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NO. 71345-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

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

Plaintiff-Appellant

v.

SPECIAL ELECTRIC COMPANY, INC.,

Defendant-Respondent; American Biltrite, Inc., et al., Defendants

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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey Ramsdell)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. RESTATEMENT OF THE CASE 2

III. ARGUMENT 11

A. Standard of Review. 11

B. The Due Process Clause Limits Washington's Authority to Exercise Personal Jurisdiction over Non-Resident Defendants. 11

C. The Minimum Contacts Factor Is Not Satisfied Unless the Defendant Has Purposefully Directed Activities at the Forum State 14

1. Under the United States Supreme Court's Stream of Commerce Case Law, Minimum Contacts Are Not Established Unless the Nonresident Defendant Purposefully Directs Its Activities at the Forum State 14

2. Washington's Newly Decided Stream of Commerce Case, *AU Optronics*, Provides the Controlling Washington Authority for the Minimum Contacts Test 22

3. Under *AU Optronics* and *McIntyre*, *Asahi* and *World-Wide Volkswagen*, the Nolls Failed to Establish that Minimum Contacts Are Present. 27

4. Representative Case Law from Other Jurisdictions Confirms that the Nolls Failed to Make the Showing of Purposeful Availment Required by *McIntyre*. 37

IV. CONCLUSION 46

TABLE OF AUTHORITIES

Page(s)

Washington Cases

CTVC of Hawaii Co., Ltd. v. Shinawatra,
82 Wn. App. 699, 919 P.2d 1243 (1996).....11, 12, 13

Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC,
155 Wn. App. 643, 230 P.3d 625 (2010).....11

Grange Ins. Association v. State,
110 Wn.2d 752, 757 P.2d 933 (1988).....12, 14, 23, 36

Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.,
71 Wn.2d 679, 430 P.2d 600 (1967).....23

Lewis v. Bours,
119 Wn.2d 667, 835 P.2d 221 (1992).....11

MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.,
60 Wn. App. 414, 804 P.2d 627 (1991).....11, 12

Omstead v. Brader Heaters, Inc.,
5 Wn. App. 258, 487 P.2d 234 (1971), aff'd 80 Wn.2d 720, 497 P.2d 1310 (1972).....23, 35, 37

Precision Lab. Plastics, Inc. v. Micro Test, Inc.,
96 Wn. App. 721, 981 P.2d 454 (1999).....11, 12, 13

Quigley v. Spano Crane Sales & Service, Inc.,
70 Wn.2d 198, 422 P.2d 513 (1967).....35

Raymond v. Robinson,
104 Wn. App. 627, 15 P.3d 697 (2001).....13

Shute v. Carnival Cruise Lines,
113 Wn.2d 763, 783 P.2d 78 (1989).....12

Smith v. York Food Machinery Co.,
81 Wn.2d 719, 504 P.2d 782 (1972).....36, 37

Page(s)

State v. AU Optronics Corp.,
__ P.3d __, 2014 WL 1779256, (May 5, 2014).....12, 15, 22, 23,
.....27, 28, 29, 30, 31, 32, 33, 35, 36, 37,43

State v. Readers Digest Association, Inc.,
81 Wn.2d 259, 501 P.2d 290 (1972).....23

Other State Cases

Jacobsen v. Asbestos Corp., Ltd.,
119 So.3d 770, 780 (La. Ct. App. 2013).....38, 39

Nicastro v. McIntyre Machinery America, Ltd.,
201 N.J. 48, 77, 987 A.2d 575 (N.J. 2010).....21

Russell v. SNFA,
370 Ill. Dec. 12, 987 N.E.2d 778 (Ill. 2013).....18, 35, 40, 41

Sproul v. Rob & Charlies, Inc.,
304 P.3d 18 (N.M. Ct. App. 2012) 42, 43

State v. NV Sumatra Tobacco Trading Co.,
403 S.W.3d 726 (Tenn. 2013).....44, 45

Wiles v. Morita Iron Works, Co.,
125 Ill.2d 144, 530 N.E.2d 1382 (Ill. 1988) 19

Willemsen v. Invacare Corp.,
352 Or. 191, 282 P.3d 867 (Or. 2012)....24, 25, 26, 30, 31, 32, 33, 35

Federal Cases

Asahi Metal Industry Co. v. Superior Court,
480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) ...17, 18, 19, 23,
..... 31, 36, 38, 40

Burger King Corp. v. Rudzewick,
471 U.S. 462, 105 S.Ct. 2174, 85 L.E.2d 528 (1985)
.....14, 15, 16, 23, 28

Page(s)

Goodyear Dunlap Tire Operations, S.A. v. Brown,
__ U.S. __, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011).....11, 12 13

Hanson v. Deckla,
357 U.S. 235,78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).....14, 16

Helicopteros Nacionales de Colombia S.A. v. Hall,
466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).....13

International Shoe Company v. Washington,
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).....14

J. McIntyre Machinery, Ltd., v. Nicastro,
__ U.S. __, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2013)
.....19, 20, 21, 22, 25, 29, 30, 31, 36, 37, 40

Marks v. United States,
430 U.S. 188, 97 S.Ct 990, 51 L.Ed.2d 260 (1977).....21, 25

Shaffer v. Heitner,
433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).....13

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).....15, 16, 22,
..... 29, 31, 32, 34, 35, 36, 40, 43, 44, 45

Statutes

RCW 4.12.025 2

RCW 4.28.185 12

Other Authorities

BLACK'S LAW DICTIONARY (9th ed. 2009).....6

I. INTRODUCTION

Special Electric's only connection with Washington is that the asbestos it brokered and supplied might have ended up in the forum. That is not sufficient to establish personal jurisdiction over Special Electric consistent with Due Process. Plaintiffs Donald and Candance Noll (the Nolls) failed to offer any evidence that Special Electric purposefully availed itself of this forum or purposefully directed any of its activities at Washington. There is no evidence that Special Electric had any awareness or expectation that any of the asbestos it brokered and supplied to CertainTeed would be sold in Washington, after CertainTeed manufactured asbestos-cement pipe in California which *it* then sold to Washington.

Under a series of United States Supreme Court cases on the stream of commerce theory of personal jurisdiction, and a just-issued decision of this Court applying that stream of commerce theory, Washington courts may not exercise personal jurisdiction over a defendant that merely places goods into a stream of commerce without any actual knowledge or understanding that the products sold by the defendant would ultimately end up in the forum state. Accordingly, this Court should affirm the decision of the trial court granting Special Electric's motion to dismiss for lack of personal jurisdiction.

II. RESTATEMENT OF THE CASE

The Nolls filed their complaint for personal injuries against Defendant and Respondent Special Electric Company, Inc. ("Special Electric") and several other defendants, on February 26, 2013, in King County. CP 1.[1] Plaintiffs claimed that Donald Noll was exposed to asbestos-containing products from approximately 1958 through 1988 and that the exposure caused Mr. Noll to develop mesothelioma. CP 2-5.

The Nolls alleged that the defendants, including Special Electric, "mined, manufactured, produced, and/or placed into the stream of commerce" asbestos products. CP 2. The Nolls claimed that jurisdiction was proper "pursuant to RCW 4.12.025 because . . . defendants transacted business and/or may be served with process in Pierce County, Washington." CP 2.[2] The Nolls *did not* allege whether Special Electric knew or expected that the products for which they arranged a sale would be incorporated into other products that would then become part of a regular course of sales into Washington. CP 1-5.

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[1] Mrs. Noll states that after Special Electric was dismissed and following Mr. Noll's death from mesothelioma she filed an amended complaint asserting wrongful death and survival claims. Brief of Appellant, at 8. Accordingly, Special Electric has followed suit for purposes of captioning the Respondent's Brief. Special Electric also adopts a naming convention whereby the actions taken by the Nolls, as plaintiffs in the trial court, will be attributed to the Nolls. Special Electric will attribute actions taken by Mrs. Noll, as the plaintiff-appellant, to Mrs. Noll.

