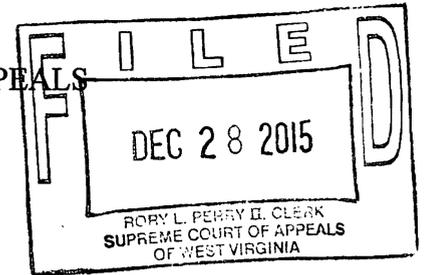


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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,

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**RESPONDENT'S RESPONSE TO  
PETITION FOR WRIT OF PROHIBITION**

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## **QUESTION PRESENTED**

Whether a West Virginia court has personal jurisdiction over Defendant, Ford Motor Company, a non-resident automobile manufacturer, in a wrongful death suit involving the death of a West Virginia resident, arising out of product defect, negligence, and breach of warranties, where (1) Defendant manufactured and distributed the subject automobile; which was purchased in West Virginia and caused injury and death to Plaintiff's decedent in West Virginia, where (2) Defendant directs its activities towards the West Virginia market by, among other things, establishing a network of dealerships in West Virginia through which it sells its vehicles, advertising in West Virginia, financing the dealerships in West Virginia which sell its vehicles, and financing the West Virginia consumers who purchase its vehicles; and where (3) Defendant's active role in litigating suits as both plaintiff and defendant in West Virginia, and Defendant's expectation of litigating these types of suits as a result of indemnification agreements with its dealerships in West Virginia, make it fair and reasonable to require Defendant to respond to suit in West Virginia.

## **STATEMENT OF THE CASE**

### **I. Plaintiff's Complaint**

Jarred Wellman was killed on March 4, 2013, in a one-car roll-over crash near Ghent, West Virginia, while operating a 2002 Ford Explorer he had purchased from MacArthur Auto Body & Repair Shop in Beckley, West Virginia. MacArthur had purchased the Explorer from Ramey Automotive Group, Inc. in Beckley. During the crash, the Explorer's "safety seatbelt released webbing, the roof crushed, the driver's window shattered out, and Jarred was partially ejected resulting in his head and upper torso contacting the pavement causing a fatal head injury." Pl.'s Compl. ¶¶ 7, 8, 11, 13-15; Pet'r's App. 11-12.

Plaintiff is a citizen of West Virginia, as was Jarred. Pl.'s Compl. ¶ 1; Pet'r's App. 8. Plaintiff sued Ford (which is not a citizen of West Virginia, Pl.'s Compl. ¶ 2; Pet'r's App. 9) and Ramey (which is a citizen of West Virginia, Pl.'s Compl. ¶ 3; Pet'r's App. 9) in the Circuit Court of Wyoming County, West Virginia, for strict product liability, negligence, and breach of warranty, express and implied, alleging that the Explorer was defective and unreasonably dangerous because, among other things, it was not crashworthy because its passenger restraint system was defectively designed and manufactured, it was not accompanied by adequate warnings and instructions, it did not have rollover canopies, or curtain airbags, electronic stability control or roll stability control, and its driver's-side roof and surrounding structure was inadequate. Pl.'s Compl. ¶¶ 43-44, 54, 68-69, 82, 94-95, 103-105, 115, 117-118; Pet'r's App. 16-18, 19, 22, 24, 28-30, 31-32, 34-36.

## **II. Ford's Contacts with West Virginia**

Though formal discovery has not yet fully commenced, Plaintiff has informally gathered publicly available evidence that demonstrates Ford's contacts with and conduct towards West Virginia. Ford aggressively markets and sells its vehicles by and through at least 35 Ford dealers (currently, in 2015) throughout West Virginia. *See* Listing of Ford dealerships, attached to Resp't's App. 1-70. Ford provides certifications for mechanics who work at these dealerships,<sup>1</sup> *see* Ford Accelerated Credential Training (FACT) brochure, attached to Resp't's App. 216, and certifies dealerships to perform specific types of repairs, *see* <http://owner.ford.com/dealer-locator.html#/> (last visited Dec. 24, 2015). Ford sends Technical Service Bulletins to its Ford dealerships in West Virginia, which contain procedures that mechanics must follow when

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<sup>1</sup> Ford provides automotive training programs, such as the FACT program, at 88 locations throughout the nation. *See* Technical Career Entry Program, *available* at <https://www.newfordtech.com/> (last visited Dec. 23, 2015). These programs train and credential technicians for Ford and Lincoln dealerships. *Id.*

repairing Ford vehicles. *See* TSB summaries for 2002 Ford Explorer Sport Trac, attached to Resp't's App. 217-234. Ford also sends representatives directly from Ford Motor Co. to West Virginia to conduct inspections of vehicles and approve certain goodwill or warranty repairs by its dealerships. *See e.g., Art Hill Ford,, Inc. v. Callender*, 406 N.E.2d 340, 341 (Ind. Ct. App. 1980) ("Art Hill Ford [the dealership] had the vehicle inspected by a Ford Motor Company representative so that repair could be authorized under the warranty before work began."); *State v. Ford Motor Co.*, 38 S.E.2d 242 (S.C. 1946) (finding Ford Motor Companies' activities "interstate in nature," as Ford's activities consisted of "sending representatives into South Carolina, servicing warranties, and supervising the dealers."). Ford sends recall notices to residents in West Virginia who own Ford vehicles, including residents who have purchased a Ford vehicle from a non-Ford dealership.<sup>2</sup> *See e.g.,* Resp't's App. 81. Although not a matter of record in the absence of formal discovery, Ford cannot in good faith dispute these points.

Ford advertises its vehicles directly to West Virginia residents through third-party websites; pop-up advertisements; television advertisements; radio advertisements; internet radio advertisements; billboards; magazine advertisements; newspaper advertisements; and/or other types of advertisements.<sup>3</sup> In Petitioner's brief, Ford states, "Nor does Ford itself target

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<sup>2</sup> As an example of Ford sending recall notices to owners of Ford vehicles who are residents in West Virginia, Patrick E. McFarland, an attorney on record for Respondent here, received a recall notice just last week from Ford for a 2008 Edge that was purchased "used" in December 2014. *See* Ford Safety Recall Notice, Resp't's App. 81.

<sup>3</sup> On Ford Motor Co.'s website, Ford's marketing department webpage states "[w]e are the eyes, ears and voices of Ford, meeting customer demand by delivering the right products to the right dealers at the right time." Departmental webpage for Ford Marketing, Sales and Service, attached to Resp't's App. 76-80. Under the "What We Do" heading, Ford's marketing webpage states that the department "[p]rovides the primary interface between the company and Ford and Lincoln stores... As the face of the company, the sales divisions have responsibility for... maintaining consistency in national and local advertising." *Id.* The marketing department "communicate[s] with the dealer network and our field team to manage specific marketing, sales, and service initiatives," and is "[r]esponsible for global strategic product, volume, fixed marketing, experience and retail planning operations." *Id.*

advertising at the State of West Virginia,” and in a footnote states that “Ford itself directs advertising and other marketing through nationally based television, print, and online media.” Pet’r’s Br. 19-20, 20 n. 6. These are contradictory statements! Apparently, Ford must think that West Virginia is not one of the 50 states. Despite Ford’s suggestion to the contrary, Ford requires dealerships to advertise; Ford requires dealerships to spend money on advertising; Ford imposes requirements on dealership advertising content; Ford funds its Ford Dealers Advertising Funds (FDAFs), requires dealers to join and pay money to FDAFs, and prescribes procedures and content for advertising *via* FDAFs.<sup>4</sup> *See id.* at 20 n. 6. No reasonable argument can be made to suggest that Ford does not direct advertising to every single state including West Virginia.

