

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

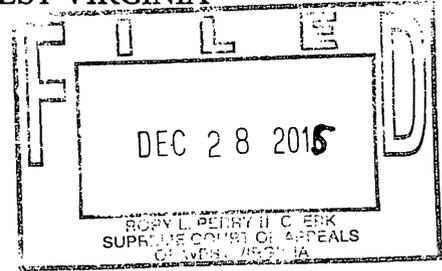
State of West Virginia ex rel. Ford Motor Company,

Petitioner,

vs.) No. 15-1149

The Honorable Warren R. McGraw,
Judge of the Circuit Court of Wyoming County;
and Danny S. Wellman, Administrator of the Estate
of Jarred S. Wellman, Deceased

Respondents,



**PROPOSED AMICUS BRIEF OF THE CENTER FOR AUTO SAFETY IN SUPPORT
OF THE RESPONDENT, DANNY S. WELLMAN,
Administrator of the Estate of Jarred S. Wellman, Deceased.**

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**STATEMENT OF IDENTITY OF THE *AMICUS CURIAE*,
THE CENTER FOR AUTO SAFETY**

This *Amicus* brief is submitted on behalf of The Center for Auto Safety (“The Center”) in support of the Respondents, Danny S. Wellman, Administrator of the Estate of Jarred S. Wellman, Deceased.

The issues raised in this appeal have significant implications for West Virginia consumers as well as foreign corporations who are subject to the jurisdictional authority of the courts of West Virginia because they have in the past and will in the future market products which cause harm to West Virginians in this State. Established in 1970 by Ralph Nader and the Consumers Union, the Center for Auto Safety was an outgrowth of the “Corvair” scandal. After that ordeal, “Nader realized that his singlehanded, sporadic monitoring of the auto industry would be ineffective.” Thus he and the union created The Center as an independent (but affiliated) organization “to keep a sharp eye on the National Highway Safety Bureau” (Acton and LeMond, 1972, p. 69) by lobbying, researching, and litigating as necessary. Today, The Center is independent of both Nader and the Consumers Union, but certain residues of that affiliation remain. Clarence Ditlow, the director of The Center, was once an employee of the Nader-founded Public Interest Research Group. Moreover, The Center’s original goals remain: to work for improved vehicle highway safety, reliability, and economy.

While these basic tenets reflect its founders’ original purposes, The Center itself has grown tremendously. Operating with more than 10,000 members and benefitting from public and private contributions, along with the sale of its published research, The Center employs 6 individuals, and serves as a nonprofit research and advocacy organization which provides a public voice for auto safety. The Center’s mission is to improve the safety, efficiency reliability

and cost to the consumer of vehicles, which explicitly demand that we do what we can to help reduce motor vehicle deaths, injuries and crashes. These goals often cause The Center to furnish testimony before Congressional oversight committees and sponsor independent analysis of pending safety legislation, government safety regulations and public health issues arising because of mistakes in the marketing of unsafe vehicles. To this end, The Center has also been involved in a number of lawsuits, challenging decisions of the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA). Examples of The Center's public health advocacy include: *Center for Auto Safety v. NHTSA* (1986), in which The Center challenged an administrative rule involving fuel economy; *Center for Auto Safety v. Lewis* (1982), asking a federal court to examine the Secretary of Transportation's settlement "of a safety investigation concerning 23 million Ford vehicles"; and, *Center for Auto Safety v. Volkswagen AG* (2015), an action seeking injunctive relief against these car companies for defrauding consumers by manipulating EPA tests intended to restrict vehicle emissions.

In addition to its direct sponsorship activity, The Center occasionally participates as an *amicus curiae* when the issue relates directly to the relationship between vehicle safety, consumer protection and the role of the civil justice system in facilitating these goals. It is for these reasons that The Center has sought permission to provide this Honorable Court with this *Amicus* Brief. The Center appears as *amicus* so as to explain why the decision of the Circuit Court of Wyoming County to deny Ford Motor Company's motion to dismiss for lack of personal jurisdiction fits squarely within well-founded constitutional jurisprudence, and to illustrate why the arguments presented by Ford Motor Company and its *amici* are out of step with both the precedent of this Honorable Court and of the United States Supreme Court. If these arguments were adopted by this Court, they would result in depriving West Virginia

consumers with equal access to the civil justice system. The Center believes that every American citizen has the right to access the courts of his home state to rectify wrongs committed in his or her home state by corporations that distribute unsafe automotive products throughout the United States. Denial of access to the consumer's home state court systems would create havoc (because it would compel West Virginians to bring lawsuits far away from home in, according to Ford Motor Company, the defendant's home state) and deprive West Virginians of the right to fair compensation for harm caused in West Virginia.