[2] The reference to Pierce County appears to be erroneous since the Nolls filed their lawsuit in King County and did not pursue any argument in support of jurisdiction in Pierce County. RCW 4.12.025 is a statute related to venue.

Special Electric is a Wisconsin corporation that performed business from July 1957 in Wisconsin and in states east of Wisconsin. CP 44. Richard Wareham formed Special Electric in 1957. CP 208.[3] In a 2008 declaration, Special Electric's then-President testified that Special Electric has: (1) never been a Washington corporation; (2) never had its principal place of business in Washington; (3) never had an office in Washington; (4) never done business in Washington; (5) never had employees, agents, property or assets in Washington; (6) never paid ad valorem or income taxes to Washington or any political subdivision or taxing authority in Washington; (7) never been licensed or registered to do business in Washington; (8) never had a registered agent in Washington; never solicited work in Washington; (9) never advertised in Washington; and (10) never consented to jurisdiction in Washington. CP 45-46.

The Nolls submitted evidence relating to an alleged connection between Special Electric and two entities known as "Special Materials Co." and "Special Asbestos Co." For the purposes of moving to dismiss Nolls' complaint only, Special Electric did not dispute that Special Electric shared a corporate identity with Special Materials Co. and Special

[3] In her Opening Brief, Mrs. Noll claim that CP 208 also supports the proposition that Special Electric was originally in the business of selling and distributing electrical insulation products, but the page cited, a one-page excerpt from a 1982 deposition of Mr. Wareham, does not support that proposition.

Asbestos Co. CP 244.[4] Special Materials was principally a brokering firm — it acted as a seller for some mines, including General Mining and Calaveras Asbestos Company. CP 227, 235. Mrs. Noll claims that Special Electric was sued "on theories of joint venture, alter ego and/or direct participation for asbestos sales by Special Materials . . ." although those theories were not in the Nolls' complaint. *See* Brief of Appellant, at 3.[5]

The Nolls' exposure claims against Special Electric appear to relate to Mr. Noll's alleged exposure to CertainTeed asbestos-cement pipe in Washington between 1977 and March 1979. CP 101 (opposition to motion to dismiss), CP 311 (Mr. Noll testimony).[6] Mr. Noll testified that he cut asbestos cement piping or worked around others cutting the same while working for the contractor Tom Lupo Construction. CP 311-12. Mr. Noll performed the work for Tom Lupo Construction in Port Orchard. CP 311. He testified that he worked with sewer pipe. CP 312.

The Nolls claimed that Special Electric supplied crocidolite fiber, known as "blue asbestos," to CertainTeed between 1975 and 1981. CP

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[4] Special Electric did not, and does not, concede or admit to any alter ego relationship between it and Special Materials or Special Asbestos. Special Electric also did not, and does not, concede or admit that Mr. Noll was exposed to any asbestos fibers allegedly distributed by Special Materials, Special Asbestos, or Special Electric. CP 244.

[5] Special Electric will refer to Special Materials and Special Asbestos by name when the actions of those entities are at issue.

[6] The Nolls' complaint does not make any exposure allegation with that amount of specificity.

101 (opposition to motion to dismiss), CP 125 (Dec. 18, 1975 purchase order from CertainTeed's Pipe & Plastics Group to Special Asbestos Co. for 968 metric tons of blue asbestos; no destination noted), CP 126 (Sept. 1, 1977 memo between Special Materials and CertainTeed regarding blue asbestos fiber requirements), CP 127 (Jan. 16, 1978 memo between Special Materials and CertainTeed regarding 330.6 metric ton shipment of asbestos to Houston), CP 128 (Jan. 16, 1978 memo between Special Materials and CertainTeed regarding 69.6 metric ton shipment of asbestos to Philadelphia), CP 129 (May 27, 1981 "unloading report" relating to a 19.80 ton shipment of blue asbestos to Richmond, California; no indication whether Special Asbestos received this report), CP 130-34 (May 26 and 28, 1981 and June 1 and 17, 1981 "unloading report[s]" relating to 19.80 ton shipments of blue asbestos to Santa Clara, California; no indication whether Special Asbestos received these reports).[7] During that period, CertainTeed, according to CertainTeed's 1999 interrogatory answers in an unrelated matter, had five asbestos-cement pipe plants located in various places in the United States, including Ambler, Pennsylvania; St. Louis, Missouri; Hillsboro, Texas; Santa Clara, California; and Riverside, California. *See* CP 141. There is no evidence

[7] Mrs. Noll claims that asbestos was "for use in the manufacture of CertainTeed's asbestos-cement pipe[,]" Brief of Appellant, at 3, citing CP 125-34, although those pages do not clarify the use to which CertainTeed put the asbestos.

that Special Electric knew the location of all of CertainTeed's asbestos-cement pipe plants, nor evidence that Special Electric knew the areas served by each of those plants. There was also no evidence that Special Electric knew whether CertainTeed had a nationwide distribution network for asbestos-cement pipe.

In late 1977, Special Materials brokered a five-year agreement between General Mining and CertainTeed to supply CertainTeed's "Pipe & Plastics Group" with 4,000 metric tons, plus or minus 10%, of blue asbestos per year. *See* CP 136, 138.[8] The contract was not to commence until 1978. CP 138. There is no indication where the blue asbestos would be shipped, including no evidence that General Mining was going to be supplying blue asbestos to all of CertainTeed's asbestos-cement plants.

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[8] Mrs. Noll claims that Special Materials, Special Asbestos, or Special Electric were the "predominant" suppliers of crocidolite to the Pipe & Plastics Group of CertainTeed. *See* Brief of Appellant, at 3, citing CP 136, 138. But those pages do not support that proposition because they do not specify what percentage of CertainTeed's blue asbestos requirements was supplied through Special Materials, Special Asbestos, or Special Electric as opposed to any other potential suppliers.

Mrs. Noll also characterized that agreement as a "requirements contract," *see* Brief of Appellant, at 3, but that misstates the record as to what type of contract can be inferred from Mrs. Noll's evidence. A "requirements contract" is "a contract in which a buyer promises to buy and a seller promises to supply ***all*** the goods . . . that a buyer needs during a specified period." *Black's Law Dictionary* 372 (9th ed. 2009) (emphasis added). In the letter between Special Materials and CertainTeed relating to the five-year contract, there was no indication that CertainTeed was promising to buy *all* the blue asbestos it needed for that period from General Mining. *See* CP 136. Likewise, in General Mining's letter to Special Materials there was no indication that General Mining was agreeing to supply ***all*** the blue asbestos CertainTeed needed during the five year period. *See* CP 138. In fact, the agreement shows that it was a contract to supply on 4,000 tons per year, plus or minus 400 tons, with CertainTeed to state its exact needs within that range. CP 138. That is not a requirements contract. Nor could it be considered a "requirements arrangement," as Mrs. Noll states on page 18 of her Brief of Appellant.

CertainTeed's Vice-President of Manufacturing for the Pipe Group, John P. McGinley, testified in 1987 in an unrelated matter that asbestos cement pipe for *water* systems contained between 10 and 20 percent asbestos by weight during the years he worked for CertainTeed (which were not specified); that crocidolite and chrysotile were the types of asbestos used; that CertainTeed generally tried to make the pipe without any crocidolite; and that crocidolite would generally make up between ***zero*** to 25 percent of the total asbestos content. CP 306-07 (emphasis added). CertainTeed asbestos cement pipe for *sewage* systems contained less asbestos overall (10 to 15 percent asbestos by weight), but the *same* proportion of crocidolite to chrysotile asbestos, *i.e.*, CertainTeed tried to not use any crocidolite with the actual amount generally ranging between ***zero*** to 25 percent of the total asbestos content. CP 307-08.[9]

CertainTeed stated in an interrogatory from an unrelated 2001 case that it sold asbestos-cement pipe to distributors and directly to end users. CP 302.[10] CertainTeed's Pipe and Plastics Group shipped material from

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[9] Mrs. Noll claims that "[a]ll asbestos-cement pipe made by CertainTeed in the relevant years contained some amount of crocidolite." Brief of Appellant, at 4, citing 307-08. But CertainTeed's Vice-President of Manufacturing for the Pipe Group testified on those pages of the record that they "tried to make them [pipes] without any [crocidolite]" and that crocidolite would make up between "zero to, say 20, 24, 25 percent --" of the total asbestos content for both water systems and sewage system asbestos cement pipes. *See* CP 307-08.

