

No. 74225-6

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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LINDA M. HOFFERBER,

Appellant,

v.

GEORGIA-PACIFIC, LLC, et al.,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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FILED  
 COURT OF APPEALS  
 STATE OF WASHINGTON  
 DIVISION I  
 2016 SEP 27 PM 2:23

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## I. ARGUMENT

The sole question for this Court to decide is whether Washington may exercise personal jurisdiction over Georgia-Pacific in this case without offending “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L. Ed. 95 (1945). Yet, markedly absent from GP’s response is any substantive argument as to why Washington’s exercise of personal jurisdiction over it would, in fact, be unfair or unreasonable. Instead, GP argues that Ms. Hofferber cannot meet the technical tests for establishing general and specific jurisdiction under *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 746, 187 L. Ed. 2d 624 (2014), and *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989), respectively. In advancing this argument, GP misinterprets and misapplies these cases and wrongly ignores the fundamental principle of fairness the Due Process Clause embodies.

Contrary to GP’s argument, Plaintiff did not abandon her jurisdictional arguments in response to defendant’s motion for summary judgment, but rather, sought a CR 56(f) continuance to conduct jurisdictional discovery. CP 113-21. Regardless, the Court has discretion to consider Plaintiff’s substantive arguments now, for under RAP 2.5(a), the appellate court *may* refuse to review any argument not raised in the trial court.

**A. This Case Raises Important Constitutional Questions Regarding the Impact of *Daimler*.**

Plaintiff Linda Hofferber appeals the trial court's erroneous interpretation of *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 746, 187 L. Ed. 2d 624 (2014), which severely limits Washington's ability to exert general jurisdiction over foreign corporations under RCW 4.28.080(10), as previously applied by the Supreme Court in *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 558 P.2d 764 (1977), and its progeny. The trial court's sweeping application of *Daimler* dramatically limits the power of Washington courts to exert jurisdiction over non-resident corporations like GP who engaged in continuous and systematic contacts in this state and marketed toxic asbestos products to Washington consumers. Additionally, the trial court's rejection of specific jurisdiction under Washington's "Long Arm Statute," RCW 4.28.185(1) and *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989), adopts a mechanistic approach which ignores the essential purpose of the Constitution's Due Process Clause: fairness to out-of-state litigants.

The Washington Supreme Court recently held that the Due Process Clause "requir[es] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *State v. LG Elecs., Inc.*, \_\_\_ Wn. 2d \_\_\_, 375 P.3d 1035, 1039-40 (2016)

(quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985) (second alteration in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 53 L. Ed. 2d 683 (1977))). For the requirements of the Fourteenth Amendment’s Due Process Clause to be met, the out-of-state defendant must have certain minimum contacts with the forum such that the maintenance of the suit “does not offend traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316. This constitutional focus on fundamental fairness applies equally whether the plaintiff is asserting specific or general jurisdiction over the foreign defendant. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L. Ed. 2d 490 (1980) (The protection against inconvenient litigation is typically described in terms of “reasonableness” or “fairness.”); *Croze*, 88 Wn.2d at 57 (The essence of the issue is one of fairness to the parties).

In its response, GP cannot explain how it would be unfair for it to defend the strict liability and negligence claims brought by a Washington citizen in a Washington court. Nor can GP convincingly argue that it was unable to “anticipate being haled into court” in Washington for asbestos claims related to its manufacture and sales of asbestos-containing joint compound products. See *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). Instead, GP advances technical,

mechanistic justifications in support of the trial court's rulings. However, GP's arguments ignore the principles articulated in *International Shoe*, where the Supreme Court emphasized, "[t]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." 326 U.S. at 319. Due Process is not a technical conception with a fixed content unrelated to time, place and circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976). Rather, it is flexible, and calls for such procedural protections as the particular situation demands. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L. Ed. 2d 484 (1972)).

If ever a "situation" or "circumstance" were to demand a less mechanistic approach to personal jurisdiction than that applied by the trial court, it is this case, involving a long-time Washington resident, who is dying of an asbestos-caused mesothelioma. Washington courts have a crucial role in providing a forum for Washington citizens like Ms. Hofferber who are injured by the products of out-of-state corporations – even if they were exposed elsewhere. This scenario is especially common in asbestos personal injury cases due to the long latency periods of between 30 to 50

years.<sup>1</sup> The trial court's application of *Daimler* and *Shute* undermines the ability of Washington courts to exercise jurisdiction over non-resident corporations with continuous and systematic contacts here whose products were also in other states.<sup>2</sup> Its approach is particularly problematic for asbestos plaintiffs like Ms. Hofferber who happened to experience asbestos exposures prior to moving here.

