. CP 943-78, 981-90. Between 1975 and 1980, Mr. Wareham attended AIA conferences and meetings a couple times per year.

46. Special Electric was also very involved with the Asbestos-Cement Pipe Producers Association ("ACPPA") of which its major crocidolite customers, including CertainTeed, were members.

47. One purpose for Special Electric's involvement in these organizations and its attending conferences and meetings was to acquire information to further its business as a supplier of asbestos.

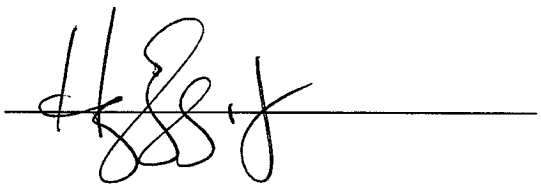
48. Special Electric's involvement in these organizations for the purpose of acquiring information further supports the reasonable inference that it would have known that CertainTeed's market for asbestos-cement pipe was nationwide, and that its nationwide market included Washington.

The court further found that Special Electric understood that the asbestos-cement pipe industry sold products containing its asbestos nationwide and that

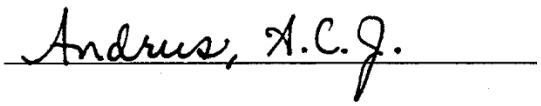
"Washington was a target market for the industry."

The trial court's findings are reasonable inferences from the evidence and support the conclusion that Special Electric purposefully availed itself of the benefits and protections of Washington law. Noll showed that Special Electric was aware of CertainTeed's connection to Washington and that Special Electric was aware that CertainTeed delivered many of its pipes outside of California, allegations the court noted were lacking in Noll I, 188 Wn.2d at 416. As in LG Electronics, Noll demonstrated a regular flow of Special Electric's asbestos into Washington State and that the presence of its product in Washington "was not the result of chance or the random acts of third parties, but a fundamental attribute of [its] businesses." 186 Wn.2d at 182. Accordingly, personal jurisdiction exists over Special Electric.

We reverse.



WE CONCUR:



Candance Noll v. Special Electric Co., Inc., No. 77888-9-I

VERELLEN, J. (dissenting) — I respectfully dissent. One of the fundamental differences between trial courts and appellate courts is the role of the trial court judge or jury as fact finder. And yet, there are limited circumstances when the role of the appellate court extends to factual determinations. A long line of cases permit de novo review of documentary evidence by an appellate court even where a trial court has made findings of fact.[23] Where a case is decided on documentary evidence and credibility is not an issue, the appellate court may independently review evidence and make required findings.[24] Notably, Noll acknowledges that this court retains the authority to undertake the resolution of the factual questions

[23] Noll v. Special Elec. Co., Inc., 9 Wn. App. 2d at 317, 444 P.3d 33 (2019); see, e.g., Serv. Emp. Int'l Union Local 925 v. Univ. of Wash., 193 Wn.2d 860, 866, 447 P.3d 534 (2019) (conducting de novo review of factual questions where a trial court made no credibility determinations and made findings of fact only on documentary evidence) (citing Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989)); State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987) ("This court is freer to review factual findings based solely on documentary evidence, as the trial court was in no better position than the appellate court to make observations of demeanor."); State ex rel. Pac. Fruit & Produce Co., Inc. v. Superior Court for King County, 22 Wn.2d 327, 331-32, 155 P.2d 1005 (1945) (explaining a trial court's findings of fact from a special proceeding were "not in any way binding" because the proceeding was decided solely on documentary evidence without evaluating witness credibility).

[24] 14A WASHINGTON PRACTICE, CIVIL PROCEDURE § 33.22, at 458-59 (3d ed. 2018) (citing Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992)).

governing the application of specific jurisdiction to Special Electric and "may do so now."[25]

The majority relies on the replacement judge's findings of fact and applies the traditional substantial evidence standard of review. But, in my view, the primary purpose of remanding for the entry of findings of fact was to seek the factual context relied upon by the now-retired trial judge for his conclusion Washington state lacked specific jurisdiction over Special Electric. When the retired judge was unavailable, the replacement judge worked diligently to review the record and make his own findings of fact. Those findings do not align with the original trial judge's conclusions. Our prior ruling did not preclude the use of a replacement judge, but, under these circumstances, we are not bound by the replacement judge's findings.[26] I respectfully conclude that this court rather than a replacement judge should make the factual decisions necessary to resolve the question of specific jurisdiction.