ARGUMENT

This court should give credence to the decision of the Circuit Court of Wyoming County and resoundingly reject the arguments of the Petitioner and its *amici*, which ask that the courts of West Virginia close their doors to its citizens who suffer horrible injury or death while using a foreign manufacturer's unsafe product in this State. The arguments of the Petitioner, if accepted, would force every West Virginian harmed in West Virginia by a product marketed and sold across the United States (and West Virginia), and targeted by foreign corporations for sale in all 50 states, to uproot themselves and find counsel to litigate legitimate lawsuits only in the state where the manufacturer is incorporated or has its principal of business to seek fair compensation for the harm suffered and the economic losses incurred in this State. That's neither fair nor constitutionally supportable.

The facts of this case present the Court with an easy answer to whether Ford Motor Company is subject to *specific jurisdiction* as this phrase has been coined by our courts. Simply because the Petitioner and its *amici* want to argue against "general jurisdiction", which is not the issue here, does not make it so. Respectfully, this case falls squarely within the jurisdictional teachings of hundreds of cases predicated upon the reasoning of the United States Supreme Court

in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 298, 297 (1980) and *J. McIntyre Mach., Ltd., Nicastro*, 131 S.Ct. 2780, 2802 (2001)(Ginsburg, J., dissenting)(“*World-Wide, supra*, provides that when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable ’to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury”). As explained below, this Honorable Court should conclude that the Circuit Court’s decision was correct and that under the facts of this case and the applicable law, Ford Motor Company is subject to the jurisdiction of West Virginia courts.

I. The Facts of this Case Demonstrate that Ford Motor Company is Subject to the Jurisdictional Authority of the Courts of West Virginia.

When Ford Motor Company presented its Motion to Dismiss based upon jurisdictional grounds to the Circuit Court, the Court was presented with two distinct documents: the Complaint and the defendant’s Motion with a supporting affidavit from one of its employees. These two pleadings provided the factual predicate for the lower court’s decision. Here is a list of the facts submitted to the Circuit Court *and* other incontrovertible facts:

- Ford Motor Company is a Delaware corporation with its principal place of business in Dearborn, Michigan.
- Ford Motor Company is registered to do business in the state of West Virginia.¹
www.apps.sos.wv.gov/business/corporations/organization.aspx?org=10442.
- Ford Motor Company markets its products in every state in the United States.
- Ford Motor Company has a national dealership network which includes several dealerships in West Virginia who market and sell new Ford products,

¹ The Court may, in deciding whether or not to issue a Writ of Prohibition, take judicial notice of facts available and incontrovertible. See, *Katherine B.T. v. Jackson*, 220 W. Va. 219 (2006).

service Ford products, honor Ford Motor Company warranties, and carry-out necessary vehicle recall work which Ford requires.

- Ford Motor Company owns and operates a subsidiary known as Ford Motor Credit Company, LLC.

<http://corporate.ford.com/content/dam/corporate/en/investors/reports-and-filings/Annual%20Reports/2014-ford-annual-report.pdf>.

- Ford Motor Credit Company is registered to do business in West Virginia, pays taxes in West Virginia, provides financing to Ford dealerships (including the defendant dealership, Ramey Automotive Group, Inc.) and the purchasers of Ford products in West Virginia. See,

www.apps.sos.wv.gov/business/corporations/organization.aspx?org=10443

and

<https://apps.wv.gov/SOS/UCC/Search/FordMotorCredit/RameyAutomotiveGroupInc.>²

- The 2002 Ford Explorer in question was assembled by Ford Motor Company in its Louisville, Kentucky plant. The Explorer was then shipped to a Ford dealership in Fort Pierce, Florida and sold as a new vehicle to a Florida resident.
- Defendant Ramey Automotive Group is a West Virginia corporation and an authorized Ford Motor Company dealership.