[10] Mrs. Noll claims that "CertainTeed sold asbestos-cement pipe nationwide in interstate commerce, and had done so for years by the time [Special Materials, Special

(continued next page)

the Santa Clara plant to Washington entities and job sites in Kennewick, Redondo Beach, Bellevue, Birch Bay, Kent, Issaquah, Federal Way, Spokane, Pasco, Quincy, Chehalis, and Olympia. CP 175-204. Nothing in the record indicates whether any other CertainTeed plants besides Santa Clara also produced material for the Washington market. While the CertainTeed forms tend to show that CertainTeed shipped material into Washington from Santa Clara, the item description codes on the shipping forms are not self-explanatory and there is no evidence from which to infer that the material CertainTeed was shipping from Santa Clara was in fact asbestos-cement pipe.

In support of their motion for reconsideration, the Nolls submitted a handwritten chart titled "Consolidated Report of Fiber Rec'd at Santa Clara (all figures in short tons)." CP 274. The chart appears to have been an exhibit to the 1987 deposition of Robert Hartman, a former CertainTeed employee, or perhaps one of nine pages produced at a previous deposition of Mr. Hartman. CP 287-89. Mr. Hartman testified that the numbers on the chart came from the raw materials inventory and that the numbers represented tons received, assuming that the deposition

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Asbestos, or Special Electric] began supplying it with asbestos used to make such pipe." Brief of Appellant, at 4, citing CP 302. Nothing on that page of the record would allow an inference that CertainTeed made nationwide sales. In fact, the interrogatory question on CP 302 asked about sales in Illinois. CP 302. Furthermore, nothing on that page or any other page of the record supports an inference that Special Electric had any awareness of the supposed nationwide scope of CertainTeed's sales.

testimony in fact refers to the chart reproduced in this record at CP 274. *See* CP 288-90.

The chart titled "Consolidated Report of Fiber Rec'd at Santa Clara (all figures in short tons)" itself does not indicate the *type* of asbestos that was received by the Santa Clara plant, but Mr. Hartman, assuming he was referring to the same chart, testified that General Mining and an entity called "Capes" supplied crocidolite to the Santa Clara plant. CP 294. The handwritten chart appears to show that Capes delivered 220 short tons of crocidilite asbestos to the Santa Clara plant between 1976 and 1982. CP 274, 294. The handwritten chart also appears to show that the Santa Clara plant received the following tonnage of crocidolite for the following years from General Mining: 43 short tons in 1976; 418 short tons in 1977; 221 short tons in 1978; and 379 short tons in 1979. CP 274. Neither the chart nor Mr. Hartman's testimony provide any evidence that Special Electric was the broker for the General Mining crocidolite asbestos received by the Santa Clara plant during the relevant time frame. The only evidence in the record connecting Special Electric, Santa Clara, and blue asbestos are the "unloading reports" from 1981, *after* Mr. Noll's alleged exposures from 1977 through March 1979. *See* CP 130-34, 311.

Special Materials also supplied asbestos from Calaveras Asbestos, Ltd., to CertainTeed's Santa Clara plant between 1977 and 1979. CP 144-

73. The handwritten chart titled "Consolidated Report of Fiber Rec'd at Santa Clara (all figures in short tons)" shows that Calaveras asbestos accounted for 3,413 short tons of chrysotile asbestos between 1976 and 1979. CP 274, 295. The chart shows the following total tonnage amounts of asbestos received by the Santa Clara plant from all sources for the following years: 4,805 tons in 1976; 6,096 tons in 1977; 6,740 tons in 1978; and 6,283 tons in 1979.

Special Electric had sales staff in the following cities: Chicago, Illinois; Cleveland, Ohio; Dayton, Ohio; Des Moines, Iowa; Detroit, Michigan; Milwaukee, Wisconsin; New York, New York; Smithfield, North Carolina; Santa Ana, California; Winter Park, Colorado; and St. Louis, Missouri in 1970. CP 213 (*see* letterhead). There is no evidence that Special Electric had sales staff in Washington.

The trial court granted Special Electric's motion to dismiss the Nolls' complaint for lack of personal jurisdiction and denied the Nolls' motion for reconsideration. CP 408-09. Mrs. Noll appealed.

III. ARGUMENT

A. Standard of Review.

"A trial court's ruling on personal jurisdiction is a question of law reviewed *de novo* when the underlying facts are undisputed." *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999), citing *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). "For purposes of determining jurisdiction, this court treats the allegations in the complaint as established." *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 653, 230 P.3d 625 (2010).

The party asserting jurisdiction has the burden of proof. *CTVC of Hawaii Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 708, 919 P.2d 1243 (1996). Where the plaintiff's proof is limited to written materials, the materials must demonstrate a prima facie showing of jurisdiction to avoid a motion to dismiss. *Precision Lab. Plastics*, 96 Wn. App. at 725; *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

B. The Due Process Clause Limits Washington's Authority to Exercise Personal Jurisdiction over Non-Resident Defendants.

"The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlap Tire Operations, S.A. v. Brown*, __ U.S.

__, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011). Thus, while Washington's long-arm statute, RCW 4.28.185,[11] provides the relevant statutory standards for the exercise of personal jurisdiction, the reach of the long-arm statute may not extend further than the bounds set by Due Process Clause of the United States constitution. *See MBM Fisheries,* 60 Wn. App. at 422-23, citing *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766, 783 P.2d 78 (1989); *Precision Lab. Plastics,* 96 Wn. App. at 725-26 ("Personal jurisdiction is bounded by due process under the Fourteenth Amendment[.]"). Accordingly, analysis of jurisdiction under a long-arm statute involves two separate issues: "(1) does the statutory language purport to extend jurisdiction, and (2) would imposing jurisdiction violate constitutional principles." *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 756, 757 P.2d 933 (1988).

"A court may exercise either general or specific personal jurisdiction over a nonresident defendant." *State v. AU Optronics Corp.*, __ P.3d __, 2014 WL 1779256, at *5 (May 5, 2014); *CTVC of Haw.*, 82 Wn. App. at 708, citing *MBM Fisheries,* 60 Wn. App. at 418. General jurisdiction over a nonresident defendant is allowed where the

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[11] Stating in pertinent part that: "(1) Any person, whether or not a citizen or resident of this state, who . . . does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts: (a) The transaction of any business within this state; [or] (b) The commission of a tortious act within this state[.]"

"defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state." *Raymond v. Robinson*, 104 Wn. App. 627, 632, 15 P.3d 697 (2001); *Goodyear*, __ U.S. __, 131 S.Ct. at 2851, 2853-54. General jurisdiction is not at issue on this appeal because there is no basis for it and because the Nolls did not attempt to establish general jurisdiction before the trial court or argue in favor of it on appeal.

In contrast to general jurisdiction, a "Washington court may exercise specific jurisdiction over a nonresident defendant when the defendant's limited contacts give rise to the cause of action." *CTVC of Haw.*, 82 Wn. App. at 709. Specific jurisdiction "arises from certain activities within the state." *Precision Lab. Plastics*, 96 Wn. App. at 725-26. "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the United States Supreme Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." *Helicopteros Nacionales de Colombia S.A. v. Hall,* 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The Court examines the following three elements to determine if the exercise of specific jurisdiction satisfies due process:

> (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, 110 Wn.2d at 758, citing *Burger King Corp. v. Rudzewick*, 471 U.S. 462, 472-78, 105 S.Ct. 2174, 85 L.E.2d 528 (1985).