Although voluminous details are presented, all the key facts are grounded in undisputed declarations and documents. There are no questions of credibility nor particular topical concerns.[27] The complexity of specific jurisdiction

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[25] Appellant's Supp. Br. Opp. Resp't's Mot. That Trial Court Exceeded Its Authority on Remand at 12 (citing W.R.P. Lake Union Ltd. P'ship v. Exterior Servs. Inc., 85 Wn. App. 744, 750, 934 P.2d 722 (1977)).

[26] Serv. Emps. Int'l Union Local 925, 193 Wn.2d at 866.

[27] For example, some domestic relations cases are not suited to de novo review of undisputed documents. See In re Marriage of Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (reviewing a trial court's domestic relations decision for abuse of discretion despite all evidence being documentary because "'local trial judges decide factual domestic relations questions on a regular basis' and consequently stand in a better position than an appellate judge to decide" fact-

jurisprudence does not compel deference to factual findings by a judicial officer with no greater insight into the undisputed evidence than we have.

I agree with the majority that "establishing purposeful availment for the exercise of personal jurisdiction in stream of commerce cases in Washington state requires a showing of actual awareness."[28] We must decide whether Special Electric was actually aware that CertainTeed was distributing concrete pipe containing Special Electric's asbestos to Washington state. And this narrow question is readily resolved by this court reviewing the undisputed declarations and documents.

As acknowledged by the replacement judge, there is no direct evidence that Special Electric was aware CertainTeed's asbestos concrete pipe products were flowing to Washington state.[29] And the documents reviewed by Special Electric did not indirectly reveal that information. The references in CertainTeed's 1971 annual report showed it operated five asbestos cement pipe plants "coast to coast,"[30] but this merely reflects the location of some of its asbestos cement pipe plants on the coasts in California and Georgia. The 1977 annual report refers to distributing pipe "nationwide" with sales in the Southwest and West and strong demand on the "west coast," but these are merely general geographic references

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intensive domestic relations issues) (quoting In re Parentage of Jannot, 149 Wn.2d 123, 126-28, 65 P.3d 664 (2003) (distinguishing domestic relations cases from other civil cases and declining to apply de novo review where the trial court's decision was based solely on documentary evidence)).

[28] Majority at 11.

[29] Clerk's Papers (CP) at 687 (finding of fact (FF) 37).

[30] CP at 683-84, 688 (FF 38).

with no specific reference to Washington state. And mere aspirations for nationwide distribution are not adequate for specific jurisdiction based upon the stream of commerce theory.[31] The 1978 CertainTeed annual report refers to use of asbestos concrete pipe by municipalities in "Pacific states" without indicating CertainTeed's share of that market or if municipalities in Washington state were buying pipe from CertainTeed.[32] Nor are other documents compelling. Documents revealing a close working relationship with Mr. Wareham by virtue of his trips to South Africa do not show Special Electric's actual knowledge of CertainTeed's sales of asbestos concrete pipe in Washington state. Sales of other CertainTeed products in Washington state also do not establish awareness of CertainTeed asbestos concrete pipe sales in Washington state. And there is no evidence that Special Electric ever saw a 1965 CertainTeed bulletin regarding its sales of pipe in Washington. Arguably, this evidence could show a supplier should have known CertainTeed used its asbestos to serve consumers in Washington state, but actual awareness is required for a court to possess specific jurisdiction over Special Electric.