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<sup>4</sup> One court found that, as regards Ford’s advertising in the State of Delaware:

[Ford] directs national advertising to Delaware. Although the actual activities for advertising and marketing occur in Michigan, Ford contributes money directly into an advertising fund maintained by or on behalf of Ford dealerships in Delaware. Ford develops and initiates rebates and sales incentive programs implemented in Delaware designed to increase vehicle sales. Lastly, dealers must install and maintain signage identifying the dealer as being authorized to sell, lease and service new and used Ford vehicles. It is Ford which establishes standards for and must approve that signage.

*Ford Motor Co. v. Dir. of Revenue*, No. CIV.A.04C-02-155CHT, 2008 WL 2058522, at \*3 (Del. Super. Ct. Apr. 25, 2008) *aff’d*, 963 A.2d 115 (Del. 2008). Another court found that:

Ford engages in several practices designed to boost its sales to the independent dealers. For each dealership, Ford develops a sales plan based on Ford's production and the dealer's expected needs. In addition, Ford District and Zone managers with offices in New Jersey and Virginia make frequent visits to dealers in Delaware to persuade these dealers to commit to buying certain models and quantities of Ford vehicles. Ford also enters into with each dealer a Sales and Service Agreement that imposes requirements on the dealers' conduct of business that are designed to enhance the Ford brand and increase sales of vehicles and parts. These requirements include certain sales practices and inventory guidelines, the performance of warranty and other service work on Ford vehicles, the display of Ford signage, and the usage of Ford trademarks. Ford also engages in its own extensive nationwide advertising campaigns, sales, and promotional activities, in addition to contributing to the local dealers' advertising funds.

*Ford Motor Co. v. Dir. of Revenue*, 963 A.2d 115, 117-18 (Del. 2008).

Ford Motor Co. enters into agreements governing their relationship with each Ford dealership in the state of West Virginia. Among other things, Ford agrees to defend its dealers against lawsuits in West Virginia brought by West Virginia residents for injuries relating to defects in Ford vehicles:

[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: ... 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)... [and] ... bodily injury or property damage arising out of an occurrence caused solely by a defect in the design of that product . . . .

*Mel Clayton Ford v. Ford Motor Co.*, 104 Cal. App. 4th 46, 49, 127 Cal. Rptr. 2d 759, 761 (Cal. App. 2002). Ford further agrees 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...” *Id.* Pursuant to such indemnification agreements, Ford expects to and has agreed that it will defend lawsuits of the type brought by Plaintiff here in West Virginia. Of high relevance here, Ramey has cross-claimed Ford, asserting that Ford and Ramey “are parties to a contract wherein Ford has agreed to provide Ramey indemnification and defense in cases such as this. As such, Ford owes Ramey a contractual duty to indemnify and defend Ramey in this matter.”<sup>5</sup> *See* Resp’t’s App. 258.

Ford Motor Co. is registered to do business in West Virginia, and has an authorized agent in West Virginia. *See* Resp’t’s App. 111-115. The same is true for Ford Motor Credit Co., a wholly-owned subsidiary of Ford Motor Co.<sup>6</sup> *Id.* at 105-110. Ford Motor Service Co., another

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<sup>5</sup> Ramey Automotive Group, Inc. also asserts that the alleged defective condition of the vehicle, as well as any non-compliance with standards or breach of warranty, was caused by the acts or omissions of Ford Motor Company. Resp’t’s App. 257-258.

<sup>6</sup> The U.S. Supreme Court reaffirmed that agency theory is recognized in the specific jurisdiction context:

wholly-owned subsidiary of Ford Motor Co., is also registered to business in West Virginia and has an authorized agent in West Virginia. *Id.* at 116-118. And, before it merged into Ford Motor Credit Co., in 2011, Ford Motor Credit CSV, a wholly-owned subsidiary of Ford, was registered to do business in West Virginia and had an authorized agent in West Virginia. *Id.* at 102-104.

Ford Motor Co. paid \$4527.45 in personal property taxes this year in Kanawha County. *See Resp't's App.* 88-90. Ford also paid property taxes in Putnam County for the years 2009 and 2010. *Id.* at 94. Ford Motor Credit Co., the wholly-owned subsidiary of Ford Motor Co., has paid property taxes in Berkeley, Cabell, Fayette, Greenbrier, Jackson, Jefferson, Kanawha, Mingo, Monongalia, Ohio, Putnam, Ritchie, Harrison, Marion, and Upshur counties since 1993 in excess of \$132,000.00, presumably due to doing business in West Virginia. *Id.* at 82-99.

Ford Motor Credit Co. has submitted at least 309 UCC filings in the state of West Virginia since 1980. *See Resp't's App.* 100. Ford Motor Co., either by itself or jointly with Ford Motor Credit Co., has submitted 34 UCC filings in West Virginia since 2000. *See id., available at* <https://apps.wv.gov/SOS/UCC/Search>. Ford Motor Co., by itself or through its wholly-owned subsidiary Ford Motor Credit Co., has obtained 70 distinct security interests in West Virginia since 1980, and has financed 50 separate companies, primarily Ford dealerships. *See id.* Of note, Ford Motor Credit Co. obtained a security interest for a loan it gave to Ramey Automotive Group., Inc. in 2004, which remained active through the date in 2009 when Ramey Automotive

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Agency relationships, we have recognized, may be relevant to the existence of specific jurisdiction. The corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact. As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.

*Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n. 13 (internal quotations and citations omitted). Additionally, considering that Ford Motor Credit is a wholly-owned subsidiary of Ford and is absolutely essential to Ford's business in West Virginia, it is clear that Ford Motor Credit's contacts may be deemed the contacts of Ford.

Group, Inc., purchased the Wellman vehicle in West Virginia and then re-sold it to MacArthur Auto Group, which in-turn sold it to Plaintiff's decedent. *See id.* at 101. Accordingly, Ford Motor Co., through its wholly-owned subsidiary Ford Motor Credit Co., was financing the company which purchased the Wellman vehicle in West Virginia.

In addition to financing the institutions in West Virginia that Ford uses to sell its vehicles to West Virginia residents, Ford provides financing to West Virginia residents through its wholly-owned subsidiary, Ford Motor Credit Co., so that individual residents may purchase Ford vehicles in West Virginia. At least one West Virginia dealership, Mountaineer Automotive, states on its website that Mountaineer Automotive will “work directly with the Ford Motor Company to create the programs that benefit our customers the most.”<sup>7</sup> *See* Ford Credit at Mountaineer Automotive, attached to Resp't's App 74-75.

Ford maintains and operates websites for each of its West Virginia dealerships, either directly or through Dealer Direct LLC d/b/a FordDirect.Com, a joint venture between Ford Motor Company and its Ford dealers.<sup>8</sup> *See, e.g.,* Webpage for Weston Ford, Inc., attached to Resp't's App. 73. When a West Virginia resident wants to purchase a vehicle from a Ford dealer, for example Weston Ford, Inc., and goes online to [www.westonwvford.com](http://www.westonwvford.com), that resident will notice at the bottom of the website “© 2015 Ford Motor Company” and “© 2015 Dealer Direct

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<sup>7</sup> Further, as discussed below, the Mountaineer Automotive webpage is maintained and operated by Ford Motor Co., and, accordingly to the language at the bottom of its webpage which states, “© 2015 Ford Motor Company,” the content on its page is copyrighted material owned by Ford Motor Co. *See id.*

<sup>8</sup> On the FordDirect.com website, under company information, it states: “FordDirect provides digital marketing and advertising solutions to Ford and Lincoln dealers, giving them the platform to drive more sales. With a foundation built by Ford Motor Company and its franchise dealers, and being the only joint venture of its kind, FordDirect understands the automotive and dealer business. Since 2000, FordDirect has been working with dealers to develop the best products for their unique needs, and offering solutions to connect with consumers whenever and wherever they are.” *See* FordDirect.com Company Overview, attached to Resp't's App. 71-72.