**B. Washington Has General Jurisdiction Over Defendant.**

The trial court justified its dismissal of Georgia-Pacific on the ground that *Daimler* “change(d) the landscape” of general jurisdiction. RP 19. However, it is improbable that the Supreme Court intended *Daimler* to be interpreted so broadly when the narrow question the Court set out to answer was, “whether, consistent with the Due Process Clause of the Fourteenth Amendment, *Daimler* is amenable to suit in California courts *for claims involving only foreign plaintiffs and conduct occurring entirely*

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<sup>1</sup> Mesothelioma is a terminal cancer of the lining of the lung caused by asbestos exposure with a latency period of 30 to 50 years between exposures and diagnosis. ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS 360-61 (Ronald F. Dodson & Samuel P. Hammar eds., CRC Press, 2006).

<sup>2</sup> The undersigned firm is presently seeking direct review to the Supreme Court of Washington in a related case, *Cox v. CertainTeed Corp. et al.*, No. 92599-2. The *Cox* case involves asbestos-related personal injury claims brought by Idaho residents Robert and Gail Cox for exposures that took place there, including to Georgia-Pacific joint compounds. Given that *Cox* and this case raise the same issues, the undersigned firm anticipates filing a motion to transfer this matter to the Supreme Court and consolidate the two cases for oral argument when the Supreme Court grants direct review or, alternatively, consolidate the two cases for oral argument in this Court should the Supreme Court deny direct review.

*abroad.*” *Daimler*, 134 S.Ct. at 753 (emphasis supplied). The trial court’s expansive reading of *Daimler* was disproportionate to the narrow question that was actually before the Supreme Court in that case.

Plaintiff contends that, notwithstanding *Daimler*, Washington may exert general jurisdiction over GP because of its continuous and systematic contacts with Washington – contacts which GP cannot deny. As the Washington Supreme Court held in *Croze*, the fundamental principle underlying the Due Process Clause is “fairness to the parties” and the following criteria should be considered in determining whether Washington’s assertion of jurisdiction over an out-of-state defendant satisfies this imperative:

Factors which we consider in concluding that [out-of-state defendants] are justifiably subject to service of process in the State of Washington include the interest of the state in providing a forum for its residents; the ease with which the Respondents could gain access to another forum; the amount, kind and continuity of activities carried on by the foreign corporations in the State of Washington; the significance of the economic benefits accruing to the foreign corporations as a result of activities purposefully conducted in the State of Washington; and the foreseeability of injury resulting from the use of [defendant’s] products . . . .

88 Wn.2d at 57-58 (citations omitted).

Applying these factors, it is readily apparent that jurisdiction is proper in this case. Washington clearly has a paramount interest in

providing a forum for Ms. Hofferber, a long-time Washington resident. In addition, the “amount, kind and continuity” of activities carried on by GP in Washington, and the significance of the economic benefits accruing to it as a result of those activities, support a finding of general jurisdiction. *See generally* Corr. Br. Of App. at 5-6. It was also foreseeable to GP when Ms. Hofferber used their asbestos-containing products in the mid-1970s that individuals could be injured by unprotected asbestos exposures.

In *World-Wide Volkswagen*, the U.S. Supreme Court listed several factors which must be considered when evaluating whether jurisdiction over a non-resident defendant satisfies Due Process:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute...; the plaintiff’s interest in obtaining convenient and effective relief. . . ; *the interstate judicial system’s interest in obtaining the most efficient resolution of controversies*; and the shared interest of the several States in furthering fundamental substantive social policies.