Under these unusual circumstances, this court should independently review the undisputed declarations and documents and not defer to the replacement judge. To establish specific jurisdiction, Noll had to establish Special Electric was

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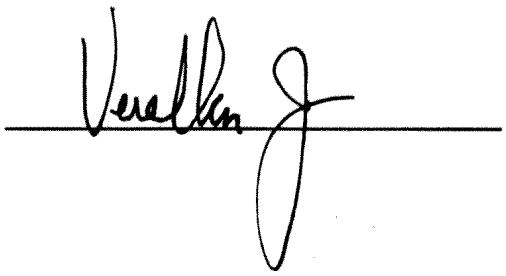
[31] Noll v. American Biltrite Inc., 188 Wn.2d 402, 414, 395 P.3d 402 (2017) (citing J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 888-89, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (Breyer, J., concurring)); State v. L.G. Electronics, Inc., 186 Wn.2d 169, 181, 375 P.3d 1035 (2016) (citing J. McIntyre, 564 U.S. at 888-89 (Breyer, J., concurring)).

[32] CP at 991-92, 998 (FF 42).

actually aware that CertainTeed was distributing asbestos concrete pipe in Washington state. After reviewing the record, the evidence does not show Special Electric was actually aware its asbestos was being used by CertainTeed to construct pipe for distribution in Washington state. Because Noll did not meet her burden, I would affirm the original trial judge's decision that there is no basis for specific jurisdiction.



APPENDIX B

Compilation of discretionary decisions based on a paper record that have been reviewed only for an abuse of discretion in Washington appellate courts

Amendment of Pleadings

- *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599 (2010)

Application to Sue Court-Appointed Receiver

- *Ginsberg v. Katz*, 27 Wn. App. 593, 597, 619 P.2d 995 (1980)

Appointing Substitute Counsel

- *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991)

Authorizing Filing of Citizens Complaint

- *Matter of Ware*, 5 Wn. App. 2d 658, 676-78, 420 P.3d 1083 (2018)

Awarding Prejudgment Interest

- *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 595, 355 P.3d 286 (2015)

Awarding Reasonable Attorneys' Fees

- *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 621, 626-27, 439 P.3d 676 (2019)

Change of Venue

- *State v. Hujus*, 73 Wn.2d 240, 242-43, 438 P.2d 212 (1968)

Class Certification

- *Eriks v. Denver*, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992)

Conducting Separate Trials for Joint Defendants

- *State v. Courville*, 63 Wn.2d 498, 500-02, 387 P.2d 938 (1963)

Consolidating Cases

- *State v. Norby*, 122 Wn.2d 258, 264-65, 858 P.2d 210 (1993)

Continuances

- *Balandzich v. Demeroto*, 10 Wn. App. 718, 720-21, 519 P.2d 994 (1974)

Dismissal for Lack of Prosecution

- *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988)

Dismissal of Criminal Prosecution

- *State v. Blackwell*, 120 Wn.2d 822, 830-32, 845 P.2d 1017 (1993)

Entertaining a Writ of Review

- *Birch Bay Trailer Sales, Inc. v. Whatcom County*, 65 Wn. App. 739, 745-46, 829 P.2d 1109 (1992)

Imposition of CR 11 Sanctions

- *Dexter v. Spokane Cty. Health Dist.*, 76 Wn. App. 372, 377, 884 P.2d 1353 (1994)

Imposition of CR 37 Sanctions

- *Lindblad v. Boeing Co*., 108 Wn. App. 198, 207, 31 P.3d 1 (2001)

Imposition of Legal Financial Obligations

- *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015)

Imposition of Restitution

- *State v. Davison*, 116 Wn.2d 917, 919-20, 809 P.2d 1374 (1991)

Issuance of Search Warrant

- *State v. Neth*, 165 Wn.2d 177, 182-86, 196 P.2d 658 (2008)

Ordering Additional Discovery

- *Hewitt v. Hewitt*, 78 Wn. App. 447, 455, 896 P.2d 1312 (1995)

Preliminary Injunctions

- *City of Bremerton v. Sesko*, 100 Wn. App. 158, 162, 995 P.2d 1257 (2000)

Recusal of Judge

- *State v. Leon*, 133 Wn. App. 810, 812-13, 138 P.3d 159 (2006)