LLC.” *Id.* On Weston Ford’s website, a West Virginia resident will be able to search new and used inventory of Ford vehicles and obtain price quotes. *See id.*, available at <http://www.westonwvford.com>. As the content on these websites is copyrighted material owned by Ford Motor Company and Dealer Direct LLC, Ford is engaging West Virginia residents through its online presence directed solely to the West Virginia market.<sup>9</sup>

Lastly, Ford Motor Co., by itself and through Ford Motor Credit Co., actively litigates and defends cases in West Virginia. *See Ford Motor Credit Co. LLC v. Harris*, Civil Action No. 07-C-109, 2007 WL 5950829 (Cir. Ct. Putnam County Dec. 13, 2007); *Ford Motor Credit Company LLC v. Roberts*, Civil Action No. 10-C-326 (Cir. Ct. Wood County Apr. 24, 2013) (abstract of judgment), attached to Resp’t’s App. 203-204; *Waller v. Ford Motor Co.*, JVR No. 477462, 2007 WL 4823945 (Cir. Ct. Mingo County June 2007); *Huber v. Ford Motor Co.*, JVR No. 402946, 2002 WL 31941224 (Cir. Ct. Monongalia County Nov. 2002); *Gamlin v. Ford Motor Company*, JVR No. 369500, 1997 WL 1526562 (Cir. Ct. Preston County July 1997).

### **III. Procedural History**

Plaintiff initiated this product liability, negligence, and breach of warranty action in the Circuit Court of Wyoming County, West Virginia. Ford was served with a Summons and Complaint on February 10, 2015. *See* Circuit Court Docket, attached to Pet’r’s App. 135.

On March 12, 2015, Ford filed a Notice of Removal in the Southern District of West Virginia. On or about March 31, 2015, Plaintiff filed its Motion to Remand. On June 5, 2015, Judge Berger, sitting in the U.S. District Court for the Southern District of West Virginia, issued an Order granting remand but, but she stayed remand until a determination of attorney’s fees and

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<sup>9</sup> Additionally, Defendant Ford, through Dealer Direct LLC dba FordDirect.com and dba FordDirectUsed.com, maintains and operates [www.FordDirect.com](http://www.FordDirect.com) and [www.FordDirectUsed.com](http://www.FordDirectUsed.com), which allows users to engage inventories of used and new cars throughout West Virginia from Ford dealers and request price quotes.

costs was made as a result of Ford's improvident removal. On September 11, 2015, Judge Berger entered a second order wherein Her Honor, while reserving the issue of fees and costs, lifted her stay and remanded the case to the Circuit Court of Wyoming County. Pet'r's App. 135.

Ford's initial act after remand was to appear in the Circuit Court on September 21, 2015, to file a stipulated protective order regarding discovery and access to [www.forddocs.com](http://www.forddocs.com).<sup>10</sup> Pet'r's App. 135. Ford's motion to dismiss was filed on September 23, 2015. Pet'r's App. 135. Ford noticed its motion for hearing on October 28, 2015. But before the scheduled hearing could be conducted, and before Plaintiff's response was due, the Circuit Court issued an Order denying Ford's motion on October 5, 2015.<sup>11</sup> Pet'r's App. 135. On or about October 15, 2015, Ford submitted a motion requesting findings of fact and conclusions of law from the Circuit Court, along with a Motion to Stay. Pet'r's App. 135. On October 22, 2015, the Circuit Court granted Ford's Motion to Stay and issued an Order setting forth conclusions of law and findings of fact.<sup>12</sup> Pet'r's App. 136. Ford requested its Writ of Prohibition on November 20, 2015.

### **SUMMARY OF ARGUMENT**

The Circuit Court has authority pursuant to the West Virginia long-arm statutes and the Due Process Clause of the Fourteenth Amendment to subject Ford to suit in West Virginia. Moreover, Ford has consented to the jurisdiction of the Circuit Court through its actions.

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<sup>10</sup> During the time between Judge Berger's two orders regarding remand, Ford and Plaintiff negotiated over various discovery stipulations which were entered on September 21, 2015, and, in addition, negotiated and agreed protocol for a vehicle inspection which was utilized by the parties at an inspection of the subject 2002 Ford Explorer which took place on August, 2015.

<sup>11</sup> Plaintiff's response to Ford's Motion was due October 26, 2015. *See* W. Va. R. Civ. P. 6(d)(2).

<sup>12</sup> Similarly, Plaintiff's responses to Ford's Motion Requesting Findings of Fact and Conclusions of Law and Motion to Stay (neither motion was noticed for hearing) were not due at the time when the Circuit Court entered its Order setting forth findings and staying the proceedings. As a result, Plaintiff did not have input into these matters.

The Circuit Court found that Ford is subject to jurisdiction essentially because (1) it has sufficient contacts with West Virginia that it is “at home,” (2) this action arises out of a defective vehicle manufactured and distributed by Ford and sold through Ramey Automotive Group, Inc., which owns a local Ford dealership in West Virginia, and (3) it is reasonable to require Ford to litigate in West Virginia. The Circuit Court is absolutely correct in all of its points.

Should this Court find that Ford is not subject to jurisdiction, this Court will be holding that all product manufacturers are immune from suit in West Virginia as long as their products are not initially distributed within West Virginia. Ford has not cited any authority for this proposition, and neither this Court nor any other has so held. Ford is subject to specific jurisdiction because this action arises out of Ford’s placement of the subject vehicle into the stream of commerce with an expectation that it would be marketed in the State of West Virginia, and because requiring Ford to defend itself in this case would be reasonable and just. Ford is also subject to general jurisdiction in West Virginia because its contacts with West Virginia are “systematic and continuous,” such that it is at “home” in West Virginia. Lastly, Ford consented to jurisdiction by appearing in the Circuit Court for matters other than to challenge jurisdiction.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court’s consideration of the important legal issues raised by this case. Respondent disagrees with Ford, however, that oral argument under Rule 20 is appropriate. Instead, oral argument under Rule 19 is appropriate because this case involves application of settled West Virginia law. W. Va. R. App. P. 19(a)(1).

## **STANDARD OF REVIEW**

This Court has original jurisdiction in prohibition proceedings pursuant to Art. VIII, §3, of The Constitution of West Virginia. That jurisdiction is recognized in Rule 16 of the West Virginia Rules of Appellate Procedure and by W. Va. Code § 51-1-3 and W. Va. Code § 53-1-2.

“A writ of prohibition ‘lies as a matter of right whenever the inferior court (a) has [no] jurisdiction or (b) has jurisdiction but exceeds its legitimate powers.’” *State ex rel. Farber v. Mazzone*, 213 W.Va. 661, 664, 584 S.E.2d 517, 520 (2003) (quoting *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969)).

In reviewing a writ of prohibition, the Court must observe that the burden of proof is on the petitioner to demonstrate *clearly* an absence of jurisdiction: “To obtain relief in prohibition on the ground that a tribunal is acting outside of its jurisdiction, the petitioner must clearly demonstrate that it lacks authority to adjudicate a particular matter before it.” *Health Mgmt., Inc. v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999). *See also* Syl. pt. 1, in part, *Fahey v. Brennan*, 136 W.Va. 666, 68 S.E.2d 1 (1951) (“A writ of prohibition does not lie in the absence of a clear showing that a trial court is without jurisdiction to hear and determine a proceeding...”); *Fisher v. Bouchelle*, 134 W.Va. 333, 335, 61 S.E.2d 305, 306 (1950) (“[T]he writ will not be awarded in cases where it does not clearly appear that the petitioner is entitled thereto.”); Syl., *Vineyard v. O’Brien*, 100 W.Va. 163, 130 S.E. 111 (1925) (“The writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction”); Syl. pt 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W.Va. 91 (1873) (“Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal.”).

