Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

_____

No. 852027

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

JONATHAN T. SORRENTINO, as Personal Representative of the Estate of THOMAS R. SORRENTINO,

Respondent,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,

Defendant,

and

VOLKSWAGEN AKTIENGESELLSCHAFT,

Petitioner.

VOLKSWAGEN AKTIENGESELLSCHAFT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Volkswagen Aktiengesellschaft, defendant-appellant below, seeks review of the decision identified in part II.

II. COURT OF APPEALS DECISION

Volkswagen Aktiengesellschaft seeks review of Division One's decision affirming the exercise of specific personal jurisdiction over it. A copy of that decision is attached as Appendix A. A copy of Division One's order denying Volkswagen Aktiengesellschaft's reconsideration motion, along with that motion, is attached as Appendix B.

III. INTRODUCTION

Plaintiff-Respondent Thomas Sorrentino obtained a nearly $5 million judgment against Volkswagen Aktiengesellschaft, a German corporate entity, and its independent subsidiary Volkswagen Group of America, Inc. (*Volkswagen America*), jointly and severally. Division One affirmed the judgment, which was based on a jury verdict for product liability, including

the trial court's decision to exercise specific jurisdiction over Volkswagen Aktiengesellschaft.

Volkswagen Aktiengesellschaft now seeks review of only whether it is subject to specific jurisdiction in Washington based solely on its independent subsidiary's contacts with Washington. Sorrentino's judgment against Volkswagen America will thus stand, regardless of this Court's ruling.

Disregarding the trial court's finding that Volkswagen Aktiengesellschaft's independent subsidiary was neither its agent nor alter ago, Division One held that a foreign corporation is subject to specific jurisdiction in Washington based solely on (1) its independent subsidiary's Washington contacts and (2) its general interest in its subsidiary's doing business in the United States. That expansive view of specific jurisdiction opens parent companies to suit anywhere a subsidiary does business. This reformulation of the constitutional purposeful-availment standard means even an independent subsidiary's contacts may subject its parent company to Washington's jurisdiction.

Division One's novel approach violates due process and conflicts with numerous controlling decisions that have required at least an agency relationship before an independent subsidiary's contacts may be imputed to a parent company for personal jurisdiction.

In addition, Division One's decision alters the burden of proof for personal jurisdiction that this Court established in *LG Electronics*. Division One's decision allows a plaintiff to invoke specific jurisdiction against a defendant—after a bench trial and a full evidentiary record—based on a mere prima-facie showing instead of a preponderance of the evidence. A Washington court, under Division One's decision, must accept a plaintiff's jurisdictional allegations as true. This cannot be reconciled with *LG Electronics*. And because a plaintiff must establish personal jurisdiction over a defendant in every civil case, Division One's decision raises an issue of substantial public interest that this Court should resolve.

This Court has not opined on personal jurisdiction in almost a decade. This case raises a significant and recurring question of law under the Fourteenth Amendment's Due Process Clause. It also presents an ideal vehicle to ensure that Washington precedent is consistent with controlling Supreme Court precedent and to resolve the flipside of the question this Court answered nearly a decade ago in *Noll v. American Biltrite Inc.*, 188 Wn.2d 402, 497 P.2d 1311 (2017), which involved allegation adequacy at the pleading stage.

This Court should grant review to resolve these important issues because Division One's decision involves a legal question under the U.S. Constitution, conflicts with decisions of this Court and the Court of Appeals, and raises several issues of substantial public interest.

IV. ISSUES PRESENTED FOR REVIEW

1. Lawful exercise of specific personal jurisdiction over Volkswagen Aktiengesellschaft.

The Due Process Clause permits a state court to exercise specific jurisdiction over a foreign corporation that has sufficient minimum contacts with the forum. Division One affirmed the

exercise of specific jurisdiction over Volkswagen Aktiengesellschaft based solely on this German entity's recognition that its vehicles will be sold in the United States and on its independent U.S. subsidiary's contacts, even though the subsidiary is neither Volkswagen Aktiengesellschaft's agent nor alter ego. That decision has the far-reaching consequence of subjecting a foreign corporation to specific jurisdiction in Washington, even if that foreign corporation has no minimum contacts with Washington, any time that corporation contracts with an independent subsidiary that does business in Washington.

Should this Court grant review because Division One's decision (1) raises a significant legal question under the U.S. Constitution, (2) conflicts with *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 309 P.3d 555 (2013), which held that the parent must manage and substantially control the subsidiary's operations to warrant disregarding corporate separation, and (3) raises an issue of substantial public interest about whether an independent subsidiary's forum contacts may be imputed to its parent company based on a standard parent–subsidiary relationship to establish specific jurisdiction? *Yes.* (RAP 13.4(b)(2)–(4)).

2. A plaintiff's burden to establish specific jurisdiction.

A plaintiff must establish personal jurisdiction over a defendant. Absent an evidentiary hearing, a plaintiff need only make a prima-facie showing; after an evidentiary hearing, under *LG Electronics*, a plaintiff must establish jurisdiction by a preponderance of the evidence. The parties tried personal jurisdiction to the bench. In affirming the exercise of personal jurisdiction over Volkswagen Aktiengesellschaft, Division One considered only whether Sorrentino made a sufficient prima-facie showing of jurisdiction, treated Sorrentino's allegations as

true, and disregarded Volkswagen Aktiengesellschaft's evidence rebutting jurisdiction.

Should this Court grant review because Division One's decision on specific jurisdiction (1) conflicts with this Court's specific-jurisdiction decision in *State v. LG Electronics*, 186 Wn.2d 169, 375 P.3d 1035 (2016), which held that a plaintiff must prove personal jurisdiction by a preponderance of the evidence after an evidentiary hearing, and (2) raises an issue of substantial public interest? *Yes.* (RAP 13.4(b)(1), (4)).

V. STATEMENT OF THE CASE

A. Volkswagen America is the exclusive importer of Volkswagen vehicles and parts in the United States.

Volkswagen Aktiengesellschaft is a German stock company headquartered in Wolfsburg, Germany. RP 1045. It operates exclusively in Germany, designing and manufacturing Volkswagen vehicles and genuine replacement parts. RP 1045–46.

To serve the growing demand for its vehicles in the 1950s, independently owned importing companies worked with Volkswagen Aktiengesellschaft in Germany to buy, distribute, and sell its vehicles and replacement parts abroad. RP 1045–49. One such company was Volkswagen America, incorporated in

New Jersey as an independently operated subsidiary of Volkswagen Aktiengesellschaft. RP 838–42, 1048–49.

For the United States market, Volkswagen America is the exclusive, authorized importer of Volkswagen vehicles and parts. RP 838–42, 1048–49. At all relevant times, Volkswagen America bought Volkswagen vehicles and genuine replacement parts in Germany from Volkswagen Aktiengesellschaft. CP 1315, 1331–32; RP 863. It imported the vehicles and parts into the United States and then marketed and sold them to authorized, independently owned Volkswagen distributors and dealerships. CP 1332; RP 842–43, 852, 863.

Volkswagen America also imported the service literature for the Volkswagen vehicles and parts. RP 857–60, 1072–79. Volkswagen America was responsible for promoting sales, customer service, and instruction of technical personnel at local dealerships. RP 848–51, 1071. And it advertised Volkswagen Aktiengesellschaft products in the United States. RP 890.

A standard importer agreement controlled the relationship between Volkswagen Aktiengellschaft and Volkswagen America. Ex. 205. Under that agreement, (1) Volkswagen Aktiengesellschaft agreed to sell its vehicles and parts in Germany to Volkswagen America, which would resell and distribute them into and throughout the United States; (2) Volkswagen America was not Volkswagen Aktiengesellschaft's agent; and (3) Volkswagen Aktiengesellschaft neither controlled Volkswagen America's operations nor directed its activities in the United States. RP 1024; Ex. 205 at 3. Although Volkswagen America was a wholly owned subsidiary, it was a distinct, independently run business. RP 1024.

B. Volkswagen America established a network of independently owned Volkswagen distributors and dealerships in the United States.

Volkswagen America established a network of independently owned distributors in the United States, which worked with over 200 independently owned dealerships across

the country. RP 851–52, 863–64. Volkswagen America contracted with the regional distributors, which in turn contracted with the local dealerships to sell Volkswagen vehicles and parts and to hire mechanics to repair the vehicles. Ex. 205 at 6–10; RP 873.

Riviera Motors, based in Oregon, was one of Volkswagen America's distributors. RP 799, 857, 868. Riviera served the market for Volkswagen vehicles and parts in Washington. RP 868. It worked with 26 authorized, independently owned dealerships throughout the United States. RP 790, 869.

Volkswagen Aktiengesellschaft had no contractual relationship with the distributors or dealerships. RP 873. And neither Volkswagen Aktiengesellschaft nor Volkswagen America controlled how the distributors or dealerships ran their businesses. RP 979–80.

C. The trial court repeatedly declined to dismiss Volkswagen Aktiengesellschaft for lack of specific jurisdiction.

United Volkswagen was an independent dealership in Spokane. RP 790, 869. United hired and trained mechanics to service used Volkswagen vehicles. RP 1702. For three years in the early 1970s, Sorrentino worked as a mechanic at United. RP 1702–10. He serviced the brakes and clutches on Volkswagen vehicles. RP 1710–14, 1780–85.

Nearly a half century later, Sorrentino contracted mesothelioma. RP 1694. He sued numerous defendants, including both Volkswagen Aktiengesellschaft and Volkswagen America, for product liability and negligence. CP 1–4, 42–45, 85–88, 206–11. Sorrentino alleged that exposure to asbestos-containing friction parts via his work at United caused his mesothelioma. CP 206–11.

Volkswagen America did not contest personal jurisdiction. But Volkswagen Aktiengesellschaft did, repeatedly arguing that it lacked minimum contacts with Washington

sufficient to justify jurisdiction under the U.S. Constitution. CP 89–105. After jurisdictional discovery, the court found that (1) Volkswagen Aktiengesellschaft and Volkswagen America had no agency relationship and (2) Sorrentino made no alter-ego argument. RP 68–69. It nonetheless concluded that, based on Volkswagen America's in-state conduct, Volkswagen Aktiengesellschaft had purposeful minimum contacts with Washington. CP 1184–87, 2492–94, 4505–08; RP 16–18, 30–31, 69.

The case proceeded to trial. After Sorrentino rested, Volkswagen Aktiengesellschaft renewed its request to dismiss for lack of personal jurisdiction. CP 10976–88. The trial court declined to dismiss. RP 1957–58, 1976, 1998–99.

Rendering a split verdict, the jury found product liability but no negligence. CP 11136–38. The court denied post-trial motions for judgment as a matter of law under CR 50 and for a new trial under CR 59 and made additional findings purporting

to support subjecting Volkswagen Aktiengesellschaft to personal jurisdiction. CP 11703–09.

The court later entered judgment for nearly $5 million against both Volkswagen Aktiengesellschaft and Volkswagen America, jointly and severally. CP 11700–02.

D. Division One affirmed the judgment and concluded that Volkswagen Aktiengesellschaft is subject to specific jurisdiction in Washington.

On appeal, Volkswagen Aktiengesellschaft and Volkswagen America challenged the trial court's refusal to dismiss Sorrentino's two product-liability theories, three instructional errors, and its exercise of specific jurisdiction over Volkswagen Aktiengesellschaft.

Division One affirmed. It held that Volkswagen Aktiengesellschaft targeted the United States market, subjecting itself to specific jurisdiction in Washington. *Decision* at 28–36. To reach that conclusion, the court imputed Volkswagen America's contacts with Washington to Volkswagen Aktiengesellschaft. *Id.* It declined to address the lack of an

agency relationship between the two companies. *Id.* at 33 n.14. And it applied a "prima facie" standard—rather than a "preponderance of the evidence" standard—to determine that Sorrentino satisfied his burden to establish jurisdiction. *Id.* at 27.

Volkswagen Aktiengesellschaft seeks review of these important personal-jurisdiction issues.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Division One's decision affirming the exercise of specific jurisdiction over a foreign company based on the actions of its independent subsidiary raises a significant legal question under the U.S. Constitution, conflicts with *FutureSelect*, and raises an issue of substantial public interest.

This case presents an ideal opportunity for this Court to ensure that its requirements for exercising personal jurisdiction over a foreign defendant are consistent with controlling U.S. Supreme Court precedent on a recurring issue of far-reaching importance to Washington and its citizens. This Court has not opined on personal jurisdiction in almost a decade. *See Noll*, 188 Wn.2d at 405. By intervening to correct Division One's

departure from controlling precedent, this Court can provide much-needed guidance to Washington courts, avoid the confusion that would result from the irreconcilable conflict between Division One's decision and its earlier decision in *FutureSelect*, and ensure that the same standard for exercising personal jurisdiction is applied in Washington as it is in other States—consistent with the Due Process Clause.

1. Division One subjected Volkswagen Aktiengesellschaft to specific jurisdiction by imputing its independent subsidiary's contacts with Washington to Volkswagen Aktiengesellschaft. Even though the trial court found that the independent subsidiary was neither Volkswagen Aktiengesellschaft's agent nor alter ego, Division One still held that the independent subsidiary's contacts may be imputed to Volkswagen Aktiengesellschaft.

That decision makes a standard parent–subsidiary relationship a trump card for personal jurisdiction over the parent company. Under the decision's framework, any product

manufacturer with shared financial goals and uniform standards with a subsidiary or distributor is now subject to jurisdiction anywhere its subsidiary or distributor operates. Merely setting uniform brand standards, such as in the importer agreement, would subject a manufacturer to jurisdiction in every state in a distribution network.

Such a significant, unlawful expansion of specific jurisdiction has far-reaching jurisdictional implications for any parent company that contracts with an independent subsidiary to transact business in the United States. Volkswagen Aktiengesellschaft's general standards for consistent services and reasonable directives—of the kind that may exist in any parent–subsidiary relationship-—cannot satisfy the high threshold for imputing a subsidiary's contacts to its parent under controlling precedent. *See Daimler AG v. Bauman*, 571 U.S. 117, 134–35 n.13, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 891, 309 P.3d 555 (2013), *aff'd*, 180

Wn.2d 954, 331 P.3d 29 (2014), and *aff'd*, 190 Wn.2d 281, 413 P.3d 1 (2018).