Requiring Defendant to Alter Appearance

- *State v. Smith*, 90 Wn. App. 856, 859-60, 954 P.2d 362 (1998)

Revoking Suspended Sentence

- *State v. Miller*, 159 Wn. App. 911, 918-23, 247 P.3d 457 (2011)

Sanctions for Noncompliance with Discovery Orders

- *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)

Sending a Proposed Instruction to the Jury

- *In re Detention of Pouncy*, 168 Wn.2d 382, 390-91, 229 P.3d 678 (2010)

Shortening Time to Hear a Motion

- *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236, 88 P.3d 375 (2004)

Staying Proceedings

- *King v. Olympic Pipeline Co*., 104 Wn. App. 338, 348, 16 P.3d 45 (2000)

Striking Affirmative Defenses

- *Oltman v. Holland Am. Line USA, Inc*., 163 Wn.2d 236, 244, 178 P.3d 981 (2008)

Vacating Judgment or Order

- *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 765-66, 938 P.2d 345 (1997)

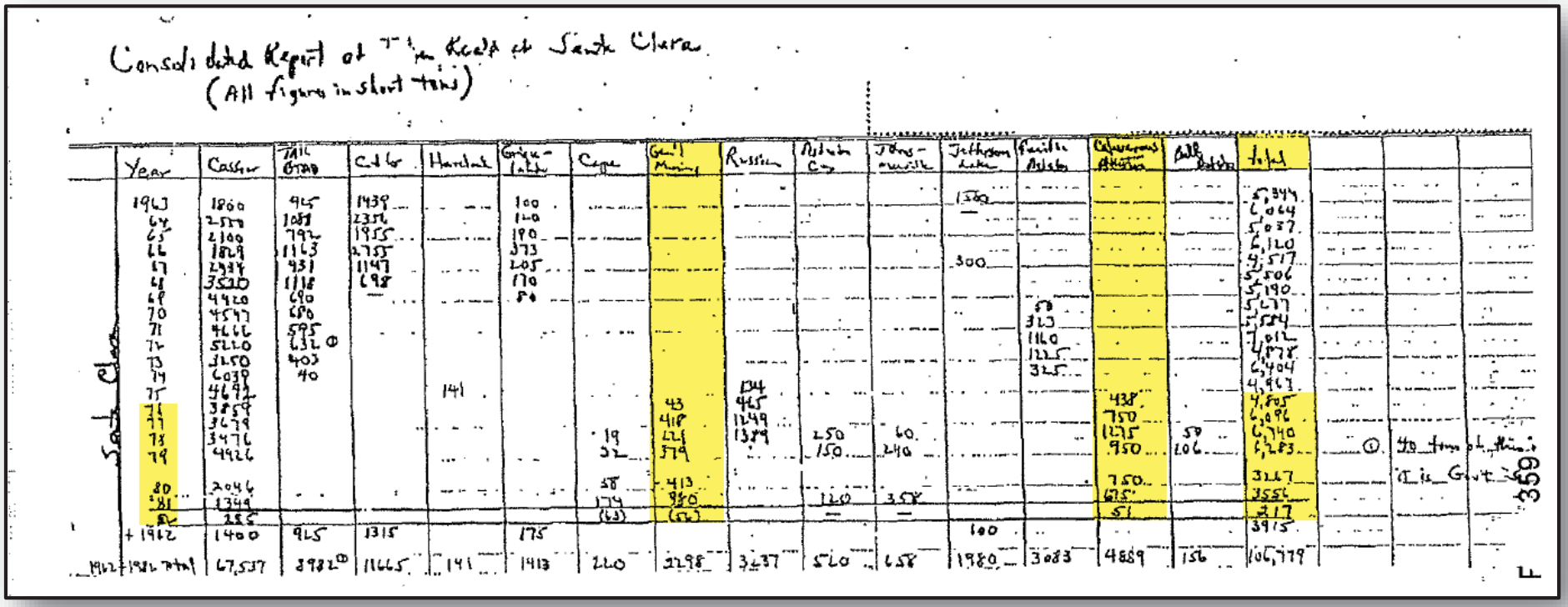
Waiving Court Costs for Indigent Parties

