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No. 91998-4

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.

BRIEF OF RESPONDENT CANDANCE NOLL IN RESPONSE
TO BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS

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 ORIGINAL

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INTRODUCTION

The Washington Defense Trial Lawyers Association (“WDTL” or “Amicus”) has filed an *Amicus Curiae Brief* urging this Court to reverse the appellate court decision in *Noll v. American Biltrite, Inc.*, 188 Wn. App. 572, 355 P.3d 279 (2015). Respondent Candance Noll respectfully submits that the appellate court’s decision should be affirmed.

The points made in the *Amicus Brief* add little or nothing to the arguments here. Its most notable aspect is the inexcusable extent to which WDTL misrepresents (or simply ignores) the actual record in terms of what evidence was presented by whom and what positions have been asserted by the respective parties. WDTL also overstates the import and application of *Walden v. Fiore*, —U.S.—, 134 S.Ct. 1115 (2014) to stream-of-commerce cases. Otherwise, Amicus merely reasserts versions of arguments previously made by Petitioner Special Electric Company.

ARGUMENT

(A)

Amicus Seriously Mischaracterizes The Record

Footnote 6 of the *Amicus Brief* is predominantly fiction. WDTL states that Special Electric submitted evidence “demonstrating its lack of awareness,” then unequivocally refers to “Special Electric’s unrefuted evidence that it was not aware CertainTeed was selling its finished product

into Washington.” *Id.* Special Electric presented no such evidence and has never claimed to have done so. As Mrs. Noll previously pointed out, the only evidence Special Electric presented was a dated declaration from an officer, who resigned before this case was filed, which addressed only facts relating to general jurisdiction—which is not at issue here. CP 44–46.

WDTL suggests that the trial court considered actual awareness and granted the motion to dismiss because Mrs. Noll failed to refute Special Electric’s (nonexistent) evidence that it lacked awareness. *See Amicus Br.*, p. 18, n. 6. Special Electric did not assert in the trial court that Mrs. Noll was required to prove actual awareness. Rather, it argued, and the trial court held, that Ms. Noll had to prove “targeting” per the plurality in *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873, 131 S.Ct. 2780 (2011). Special Electric abandoned that position after the court in *State v. AU Optronics Corp.*, 180 Wn. App. 903, 328 P.3d 919 (2014) held that Justice Breyer’s concurrence is controlling. *See also State v. LG Electronics, Inc.*, 186 Wn.2d 169, 180–81, 375 P.3d 1035 (2016). Contrary to WDTL’s assertion, Special Electric, not Mrs. Noll, has “adopted a different argument” on appeal.¹

¹ Failing to ask for an evidentiary hearing in the trial court is not, as WDTL asserts, a forfeiture by Plaintiff. Rather, because neither party

(B)
Amicus Exaggerates The Import Of *Walden v. Fiore*
As Applied To The Stream-Of-Commerce Jurisdiction Analysis

Regardless of what courts in other jurisdictions have done, this Court has applied *Walden* to intentional torts, not stream-of-commerce cases. See *Pruczinski v. Ashby*, 185 Wn.2d 492, 501, 374 P.3d 102 (2016) (“forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum”) (quoting *Walden*, 134 S.Ct. at 1123); see also *LG Electronics*, 186 Wn.2d at 195 (in *Walden*, the U.S. Supreme Court applied the *Calder* “effects test” to analyze jurisdiction in an intentional tort case) (McCloud, J., concurring in part; dissenting in part) (referencing *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482 (1984)). Perhaps tellingly, the majority in *LG Electronics* does not even mention *Walden* as part of its stream-of-commerce analysis.