² Personal jurisdiction over the parent company is appropriate when the wholly owned subsidiary conducts continuous and substantial business in West Virginia. See, *Hill v. Showa Denko, K.K.*, 188 W. Va. 654 (1992); *Bowers v. Wurzburg*, 202 W. Va. 43, 46 (1998). The parent company's subsidiary may in accordance with agency law by way of its purposeful activities in West Virginia justify, without more—a finding of specific jurisdiction. See, *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, n. 13 (2014); *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 753 F. 3d 521, 531 (5th Cir. 2014).

- Defendant Ramey Automotive Group marketed and sold the Plaintiff's Ford Explorer as a used vehicle to another West Virginia corporation in July 2009, which in turn sold it to the Plaintiff who is a West Virginian.
- Defendant Ramey Automotive Group is a properly named defendant.
- A segment of Ford Motor Company's gross income for sales, services and repair work is derived from the activities of its dealership network in West Virginia.
- Defendant Ramey has a written Dealership Agreement with the Ford Motor Company.³ That Agreement provides in pertinent part that Ford agrees:

to "defend, indemnify, hold harmless and protect the Dealer from any losses, damages or expense, including costs and attorney's fees, resulting from or related to lawsuits, complaints or claims commenced against the Dealer by third parties concerning: (1) . . . bodily injury or property damage arising out of an occurrence caused solely by a 'production defect' in that product (i.e., due to defective materials or workmanship utilized or performed at the factory), except for any 'production defect' in tires and diesel engines made by others, provided, however, that the 'production defect' could not have been discovered by the Dealer in the reasonable pre-delivery inspection of the VEHICLE, FOREIGN VEHICLE, TRUCK or HEAVY DUTY TRUCK (as applicable) as recommended by the Company. (2) . . . bodily injury or property damage arising out of an occurrence caused solely by a defect in the design of that product"

³ Ford Motor Company submitted an affidavit in support of its Motion to Dismiss in which one of its employees referenced but did not attach the Dealership Agreement.

Ford further agreed that "[i]n the event that any legal action arising out of any of these causes is brought against the Dealer, [Ford] shall undertake, at its sole expense, to defend said action on behalf of the Dealer when requested to do so by the Dealer, provided that the Dealer promptly notifies [Ford] in writing of the commencement of the action against the Dealer and cooperates fully in the defense of the action in such manner and to such extent as [Ford] may reasonably require

Mel Clayton Ford v. Ford Motor Co., 104 Cal. App. 4th 46, 49 (CA App. 2002).

- In October, 2009, after the Plaintiff purchased the Explorer Sport, Ford announced a recall of Ford Explorers for flaws in the vehicle's speed control system which would be repaired free of charge by every (West Virginia) Ford dealerships. See, NHTSA Recall Number 09V399000.
- As a matter of federal law, Ford was obligated to contact every registered owner of its recalled vehicles to alert the owner of the recall and offer a repair free of charge through its dealership network.⁴

www.fordproblems.com/recalls/Explorer/2002.

II. West Virginia Jurisdictional Law Establishes Appropriate Legal Guidelines in Accordance with Constitutional Parameters to Obtain Jurisdiction Over the Ford Motor Company.

West Virginia courts have jurisdiction over a foreign corporation when (1) a state long-arm statute confers jurisdiction and (2) imposing jurisdiction does not violate constitutional principles. See *Abbott v. Owens-Corning Fiberglas Corp.*, 191 W. Va. 198 (1994). In West

⁴ Absent factual discovery, we cannot confirm that Ford actually sent the recall notice.

Virginia, a court's ability to exercise long-arm jurisdiction over a foreign defendant operates to the fullest extent permitted by due process. The West Virginia long-arm statute, W. Va. Code § 56-3-33(a), provides that a nonresident corporation is subject to personal jurisdiction in this State if, inter alia, it engages in any of the following activities:

- (1) Transacting any business in the State;
- (2) Contracting to supply services or things in this State . . .
- (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 court of conduct, or drives substantial revenue from goods used or consumed or services rendered in this State”

The court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation. The first step involves determining whether the defendant's actions satisfy the personal jurisdiction statutes set forth in W. Va. Code, W. Va. Code §§ 31D-15-1501 and W.Va. Code, 56-3-33. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process. *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994). There must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense in the forum state. *Pries v. Watt*, 186 W. Va. 49, 410 S.E.2d 285 (1991). To what extent a nonresident defendant has minimum contacts depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state. *Id.*