C. The Minimum Contacts Factor Is Not Satisfied Unless the Defendant Has Purposefully Directed Activities at the Forum State.

1. Under the United States Supreme Court's Stream of Commerce Case Law, Minimum Contacts Are Not Established Unless the Nonresident Defendant Purposefully Directs Its Activities at the Forum State.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. at 471-72, quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The general — "essential" — rule is that "in each case 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 protection of its laws." *Hanson v. Deckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) (emphasis added), citing *Int'l Shoe Co.*, 326 U.S. at 319. Minimum contacts are established where the defendant has "'***purposefully directed***' his activities at . . . the forum." *Burger King*, 471 U.S. at 472 (citation omitted;

emphasis added). That requirement "ensures that a defendant will not be haled into a jurisdiction solely as the result of random, fortuitous, or attenuated circumstances." *State v. AU Optronics Corp.*, __ P.3d __, 2014 WL 1779256, at *5 (May 5, 2014), citing *Burger King*, 471 U.S. at 475.

"The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation that they will be purchased by the consumers* ***of the forum State***." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (emphasis added). The foreseeability that a product sold by a nonresident defendant could cause injury in the forum State has never been, by itself, a "sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. The foreseeability that is critical to the due process analysis "is not the mere likelihood that a product will find its way into the forum State." *World-Wide Volkswagen*, 444 U.S. at 297. Instead, the focus of the inquiry is whether "the defendant's conduct and connection with the forum State are such that he should ***reasonably anticipate*** being haled into court there." *Id.* (emphasis added). This is crucial to the due process interests at stake, for when a company has "clear notice that it is subject to

suit" in the forum State it can act to "alleviate" the risks of litigation there by, for example, "severing its connection with the State." *Id.*

If the sale of a product of a manufacturer or distributor "is not simply an isolated occurrence, but arises from the ***efforts*** of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States[.]" *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added). "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. at 253. Jurisdiction is proper "where the contacts proximately result from *actions* by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (emphasis in original; citation omitted).

In *World-Wide Volkswagen*, the Supreme Court held that an Oklahoma state court could not exercise personal jurisdiction over a nonresident automobile dealer and its wholesale distributor in a products-liability action arising from an Oklahoma car accident which involved a car purchased in New York by New York plaintiffs. 444 U.S. at 287. The nonresident defendants' markets were limited to New York, New Jersey, and Connecticut, and there was no evidence that any cars were sold to customers outside that area. *Id.* at 287-88. The consumer's unilateral act

of bringing the defendants' product into the forum state did not allow a sufficient basis for personal jurisdiction, even if it was foreseeable that purchasers of automobiles sold by the dealer and its regional distributor could drive them to Oklahoma. 444 U.S. at 298.

The Supreme Court revisited the stream of commerce test in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). There, a plurality of four justices would have held that as "long as a participant in this process [the "regular and anticipated flow" of products from manufacture to distribution to retail sale] is *aware* that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *See Asahi Metal Indus.*, 480 U.S. at 117 (opinion of Brennan, J., with White, Marshall, and Blackmun, JJ., concurring) (emphasis added). Another plurality of four justices would have required an additional showing of conduct directed toward the forum State — something more than mere awareness that the stream of commerce may or will sweep the product into the forum State. *See Asahi Metal Indus.*, 480 U.S. at 112-13 (opinion of O'Connor, J., with Rehnquist, C.J., Powell and Scalia, JJ., concurring) ("for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing advice to customers in the forum State, or marketing the product through a distributor who has

agreed to serve as the sales agent in the forum State."). There was no holding resolving the issue because the ninth member of the Court — Justice Stevens — concluded the issue did not need to be addressed. *See Asahi Metal Indus.*, 480 U.S. at 121-22 (opinion of Stevens, J., with White and Blackmun, JJ., concurring).

Although the opinions were splintered in *Asahi* on the issue of minimum contacts, at least one theme emerged: under the both the narrow and broad approaches, the Court required, at least, that *the defendant be aware that the distribution system would sweep its product* ***to the forum State***. *Compare Asahi Metal Indus.*, 480 U.S. at 117, 121 (opinion of Brennan, J., with White, Marshall, and Blackmun, JJ., concurring) (stating that the facts found by the California court should have supported a finding of minimum contacts where the defendant was aware of the operation of the distribution system that carried its product to California, and knew it would benefit from sales there) *with Asahi Metal Indus.*, 480 U.S. at 112-13 (opinion of O'Connor, J., with Rehnquist, C.J., Powell and Scalia, JJ., concurring) (defendant's awareness that its products would be incorporated into products sold in California would not have been sufficient basis to demonstrate purposeful availment).[12] *Accord Russell v.*

[12] An affidavit from the component part purchaser in *Asahi* provided the evidence that supported the California court's finding that the defendant was "fully aware" that the
(continued next page)

SNFA, 370 Ill. Dec. 12, 987 N.E.2d 778, 793 (Ill. 2013), cert. denied, 134 S.Ct. 295 (2013) (noting that *Asahi* requires, "'at a *minimum*, that the alien defendant is *aware* that the final product is being marketed in the forum state[]'"), quoting *Wiles v. Morita Iron Works, Co.*, 125 Ill.2d 144, 160, 530 N.E.2d 1382 (Ill. 1988) (holding that there was no basis for the exercise of personal jurisdiction over foreign defendant where there was no evidence that defendant was aware that its product would end up in Illinois) (emphasis in original; quotation to *Asahi* omitted).

The Supreme Court attempted to resolve its differing conceptions of the stream of commerce doctrine in *J. McIntyre Machinery, Ltd., v. Nicastro*, __ U.S. __, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011). There, a New Jersey resident was injured by a machine manufactured by a British manufacturer and sold to the United States market by an independent Ohio-based distributer. The plaintiff's New Jersey employer bought a single machine from the American distributor. The English manufacturer attended trade shows in the United States, but not in New Jersey. Six justices of the Supreme Court found that due process prohibited the New Jersey court from exercising personal jurisdiction over the British manufacturer.

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component parts would end up in California. *See Asahi Metal Indus.*, 480 U.S. at 107-08 (opinion of the Court).

A plurality of four justices would have held that the plaintiff did not establish that the British manufacturer engaged in conduct purposefully directed at New Jersey. The three key facts relied on by the plaintiff — that a distributor agreed to sell the machines in the United States, that officials for the defendant attended trade shows in several other states, but not New Jersey, and that up to four machines ended up in New Jersey — revealed only an intent to serve the U.S. market without showing that the British Manufacturer purposefully availed itself of the New Jersey market. *See McIntyre*, __ U.S. __, 131 S.Ct. at 2790-91 (opinion of Kennedy, J., with Roberts, C.J., Scalia, and Thomas, JJ., concurring). Those Justices would have set in place jurisdictional rules based on actions, not expectations. *Id.* at 2789

In a concurring opinion, Justice Breyer, joined by Justice Alito, agreed that the New Jersey court could not exercise personal jurisdiction, but insisted that the case should be resolved based on existing precedent instead of a refashioning of jurisdictional rules. *McIntyre*, __ U.S. __, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment, joined by Alito, J.). Justice Breyer's opinion rejected "the absolute approach adopted by the New Jersey Supreme Court" that "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system

that *might* lead to those products being sold in any of the fifty states.'" *McIntyre*, __ U.S. __, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment, joined by Alito, J.) (emphasis in original), quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 77, 987 A.2d 575 (N.J. 2010). In rejecting the rule that minimum contacts are established by placing goods in a nationwide distribution system that might lead to those goods being sold in any of the fifty states, Justice Breyer was also joined by the Justice Kennedy plurality. *See McIntyre*, __U.S. __, 131 S.Ct. at 2786 (opinion of Kennedy, J., with Roberts, C.J., Scalia, and Thomas concurring) (rejecting the rationale of the New Jersey Supreme Court).