444 U.S. at 292 (1980) (citations omitted, emphasis supplied).

The trial court’s sweeping interpretation of *Daimler* undermines the comity of the interstate judicial system in cases involving cumulative exposures to toxic materials. Based on the numerous reported asbestos cases in Washington over the past three decades, it is easy to imagine a

plaintiff being exposed to asbestos brakes while growing up on her parents' Minnesota farm in the 1950s; working around asbestos insulation at a Texas oil refinery in the 1960s; and installing asbestos drywall products during a home remodel in Washington in the 1970s. Under Defendants' interpretation of *Daimler*, if this individual were diagnosed with mesothelioma, she would be obliged to bring suit against the brake manufacturers in Minnesota, the insulation manufacturers in Texas and the drywall manufacturers in Washington -- even where the defendants sold identical products in Washington during the relevant periods, and all exposures contributed to his disease. GP's approach would mandate concurrent litigation in multiple jurisdictions with fragmented, redundant and potentially inconsistent results. The interstate judicial system has a paramount interest in facilitating efficient resolution of asbestos-related personal injury cases; however, the trial court's sweeping interpretation of *Daimler* fosters the development of inefficiencies and duplication of effort throughout already overburdened civil justice systems.

With respect to the other factors identified in *World-Wide Volkswagen*, Ms. Hofferber obviously has a strong interest in obtaining the "convenient and effective" relief available solely in her home state of residence. 444 U.S. at 292. Moreover, given the thousands of Washington consumers who were exposed to asbestos-containing GP products

contemporaneously with Ms. Hofferber during the 1970s, Washington has a palpable “interest in adjudicating the dispute.” *Id.* See generally, *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 354, 722 P.2d 826 (Div. 1, 1986), *aff’d*, 109 Wn.2d 235, 744 P.2d 605 (1987) (noting that Washington’s approach to tort law is one which favors consumers).

GP is incorrect in its assertion that “virtually every court” that has considered a more limited approach to *Daimler* has “rejected it.” GP’s Resp. Br. at 14. For example, West Virginia’s Supreme Court of Appeals recently held that “a court may assert general personal jurisdiction over a nonresident corporate defendant to hear any and all claims against it when the corporation’s affiliations with the State are so substantial, continuous, and systematic as to render the nonresident corporate defendant essentially at home in the State.” *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 332 (2016). The Court interpreted *Daimler* to not “completely” preclude jurisdiction over corporations outside the paradigm of the state of incorporation and the principal place of business. *Id.* It emphasized the Supreme Court’s recognition of an alternate basis for general jurisdiction over a defendant with substantial connections to the forum:

We do not foreclose the possibility that in an exceptional case, *see, e.g., Perkins...*, a corporations’ operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in the State.

But this case presents no occasion to explore that question, because Daimler’s activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State.

*State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 332-33 (W. Va. 2016) (quoting *Daimler*, \_\_\_ U.S. at \_\_\_ n. 19, 134 S.Ct. at 761 n. 19, 187 L. Ed. 2d 624 (citations omitted)). Most significant, the Court observed that *Daimler*, *Goodyear* and *Helicopteros* all “involved international considerations,” whereas *McGraw*, in contrast, involved a product defect that manifested in West Virginia, which caused the death of a West Virginia resident there. *Id.* at 333. While the Court stopped short of finding that West Virginia had general jurisdiction over Ford, ruling instead that the case needed to be remanded to permit jurisdictional discovery, its analysis of the proper scope of *Daimler* is consistent with Ms. Hofferber’s. Likewise, this Court should construe *Daimler* as Plaintiff advocates, reaffirm that *Croze* remains good law and reverse the trial court’s dismissal of Ms. Hofferber’s claims for lack of general jurisdiction.

**C. Washington Has Specific Jurisdiction Over Defendant.**

The Supreme Court’s holding in *Daimler* is explicitly limited to “general (all purpose) jurisdiction.” 134 S.Ct. at 758. (“Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category.”)

Accordingly, even if the Court agrees with the trial court that *Daimler* “changed the landscape,” it should hold that Washington has specific jurisdiction over GP in this case.

Plaintiff’s cause of action is *connected with* GP’s extensive and purposeful contacts with Washington, and assumption of jurisdiction over the company does not offend traditional notions of fair play and substantial justice. Permitting Washington to exercise jurisdiction over corporations who have millions of dollars of sales to Washington consumers is eminently fair and not precluded by either *Daimler* or *Shute*.

**1. Georgia-Pacific Had Purposeful Minimum Contacts with Washington.**

GP insists that the first prong of the three-part specific jurisdiction test from *Shute* may only be met in cases where the plaintiff’s injuries occurred *in Washington*. See GP Resp. Br. at 22-23. However, the plain language of *Shute* confirms that GP’s argument wrongly conflates the first and second prongs:

- (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
- (2) the cause of action must arise from, or be connected with, such act or transaction; and
- (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice.

