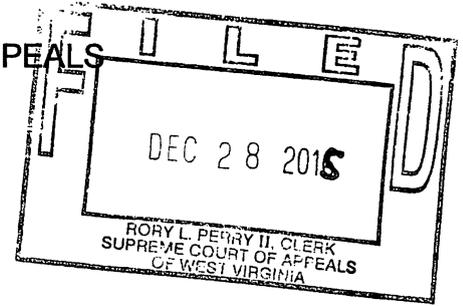


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



State of West Virginia ex rel, Ford Motor Company,

Petitioner,

vs.) No. 15-11449

The Honorable Warren R. McGraw,
Judge of the Circuit Court of Wyoming County;
and Danny S. Wellman, deceased,

Respondent.

PROPOSED AMICUS BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE
GROUP IN SUPPORT OF THE RESPONDENT AND IN OPPOSITION TO THE
PETITION FOR WRIT OF PROHIBITION

L. Lee Javins, II (W.Va. Bar No. 6613)
Bailey, Javins & Carter, LC
213 Hale Street
Charleston, WV 25301
(304) 345-0346
Counsel for *Amicus Curiae*
The Attorneys Information
Exchange Group

John Gsanger
Pro Hac Vice Pending
Texas State Bar No. 00786662
The Edwards Law Firm
802 N. Carancahua St., Suite 1400
Corpus Christi, Texas 78401
Telephone: (361) 698-7600
jgsanger@edwardsfirm.com

Counsel for *Amicus Curiae*, The
Attorneys Information Exchange
Group

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III. STATEMENT OF AMICUS CURIAE IDENTITY AND INTEREST

The Attorneys Information Exchange Group (AIEG) is an organization of over 700 attorneys who practice civil litigation throughout the United States. AIEG's members have dedicated themselves to the creation of a private cooperative that serves to educate Americans who have suffered serious or catastrophic injury as a result of defectively designed motor vehicles and to share information amongst its members to facilitate the fair representation of these victims. AIEG members pursue products liability claims focusing which often focus on the faulty design or manufacture of motor vehicles, and our clients are those Americans who have suffered catastrophic injury or they have suffered the loss of beloved family members. AIEG's members have a vital interest in the effect that the West Virginia Supreme Court's decision may have on clients we represent now and in the future. The members of AIEG and, indeed, all consumers, have an interest in ensuring that this Honorable Court affirms the decision of the lower court and reaffirms the traditional approach to personal jurisdiction adopted over a third of a century ago in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). We believe it is critical to the civil justice system that injured consumers continue to enjoy the privilege of having their grievances addressed in the state in which they reside

and were harmed by the marketing of a defective product. Accordingly, AIEG respectfully offers this amicus brief.

IV. ISSUES PRESENTED

- Issue A. When assessing its jurisdiction over out-of-state product manufacturers, should West Virginia continue to follow the stream-of-commerce analysis adopted by the Supreme Court of the United States in *World-Wide Volkswagen*?
- Issue B. With respect to the exercise of jurisdiction over out-of-state product manufacturers, did the minority opinions in *Asahi* or *Nicastro* overrule *World-Wide Volkswagen*?
- Issue C. When a West Virginia resident is killed in West Virginia by a product he purchased in West Virginia, is the exercise of a West Virginian court's personal jurisdiction over the product manufacturer a question of specific jurisdiction or general jurisdiction?

V. ARGUMENT

A. West Virginia's Standard for Exercising Personal Jurisdiction

West Virginia applies the stream-of-commerce test with respect to exercising jurisdiction over out-of-state product manufacturers:

This Court, however, is satisfied that CSR introduced a product into the stream of American commerce that it knew would be used in West Virginia. “Personal jurisdiction ‘premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause’ and can be exercised without the need to show additional conduct by the defendant aimed at the forum state.” *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987); Syllabus Point 2, *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992).

State ex rel. CSR Ltd. v. MacQueen, 441 S.E.2d 658, 660 (W. Va. 1994); *Cook v. Channel One, Inc.*, 549 S.E.2d 306, 310 (W. Va. 2001) (“CLC would presumptively be under the jurisdiction of any state where its vehicle causes an injury” due to “placement of a product into the stream of commerce”); *Marion v. Sabra Tours Int'l, Inc.*, 438 S.E.2d 42, 46 (W. Va. 1993) (“where, as is the case here, out-of-state specialists accept large tours from *travel agents* in West Virginia, then they have held themselves out in the stream of commerce to such an extent that our long arm jurisdiction will reach them”); *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609, 613 (1992) *cert. denied*, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993) (“most courts and commentators have found that jurisdiction premised on the

placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct,” quoting *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S.Ct. 1026, 94 L.Ed.2d 92, 1034–35 (1987) (Brennan, J., concurring)).