Insofar as the holding of *McIntyre* is concerned, Justice Breyer's rationale is the narrowest and therefore constitutes the holding. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct 990, 51 L.Ed.2d 260 (1977) (holding that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds . . .") (internal quotation marks omitted; ellipses in original). Justice Breyer, applying the pre-existing stream of commerce case law, rested his decision on two facts from the case, as stated by the New Jersey Supreme Court: first, there was no regular flow or regular course of sales to New Jersey

and, second, there was "no 'something more,' such as special state-related design, advertising, advice, marketing or anything else":

> Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no special effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer 'purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users.

McIntyre, __ U.S. __, 131 S.Ct. at 2792 (Breyer, J., concurring in the judgment, joined by Alito, J.), quoting *World-Wide Volkswagen*, 444 U.S. at 297-98 (internal quotation marks omitted).

2. Washington's Newly Decided Stream of Commerce Case, *AU Optronics*, Provides the Controlling Washington Authority for the Minimum Contacts Test.

Only one Washington court has decided a personal jurisdiction issue relying on a stream of commerce analysis since the United States Supreme Court decided *McIntyre*. In *AU Optronics*, this Court rejected the plaintiff's argument that "merely placing goods into a broad stream of commerce can constitute purposeful minimum contacts." 2014 WL 1779256, at *7. *AU Optronics* held that the Washington cases cited as supporting that proposition were decided before the United Supreme Court decided *World-Wide Volkswagen*, *Asahi*, and *McIntyre* and, as such, were no longer good law for determining whether the exercise of specific

jurisdiction under a stream of commerce theory comports with federal due process requirements, specifically with the requirement that the nonresident defendant act purposefully toward the forum state. *Id.*[13] Because the issues in *AU Optronics*, like the issues in this case, require an examination of federal due process case law, *AU Optronics* did not look to Washington decisions for guidance. As *AU Optronics* observed, no "recent Washington case applies a simple stream of commerce analysis." 2014 WL 1779256, at *7.[14]

In *AU Optronics*, defendant LG Display was a manufacturer and distributor of components (LCD panels) for retail consumer goods. 2014 WL 1779256, at *1. Third parties mass-marketed those goods throughout the United States. *Id.* LG Display sold its goods to a global consumer electronics brand and to an original equipment manufacturer. LG

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[13] The Washington cases specifically mentioned by *AU Optronics* as being outdated were those cited by the party trying to establish personal jurisdiction and include: *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 684, 430 P.2d 600 (1967); *Omstead v. Brader Heaters, Inc.*, 5 Wn. App. 258, 269-71, 487 P.2d 234 (1971), aff'd 80 Wn.2d 720, 497 P.2d 1310 (1972); *State v. Readers Digest Ass'n, Inc.*, 81 Wn.2d 259, 276-78 501 P.2d 290 (1972); and *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 761, 757 P.2d 933 (1988).

[14] Although *Grange* was decided after *Asahi* and *Burger King*, that case does not "appl[y] a simple stream of commerce analysis[,]" as put by *AU Optronics*, because its discussion of minimum contacts is dicta — the *Grange* court stated that it was not applying the minimum contacts principles it set forth (based on outdated Washington case law) because of circumstances unique to the fact that the defendant in *Grange* was a State and not a commercial, nongovernmental defendant. *See Grange*, 110 Wn.2d at 762. In any event, *Grange* would have found that minimum contacts existed where the employee of the defendant ***knew*** that the "products" were to be shipped into Washington. *Id.* That much of *Grange*'s dicta is consistent with federal due process standards.

Displays' goods entered Washington through both those streams of commerce. The trial court granted LG Display's motion to dismiss for lack of personal jurisdiction. The Court of Appeals reversed and, in the absence of controlling Washington authority, relied primarily on the post-*McIntyre* reasoning of the Oregon Supreme Court in *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867 (Or. 2012).

In *Willemsen*, a defendant, CTE Tech. Corp., was a Taiwanese corporation that manufactured battery chargers, and another defendant, Invacare Corp., was an Ohio corporation that manufactured motorized wheelchairs. CTE supplied Invacare with battery chargers built to Invacare's specifications, which Invacare then sold along with its motorized wheelchairs in Oregon and across the United States. During the relevant two year period, Invacare sold 1,166 motorized wheelchairs in Oregon. Of those 1,166 wheelchairs, 1,102 came with battery chargers that CTE had manufactured and sold to Invacare. *Willemsen*, 282 P.3d at 870-71.

The plaintiffs alleged that CTE's battery charger caused their mother's death. The trial court denied CTE's motion to dismiss for lack of personal jurisdiction. CTE's appeal reached the United States Supreme Court, which remanded the case to Oregon for further consideration in light of the intervening decision in *McIntyre*. The issue was whether the

Due Process Clause permitted Oregon to exercise personal jurisdiction over CTE. *Willemsen* noted that a majority of the members of the United States Supreme Court agreed "that the fact that an out-of-state manufacturer sells its products through an independent nationwide distribution system is not sufficient, without more, for a state to assert personal jurisdiction over the manufacturer when only one of its products ends up in a state and causes injury there." *Willemsen*, 282 P.3d at 872, citing *McIntyre*, 131 S.Ct. at 2791 (plurality opinion) and 131 S.Ct. at 2792 (Breyer, J., concurring in the judgment). The Court in *Willemsen* also noted that Justice Breyer's opinion, the narrowest and therefore the holding under *Marks*, *disapproved* of the rule that "a state could assert jurisdiction over an out-of-state manufacturer as long as the manufacturer knows or should know that its products 'are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" *Willemsen*, 282 P.3d at 874, citing *McIntyre*, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment) (emphasis in original; citation to New Jersey Supreme Court's reversed decision omitted).

The Oregon Supreme Court ruled that the sale of over 1,102 motorized wheelchairs with CTE battery chargers showed a regular flow or regular course of sales in Oregon, sufficient for Oregon to exercise

personal jurisdiction over CTE. *Willemsen*, 282 P.3d at 874 ("The sale of the CTE battery charger in Oregon that led to the death of plaintiffs' mother was not an isolated or fortuitous event."). In the master supply agreement between CTE and Invacare, CTE warranted that it would provide chargers that complied with all federal, state and local laws. 282 P.3d at 870. The Oregon Supreme Court held that by so agreeing CTE "voluntarily undertook to bring its battery chargers into compliance with the laws of the various states in which Invacare sold them." 282 P.3d at 877. CTE also agreed that it would maintain products liability insurance coverage. 282 P.3d at 870, 877. The Oregon Supreme Court held that in making that agreement, "CTE anticipated the need to defend against the very sort of claim that plaintiffs have brought here, and it agreed to obtain insurance as a hedge against the cost of doing so." 282 P.3d at 877.

It was uncontested in *Willemsen* that "CTE sold its battery chargers to Invacare in Ohio with the ***expectation*** that Invacare would sell its wheelchairs together with CTE's battery chargers nationwide." 282 P.3d at 872 (emphasis added). CTE conceded that it ***expected*** its battery chargers to end up in Oregon, but argued that expectation was not enough. *Id.* CTE's position was that "the mere fact that [CTE] may have expected that its battery chargers might end up in Oregon is not sufficient to give Oregon courts specific jurisdiction over it." *Id.*

Applying *Willemsen*, *AU Optronics* held that Washington may exercise personal jurisdiction over LG Display because LG Display "*understood*" that third parties would sell large numbers of its products containing its LCD panels in Washington. 2014 WL 1779256, at *8 (emphasis added). In its complaint, the State alleged that LG Display "'*knew or expected* that products containing their LCD panels *would be* sold in the U.S. and in Washington.'" 2014 WL 1779256, at *2, *9 (quoting from complaint; emphasis added) The Court noted that LG Display also agreed, as part of a master purchase agreement, to obtain and maintain all necessary U.S. regulatory approval for sale of its products. 2014 WL 1779256, at *8. The *AU Optronics* court further noted that LG Display representatives met with various companies in Washington. 2014 WL 1779256, at *8. That conduct, plus the large volume of "***expected*** and actual sales" (millions of dollars' worth of products in a regular course of sales), established sufficient minimum contacts. 2014 WL 1779256, at *8 (emphasis added).