113 Wn.2d at 767-68. Indisputably, the first prong is focused entirely on the *defendant's* contacts with the forum – not on the plaintiff's.

The Washington Supreme Court's recent opinion in *State v. LG Elecs., Inc.*, \_\_\_ Wn. 2d \_\_\_, 375 P.3d 1035 (2016), reaffirms that “where a foreign manufacturer seeks to serve the forum state's market, the act of placing goods into the stream of commerce with the intent that they will be purchased by consumers in the forum state can indicate purposeful availment.” *Id.* at 1040 (citations omitted). Thus, *LG Electronics* confirms that the first prong of *Shute* has been met in this case. The defendant's challenges to the appropriateness of this authority should be rejected.

Georgia-Pacific's assertion that *World-Wide Volkswagen* should be construed narrowly fails to acknowledge a unique feature of asbestos-related personal injury cases. In *World-Wide Volkswagen*, discovery of the alleged product defect and the onset of the resultant injury to the plaintiff was virtually contemporaneous. With asbestos exposures, in contrast, the *use* of the defective products occurs many decades before an asbestos disease's symptoms present themselves. As a result, there is a greatly increased chance that asbestos plaintiffs will reside in jurisdictions *other* than where they were initially exposed to asbestos. The authority upon which GP now relies fails to take into account this unusual aspect of asbestos litigation.

In *Noll v. American Biltrite, Inc.*, 188 Wn. App. 572, 355 P.3d 279 (2015), this Court adopted a broad, flexible interpretation of what minimum contacts were necessary for an asbestos fiber supplier to have availed itself of the benefits of doing business in Washington. The Court emphasized the known hazardous nature of asbestos, commenting that this was “one of the factors mentioned by Justice Stevens” in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L. Ed. 2d 92 (1987), as affecting the jurisdictional inquiry. *Noll*, 188 Wn. App. at 582. The Court held it was not dispositive whether the foreign defendant knew its asbestos was flowing into Washington, because the company’s “contacts with Washington were systematic. They were not random, isolated, fortuitous, attenuated, or anomalous.” *Id.* at 587. The same is true of GP’s relationship to Washington, with its substantial supply of asbestos-containing products to consumers like Ms. Hofferber.

Georgia-Pacific’s reliance on *Walden v. Fiore*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1115, 188 L. Ed. 2d 12 (2014), for the notion that “the plaintiff cannot be the only link between the defendant and the forum” is misplaced. *See* GP Resp. Br. at 24-25. As the Washington Supreme Court pointed out in *LG Electronics*, the circumstances in *Walden* involved a defendant police officer whose connection to Nevada (where plaintiffs contended personal jurisdiction was proper), was not purposeful, but merely ““random”” and

“fortuitous.” 375 P.3d at 1042 fn. 4 (*quoting Walden*, 134 S.Ct. at 1123) (*quoting Burger King*, 471 U.S. at 475, 105 S.Ct. 2174). The Supreme Court in *LG Electronics* distinguished *Walden* from cases where the defendant corporations “intended to serve the Washington market” with their products. *Id.* The same is true for Ms. Hofferber’s evidence showing that GP engaged in purposeful and systematic commercial activities in Washington marketing, distributing and selling its asbestos-containing joint compounds. Thus, GP’s reliance on *Walden* is contrary to the Supreme Court’s holding in *LG Electronics*.<sup>3</sup>

**2. Plaintiff’s Claims Are “Connected With” Georgia-Pacific’s Contacts With Washington.**

Georgia-Pacific claims that the persuasive authority upon which Plaintiff relies does not support the conclusion that Washington has specific jurisdiction over it in Ms. Hofferber’s case. In fact, however, Plaintiff’s argument that their cause of action is “connected with” Defendants’ sales of identical asbestos products is firmly rooted in principles fundamental to