2. The Due Process Clause of the "Fourteenth Amendment limits the personal jurisdiction of state courts." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 582 U.S. 255, 261, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017); U.S. CONST. amend. XIV. That Clause "sets the outer boundaries of a state tribunal's authority" to render a judgment against a foreign corporation. *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 923, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). It "protects the defendant's right not to be coerced except by lawful judicial power." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).

Due process requres that a foreign defendant has "purposeful minimum contacts" with the forum state. *Id.*; *see*

also Noll, 188 Wn.2d at 411. To establish those contacts, the defendant must act so as to "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The defendant's contacts with the forum—not those of a third party—control for purposeful availment. *Noll*, 188 Wn.2d at 411–15.

To exercise specific jurisdiction over a foreign manufacturer, a finding of purposeful availment requires "something more" than the manufacturer's placing a product into the stream of commerce. *McIntyre*, 564 U.S. at 889. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for

example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular 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." *Id.* (emphasis added).

In *McIntyre*, for instance, the U.S. Supreme Court reversed a state high court's decision subjecting a foreign manufacturer to personal jurisdiction because it established a "nationwide distribution system" and failed to take "some reasonable step to prevent the distribution of its products in this State." 564 U.S. at 879. Justice Breyer's controlling concurrence explained that "something more" required "specific effort" by the foreign defendant itself "to sell in [that state]" to establish specific jurisdiction. *Id.* at 889. These contacts could include state-specific efforts as "special state-related design, advertising, advice, marketing," or other specific connections, such as targeting potential customers in the forum. *Id.*

Critical to the issue here, the exercise of personal jurisdiction must be based on the defendant's *own actions* directed towards the forum. The "relevant relationship" to the forum, this Court has recognized, "must arise out of the contacts that the *defendant itself* creates with the forum state." *Noll*, 188 Wn.2d at 415–16 (citing *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)); *see also Bristol-Myers*, 582 U.S. at 262 (explaining that the "*suit* must aris[e] out of or relat[e] to the defendant's contacts with the *forum*" (citations omitted)). The "primary focus" is the "*defendant's* relationship to the forum State." *Bristol-Myers*, 582 U.S. at 262 (emphasis added). The U.S. Supreme Court has "consistently rejected attempts to satisfy the defendant-focused minimum contacts inquiry by demonstrating contacts between a third party and the forum state." *Noll*, 188 Wn.2d at 415 (citing *Walden*).

Under this constitutional rule, corporations are presumed separate, and "the parent company is not automatically subject to jurisdiction...simply because the subsidiary is carrying on

business in the forum state." 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1069.4 (3d ed. updated Apr. 2019). The only limited exception to this constitutionally based rule applies to impute contacts if the third party is proven to be the foreign defendant's alter ego or agent. *FutureSelect*, 175 Wn. App. at 891; *see also Daimler AG*, 571 U.S. at 133–36; *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017); RCW 4.28.185(1); *CTVC of Haw. Co. v. Shinawatra*, 175 Wn. App. 840, 889, 309 P.3d 555 (2013).

That type of agency relationship may exist when a parent corporation has "more than a standard parent–subsidiary relationship" with its subsidiary. *FutureSelect*, 175 Wn. App. at 891; *see also Williams*, 851 F.3d at 1025; *Diece-Lisa Indus., Inc. v. Disney Enters., Inc.*, 943 F.3d 239, 251 (5th Cir. 2019); *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 850 (6th Cir. 2017). The parent must actively manage and substantially control the subsidiary's operations to warrant disregarding corporate separation. *FutureSelect*, 175 Wn. App. at 891–92.

By allowing the assertion of specific jurisdiction over Volkswagen Aktiengesellschaft merely because Volkswagen Aktiengesellschaft manufactured a product that an independent subsidiary later sold in Washington—and while disregarding the trial court's finding of no agency relationship—Division One's decision violates these important limitations on the exercise of specific jurisdiction over a foreign manufacturer. CP 6851–55; RP 68, 1956–58; *Decision* at 33 n.14. It also directly conflicts with binding U.S. Supreme Court precedent. *See Daimler AG*, 571 U.S. at 133–36 (explaining that a subsidiary's contacts may be imputed to its parent only "when the former is so dominated by the latter as to be its alter ego"). The Supreme Court in *Daimler AG* rejected the Ninth Circuit's overbroad view of personal jurisdiction imputing an independent subsidiary's forum contacts to its parent company based on a standard parent–subsidiary relationship. *Id.* at 133–36. Although the Court recognized that "[a]gency relationships…may be relevant to the existence of specific jurisdiction," the importer agreement in

Daimler AG—like here—"expressly disavowed the creation of an agency relationship." *Id.* at 135 n.13, 136 n.15.

3. Division One's decision also conflicts with *FutureSelect*, which analyzed this precise issue in the same jurisdictional context, but where—unlike here—the court concluded that an agency relationship existed between the foreign parent and its subsidiary. The court held there that a subsidiary's contacts with Washington "may be imputed to its parent corporation for purposes of long-arm jurisdiction if the parent actively managed and controlled key aspects of the [subsidiary's] activities in Washington." *Id.* at 851. The parent company's control over the subsidiary's activities in Washington in *FutureSelect* were "significant and purposeful." *Id.* at 892. And the parent company "actively managed" the subsidiary's marketing and solicitation of investments, including the selection of investments and due-diligence programs. *Id.* at 891–92.

In contrast to *FutureSelect*, Volkswagen Aktiengesellschaft and Volkswagen America's parent–

subsidiary relationship was independent. The trial court found that Volkswagen Aktiengesellschaft and Volkswagen America had no agency relationship. They were, and operated as, independent, distinct entities. Ex. 205 at 3; CP 1209, 4179–80. Volkswagen America transacted all business in Washington on its own behalf. Ex. 205 at 3. It built and controlled the distribution networks for Volkswagen vehicles and parts. *See* RP 798–99, 857–68. Volkswagen Aktiengesellschaft neither implemented nor controlled the distribution system in the United States, including in Washington. CP 1209–10. Nor was Volkswagen America, as Sorrentino conceded, an agent or alter ego of Volkswagen Aktiengesellschaft. *See* CP 6851–55; RP 68, 1956–58.

4. Division One's decision also conflicts with numerous other federal circuit courts that have addressed the same issue. *E.g.*, *Williams*, 851 F.3d at 1025 (requiring a parent's "substantial control" over subsidiary and declining to impute contacts); *Diece-Lisa*, 943 F.3d at 251 (declining to

impute contacts); *Anwar*, 876 F.3d at 848–50 (declining to impute contacts); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184–86 (2d Cir. 1998) (affirming decision that Nissan U.S.A. is neither an "agent" nor "mere department" of Nissan Japan, even though Nissan Japan sells cars in the United States through Nissan U.S.A. and one of Nissan Japan's four managing executive directors is the chairman of Nissan U.S.A.); *Knepfle v. J-Tech Corp.*, 48 F.4th 1282, 1291–93 (11th Cir. 2022) (concluding that the trial court erred in imputing the independent subsidiary's contacts to the foreign parent company for specific jurisdiction absent agency or alter ego); *see also Volkswagen Aktiengesellschaft v. Jones*, 227 So.3d 150, 159 (Fla. Dist. Ct. App. 2017) (same).

Division One's outlier decision makes any parent–subsidiary relationship, regardless of independence, a trump card for personal jurisdiction over the parent corporation. It treats the contacts of Volkswagen Aktiengesellschaft and Volkswagen America as interchangeable, without basis, under the vague

standard of "sweeping control"--even though the trial court found no agency relationship. *Decision* at 29–32. That sweeping standard violates the constitutional requirement that, absent an agency relationship, only a defendant's contacts with a forum can establish purposeful availment under the Due Process Clause. And it would subject any foreign defendant to personal jurisdiction in Washington courts if it contracted with a third party that does business in Washington under a standard parent–subsidiary relationship.

This Court should grant review to address (1) this significant legal question under the U.S. Constitution, (2) the conflict with *FutureSelect*, and (3) this issue of substantial public interest affecting any foreign parent company sued in Washington based on its independent subsidiary's contacts.

B. Division One's decision applying a "prima facie" standard to establish personal jurisdiction, after a full trial and evidentiary record, conflicts with this Court's decision in *LG Electronics* and raises an issue of substantial public interest.

Division One's decision eliminates a plaintiff's burden to establish specific jurisdiction on the merits—after a trial—by a preponderance of the evidence. Under this new standard, a trial court may accept a plaintiff's mere allegations as true, despite jurisdictional discovery and live testimony; disregard a defendant's jurisdictional evidence; and exercise specific jurisdiction over a defendant if the plaintiff makes a prima-facie showing of jurisdiction. This expansive, impermissible framework for specific jurisdiction conflicts with this Court's decision in *State v. LG Electronics*, 186 Wn.2d 169, 375 P.3d 1035 (2016), and raises an issue of substantial public interest.

In every civil case, as a constitutional requirement, the plaintiff must establish personal jurisdiction over the defendant. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013), *aff'd*, 181 Wn.2d 272, 333

P.3d 380 (2014). When personal jurisdiction is resolved without an evidentiary hearing, the plaintiff need only make a "prima facie showing of jurisdiction." *LG Elecs.*, 186 Wn.2d at 176. But this Court's precedent requires the plaintiff, after an evidentiary hearing, to prove personal jurisdiction by a preponderance of the evidence. *Id.*; *see also State v. LG Elecs.*, 185 Wn. App. 394, 408, 341 P.3d 346 (2015) ("Following an evidentiary hearing, the plaintiff's burden is no longer that of a prima facie showing."), *aff'd*, 186 Wn.2d 169, 375 P.3d 1035 (2016).

Division One misapplied these fundamental rules to deprive Volkswagen Aktiengesellschaft of due process. In analyzing specific jurisdiction, it considered only whether Sorrentino made a sufficient "prima facie showing of jurisdiction" over Volkswagen Aktiengesellschaft. *Decision* at 27. Worse, it treated the allegations in Sorrentino's complaint as true. *Id.* And it applied these standards because Volkswagen

Aktiengesellschaft supposedly "never asked for an evidentiary hearing." *Id.*

But the two-week trial itself was the evidentiary hearing. *LG Elecs.*, 185 Wn. App. at 409; *see also* CR 12(d). The trial court implicitly deferred, under CR 12(d), the determination of Volkswagen Aktiengesellschaft's repeated dismissal requests for lack of jurisdiction until trial. After all, an order denying a motion to dismiss for lack of jurisdiction, as the trial court correctly recognized, is an interlocutory order that may be revised at any time before entry of final judgment. RP 73; CR 54(b). The parties tried the issue of personal jurisdiction to the bench during the trial. RP 1045–51, 1069–73, 1928–58. And Volkswagen Aktiengesellschaft maintained during trial that the trial was the evidentiary hearing, requiring the trial court to consider the full evidentiary record. RP 1932–35, 1949–50.

At trial, Volkswagen Aktiengesellschaft renewed its request for dismissal for lack of personal jurisdiction. CP 10976–88. And both Volkswagen Aktiengesellschaft and

Sorrentino presented voluminous jurisdictional evidence during trial, permitting the trial court to make findings post-trial. CP 11703–09; RP 1938–53. Those findings confirm that the trial court held an evidentiary hearing and thus should have required Sorrentino to establish personal jurisdiction by a preponderance of the evidence.

Division One's decision to apply a prima-facie standard to personal jurisdiction, giving deference to Sorrentino's allegations even though the parties had an evidentiary hearing, conflicts with *LG Electronics* and raises an issue of substantial public interest. Review is warranted to guide lower courts in applying the correct standard on a plaintiff's burden of proof to establish personal jurisdiction in cases where personal jurisdiction is contested through trial and tried to the bench.

VII. CONCLUSION

Division One's decision affirming the exercise of specific jurisdiction over Volkswagen Aktiengesellschaft involves a significant legal question under the U.S. Constitution, conflicts

with decisions of this Court and Division One, and raises issues of substantial public interest. This Court should grant review.

> This document contains 4,500 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted: November 20, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via appellate portal to the following:

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DATED this 20th day of November, 2024.

S/ Allie Keihn
Allie Keihn, Legal Assistant

APPENDIX A

FILED
9/16/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JONATHAN T. SORRENTINO, as Personal Representative of the Estate of THOMAS R. SORRENTINO,

Respondent,

v.

AMMCO TOOLS, INC., individually and as a subsidiary of HENNESSY INDUSTRIES, INC., individually and as a subsidiary of DANAHER CORPORATION; GENUINE PARTS COMPANY; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; PNEUMO ABEX, LLC; UNION CARBIDE CORPORATION; and WHITEY'S WRECKING, INC.,

Defendants,

VOLKSWAGEN GROUP OF AMERICA, INC., and VOLKSWAGEN AKTIENGESELLSCHAFT,

Appellants.

No. 85202-7-I

DIVISION ONE

UNPUBLISHED OPINION

DÍAZ, J. — Thomas Sorrentino, a former mechanic, sued Volkswagen Aktiengesellschaft (VWAG) and Volkswagen Group of America (VWoA) (together

VW), claiming its 1970s brake products contained asbestos and caused his fatal mesothelioma. A jury found VW's brakes were not reasonably safe and were a substantial factor in causing Sorrentino's mesothelioma. On appeal, VW argues the superior court erred by denying its motion for judgment as a matter of law (JMOL), by denying three of its proposed jury instructions, and by finding the court had personal jurisdiction over VWAG. We disagree and affirm the superior court.

I. BACKGROUND

VWAG defines itself as "a German stock company headquartered in Wolfsburg, Germany" which "design[s] and manufacter[s] Volkswagen vehicles." VWoA is a wholly owned subsidiary of VWAG. In a 1971 importer agreement, VWAG appointed VWoA as the "importer for VW Products" to the "continental United States and the States of Alaska and Hawaii." Through this agreement, VWoA established a network of VW distributors throughout the United States. United Volkswagen (United) was such a dealership for the Spokane area.