A writ of prohibition is “a drastic remedy,” and the WVSCA has cautioned that such writs should be granted only in extraordinary situations. *Health Mgmt., Inc.*, 207 W.Va. at 72, 528 S.E.2d at 766.

Moreover, the WVSCA has held that “prohibition relief is inappropriate where jurisdiction turns upon contested issues of fact... [P]rohibition is confined to situations where the existence of jurisdiction revolves around questions of law.” *Id.* (citing *Lewis v. Fisher*, 114 W.Va. 151, 171 S.E. 106 (1933)). The Court has emphasized further:

The right of the trial court to determine the existence or nonexistence of facts that give rise to its own jurisdiction will not be interfered with by any other court, and the sole remedy is by appeal or writ of error... *If [a finding of jurisdiction] rests upon a determination of fact, prohibition will not lie.*

114 W.Va. at 154, 171 S.E. at 107 (emphasis added). *See also State ex rel. Zirk v. Muntzing*, 146 W.Va. 878, 894, 122 S.E.2d 851, 860 (1961) (“[W]here... the jurisdiction of the circuit court depends upon disputed questions of fact, that court has the right to determine its own jurisdiction from the facts before it, and prohibition will not be granted to prevent it from doing so.”); Syl. pt. 1, *Downs v. Lazzelle*, 102 W.Va. 663, 136 S.E. 195 (1926) (“Prohibition will not lie against an inferior court or a judge thereof to deprive it or him of the right to pass upon the extrinsic facts determinative of jurisdiction.”); *Stewart v. State Road Comm’n of West Virginia*, 117 W.Va. 352, 185 S.E. 567 (1936), *overruled on other grounds*. Contrary to Ford’s assertion, the relevant facts are highly disputed, and resolution of the present issues turns primarily on determination of fact. Should this Court determine that further development of the underlying facts is necessary, it may remand this matter to the Circuit court for discovery proceedings.

## **ARGUMENT**

### **I. Ford is Subject to Jurisdiction Under West Virginia's Long-Arm Statutes and the Due Process Clause of the Fourteenth Amendment**

Under West Virginia law, this Court employs a two-step approach to determine whether a court has the authority to assert personal jurisdiction over a foreign defendant, such as Ford. The first step involves determining whether Defendant Ford's actions satisfy the West Virginia long-arm statutes, set forth in W. Va. Code § 56-3-33 and § 31D-15-1501; the second step involves determining whether Defendant Ford's contacts with West Virginia satisfy federal due process. *Nezan v. Aries Technologies, Inc.*, 226 W.Va. 631, 637, 704 S.E.2d 631, 637 (2010) (citing *Abbot v. Owens-Corning Fiberglas Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (1994)).

#### **A. Ford is Subject to Jurisdiction under West Virginia's Long-Arm Statutes**

The Circuit Court has the authority pursuant to the applicable West Virginia long-arm statutes, set forth at W. Va. Code § 56-3-33 and § 31D-15-1501, to assert personal jurisdiction over Ford. The first, general long-arm statute, pursuant to West Virginia Code § 56-3-33(a) (2008), confers *in personam* jurisdiction on a nonresident when one of the following applies:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or things in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he or she 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;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: *Provided*, That he or she also 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;
- (6) Having an interest in, using or possessing real property in this state; or
- (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

The second long-arm statute, of a more narrow applicability, is West Virginia Code § 31D-15-1501 (2008), which defines when a foreign corporation is doing business in the state for purposes of asserting *in personam* jurisdiction. The statute specifies as follows:

- (d) A foreign corporation is deemed to be transacting business in this state if:
- (1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this state;
  - (2) The corporation commits a tort, in whole or in part, in this state; or
  - (3) The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this state notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this state at the time of the injury.

*In personam* jurisdiction may be obtained over Ford under either or both long-arm statutes. See *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992) (applying both the general and corporation-specific long-arm statutes to a foreign defendant-manufacturer). While Ford correctly asserts that the West Virginia long-arm statutes are co-extensive with the full reach of due process, Pet'r's Br. 13 (citing *In re Celotex Corp. v. Rapid Am. Corp.*, 123 F.3d 619, 627-28 (4th Cir. 1997); *Leslie Equip. Co. v. Wood Res. Co.*, 224 W.Va. 530, 534 n. 14, 687 S.E.2d 109, 115 n. 14 (2009)), Ford has not challenged the Circuit Court's authority pursuant to West Virginia's long-arm statutes, and therefore has waived any such challenge. That said, a brief analysis of West Virginia's long arm statutes for the sake of comprehensiveness follows.

The Circuit Court has authority under its general long-arm statute under § 56-3-33(a)(1)-(2) and (4)-(5) to assert jurisdiction over Ford. Ford has conceded in previous litigation in the State of West Virginia that it is authorized to and transacts business in West Virginia. See Compl. ¶ 5, Ford's Ans. ¶ 5, *Haynes v. Ford Motor Co.*, Civil Action No. 15-C-824 (Cir. Ct. Kanawha County Apr. 30 2015) (attached to Resp't's App. 119-135, 136-164); Compl. ¶ 6, Ford's Ans. ¶ 6, *Jones v. Ford Motor Co.*, Civil Action No. 15-C-710 (Cir. Ct. Kanawha County

Apr. 13 2015) (attached to Resp't's App. 165-179, 180-202). Accordingly, the Circuit Court may assert jurisdiction over Ford pursuant to § 56-3-33(a)(1). Ford also concedes that it enters into contracts with dealerships in the State of West Virginia to supply Ford vehicles to consumers in West Virginia. *See* Aff. of Shawn McDermott ¶ 8, Pet'r's App. 108-109. Accordingly, the Circuit Court may assert jurisdiction over Ford pursuant to § 56-3-33(a)(2). Furthermore, Plaintiff alleges that Defendant Ford caused tortious injury in West Virginia as a result of product defects and breach of warranty; Ford derives substantial revenue from goods used or consumed or services rendered in West Virginia; and Ford regularly does and solicits business in West Virginia. *See* Pl.'s Compl. ¶¶ 5, 9, 39-89, Pet'r's App. 10-11, 15-28. Accordingly, the Circuit Court may assert jurisdiction over Ford pursuant to § 56-3-33(a)(4)-(5).<sup>13</sup>

The Circuit Court also has jurisdictional authority under the corporation-specific long-arm statutes, W.Va. Code §§ 31D-15-1501(d)(1) and (3). Ford, through its wholly-owned subsidiary Ford Motor Credit Co., obtained a security interest on a loan to Ramey Automotive Group, Inc. in 2004, which has remained active. *See* Resp't's App. 101. Accordingly, the Circuit Court may assert jurisdiction over Ford pursuant to § 31D-15-1501(d)(1). Furthermore, Plaintiff alleges that Defendant Ford manufactured a defective product which caused injury to Plaintiff within West Virginia. Accordingly, regardless of whether Ford has agents, servants or employees within West Virginia, the Circuit Court may assert personal jurisdiction over Ford pursuant to W. Va. Code § 31D-15-1501(d)(3).<sup>14</sup> *See* Pl.'s Compl. ¶¶ 39-62, Pet'r's App. 13-21.

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<sup>13</sup> Similarly, in *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992), this Court determined that it had authority pursuant to the West Virginia long-arm statute to assert jurisdiction over a Japanese manufacturer where the defendant derived substantial revenue from its product being purchased and used in West Virginia, and because the defendant, through its U.S. distributor, solicited business in West Virginia. *Id.* at 661, 425 S.E.2d at 616.

<sup>14</sup> Similarly, in *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992), this Court determined that it had authority pursuant to the West Virginia corporation-specific long-arm statute to assert

Because the Circuit Court has the authority pursuant to the applicable West Virginia long-arm statutes, set forth at W. Va. Code § 56-3-33 and § 31D-15-1501, to assert personal jurisdiction over Ford, the next step is to determine whether Ford has sufficient contacts with the State of West Virginia under a due process analysis.

