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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.

)
SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
(A) The <i>LG Electronics</i> Decision Neither Recognizes Nor Imposes An “Actual Knowledge” Requirement.....	4
(B) Washington Has Rightfully Continued To Adhere To Its Reasonably Broader Application Of The Stream-Of-Commerce Doctrine.....	7
(C) Fairness To Out-Of-State Defendants Does Not Require Sacrificing Justice For The Citizens of Washington.....	11
CONCLUSION.....	14

TABLE OF AUTHORITIES

Washington decisions

<i>AU Optronics Corp., State v.</i> , 180 Wn. App. 903 (2014).....	2, 4
<i>FutureSelect Portfolio Mgmt., Inc. v.</i> <i>Tremont Group Holdings, Inc.</i> , 180 Wn.2d 954 (2014)	12
<i>Grange Ins. Assoc. v. State</i> , 110 Wn.2d 752 (1988)	8, 9
<i>LG Electronics, Inc., State v.</i> , 186 Wn.2d 169, 375 P.3d 1035 (2016)	4-7, 9, 10
<i>Noll v. American Biltrite, Inc.</i> , 188 Wn.App. 572 (2015).....	<i>passim</i>
<i>Oliver v. American Motors Corp.</i> , 70 Wn.2d 875 (1967)	6, 7, 9
<i>Shute v. Carnival Cruise Lines</i> , 113 Wa.2d 763 (1989)	11

U.S. Supreme Court decisions

<i>Asahi Metal Industry Co. v. Superior Court</i> , 480 U.S. 102 (1987)	6, 8, 9
<i>Daimler AG v. Bauman</i> , 134 S.Ct. 746 (2014)	6, 12
<i>Goodyear Dunlop Tires Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011)	6
<i>International Shoe Co. v. State of Washington</i> , 326 U.S. 310 (1945)	11-12

J. McIntyre Machinery v. Nicastro,
564 U.S. 873 (2011)2, 4, 6, 9, 10

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980)4, 6, 7-9

Other decisions

Atlantic Richfield Co., State v.,
142 A.3d 215 (Vt. 2016)9

Book v. Doublestar Dongfeng Tyre Co.,
860 N.W.2d 576 (Iowa 2015)9, 10, 12

Butler v. JLA Indus. Equip., Inc.,
845 N.W.2d 834 (Minn. App. 2014)9, 12

Ford Motor Co., State ex rel. v. McGraw,
788 S.E.2d 319 (W.Va. 2016)10

*Gray v. American Radiator and
Standard Sanitary Corp.*,
176 N.E.2d 761 (Ill. 1961)6, 7-8, 9

Marks v. Westwind Helicopters, Inc.,
2016 WL 5724300 (magistrate recommendation Jan. 20, 2016)
adopted 2016 WL 5793771 (W.D. La. Sept. 30, 2016)10

Russell v. SNFA,
987 N.E.2d 778 (Ill. 2013)5, 10

Sproul v. Rob & Charlies, Inc.,
304 P.3d 18 (N.M. App. 2012)10

Willemsen v. Invacare Corp.,
282 P.3d 867 (Or. 2012)5, 10

INTRODUCTION

The case at bar presents the classic scenario for asserting personal jurisdiction, under the stream-of-commerce doctrine, over an out-of-state defendant that regularly supplied substantial amounts of a component material (raw asbestos) to a manufacturer for use in products (CertainTeed asbestos pipe), which were regularly sold in substantial quantities into the Washington and which injured a Washington citizen in Washington. The Court of Appeals held that jurisdiction is proper in such circumstances and reversed the trial-court order granting Defendant-Petitioner Special Electric Company's motion to dismiss. *Noll v. American Biltrite, Inc.*, 188 Wn.App. 572 (2015). Consistent with decades of Washington jurisprudence, the appellate court rejected Special Electric's argument that a plaintiff must provide direct evidence that the component supplier had actual, subjective knowledge of the manufacturer's distribution network, in addition to showing a regular and substantial flow of the offending material into Washington through established distribution channels. Special Electric has requested and obtained review in this Court of that specific point. *See Sp. Elec. Pet. for Rev.*, p. 1 (seeking review as to whether "Washington courts exercise specific personal jurisdiction over the nonresident broker, when the plaintiff has no evidence that the broker

was aware that the manufacturer was selling pipe into Washington which contained the broker's asbestos").