Under West Virginia law, the keys to exercising jurisdiction are fairness, justice, and – where a defendant has placed a product in the stream of commerce – whether the defendant should reasonably anticipate being haled into court in a forum where that product killed someone:

The Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), delineated the following elements as necessary for a state to acquire jurisdiction over a nonresident defendant:

[I]n order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

International Shoe at 316, 66 S.Ct. at 158. Recently, in Syl. Pt. 1, *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992) *cert. denied*, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993) (holding that personal jurisdiction can be “premised on the placement of a product into the stream of commerce”), this Court repeated our standard for jurisdictional due process:

“The standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of an action in the

forum does not offend traditional notions of fair play and substantial justice.” Syllabus Point 1, *Hodge v. Sands Manufacturing Company*, 151 W.Va. 133, 150 S.E.2d 793 (1966).

...Indeed “the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980), quoted in *Hill by Hill, supra*, 188 W.Va. at 657, 425 S.E.2d at 612.

Norfolk S. Ry. Co. v. Maynard, 190 W. Va. 113, 116-18, 437 S.E.2d 277, 280-82 (1993).

When assessing the fairness of litigating a case in West Virginia, the analysis must balance (1) the burden on the defendant from going forward in West Virginia, and (2) the burden, delay, and inconvenience on the claimant from declining to go forward in West Virginia, as well as (3) the interests of West Virginia in exercising jurisdiction over corporations selling and supplying defective products which harm West Virginians:

Based upon the reasoning found in *World–Wide Volkswagen* and *Asahi*, our next step is to determine what burdens are placed on SDK by exercising personal jurisdiction, and on the plaintiff by refusing to exercise jurisdiction over SDK. We also must analyze the plaintiff's interest in obtaining speedy and convenient relief, the shared interests of the states in furthering fundamental social policies, and what interests exist on the part of the forum state—West Virginia—in West Virginia's exercise of jurisdiction over SDK.

West Virginia's long-arm statute authorizes the exercise of personal jurisdiction where a foreign corporation sells, offers for sale, or supplies a defective product within the state which causes injury in West Virginia. Specifically, W.Va.Code § 31D-15-1501 provides, in part:

For the purpose of this section, a foreign corporation not authorized to conduct affairs or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein ... (c) if such a corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within the State notwithstanding the fact that such corporation has no agents, servants, or employees or contacts within this State at the time of said injury.

... A second long-arm statute, W.Va.Code § 56-3-33(a)(4) (1992), permits the exercise of personal jurisdiction within the following parameters:

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

The federal court for the Northern District of West Virginia analyzed W.Va.Code § 56-3-33(a)(4) in *Hinzman v. Superior Toyota, Inc.*, 660 F.Supp. 401 (N.D.W.Va.1987). The court divided W.Va.Code § 56-3-33(a)(4) into two basic requirements necessary to exercise jurisdiction: (1) a tortious injury in West Virginia that is caused by an out of state act or omission, and (2) a relationship between the defendant and West Virginia exists in any of the three manners specified in subsection (4). *Id.* at 402. Thus, if the company regularly does or solicits business in West Virginia, engages in another persistent course of conduct, or derives substantial revenue from goods used or consumed in

West Virginia, then personal jurisdiction would extend out of West Virginia.

Hill, 188 W. Va. at 659-61, 425 S.E.2d at 614-16 (footnote omitted). In addition to weighting any alleged burden on the defendant against West Virginia's interest in adjudicating the dispute and the claimant's interest in obtaining relief in West Virginia, the court should also consider the interstate judicial system's interest in obtaining the most efficient resolution of controversies:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, [78 S.Ct. 199, 201, 2 L.Ed.2d 223] (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court*, *supra*, [436 U.S. 84] at 92 [98 S.Ct. 1690, [at 1696-97] 56 L.Ed.2d 132 (1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37, [97 S.Ct. 2569, 2583 n. 37, 53 L.Ed.2d 683] (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. California Superior Court*, *supra*, [436 U.S.] at 93, 98 [98 S.Ct. at 1697, 1700].