- *O'Connor v. Matzdorf*, 76 Wn.2d 589, 600, 458 P.2d 154 (1969)

APPENDIX C

CertainTeed, the Special Entities, and Purposeful Availment

The record of asbestos sales to CertainTeed's Santa Clara plant:



Consolidated Report of [illegible] Records at Santa Clara
(All figures in short tons)

Year	Cassiar	Talc Group	Celite	Hardinite	Grique-Lite	Cape	Gen'l Mining	Russian	Natural Cement	Johns-Manville	Jefferson Lake	Pacific Asbestos	Calaveras Asbestos	Bell Asbestos	Total
1962	1400	945	1315		175						100				3915
1962-1981 Total	67,537	3982[1]	11665	141	1913	220	2298	3437	520	658	1980	3083	4889	156	106,779

CP 1747

Clerk's Papers Page 359

CertainTeed, the Special Entities, and Purposeful Availment

Date	General Mining	Calaveras	General Mining + Calaveras	Total asbestos from ALL sources	Percentage Contribution from General Mining & Calaveras
1976*	43	438	481	4,805	**10%**
1977*	418	750	1,168	6,096	**19%**
1978*	221	1,275	1,496	6,740	**22%**
1979*	379	950	1,329	6,283	**21%**
1980*	413	750	1,163	3,267	**36%**
1981	880	675	1,555	3,556	**44%**

CP 1748

* = Years of Exposure per 3rd Amended Complaint

Clerk's Papers Page 359

BY MR. VISSE:

Q. Okay, Mr. Hartman, what we've designated as Plaintiff's 3-A through 3-I are simply better copies of Plaintiff's Exhibit 1-A through 1-I, to your last deposition, is that correct?

A. I'm not sure I understand the word "better".

Q. More legible.

MR. LEVIN: You really just have to answer whether or not they are copies, whether or not they are better or not--

MR. VISSE: That is really all I'm asking you is whether they are copies.

THE WITNESS: Yes, they're copies.

- - -

BY MR. VISSE:

Q. And Plaintiff's Exhibit-4 is a copy of Plaintiff's Exhibit-2, with the ommission of the Riverside plant figures and the handwritten notations at the bottom of Plaintiffs Exhibit-2 and the addition of some years that were missing from Plaintiffs Exhibit-2, is that correct?

A. Yes, that is correct.

Q. Looking at Plaintiff's Exhibit-4, looking across the top column, we see at the far left hand side Cassiar, could you tell me what Cassiar represents?

A. Each number in that column represents the tonage by year of the totality of Cassiar fibres that came into the Santa Clara plant.

Q. Do you know the country of origin for these Cassiar fibres?

A. Yes.

Q. What was that?

A. It was Canada.

Q. This column of Cassiar fibres is a compilation of the columns on Exhibit 3-A through 3-I, which are headed AK, AZ, is that correct?

A. Or any other Cassiar fibre, which may show up.

Q. AX?

A. Yes, CT, CY, any Cassiar fibre would be shown in that year.

Q. For clarity's sake could you simply run through the list of possible designations for Cassiar fibres that appear on Exhibit 3-A through I?

A. They would include AC, AK, AX, AY, AZ, CP, CY, CT, that should be all.

Q. What type of fibre is the Cassiar fibre?

A. The Cassiar fibre is a chrysotile.

Q. In looking at the next column on Plaintiffs Exhibit-4, we see the letters all in capitals TAKBTAD what type of fibre were these?

which company provided that fibre?