3. Under *AU Optronics* and *McIntyre*, *Asahi* and *World-Wide Volkswagen*, the Nolls Failed to Establish that Minimum Contacts Are Present.

The Nolls failed to show that Special Electric's activities constituted purposeful availment of Washington's laws or purposeful direction toward Washington. The record demonstrates an unrefuted

absence of Washington contacts, including, for example, evidence (CP 45-46) that Special Electric:

- was never a Washington corporation;
- never had its principal place of business or office in Washington;
- never did business in Washington;
- never had employees, agents, property or assets in Washington;
- never paid ad valorem or income taxes to Washington or any political subdivision or taxing authority in Washington;
- was never licensed or registered to do business in Washington;
- never had a registered agent in Washington;
- never solicited work in Washington;
- never advertised in Washington; and
- never consented to jurisdiction in Washington.

Those facts demonstrate that Special Electric had no meaningful "contacts, ties, or relations" to Washington. *See Burger King*, 471 U.S. at 471-72.

In particular, the absence of evidence that Special Electric ever solicited work from Washington sets this case apart from *AU Optronics*, where the defendant's representatives made a trip to Washington in an

attempt to solicit business. That conduct was one of the factors *AU Optronics* relied on when finding that minimum contacts were established. *See* 2014 WL 1779256, at *9 ("The fact that those meetings resulted in no business does not discount LG Display's *efforts* to target Washington.") (emphasis added). There is no evidence Special Electric made such efforts here. In fact, the absence of evidence of any specific *efforts* by Special Electric to broker sales in Washington or to Washington companies aligns this case with *McIntyre*, where Justice Breyer noted that the plaintiff there failed to meet his burden of proving jurisdiction where he "has shown no specific *effort* by the British Manufacturer to sell in New Jersey." *McIntyre*, 131 S.Ct. at 2792 (Breyer, J., concurring in the judgment) (emphasis added); *see also World-Wide Volkswagen*, 444 U.S. at 297 (holding that the "efforts" of a manufacturer or distributor to serve market for products in other states should be considered in determining whether minimum contacts exist).

Perhaps even more damaging to the Nolls' case than the declaration from Special Electric's then-President attesting to the lack of minimum contacts is the fact that none of the evidence submitted by the Nolls establishes any purposeful contacts with Washington. As an initial matter, there is no evidence that Special Electric had any control over CertainTeed's distribution system. Moreover, there is no evidence that

Special Electric knew, expected, or anticipated anything about the operation of CertainTeed's distribution system. There is no evidence that Special Electric had any expectation that the products it brokered to CertainTeed would then be incorporated into products that would then be sold in Washington. Nor is there evidence that Special Electric knew anything about any sales of asbestos-cement pipe to Washington or that Special Electric would have expected sales of asbestos-cement pipe to Washington. For example, there is no evidence Special Electric would have known about the invoices demonstrating sales of some CertainTeed product to Washington. *See* CP 175-204. In short, the record on appeal contains nothing to indicate that Special Electric anticipated the material it brokered the sale of would end up in Washington.

To the extent that Mrs. Noll argues that Special Electric is subject to jurisdiction in Washington based on its arrangement to regularly supply asbestos to the maker of asbestos pipe with established nationwide distribution channels, such a showing is not enough. *See* Brief of Appellant, at 22. *Willemsen* and *AU Optronics* rejected the argument that "merely placing goods into a broad stream of commerce can constitute purposeful minimum contacts." *AU Optronics*, 2014 WL 1779256, at *7; *Willemsen*, 282 P.3d at 874, citing *McIntyre*, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment). In the portion of *McIntyre* cited in

Willemsen, Justice Breyer *disapproved* of the rule that a state could assert jurisdiction over an out-of-state manufacturer as long as the manufacturer "'knows or should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" *McIntyre*, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment) (emphasis in original) (quotation to New Jersey Supreme Court's reversed decision omitted). *Accord McIntyre*, __U.S. __, 131 S.Ct. at 2786 (opinion of Kennedy, J., with Roberts, C.J., Scalia, and Thomas concurring), (rejecting the rationale of the New Jersey Supreme Court). For that reason, the cases cited by Mrs. Noll are no longer good law for the proposition that placing goods in the "general, broad stream of commerce constitutes a purposeful act directed at Washington that satisfies the due process requirement." *See* Brief of Appellant, at 10-11, 18-22.

Mrs. Noll cannot meet the test of showing the knowledge, expectation, or awareness that is required to establish that Special Electric *purposefully directed* its activities at Washington. Consistent with *World-Wide*, *Asahi*, and *McIntrye*, neither *AU Optronics* nor *Willemsen* allowed the exercise of jurisdiction without a showing that the non-resident defendant had actual knowledge, or an expectation or understanding, that the products they sold would end up in the forum State. In *Willemsen*, for

example, the defendant conceded that it *expected* its component parts to end up in Oregon. *See* 282 P.3d at 872. The issue was whether that expectation was sufficient. *Id.* The Oregon Supreme Court ruled that it was, when combined with a regular flow of products. Unlike the defendant in *Willemsen*, Special Electric made no such concession here. Nor is there evidence in the record showing that Special Electric had such an expectation about CertainTeed's sales of asbestos-cement pipe. In other words, the Nolls failed to establish the evidence that was a given in *Willemsen*.

Notably too, unlike in *AU Optronics*, the Nolls did not allege that Special Electric knew or expected that the products for which they arranged a sale would be incorporated into other products that would then become part of a regular course of sales into Washington. *Compare* CP 1-5, *with AU Optronics*, 2014 WL 1779256, at *2, *9 (quoting from complaint). Further unlike in *AU Optronics*, there is no evidence here to support any finding that Special Electric "understood" the asbestos from the sales it brokered would make its way into a product in California that would then be distributed in a system that included a regular flow to Washington. 2014 WL 1779256, at *8. That *understanding* was a factor the *AU Optronics* court relied on in finding the minimum contacts element was satisfied. *Id. Accord World-Wide Volkswagen*, 444 U.S. at 298 (a

defendant's "expectation that [the goods placed into commerce] will be purchased by consumers within the forum State" allows the forum State to exercise jurisdiction).

Finally, unlike the evidence in both in *AU Optronics* and *Willemsen*, the purchase agreement between CertainTeed and Special Electric contained no acknowledgment that United States-wide marketing would occur in the form of, for example, a guarantee that the products met all U.S. regulatory approval. *Compare* CP 138 (purchase agreement) *with AU Optronics*, 2104 WL 1779256, at *8 *and Willemsen*, 282 P.3d at 870, 877. In short, unlike the plaintiffs in *AU Optronics* and *Willemsen*, the Nolls failed to marshal the necessary evidence to make a prima facie case that Special Electric purposefully directed its activities at Washington.

Apparently hoping to cure these evidentiary shortcomings, Mrs. Noll advocates an easier-to-meet "constructive awareness" or "should have known" standard,[15] but that standard relies on Washington case law that has not kept up with United States Supreme Court developments. First, there is no evidence on which to base a conclusion that Special Electric should have known that the asbestos it brokered was bound to be incorporated into the asbestos cement pipe used to supply the Washington market. Second, even if the Nolls knew that CertainTeed supplied the

[15] *See* Brief of Appellant, at 18, 30.