Norfolk, 190 W. Va. at 116-18, 437 S.E.2d at 280-82 (quoting *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct.at 564-65)

When assessing the relationship between the manufacturer and the jurisdiction, a foreign manufacturer which is totally separate from the

distribution network is less susceptible to jurisdiction as compared to a parent company with a subsidiary acting within the jurisdiction:

The facts in the case now before us are different from those found in *Asahi*. In *Asahi*, the Japanese valve manufacturer corporation was a separate entity from the Taiwanese company, which purchased the valves and then sold the completed tires in the United States. No evidence was presented which would connect the two foreign corporations. In this case, SDA is a wholly-owned subsidiary of SDK, with SDK ordering SDA when to stop selling the defective product.

...

Unlike this case, *Hodge* did not involve an establishment of a distribution system for its product through the mechanism of a wholly owned subsidiary. The use of the wholly owned subsidiary enabled SDK to run all their United States distribution of L-tryptophan through that company. Further, SDK admitted that once they realized the problem with the L-tryptophan, they ordered SDA to halt distribution. We fail to see how much more control SDK could have over SDA.

Like the federal district court's analysis of W.Va.Code § 56–3–33(a)(4) in *Hinzman*, we note that SDK derived substantial revenue from the L-tryptophan purchased and used in West Virginia. Although SDK denied that it solicited business in West Virginia, SDA clearly did. Further, under the analysis set forth in *World–Wide Volkswagen* and affirmed in *Asahi*, we determine that West Virginia has a substantial and legitimate interest in exercising personal jurisdiction over SDK, the company that manufactured and sold the contaminated L-tryptophan.

Hill, 188 W. Va. at 659-61, 425 S.E.2d at 614-16. Accordingly, when assessing the burden on a defendant, the fact that the defendant has set up a subsidiary to conduct business in the state indicates that litigating in the

forum would impose relatively little burden and it would be fair to require the litigation to go forward in that jurisdiction:

The burden of SDK submitting to jurisdiction in the United States and West Virginia would be minimal since SDK has already gone through the effort of setting up SDA in the United States. They have obviously found doing business in the United States to be profitable enough to create SDA. We fail to see how defending these suits in the United States would be a greater burden. By contrast, requiring the plaintiff to travel to Japan to litigate this case would create a substantial burden. Consequently, we conclude that “notions of fair play and substantial justice” require us to exercise personal jurisdiction over SDK. *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158.

Moreover, under Justice Brennan's analysis in *Asahi*, *supra*, SDK benefitted from its contacts with West Virginia regardless of whether it directly conducts business in or directed toward West Virginia. We conclude that personal jurisdiction “premised on the placement of a product into the Stream of Commerce is consistent with the Due Process Clause,” and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. *Asahi*, 480 U.S. at 117, 107 S.Ct. at 1034. Given the distribution pattern of the product, this and the many other lawsuits filed as a result of the use of the contaminated L-tryptophan cannot come as a surprise. Accordingly, we reverse the decision of the Circuit Court of Kanawha County and hold that SDK is subject to the long arm jurisdiction of West Virginia and the United States Supreme Court's decisions in *International Shoe*, *World-Wide Volkswagen*, and *Asahi*.

Id.

B. Fairness, Justice, Burdens, and Efficiency in This Case

The jurisdictional factors in this case weigh heavily in favor of West Virginia exercising jurisdiction over Ford.

First, Ford placed the defective vehicle into the stream of commerce, and Ford has enjoyed the benefits of doing such business in West Virginia, and Ford can anticipate being haled into a West Virginia court to answer for its defective products which have killed West Virginians in West Virginia.

Second, the burden on Ford is minimal or nonexistent because Ford has a contractually agreed to defend its products in West Virginia and has a wholly owned subsidiary that operates in West Virginia to facilitate Ford's primary business of selling vehicles in West Virginia and elsewhere.

Third, if the surviving family members of Jarred Wellman were forced to pursue justice in another forum, the burden on them would be substantial because the product was purchased in West Virginia (where they live) and the product failed in West Virginia (where witnesses to the failure are located). Dismissing their West Virginia case and forcing them to search out another forum and begin the legal process anew would cause both needless delay and unnecessary added expense.