Sorrentino worked as a mechanic at United from 1972 to 1975. Sorrentino primarily serviced the brakes and clutches of VW vehicles. For brake jobs, Sorrentino used compressed air and brake grinders. According to Sorrentino, brake jobs left the "workshop full of dust at times," which contained asbestos.

In 2020, a doctor diagnosed Sorrentino with mesothelioma. In January 2021, Sorrentino filed suit in King County Superior Court against numerous entities, including VWAG and VWoA. Sorrentino alleged that VW's failure to provide asbestos warnings was a direct and proximate cause of his mesothelioma.

Sorrentino passed away in February 2021. Thereafter, a personal

representative of Sorrentino's estate litigated the suit.[1] A jury trial commenced on November 28, 2022.

At trial, as in the present appeal, VW did not dispute that its brakes contained asbestos at the time of Sorrentino's exposure at United. For example, a VWAG witness testified "[a]utomobiles [VWAG] manufactured and sold to [VWoA] between 1972 and 1975 contained asbestos brakes and clutches" and at the time, "all brakes contained asbestos.". And VW did not contest that it "knew in the 1940s asbestos could cause lung cancer" and "understood it was a carcinogen," but believed illness required "high doses."

As will be discussed in more detail below, Sorrentino received numerous instructional materials for brake jobs and VW did not dispute that VW's brake part boxes, instructional materials, and service bulletins lacked asbestos warnings at the time of Sorrentino's exposure. Finally, VW did not dispute that Sorrentino received no training at United on asbestos safety whether by VW, co-workers, or others.

After Sorrentino rested his case, VW moved for a JMOL under CR 50 on December 9, 2022, making the same arguments it makes now on appeal.[2] That

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[1] For clarity and simplicity, we will continue referring to the respondent as "Sorrentino."

[2] Namely, VW argued that Sorrentino (a) failed to show VWAG was subject to personal jurisdiction in Washington; (b) offered no evidence that he would have read or heeded an asbestos warning; (c) offered no evidence that VW's brakes were unsafe beyond what was reasonably expected by the ordinary consumer at the time as it claimed it was industry custom in the 1970s to use asbestos in brake parts; and (d) failed to show exposure to asbestos survives a "but-for" or substantial factor test for in causing his injury. Moreover, VW had previously moved twice to dismiss under CR 12(b)(2) for lack of personal jurisdiction. Both

same day, the court denied this motion after hearing argument.

On December 19, 2022, the jury found both VWAG and VWoA liable for selling products that were not reasonably safe, and that those unsafe products were a substantial factor in causing Sorrentino's mesothelioma. However, the jury found both VWAG and VWoA were not liable for negligence. The jury awarded $5.75 million in damages, which the court reduced to $4.7 million.

VW renewed its above-referenced (A) JMOL motion, (B) related motion for a new trial, and (C) its motions to dismiss for lack of personal jurisdiction, each of which the court denied and which are now the subjects of the present appeal. We address each in turn.

II. ANALYSIS

As a preliminary matter, the parties agree that common law product liability principles govern Sorrentino's claims, rather than the Washington Product Liability Act (WPLA), chapter 7.72 RCW. LAWS OF 1981, ch. 27, § 3. We accept this agreement because Sorrentino's exposure occurred before the 1981 effective date of the WPLA. LAWS OF 1981, ch. 27, § 3. In Washington, common law product liability claims follow Restatement (Second) of Torts § 402A (Am. Law Ins. 1965). Lenhardt v. Ford Motor Co., 102 Wn.2d 208, 211, 683 P.2d 1097 (1984).

Under those principles:

> (1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby *caused* to the ultimate user or consumer, or to his property, if

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motions were unsuccessful. None of these decisions are directly at issue on appeal.

> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies *although*
>
> (a) *the seller has exercised all possible care in the preparation and sale of his product*, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT § 402A (emphasis added).

Further, the Restatement measures liability "solely by the characteristics of the product [the seller] has produced rather than [the seller's] behavior" and, in this sense, the Restatement permits claims under "strict liability principles of this jurisdiction." Lenhardt, 102 Wn.2d at 213 (holding such strict liability claims do "not sound in negligence"); see also Br. of Resp't at 12 (describing his pertinent claim, without later objection, as a strict liability claim).

A. Whether the Court Erred in Denying Judgment as a Matter of Law

We review motions for a judgment as a matter of law de novo. Salisbury v. City of Seattle, 25 Wn. App. 2d 305, 314, 522 P.3d 1019 (2023). A JMOL is appropriate "only when *no* competent and substantial evidence exists to support a verdict." Id. (emphasis added). Substantial evidence is "sufficient to persuade a fair-minded person of the order's truth or correctness." Sylvester v. Pierce County, 148 Wn. App. 813, 823, 201 P.3d 381 (2009). "All evidence and reasonable inferences from the evidence must be viewed in the light most favorable to the nonmoving party," here Sorrentino. Salisbury, 25 Wn. App. 2d at 314.

VW's argument that the court wrongly denied his renewed JMOL is twofold. First, VW claims Sorrentino failed to prove that the sale of its unreasonably dangerous product without a warning *caused* his injury because there is no substantial evidence he would have read or heeded any such warning. Second, VW claims that Sorrentino failed to present substantial evidence that VW brakes were less safe than the ordinary consumer would have expected between 1972 and 1975. We disagree with both arguments.

1. Whether There is Substantial Evidence Sorrentino Would have Heeded

Specifically, VW argues that Sorrentino's own testimony conclusively establishes that, while "he could [have] referenced" (unrelated) materials VW provided, he did not consult such materials during his time at United other than 'as needed.'" VW also cites to Sorrentino's testimony that he "'was always a hands-on, see-it, touch-it kind of a learner'" and did not read instructions about grinding brake pads, using compressed air, or replacing clutches. Based on such testimony, VW claims Sorrentino failed to establish causation because there is no substantial evidence, i.e., no fair-minded person could conclude, Sorrentino would have heeded an asbestos warning even if one had been placed on its product.

"For strict liability and negligence claims, a plaintiff must establish proximate cause between the defect or breach and the injury." Budd v. Kaiser Gypsum Co., Inc., 21 Wn. App. 2d 56, 73, 505 P.3d 120 (2022). Proximate causation requires both cause in fact and legal causation. Id. Here, the parties contest only cause in fact, which "refers to the 'but for' consequences of an act—the physical connection between an act and an injury.'" Id. (quoting Ayers v. Johnson & Johnson Baby

Prods. Co., 117 Wn.2d 747, 753, 818 P.2d 1337 (1991)). "In a failure to warn case, a showing that the plaintiff *would have heeded a warning* had one been given can establish cause in fact." Id. (emphasis added). In other words, a plaintiff may establish cause in fact in a failure to warn case if they put forth evidence they would have "heeded a warning." Id. With this standard in mind, we disagree with VW for three general reasons.

First, VW's argument misunderstands how we must view Sorrentino's testimony. Sorrentino testified that he referred to a binder of instructional materials on brake jobs, albeit "as needed," to track updated techniques and procedures. When we view this testimony in the light most favorable to Sorrentino, as we must, a fair-minded jury could interpret this statement simply to mean he reviewed written materials regularly as the need arose. Salisbury, 25 Wn. App. 2d at 314. That interpretation of that statement alone is substantial evidence that he would have read a warning on the product, if the need arose.

Sorrentino also takes an overly narrow of this testimony, which must be viewed within its broader testimonial context. Sorrentino testified as follows:

> Q. . . . For the work you described with the brakes, taking, you know, brakes off a vehicle and then installing new brakes, did you ever refer to any type of written instruction in order to perform that work?
> A. Oh. I believe there was some *pamphlet illustrations* that you could reference.
> Q. And what were those pamphlets or illustrations?
> A. They were – I'm trying to recall the exact name of them, but they were put out by Volkswagen, and they were just sort of an updated material that could be put in a *binder for reference purposes,* because they may have found little changes to things that they felt were conducive to doing a better job.
> Q. Did you refer to that binder?
> A. As needed.
> Q. Okay. And why would you refer to the binder; what did you need

> to know that Henry[3] hadn't taught you?
> A. I don't recall the specifics, but, you know, the idea was that if we got a piece of the material as such, you know, someone in the shop would *begin to talk about*, 'Oh, hey, I ran across this' – you know, this update on perhaps something like a bearing installation and torque – and torque numbers. *Something like that might change, and so you could reference that and find out what – you know where the change was made.*

(Emphasis added.) Seeing his "as needed" testimony in this context and viewing this testimony in the light most favorable to Sorrentino, a fair-minded jury could interpret this testimony to mean he received, organized in binders, discussed, and referenced (i.e., heeded) instructional materials to do "a better job" changing brakes. In turn, a fair-minded jury could reasonably infer that, because Sorrentino read some materials VW provided, he would have read and heeded an asbestos warning.[4]

Moreover, Sorrentino also testified that he inspected the packaging for VW brake parts as well as the parts themselves, stating:

> Q. What were – what were the brand or manufacturer of the parts they stocked at United Volkswagen, if you remember?
> A. Primarily they were OEM parts, Volkswagen parts that they stocked.
> Q. What do you mean by "OEM"?
> A. Original equipment.
> Q. *And how did you know they were Volkswagen?*
> A. *Oh, they would have a little insignia, either, I think on the box,*

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[3] "Henry" refers to Henry Proctor, a "service specialist at United." Proctor received training from VW which he passed on to workers at United.

[4] Expanding the context even further, immediately following the testimony reviewed above, the jury heard contrasting testimony about Sorrentino's practices in changing *clutches*, where he unequivocally stated he never referred to written materials when "removing clutches and replacing clutches" because "that came to me via hands-on" without any elaboration. Based on this testimony, again, the jury could reasonably infer Sorrentino more frequently reviewed written materials about the brakes than is suggested by VW's reading of the "[a]s needed" comment in isolation.

> *sometimes on the side of the – stamped in the side of the brake pad shoe – brake shoe, yeah.*

(Emphasis added.) In other words, the jury could reasonably infer that Sorrentino would have seen a warning located on a brake part box or the part itself. In turn, as in Budd, the above "evidence shows [the plaintiff] read[]" materials provided by the manufacturer generally and, thus "viewed in [Sorrentino's] favor" as the nonmoving party, "sustains the jury's verdict" that he would have heeded such a warning here.[5] 21 Wn. App. 2d at 75 n.13.

Second, VW's argument minimizes binding authority that warnings may travel from a manufacturer to a consumer through intermediaries. For instance, our Supreme Court has held that the "WPLA does not specify who should receive these warnings." Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 754, 389 P.3d 517 (2017). Similarly, the Restatement does not specify who should receive these warnings from a manufacturer. RESTATEMENT § 402A.

In fact, the actions of intermediaries can be critical to alerting consumers of potential dangers. Taylor, 187 Wn.2d at 755 (hospitals as an intermediary between their staff and equipment manufacturers); Ayers, 117 Wn.2d at 758 (parents as an intermediary between their children and baby oil manufacturers);

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[5] It is also telling that, VW questioned Sorrentino about his smoking habits, asking "you told us the other day that even though you saw cigarette – warnings on cigarette packs, you still didn't quit smoking. So even if you have been warned, what would you have done?" As in Budd, where the court rejected the defendant's similar argument that evidence that Budd smoked cigarettes despite reading the warning labels showed he would not have heeded a warning about the asbestos-containing product, this evidence *supports* the inference that Sorrentino read warning labels and, as will be discussed below, given the severity of the injury here, supports the inference he would have heeded such a warning. Budd, 21 Wn. App. 2d at 75 n.13.

Sherman v. Pfizer, Inc., 8 Wn. App. 2d 686, 702, 440 P.3d 1016 (2019) (a drug manufacturer may rely on doctors as learned intermediaries if the product has the necessary warnings); Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 814, 733 P.2d 969 (1987) (discussing the failure of an employer with actual knowledge of hazard to warn its employees). In other words, evidence that a plaintiff would have "heeded a warning" from an intermediary also can establish cause in fact.

At oral argument, VW's appellate counsel argued that it would be mere "speculation" and an "unreasonable inference" to assume United, as an intermediary, would have passed on asbestos warnings in light of evidence on their lacking safety practices.[6] Wash Ct. of Appeals oral argument, Jonathan T. Sorrentino v. Volkswagen Group of America Inc. et al, No. 85202-7-I (July 9, 2024), at 9 min., 30 sec. through 10 min., 5 sec. video recording by TVW, Washington State's Public Affairs Network,

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[6] In full, VW's appellate counsel stated:

> If we look at the testimony of Rob Saraceno going through cross examination, the manual required that the workplace, the machine be bolted down to the workbench. That wasn't done by United. It also required a dust collection bag to be affixed to the back of the machine so that it would prevent these plumes of dust being scattered throughout the shop. That wasn't done. That's the type of workplace practice and workplace training that we are talking about on this record. And the- and speculation that United . . . would have then passed on warnings about asbestos . . . in the brake parts to their employees and they would have followed those warnings, that would be an unreasonable inference.

Wash Ct. of Appeals oral argument, Jonathan T. Sorrentino v. Volkswagen Group of America Inc. et al, No. 85202-7-I (July 9, 2024), at 9 min., 30 sec. through 10 min., 5 sec. video recording by TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?clientID=9375922947&eventID=2024071092.

https://www.tvw.org/watch/?clientID=9375922947&eventID=2024071092.

Indeed, the jury heard testimony on loose safety practices at United, including that employees and supervisors did not use provided respirators. Sorrentino's former United coworker, Robert Saraceno, testified that he never saw "anyone use a respirator or respiratory protection when they were grinding brake shoes at United Volkswagen," even though masks were available and everyone used the brake grinder which created a lot of dust. And Saraceno further testified that he did not recall Sorrentino ever wearing a mask. But, again, this is not the totality of the testimony.