A plaintiff need only make a *prima facie* showing of jurisdiction. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F. 3d 390, 396 (4th Cir. 2003). The court must view the allegations in the Complaint as established for purposes of determining jurisdiction and all facts, and reasonable inferences must be drawn in the light most favorable to the Plaintiff. *Id.* A state court's assertion of personal jurisdiction over a non-resident defendant is consistent with due process if that defendant has sufficient minimum contacts with the forum state, and maintenance of the suit would not offend traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 476 (1985) (citing *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945)). Where, as here, the assertion of jurisdiction arises from a defendant's activities within the forum, a state court exercises specific, rather than general jurisdiction. See, *Smith v. Teledyne Conti Motors, Inc.*, 840 F. Supp. 2d 927 (D. C. South Carolina 2012) (Specific jurisdiction found based on accident in S. Carolina, plane's engine built by foreign defendant sold outside S. Carolina but with knowledge it was going to be installed in planes flown across the country); *Collier v. Land & Sea Rest. Co. LLC*, 2014 U. S. Dist LEXIS 147118 *20 (D.C. Va. 2014) (Specific jurisdiction found against a nationwide wholesaler of shell fish, which sold its product to a Massachusetts' named defendant which it knew marketed the fish throughout the U.S. when:

“ . . . the sale of a product ‘arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury ...’ *World-Wide Volkswagen*, 444 U.S. at 297”.

III. The Stream of Commerce Test Validates The Circuit Court's Finding of Jurisdiction Over Defendant Ford Motor Company.

The Circuit Court analyzed the arguments of the parties and found that the Plaintiffs alleged that Defendant Ford manufactured a defective product and that this product caused injury to Plaintiffs in West Virginia. The Circuit Court then correctly found that Ford Motor Company by marketing its products in this State is conducting business in accordance with the West Virginia long-arm statute. Accordingly, *in personam* jurisdiction was correctly found.⁵ See, *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992). Like *Hill*, here the Plaintiff's decedent in West Virginia purchased a 2002 Ford Explorer which had been manufactured by Defendant Ford; the Plaintiff's decedent was injured in West Virginia by the defective 2002 Ford Explorer; and, the Defendant Ford regularly solicits and conducts business in West Virginia, thereby deriving substantial revenue from the sale and use of its products in this state. Accordingly, applying the West Virginia long-arm statutes and the rationale employed by this Honorable Court in *Hill*, the Circuit Court correctly found that Ford is subject to *in personam* jurisdiction. This conclusion is aligned with basic constitutional jurisprudence established and restated by this Court, the US Supreme Court and other courts throughout the United States.

When a plaintiff alleges specific jurisdiction, as here, due process requires analysis and application of the "stream-of-commerce" approach, under which the minimum contacts requirements are 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. E.g., *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2788 (2011)

⁵ As noted above, Ford's business activities in West Virginia go well beyond simply marketing and selling its products. Its wholly owned subsidiary provides financial services for hundreds of thousands of West Virginians; Ford's subsidiary Ford Motor Credit Company pays taxes in West Virginia; Ford Motor Company instructs its dealership network to serve as its agent to conduct nationwide safety recalls of all of its affected products in this state, etc.

(Where the defendant has targeted the sale of its products in the forum state, the exercise of jurisdiction is warranted.). See also, *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F. 3d 174 (5th Cir. 2013); *ITL Int'l, Inc. v. Constenia, S.A.*, 669 F. 3d 493, 496 (5th Cir. 2012); *Book v. Voma Tire Corp.*, 860 N. W. 2d 576 (Iowa 2015); *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Ore. 2012).

The U.S. Supreme Court first used the stream-of-commerce test in *World-Wide Volkswagen Corp.*, supra. 444 U.S. 286, 297-298, stating:

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the *Due Process Clause* if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

In subsequent decisions of the U. S. Supreme Court there have been divided opinions about how to address questions of jurisdiction pertinent to foreign corporations, who have very limited commercial contacts, but no one on the Court has disputed the logic and rationale of allowing the exercise of jurisdiction over corporations like Ford Motor Company which market their products across the United States at high volume. Examples are found in these decisions:

1. Justice Breyer's concurrence in *J. McIntyre Mach. v. Nicastro*, 131 S. Ct. at 2792-94:

“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. . . . “

2. Judge Ginsberg, made the following pertinent observations in *J. McIntyre Machinery, LTD.* supra., confirming that the stream-of-commerce predicate for jurisdiction remains embedded in our jurisprudence: [Dissenting opinion, 131 S. Ct. at 2801-02]

“ . . . ‘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).