Fourth, West Virginia has an interest in exercising jurisdiction in this case because a West Virginia citizen was killed. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–474, 105 S.Ct. 2174, 2182–83 (1985) (reaffirming that “forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that

delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” and holding a “State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors”); *In re Silver Bridge Disaster Litig.*, 381 F. Supp. 931, 946 (S.D.W. Va. 1974) (West Virginians “have substantial interests in applying their tort law since the acts predictably impacted within their jurisdictions, and since [four] of plaintiffs’ decedents resided in ... West Virginia”).

Finally, the interstate judicial system's interest in obtaining the most efficient resolution of controversies also militates in favor of maintaining this case in West Virginia because Ford's co-defendant Ramey Automotive Group, Inc. is a West Virginia company. If the claims against Ford are prosecuted in another forum, there will be inefficient parallel litigation in two jurisdictions (a West Virginia case against Ramey Automotive and a second case against Ford).

C. *Rebutting Strawman Arguments from Ford and its Amici*

Ford and its amici raise several arguments that warrant rebuttal.

1. *World-Wide Volkswagen is Applicable in West Virginia*

The Supreme Court of the United States held that a “forum State does not exceed its powers under the Due Process Clause if it asserts personal

jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). This Court has traditionally followed the stream-of-commerce jurisdictional analysis from *World-Wide Volkswagen*:

Obviously, as the Supreme Court of the United States held in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980), jurisdiction cannot be asserted over a defendant with which a state has no contacts, no ties and no relations. However, in the case before us, the evidence is virtually incontrovertible that CSR introduced its asbestos fibers into the stream of American commerce; CSR knew the products containing their fibers would be distributed throughout the United States; CSR had an ongoing commercial relationship with Johns Manville, the largest American manufacturer of asbestos products; and, CSR was actively engaged in the development and introduction of products that contained their raw materials. These circumstances are sufficient at this time to give our courts jurisdiction

State ex rel. CSR Ltd. v. MacQueen, 190 W.Va. 695, 698, 441 S.E.2d 658, 661 (1994); see also *Hough v. Boll Med., Inc.*, 11-0814, 2012 WL 2979068, at *3 (W. Va. Mar. 9, 2012) (relying on *World-Wide Volkswagen*); *Norfolk S. Ry. Co. v. Maynard*, 190 W. Va. 113, 116-18, 437 S.E.2d 277, 280-82 (1993) (relying on *World-Wide Volkswagen*); *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 657-61, 425 S.E.2d 609, 612-16 (1992) *cert. denied*, 508 U.S.

908, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993) (relying on *World–Wide Volkswagen*).

2. *Asahi* and *Nicastro* Did Not Change *World-Wide Volkswagen*

In the wake of *World–Wide Volkswagen*, the Supreme Court revisited the stream-of-commerce in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), but none of the three separate opinions from *Asahi* achieved majority status:

The United States Supreme Court addressed the stream of commerce theory of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). ... [T]he *Asahi* Court split on whether placing a product into the stream of commerce, without more, was sufficient to allow the forum state to exercise personal jurisdiction over the manufacturer of a defective product However, four members of the Court, led by Justice Brennan, determined that the defendant had satisfied the minimum contacts test found in *International Shoe* because it put goods in the stream of commerce that the defendant knew would lead into the forum state.... Justice Brennan stated that the requirement ... of some additional conduct aimed at the forum state is inconsistent with *World–Wide Volkswagen* and unnecessary

Hill, 188 W.Va. at 658, 425 S.E.2d at 613. This Court has followed Justice Brennan's view in *Asahi*, which is a straightforward continuation of *World–Wide Volkswagen*. See, e.g., *id.* (following Brennan, J., opinion in *Asahi* and continuing to apply *World–Wide Volkswagen*); see also *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 176, 178 (5th Cir. 2013), *cert. denied*, 134 S. Ct.

644, 187 L. Ed. 2d 420 (2013) (discussing and following the *World–Wide Volkswagen* stream-of-commerce analysis).

The Supreme Court next revisited the stream-of-commerce in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), but – again – none of the three separate opinions from *Nicastro* achieved majority status.

Justice Kennedy’s plurality opinion in *Nicastro* held that jurisdiction is properly premised on placing goods into the stream of commerce where the manufacturer or distributor seeks to serve the jurisdiction’s market:

This Court has stated that a defendant's placing goods into the stream of commerce “with the expectation that they will be purchased by consumers within the forum State” may indicate purposeful availment. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors “seek to serve” a given State's market. *Id.*, at 295, 100 S.Ct. 559. Sometimes a defendant does so by sending its goods rather than its agents.