**B. Ford is Subject to Jurisdiction under a Due Process Analysis**

A due process analysis reveals that the Circuit Court has the authority under the Constitution to assert personal jurisdiction over Ford. The Due Process Clause of the Fourteenth Amendment permits a court to assert personal jurisdiction over an out of state defendant only when the defendant has sufficient contacts with the forum State, so that it will be “fair and just to require a defense to be mounted” there. *Nezan v. Aries Technologies, Inc.*, 226 W.Va. 631, 638, 704 S.E.2d 631, 638 (2010) (quoting Syl. pt. 2, *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991)). The degree to which those contacts must be in terms of quality and nature depends on whether or not the litigation arises out of or relates to those contacts. *International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L.Ed. 95 (1945). When the litigation is unrelated, a forum State court may obtain general jurisdiction over a foreign defendant when the defendant’s contacts with the forum can be said to be “systematic and continuous.” *Id.* at 320, 66 S. Ct. at 160. When the litigation arises out of or relates to the defendant’s contacts with the forum State, a court may obtain specific jurisdiction over a foreign defendant so long as the defendant has purposefully directed its conduct at the forum State. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 297, 62 L.Ed.2d 490 (1980). In the present case, the Circuit Court may assert either general or specific personal jurisdiction over Ford.

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jurisdiction over a foreign manufacturer where the plaintiff alleged injury in West Virginia from product defect. *Id.* at 660, 425 S.E.2d at 615.

## **1. Ford is Subject to Specific Jurisdiction in the Present Matter**

The Circuit Court has the authority to assert specific jurisdiction over Ford because Ford has purposefully directed its conduct towards West Virginia, the litigation arises out of or relates to those contacts, and it would be reasonable and just to require Ford to defend itself here. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 297, 62 L.Ed.2d 490 (1980).

### **a. Ford has purposefully directed its conduct towards West Virginia**

#### **i. The Circuit Court has authority to subject Ford to specific jurisdiction pursuant to U.S. Supreme Court and West Virginia precedent**

In product liability actions, as here, a defendant purposefully directs conduct towards a forum State by placing its product into the “stream of commerce” with an expectation that the product will be purchased and used by consumers in the forum state. *World-Wide*, 444 U.S. 286, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980). In *World-Wide Volkswagen Corp.*, the leading case on specific jurisdiction, the U.S. Supreme Court addressed whether a foreign automobile retailer and distributor could be subjected to personal jurisdiction in Oklahoma where their only connection to Oklahoma was the fact that the plaintiffs were involved in an automobile collision in Oklahoma. *Id.* At 287, 100 S. Ct. at 562. The Court set forth the rule 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.”<sup>15</sup> *Id.* at 297-98; 100 S. Ct. at 567. The Court further stated:

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<sup>15</sup> The Court furthermore explained the following:

When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there, and can act to

[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 owners or to others.

*Id.* at 297, 100 S. Ct. at 567. In its reasoning, based on crucial findings of fact that defendants neither sold nor distributed vehicles to Oklahoma, closed no sales in Oklahoma, and solicited no business from the Oklahoma market, the Court determined that the defendants lacked sufficient contacts, ties, or relations with Oklahoma to assert specific jurisdiction. *Id.* at 295, 312, 100 S. Ct. at 556, 568. Nonetheless, the rule set forth in *World-Wide*, known as the “stream of commerce” theory, has become widely implemented.

After *World-Wide*, the first U.S. Supreme Court decision to involve the issue of specific jurisdiction and stream of commerce theory was *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 107 S. Ct. 1026, 94 1.Ed.2d 92 (1987). In *Asahi*, the Court held that a Japanese manufacturer of tire valve assemblies which sold its product to a Japanese manufacturer of tires, which in turn sold its tires to consumers in California, was not subject to personal jurisdiction for product liability actions in California. *Id.* at 108, 107 S. Ct. at 1030. However, the Court was divided in its reasoning.

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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.

*Id.* at 297-98, 100 S. Ct. at 567 (internal citations and quotation marks omitted).

Justice Brennan, authoring the opinion joined by Justices White, Marshall and Blackmun, concluded that simply placing goods into the stream of commerce is evidence of purposeful availment “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State.”<sup>16</sup> *Id.* at 117, 107 S. Ct. at 1035. That is, “mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the steam of commerce” is sufficient for due process. *Id.* at 107, 107 S. Ct. at 1028. Accordingly, because the Japanese manufacturer actually knew and expected its product to be sold and consumed in California, Justice Brennan reasoned that the defendant had “purposefully engaged in forum activities” and availed itself of the California market.<sup>17</sup> *Id.*

On the other hand, Justice O’Connor offered a separate opinion, joined by the Chief Justice and Justices Powell and Scalia, holding that in addition to placement of a product into the stream of commerce with the expectation that the product will be marketed in the forum state, a plaintiff must establish some affirmative conduct by the defendant which suggests an intent to serve the forum market. *Id.* at 112, 107 S. Ct. at 1032. In so holding, Justice O’Connor seemed to expand the rule that had been set down in *World-Wide Volkswagen Corp.* *Id.* at 120, 107 S. Ct. at 1036. Justice O’Connor explained that additional conduct may consist of “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.*

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<sup>16</sup> Similarly, Justice Stevens concluded that Justice O’Connor’s opinion “misapplies [the test] to the facts of this case.” *Id.* At 122, 107 S. Ct. at 1037 (Stevens, J.). He concluded that Asahi’s conduct did indeed rise to the level of “purposeful availment.” *Id.*

<sup>17</sup> Nonetheless, Justice Brennan found that the Court lacked authority to assert personal jurisdiction on account of notions of fairness and justice. *Id.*

In the post-*Asahi* period, some jurisdictions have followed the stream of commerce theory as set forth in *World-Wide Volkswagen Corp.* and reaffirmed by Justice Brennan's opinion in *Asahi*, while other jurisdiction have followed the more stringent "additional conduct" test set forth in Justice O'Connor's opinion. See *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (following the *World-Wide Volkswagen* analysis); *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 176-78 (5th Cir. 2013), *cert denied*, 134 S. Ct. 644, 187 L.Ed.2d 420 (2013) (following the *World-Wide Volkswagen* analysis); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358 (Fed. Cir. 2012) (acknowledging that the split opinions in *Asahi Metals Indus. Co.* and *J. McIntyre Machinery* do nothing to change the pre-existing precedent as set forth in *World-Wide Volkswagen Corp.*).

The WVSCA has held, consistent with the rule set forth in *World-Wide* and followed-up on by Justice Brennan in *Asahi*, 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." *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 661, 425 S.E.2d 609, 616 (1992), *cert. denied*, 508 U.S. 908, 113 S. Ct. 2338, 124 L.Ed.2d 249 (1993) (quoting *Asahi*, 480 U.S. at 117, 107 S. Ct. at 1034.) This is West Virginia precedent derived from the U.S. Supreme Court holdings in *World-Wide* and *Asahi*, and absolutely is the rule to apply in the case at hand.