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<sup>3</sup> Additionally, although GP would like the Court to embrace the reasoning from the U.S. District Court for the Southern District of Florida in *Waite v. All Acquisition Corp.*, 2016 WL 2346743 (S.D. Fla. May 4, 2016), the Court should decline the invitation. *See* GP Resp. Br. at 33-34. *Waite* relies heavily upon *Walden* in its articulation of the minimum contacts necessary for a state to exercise specific jurisdiction, which directly contradicts the Washington Supreme Court’s analysis in *LG Electronics*. Specifically, under *Walden*, the defendant must have engaged in “suit-related” conduct for the “minimum contacts” standard to be met. *Walden*, at \*3.

the Due Process inquiry, post-*Daimler* legal commentary, and the holdings from persuasive case law.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 fn. 10, 104 S.Ct. 1868, 80 L. Ed. 2d 404 (1984), the Supreme Court declined to reach the issue of whether the “relates to” and “connected with” factors are separate and distinct from the “arise from” inquiry. However, the dissent observed that “there is a substantial difference between these two standards for asserting specific jurisdiction.” *Id.* at 425 (Brennan, J., dissenting). In the absence of any clear directive from the United States Supreme Court on the issue, the Court should breathe life and meaning into these heretofore largely ignored terms as consistent with “traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316.

Recent legal commentary correctly predicts that after *Daimler*, “the ‘connectedness’ or ‘relatedness’ requirement is likely to emerge as the central battleground in personal jurisdiction litigation. This is especially true in cases brought against large multinational corporations outside of their home state.” Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228 (2014). Most significant, the authors conclude that

jurisdiction is proper under the *identical* circumstances present in the case at bar:

Although the Supreme Court has held that the plaintiff's forum contacts cannot standing alone be decisive, in those cases in which the defendant is engaging in "continuous and systematic" forum conduct that is *substantially similar* to the occurrence that is the basis of the lawsuit, such additional state interests should allow the state to adjudicate the controversy, even if none of the defendant's forum contacts caused or will be aspects of plaintiff's claims.

*Id.* at 240 (emphasis supplied). Notably, the authors also invoke the very same passage from *World-Wide Volkswagen* that Plaintiff cites in her opening brief as supporting specific jurisdiction over GP. *Id.* at 240-41.

Based on this analysis, Ms. Hofferber's mesothelioma is clearly "related to" and "connected with" GP's contacts with Washington. After all, during the mid-1970s, GP operated five distribution centers in Washington, and made deliveries of its asbestos-containing joint compounds here via *truckload* and *railcar*. CP 298. The company likewise had distributions centers in Sioux Falls, South Dakota and Billings, Montana, from which it shipped its products to Pierre, South Dakota. CP 299. Thus, the company's continuous and systematic sales of asbestos-containing joint compounds throughout the country – including in South Dakota and Washington – are a proximate cause of Ms. Hofferber's illness. GP's contacts with Washington and South Dakota were functionally

equivalent. Plaintiff alleges that, in both states, GP placed into the stream of commerce dangerous, asbestos-containing products for sale without adequate warnings to consumers of asbestos hazards. Because its tortious conduct was indistinguishable from state to state, its supply of its toxic products to Washington is “connected” to Ms. Hofferber’s injuries.

GP’s attempts to distinguish the cases upon which Plaintiff relies are unavailing. GP argues that *Chew v. Dietrich*, 143 F.3d 24 (2d Cir.) (1998) *cert denied*, 525 U.S. 948 (1998) is unpersuasive because a court applying the ‘but for’ test would also have found jurisdiction over the foreign defendant. *See* GP Resp. Br. at 27-28. This critique misses the point. Plaintiff relies on *Chew* for the principle that, “[t]he relatedness test is but a part of a general inquiry which is designed to determine whether the exercise of personal jurisdiction in a particular case does or does not offend ‘traditional notions of fair play and substantial justice.’” *Chew*, 143 F.3d at 29 (*quoting International Shoe*, 326 U.S. at 316). This Court should eschew strict adherence to the “but for” standard, because flexibility is “necessary in the jurisdictional inquiry,” and relatedness cannot merely be reduced to “one tort concept for all circumstances.” *Id.* Likewise, Plaintiff cites to *Del Ponte v. Universal City Dev. Partners, Ltd.*, 07-CV-2360 KMK LMS, 2008 WL 169358 (S.D.N.Y. Jan. 16, 2008) for the same principle. This case is especially persuasive because the U.S. District Court held New York had

