No. 98979-6

(COA NO. 77888-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Respondent-Petitioner,

and

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

Defendants.

MEMORANDUM OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY, INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The Court's decision on whether to grant review in this case implicates applicable concerns for WDTL and for foreign defendants generally, who would benefit from a clear and reliable articulation of law on this vexing question of jurisdiction over a component part manufacturer, addressing not only the due process requirement but also the appropriate procedure and scope of discovery, for a trial court considering a 12(b)(2) motion to dismiss. The issue pertaining to the proper standard and scope of review for a predecessor judge's decision is also of interest and concern, and will likely arise with greater frequency, particularly in the age of COVID, where Judges may more commonly be called on to substitute for one another in the middle of a case.

II. STATEMENT OF THE CASE

WDTL relies upon the facts set forth in the Petition for Review and in Petitioner's briefing.

III. ARGUMENT

A. Judge Scott's Ruling applied the wrong standard, and failed to apply proper (or any) deference to Judge Ramsdell's Order.

Judge Ramsdell concluded that the Nolls' evidence was insufficient to establish purposeful availment. The Court of Appeals remanded for entry of factual findings to "support" Judge Ramsdell's legal conclusion that Noll had failed to prove purposeful availment. Then, with Judge Ramsdell having retired, the chief civil judge of the King County Superior Court (Judge Spector) denied the parties' joint request that Judge Ramsdell be given pro-tem appointment to preside over the limited proceeding, and assigned the matter to Judge Michael Scott.

Judge Scott's ultimate conclusion was that the factual record could only be read one way, and that way supported a conclusion that Special Electric purposefully availed itself of the benefits of doing business in Washington. Based on that conclusion, and Judge Scott's findings, the Court of Appeals reversed Judge Ramsdell's dismissal order—albeit in a divided ruling, with Judge Verellen dissenting. Judge Scott's conclusion that the factual record could only be read one way appears to be undermined from the outset, by the fact that Judge Ramsdell had reached the opposite conclusion.

"The law of the case principle relates to (a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate rulings at trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal." *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 56, 366 P.3d 1246, 1259 (2015) (quoting *Arceneaux v. Amstar Corp.*, 66 So.3d 438, 448 (La.2011)). The plain language of [RAP 2.5(c)] affords appellate courts discretion in its application." *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

The same discretion is not afforded to the trial court on remand from the appellate court. *Lodis*, 192 Wn. App. at 57. This principle—that "the decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand"—is also reflected in RAP 12.2. *Id*. at 57-58 (citations omitted).

Here, the Court of Appeals' Decision states that it remanded Judge Ramsdell's order "for the trial court to make specific factual findings *in support of its ruling*" based on its inability to discern the reasoning or facts underlying Judge Ramsdell's decision. *Decision*, 4 (emphasis added). The Court of Appeals asked the trial court to answer a series of questions, "as well as any other findings of fact that *support* its decision." *Id*. (emphasis added).

The Court of Appeals retained plenary jurisdiction over this case, including specifically over Judge Ramsdell's decision. It remanded for the entry of findings of fact to aid the Court of Appeals' appellate review of

Judge Ramsdell's decision, concluding that Noll had failed to prove purposeful availment. Significantly, the remand was not an entire "case remand," which restores the trial court's full jurisdiction for all purposes and allows the trial court to revisit its underlying decision, the Court of Appeals instead issued a limited "record remand." *Jung v. Jung*, 844 A.2d 1099, 1107 n.7 (D.C. 2004) (citing *Bell v. United States*, 676 A.2d 37, 41 (D.C. 1996)). In that situation, the appellate court "retains jurisdiction over the case, and the trial court may take no action . . . other than that specified in the record remand order." *Id.* The "scope of the trial court's authority on remand is necessarily limited by [the appellate court's] jurisdiction and instructions." *Id.* The trial court's duty in a limited remand is to "comply strictly" with the intent and meaning of the directions given by the appellate court. *People v. Bellanca*, 204 N.W.2d 547, 579 (Mich. Ct. App. 1972). When the appellate court remands a matter with specific instructions, the trial court cannot exceed the scope of the remand instructions. *People v. Russell*, 825 N.W.2d 623, 628 (Mich. Ct. App. 2012). On record remands, the appellate court may direct the trial court to make additional findings and to explain a ruling. *Bell*, 676 A.2d at 41. But the trial court does not have the authority to modify or reverse the ruling still on appeal. *Id*.