In *Hill*, the WVSCA addressed the application of the stream of commerce theory in a case involving similar facts and particularly a similar distribution network as this case. There, a plaintiff who became ill while taking a drug brought suit against the manufacturer of that drug, Showa Denko, K.K.. *Id.* at 656, 425 S.E.2d at 611. Showa Denko, K.K., a Japanese corporation, distributed its drug through a wholly-owned American subsidiary, Showa Denko America, Inc.,

who in turn supplied the drug to another distributor, P. Leiner Nutritional Products, who in turn supplied the drug to Rite-Aid Pharmacies, where the plaintiff purchased the drug from. *Id.*

Applying the principles as set forth under *World-Wide Volkswagen* and *Asahi*, the WVSCA make several key determinations: (1) Showa Denko, K.K., had an established distribution system for its product; (2) Showa Denko, K.K., through its wholly-owned subsidiary, distributed its product throughout the U.S.; (3) Showa Denko, K.K., retained control of the entire U.S. distribution as it had the ability to halt distribution of a defective product; (4) Showa Denko, K.K., through its U.S. distributor, clearly solicited business in West Virginia; (5) West Virginia has a substantial and legitimate interest in exercising personal jurisdiction over manufacturers of products where defects lead to injury in West Virginia; and (6) the fact that Showa Denko, K.K., exerted the effort required to set up a distribution system in the U.S. and that would be directed towards West Virginia was sufficient evidence that the “notions of fair play and substantial justice” would require the WVSCA to exert personal jurisdiction. *Id.* at 660-61, 425 S.E.2d at 615-16. The reasoning as set forth in *Hill* should lead this Court’s analysis of the present case.

In line with West Virginia precedent, a West Virginia court may assert jurisdiction over Ford because Ford held an expectation that its vehicles would be marketed in West Virginia. Ford has an established distribution system for its products; Ford contracts with dealerships in West Virginia to sell its products; Ford retains control over the distribution of its products, and actively chooses to distribute its product in West Virginia; West Virginia has a substantial and legitimate interest in asserting personal jurisdiction over Ford and providing its residents a forum to litigate their claims; and notions of fair play and substantial justice comport with asserting jurisdiction as Ford actively litigates and defends suits in West Virginia, contracts to defend

dealers in West Virginia litigation, and would be no more burdened in terms of resources as it would be to defend against suit in Michigan. Ford has “purposefully engaged in forum activities” and has availed itself of the West Virginia market. Ford is not only aware that its products are being marketed in West Virginia, but Ford itself established the market in West Virginia. *See Asahi*, 480 U.S. at 117, 107 S. Ct. at 1035. Ford’s awareness of its product being marketed and sold in West Virginia, even without all of the extensive contacts that Ford has here, is sufficient to satisfy due process requirements for personal jurisdiction. *Hill*, 188 W.Va. at 661, 425 S.E.2d at 616; 480 U.S. at 117, 107 S. Ct. at 1035; *World-Wide*, 440 U.S. at 297-98, 100 S. Ct. at 567.

Ford incorrectly asserts that “this Court rejected this ‘stream of commerce’ theory in *Griffith v. ConAgra Brands, Inc.*” and that “purposeful direction” cannot be satisfied by placing a product into the stream of commerce, “except in rare circumstances not present here.” Pet’r’s Br. 20. The *Griffith* Court barely touched upon the stream of commerce theory, did not reject Justice Brennan’s reasoning as followed in *Hill*, and is highly distinguishable from the present case.

In *Griffith*, this Court heard an appeal from the Circuit Court of Berkeley County which had set aside a tax assessment for unpaid corporation net income tax and business franchise tax relating to royalties received on trademarks. 229 W.Va. 190, 191, 728 S.E.2d 74, 75 (2012). ConAgra Brands received royalties for third-party licensees using trade names such as Country Skillet, Butterball, Kid Cuisine, or Morton. *Id.* at 192, 728 S.E.2d at 76. West Virginia assessed tax on royalties received by ConAgra Brands for profits derived from licensees for use of trade names in West Virginia. *Id.* at 194, 728 S.E.2d at 78.

On appeal, the issue heard was whether a tax could be upheld under either the Due Process clause or the Commerce clause. Regarding due process, the Tax Commissioner argued that ConAgra Brands placed trademarks into the “stream of commerce” with the expectation that

products bearing its trademarks would be sold and used in West Virginia. *Id.* at 198-99, 728 S.E.2d at 82-83. This Court distinguished the facts in *Griffith* from *Hill v. Showa Denko, K.K.* *Id.* at 199, 728 S.E.2d at 83. Whereas in *Hill* this Court found a Japanese manufacturer subject to personal jurisdiction when it distributed its goods into West Virginia through a wholly-owned American distributor, *Griffith* involved companies transferring their trade names to ConAgra Brands on agreement that they would pay ConAgra Brands royalties for use of those trade names – but ConAgra Brands did not create the trade names; ConAgra Brands was in no way involved with the manufacture, distribution, sale, or solicitation of products bearing such trade names; and ConAgra Brands had no ability to halt the manufacture, distribution, sale, or solicitation of products bearing its trade names. *Id.* Unlike the distributor in *Hill*, ConAgra Brands acquired trademarks and trade names from unrelated entities, *Id.*, and was not simply a shell corporation for these companies that were doing the manufacture, distribution, sale, or solicitation. *Id.*

*Griffith* has absolutely nothing to do with the present matter, and thus Ford’s assertions about *Griffith* are wholly incorrect and provide no support to its position. *Hill v. Showa Denko, K.K.*, and its application of Justice Brennan’s reasoning from *Asahi*, is the law of the land in West Virginia on this issue.

**ii. The Fourth Circuit’s approach to *Asahi* is not binding, but nevertheless Ford’s contacts satisfy the “additional conduct” standard**

Where, as here, this Court has appropriately chosen to follow Justice Brennan’s opinion in *Asahi*, Fourth Circuit jurisprudence following Justice O’Connor’s opinion is not binding. Nevertheless, because this Court gives reverence to Fourth Circuit jurisprudence, application of Justice O’Connor’s “additional conduct” standard regarding the stream of commerce theory is

discussed below. Even under this approach, Ford's contacts with West Virginia would grant this Court the authority to assert personal jurisdiction.

In *Lesnick v. Hollingsworth & Vose*, the Fourth Circuit court ruled that a foreign defendant does not direct its conduct toward a forum State when it is merely aware that its product is being marketed there. 35 F.3d 939, 947 (1994). *Lesnick* involved a products liability suit brought in Maryland against a nonresident manufacturer of cigarette filters, Hollingsworth & Vose, which had sold filters to Lorillard, the manufacturer of Kent cigarettes, which in turn distributed cigarettes throughout the nation. *Id.* at 940. Although the court found that Hollingsworth & Vose knew that its filters would be sold to Maryland residents, the court reasoned that all of its contacts to Maryland were indirectly established through the cigarette manufacturer, Lorillard, and therefore none of its conduct was directed towards the state of Maryland. *Id.* at 946-47. The court apparently sided with Justice O'Connor's opinion in *Asahi*, and found that the defendant was not subject to personal jurisdiction. *Id.* at 947.

Even under the "additional conduct" standard set out in Justice O'Connor's opinion in *Asahi* and followed by the Fourth Circuit in *Lesnick*, Ford's contacts with West Virginia establish much more than "mere awareness" of its product being marketed in West Virginia. Unlike in *Lesnick*, Ford contracts directly with dealerships in West Virginia; Ford sends representatives to West Virginia for warranty issues and goodwill repairs; Ford finances the dealerships in West Virginia that sell its vehicles; Ford finances customers in West Virginia; Ford advertises in West Virginia, directly and through its dealerships; Ford sends recall notices to West Virginia residents who own Ford vehicles; Ford sends technical services bulletins to its dealerships in West Virginia directing its dealerships on how to repair and service its vehicles; Ford trains and certifies mechanics for its West Virginia dealerships; Ford certifies dealerships

for certain types of repairs; Ford operates and maintains websites for its dealerships in West Virginia; and Ford has agreed to indemnify its dealerships and defend those dealerships in West Virginia against the types of lawsuits at issue here. All of these facts establish that Ford exhibits action “purposefully directed toward” West Virginia with an intent to serve the West Virginia market. *See id.* at 945. Ford does not simply sell component parts to a single distributor who in turn sells Ford vehicles throughout the country; Ford directly sends its manufactured vehicles into every State, including West Virginia, through its Ford-created network of dealers. Accordingly, whether this Court follows its own precedent or chooses to adopt the Fourth Circuit “additional conduct” standard, Ford’s contacts with West Virginia are sufficient to grant the Circuit Court jurisdiction over Ford.