3. Justice Ginsburg then reaffirmed the importance of the “specific jurisdiction”/stream-of-commerce test” in *Daimler v. Bauman*, 134 S. Ct. 746, 755, n.7 (2011) by recounting the holdings in several prior decisions:

“ . . . *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (opinion of

O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the “stream of commerce” while also “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”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (“[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”); *Calder v. Jones*, 465 U. S. 783, 789-790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (California court had specific jurisdiction to hear suit brought by California plaintiff where Florida-based publisher of a newspaper having its largest circulation in California published an article allegedly defaming the complaining Californian; under those circumstances, defendants “must ‘reasonably anticipate being haled into [a California] court’”); *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, 780-781, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (New York resident may maintain suit for libel in New Hampshire state court against California-based magazine that sold 10,000 to 15,000 copies in New Hampshire each

month; as long as the defendant “continuously and deliberately exploited the New Hampshire market,” it could reasonably be expected to answer a libel suit there).”

In light of this precedent, the question raised here is whether or not it is fair to compel a manufacturer selling millions of products nationwide, and who markets its products in West Virginia, and who conducts substantial business in this state should be obligated to defend its allegedly unsafe design in this state where the product was used and caused fatal injury to a resident? We think it’s quite fair. See *Asahi*, 480 U.S. at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107 (Brennan, J., concurring in part and concurring in judgment). Products liability law was adopted in West Virginia to provide its citizenry with a means to ensure that the costs of injuries resulting from defective products are borne by the manufacturer that put the product on the market. E.g., *Morningstar v. Black & Decker Mfg., Co.*, 162 W. Va. 857 (1979); *Blankenship v. GM Corp.*, 185 W. Va. 350 (1991). If Ford isn’t held to account for its conduct in West Virginia, it will undermine that purpose. The nature of the product should be considered in deciding this issue; as Justice Stevens’ noted in his concurrence in *Asahi*, the jurisdictional analysis “is affected by the volume, the value, and the *hazardous character* of the components.” *Asahi*, 480 U.S. at 122, 107 S. Ct. at 1037. Ford’s products are marketed in large volume across the United States and, by their very nature, cars, trucks and SUVs are sold, resold and transported every day from state to state. In fact, the Ford dealership network allows for the exchange of new vehicles between dealers from state-to-state to facilitate sales and manage inventory. Further, Ford Motor Company through its wholly owned subsidiaries sell parts and accessories via its dealerships across the United States, providing goods and services to all customers in West Virginia and every other state. See,

www.corporate.ford.com/content/dam/corporate/en/investors/reports-and-filings/Annual%20Reports/2014-ford-annual-report.pdf [pp. 2-4]. Its common knowledge that Ford products made and delivered for original sale in one state will be transferred, sold and resold and used in all 50 states.

IV. Arguments Raised by Ford Motor Company's Amici Are Unsound.

Essentially, the Petitioner and its *amici* attack the Circuit Court's decision by arguing that Ford Motor Company is not "at home" in West Virginia and, therefore, this Court should dismiss this case for want of "general jurisdiction." Respectfully, that argument is the proverbial red-herring. No one has asserted that Ford's obligation to answer in the courts of West Virginia is based upon principles of "general jurisdiction." As unerringly demonstrated above, Ford is required to defend itself in the courts of West Virginia based upon principles of "specific jurisdiction." As to the latter point, it appears that Ford and its *amici* want this Honorable Court to either ignore or erase decades of irrefutable case law which has defined the basic due process principles which led the West Virginia legislature (and virtually every other state legislature) to enact Long Arm statutes (W. Va. Code §§ 31D-15-1501 and W. Va. Code, 56-3-33 [1984]), requiring foreign corporations to answer for the harm they have caused West Virginians if, as in this case, Ford is:

- (1) Transacting any business in the State;
- (2) Contracting to supply services or things in this State . . .
- (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

court of conduct, or drives substantial revenue from goods used or consumed or services rendered in this State”