The jury, however, also heard Sorrentino's own testimony that he would have heeded warnings from a qualified intermediary, if they had indicated there was an issue with asbestos or United's safety practices, stating:

> Q. Well you told us the other day that even though you saw cigarette – warnings on cigarette packs, you still didn't quit smoking. So even if you had been warned, what would you have done?
> A. Well, given that, the differences in the scenario I think is that, you know, cigarette smoking was a social thing, and even though, yes, it did have a warning on it, you saw most everybody ignore it as if it was some almost ploy to – I don't know – get you to buy more, or what have you.
>
> But . . . *a warning from a – in a setting where you're working and there's a – supposedly an [Occupational Safety and Hazard] representative that's supposed to be doing something about it, I think I'd have paid attention.*
> Q. Do you believe that your employer, United Volkswagen, should have taken steps to protect the safety of you and your coworkers?
> . . .
> A: You know, I think any employer should care about their employees.

As in Taylor, this testimony supports a reasonable inference by a fair-minded person that Sorrentino would have heeded a warning from an intermediary had it

been given. 187 Wn.2d at 755.

Third, this same testimony also supports a reasonable inference that, had a warning existed explaining the *severity* of the consequences of asbestos exposure, Sorrentino would have heeded it. Our Supreme Court has cited approvingly to jury instructions stating that a product "warning must be appropriate in view of the seriousness of any danger involved to reasonably advise of the consequences of improper use." Lockwood v. AC&S, Inc., 109 Wn.2d 235, 269, 744 P.2d 605 (1987). Here, the severity of the injury is extraordinarily high as asbestos exposure causes multiple forms of life-threatening cancer.[7] Thus, the inference is more easily drawn that Sorrentino would have heeded a warning highlighting the inordinate risk involved.

Moreover, Sorrentino testified (albeit at a high level) that he "certainly wish[ed he] knew something about asbestos." A fair-minded jury could have coupled that testimony with his testimony about heeding warnings from intermediaries to find Sorrentino would have heeded such a warning, had it been in "a form which reasonably could be expected to catch the attention of, and to be understood by, the ordinary user." Id. at 269.

Finally, VW also cites to two cases where our courts rejected a failure to warn claim as the plaintiff failed to show they would have heeded a warning: Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 257-58, 978 P.2d 505 (1999) and

[7] At trial, it was discussed that the "main categories" of injuries associated with asbestos exposures are "a scarring of lung tissue normally associated with a high level of exposure. The second is lung cancer. And the third is malignant mesothelioma, a cancer of the lining of either the lung, but it also can occur in the gut cavity or in the -- around the heart."

Sherman, 8 Wn. App. 2d at 702. Neither case helps the appellants.

In Hiner, the plaintiff definitively "testified she looked at her owner's manual for some information, *but had not read the statement about snow tires* in the five years she had the manual." 138 Wn.2d at 257 (emphasis added). Additionally, she testified "*she did not look for warnings* on any of" the challenged products. Id. at 257-58 (emphasis added). As such, our Supreme Court held the record did not support the inference that the plaintiff would have heeded warnings had they existed. Id. at 258. Hiner is plainly distinguishable because Sorrentino at a minimum reviewed VW's materials "as needed" and regularly reviewed the brake's packaging.

Similarly in Sherman, the plaintiff "testified unequivocally that . . . he did not read package inserts and did not recall ever reading a package insert" meaning "any changes to the package inserts for [the drug in question] did not impact his prescription decision because he did not look at them." 8 Wn. App. 2d at 699 (emphasis omitted) (citing Douglas v. Bussabarger, 73 Wn.2d 476, 438 P.2d 829 (1968) (a similar case where plaintiff testified they had *never* read warning materials)).

The testimony from Hiner and Sherman is materially different from Sorrentino's testimony, both as to the unequivocal tone of the testimony and the lack of any consideration of the severity of the injury. The record here does not compel a fact finder to conclude that any warnings would not have affected Sorrentino's decision. Sherman, 8 Wn. App. 2d at 698-99.

For the reasons above, we hold the court did not err in denying VW's motion

for JMOL as VW failed to establish there was "*no* competent and substantial evidence" that that Sorrentino would have heeded an asbestos warning. Salisbury, 25 Wn. App. 2d at 314. A fair-minded jury could interpret all of this evidence to mean that Sorrentino would have read and heeded a warning. In turn, we hold there is substantial evidence to establish the failure to warn was a cause in fact of Sorrentino's injury. Budd, 21 Wn. App. 2d at 73.

2. Whether Feasibility Defines a Consumer's Reasonable Expectations

Under Washington's common law test, a product is not reasonably safe if it is "unsafe to an extent beyond that which would be contemplated by the ordinary consumer." Seattle–First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975). Factors such as the "relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk *may* be relevant in a particular case." Id. (emphasis added).

Feasibility is only one of several factors under the common law that could establish the "reasonable expectations of an ordinary consumer." Lenhardt, 102 Wn.2d at 215 ("industry custom is *not always* admissible in a product liability cause of action that arises before the effective date of the [WPLA]") (emphasis added). As such, the jury could assign whatever weight it wished to feasibility in weighing the various factors: including the "gravity of the potential harm." Tabert, 86 Wn.2d at 154.

VW argues that the "undisputed evidence showed that there was no feasible, safer alternative to the encapsulated chrysotile asbestos in Volkswagen friction products." In other words, it avers that "[e]liminating asbestos from

Volkswagen friction products was indisputably not feasible." VW heavily relies on Connor v. Skagit Corp., 99 Wn.2d 709, 664 P.2d 1208 (1983), for the proposition that when a plaintiff bases the product defect claim on the availability of an alternative design, it becomes her burden to prove feasibility. Connor does not support their position.

The court in Connor held that "the existence of an alternative, safe design is *a* factor which the jury *may* consider in determining whether a product is unreasonably dangerous" and held that a plaintiff may "establish that a product is unreasonably dangerous by means of factors other than the existence of alternative design." 99 Wn.2d at 715 (emphasis added).

Here, Sorrentino does not "contend[] that a reasonable alternative design existed for asbestos containing friction products in the 1970s," but that the "magnitude of the harm—death by cancer—and the nature of the product made the product unreasonably unsafe." As in Ayers, "'because of the gravity of the potential harm," we hold that "the jury could have reasonably concluded that the product was unsafe to an extent beyond that contemplated by the ordinary consumer." 117 Wn.2d at 766. That is, a fair-minded jury could find that no reasonable mechanic (the consumer) expects fatal consequences from installing new brake pads, regardless of the feasibility of other options at the time. In turn, there is substantial evidence for the jury's finding despite that factor and it was not error for the court to deny VW's motion for a JMOL.

B. Whether the Court Erred in Giving the Jury Instructions It Did

"In general, whether to give a particular instruction is within the trial court's

discretion." Taylor, 187 Wn.2d at 767. "Where substantial evidence supports a party's theory of the case, trial courts are required to instruct the jury on the theory." Id. However, "[j]ury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." Fergen v. Sestero, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

Even so, "[a]n erroneous instruction is reversible error only if it is prejudicial to a party." Fergen, 182 Wn.2d at 803. "A jury instruction is prejudicial if it substantially affects the outcome of the case." Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash., 162 Wn. App. 495, 505, 254 P.3d 939 (2011). "'Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading.'" ADA Motors, Inc. v. Butler, 7 Wn. App. 2d 53, 60 n.11, 432 P.3d 445 (2018) (quoting Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012)). "The party challenging an instruction bears the burden of establishing prejudice." Fergen, 182 Wn.2d at 803.

"We review a trial court's decision to give a jury instruction 'de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.'" Taylor, 187 Wn.2d at 767 (quoting Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)).

Here, VW challenges the superior court's denial of three of its proposed jury instructions, which we address in turn.

1. Whether the Court Erred in Failing to Give a Failure to Heed Instruction

VW proposed an instruction which stated, in pertinent part, that, if the jury found "one or more of the defendants was required to place a warning on its products and failed to do so, or gave an inadequate warning, you should also consider whether plaintiff has proven that Thomas Sorrentino would have heeded such a warning." The court declined the request and its instructions did not expressly reference the possible failure to heed.

VW now argues the court was obligated to provide this proposed instruction as it was derived from our Supreme Court's holding in Hiner. However, VW does not rigorously explain why the ultimate holding in Hiner is appropriate and, in fact, concedes in a footnote that the "proposed instruction did not appear in Hiner" as that matter was resolved on a JMOL argument. Br. of Appellant at 41 n.6 (citing Hiner, 138 Wn.2d at 250-51, 253). The Hiner court was not presented with and did not address whether to provide the jury this precise instruction or not.

Moreover, this court held that "[s]imply because a statement is made by an appellate court does not mean that it can be properly incorporated into a jury instruction." Van Cleve v. Betts, 16 Wn. App. 748, 756, 559 P.2d 1006 (1977). Otherwise, courts would risk misusing an "overbroad statement of the law when it is removed from the factual context of that case." Id.

And, had the proposed instruction been given, the holding in Hiner would have been "removed from" its distinguishable factual context. Id. As discussed earlier, the plaintiff in Hiner unequivocally stated she never read the relevant warnings. 138 Wn.2d at 257-58. The evidence here does not support that Sorrentino never would "have heeded such a warning," as the factual context in

Hiner suggests is required. In turn, we hold the court did not abuse its discretion in finding as "a matter of fact" that the instruction was not warranted. Taylor, 187 Wn.2d at 767.

As a matter of law, the VW's proposed instruction also presents an overly narrow definition of causation focused implicitly on (a) only VW itself providing warnings to Sorrentino and (b) Sorrentino suffering injuries only when he himself was changing brakes. As to the former, as discussed earlier, intermediaries can play a key role in warning consumers of dangerous products. Id. at 755. As to the latter, at issue at trial was whether Sorrentino was also affected by "bystander exposure." There was testimony that "Sorrentino would have not only the exposure to asbestos from his own work, but he would also have exposures to asbestos as a bystander to the work of the other mechanics."

VW's proposed jury instruction did not capture any of the above considerations and, in turn, does not "properly inform the trier of fact of the applicable law." Fergen, 182 Wn.2d at 803. As such, we hold the court did not improperly find as "a matter of law" that the instruction was not appropriate. Taylor, 187 Wn.2d at 767.

Even assuming arguendo that the instruction was given in error, VW fails to establish prejudice. VW claims it was prejudiced by the failure to give the instruction because it allowed Sorrentino to assert in his closing argument that it was "absolutely false" that the plaintiff is required to prove Sorrentino would have heeded the warning. In other words, VW avers that the lack of an instruction permitted Sorrentino to not prove causation in full.

On the contrary, the court's instruction flatly stated it was the plaintiff's burden to prove causation and to prove that VW's failure to warn "was a proximate cause of the plaintiff's injury." Based on this instruction, VW could*, and did*, argue at length during its closing argument that Sorrentino failed to prove causation, when its counsel stated:

> The claim is failure to warn. *How do you warn a guy who doesn't look at the manual?* Think back on what he said. Was it something like, mechanic see, mechanic do? Something like that, right? He was hands on. He didn't look at the book. Mr. Proctor got training. He learned from others.
>
> But the instruction that they claim was missing, *they have to prove to your level of confidence that he would have seen it and he would have heeded it.* In other words, he would have followed it.

(Emphasis added). VW's counsel continued:

> So where was the opportunity to warn him and where *did they prove that he would've followed those instructions?* That burden is theirs. Ask yourself, did they prove to your level of confidence that he would've followed an instruction had an instruction been given? Did they prove to your level of confidence that he would've followed an instruction had an instruction been given?

(Emphasis added).

We hold that, even if there was an instructional error, the court's instruction "allow[ed] each party to argue its theory of the case." Fergen, 182 Wn.2d at 803. VW's counsel made the argument it would have made with the instruction. And otherwise, VW does not show the absence of a more specific instruction "substantially affect[ed] the outcome of the case." Moratti, 162 Wn. App. at 505. Thus, this assignment of error fails.

2. Whether the Court Erred in Failing to Give a But-For Causation Instruction

There are two types of proximate causation at issue here: "but-for"

causation and "substantial factor" causation. "Washington courts have applied the substantial factor test in only four types of cases," one of which being "toxic tort cases, including multisupplier asbestos injury cases." Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 685, 183 P.3d 1118 (2008) (refusing to extend the substantial factor test to facts involving a "contaminated food product."). "[B]ecause of the peculiar nature of asbestos products and the development of disease due to exposure to such products, it is extremely difficult to determine if exposure to a particular defendant's asbestos product actually caused the plaintiff's injury." Lockwood, 109 Wn.2d at 248. As such, "substantial factor causation instructions are commonly given in asbestos-injury cases tried in Washington," and "allow the plaintiff to establish causation by showing that the defendant's . . . product was a substantial factor in bringing about the injury, even though the injury would have occurred without it." Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 28-29, 935 P.2d 684 (1997).

VW argues that a substantial factor instruction, which the court gave here, is only proper in cases involving multiple sources of potential exposure. In turn, VW asserts that the court was required, as a matter of law, to give VW's proposed instruction which put forth a "but for" causation standard and which "requires a plaintiff to establish that had the defendant's act not occurred, the plaintiff would not have been harmed." Br. of Appellant at 44 (citing Daugert v. Pappas, 104 Wn.2d 254, 260, 704 P.2d 600 (1985)).

We could not locate an asbestos exposure case where the court gave a "but for" causation instruction, nor does VW cite to one. This omission alone requires

us to reject VW's argument. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Still, VW insists that a substantial factor standard "is justified only 'when a plaintiff is unable to show that one event alone was the cause of the injury.'" Br. of Appellant at 45 (quoting Fabrique, 144 Wn. App. at 684). This claim is inaccurate.

This court recently considered a case where a worker "wore 3M Company's 8710 mask from 1972 to around 1980 while working as an insulator at Puget Sound Naval Shipyard (PSNS), where he was exposed to asbestos and asbestos-containing products." Roemmich v. 3M Company, 21 Wn. App. 2d 939, 943, 509 P.3d 306 (2022). In other words, Roemmich was focused on one job (PSNS) and one product (a type of 3M mask). Id. Yet there, this court held that, while the "change from the 'but-for' test to the substantial factor test is *normally* justified only when a plaintiff is unable to show that one event alone was a cause of the injury," "the substantial factor test should be used in cases where it is difficult to establish the exact event or party that caused the harm." Id. at 950 (emphasis added). Thus, the question is not what plaintiff must or must not show, but whether it is difficult to establish the exact event or party that caused the harm.