A. It is my recollection that we could not get all of BTAD and TAK requested and that was made of Griqualand fibre.

Q. Supplied by?

Q. Turner.

Q. We are looking at the next column that says "Cape"; what type of fibre is that?

A. That is also a blue.

Q. That is crocidolite?

A. Yes.

Q. The country of origin for that, sir?

A. Again, South Africa.

Q. And the next column, I believe, it says General Mining?

A. That is correct.

Q. And the type of fibre there, sir?

A. That is also crocidolite.

Q. Country of origin?

A. South Africa.

Q. The next column is Russian, and the type of fibre?

A. Chrysotile.

Q. The country of origin should be obvious?

A. Right.

Q. The next column?
A. Asbestos Corp. Fibre.
Q. And?
A. That is a chrysotile.
Q. Country of origin?
A. Canada.
Q. And the next column, is?
A. John's Manville.
Q. That was also a chrysotile?
A. Yes.
Q. That was from?
A. Canada.
Q. And if I recall your prior deposition, the next three columns list three companies, and if you can just read the three companies?
A. Jefferson Lake, Pacific Asbestos, Calaverous Asbestos, as shown as separate columns were really all the same ore body; the same mine, that is.
Q. The fibre type?
A. Chrysotile.
Q. Where was that mine located?
A. In California.
Q. The next column we have is?
A. Bell Asbestos.
Q. Type of fibre there?

A. Chrysotile.

Q. Country of origin?

A. Canada.

Q. And then the final column is a total of all of the columns running across the page?

A. That is correct.

Q. I would like to ask you a few questions, as we approach our deadline for concluding here, regarding the fibre requirements for Keasbey and Mattison, this is before 1962; do you have any expertise from your position in Keasbey and Mattison as to the fibre requirements for Keasbey and Mattison?

MR. LEVIN: Objection, vague, particularly in that he held two positions during two distinct time periods, two very different positions. I think that is vague and over broad, and may call for some speculation as to some of the time period.

- - -

BY MR. VISSE:

Q. During either of your positions with Keasbey and Mattison, did you have some expertise regarding the fibre requirements for Keasbey and Mattison?

MR. LEVIN: That is compound.

THE WITNESS: At the time of needing to

Consolidated Report of T'ya Recd at Santa Clara
(All figures in short tons)

Santa Clara

Year	Cassiar	TAIC GRAV	C & G	Hardwick	Grig-Lake	Cape	Gen'l Mining	Russian	Asbestos Corp	Johns-Manville	Jefferson Lake	Pacific Asbestos	Calaveras Asbestos	All Others	Total			
1963	1860	945	1439		100						1580				5,344			
64	2550	1081	2356		120										6,064			
65	2100	792	1955		190										5,037			
66	1829	1163	2755		373										6,120			
67	2934	431	1147		205										4,517			
68	3520	1118	698		170						300				5,506			
69	4420	690	—		80										5,190			
70	4597	680										50			5,277			
71	4666	595										323			5,584			
72	5220	631 ①										1160			7,012			
73	3250	403										1225			4,878			
74	6039	40										325			6,404			
75	4692			141				134							4,967			
76	3859						43	465					438		4,805			
77	3679						418	1249					750		6,096			
78	3476					19	221	1389	250	60			1175	50	6,740			
79	4426					32	379		150	240			950	106	6,283	①	40 tons of this	
80	2046					58	413						750		3267		it is Govt.	
'81	1344					174	980		120	358			675		3556			
82	255					(63)	(56)		—	—			51		217			
+ 1962	1400	965	1315		175						100				3915			
1962–1982 Total	67,537	8982 ①	11665	141	1413	220	2298	3437	520	658	1980	3083	4889	156	106,779			

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APPENDIX D

Editor's Note : Today is the third day of the Senate Judiciary Committee's hearings on the nomination of Amy Coney Barrett to the Supreme Court. Follow @SCOTUSblog on Twitter for live updates on the hearings.
Click here for important resources on Barrett's nomination and the confirmation process.

Briefly Mentioned : On Wednesday, the justices will hear oral argument in *Torres v. Madrid* and *Pereida v. Barr*. Click here to tune in live.

Ford Motor Company v. Montana Eighth Judicial District Court

Consolidated with:
- *Ford Motor Company v. Bandemer*

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
19-368	Mont.	Oct 7, 2020 Tr. Aud.	TBD	TBD	TBD	OT 2020

Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is counsel on an amicus brief in support of the respondents in this case.