jurisdiction over the foreign defendant even though it was unknown whether the defendant was in fact the supplier of the defective product. Adopting the framework from *Chew*, the district court held it significant that “the type of product purchased from New York by (defendant) is *of the same type* as that alleged to have caused the injury in this case.” *Id.* at \*10 (emphasis supplied). Following *Chew*, the district court held that the defendant’s consistent activity in the forum permitted a “broader interpretation of ‘arise from or relate to.’” *Id.* Contrary to GP’s reading of the case, *Del Ponte* confirms that the Court may more flexibly interpret the meaning of “connected to” in cases, like this one, where a nonresident defendant had purposeful contacts with the forum involving the same *type of products* that ultimately harmed the plaintiffs elsewhere. Finally, GP contends that Plaintiff’s citation to *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 926 P.2d 1085, 58 Cal. Rptr. 2d 899 (1996), should be rejected because its holding was “limited to the context of an ongoing franchise relationship.” GP Resp. Br. at 30-31. Following this logic, however, courts should not rely on the holding and reasoning from *Burger King* then, either, which is also a case involving franchisee contacts. *Vons Companies* remains important because the California Supreme Court thoroughly evaluated the full spectrum of approaches to personal jurisdiction, and concluded that strict adherence to formulaic “tests” was inappropriate.

Georgia-Pacific also maintains that Plaintiff's interpretation of the "connected with" language expressed in *Shute* will create unfair results by requiring manufacturers to defend product liability suits in any state where they sold products -- irrespective of the locus where the injury occurred. However, the fact that Washington courts *may* exercise jurisdiction over a foreign defendant does not mean that they *will* do so. Under the doctrine of *forum non conveniens*, "courts have discretionary power to 'decline jurisdiction where, in the court's view, the difficulties of litigation militate for the dismissal of the action subject to a stipulation that the defendant submit to jurisdiction in a more convenient forum.'" *Myers v. Boeing Co.*, 115 Wn.2d 123, 127-28, 794 P.2d 1272 (1990) (quoting *Werner v. Werner*, 84 Wn.2d 360, 370, 526 P.2d 370 (1974)). The United States Supreme Court laid out the relevant factors in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L. Ed. 1055 (1947):

Private interest factors include the relative ease of access to proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, possibility of view of the premises if that be appropriate and all practical problems that make trial of a case easy, expeditious and inexpensive. Public interest considerations in applying the doctrine include the undesirability of piling up litigation in congested centers, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws.

*Id.* at 508-509. If litigating a case in Washington is somehow unfair or inconvenient, a motion to dismiss based on *forum no conveniens* – not dismissal for lack of jurisdiction – is the appropriate mechanism for relief.

Considering the high volume of commercial activities GP has conducted in Washington – including significant sales of asbestos-containing products – the company cannot credibly claim it was somehow unable to “anticipate being haled into court” in Washington. It has been sued in asbestos litigation for decades, including hundreds of times in Washington (including in cases by non-Washington residents exposed elsewhere). Its sophisticated counsel is well aware of the long latency periods characteristic of asbestos-related diseases caused by people who unwittingly used GP’s hazardous products. They know it is commonplace for asbestos victims to relocate to states where they experienced no exposure, but where they subsequently develop their asbestos-related diseases.

In sum, this Court should hold that when foreign defendants engage in “‘continuous and systematic’ forum conduct that is substantially similar to the occurrence that is the basis of the lawsuit... ..additional state interests may allow the state to adjudicate the controversy, even if none of the defendant’s forum contacts caused or will be aspects of plaintiff’s claims.” Rhodes & Robertson, 48 U.C. DAVIS L. REV. at 240.

**D. The Trial Court Abused Its Discretion by Denying Plaintiff's CR 56(f) Continuance.**

The trial court's denial of Plaintiff's Civil Rule 56(f) motion was an abuse of discretion because the court decided, as a matter of law, that no additional discovery could possibly raise a genuine issue of material fact over whether Washington may properly exercise general or specific jurisdiction over GP. The trial court reached this conclusion despite the imperative to make all inferences in Ms. Hofferber's favor when ruling on GP's motion for summary judgment. In addition, the trial court abused its discretion by failing to recognize Ms. Hofferber was entitled to *full* discovery prior to any summary disposition of her claims per CR 56.