Washington market and that it did so from its Santa Clara plant, there is no evidence suggesting that Special Electric should have known the asbestos it brokered was used for the products shipped to Washington. The Nolls argue that Special Electric had a "requirements contract" with CertainTeed, but that is not the case. Instead, the deal was a straight supply agreement of 4,000 pounds per year. There is nothing to suggest that Special Electric knew what CertainTeed's full needs were or knew that it was supplying all of CertainTeed's needs such that it should have known that the CertainTeed asbestos cement pipe in Washington contained the asbestos it brokered. For the same reasons Special Electric did not have actual knowledge, awareness, or expectations about CertainTeed's chain of distribution, there is no evidence from which an inference could be drawn that Special Electric should have known.

To the extent Mrs. Noll argues that it is foreseeable that the asbestos Special Electric brokered might have ended up in Washington, mere foreseeability is not sufficient. *See World-Wide Volkswagen*, 444 U.S. at 295 (The foreseeability that a product sold by a foreign defendant could cause injury in the forum State has never been, by itself, a "sufficient benchmark for personal jurisdiction under the Due Process Clause."). The foreseeability that is critical to the due process analysis "is

not the mere likelihood that a product will find its way into the forum State." *World-Wide Volkswagen*, 444 U.S. at 297.[16]

Putting the lack of evidence aside, Mrs. Noll's proposed test was already rejected by the United States Supreme when it rejected the argument that a non-resident defendant can be haled into the forum State where they should have known their products might end up. The "reasonably should have known" standard was the standard upon which the New Jersey Supreme Court based its decision to exercise jurisdiction over the foreign manufacturer, a rationale that was rejected both by Justice Breyer's opinion containing the holding of the case, *see McIntyre*, 131 S.Ct. at 2793, and by four other Justices in the Justice Kennedy plurality, *see McIntyre*, 131 S.Ct. at 2785. *Willemsen*, relied on by *AU Optronics*, recognizes that the United States Supreme Court, in *McIntyre*, rejected that view that a state may exercise specific jurisdiction over a non-resident defendant on the basis that the non-resident defendant knew or should have known its products might be sold in any of the fifty states due to the operation of a nationwide distribution system. *Willemsen*, 282 P.3d at 873-74. *See also Russell v. SNFA*, 370 Ill. Dec. 12, 987 N.E.2d 778, 792-

[16] Mrs. Noll cites to *Omstead* and *Quigley v. Spano Crane Sales & Service, Inc.*, 70 Wn.2d 198, 422 P.2d 512 (1967) to argue that foreseeability was sufficient. *See* Brief of Appellant, at 20-21. But those cases are no longer good law for that point after the United States Supreme Court in *World-Wide Volkswagen* rejected that argument. *See AU Optronics*, 2014 WL 1779256, at *7 n.57, expressly declining to rely on *Omstead*.

93 (Ill. 2013). Although Mrs. Noll cites to all three of those cases, she fails to explain how her "should have known" standard remains a valid basis for this Court to decide the case.

The Washington cases relied on by Mrs. Noll to support her constructive awareness standard are no longer good law on the due process standard for minimum contacts. As *AU Optronics* held, Washington courts should look to the more recent United States Supreme Court cases for guidance on deciding issues of federal constitutional law, not Washington cases decided before the United States Supreme Court decided *World-Wide Volkswagen*, *Asahi*, and *McIntyre*. 2014 WL 1779256, at *7. While Mrs. Noll also cites *Grange*, decided after *World-Wide Volkswagen* and *Asahi*, for the proposition that "it is fair to charge the manufacture with knowledge that its conduct [placing goods in the stream of commerce] might have consequences in another state[,]" that dicta from *Grange* only restates the old, outdated Washington law holding that merely placing goods in the stream of commerce satisfies due process. *See* Brief of Appellant, at 19; *Grange*, 110 Wn.2d at 761, citing *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 723, 504 P.2d 782 (1972). As the Washington Supreme Court recognized in *Grange* itself, *York Food* did not require the plaintiffs to make a showing of purposefulness to satisfy the minimum contacts test. *Grange*, 110 Wn.2d at 759. *York Food*'s

holding — "that the necessary minimum state contact exists if a nonresident manufacturer knowingly places its goods in the broad stream of interstate commerce proposition"[17] — was rejected in *AU Optronics*. *See* 2014 WL 1779256, at *7. Further, *York Food* relies on *Omstead v. Brader Heaters, Inc.*, 5 Wn. App. 258, 487 P.2d 234 (1971), aff'd 80 Wn.2d 720, 497 P.2d 1310 (1972), a case upon which *AU Optronics* expressly declined to rely. *See* 2014 WL 1779256, at *7 n.57. In sum, applying the analysis of *AU Optronics* and the United States Supreme Court precedents upon which *AU Optronics* based its analysis, the Nolls failed to show that Special Electric purposefully directed any activities at Washington.

4. Representative Case Law from Other Jurisdictions Confirms that the Nolls Failed to Make the Showing of Purposeful Availment Required by *McIntyre*.

While there are too many cases from other jurisdictions interpreting *McIntyre* to provide for a summary of its application across the United States, a sampling of cases from across the country are instructive in the application of *McIntyre*, and confirms that the Nolls failed to make the showing of purposeful availment required by *McIntyre*.

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[17] *York Food Mach.*, 81 Wn.2d at 723, citing *Omstead v. Brader Heaters, Inc.*, 5 Wn. App. 258, 487 P.2d 234 (1971), aff'd 80 Wn.2d 720, 497 P.2d 1310 (1972).

(a) *Jacobsen v. Asbestos Corp., Ltd.*

Jacobsen v. Asbestos Corp., Ltd., presents a similar fact pattern in which an asbestos plaintiff's personal injury complaint against an asbestos broker was dismissed for lack of personal jurisdiction under the easier-to-satisfy of the two stream of commerce tests from *Asahi*. 119 So.3d 770 (La. Ct. App. 2013).[18] In *Jacobsen*, the defendant was a New York corporation that acted as a sales agent in the transaction of raw asbestos mined from South Africa. The broker defendant arranged for a sale to Johns-Manville Corporation, which had a plant for manufacturing asbestos-cement pipe in Louisiana. *Jacobsen*, 119 So.3d at 782-84. The defendant *did not know* that Johns-Manville manufactured asbestos cement pipe in Louisiana, did not think the asbestos would be shipped to Louisiana, and was not involved in the process of shipping the asbestos from South Africa to its destination. The injury occurred in Louisiana.

Applying the broader minimum contacts test, the Louisiana court held that minimum contacts were not established because the broker defendant's only connection with Louisiana was that the asbestos it brokered and supplied ended up there. *Jacobsen*, 119 So.3d at 786. The

[18] As applied by the Louisiana court, the broader, easier-to-satisfy theory is that "a defendant's placing of its product in the stream of commerce *with the knowledge* that the product *will be used* in the forum state is enough to constitute minimum contacts." *Jacobsen v. Asbestos Corp.*, Ltd., 119 So.3d 770, 780 (La. Ct. App. 2013) (emphasis added).

Court considered the following deficiencies in the plaintiff's evidence in determining that the plaintiff did not establish purposeful availment:

- The broker in *Jacobsen* did not have property or an office in the forum state and did not advertise there or send any employees to Louisiana;
- There was no evidence that the defendant broker knew that the asbestos might be shipped to Louisiana after Johns-Manville received it; and
- The broker did not participate in the transfer of the asbestos into Louisiana. *Id.*

There was no evidence that the broker could ever reasonably anticipate that the products would find their way to Louisiana. *Id.*

Here, even assuming that Special Electric knew the asbestos it brokered would end up in Santa Clara, there is no evidence, like in *Jacobsen*, that it knew the asbestos it brokered would end up in in the forum State after the manufacturer received it. Like in *Jacobsen*, there is no evidence here that the broker participated in the transfer of the asbestos (incorporated into asbestos cement pipe) into Washington. That was a sufficient basis for the *Jacobsen* court to hold that the defendant broker did not purposefully avail itself of the benefits and protections of Louisiana law. 119 So.3d at 786.