Plaintiff-Respondent Candance Noll respectfully submits that the Court of Appeals correctly decided this matter and requests that its decision be affirmed. Special Electric's "actual knowledge" requirement has not been recognized, and doing so would impose an unprecedented and unreasonable hurdle to Washington's ability to protect citizens, like Decedent Donald Noll, from harm inflicted here in Washington.

STATEMENT OF THE CASE

Several points regarding the record here are worth emphasizing.

First, despite the recent focus of its argument, Special Electric has not expressly denied knowing where CertainTeed distributed pipe nor offered evidence that it was ignorant of CertainTeed's distribution network. Special Electric did not assert in the trial court that Plaintiff was required to prove actual knowledge. 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 (2011). Special Electric abandoned that position after *State v. AU Optronics Corp.*, 180 Wn.App. 903 (2014) made clear that Justice Breyer's narrower opinion represents the holding in *J. McIntyre*.

Second, Special Electric has accepted the facts as characterized by the Court of Appeals here. *See Sp. Elec. Pet. for Rev.*, p. 4, fn. 5. Such acceptance includes that Special Electric “regularly supplied raw asbestos for the manufacture of pipe that moved into Washington through established channels of sale” (*Noll*, 188 Wn.App at 578, ¶10), and that both occurred in substantial quantities (*Id.* at 577-78, ¶¶8-9). Special Electric has not presented any evidence contradicting Mrs. Noll’s detailed proof tracing how its asbestos came into Washington and injured her deceased husband. In fact, the only evidence Special Electric offered was a dated declaration from an officer, who resigned before this case was filed, going only to the lack of *general* jurisdiction—which was never an issue. CP 44-46.

ARGUMENT

Special Electric’s theory rests on attempting to imply an “actual knowledge” requirement from isolated phrases in various opinions, none of which expressly recognizes that theory. Special Electric cannot cite a single 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. At most, it can cite a few non-binding opinions denying jurisdiction, where a defendant affirmatively proved lack of knowledge of an intermediary’s distributions.

(A)
The *LG Electronics* Decision Neither Recognizes
Nor Imposes An “Actual Knowledge” Requirement

Special Electric tries to characterize its position as simply advocating for the acknowledgement of an already-existing requirement that plaintiffs must provide evidence of awareness on the part of a defendant to establish stream-of-commerce jurisdiction. In reality, it is asking this Court, as it did the Court of Appeals, to not only impose an “actual knowledge” requirement, but also require that plaintiffs prove such actual knowledge by direct evidence. The Court of Appeals correctly rejected that argument:

The governing precedents do not require a plaintiff to prove a component supplier’s actual knowledge of the manufacturer’s plans to ship finished product into the forum state. *AU Optronics*, *World-Wide Volkswagen Corp.*, and Justice Breyer’s concurrence in *J. McIntyre* require objective facts evidencing a regular flow or regular course of sales by which the product enters the forum state....

Noll, 188 Wn.App at 585, ¶25.

Based on its prior submissions, Special Electric will doubtless argue that this Court either imposed an actual knowledge requirement or recognizes such requirement as already existing in its most recent decision on specific jurisdiction, *State v. LG Electronics, Inc.*, 186 Wn.2d 169, 375 P.3d 1035 (2016). Respectfully, based on the Court’s opinion, such does not appear to be the case. The *LG Electronic* opinion *observes* that the

“State argue[d]” that the defendant companies acted with knowledge that the price-fixed products would be sold in Washington. 186 Wn.2d at ¶ 14, 375 P.3d at 1040. However, nowhere in its opinion does the Court base its holding that observation. Rather, this Court more expressly upheld jurisdiction because the State showed that there had been a regular flow of a substantial volume of the products at issue into Washington. *See* 186 Wn.2d at ¶ 23, 375 P.3d at 1042 (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”). *See also* 186 Wn.2d at ¶ 24, 375 P.3d at 1042 (“we agree...that ‘[t]he presence of millions of CRTs in Washington was not the result of chance or the random act of third parties, but a fundamental attribute of [the defendants’] businesses”).