As noted above, the evidence at trial established numerous potential sources of exposure, including the dust released by Sorrentino's co-workers. Sorrentino also testified that he was exposed to asbestos when changing non-VW

brakes for family and friends in his driveway, regularly over a period of about ten years. There was no evidence to the contrary. In turn, as in Roemmich, "regardless of whether [VW's brakes parts were] the only reason for [] mesothelioma, there was substantial evidence from which the jury could determine that the [parts were] defective and contributed to his injury. And because the harm done by [VW] and [] other[s] … was identical—[Sorrentino] developing mesothelioma—the substantial factor test applies." 21 Wn. App. 2d at 951.

Finally, VW did not even argue that it was prejudiced by the absence of this instruction, as was its burden. Fergen, 182 Wn.2d at 803. As such, for the reasons above, we hold the court did not improperly find as "a matter of law" that the instruction was not warranted. Taylor, 187 Wn.2d at 767.

3. Whether the Court Erred in Failing to Give an Industry Custom Instruction

VW proposed an instruction which stated in pertinent part that in "evaluating Plaintiff's claims, you may consider evidence of custom in the industry, and whether or not the product complied with government regulatory standards in place at the time." The court's given instruction did not expressly reference industry custom, but stated the jurors could consider "the cost and feasibility of eliminating or minimizing the risk, and such other factors as the nature of the product and the claimed defect indicate are appropriate."

As discussed earlier, industry custom is "not always admissible in a product liability cause of action that arises before the effective date of the [WPLA]"—let alone a dispositive factor—in determining the reasonable expectations of an ordinary consumer because the "liability of the manufacturer is measured solely by

the characteristics of the product he has produced rather than his behavior." Lenhardt, 102 Wn.2d at 213-15 (adding "strict liability does not sound in negligence"). Thus, we hold the court was not obligated as "a matter of law" to provide such an instruction. Taylor, 187 Wn.2d at 767.

Even so, industry custom or feasibility of design can be considered when the plaintiff opens the door by "present[ing] evidence that puts in issue the custom of the industry or feasibility of alternative design" as "the defendant should be allowed to meet that evidence." Lenhardt, 102 Wn.2d at 213-14. That said, "when a plaintiff establishes at trial that a particular design allows a certain event to occur and alleges that event is not reasonably safe based upon the reasonable consumer expectation concerning that product, the defendant may not introduce evidence that his design comports with the design of other manufacturers." Id. at 214. And VW alternatively argues that this instruction was necessary as Sorrentino opened the door to industry custom in three distinct ways.

First, VW alleges Sorrentino elicited answers on industry custom when questioning fact witnesses at trial. The initial citation points to the testimony of Neal Palmer, a VW products analysis engineer. But there, VW's *own* attorney was cross examining Palmer. The remainder of the citations involve trial testimony from Lars Muhlfelder, a VW engineer who was being questioned by Sorrentino's attorney. In that questioning, Muhlfelder asserted, repeatedly and unprompted, that asbestos was an "industry standard" material in brakes and clutches. Sorrentino's attorney did not ask about industry custom. The remaining two citations point to cross examination by VW's counsel. In short, Sorrentino did not

open the door to a discussion of industry custom at the times VW cites.[8]

Second, VW alleges Sorrentino's opening statement opened the door to industry custom. There, Sorrentino's counsel stated that "[t]he [VW] break contained chrysotile asbestos in the 1970s, and all brakes had chrysotile asbestos in the break pad during this particular time period." However, this reference to industry custom was isolated and made in passing within a relatively lengthy opening statement. This one line–which was unconnected to any evidence Sorrentino adduced and supports VW's substantive claim—is hardly placing industry custom "at issue."

Third, VW alleges the "studies relied on by Sorrentino's experts addressed the automotive industry's use of chrysotile asbestos in brake manufacturing" opened the door requiring a related jury instruction. Similar to the above, the expert either brought up industry custom unprompted or otherwise did not make any direct claims as to the uniformity of industry custom. As such, we hold the court did not abuse its discretion to find as "a matter of fact" that the instruction was not warranted under that theory. Taylor, 187 Wn.2d at 767.

Even if there was error to not give this instruction, the instruction given still allowed the jury to consider the "feasibility of eliminating or minimizing the risk."

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[8] Similarly, VW alleges Sorrentino elicited testimony from its expert which opened the door to evidence of industry custom. In the first two citations, in response to Sorrentino's attorney's question on the expert's "experience" and about the brakes used at United, the expert discussed industry custom unprompted. In the final citation, Sorrentino's attorney asked about "background level asbestos exposure." The expert answered that this information was not necessary for their causation analysis. As above, Sorrentino's attorney thereafter did not ask about industry custom, and any response related thereto was unsolicited.

And during their closing argument, VW could, *and did*, argue for the jury to consider "the *cost and feasibility* of eliminating or minimizing the risk" of asbestos, which they argued it was Sorrentino's "burden to prove." (Emphasis added). What's more, VW argued that the jury "may consider *custom in the industry*, technological feasibility, and whether the product was or was not in compliance with nongovernmental standards or with statutes or administrative regulations." (Emphasis added). In other words, VW repeatedly urged the jury to consider industry custom under the court's given instructions.

We hold that, even if there was an instructional error, the court's instruction "allow[ed] each party to argue its theory of the case." Fergen, 182 Wn.2d at 803. Further, VW point to no relevant fact in the record to prove the absence of such an instruction "substantially affect[ed] the outcome of the case." Moratti, 162 Wn. App. at 505. [9]

C. Whether This Court Has Personal Jurisdiction Over VWAG

A court's exercise of personal jurisdiction must comport with the relevant state long-arm statute and the Fourteenth Amendment's due process clause. Duell v. Alaska Airlines, Inc., 26 Wn. App. 2d 890, 896, 530 P.3d 1015 (2023). Washington's "'long-arm statute permits jurisdiction over foreign corporations to

[9] VW does argue that the "split verdict" at trial shows it was prejudiced by the absence of guidance on industry custom in the common law product liability portion of the case. It is true that the court expressly mentioned industry custom in its negligence instructions and that the jury returned a verdict finding VW was not negligent. However, as discussed above, Lenhardt explains that (strict) liability in pre-WPLA claims "is measured solely by the characteristics of the product" and "does not sound in negligence." Lenhardt, 102 Wn.2d at 213. In other words, what the jury decided on negligence is conceptually distinct from its decision on a strict liability claim such as a common law pre-WPLA claim.

the extent permitted by the due process clause of the United States Constitution.'" Id. (quoting Sandhu Farm Inc. v. A&P Fruit Growers Ltd., 25 Wn. App. 2d 577, 583, 524 P.3d 209 (2023)).[10] The due process clause requires that a defendant have certain minimum "contacts" with it such that "the maintenance of the suit . . . does not offend 'traditional notions of fair play and substantial justice.'" Id. at 897 (quoting Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).[11]

"A Washington court may exercise specific personal jurisdiction over a nonresident defendant when the defendant's limited contacts give rise to the cause of action." Gorden v. Lloyd Ward & Associates, P.C., 180 Wn. App. 552, 567, 323 P.3d 1074 (2014). When gauging whether there are sufficient minimum contacts for specific jurisdiction, Washington courts utilize the two-prong Ford test. Duell, 26 Wn. App. 2d. at 899 (citing Ford Motor Co. v. Montana Eighth Judicial Dist. Ct., 592 U.S. 351, 352, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021)). Under this test,

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[10] Specifically, Washington's long-arm statute, RCW 4.28.185(1)(a)-(b), states that "[a]ny person" submits to the jurisdiction of Washington courts by conducting a "transaction of any business within this state" or by "commi[tting] a tortious act within this state" and that "'any person'" includes both "nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution." Downing v. Losvar, 21 Wn. App. 2d 635, 654, 507 P.3d 894 (2022) (quoting RCW 4.28.185(1)(a)).

[11] There are two bases for personal jurisdiction under the minimum contact requirement. General jurisdiction provides for personal jurisdiction over a defendant corporation when they are "'essentially at home'" in the forum state. Duell, 26 Wn. App. 2d at 897 (quoting Montgomery v. Air Serv. Corp., 9 Wn. App. 2d 532, 538, 446 P.3d 659 (2019)). "Specific jurisdiction covers a narrower class of claims when a defendant maintains a less intimate connection with a state." Id. Sorrentino does not allege that VWAG was "at home" in Washington and subject to general jurisdiction. Thus, we will discuss the requirements only for specific jurisdiction.

"(1) the defendant must purposefully avail itself of the privilege of conducting activities within the forum state, and (2) the plaintiff's claims must arise out of or relate to the defendant's contacts with the forum." Id. Courts then must consider additionally whether applying personal jurisdiction comports with "traditional notions of fair play and substantial justice." Downing v. Losvar, 21 Wn. App. 2d 635, 678, 507 P.3d 894 (2022).

This court reviews motions to dismiss for lack of personal jurisdiction de novo. State v. LG Elecs., Inc., 186 Wn.2d 169, 176, 375 P.3d 1035 (2016). Additionally, the plaintiff has the burden of demonstrating personal jurisdiction. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 885-86, 309 P.3d 555 (2013). However, because VWAG never asked for a CR 12(d) evidentiary hearing, we consider only whether Sorrentino made a sufficient prima facie showing of jurisdiction, and not whether VWAG rebutted said showing.[12] Id. "In this setting, '[w]e treat the allegations of the complaint as true.'" Id. at 886 (quoting SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 563, 226 P.3d 141 (2010), abrogated on other grounds by Noll v. American Biltrite Inc., 188 Wn.2d 402, 411-16, 395 P.3d 1021 (2017)).

By way of summary, VW argues the "trial court erred when it concluded that it could exercise specific jurisdiction over VWAG" as "VWAG never made any

[12] "CR 12(d) permits any party to seek an evidentiary hearing prior to trial when 'lack of jurisdiction over the person' has been raised as an affirmative defense pursuant to CR 12(b)(2): '[U]nless the court orders that the hearing and determination thereof be deferred until the trial.'" State v. LG Elecs., Inc., 185 Wn. App. 394, 409, 341 P.3d 346 (2016) (alteration in original) (quoting CR 12(d)). There was no request for an evidentiary hearing prior to or after trial, and no request for special interrogatories to the jury on these issues.

purposeful connection to or otherwise availed itself of Washington." In support of its position, VW challenges many of the superior court's findings of fact supporting personal jurisdiction.

"We review findings of fact under the substantial evidence standard." Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 640, 201 P.3d 346 (2009). Substantial evidence is that "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." In Re Dependency of A.M.F., 23 Wn. App. 2d 135, 141, 514 P.3d 755 (2022). When evidence is voluminous and complex, this court has the authority to defer to the trial court's findings as to the facts of the circumstances. Noll v. Special Elec. Co., Inc., 9 Wn. App. 2d 317, 321, 444 P.3d 33 (2019). Additionally, "we view the evidence and reasonable inferences drawn from it in the light most favorable to the prevailing party[,]" i.e., Sorrentino. A.M.F., 23 Wn. App. 2d at 141. "Unchallenged findings of fact are verities on appeal." Rush v. Blackburn, 190 Wn. App. 945, 956, 361 P.3d 217 (2015).

Here, we address only the challenged findings necessary for our jurisdictional analysis.

1. Whether VW Purposefully Availed Itself of Washington

To satisfy the purposeful availment prong of the Ford test, "[t]he contacts between the non-resident defendant and the forum state must show that the defendant deliberately 'reached out beyond' its home." Duell, 26 Wn. App. 2d at 901 (quoting Ford, 592 U.S. at 358). A defendant's "random, isolated or fortuitous" contacts with the forum state do not satisfy due process requirements. Id. (quoting Ford, 592 U.S. at 359). Even so, "[j]urisdiction may not be avoided merely because

the defendant did not physically enter the forum state." Id. at 901.

That said, the United States Supreme Court "held that a foreign manufacturer's sale of products through an independent, nationwide distribution system is not sufficient, *without something more*, for a state to assert personal jurisdiction over the manufacturer when only one product enters the forum state and causes injury."[13] Noll, 188 Wn.2d at 414 (emphasis added) (citing J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888-89, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)). Even so, J. McIntyre "'[does] not foreclose an exercise of personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as a part of the regular flow of commerce.'" Id. (quoting LG Elecs., 186 Wn.2d at 181).

Here, Sorrentino's complaint alleged facts that indicated VWAG's involvement with VWoA "was much more than a standard parent-subsidiary relationship." FutureSelect, 175 Wn. App. at 891. Specifically, Sorrentino alleged that "VWAG purposely availed itself of the Washington legal system by entering into an importer agreement with [VWoA]." And, pursuant to that agreement, he alleges that, "VWAG distributed hundreds of thousands of vehicles to the United States each year in the 1970s with the intent and expectation that many of those vehicles would be sold in Washington State." Following trial, the court found—in

[13] Our Supreme Court held that "stream of commerce cases from the United States Supreme Court in recent years have been deeply fragmented" and found that these cases should be decided based on Justice Breyer's concurrence in J. McIntyre because this opinion was decided on the narrowest grounds. Noll v. American Biltrite Inc., 188 Wn.2d 402, 414, 395 P.3d 1021 (2017) (citing J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)).

finding of fact 13, now challenged by VW—that VWAG sold a significant number of vehicles "through" VWoA with the intent that some would be sold in Washington. This allegation and finding are supported by ample evidence.

Alfred Ströhlein, VWAG's CR 30(b)(6) designated representative, chief legal officer, and deputy general counsel, testified it was "correct" to say the "importer agreement included Washington state." Further, Ströhlein "agree[d]" that VWAG's "business objective was to have customers purchase as many [VWAG] vehicles as possible throughout each of the U.S. states, *including Washington state*."