Issue: Whether the "arise out of or relate to" requirement for a state court to exercise specific personal jurisdiction over a nonresident defendant under *Burger King Corp. v. Rudzewicz* is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.

SCOTUSblog Coverage

- Argument analysis: Due process, causation and stopping points for a 1945 doctrine in a 2020 world (Howard M. Wasserman)
- Case preview: Defining "relatedness" in personal jurisdiction (Howard M. Wasserman)
- Justices to hear October arguments by phone (Amy Howe)
- Court releases October calendar (Amy Howe)
- Court releases April calendar (Amy Howe)
- Justices add three new hours of argument to calendar (Amy Howe)
- Relist Watch (John Elwood)

Date	Proceedings and Orders (key to color coding)
Jul 24 2019	Application (19A103) to extend the time to file a petition for a writ of certiorari from August 19, 2019 to September 18, 2019, submitted to Justice Kagan.
Jul 25 2019	Application (19A103) granted by Justice Kagan extending the time to file until September 18, 2019.
Sep 18 2019	Petition for a writ of certiorari filed. (Response due October 21, 2019)
Sep 26 2019	Blanket Consent filed by Petitioner, Ford Motor Company.
Oct 01 2019	Motion to extend the time to file a response from October 21, 2019 to November 20, 2019, submitted to The Clerk.
Oct 04 2019	Motion to extend the time to file a response is granted and the time is extended to and including November 20, 2019.

Nov 20 2019	Brief of respondent Charles Lucero, personal representative of the Estate of Markkaya Jean Gullett in opposition filed.
Dec 04 2019	DISTRIBUTED for Conference of 1/10/2020.
Dec 04 2019	Reply of petitioner Ford Motor Company filed.
Jan 13 2020	DISTRIBUTED for Conference of 1/17/2020.
Jan 17 2020	Petition GRANTED. The petition for a writ of certiorari in No. 19-369 is granted. The cases are consolidated, and a total of one hour is allotted for oral argument. VIDED.
Jan 17 2020	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 19-368. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 19-368. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the filing is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
Jan 27 2020	Blanket Consent filed by Petitioner, Ford Motor Company.VIDED.
Feb 21 2020	SET FOR ARGUMENT on Monday, April 27, 2020. VIDED.
Feb 26 2020	Record requested from the Supreme Court of Montana.
Feb 28 2020	Joint appendix filed (statement of costs filed). VIDED.
Feb 28 2020	Brief of petitioner Ford Motor Company filed. VIDED.
Mar 04 2020	The record of the Supreme Court of Montana is available on its' website (www.supremecourtdocket.mt.gov).
Mar 05 2020	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. VIDED.
Mar 06 2020	Brief amicus curiae of Washington Legal Foundation filed. VIDED.
Mar 06 2020	Brief amicus curiae of United States filed. VIDED.
Mar 06 2020	Brief amici curiae of The Alliance for Automobile Innovation, et al. filed. VIDED.
Mar 06 2020	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed. VIDED.
Mar 06 2020	Brief amici curiae of Pharmaceutical Research and Manufacturers of America (PhRMA) filed. VIDED.
Mar 06 2020	Brief amicus curiae of Institute of International Bankers filed. VIDED.
Mar 06 2020	Brief amicus curiae of DRI - The Voice Of The Defense Bar filed. VIDED.
Mar 19 2020	CIRCULATED
Mar 30 2020	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 30 2020	Brief of respondents Charles Lucero, personal representative of the Estate of Markkaya Jean Gullett, et al. filed. VIDED. (Distributed)
Apr 02 2020	Brief amicus curiae of Professor Jonathan R. Nash filed. VIDED. (Distributed)
Apr 02 2020	Brief amicus curiae of Civil Procedure Professors filed. VIDED. (Distributed)
Apr 03 2020	ORAL ARGUMENT POSTPONED. VIDED.
Apr 03 2020	Brief amici curiae of Civil Procedure and Federal Courts Professors filed. VIDED. (Distributed)
Apr 03 2020	Brief amicus curiae of The Center for Auto Safety filed. VIDED. (Distributed)
Apr 06 2020	Motion of Minnesota, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. VIDED.
Apr 06 2020	Brief amici curiae of Professors of Jurisdiction filed. VIDED. (Distributed)
Apr 06 2020	Brief amici curiae of Civil Procedure Professors Pamela K. Bookman, et al. filed. VIDED. (Distributed)
Apr 06 2020	Brief amicus curiae of Foundation for Moral Law filed. VIDED. (Distributed)
Apr 06 2020	Brief amicus curiae of National Association of Home Builders filed. VIDED. (Distributed)
Apr 06 2020	Brief amicus curiae of Main Street Alliance filed. VIDED. (Distributed)