The *LG Electronics* opinion cites with approval to the Oregon and Illinois decisions in *Willemssen v. Invacare Corp.*, 282 P.3d 867 (Or. 2012) and *Russell v. SNFA*, 987 N.E.2d 778 (Ill. 2013). *See* 186 Wn.2d at ¶ 23, 375 P.3d at 1042. Both of those decisions reject any actual knowledge requirement. Both decisions were cited in Mrs. Noll’s briefing with the Court of Appeals and are persuasive here because they are consistent with

Washington stream-of-commerce jurisprudence.¹ *Willimsen*, in particular and like the case the case at bar, is a classic stream-of-commerce product-liability case upholding jurisdiction over the supplier of a dangerously defective component in the state where injury occurred.

If anything, this Court's upholding jurisdiction in *LG Electronics* should be *a fortiori* for doing the same in the case at bar. Unlike this case, *LG Electronics* did not present a classic stream-of-commerce fact pattern, in which a Washington citizen suffered bodily harm from the dangerous physical properties of offending material sent here through regular channels of commerce. *See e.g.* 186 Wn.2d at ¶ 28, 35, 375 P.3d at 1044-6 (*Gordon McCloud, J., dissenting*). The harm resulting from the international price-fixing at issue in *LG Electronics* is more remote and indirect than Mr. Noll's physically inhaling asbestos from Special Electric here in Washington. Additionally, much like the U.S. Supreme Court's recent decisions on personal jurisdiction (*J. McIntyre* 564 U.S. 873; *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and, less recent, *Asahi*

¹ Indeed, Illinois and Washington recognized stream-of-commerce as a basis for specific jurisdiction prior to the Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *See Gray v. American Radiator and Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961); *Oliver v. American Motors Corp.*, 70 Wn.2d 875 (1967). Both are cited with approval in *World-Wide VW*, 444 U.S. at 298 & 291, n. 9.

Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987)), *LG Electronics* involved considerations of international comity that can temper the exercise of jurisdiction. There is no such mitigating consideration here. Special Electric was a Wisconsin corporation that sold asbestos to CertainTeed, another U.S. company.

If Washington can assert jurisdiction over non-U.S. companies to answer for the indirect effects of an international price-fixing scheme, Washington should surely be able to assert jurisdiction over a U.S. company to answer for a Washington citizen's fatal cancer caused by thousands of tons of asbestos which that company placed into the stream of commerce.

(B)

Washington Has Rightfully Continued To Adhere To Its
Reasonably Broader Application Of The Stream-Of-Commerce Doctrine

This Court adopted stream-of-commerce as articulated by the Illinois Supreme Court in *Gray*, 176 N.E.2d 761, before the U.S. Supreme Court did so. *See Oliver*, 70 Wn.2d at 887-88. The Supreme Court endorsed both *Gray* and *Oliver* when it recognized stream-of-commerce jurisdiction in *World-Wide VW*, 444 U.S. at 298 & 291, n. 9. This Court, in *Oliver*, clearly indicated that direct proof of actual knowledge is not required, and that any awareness may be inferred from objective circumstances and the defendant's acts. *See* 70 Wn.2d at 887 (“[t]he term

'purposeful' we use, of course, in the sense that the actor intended or at least *could be charged with knowledge* that his conduct might have consequences in another state") (*emphasis added*); 70 Wn.2d at 888 (the court in *Gray* "recognize[d] that there had to be some *course of conduct* upon which to rationally base the *inference* of submission to jurisdiction" such as "a general course of conduct outside the state but inevitably affecting persons in the state and from which it seems fair to *imply* submission") (*emphasis added*).

