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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner,

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

Defendants.

Filed 
Washington State Supreme Court

SEP 25 2015

Ronald R. Carpenter
Clerk 

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

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I. IDENTITY AND 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 of Appeals' decision in this case implicates applicable concerns for WDTL. For the reasons set forth below, WDTL respectfully requests that this Court grant review and reverse the Court of Appeals' decision.

II. STATEMENT OF THE CASE

WDTL relies upon the facts set forth in the Petition for Review.

III. ARGUMENT

- A. This Court should grant review under RAP 13.4(b)(1), (b)(3) and (b)(4) to bring clarity to the question of when Washington courts can exercise specific personal jurisdiction over a foreign component part manufacturer.**

This case concerns specific personal jurisdiction¹ over a non-resident manufacturer of a component part that allegedly caused injury in Washington. The Court of Appeals failed to require the plaintiff to plead and prove Special Electric was aware that its product was incorporated into an end product being sold by a third party in Washington, the minimum common ground between the two pluralities in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 1028, 94 L. Ed. 2d 92 (1987). This failure requires review under RAP 13.4(b)(1). The question of jurisdiction over a component part manufacturer is significant and vexing and deserves clear resolution in Washington, supporting review under RAP 13.4(b)(3). Finally, this case involves an issue of substantial public interest pursuant to RAP 13.4(b)(4) inasmuch as it impacts Washington residents who may be injured by products that end up in Washington but that incorporate components whose manufacturers did not direct them to this State. WDTL urges the Court to accept review and explains its position in greater detail below.

B. The Court of Appeals applied the wrong test when it determined Special Electric was subject to specific jurisdiction.

To determine whether the exercise of specific jurisdiction over a

¹ General jurisdiction is not an issue. The Nolls have not argued for general jurisdiction, either before the trial court, or on appeal.

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, 758, 757 P.2d 933 (1988) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). Federal and state law require that the defendant must have done some act by which it “purposefully avails itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws.” *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 34, 823 P.2d 518 (1992) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). 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, 295, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (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).

In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 1028, 94 L. Ed. 2d 92 (1987), the Supreme Court revisited the stream of commerce in the case of a foreign manufacturer of a component part. The issue was “whether the mere awareness on the part of the foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes ‘minimum contacts’ between the defendant and the forum State[.]” *Id.* at 105. While the Supreme Court unanimously agreed that it was unreasonable to exercise personal jurisdiction over the component manufacturer, the reasoning split the Court into two plurality opinions of four justices each.

The first plurality opinion, authored by Justice O’Connor,

agreed that jurisdiction was not justified under the stream of commerce theory, and opined 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. Instead, Justice O’Connor concluded that some “additional conduct” was required, which would indicate “an intent or purpose to serve the market in the forum State,” in addition to the defendant’s mere awareness. “[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.” *Id.* Under this approach, mere awareness is insufficient to sustain personal jurisdiction.

The second plurality opinion, authored by Justice Brennan, rejected Justice O’Connor’s requirement for some “additional conduct.” Justice Brennan argued that a defendant should be subject to jurisdiction whenever “the regular and anticipated flow of products,” as opposed to “unpredictable currents or eddies,” leads the product to be marketed in the forum state. —*Id.* at 117. “As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.* Thus, Justice Brennan required *at least* awareness.

Although *Asahi* left considerable confusion in its wake, the requirement common to both pluralities is that the defendant must at least be aware that its product was “being marketed in” the forum state.

The Supreme Court recently re-visited the stream of commerce personal jurisdictional analysis contemplated in *Asahi* in the case of *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).² Like *Asahi*, however, *J. McIntyre* failed to garner a majority in favor of one approach or the other. The instant case, like *Asahi* and *J. McIntyre*, involves a non-resident manufacturer of a component (Special Electric), and an intermediary (CertainTeed) positioned in the stream of commerce between the component manufacturer and the eventual plaintiff. While *J. McIntyre* and *Asahi* have failed to produce majority agreement on precisely what due process requires in order to exercise specific personal jurisdiction over a non-resident component manufacturer, both decisions require *at least* the component manufacturer’s awareness that its product is being marketed in the forum State.

The closest this Court has come to addressing the stream of commerce issue in Washington is *Grange Insurance Association v. State*, 110 Wn.2d 752, 757 P.2d 933 (1988), a case that was far afield

² *J. McIntyre* is analyzed in detail in the Petition for Review at pages 12 through 15.

from the non-resident component-part manufacturing context. Therefore, the issue of which test to apply has yet to be decisively resolved or even analyzed by this Court in meaningful depth.

The Supreme Court has recently issued three opinions on personal jurisdiction. Although none of them deal specifically with product liability, each of them tightened the personal jurisdictional requirements that must be met to satisfy due process. One of these concerned specific jurisdiction.³ In *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), a unanimous Court rejected the Ninth Circuit’s “effects test” for specific jurisdiction.⁴ *Walden* is significant as the Court’s most recent specific jurisdiction case.