Ströhlein further testified that VWAG's importer agreement *required* VWoA to market VWAG's automobiles specifically in Washington, in the following exchange:

> Q. Volkswagen AG knew and understood that its automotive products were being advertised by Volkswagen of America for sale in the continental US, *including Washington state*, between 1971 and 1975, correct? . . .
>
> THE WITNESS: That is a *requirement* under the importer agreement in place at the time.

(Emphasis added).

Ströhlein's testimony also distinguishes this matter from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), which VW relies on. There, VW entity did not market in Oklahoma, nor did it regularly sell to Oklahoma residents. Id. at 289. That entity had no contacts with Oklahoma other than one of its cars could happen to drive through the state. Id. at 294. Thus, the court found the VW entity did not purposefully avail

itself of the laws of Oklahoma because the car reaching Oklahoma was "fortuitous" and "isolated." Id. at 295.

In contrast, Ströhlein's testimony provides substantial evidence that VW's importer agreement required VWAG's automobiles to reach Washington markets and, thus, it was hardly a mere "isolated" or "fortuitous" occurrence that VW's cars were in Washington. Duell, 26 Wn. App. 2d at 901 (quoting Ford, 592 U.S. at 358).

Still, VW also disputes the court's finding of fact 15, which found that the importer agreement also tasked VWoA with creating a distribution network. The importer agreement, in fact, states the "[i]mporter will appoint at locations to be *approved by VW* such number of dealers as may correspond to the requests of VW and will enter with them into agreements which will impose . . . duties and obligations assumed by Importer towards VW." (Emphasis added). The standard dealer terms and conditions created pursuant to the above applied to United between 1972 and 1975. Again, this evidence provides ample support for this finding.

Finally, VWAG argues that the court's findings 18, 20, and 26 are not supported by substantial evidence. Finding 18 states that the importer agreement represents VWAG giving VWoA "specific directives" with the former "retain[ing] control over [VWoA]'s activities." Similarly, finding 20 states that VWAG retained control and could give directives related to customer service and promotion of VWAG products. Finding 26 states that VWAG retains control over repair and servicing of the vehicles. We hold that there is substantial evidence for each.

The importer agreement demonstrates VWAG's control over VWoA's

dealerships sites. The agreement stipulates that the "Importer shall maintain a place of business . . . in a manner *reasonably satisfactory to VW*." (Emphasis added). Indeed, the agreement lays out specific requirements for the layout of such sites, such as requirements for "a salesroom, a repair shop and *an inventory of VW parts*." (Emphasis added).

Moreover, the importer agreement outlines VWAG's sweeping control over various aspects of VWoA's operations, when stating:

> (3) In the conduct of its business, Importer will safeguard *and in every possible way promote the interests of VW* and the favorable reputation of VW Products. Importer will arrange for the efficient promotion of VW Products; and in such promotion, as well as in its activities relating to the sale of VW Products, the customer's service for VW Products and the supply of VW Parts, it *will give due consideration to all reasonable directives and suggestions of VW relating thereto.*

(Emphasis added).

Further, VWAG's importer agreement required VWoA "employ such number of competent office employees and technical fieldmen, *as in the opinion of VW*, may be required to assure prompt and satisfactory customer's service[.]" (Emphasis added).

A later similar importer agreement further requires that "technical personnel . . . will be *thoroughly trained in special Volkswagen courses* and thereafter currently and thoroughly instructed about all new suggestions of VW for the servicing and repair of VW products." (Emphasis added).

Additionally, VWoA was required to provide "at least one complete set of Volkswagen customer's service literature per repair shop." Accordingly, VWAG created service bulletins and service manuals. These bulletins, as Ströhlein

agreed, were made "to ensure that the standard of quality was passed down from [VWAG] to [VWoA] and, ultimately, to distributors and dealers." The manuals had a similar goal. Thus, findings 18, 20, and 26 are supported by substantial evidence.[14]

For the reasons above, we hold Sorrentino made a sufficient prima facie showing of jurisdiction, and the superior court did not err in finding, that VWAG purposefully availed itself of the privilege of operating in Washington.

2. Whether the Claims Arise From or Relate to VW's Contacts

Again, the second prong of the Ford test—whether the claim arises out of or relates to the defendant's contacts—is met when a plaintiff establishes a nexus between her claims and the defendant's contacts with the forum. Duell, 26 Wn. App. 2d at 904. Under Ford, the phrase "arise out of or relate to . . . 'asks about causation; but the back half after the 'or' contemplates some relationships that will support jurisdiction without a causal showing.'" Duell, 26 Wn. App. 2d at 904-05 (quoting Ford, 592 U.S. at 362). "'Even regularly occurring sales of a product in a state do not justify the exercise of jurisdiction over a claim unrelated to those sales.'" Id. (quoting Downing, 21 Wn. App. 2d at 673).

VWAG briefly argues there is no nexus between Sorrentino's claim and VWAG as the latter only had a "general interest in the United States" and "never

[14] VWAG makes two further arguments we need not respond to, namely that (a) it did not purposefully avail itself of doing business in Washington because an agency relationship did not exist between VWAG and VWoA, and (b) the court improperly relied on a stream of commerce theory to exercise personal jurisdiction, The court's assertion of personal jurisdiction over VWAG is not premised on either theory alone, and we need not address this argument further.

deliberately extended business into Washington." As in Duell, VWAG "provides little argument other than conclusory statement[s] that any suggested link between [VWAG] and [Sorrentino] [are] too attenuated." Id. at 905. For that reason alone, its argument fails.

More substantively, Sorrentino's complaint in fact alleged that his "mesothelioma was proximately caused by asbestos exposure arising from his work on asbestos-containing brakes manufactured by VWAG" and "through the use of asbestos containing VWAG replacement parts under the supervision of service managers . . . who were contractually obligated to follow VWAG work practices."

What's more, Sorrentino alleged his injuries arose from a failure to include asbestos warnings within brake parts as well as in instruction manuals and bulletins created by VWAG and required by the importer agreements to be utilized by United. Additionally, the brake parts, instruction manuals, and bulletins created by VWAG were in Washington because VWAG specifically required VWoA to create a distribution network for their automobiles and parts. And again, Ströhlein testified that VWAG's importer agreement with VWoA required expansion into Washington specifically. Even Sorrentino's role as a "technical fieldm[a]n" in United's repair shop was required by the importer agreements.

For the reasons above, we hold Sorrentino made a sufficient prima facie showing of jurisdiction and, in turn, the superior court did not err in finding Sorrentino's claims arose out of or were related to VWAG's minimum contacts with Washington. FutureSelect, 175 Wn. App. at 891.

3. Whether Jurisdiction Comports with Fair Play and Substantial Justice

In addition to the two-pronged Ford test, this court must consider whether the forum state asserting personal jurisdiction over the foreign entity comports with fair play and substantial justice. Downing, 21 Wn. App. 2d at 679. A defendant bears the burden to "present a *compelling* case that . . . render jurisdiction unreasonable" and "[o]nly in rare cases will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." Id. at 678-80 (emphasis added).

VWAG briefly argues that exercising personal jurisdiction over it would offend notions of fair play and substantial justice because VWAG "at best had only attenuated contacts with the United States market." Otherwise, VWAG essentially reiterates its previously discussed arguments, but now urges us to evaluate these arguments in light of fairness and reasonableness. We disagree.

Under Downing, we evaluate the interests of the State, the defendant, and the plaintiff to determine the fairness and reasonableness of haling the defendant into a Washington court. 21 Wn. App. 2d at 679. We further held the State is interested in "making businesses bear the burden of placing defective products in commerce." Id. at 660. We further noted that "[m]odern commerce demands personal jurisdiction throughout the United States of large manufacturers" and the "'vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause.'" Id. at 665 (quoting Helicopteros

Nacionales de Colombia, SA v. Hall, 466 U.S. 408, 422-23, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) (Brennan, J., dissenting)). In short, given the State's interest in protecting its residents from defective products purposefully placed in its market, the exercise of jurisdiction over VWAG here comports with fair play and substantial justice.

We also held that "modern transportation and communications render defending oneself in another state less burdensome." Id. at 679. VWAG's generalized arguments fail to overcome these interests and other considerations. Thus, personal jurisdiction over VWAG comported with fair play and substantial justice.

Therefore, considering each of the Ford factors, we hold the superior court did not err in finding it had personal jurisdiction over VWAG.

III. CONCLUSION

For the reasons above, we affirm the superior court's denial of VW's motion for a JMOL, the court's denial of VW's proposed jury instructions, and the court's determination that it has personal jurisdiction over VWAG.

Díaz, J.

WE CONCUR:

Chung, J.

Dwyer, J.

APPENDIX B

FILED
10/21/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JONATHAN T. SORRENTINO, as Personal Representative of the Estate of THOMAS R. SORRENTINO,

Respondent,

v.

AMMCO TOOLS, INC., individually and as a subsidiary of HENNESSY INDUSTRIES, INC., individually and as a subsidiary of DANAHER CORPORATION; GENUINE PARTS COMPANY; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; PNEUMO ABEX, LLC; UNION CARBIDE CORPORATION; and WHITEY'S WRECKING, INC.,

Defendants,

VOLKSWAGEN GROUP OF AMERICA, INC., and VOLKSWAGEN AKTIENGESELLSCHAFT,

Appellants.

No. 85202-7-I

DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Volkswagen Group of America, Inc., and Volkswagen Aktiengesellschaft, filed a motion for reconsideration of the opinion filed on

September 16, 2024, in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied

FOR THE COURT:

Díaz, J.

Judge

No. 852027

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JONATHAN T. SORRENTINO, as Personal Representative of the Estate of THOMAS R. SORRENTINO,

Respondent,

v.

VOLKSWAGEN GROUP OF AMERICA, INC. and VOLKSWAGEN AKTIENGESELLSCHAFT,

Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Hon. Ken Schubert

APPELLANTS' MOTION FOR RECONSIDERATION

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RESTATEMENT (SECOND) OF TORTS § 402A (1965) 8

I. IDENTITY OF MOVING PARTIES

Appellants Volkswagen Aktiengesellschaft (VWAG) and Volkswagen Group of America, Inc. (collectively *Volkswagen*) seek the relief described in Section II.

II. RELIEF SOUGHT

This Court should reconsider its decision on the merits (the *Decision*) under RAP 12.4 to correct legal and factual errors. A copy of the slip opinion is attached as Appendix A.

III. FACTS

Volkswagen identifies all the material facts in this motion's argument section.

IV. ARGUMENT

A party may seek reconsideration of a decision terminating review. RAP 12.4. The motion should be granted if the moving party shows that the appellate court has "overlooked or misapprehended" points of law or fact. RAP 12.4(c). This Court may modify its decision with or without rehearing oral

argument or take such other action as may be appropriate. RAP 12.4(g).

A. Reconsideration is warranted because no evidence or reasonable inference from the evidence supports that Thomas Sorrentino would have read and heeded a warning.

To establish causation on his warning claim, Sorrentino needed to prove that he would have read and heeded a product warning. The Decision infers his habits far beyond what the record reasonably supports. No evidence supports that Sorrentino had a propensity to read and heed product warnings. And the stacked inferences the Decision draws from the record are unreasonable and thus do not support a jury question on causation under CR 50. Reconsideration is warranted.

Under the common law, a product manufacturer must warn end users. *Minert v. Harsco Corp.*, 26 Wn. App. 867, 874, 614 P.2d 686 (1980). Causation is an "essential element" of a warning claim. *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 441, 739 P.2d 1177 (1987). A plaintiff must prove that the lack of warnings proximately caused the claimed injury.

Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 258, 978 P.2d 505 (1999). This element requires more than mere speculation that the plaintiff would have read and heeded a product warning. *See Budd v. Kaiser Gypsum Co., Inc.*, 21 Wn. App. 2d 56, 73–75, 505 P.3d 120 (2022).

The Decision extrapolates Sorrentino's propensity to read warnings without sufficient evidentiary support. Sorrentino testified that he reviewed "pamphlet illustrations…put in a binder for reference purposes" only "as needed" for brake jobs. RP 1819. From that testimony "alone," the Decision concludes that "a fair-minded jury could interpret this statement simply to mean he reviewed written materials *regularly* as the need arose." *Decision* at 7 (emphasis added).

But that interpretation exceeds a "most favorable" view of Sorrentino's testimony. It instead makes an evidentiary leap and injects a frequency element unsupported by the testimony. *See Walls v. Jacob N. Printing Co.*, 618 N.W.2d 282, 286 (Iowa 2000) ("[I]nferences can assist in establishing a basic fact, but

they cannot in and of themselves create evidence."). Sorrentino never testified that he "regularly" read anything. Again, he testified that he reviewed these pamphlet illustrations for brake jobs "as needed." RP 1819. "As needed" does not mean "regularly." And for other materials, he did not consult them at all or even know that they existed. RP 1883–84, 1888.

When asked to clarify his "as needed" testimony on reviewing written materials for brake jobs, Sorrentino explained that there were "some pamphlet illustrations that you *could* reference." RP 1819 (emphasis added). These materials "*could* be put in a binder for reference purposes," and Sorrentino "*could*," but not necessarily that he did, "reference" these "pamphlet illustrations." RP 1819 (emphasis added). And when asked on cross-examination to explain when or why he would "refer to" these illustrations, Sorrentino responded again that they were something one "*could* reference":

> I don't recall the specifics, but... the idea was that if we got a piece of material as such, you know, someone in the shop would begin to talk about, 'Oh, hey, I ran across this' –

> you know, this update on perhaps something like a bearing installation and torque – and torque numbers. Something like that might change, and so you *could reference* that and find out what – you know, where the change was made.

RP 1820 (emphasis added). Sorrentino's vague, conditional testimony cannot support a reasonable inference that he in fact reviewed, let alone "regularly" reviewed, written materials for brakes jobs or for any other work while at United.

Nor does the "broad[er] testimonial context" plug Sorrentino's evidentiary gap on causation. *Decision* at 7–8. For instance, when using the compressed-air machine to clean parts, Sorrentino read nothing because "that came to [him] hands-on"—"[i]t was more of a…see somebody do it, you do it, sort of 'monkey see, monkey do.'" RP 1820.