Notably, GP neglects to address binding authority from *LG Electronics* emphasizing the importance of allowing complete discovery prior to dismissing claims for lack of personal jurisdiction in the summary judgment context. The Supreme Court in *LG Electronics* upheld this Court's determination that summary judgment motions for lack of personal jurisdiction should only be granted after *full and reasonable* discovery has been afforded to the parties:

A simple rule emerges from *Putman* and the cases previously cited: If the defendant's motion to dismiss is to be decided by crediting the averments in the plaintiff's complaint, discovery is not required. However, if the defendant's motion to dismiss is to be decided based on

evidence or the lack thereof, full and reasonable discovery must be afforded.

*State v. LG Elecs., Inc.*, 185 Wn. App. 394, 408 fn. 17, 341 P.2d 346 (2015), *aff'd*, \_\_\_ Wn.2d \_\_\_, 375 P.3d 1035 (2016). *See also id.* at 404 fn. 12 (“After a fair opportunity for discovery, a party may, of course, bring a motion to dismiss for want of personal jurisdiction as a CR 56 motion.”) Contrary to this directive, the trial court indisputably did *not* afford Ms. Hofferber “full and reasonable” discovery.<sup>4</sup>

Additionally, it is untrue that Ms. Hofferber “cannot articulate” what was to be gained by deposing GP’s CR 30(b)(6) designee, as the company alleges. GP Resp. Br. at 36-37. In fact, Plaintiff referenced some of the topics which were left undeveloped or unaddressed in GP’s discovery responses. *See* Corr. Br. of App. at 34 (*citing* CP 118-21). In particular, Plaintiff sought more discovery about how GP’s contacts compared to those in the rest of the country. CP 119-20. She also suggested, by way of example, that it was reasonable to obtain more information about GP’s contacts with Washington in 1975 and 1976 when Ms. Hofferber was being exposed to its toxic joint compounds. CP 120. The defendant also refused

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<sup>4</sup> Although in its written reply before the trial court, GP suggests Plaintiff was “unfair” in her characterization that the company “refused” to present a corporate witness for deposition, CP 273, this suggestion is belied by defense counsel’s Sept. 28, 2015 letter expressing the unilateral decision not to produce a witness. *See* CP 244. That GP appears to have softened its position during oral argument, RP 21-23, further underscores that the trial court abused its discretion by denying Plaintiff’s request for a short continuance to be able to depose GP’s witness in this case.

entirely to answer some of Plaintiff's questions, such as about the extent to which GP filed claims in Washington courts. *Id.* The Plaintiff would like to further explore with a GP witness how its contacts with South Dakota compare to this with Washington, and area of inquiry which was not addressed at all in the deposition that occurred in the *Cox* case.

The authority upon which GP relies is readily distinguishable. For example, in *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986), the plaintiffs seeking the CR 56(f) continuance had no explanation for why the deposition they sought had not occurred during the 16-month period when the action had been pending, and provided no information about what evidence they specifically hoped to obtain that could raise genuine issues of material fact. In contrast, Ms. Hofferber explained to the trial court both why the discovery had not occurred (i.e., GP refused to produce a 30(b)(6) witnesses), and what additional information could be obtained therefrom, as explained *supra*.

In *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), the Washington Supreme Court observed that whether a court's discretion is based on untenable grounds "depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision...." GP cannot articulate how it would have been prejudiced by

having to produce a corporate witness for deposition under Civil Rule 30(b)(6) to answer Ms. Hofferber's questions. In contrast, Ms. Hofferber has a compelling interest in having been afforded "full and reasonable" discovery prior to dismissal of her claims against the asbestos product manufacturer. This Court should therefore find that, consistent with its reasoning in *LG Electronics*, the trial court abused its discretion in denying Plaintiff's request for a CR 56(f) continuance to depose GP under CR 30(b)(6).

## II. CONCLUSION

For the foregoing reasons, Ms. Hofferber requests that the Court reverse or vacate the trial court's grant of Georgia-Pacific's motion to dismiss and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September 2016.

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**CERTIFICATE OF SERVICE**

I certify that on September 7, 2016, I caused to be served a true and correct copy of the foregoing document via electronic mail upon:

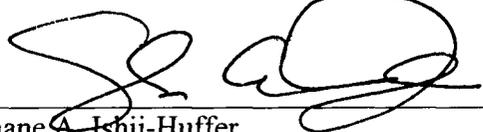
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