In *Walden*, the Ninth Circuit reversed the trial court’s dismissal for lack of jurisdiction, finding that because the Georgia-based defendant knew the plaintiffs had a residence in Nevada, he should have

³ The other two concerned general jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S. Ct. 2846 (2011), held that general jurisdiction requires proof that a corporation is “fairly regarded as at home” in the forum State. *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), re-emphasized the “at home” requirement for general jurisdiction and rejected the Ninth Circuit’s approach to agency.

⁴ Although *Walden* was an intentional tort case, it addressed principles of specific jurisdiction that are applicable to all cases. *Walden*, 134 S. Ct. at 1123. Later cases demonstrate, that *Walden*’s re-emphasized focus on “whether the defendant’s actions connect him to the forum...[.]” *Id.* at 1124, is applied in a wide variety of litigation settings. See, e.g., *Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 n.2 (5th Cir. 2014); *Pub. Impact, LLC v. Boston Consulting Grp., Inc.*, 15-CV-464, 2015 WL 4622028, at *8 (M.D.N.C. Aug. 3, 2015); *Presby Patent Trust v. Infiltrator Sys., Inc.*, 14-CV-542-JL, 2015 WL 3506517, at *3 (D.N.H. June 3, 2015); *Sutcliffe v. Honeywell Int’l, Inc.*, CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015).

anticipated that the effects of his conduct would be felt there, despite the fact that none of the suit-related conduct occurred in Nevada. *Id.* at 1120. The Supreme Court found the Ninth Circuit’s “approach to the ‘minimum contacts’ analysis impermissibly allows a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.” *Id.* at 1124 – 25. The Supreme Court ruled that “a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.” *Id.* at 1123. Instead, the Court held: “For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* at 1121.⁵ *Walden* requires courts examining specific jurisdiction to focus on the defendant’s suit-related, or, “challenged,” conduct, and whether that conduct created a substantial connection with the forum.⁶

The Court of Appeals nevertheless concluded that *CertainTeed’s* sales in Washington of a product that incorporated Special Electric’s component part satisfied a minimum contacts inquiry that should have

⁵ “Suit-related conduct” means the defendant’s “challenged conduct.” “[The Ninth Circuit’s approach] also obscures the reality that *none of petitioner’s challenged conduct had anything to do with Nevada itself.*” *Walden*, 134 S.Ct. at 1125 (emphasis added).

⁶ Courts in product liability cases have looked to *Walden* for guidance. See *Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750 (N.D. Ill. 2014); *Gutierrez v. N. Am. Cerruti Corp.*, No. CIV.A. 13-3012, 2014 WL 6969579 (E.D. Pa. Dec. 9, 2014); *Shrum v. Big Lots Stores, Inc.*, No. 3:14-CV-03135-CSBDGB, 2014 WL 6888446 (C.D. Ill. Dec. 8, 2014); *In re Methyl Tertiary butyl Ether (MTBE) Products Liability Litig.*, No. 07 CIV. 10470, 2014 WL 1778984 (S.D.N.Y. May 5, 2014).

been focused solely on Special Electric’s suit-related conduct, and whether *that conduct* created a substantial relationship between Special Electric and Washington. Noll did not plead, and no evidence established, that Special Electric was aware that its product was incorporated into pipe that CertainTeed was selling in Washington. CP 2; *see, generally*, CP 100-236. The Court of Appeals acknowledged that Special Electric “may not have actually known that its asbestos was ending up in Washington as a component of pipe.” *Noll*, 2015 WL 3970580 at *1.⁷

Here, specific jurisdiction can only be supported through a speculative connection between Special Electric and Washington that bumps down the stream of commerce, by way of defendant’s relationship with a third party, CertainTeed, and *that party’s* connection with Washington. But, under *Walden*, a third party’s connections to the forum cannot support personal jurisdiction. Moreover, contrary to *Asahi’s* requirement of awareness, the Court of Appeals upheld jurisdiction despite concluding that Special Electric might *not* have been aware that its product was being marketed in Washington. For these reasons, this Court should grant review.

⁷ The plaintiff did not allege in the complaint that Special Electric was aware that its asbestos was a component of an end product that was ending up in Washington, and also did not allege that Special Electric directed its products to Washington. CP 2.

C. Noll erroneously alleges that Special Electric failed to raise its current argument or case theory before the trial court

Noll’s contention—that Special Electric is presenting an argument on appeal that it did not raise at the trial court—is incorrect. Special Electric argued that the exercise of jurisdiction was improper because there was no evidence “that Special Electric knew or should have foreseen that its products would end up in Washington.” CP 324. This is a distillation of the precise argument Special Electric now pursues.

IV. CONCLUSION

This Court should grant review and should reverse the Court of Appeals’ decision.

Respectfully submitted this 9th day of September, 2015.

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Dear Mr. Carpenter:

Pursuant to our pending application, please find attached WDTL's *Amicus Curiae Memorandum* in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, other amici and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew
Chair, WDTL Amicus Committee

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