The Decision's unreasonable, stacked inferences pervade its analysis on Sorrentino's warning claim. It states that "Sorrentino testified that he inspected the packaging for VW brake parts as well as the parts themselves." *Decision* at 8. From that testimony, the Decision concludes that "the jury could

reasonably infer that Sorrentino would have seen a warning located on a brake part box or the part itself." *Decision* at 8.

But that testimony fails to support that inference. Sorrentino recognized Volkswagen parts because they had a "little insignia" on them. RP 1723. That Sorrentino could recall seeing a Volkswagen logo on a box says nothing about whether he would have read and heeded a warning, if given, on Volkswagen products. That testimony shows, at most, that he knew which manufacturer's parts he was working with. Being able to recognize one of the world's most iconic logos does not reasonably support an inference that Sorrentino would have *read and heeded* a product warning.

Sorrentino's testimony, viewed as a whole and in context, is functionally identical to the plaintiff's insufficient testimony in *Hiner*. The Supreme Court there held that the plaintiff's testimony supported no reasonable inference that she would have heeded a warning. *Hiner*, 138 Wn.2d at 258. The Decision purports to distinguish that binding authority by explaining that

"the plaintiff [in *Hiner*] definitively 'testified she looked at her owner's manual for some information, but had not read the statement about snow tires in the five years she had the manual.'" *Decision* at 13 (quoting *Hiner*, 138 Wn.2d at 257). And the plaintiff "'did not look for warnings on any of' the challenged products." *Id.* (quoting *Hiner*, 138 Wn.2d at 257–58).

But Sorrentino's testimony shows that he had the same, if not worse, propensities on consulting written materials. Both Sorrentino and Hiner testified that they had reviewed the product's written materials "for some information." *Hiner*, 138 Wn.2d at 257; *see also* RP 1819–20. But neither testified that they looked for or read warnings. Under *Hiner*, which controls, no basis exists for a reasonable inference that, had warnings been provided, Sorrentino would have read and heeded them. He thus failed to meet his burden to establish causation.

More, the Decision relies on testimony about Sorrentino's workplace practices and coworkers' propensities to unreasonably infer Sorrentino's propensities to read and heed

warnings. It justifies this reliance on the basis that "warnings may travel from a manufacturer to a consumer through intermediaries." *Decision* at 9 (citing *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 754–55, 389 P.3d 517 (2017)). But the Decision misapprehends the controlling authority and draws unreasonable inferences from the record.

For starters, *Taylor*—a WPLA case—is not "binding authority" (*Decision* at 9) because the common law of product liability governs Sorrentino's warning claim. *Decision* at 4.

The Decision next says that "the Restatement [section 402A] does not specify who should receive these warnings from a manufacturer." *Decision* at 9. Although that is technically correct, the Decision ignores later developments under Washington common law. After the Supreme Court in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), adopted section 402A, later decisions clarified that, under the common law, the product manufacturer must warn the "ultimate user."

Minert, 26 Wn. App. at 874; *see also Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 155, 570 P.2d 438 (1977).

The Decision cites one case applying the common law for the proposition that intermediaries play a critical role in alerting consumers. *Decision* at 9 (citing *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 733 P.2d 969 (1987)). This Court observed that *Campbell* concerned the "failure of an employer with actual knowledge of [the] hazard to warn its employees." *Id.* The manufacturer there had duties to warn both the employer and the plaintiff employee. *Campbell*, 107 Wn.2d at 814. The plaintiff's employer failed to warn the employee, but that was irrelevant to the manufacturer's duty to warn the ultimate user—the plaintiff employee. *See id.* at 816 (holding that the manufacturer "had an effective means of communicating its warning to PUD employees").

Campbell demonstrates that a product manufacturer must warn the ultimate product user, even if it also warns an intermediary employer. The inquiry thus turns on whether the

user would follow that warning. But the Decision extrapolated from an *unspecified* intermediary's supposed propensity to pass on warnings to establish Sorrentino's propensity to read and heed those warnings. That is error both in fact and in law.

Even if Sorrentino's coworkers' propensities and his employer's workplace practices could be used to satisfy his causation burden, the Decision draws and stacks unreasonable inferences from the record to support the erroneous conclusion that Sorrentino created a jury question on causation.

On this record, it is unreasonable to infer that Sorrentino would have learned of and heeded a warning through his supervisor Henry Procter or fellow workers. The only evidence of the training and work culture at United came from Sorrentino and his co-worker Bob Saraceno. Their undisputed testimony reflects that they—and other employees—did not routinely read or refer to service bulletins, repair manuals, or other written materials.

Sorrentino and Saraceno acknowledged that United was not concerned with safety or adhering to the then-existing OSHA and WISHA requirements. RP 829–31, 1845--46, 1890–91, 1894. Sorrentino presented no evidence that United provided safety training to its employees, including him, or that anyone at United was a certified mechanic. RP 1821. These deficiencies undercut the reasonableness of inferring that any warning in this workplace from an intermediary, including a hypothetical OSHA representative, would have been given or heeded. *Decision* at 11.

Worse, the undisputed evidence reflects that United management refused to provide its employees with instruction manuals for products used by its employees—the AMMCO brake-grinding machine.

Saraceno testified that he reviewed no workshop manual, bulletin, circular, or other written material for information on brake jobs. RP 808. He knew how to do brake jobs before he worked at United. RP 808. If he needed to consult a manual, he

used *his own* manuals, but "90 percent of the stuff [Saraceno] already knew how to do." RP 808. Procter taught Saraceno how to use the AMMCO brake machine. But neither United nor Procter provided the AMMCO's instruction manual to United employees, including Saraceno and Sorrentino. RP 826–30. Saraceno did not know that an AMMCO instructional manual even existed. RP 828–30.

Among other things, that manual instructed to bolt the machine to a workbench and to affix a dust-collection bag. RP 824–32. United did neither of those things. And Saraceno always complained to United's shop foreman that the AMMCO machine had no collection bag. RP 826.

Notably, the AMMCO grinder produced large clouds of asbestos dust from routinely grinding brake shoes to fit the brake drum, but United employees did not consult and were not aware of the instruction manual or its directions to attach the dust bag to collect dust and to wear respirator masks. RP 822–33. Sorrentino used the AMMCO brake grinder for 85 percent of the

brake jobs he did and observed dust plumes emanating from it. RP 1780. Neither Sorrentino nor United followed the AMMCO directions that would have mitigated Sorrentino's asbestos dust exposure. It is not reasonable to infer that additional warnings about asbestos would have changed this behavior.

Not only does the record not support a reasonable inference that Sorrentino would have seen let alone read a warning, but Sorrentino presented no evidence that warnings from intermediaries, including Volkswagen of America or United, would have changed his behavior. To the contrary, the evidence established a pervasive culture of disregard for safety measures. United employees generally did not wear masks or any type of respirator protection. RP 816. The employees even made fun of the one mechanic who did wear a mask. RP 832. This evidence demonstrates that United did not adhere to state and federal safety requirements. It is not reasonable to infer that United would instruct Sorrentino on a warning from the product manufacturer even if United received it.

The Decision presumes that the severity of a hypothetical asbestos warning would have changed Sorrentino's behavior. *See Decision* at 12 (citing *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987)). But *Lockwood* concerned the adequacy of a warning that was given. 109 Wn.2d at 269. Opining on a hypothetical warning's adequacy as evidence of a plaintiff's propensity to read and heed a warning is pure speculation. And nothing supports reasonably inferring that Sorrentino would have acted differently depending on a warning's severity.

The controlling test is whether the end user—Sorrentino—would have read and heeded a warning. Sorrentino presented no sufficient evidence that he would have done so. The Decision errs by stacking unreasonable inference on inference to conclude that a jury could have reasonably found that Sorrentino would have regularly read and heeded warnings. That is error. *See Leftwich v. Wal-Mart Stores E., LP*, ___ So.3d ___, 2024 WL 716972, at *3 (Fla. Dist. Ct. App. Feb. 22, 2024) (explaining that

the "purpose of th[e] rule against stacking inferences is to protect litigants from verdicts based on conjecture and speculation").

This Court should reconsider its causation analysis for Sorrentino's warning claim. It should vacate the judgment and grant Volkswagen judgment as a matter of law because Sorrentino failed to meet his burden to establish causation under CR 50.

B. Reconsideration is warranted because the Decision misapplies the legal standard for analyzing instructional error on Volkswagen's proposed industry-custom instruction.

Sorrentino blew open the door to industry custom's relevance at trial. The Decision fails to mention that *Sorrentino himself* presented evidence on industry custom. Under binding precedent, because Sorrentino opened the door, Volkswagen was entitled to an instruction on industry custom. The Decision errs in concluding otherwise.

Industry-custom evidence is admissible to rebut evidence introduced by the plaintiff. *Lenhardt v. Ford Motor Co.*, 102 Wn.2d 208, 213–14, 683 P.2d 1097 (1984). When the

plaintiff opens the door by presenting evidence, "the defendant should be allowed to meet that evidence" to give the jury a complete picture. *Id.* The defendant is entitled to respond, including with an instruction on industry custom. *Cantu v. John Deere Co.*, 24 Wn. App. 701, 706, 603 P.2d 839 (1979).

The Decision misapprehends the analysis for instructional error. Parties must be given an instruction on a theory supported by substantial evidence. *Taylor*, 187 Wn.2d at 767.

The Decision rejects any instructional error because the trial court's instructions "allow[ed] each party to argue its theory of the case." *Decision* at 25 (citing *Fergen v. Sestero*, 182 Wn.2d 794, 346 P.3d 708 (2015)). But that principle does not trump the bedrock rule that a party must be given an instruction on a theory supported by substantial evidence. *Taylor*, 187 Wn.2d at 767. Despite substantial evidence presented by Sorrentino and Volkswagen supporting the jury's consideration of industry custom as a factor relevant to an ordinary consumer's reasonable

expectations in the early 1970s, the trial court gave no such instruction.

Industry-custom evidence pervaded the trial, as both sides marshaled such evidence to advance their case theories. Sorrentino fused industry custom into his opening statement, expert testimony, and closing argument. In opening statement, for instance, his counsel said that the "VW brake contained chrysotile asbestos in the 1970s, and all brakes had chrysotile asbestos in the brake pad during this particular time." RP 736; *see also* RP 2671 (closing argument) ("Those brakes and clutches, during that time period, contained chrysotile asbestos.").

The Decision downplays these remarkable statements as "isolated and made in passing within a relatively lengthy opening statement." *Decision* at 24. But the Decision ignored the extensive evidence Sorrentino presented on the automotive industry's universal use of asbestos in friction parts in the 1970s:

- Sorrentino asked his expert Mr. Ewing to summarize his asbestos-related experience. RP 1175. The expert explained that he was part of a govermnent program measuring the exposures from "manufacturing of asbestos-containing friction products, which includes brakes and clutches as well as virtually all the brakes and clutches that were in use with—some exceptions were asbestos containing." RP 1175.

- Sorrentino asked his expert Mr. Ewing about which exposures to asbestos were deemed significant and how he calculated those exposures. RP 1214, 1220. The expert said that he reviewed measurements from brake and clutch work that was comparable to Sorrentino's work at United. RP 1214–17, 1220–21.

- Sorrentino asked his expert Dr. Holstein if he had an opinion about the asbestos type and content of the Volkswagen brakes at United. RP 1348--49. Dr. Holstein explained that the brakes would have been composed of chrysotile asbestos, as "most brakes on cars and light trucks in the United States in the early 1970s, the brakes were in the range of 50, 60, or 70 percent asbestos." RP 1349.

- Sorrentino asked Dr. Holstein about background level of asbestos exposure. RP 1356. Dr. Holstein explained that "because asbestos was used widely in commerce and industry, and now very little, it began to build up in the air of the general environment." RP 1356.

- Sorrentino asked Dr. Holstein about mesothelioma rates among brake-fabrication workers. RP 1403. Dr. Holstein testified that "you need asbestos to make brake linings in that era. That's what they were mostly made out of." RP 1403. He further opined that "there are studies that show elevated rates of mesothelioma in brake manufacturing facilities where the only kind of asbestos they were using was chrysotile asbestos." RP 1403.

The jury heard all this testimony. It permeated Sorrentino's case theory that his exposure to chrysotile asbestos in automotive-friction parts at United caused his injuries.

A defendant may rebut industry-custom evidence with their own evidence. *Cantu*, 24 Wn. App. at 706. In *Cantu*, the plaintiff's expert testified to engineering standards and the availability of alternative designs, which "put the standards of the industry in issue." *Id.* at 704--05. Sorrentino's experts offered the same type of testimony, explaining the prevalence of chrysotile asbestos in friction parts when Sorrentino worked at United.

Volkswagen appropriately presented evidence on industry custom about the universal use of asbestos in friction parts across

the automotive industry. RP 993–94, 1109–10, 1118, 1226. And Volkswagen's questioning verified that Sorrentino's experts considered information from that industry-wide usage when analyzing Sorrentino's injuries.

The Decision minimizes this testimony by pointing out that Volkswagen's counsel was cross-examining Sorrentino's witnesses. *Decision* at 23. But Volkswagen was "entitled to respond" to Sorrentino. *Cantu*, 24 Wn. App. at 706. And, regardless, the substantial evidence on industry custom entitled Volkswagen to an instruction. *See id.* And Sorrentino never argued, nor did the Decision conclude, that VW's proposed industry-custom instruction misstated the law or was otherwise confusing or misleading.

The trial court's denial of Volkswagen's proposed instruction on industry custom prejudiced Volkswagen. The Decision notes that "VW repeatedly urged the jury to consider industry custom under the court's given instructions." *Decision* at 25. But "whether counsel in fact argued his theory of the case

is not the applicable test; the test for sufficiency of instructions is whether *the court's instructions* afforded counsel a satisfactory opportunity to argue his theory to the jury. *State v. Hackett*, 64 Wn. App. 780, 786–87, 827 P.2d 1013 (1992). Being allowed to recite words at closing argument untethered to any instructions recognizing or supporting that legal concept is not being allowed to argue a "theory of the case." Absent an instruction supporting a theory, the jury can only presume that the theory lacks any legal basis. *Cf. Keller v. City of Spokane*, 146 Wn.2d 237, 251, 44 P.3d 845 (2002) (recognizing that, absent an instruction on the plaintiff's case theory, the jury could have erroneously concluded that a contributory-negligence finding would relieve the defendant of its duty).