Here, it is plain that the Court of Appeals' explicit contemplation was that Judge Ramsdell's order would be the law of the case, and binding on the trial court on the narrow record remand. Indeed, if Judge Ramsdell had not retired, or had been appointed by Judge Spector, it seems clear

that the task on remand would simply have been to put more flesh on the bones—to "support [the prior] ruling," but in no case to reconsider the outcome, or go beyond the Court of Appeals' narrow request. But because Judge Ramsdell retired (and because Judge Spector denied the parties' joint request that Judge Ramsdell be given pro-tem appointment to preside over the limited proceeding), an entirely new judge received the remand. Judge Scott, upon taking the case up, plainly did not follow the Court of Appeals' explicit instruction to "support" the predecessor judge's ruling; instead, he *sua sponte* decided , or "clarif[ied] that '[t]his court's [meaning the trial 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[.]" *Decision*, 5. Judge Scott's decision, however, contravened the Court of Appeals' explicit instructions, and what should have been the law of the case as well.

These errors by the trial court—and then by the Court of Appeals in ratifying them—highlight why Judge Verellen's dissent, was the most logical and appropriate approach to resolution of this case. He concluded that under the "unusual circumstances" presented, the Court of Appeals was in a position to independently review the paper record de novo, rather than defer to Judge Scott's findings, and found that the evidence did not show Special Electric was aware of its asbestos being distributed into Washington. He stated: "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. 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." Decision, 15-16 (citing *Serv. Emp. Int'l Union Local 925 v. Univ. of Wash.*, 193 Wn.2d 860, 866, 447 P.3d 534 (2019) and others).

With Judge Scott's decision, the trial court not only disregarded the Court of Appeals' narrow instruction on record remand, but also effectively substituted judgment in a de novo review, rather than in the much more appropriate abuse of discretion standard, under which the analysis of the record before Judge Ramsdell should have been much more limited, to a consideration of whether there was substantial evidence to support the original Order.

It is true that the unusual circumstances in this case may not arise with frequency; but in King County, where judges are routinely substituted, and more importantly, in the age of COVID, it will be ever more common that a superior court judge might preside over a matter, make a discretionary decision, and then be reassigned and replaced. The question of what deference should be owed to the previous judge is one that may arise with greater frequency, and should be addressed by this Court to avoid further confusion or error.

B. The Court of Appeals' adoption of an "awareness" test—as the basis for showing a defendant's purposeful availment—is contrary to Due Process and recent U.S. Supreme Court case law.

To determine whether the exercise of specific jurisdiction over a

foreign corporation will comport with due process, courts apply a three-part test:

> (1) that purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice."

Grange Ins. Ass'n v. State, 110 Wn.2d 752, 757 P.2d 933 (1988) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal jurisdiction. *Burger King Corp.*, 471 U.S. at 474 (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). "Instead, 'the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King Corp.*, 471 U.S. at 474. "'[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.'" *Id.* at 474–75. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of … the 'unilateral activity of another party or a third person.'" *Id.* at 475 (internal citations omitted). "Jurisdiction is proper 'where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id* (emphasis in original, citation omitted).

The instant case bears resemblance to two seminal U.S. Supreme Court cases analyzing personal jurisdiction in the same context, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), and *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). This case similarly involves a non-resident manufacturer of a component (Special), and an intermediary third-party manufacturer (CertainTeed) positioned in the stream of commerce between the component manufacturer and the eventual plaintiff. While *J. McIntyre* and *Asahi* failed to produce clear agreement or guidance on precisely what due process requires in order for a state to exercise specific personal jurisdiction over a non-resident component manufacturer, both described the component manufacturer's awareness that its product was marketed in the forum state as the *bare minimum* for the exercise of personal jurisdiction.