(b) *Russell v. SNFA*

In *Russell v. SNFA*, cited by Mrs. Noll, the defendant French company manufactured custom-made bearings for the aerospace industry, including the tail-rotor bearings for the helicopter involved in the subject crash in Illinois. 370 Ill.Dec. 12, 987 N.E.2d 778 (Ill. 2013). An Italian company manufactured the helicopter and its Pennsylvania-based subsidiary distributed its helicopter and component parts internationally and in the United States. The distributor sold 2,198 of the defendant's products in Illinois in the ten years before the lawsuit. The distributor also sold 5 helicopters to Illinois customers. The French defendant knew the Italian company sold helicopters in the United States. 987 N.E.2d at 782-83. In addition to selling component parts to the Italian-company and its subsidiary, the French defendant sold component parts to other manufacturers, including a manufacturer, Hamilton Sundstrand, with locations in Illinois. The French defendant's sales representative attended at least three meetings in Illinois seeking to sell a bearing for use in the Hamilton Sundstrand Illinois location. In addition, there was a purchasing agreement between the French defendant and the Hamilton Sundstrand Illinois facility. *Id.*

The Illinois Supreme Court, applying *World-Wide Volkswagen, Asahi,* and *McIntyre*, held that minimum contacts existed because the

French defendant "knowingly used a distributor . . . to distribute and market its products throughout the world, including the United States and Illinois." *Russell*, 987 N.E.2d at 797. The fact that the French defendant custom-made the products specifically for the Italian helicopter manufacturer was a crucial factor in determining that the sole market for defendant's bearings of that type would be the Italian helicopter manufacturer and the owners of its helicopters, such that the Italian manufacturer and its Pennsylvania distributor were the only way the products would reach the final consumers in the United States, including Illinois. *Russell*, 987 N.E.2d at 797-98.

In other words, the court found that the Italian manufacturer and its Pennsylvania distributor effectively operated as the American distributor for the French defendant. *Russell*, 370 Ill.Dec. at 31. That link is missing here. There is no evidence that Special Electric custom-manufactured asbestos for CertainTeed such that it did not have another way to sell its asbestos except through CertainTeed. Instead, Special Electric was merely a commodities broker; CertainTeed was not acting as its de facto distributor as in *Russell*. Further, *Russell* relied on the fact French defendant's business relationship with the Illinois division of Hamilton Sunstrand demonstrated that the French defendant benefitted from Illinois' system of laws, infrastructure and business climate. From that the Court

concluded that the French defendant had purposefully availed itself of the privilege of conducting business within the forum state. There is no similar evidence here.

(c) *Sproul v. Rob & Charlies*

In *Sproul v. Rob & Charlies, Inc.*, a personal injury suit by a bicycle rider plaintiff, a foreign bicycle component manufacturer defendant was dismissed for lack of personal jurisdiction in New Mexico. 304 P.3d 18 (N.M. Ct. App. 2012). The foreign defendant sold its component parts internationally through a network of agents and suppliers, including a supplier that served that New Mexico market. 304 P.3d at 28. In addition, the manufacturer defendant had a marketing and sales employee who provided customer service and support to the manufacturer's clients throughout the United States, including New Mexico. On that basis, the New Mexico Court of Appeals concluded that "the manufacture and marketing by [the manufacturer defendant, its distributors, and its employee], as well as the ultimate sale [through a New Mexico bike shop], reflect more than the mere expectation that the product *might* be purchased by a resident in this forum." *Sproul*, 304 P.3d at 28 (emphasis in original). "Rather, the [component] that was incorporated into [the plaintiff's] bicycle came to be in New Mexico due to the efforts

of the 'manufacturer or distributor to serve directly or indirectly' the market here." *Id.*, quoting *World-Wide Volkswagen*, 444 U.S. at 297.

Sproul held that the plaintiff need not show that the defendant have actual knowledge that its products were marketed in New Mexico and that it was enough that the defendant placed the products in the stream of commerce. 304 P.3d at 28-29. That makes *Sproul* inconsistent with *AU Optronics*, which rejected the plaintiff's argument that "merely placing goods into a broad stream of commerce can constitute purposeful minimum contacts." 2014 WL 1779256, at *7. In any event, there is no evidence here that CertainTeed's distribution system was nationwide. While Mrs. Noll *argues* otherwise citing to CP 302, there is nothing there to support a reasonable inference of a nationwide distribution. Instead, responding to an interrogatory question about asbestos-containing products *in Illinois*, CertainTeed stated only that it sold asbestos-cement pipe to distributors and end users without saying anything from which a nationwide reach could be implied. *See* CP 302. That is an important point because Mrs. Noll argues that "nationwide distribution is alone sufficient." *See* Brief of Appellant, at 29. While that statement of the law is inconsistent with *AU Optronics*, assuming *arguendo* there was evidence that CertainTeed sold asbestos-cement pipe nationwide, the Nolls offered no evidence that Special Electric knew or expected that.

(d) *State v. NV Sumatra Tobacco Trading Co.*

In *State v. NV Sumatra Tobacco Trading Co.*, an Indonesian cigarette manufacturer defendant sold cigarettes to a distributor and another distributor bought those cigarettes for sale in Tennessee. 403 S.W.3d 726 (Tenn. 2013). 11.5 million of the manufacturer's cigarettes were sold in Tennessee over a three year period. The State of Tennessee sued the Indonesian cigarette manufacturer. The question for the Tennessee Supreme Court was whether a foreign manufacturer could be subject to a state court's jurisdiction when the manufacturer's product arrives at the state through a series of independent intermediaries not under the manufacturer's control. 403 S.W.3d at 740. The other issue was whether the "manufacturer who has targeted the United States market as a whole can be subject to personal jurisdiction in a state where the manufacturer's products have been sold, when the evidence fails to show that the manufacturer specifically targeted the forum state." *Id.* The court determined that based on the attenuated nature and quality of the sales in Tennessee that the sales did not amount to minimum contacts sufficient for the defendant to reasonably expect to be haled into court in Tennessee.

The Tennessee Supreme Court summarized *World-Wide Volkswagen* as holding that

> the defendant corporation's relevant 'expectation' arises from the company's purposeful availment of the forum state. The 'expectation' is what arises from the company's 'efforts' to serve the forum's state's market. And these 'efforts' involve 'conduct and connection[s]' with the forum state.

403 S.W.3d at 744 (quoting *World-Wide Volkswagen*). After extensive analysis, the *NV Sumatra* court held: that national contacts alone cannot justify jurisdiction in an individual state, 403 S.W.3d at 761; that beyond placing its products in the international stream of commerce, the defendant's targeted behavior at the United States was minimal at most, 403 S.W.3d at 765; that the defendant made no sales and marketing efforts in Tennessee, 403 S.W.3d at 764; that the defendant did not exert any control over the destination of the products it sold to an intermediary, 403 S.W.3d at 763, that the company was not aware to whom its cigarettes were ultimately sold, until such time it became aware which is when it cut off sales to Tennessee, 403 S.W.3d at 764-65, that the defendant's presumed knowledge that its cigarettes were being sold in Tennessee was not sufficient. 403 S.W.3d at 765. While the distribution network in *NV Sumatra* was even more attenuated that the distribution network at issue here, all the reasons for holding that minimum contacts did not exist hold true here.

IV. CONCLUSION

The trial court did not err by granting Defendant and Respondent Special Electric's motion to dismiss for lack of personal jurisdiction. In the absence of minimum contacts between Special Electric and Washington, requiring Special Electric to defend against the Nolls' complaint in Washington would offend due process. For that reason, this Court should affirm.

RESPECTFULLY SUBMITTED this 17th day of June, 2014.

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