The jury's split verdict demonstrates the prejudice. The court instructed on industry custom for Sorrentino's negligence claim, and the jury found for Volkswagen. CP 11123. The Decision states that there is no evidence of prejudice because "what the jury decided on negligence is conceptually distinct

from its decision on a strict liability claim such as a common law pre-WPLA claim," as product liability solely concerns the characteristics of the product. *Decision* at 25 n.9. That is broadly true, as evidence of industry custom is generally not relevant under the common law. *Lenhardt*, 102 Wn.2d at 211. But it certainly becomes relevant once "the plaintiff presents evidence that puts in issue the custom of the industry or feasibility of alternative design." *Id.* at 213. Under that scenario, the reasonableness of the defendant's conduct—not just the product's characteristics—becomes relevant.

This Court should reconsider its analysis of the industry-custom instruction. Volkswagen was entitled to an instruction and was prejudiced by not having one because the jury could have found no product liability on industry custom alone. This Court should vacate the judgment and remand for a new trial on liability with the necessary instruction.

C. Reconsideration is warranted because the Decision improperly imputes a separate entity's contacts with Washington to establish specific jurisdiction over VWAG.

The Decision misapplied controlling precedent on specific jurisdiction. Sorrentino needed to make more than a prima facie showing of jurisdiction once this matter went to trial. The preponderance standard applied.

Worse, the Decision imputes Volkswagen of America's contacts with Washington to VWAG and relies on VWAG's general targeting of the United States to affirm the trial court's exercise of specific jurisdiction over VWAG. But neither basis establishes specific jurisdiction over VWAG in Washington under controlling state and federal law.

1. The Decision is internally inconsistent and applies the wrong legal standards.

The Decision recites several incorrect legal standards in its analysis of the record.

First, the Decision misunderstands Sorrentino's burden of proof. Sorrentino had to establish specific jurisdiction over

VWAG by a preponderance of the evidence. *See Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013), *aff'd*, 181 Wn.2d 272, 333 P.3d 380 (2014).

The Decision misapprehends the case law. It states that "because VWAG never asked for a CR 12(d) evidentiary hearing, we consider only whether Sorrentino made a sufficient prima facie showing of jurisdiction, and not whether VWAG rebutted said showing." *Decision* at 27. The Decision thus gave deference to that prima facie showing "'[u]nless the court orders that the hearing and determination thereof be deferred until the trial.'" *Id.* (quoting *State v. LG Elecs., Inc.*, 185 Wn. App. 394, 341 P.3d 346 (2016)). But the very case law the Decision cited confirms that any prima facie showing establishes jurisdiction only before the trial begins.

The trial itself served as the evidentiary hearing. *See LG Elecs.*, 185 Wn. App. at 409; *see also* CR 12(d). At trial, VWAG continued to contest this issue, seeking dismissal for lack of

personal jurisdiction. CP 10976–988. And the trial court entered findings and conclusions following trial. CP 11703–709. Sorrentino had to meet his burden to establish specific jurisdiction over VWAG by a preponderance of the evidence.

Second, the Decision's specific-jurisdiction analysis is internally inconsistent. It correctly acknowledges that Volkswagen's pre-trial motions to dismiss is not at issue. *Decision* at 3–4 n.2; *see also* CP 89–105. Volkswagen renewed that issue at trial, seeking dismissal of VWAG for lack of personal jurisdiction. CP 10976–988. That dismissal motion is properly before this Court.

But the Decision contradicts itself. A party is entitled to judgment as a matter of law when no legal or factual basis exists to sustain the verdict. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000). This necessitates review of all facts offered at trial. But the Decision applies the CR 12 standard for motions to dismiss. *Decision* at 27. And it treats the facts alleged in Sorrentino's complaint as true. *Id.* at

29. Those standards do not apply to reviewing a motion or renewed motion for judgment as a matter of law.

The Decision initially recognizes that it is not reviewing the pretrial motions to dismiss. But it blends a motion-to-dismiss analysis into its ultimate review of the trial record. That taints this analysis with unproven, alleged facts from the complaint and an overly deferential review standard. These errors warrant reconsideration.

2. The exercise of specific jurisdiction premised on general targeting of the United States market and a subsidiary's relationship with Washington misapprehends controlling law.

The Decision's procedural errors are compounded by its reliance on evidence that fails to satisfy the controlling legal tests for specific jurisdiction. It relies on VWAG's general interest in the United States market. But that does not establish state-specific jurisdiction. And it imputes Volkswagen of America's contacts with Washington to VWAG. This blurring of distinct corporate entities is rarely permitted and is without legal basis on this record.

VWAG's general targeting of the United States does not support exercising specific jurisdiction over VWAG in Washington. The U.S. Supreme Court requires "something more" than placing a product into the national stream of commerce. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 889, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). Specific jurisdiction may be established when a defendant intends to serve a specific state. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion).

But no evidence exists that VWAG specifically targeted Washington. Examples of state-specific targeting can include "special state-related design, advertising, advice, marketing," or other specific connections such as potential customers that the manufacturer targeted in the state. *McIntyre*, 564 U.S. at 889. VWAG sold no vehicles or replacement parts in Washington. CP 1209. It did not design or manufacture vehicles or replacement parts exclusively for the Washington market.

CP 1209. And it did not create or even authorize any of the independently owned dealerships in Washington. RP 790, 869. VWAG's general targeting of the United States market is not the "something more" required to establish specific jurisdiction in Washington.

Sorrentino offered evidence of VWAG's general knowledge that various states would receive VWAG's products. A manufacturer's knowledge that the stream of commerce will "sweep the product into the forum state" alone is insufficient to subject a nonresident defendant to suit in any state where the product ends up. *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007). State-specific contacts must indicate intent to "serve the market in the forum State." *Asahi*, 480 U.S. at 112. This is known as the "stream-of-commerce-plus test." *Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 503--04 (9th Cir. 2023).

Sorrentino presented no evidence beyond VWAG's general targeting of the United States market. The Decision cites

Volkswagen's corporate designee Alfred Ströhlein's statements that VWAG, via its importer agreement with Volkswagen of America, intended to sell parts and vehicles in Washington and that Volkswagen of America was required to market vehicles in Washington. *Decision* at 30.

But context is key. Ströhlein explained that VWAG's "intent and expectation that VWAG vehicles would be sold and serviced throughout the United States." CP 4185. When asked whether the vehicles and parts were distributed to Washington, he explained that he had "no information about the states to which the vehicles were delivered and where the vehicles were repaired." CP 4189. Nor did he have any information on where the parts were sent. CP 4190. He acknowledged only that Washington was part of the nationwide territory contemplated by the importer agreement. CP 4189–90. The importer agreement and associated distribution network established no meaningful connection between VWAG and Washington.

The Decision also errs by relying on Volkswagen of American's actions to establish the "something more." Corporations are presumed separate, and "the parent company is not automatically subject to jurisdiction...simply because the subsidiary is carrying on business in the forum state." 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1069.4 (3d ed. updated Apr. 2019).

Courts disregard a parent corporation's separateness from its subsidiaries for specific personal jurisdiction only in exceptional circumstances. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 887–89, 309 P.3d 555 (2013), *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014), and *aff'd*, 190 Wn.2d 281, 413 P.3d 1 (2018). More than a standard parent-subsidiary relationship is required for imputing the subsidiary's contacts to the parent. *Id.* at 891.

VWAG and Volkswagen of America are distinct entities. As Sorrentino and the trial court both acknowledged, Volkswagen of America was not an alter ego of VWAG, so that

cannot be a basis to impute contacts. *See* CP 6851–55; RP 68, 1956–58. They were, and operated as, independent entities. Ex. 205 at 3; CP 1209, 4179–80.

The Decision concludes that "VWAG's involvement with VWoA 'was much more than a standard parent-subsidiary relationship,'" but it offers no meaningful analysis of that conclusion. *Decision* at 29 (quoting *FutureSelect*, 175 Wn. App. at 891). And *FutureSelect* is inapposite.

FutureSelect involved a parent-dominant relationship where the parent "actively managed" the subsidiary's marketing and solicitation of investments, including the selection of investments and due diligence programs. *FutureSelect*, 175 Wn. App. at 891–92. The parent's "active management and control" determined the success and financial rewards of the subsidiary. *Id.* at 892. The parent's control over the activities directed at Washington were "significant and purposeful." *Id.*

In contrast, the subsidiary Volkswagen of America transacted all business in Washington on its own behalf. Ex. 205

at 3. It built and controlled the distribution networks for Volkswagen vehicles and replacement parts. *See* RP 798–99, 857–58, 863, 868. VWAG did not implement or otherwise control a distribution system in Washington. CP 1209–10. VWAG's relationship with Volkswagen of American did not rise to the type of control that justifies this extraordinary disregard of these distinct corporate forms.

The Decision relies on certain findings that cannot establish specific personal jurisdiction under the correct legal test. For example, the trial court found that VWAG sold a significant number of vehicles "through its subsidiary, Volkswagen Group of America, with the intent that they would be sold and serviced throughout the United States, including in Washington State." CP 11705 (FOF 13); *see also Decision* at 30. And it found that the importer agreement tasked Volkswagen of America with creating a distribution network through the United States, including Washington. *Decision* at 31.

But Volkswagen challenged these findings because VWAG sold vehicles to its independent subsidiary, without any direction of or control where vehicles and parts would be distributed. *See* Ex. 205 at 11–12; *see also* RP 842–43, 852. And even if these findings are accepted as true, they establish only a general targeting of the United States as a whole; they establish no specific targeting of Washington, as required.

The Decision cites findings 18, 20, and 26 to support VWAG's control over Volkswagen of America, thereby allowing this Court to impute Volkswagen of America's contacts to VWAG. *See* CP 11705 (finding 18, stating that "[t]hrough a 1971 importer agreement, VWAG gave VWAG [sic] specific directives and retained control over VWofA's activities."); CP 11705 (finding 20, stating that "VWAG retained control of the ability to give reasonable directives and suggestions."); CP 11706 (finding 26, stating that "VWAG intended to retain control over the repair and servicing of its vehicles at Volkswagen authorized dealerships throughout the United States

to ensure consistent service and customer experience."). But these findings misstate the importer agreement: it made clear that "[Volkswagen of America] will transact all business pursuant to this Agreement on its own behalf." Ex. 205 at 3. And nothing establishes that VWAG controlled Volkswagen of America's activities in Washington or anywhere else in the United States.

Even if those findings were correct, VWAG's general standards for consistent services and reasonable directives cannot satisfy the high threshold for imputing the subsidiary's contacts to the parent. *See Daimler AG v. Bauman*, 571 U.S. 117, 134–35 n.13, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (explaining that a subsidiary's contacts may only be imputed to its parent "when the former is so dominated by the latter as to be its alter ego"). VWAG and Volkswagen of America are not alter egos. *See* CP 6851–55; RP 68, 1956–58. And these findings do not establish that VWAG's directives and standards are "much more than a standard parent-subsidiary relationship."

FutureSelect, 175 Wn. App. at 891. The Decision applies an extraordinary remedy without explaining why these circumstances are extraordinary.

Nor does the Decision address the trial court's errors in other findings. *See Volkswagen's Opening Brief* at 72–78. For example, finding 27 wrongly states that VWAG disseminated bulletins throughout the United States, when Volkswagen of America brought the bulletins into the American market. CP 1318, 1706. And finding 32 states that "VWAG engaged in advertising campaigns that were intended to, and did, cover the United States market." CP 1170 7. But Volkswagen of America independently promoted the automobiles and parts in the United States. CP 1349, 1360. The Decision overlooks these errors.

This Court should consider the troubling implications if the trial court's findings constituted the "something more" for specific jurisdiction. Under the Decision's framework, any manufacturer with shared financial goals and uniform standards for a subsidiary or distributor would be subject to jurisdiction

anywhere the subsidiary or distributor operates. The mere act of setting uniform brand standards, such as the importer agreement, would avail a manufacturer to jurisdiction in every state in a distribution network. That is a significant, unwarranted expansion of specific jurisdiction.

This Court should reconsider its specific-jurisdiction analysis. It should vacate the judgment against VWAG and remand with directions to dismiss VWAG for lack of personal jurisdiction.

V. CONCLUSION

This Court should reconsider the Decision.

First, the Decision errs in its failure-to-warn analysis. Sorrentino needed to establish that he would have read and heeded any warning if given. The record supports no reasonable inference that he would have done so such that his behavior would have changed. This Court should reconsider its unsupported, unreasonable inferences from the record and

conclude that Volkswagen is entitled to judgment as a matter of law under CR 50.

Second, the Decision errs in analyzing the instructional error on industry custom. Sorrentino raised the industry-custom issue in his opening statement, his case-in-chief, and in closing argument. Sorrentino opened the door to Volkswagen's presenting industry-custom evidence. Because substantial evidence supported Volkswagen's case theory, it was entitled to an instruction and was prejudiced by its inability to present that fact issue to the jury supported by an instruction.

Third, the Decision applies the wrong burden and tests for specific jurisdiction. Sorrentino had to establish jurisdiction over VWAG by a preponderance of evidence. And he cannot rely on VWAG's general targeting of the United States market and Volkswagen of America's contacts with Washington to establish specific jurisdiction over VWAG in Washington. That evidence does not establish the "something more" required for VWAG's availing itself to Washington courts. Sorrentino did not establish

specific jurisdiction over VWAG. This Court should reconsider the Decision, dismiss VWAG for lack of specific jurisdiction, and remand with instructions to vacate the judgment against it.

This document contains 5,958 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted: October 7, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, PS, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the method noted:

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