In *Asahi*, Justice O'Connor, writing for a four-justice plurality, concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id*. at 112. Mere awareness was not enough; some "additional conduct" was required, which would indicate "an intent or purpose to serve the market in the forum State." *Id*. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.". Under Justice O'Connor's approach, awareness is necessary but ultimately insufficient to sustain personal jurisdiction. In *J. McIntyre*, Justice

Kennedy adopted a similar position, writing for another four-justice plurality. 564 U.S. at 885. *See also*, *World-Wide Volkswagen,* 444 U.S. at 298 (requiring "expectation" that product will end up in forum state).

In this case, the Court of Appeals' decision found that Special purposefully availed itself of the Washington market based on its mere *awareness* that a third-party, CertainTeed, would in turn distribute the product outside of California (where Special delivered it), throughout the "West," and to a nationwide market that Special should have known or assumed would also have included Washington. *Decision* at 13-14.

It is, of course, disputed whether the newly announced awareness test would even be satisfied in this case. Judge Ramsdell's Order concluded there were insufficient contacts linking plaintiffs to Special—via CertainTeed—to sustain personal jurisdiction. And Judge Verellen's dissent concluded, even while agreeing to the adoption of the awareness test, that on his analysis of the record before Judge Ramsdell: "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." *Decision* at 19.

Beyond that, the adoption of this awareness test puts Washington at odds with the Due Process Clause's jurisdiction-allocating function, because it does not respect the "territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*,___ U.S. ___, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017). It also runs

counter to the prevailing trend in the U.S. Supreme Court case law, reflected by *Walden v. Fiore*, 571 U.S. 277 (2014) and *Bristol-Myers Squibb*, to *contract* and limit those circumstances where courts may sweep far flung defendants under their authority, rather than to expand them. The plain suggestion of those cases is that today's Supreme Court would in all likelihood require something more than mere awareness, just as Justice O'Connor concluded in *Asahi*, and Justice Kennedy concluded in *J. McIntyre*.[1] The Court of Appeals' adoption of the awareness test will effectively expand the instances where non-resident defendants may be haled into Washington Courts, even if they did not intend for their products to go here—when the U.S. Supreme Court's recent case law does just the opposite.

This also goes to the heart of the federalism concern laid out by Petitioners, and underpinning *Bristol-Myers Squibb.* Pet. Br. 17-19. Jurisdiction is proper where a defendant took some act directed at the forum, which a plaintiff's suit will use the forum State's coercive power to regulate. But under the awareness test, States are impermissibly empowered to "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" to regulate acts occurring elsewhere. *World-Wide Volkswagen*, 444 U.S. at 292. As Justice

[1] As Petitioners also pointed out, the U.S. Supreme Court heard oral argument in October in *Ford Motor Co. v. Mont. Eighth Judicial Dist.Court*, 444 P.3d 389 (Mont. 2019), *cert. granted*, 2020 WL 254155 (Jan. 17, 2020) (No.19-368), and *Ford Motor Co. v. Bandemer*, 931 N.W.2d 744 (Minn. 2019), *cert. granted*, 2020 WL 254152 (Jan. 17, 2020) (No. 19-369). The case presents an opportunity for the Supreme Court to further reshape this very aspect of the personal jurisdiction analysis. A ruling is expected soon, and would add further impetus for this Court's granting this Petition.

O'Connor reasoned in *Asahi*, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." This Court should grant the Petition in this case, to address these important concerns.

IV. CONCLUSION

The Court of Appeals' decision contravenes the spirit of the personal jurisdiction analysis set forth in *Walden*, *Bristoll-Myers Squibb*, and in the complex chain of case law to come before them. The Court of Appeals' adoption of the mere awareness test runs counter to the prevailing trend in U.S. Supreme Court case law, and this Court should grant review to reconsider the Court of Appeals' decision. The Court should also grant review to resolve the confusion surrounding the proper standard of review for a superior court judge called on to review a discretionary ruling from his or her predecessor.

Respectfully submitted this 23rd day of December, 2020.

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DECLARATION OF SERVICE

The undersigned does hereby declare and state as follows:

On the date set forth below, I caused to be served:

MEMORANDUM OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITION FOR REVIEW

in the within matter by arranging for a copy to be delivered on the

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DATED this 23rd day of December, 2020 in Seattle, Washington.

/s/ Ian McDonald
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December 23, 2020 - 6:45 PM

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