Nicastro, 131 S. Ct. at 2788 (Kennedy, J.).

Justice Ginsburg, joined by Justices Sotomayor and Kagan, authored a separate opinion advocating for a broad view of specific jurisdiction:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive

substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and subsequent decisions, one would expect the answer to be unequivocally, "No."

Nicastro, 131 S. Ct. at 2794-95 (Ginsburg, J.). Justice Ginsburg further explained the purposeful ailment aspect of personal jurisdiction:

"Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S., at 475, 105 S.Ct. 2174. Adjudicatory authority is appropriately exercised where "actions by the defendant himself" give rise to the affiliation with the forum. *Ibid.*Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury. See, e.g., *Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 544 (C.A.6 1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 573, 892 P.2d 1354, 1362 (1995).

Id. at 2801-02 (footnote to appendix listing numerous additional cases omitted).

Ultimately, neither Justice Kennedy's rationale nor Justice Ginsburg's rationale achieved majority status because Justice Breyer, joined by Justice Alito, concurred only in the result of the case:

The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." *Ante*, at 2788. But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case. ... I do not agree with the plurality's seemingly strict no-jurisdiction rule.... What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). ... It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen, supra*, at 297, 100 S.Ct. 559. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. ... I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the

plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.

Id. at 2792-94 (Breyer, J.).

If the facts of this case were before the Supreme Court, a majority of five justices (Ginsburg, Sotomayor, Kagan, Breyer, and Alito) would agree that exercising jurisdiction would be “fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State” because a company the size of Ford can readily “alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.” *Id.* at 2793-94 (Breyer, J.); see also *id.* at 2801-02 (Ginsberg, J.) (“it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury”). However, such facts were not before the court in *Nicastro* and so no consensus was reached.

Ultimately, the lack of consensus among the three *Nicastro* opinions results in no change to the pre-*Nicastro* stream-of-commerce analysis. The Fifth Circuit, for example, noted “the Supreme Court reversed but did not produce a majority opinion” and concluded that “application of the stream-of-commerce approach in this case does not run afoul of *McIntyre*'s narrow

holding.” *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 176, 178 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 644, 187 L. Ed. 2d 420 (2013). Accordingly, the *Ainsworth* case applied the following analysis:

In cases involving a product sold or manufactured by a foreign defendant, this Circuit has consistently followed a “stream-of-commerce” approach to personal jurisdiction, under which the minimum contacts requirement is met so long as the court “finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.” Under that test, “mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce,” but “[t]he defendant's contacts must be more than ‘random, fortuitous, or attenuated, or of the unilateral activity of another party or third person.’”

Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 177 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 644, 187 L. Ed. 2d 420 (2013) (omitting footnotes). This Court has traditionally followed this same analysis. *Compare id. with State ex rel. CSR*, 190 W.Va. at 698, 441 S.E.2d at 661 (1994); *see also Norfolk S. Ry.*, 190 W. Va. at 116-18, 437 S.E.2d at 280-82; *Hill*, 188 W.Va. at 657-61, 425 S.E.2d at 612-16.

3. *This Case Involves Specific (Not General) Jurisdiction*

Ford and its amici address this case as a general jurisdiction case. That approach is flawed.

In *Daimler AG v. Bauman*, the Supreme Court of the United States characterized general jurisdiction as “all-purpose jurisdiction” and characterized specific jurisdiction as “conduct-linked jurisdiction.” 134 S. Ct. 746, 751, 187 L. Ed. 2d 624 (2014). The claims against Ford in this case are conduct linked. As the Supreme Court’s views of general jurisdiction have narrowed, its views of specific jurisdiction have grown:

Since *International Shoe*, “specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.” *International Shoe* 's momentous departure from *Pennoyer* 's rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear ***claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum.*** Our subsequent decisions have continued to bear out the prediction that “specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.”

Id. at 755 (quoting *Goodyear*, 564 U.S., at —, 131 S.Ct., at 2854, emphasis added, footnotes and citations omitted). To illustrate this point, the *Daimler AG* opinion offered a hypothetical which confirms that this case sounds in specific jurisdiction:

First, if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction. *Second*, if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction.

Daimler AG, 134 S. Ct. at 754 n. 5 (citations omitted). This case fits squarely in the specific jurisdiction model as explained by the Supreme Court.