To avoid the relevant case law and these statutes, Ford asserts that this Court (unknowingly) found this statute unconstitutional and rejected the “stream of commerce” analysis which, according to the Petitioner, warrants reversal of the decision of the Circuit Court. This audacious argument is based upon the claim that in *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190 (2012) the court “rejected the ‘stream of commerce theory’, which is delineated in W.Va. Code, §6-3-33 (4), as inconsistent with basic due process principles”. However, the court’s decision in *Griffith, supra*, did nothing of the sort. While the Court found that the state’s taxing board could not impose taxation on a foreign corporation on apportioned income earned as a result the sale of certain products in West Virginia, that decision is inapposite to the issues presented here. The *Griffith* court did not overrule its decision in *Hill v. Showa Denko, K.K.*, 188 W. Va. 654 (1992), but it embraced the principle that: [*Griffith, supra*. 229 W. Va. at 199, n. 31]

“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, [1035], 94 L.Ed.2d 92 [108] (1987).”

Oddly, Ford also cites to the U.S. Fourth Circuit Court of Appeals decision in *Owens-Illinois, Inc. v. Rapid Am Corp.*, 124 F. 3d 619 (1997)⁶ in support of the argument that the

⁶ The Court found that the Plaintiff *Owen* “. . . has not alleged more than the entry of Old Carey products into the stream of commerce with the expectation that they would be purchased in West Virginia.

“stream of commerce” predicate for jurisdiction is dead. Yet, in that case the Court **reaffirmed** the constitutionality of applying the “stream of commerce” rationale with these statements: (Id, *Owens*, 124 F. 3d at 629)

“. . . a non-resident defendant may only be subject to personal jurisdiction under the "stream of commerce theory" if that defendant engaged in some activity purposely directed at the forum state. See id. at 945-46. In this regard, we explained: [citing to *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994)].

The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism. Such a rule would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks.”

The Petitioner and its *amici* have argued that despite Ford’s substantial business presence in West Virginia, because the Plaintiff’s vehicle was delivered by Ford to a Florida Ford dealership and sold as a new vehicle in Florida, rather than West Virginia, the product

Critically, *Owens*’ complaint is wholly devoid of any allegations that Old Carey engaged in any activity purposefully directed at West Virginia.” Id. In the instant case, the Plaintiff’s Complaint asserted that Ford Motor Company has systematically and regularly engaged in business activities directed at West Virginia both directly and through its wholly owned subsidiary and through its dealership network.

manufacturer cannot be hauled into court in West Virginia, where the defect manifested itself and caused the injury. That one fact cannot alter the “stream of commerce” jurisprudence which has its origins with the Supreme Court’s comments in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1979) and continues to this day. E.g., *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 894 F. Supp. 2d 819 (D.C.E.D. La. 2012); *Book v. Voma Tire Corp.*, 860 N. W. 2d 576 (Iowa 2015); *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Ore. 2012).

The Supreme Court’s pronouncement, applicable to companies like Volkswagen, Audi and Ford Motor Company in 1979 remains the test today for specific jurisdiction. The distinction the Court drew between the exercise of specific jurisdiction over the vehicle manufacturer versus a state based car dealership, regardless of the state of sale of the car as new, remains controlling today: [*World-Wide Volkswagen Corp.*, supra. 444 U.S. at 297-298.]

When a corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State, *Hanson v. Denckla*, 357 U.S., at 253, it has clear notice that it is subject to suit there, and can act to 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. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its

powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

Many courts have directly addressed the propriety of allowing a state court to obtain jurisdiction over a foreign corporation which markets its product in every state and is then hauled into court in the state where the injury occurred, but not in the state where the product was released for sale, based upon long arm statutes using the same language as the West Virginia statute (W. Va. Code, 56-3-33 (4)). This statutory scheme has been characterized as the “tort out/harm in” provision. E.g., *Pennzoil Prods. Co. v. Colelli & Associates*, 149 F.3d 197, 201-202 (3rd Cir. 1998); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996). In *Soria v. Chrysler Can., Inc.*, 958 N.E.2d 285, [20](Ill. App. 2011) the appellate court properly found specific jurisdiction over Chrysler of Canada after consideration of the following counter-statements:

Here, Chrysler Canada argues that there is no evidence of minimum contacts between it and Illinois. It asserts that its mere awareness that vehicles it assembles might be distributed by Chrysler United States to Illinois does not show sufficient minimum contacts. Plaintiff responds that Chrysler Canada has sufficient minimum contacts and is subject to specific personal jurisdiction in Illinois because it knows that the vehicles it assembles for Chrysler United States enter Illinois through the stream of commerce and because it intentionally serves the

United States market, including Illinois, by indirectly shipping its vehicles here.