**iii. J. McIntyre does not prevent this Court from applying West Virginia precedent**

Ford also argues in its Petition that regardless of whether this Court finds Fourth Circuit jurisprudence persuasive, the U.S. Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastrò* rejected the rule applied in *Hill v. Showa Denko, K.K.*. *See* 131 S. Ct. 2780, 180 L.Ed.2d 765 (2011). However, contrary to Ford’s interpretation, *J. McIntyre* involved another split decision with highly distinguishable facts and no single rationale binding on this Court. Accordingly, West Virginia’s precedent holding 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,” is still good law and the right rule to apply in this case. *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 661 (1992) (quoting *Asahi*, 480 U.S. at 117, 107 S. Ct.at 1034.). Such a rule, as examined above, leads to the conclusion that this Court has the authority to assert jurisdiction over Ford. Nevertheless, as discussed below, even if this Court were to accept the most stringent

rationale as set forth in *J. McIntyre*, which is consistent with both Justice O'Connor's opinion in *Asahi* and Fourth Circuit jurisprudence, the Circuit Court still would have the authority to obtain jurisdiction over Ford.

In *J. McIntyre*, the Court concluded that a New Jersey court lacked authority to assert personal jurisdiction over an out-of-country manufacturer of metal machines where the defendant's only contacts involved: (1) an American distributor that had on one occasion sold and shipped one machine to New Jersey; (2) the out-of-country manufacturer wanted its American distributor to sell its machines to anybody in America; and (3) representatives of the manufacturer attended trade shows in cities such as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. 131 S. Ct. at 2785-86, 2791. These limited facts are highly distinguishable from those in the present case.

In the four-Justice plurality opinion authored by Justice Kennedy, the Court reasoned that the plaintiff had not established conduct on the part of the manufacturer purposefully directed at New Jersey. *Id.* at 2790. "These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market." *Id.* In language somewhat similar to that of Justice O'Connor's opinion in *Asahi*, Justice Kennedy wrote:

The principal inquiry in cases of this sort is whether the defendant's activities manifest and intention to submit to the power of a sovereign... The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum state.

*Id.* at 2788. However, Justice Kennedy cautioned that Justice O'Connor's opinion in *Asahi* "does not by itself resolve many difficult questions of jurisdiction," because "[t]he defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle." *Id.* at

2790. Justice Kennedy also took pains to emphasize that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis,” and the crucial determination of whether to assert personal jurisdiction is for the forum State to make. *Id.* at 2789.

In contrast to Justice Kennedy’s plurality opinion, Justice Breyer, joined by Justice Alito, concurred in the judgment but emphasized that it would be “unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.” *Id.* at 2791. Justice Breyer noted, “[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.” *Id.* at 2792. One reason why a single sale to a consumer in the forum State could be insufficient is that without having any prior sales in the forum, without sending representatives to the forum, without advertising in the forum, a hope for a sale is only a hope and not a “reasonable expectation.” *Id.* (finding it had not been shown that the manufacturer’s products were placed into the stream of commerce “with the expectation that they will be purchased” by New Jersey users).

Justice Ginsberg, in a dissenting opinion joined by Justices Sotomayor and Kagan, concluded that *International Shoe Co.* found that due process was satisfied. *Id.* at 2794. The purpose of the “purposeful availment” requirement, Justice Ginsberg explained, “simply ‘ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.’” *Id.* at 2801 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 475, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)). “How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?” *Id.*

When, as in *J. McIntyre*, “a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as

that position taken by those Members who concurred in the judgment on the narrowest grounds...” *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L.Ed.2d 260 (1977) (internal quotation marks omitted) (ellipsis in original); accord *Panetti v. Quarterman*, 551 U.S. 930, 949, 127 S. Ct. 2842, 168 L.Ed.2d 662 (2007) (following *Marks*). Applying this rule, Justice Breyer’s opinion concurring in the judgment controls proper resolution of the present case.

Justice Breyer’s opinion relies on U.S. Supreme Court precedent and does not attempt to expand the rules that had previously been set forth. Accordingly, the same precedents that Justice Breyer had been relying on were relied on by the WVSCA in deciding *Hill v. Showa Denko, K.K.*, and therefore *Hill* is still good law. As previously discussed, application of West Virginia case law results only in the conclusion that Ford is subject to the jurisdiction of this Court.

Moreover, even if this Court were to accept the more stringent rationale employed by Justice Kennedy in *J. McIntyre*, which is essentially that applied by the Fourth Circuit in *Lesnick* and of Justice O’Connor in *Asahi*, still a West Virginia court, as has previously been discussed, does have the authority to subject Ford to specific jurisdiction in the present matter.

**b. The litigation arises out of and or relates to Ford’s contacts with West Virginia**

Plaintiff’s lawsuit arises out of or relates to Ford’s contacts with West Virginia. On page 23 of Petitioner’s brief, Ford argues that, “even if some of the West Virginia activity plaintiff has identified were conducted by Ford (and not independent dealers), plaintiff also cannot show that his claims ‘arose out of or resulting from [those] forum related activities,’ as is required for any claim to specific jurisdiction.” Pet’r’s Br. 23. But this cannot be so, as Ford’s principle business involves selling vehicles and this suit involves a defective Ford vehicle causing injury.

Although Ford cites no authority discussing how the issue of “arising out of-relating to” has been determined, it appears that neither the U.S. Supreme Court nor the WVSCA have

addressed this precise issue. However, there is a Fourth Circuit opinion of value. *See Yates v. Motivation Indus. Equip. Ltd.*, 38 Fed.Appx. 174, 2002 WL 1343251 (4th Cir. 2002). There, the court stated:

In determining whether a claim arises out of forum-related activities, circuits have applied different tests. For example, the Ninth Circuit applies a “but for” test, where courts consider whether a plaintiff's claims would have arisen but for the defendant's contacts with the forum state. *See Doe I. v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir.2001). On the other hand, the Sixth Circuit does not require that “the cause of action formally ‘arise from’ defendant's contacts with the forum; rather, this criterion requires only ‘that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities.’ ” *Bird v. Parsons*, 289 F.3d 865, 2002 WL 1012175, \*7 (6th Cir.2002).

*Id.* at 178 n. 6. The court in *Yates* considered applying the less stringent “substantial connection” test. *Id.*

Applying the less stringent, less formal “substantial connection” test, it is clear based on the common understanding of “relating to” that Plaintiff’s claims bear a substantial connection to Ford’s contacts in West Virginia.<sup>18</sup> Even under the “But For” test, it is clear that Plaintiff’s claims arise out of or relate to Ford’s contacts: But for the Plaintiff having viewed Ford

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<sup>18</sup> One recent state court decision denying Ford’s motion to dismiss for lack of personal jurisdiction, which involved substantially similar facts as here (vehicle not originally sold within the forum State), reasoned as follows:

Ford argues that it lacks the requisite contacts to support the exercise of jurisdiction because the vehicle was not originally sold or manufactured in South Carolina. This argument is misplaced and does not properly apply the stream of commerce theory. The stream of commerce theory is not focused on a particular product, but on actions by a manufacturer to serve a market for its products. Because Ford manufactured and sold the subject vehicle with the reasonable expectation that it would be used in South Carolina and this action arises from the product’s use in South Carolina, Ford has sufficient contacts in South Carolina such that the exercise of jurisdiction comports with due process under the stream of commerce theory. Ford has intentionally sought to serve a nation market, including South Carolina. It comes as no surprise that the subject Ford Explorer was swept into South Carolina through the natural currents of the stream of commerce.