The above Washington jurisprudence has never been overruled or undermined. It was reaffirmed in *Grange Ins. Assoc. v. State*, which was decided after *World-Wide VW* and *Asahi Metal*, which also remains good law, and wherein the Court held: "This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to *charge the manufacturer with knowledge* that its *conduct* might have consequences in another state. 110 Wn.2d 752, 761 (1988) (*emphasis added; citation omitted*). Consistent with this line of authority, the Court of Appeals here held that "the regular course of sales that brought the pipe into Washington satisfies the due process requirement for minimum contacts because it shows that the defendant purposefully availed itself of the protection of Washington's laws." *Noll*,

188 Wn.App. at 576, ¶ 1. *See also Butler v. JLA Indus. Equip., Inc.*, 845 N.W.2d 834, 846 (Minn. App. 2014) (“purposeful availment...may be shown by the regular flow and course of sales of a nonresident defendant’s products in the forum”).

Those precedents, and the other Washington decisions relying on them, remain good law. None of those decisions, nor any other Washington decision, expressly recognizes an “actual knowledge” requirement. Even if some of the older, rather broad applications of stream of commerce (such as relying on a single, isolated sale or the resale of used equipment) have become questionable, Washington has continued to adhere to a reasonable broad application of stream-of-commerce. *See e.g. LG Electronics*, 186 Wn.2d at 177-78 (reaffirming continued vitality of *Grange Ins. Assoc.*).

As the Supreme Court of Vermont recently ruled in upholding jurisdiction, because the U.S. Supreme Court’s opinions in *Asahi Metal* and *J. McIntyre* are inconclusive, *World-Wide VW* (which endorsed both *Gray* and *Oliver*) remains “the governing law on the stream-of-commerce doctrine.” *State v. Atlantic Richfield Co.*, 142 A.3d 215, 222 (Vt. 2016). *See also Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 583 (Iowa 2015) (“[w]e conclude that the stream-of-commerce test as adopted in *World-Wide Volkswagen Corp.* and followed by our precedents remains

good law”); *Marks v. Westwind Helicopters, Inc.*, 2016 WL 5724300, *6 (magistrate recommendation Jan. 20, 2016) *adopted* 2016 WL 5793771 (W.D. La. Sept. 30, 2016) (the import of *J. McIntyre* is that the law remains the same and that lower courts “may continue to attempt to reconcile the Supreme Court’s competing articulations of the stream of commerce test”).

The Iowa Supreme Court further observed that a number of states “have interpreted *J. McIntyre Machinery* to conclude their existing precedent on the stream-of-commerce test remains good law.” *Books*, 860 N.W.2d at 592-93. *Accord State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 342 (W.Va. 2016) (“existing precedent on stream of commerce test remains good law”). The Iowa court cites as examples, *inter alia*, *Russell*, 987 N.E.2d at 794 and *Sproul v. Rob & Charlies, Inc.* 304 P.3d 18, 33 (N.M. App. 2012), and favorably discusses *Willemsen*, 282 P.3d 867, all of which Mrs. Noll cited in her briefs below. This Court, “consistent with [the interpretation] of other courts,” held the same in *LG Electronics*, 186 Wn.2d at ¶ 23, 375 P.3d at 1042 (“*J. McIntyre* did not foreclose 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”).

There is no U.S. Supreme Court precedent requiring Washington to abandon its long-standing adherence to a reasonably broad application of the stream-of-commerce doctrine. There is no compelling reason for this Court to deviate from that jurisprudence by imposing an actual knowledge requirement that would impede Washington citizens' recourse to Washington courts for injury and death suffered in Washington.