Specifically and unremarkably, the Court in *Walden* held that committing a tort in State A against residents of State B does not subject the tortfeasor to jurisdiction in State B based solely on the plaintiffs’ residence. Focusing on that actual, narrower holding, this Court has

requested such a hearing, Mrs. Noll only needed to make a *prima facie* showing that jurisdiction is proper. E.g., *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

observed that “the plaintiff cannot be the only link between the defendant and the forum.” *Falla v. FixtureOne Corp.*, 181 Wn.2d 642, 660, 336 P.3d 1112 (2014) (quoting *Walden*, 134 S.Ct. at 1122). Here, the Nolls are not the only link between Special Electric and Washington; nor is Mrs. Noll trying to carry a tort committed elsewhere into Washington based solely on her residence. Rather, Special Electric’s asbestos was carried into Washington via the regular flow of commerce through established channels—which has sufficed to establish personal jurisdiction since *Gray v. American Radiator and Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

In that regard, by deliberately placing a substantial volume of its asbestos into those established channels Special Electric engaged in “suit-related conduct” creating “a substantial connection” with the places where those channels regularly flowed—i.e. Washington. *Amicus Br.*, p. 15 (quoting *Walden*, 134 S.Ct. at 1121). Decedent Donald Noll was injured here in Washington, his home State, by that suit-related conduct. WDTL’s assertion, that the involvement of a third-party manufacturer like CertainTeed necessarily breaks that connection, amounts to arguing that *Walden* overruled decades of stream-of-commerce jurisprudence *sub silentio*. This Court, in *LG Electronics*, declined the opportunity to adopt

such an exaggerated interpretation of *Walden*. Respectfully, there is no reason to consider adopting any different position here.²

(C)

Otherwise, Amicus Simply Represents
The Same Arguments Previously Made By Special Electric

Like Special Electric, Amicus attempts to imply an actual awareness requirement by extracting isolated phrases from various opinions, none of which expressly recognizes such a requirement. Neither Amicus nor Special Electric can cite a binding precedent from Washington or the U.S. Supreme Court that actually denies jurisdiction because the plaintiff failed to prove actual knowledge in addition to a substantial, regular flow of the offending products. Neither Amicus nor Special Electric can cite a binding decision that overrules the decades of jurisprudence upholding jurisdiction on the basis of a substantial, regular flow of the offending products into the forum.

Amicus makes the conclusory assertion that Justice Breyer's concurrence in *McIntyre Machinery* requires proof of actual awareness. On the contrary, in considering whether that plaintiff had established minimum contacts under Justice Brennan's analysis, Justice Breyer did not

² Such an interpretation would conflict with the Supreme Court's holding in *World-Wide Volkswagen Corp. v. Woodson* that jurisdiction is proper where the material in question reaches the forum as a result of "the efforts of the [defendant] to serve directly or *indirectly*, the market . . . in other States." 444 U.S. 286, 297, 100 S.Ct. 559 (1980) (*emphasis added*).

look to subjective awareness as a factor. Rather, he considered whether the plaintiff had shown any “regular flow” or “regular course” of sales of the defendant’s products into New Jersey. See *McIntyre Machinery*, 564 U.S. at 889 (citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 117 & 122, 107 S.Ct. 1026 (1987) (Brennan, J., *concurring*)). Justice Breyer rejected the reasoning relied upon by the trial court here to dismiss Special Electric—namely, the plurality’s “strict rules that limit jurisdiction where a defendant does not intend to submit to the power of a sovereign and cannot be said to have targeted the forum.” *McIntyre Machinery*, 564 U.S. at 890 (internal quotations omitted). He opined that a plaintiff can establish minimum contacts under the stream-of-commerce doctrine by either of the competing pluralities in *Asahi*. See *id.* at 889 (Breyer, J., *concurring in judgment*).

Both the plurality and concurrence in *McIntyre Machinery* expressly rejected analyses that would take a defendant’s subjective expectations or awareness into consideration. “Justice Kennedy, writing for the plurality,” stated “that what matters... ‘is the defendant’s actions, not his expectations.’” *Willemsen v. Invacare Corp.*, 282 P.3d 867, 872 (Or. 2012) (quoting *McIntyre Machinery*, 564 U.S. at 883). Justice Breyer, in his concurrence, stated that a single sale of a product would not confer jurisdiction “even if that defendant places his goods in the stream of

commerce, fully aware (and hoping) that such a sale will take place.”
Willemssen, 282 P.3d at 873 (quoting 564 U.S. at 888–89).