Responding, the Court concluded:

“ . . . [A] plaintiff must show that the action arose out of or was related to the defendant's contacts with Illinois. *Morgan, Lewis & Bockius LLP v. City of E. Chi.*, 401 Ill. App. 3d at 954 (Ill. App. Ct. 1st Dist. 2010). This requirement is clearly met here. Plaintiff's injuries clearly arose out of and were directly related to her use of a vehicle assembled by Chrysler Canada; that is, the cause of action directly arose out of Chrysler Canada's contacts with Illinois. See *Keller v. Henderson*, 359 Ill. App. 3d 605, 615-17, 834 N.E.2d 930, 296 Ill. Dec. 125 (2005); see also *Burger King*, 471 U.S. at 473 (“[t]he 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 those products subsequently injure forum customers” (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98)).” *Soria*, 958 N.E.2d at [34].

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We agree with plaintiff's assertion that Chrysler Canada continuously and intentionally serves or targets this market and is set up to manufacture vehicles for (and derives significant revenue from) the United States market, including Chrysler dealerships throughout Illinois. Chrysler Canada concedes that, during 2008 and 2009, Chrysler United

States ordered 28,383 total vehicles of various makes and models, including minivans, for its independently-owned dealerships in Illinois. *Soria*, at [29].

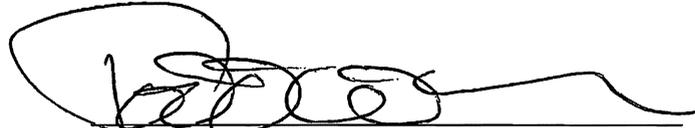
V. Conclusion

In the instant case, Ford Motor Company has for decades targeted the West Virginia marketplace. Each year, thousands and thousands of Ford products are sent by the defendant to each and every Ford dealership which has contracted with the defendant to sell its products in West Virginia. These same dealerships receive as a benefit for acting as Ford's business agent the security of an indemnification agreement that Ford will pick up the defense of products liability cases involving Ford vehicles and claims of defect.⁷ Besides the substantial financial rewards Ford obtains from this stream of commerce, Ford sells a substantial volume of parts to this same dealership network, benefitting significantly from the aftermarket of Ford products. And, of course, each year the defendant is tasked with authorizing significant commercial work in this state when vehicle recalls require repairs and replacements to alleviate realized safety defects. And, finally, Ford's wholly owned subsidiary, Ford Motor Credit, has contracts with statewide dealerships, to provide lines of credit, and with West Virginia consumers to finance the purchase of Ford products. All of these continuous and substantial business activities provide more than minimum contacts, and establish that Ford was quite aware that in return for all of these benefits, it may from time to time be compelled to answer for harm caused to West Virginians who suffer injury in state because of flaws in Ford products.

⁷ If Ford is dismissed, and only defendant Ramey remains as a party to this lawsuit, Ramey then is compelled to defend the design defect choices made by Ford Motor Company. Clearly that is unfair to both Ramey and the Plaintiffs.

Under all of these facts and the existing law, we respectfully submit that Ford Motor Company has by its conduct submitted itself to the jurisdiction of this Court and the decision of the Circuit Court should be affirmed.

Respectfully submitted:

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

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CERTIFICATE OF SERVICE

I, Todd Wiseman, counsel for *Amicus Curiae*, The Center for Auto Safety, certify that on December 28, 2015, I served the foregoing Proposed *Amicus Curiae* Brief of the Center for Auto Safety, *via* first class U.S. mail, postage prepaid, upon the following counsel of record:

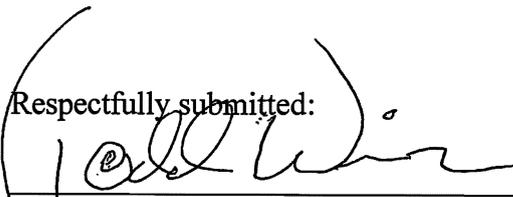
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