(C)
Fairness To Out-Of-State Defendants
Does Not Require Sacrificing Justice For The Citizens of Washington

At the most basic level, the question is still whether or not asserting jurisdiction over Special Electric under these circumstances would "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). *See also e.g. Shute v. Carnival Cruise Lines*, 113 Wa.2d 763, 768 (1989) (much of the jurisdictional case law since *International Shoe* involves distilling various tests for determining what is fair in particular types of circumstances). Notwithstanding the focus on the out-of-state defendant's due process rights, they not the only ones entitled to fairness and justice. The other side of the equation is equally important. Personal jurisdiction—especially specific jurisdiction—should not become so unreasonably constrained that a State loses its ability to protect its citizens from harm coming into the State from outside, or its citizens lose their right to redress

such harm in their home-State courts. *See e.g. Daimler*, 134 S.Ct. at 750 (since *International Shoe*, specific jurisdiction “has been cut loose from *Pennoyer’s* sway” and become the “centerpiece” for exercising jurisdiction). As the Iowa Supreme Court recently stated:

Fairness is the crux of the minimum-contacts analysis...Is it unfair to compel a manufacturer selling thousands of products nationwide to defend its allegedly unsafe design in a state where its product was sold and injured a resident using it? We think not...We adopted products liability to ensure that the cost of injuries resulting from defective products are borne by the [parties] that put such products on the market...We would undermine that purpose if we closed the local courthouse door to injured consumers.

Book, 860 N.W.2d at 595 (*internal quotes & citations omitted*). *See also Butler*, 845 N.W.2d at 841 (“fairness” to a nonresident defendant should “not extend so far as to permit a manufacturer [or component supplier] to insulate itself from the reach of the forum state’s long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products”); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 966 (2014) (declining jurisdiction over nonresident can “create a perverse incentive for [parties] to insulate themselves from liability by operating exclusively through [others]”).

Donald Noll lived and worked in Washington. He did not reach out beyond this State to expose himself to Special Electric’s asbestos. It was sent here, through regular channels of commerce, to the sites where he

worked. The Nolls invoked the jurisdiction of their home-State courts to obtain justice from the parties responsible for exposing Mr. Noll to asbestos.² They are as much entitled to the protection of Washington's laws and courts as the parties that sent their hazardous materials here and should not have to overcome some additional, unprecedented "proof of actual knowledge" requirement in the process. Special Electric should not be permitted to evade jurisdiction by tacitly "professing ignorance" of where CertainTeed was selling pipe made with its asbestos. As unanimously and correctly summarized by the appellate panel here:

Special does not claim that the presence of its asbestos on the construction sites in Washington where Donald Noll cut pipe was an isolated event. Whether Special knew that CertainTeed's Santa Clara plant was shipping pipe into Washington is not dispositive. Special's contacts with Washington were systematic. They were not random, isolated, fortuitous, attenuated or anomalous. Pipe containing Special's asbestos flowed into Washington in the regular stream of commerce, not in a mere eddy. Special benefitted indirectly from the laws of Washington that protected the marketing, sale, and use of asbestos pipe in Washington during the years that Donald Noll was exposed to it. Having accepted that benefit, Special cannot claim that its relationship with Washington lacked purpose.

Noll, 188 Wn.App. at 587, ¶ 27.

² As noted in Ms. Noll's briefs below, Washington is the only place she could obtain jurisdiction over all defendants. Requiring her to sue Special Electric in California or Wisconsin would force Washington citizens to pursue claims in multiple jurisdiction even where nonresident defendants have 'purposefully availed' themselves of Washington markets.

CONCLUSION

The Court of Appeals correctly held that jurisdiction over Special Electric is proper here. Mrs. Noll respectfully requests that this Court affirm that decision.

DATED this 15th day of November, 2016.

Respectfully submitted,

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SUPREME COURT
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CANDANCE NOLL, Individually and as
Personal Representative of the Estate of
DONALD NOLL, deceased,

Respondent,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner.

NO. 91998-4

DECLARATION OF
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I, Alyssa Stout, declare and state as follows:

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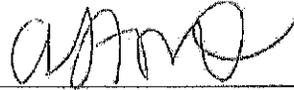
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12 I declare under penalty of perjury under the laws of the state of Washington that the
13 foregoing is true and correct.

14 DATED at Seattle, Washington this 15th day of November, 2016.

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Dear Clerk,

Attached please find the following documents for filing:

1. Supplemental Brief of Respondent; and
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.

Cause No.: 91998-4

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