Amicus also argues that proof of actual awareness represents the common ground between the competing pluralities from *Asahi*. The opposite is true—both plurality opinions found other factors to be determinative. Neither plurality in *Asahi* held that direct proof of actual subjective awareness was a separate, necessary requirement. 480 U.S. 102. Justice O’Connor held that “something more” was required to establish minimum contacts, even assuming plaintiff had proved the defendant’s awareness. *Id.* at 112–13. Justice Brennan focused on the regular and significant volume of sales as sufficient to establish minimum contacts—which is precisely how this Court has interpreted that opinion without mentioning actual knowledge or awareness:

Justice Brennan’s concurrence...concluded that a defendant can be subject to jurisdiction consistent with due process whenever the “regular and anticipated flow of products,” as opposed to “unpredictable currents and eddies,” leads the product to be marketed in the forum state.

LG Electronics, 186 Wn.2d at 179 (quoting *Asahi*, 480 U.S. at 116–17 (Brennan, J., concurring)). Mrs. Noll has consistently maintained that

minimum contacts are established here by the regular and substantial flow of Special Electric's asbestos into Washington.³

This Court did not adopt or recognize an actual awareness requirement in *LG Electronics*. In its opinion, the Court certainly *observes* that the "State argue[d]" that the defendant companies acted with knowledge that the price-fixed products would be sold in Washington. *LG Electronics*, 186 Wn.2d at 177. However, nowhere in its opinion does the Court base its holding that observation. *See id.* at 181 (U.S. Supreme Court has "not foreclose[d] an exercise of personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce").

Amicus, like Special Electric, argues that the appellate court improperly considered the hazardous nature of Special Electric's asbestos. The court simply noted that this was "one of the factors mentioned by Justice Stevens in *Asahi* as affecting the jurisdictional inquiry." *Noll*, 188 Wn. App. at 583. The court did not place undue weight on such factor, and

³ Based upon recently discovered evidence from its archived collection of documents, Special Electric has acknowledged having had some direct contacts with Washington—albeit not directly related to Mr. Noll's exposure to its asbestos. Nevertheless, those newly disclosed prior contacts would also satisfy Justice O'Connor's alternate opinion in *Asahi* by providing evidence of "something more." *See McIntyre Machinery*, 564 U.S. at 889 (referencing *Asahi*, 480 U.S. at 112).

relied primarily upon the regular flow of Special Electric's asbestos into Washington:

Special's asbestos was supplied for use in making large quantities of pipe to be distributed through existing channels of interstate commerce, including channels regularly flowing into the State of Washington. It is the regular flow or course of sales that distinguishes the facts here from the facts of *J. McIntyre*. A plaintiff is not required to prove both a regular flow *and* "something more."

Id. (emphasis by court); see also 188 Wn. App. at 585 (volume of Special's shipments of asbestos to Santa Clara and volume of CertainTeed's pipe shipments to Washington suffices to establish purposeful availment).

CONCLUSION

The Court of Appeals correctly held that jurisdiction over Special Electric is proper here. Amicus WDTL has offered no reason to alter that decision. Mrs. Noll respectfully requests that this Court affirm the Court of Appeals.

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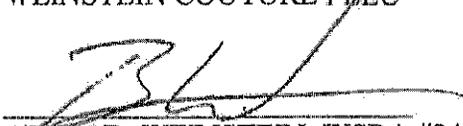
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DATED this 4th day of January, 2017.

Respectfully submitted,

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NO. 91998-4

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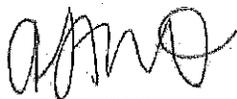
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 4th day of January, 2017.

WEINSTEIN COUTURE PLLC

A handwritten signature in black ink, appearing to read 'AS', written over a horizontal line.

Alyssa Stout
Paralegal

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Attached please find the following documents for filing:

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2. Declaration of Service.

Case Name: Candance Noll, Individually and as Personal Representative of the Estate of Donald Noll, Deceased, v. Special Electric Company, Inc.

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