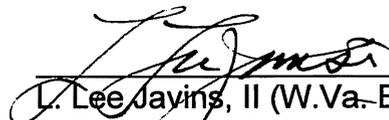
Similarly, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court confirmed that when “a defendant’s act outside the forum causes injury in the forum, ... a plaintiff’s residence in the forum may strengthen the case for the exercise of *specific jurisdiction*.” 131 S. Ct. 2846, 2857 n. 5 (U.S. 2011) (citing *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)). Likewise, in *Burger King Corp. v. Rudzewicz*, the Supreme Court explained the distinction between specific and general jurisdiction in terms of whether the claims are “**related to** the defendant’s contacts with the forum.” 471 U.S. 462, 473, n. 15, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (emphasis added). In this case, Ford’s acts – some of which occurred outside West Virginia – caused a fatal injury in West Virginia, where Jared Wellman resided, and Ford’s contacts with West Virginia are chiefly related to its vehicles and the claims in this case are related to such vehicles; all these factors weigh in favor of specific jurisdiction.

VII. CONCLUSION AND PRAYER

Jared Wellman, a West Virginia resident, was killed in a West Virginia crash as a result of defects in a Ford vehicle he purchased in West Virginia.

Under such circumstances, the West Virginian court's exercise of personal jurisdiction over Ford is an archetypical application of specific jurisdiction. When exercising jurisdiction over out-of-state product manufacturers, West Virginia follows the stream-of-commerce analysis adopted by the Supreme Court of the United States over a third of a century ago in *World-Wide Volkswagen*. None of the Supreme Court's opinions subsequent to *World-Wide Volkswagen* (not *Asahi*, *Nicastro*, *Goodyear Dunlop*, or *Daimler AG*) overrule the stream-of-commerce analysis that this Court has traditionally applied. Amicus AIEG asks this Court to deny Ford's petition.

Respectfully submitted,



L. Lee Jayins, II (W.Va. Bar No. 6613)
Bailey, Jayins & Carter, LC
213 Hale Street
Charleston, WV 25301
(304) 345-0346
Counsel for *Amicus Curiae*
The Attorneys Information
Exchange Group

John Gsanger
Pro Hac Vice Pending
Texas State Bar No. 00786662
The Edwards Law Firm
802 N. Carancahua St., Suite 1400
Corpus Christi, Texas 78401
Telephone: (361) 698-7600
jgsanger@edwardsfirm.com

Counsel for Amicus Curiae, The
Attorneys Information Exchange
Group

CERTIFICATE OF SERVICE

The undersigned L.Lee Javins, counsel for Amicus Curiae, The Attorneys Information Exchange Group, hereby certifies that on December 28, 2015, I served the forgoing Proposed Amicus Brief of the Attorneys Information Exchange Group, via first class U.S. mail, postage prepaid, upon the following parties or counsel of record:

Michael Bonasso
Flaherty Sensabaugh Bonasso, PLLC
P.O. Box 3843
Charleston, WV 2538-3843
Counsel for Ford Motor Company

Todd Wiseman
Wiseman Law Firm
1510 Grand Central Avenue
Vienna, WV 26105
Counsel for Amicus Curiae
The Center for Auto Safety

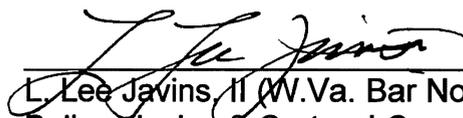
Bradley N. Garcia
O'Melveny & Myers, LLP
1625 Eye Street, NW
Washington, DC 20006
Counsel for Ford Motor Company

The Honorable Warren R. McGraw
Circuit Court Judge, Wyoming County
Main Street & Bank Street
Pineville, WV 24874

Christopher S. Slaughter
Steptoe & Johnson
P.O. Box 2195
Huntington, WV 25722-2195
Counsel for Amicus Curiae
WV Chamber of Commerce

Patrick E. McFarland
Patrick E. McFarland, PLLC
3011 Murdoch Avenue
Parkersburg, WV 26101
Counsel for Respondent

Respectfully Submitted:



L. Lee Javins, II (W.Va. Bar No. 6613)
Bailey, Javins & Carter, LC
213 Hale Street
Charleston, WV 25301
(304) 345-0346
Counsel for *Amicus Curiae*
The Attorneys Information
Exchange Group