Apr 20 2020	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED. VIDED.
Apr 20 2020	Motion of Minnesota, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED. VIDED.
Apr 29 2020	Reply of petitioner Ford Motor Company filed. VIDED. (Distributed)
Jul 13 2020	SET FOR ARGUMENT on Wednesday, October 7, 2020. VIDED.
Oct 07 2020	Argued. For petitioner: Sean Marotta, Washington, D.C. For respondents: Deepak Gupta, Washington, D. C. VIDED.

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19-369	Minn.	Oct 7, 2020 Tr. Aud.	TBD	TBD	TBD	OT 2020

Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is counsel on an amicus brief in support of the respondents in this case.

Issue: Whether the "arise out of or relate to" requirement of the 14th Amendment's due process clause is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.

SCOTUSblog Coverage

- Argument analysis: Due process, causation and stopping points for a 1945 doctrine in a 2020 world (Howard M. Wasserman)
- Case preview: Defining "relatedness" in personal jurisdiction (Howard M. Wasserman)
- Justices to hear October arguments by phone (Amy Howe)
- Court releases October calendar (Amy Howe)
- Court releases April calendar (Amy Howe)
- Justices add three new hours of argument to calendar (Amy Howe)
- Relist Watch (John Elwood)

Date	Proceedings and Orders (key to color coding)
Sep 18 2019	Petition for a writ of certiorari filed. (Response due October 21, 2019)
Sep 26 2019	Blanket Consent filed by Petitioner, Ford Motor Company.
Oct 17 2019	Motion to extend the time to file a response from October 21, 2019 to November 20, 2019, submitted to The Clerk.
Oct 17 2019	Motion to extend the time to file a response is granted and the time is extended to and including November 20, 2019.
Oct 21 2019	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed.
Oct 21 2019	Brief amicus curiae of The Alliance of Automobile Manufacturers filed. VIDED.
Nov 20 2019	Brief of respondent Adam Bandemer in opposition filed.

Jan 17 2020	Petition GRANTED. The petition for a writ of certiorari in No. 19-368 is granted. The cases are consolidated, and a total of one hour is allotted for oral argument. VIDED.
Jan 17 2020	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 19-368. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 19-368. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the filing is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
Feb 21 2020	SET FOR ARGUMENT on Monday, April 27, 2020. VIDED.
Feb 26 2020	Record requested from the Supreme Court of Minnesota.
Feb 26 2020	The record received from the Supreme Court of Minnesota, the record has been electronically filed.
Mar 06 2020	Brief amicus curiae of DRI - The Voice Of The Defense Bar filed. VIDED.
Mar 09 2020	Record received from the U.S.D.C. Todd County District Court of Minnesota. (1-Box)
Mar 19 2020	CIRCULATED
Apr 03 2020	ORAL ARGUMENT POSTPONED. VIDED.
Apr 13 2020	Argument to be rescheduled for the October Term 2020. VIDED.
Jul 13 2020	SET FOR ARGUMENT on Wednesday, October 7, 2020. VIDED.
Oct 07 2020	Argued. For petitioner: Sean Marotta, Washington, D.C. For respondents: Deepak Gupta, Washington, D. C. VIDED.

CARNEY BADLEY SPELLMAN

October 19, 2020 - 9:37 AM

Transmittal Information

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

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