*Harper v. Bridgestone Americas Tire Opers.*, No. 2015-CP-40-4650 (S.C. Ct. Com. Pl. Richland County Dec. 1, 2015), attached to Resp’t’s App. 268.

advertisements that were directed into West Virginia by Ford, Plaintiff would not have purchased the subject 2002 Ford Explorer; But for Ford distributing their 2002 Ford Explorers into West Virginia, Plaintiff would not have observed friends and neighbors driving them, and Plaintiff would not have desired to purchase a 2002 Ford Explorer; But for the popularity of 2002 Ford Explorers that Defendant Ford created through advertising and distribution, Plaintiff would not have cared to purchase a 2002 Ford Explorer; But for Ford establishing a network of dealerships in West Virginia for the sale of Ford vehicles, Plaintiff would not have been interested in a Ford vehicle; But for Ford financing Ramey Automotive Group, Inc., which purchased the 2002 Ford Explorer and then re-sold it to MacArthur which then re-sold it to Plaintiff, Plaintiff would not have received the subject 2002 Ford Explorer; But for Ford serving the West Virginia market, Ford would not have held its place as a nationally-recognized seller of automobiles, and Plaintiff would have found a 2002 Ford Explorer to be unreliable and would have purchased something else; But for Ford certifying dealerships and training technicians to service and repair Ford vehicles in West Virginia, Plaintiff would not have been willing to purchase the subject vehicle; But for Ford fulfilling its obligations in the past by sending out recall notices to owners of Ford vehicles in West Virginia, Plaintiff would not have trusted Ford and would have purchased another vehicle. Application of the “But For” test necessitates asserting personal jurisdiction over Ford and denying its writ of prohibition.

Lastly, *Pitts v. Ford Motor Co.*, 2015 WL 5256838 (S.D. Miss. Aug. 26, 2015), relied upon by Ford, is highly distinguishable from the case at hand. There, a Texas resident purchased a Ford vehicle in Texas and was involved in a collision while traveling in Mississippi. *Id.* at \*7. “James Pitts unilaterally transported the automobile to Biloxi, Mississippi, where Plaintiffs claim they were injured as a result of defects in the automobile. Plaintiffs have not demonstrated a

meaningful connection between Plaintiffs' injuries and the Mississippi contacts..." *Id.* In the case at hand, Plaintiff, a West Virginia resident, purchased the 2002 Ford Explorer in West Virginia, and suffered damages as a result of injury occurring in West Virginia.<sup>19</sup>

**c. Requiring Ford to defend itself in this action in West Virginia does not offend traditional notions of fairness and justice**

Ford fails to argue that notions of substantial justice and fair play prevent this Court from asserting personal jurisdiction, and accordingly Ford has waived this argument. Nonetheless, an examination of several factors including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," *Asahi*, 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, demonstrate that asserting personal jurisdiction over Ford is proper. The burden on Ford is no more than it would be in Michigan, as Ford actively litigates and defends lawsuits in West Virginia and agrees to indemnify and defend its dealers in West Virginia. Second, West Virginia has a great interest in asserting personal jurisdiction over Ford in this Case, as this state allows Ford to sell its vehicles in West Virginia to West Virginia residents, and West Virginia has an interest in protecting its residents. Third, the Plaintiff has a substantial interest in obtaining relief, and requiring the Plaintiff to litigate in Michigan would be so overly burdensome that it could prevent the Plaintiff from litigating this case at all. Accordingly, when these considerations are taken into account, it is clear that a West Virginia court has the authority to assert jurisdiction over Ford. Accordingly, this Honorable Court should deny Ford's Writ.

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<sup>19</sup> *Pitts*, if anything, stands merely for the proposition that Ford "deliberately targeted the State of Mississippi and purposefully availed itself of the privilege of conducting business activities within the State of Mississippi" by (1) registering an agent for process in Mississippi; (2) holding a certificate of Good Standing in Mississippi; (3) holding manufacturer licenses issued by Mississippi; (4) maintain a website; (5) submitting a promotion video directed to Mississippi; and (6) selling vehicles through franchise dealerships in Mississippi. *Id.* at \*6. If Ford cites *Pitts* for authority, it should be bound by the court's reasoning relating to the issue of purposeful availment. And, at least in that respect, *Pitts* is similar to the case now before this court. Ford's petition for writ of prohibition must, therefore, be denied.

## **2. Ford is Subject to General Jurisdiction in West Virginia**

### **a. Ford is subject to general jurisdiction under long-standing U.S. Supreme Court precedent**

The Supreme Court in *International Shoe Co. v. Washington*, relying on *Pennoyer v. Neff*, recognized general jurisdiction as one of the two basic types of jurisdiction under the minimum contacts analysis. *Int'l Shoe Co.*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945); *Pennoyer*, 95 U.S. 714, 24 L.Ed. 565 (1877). General jurisdiction, which subjects a defendant to suits unrelated to its contacts with a forum State, may be asserted over a foreign defendant when its activities in the forum State are “systematic and continuous,” as opposed to “irregular [or] casual.” *Id.* at 320, 66 S. Ct. at 160. The Court ruled that this is so because by accepting the privilege of conducting activities within a forum State, it not only enjoys the protections and benefits of the laws of the State but also takes on obligations within the state, such as the responsibility to respond to lawsuits. 326 U.S. at 319, 66 S. Ct. at 160. Ultimately, the Court found that a Delaware shoe corporation, having its principal place of business in Missouri, was subject to suit in the state of Washington under a general jurisdiction analysis because it employed salesman residing in Washington, regularly engaged in solicitation of orders, and paid commissions to salesmen. *Id.* at 321, 66 S. Ct. at 161. Under this rule, asserting jurisdiction over such a defendant comports with notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment.

Post-*International Shoe*, the U.S. Supreme Court addressed the issue of general jurisdiction in *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L.Ed. 485 (1952). There, the Supreme Court concluded that a Philippine’s corporation, with its principal place of business in the Philippines, was subject to general jurisdiction because it carried on activities in Ohio consisting of directors’ meetings, business correspondence, banking, stock

transfers, payment of salaries, and purchasing of machinery. *Id.* at 447-48, 72 S. Ct. at 419. The Court applied the rule that had been set out in *International Shoe* requiring “systematic and continuous” contacts. The Court also added to that rule, by emphasizing in its decision, that to assert personal jurisdiction over a defendant is a decision reserved the forum State’s courts. *Id.* at 448, 72 S. Ct. at 420 (“Consideration of the circumstances which, under the law of Ohio, ultimately will determine whether the courts of that State will choose to take jurisdiction over the corporation *is reserved for the courts of that State.*”) (emphasis added).

General jurisdiction was addressed again in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, in 1984. 466 U.S. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984). The Court, citing to *International Shoe* and *Perkins*, re-affirmed the required showing of “systematic and continuous” contacts. *Id.* at 415, 104 S. Ct. at 1872. There, Texas residents brought a product liability suit in Texas against a Colombian corporation with a principal place of business in Colombia, for injuries sustained as a result of a helicopter crash in Peru. *Id.* at 409-10, 104 S. Ct. at 1869-70. Finding that Helicol’s contacts with Texas consisted of sending its CEO to Houston for a contract negotiation, accepting checks in its US bank account checks drawn on a Houston bank, purchasing helicopters and parts from a helicopter company in Texas, and sending personnel to Texas for training, the Court found that the foreign defendant lacked “systematic and continuous” contacts such that it could be held to respond to unrelated lawsuits in Texas. Crucial to its holding was the rationale that “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of” general jurisdiction. *Id.* at 418, 104 S. Ct. at 1874.

Considering these precedents, the rule to be applied in the case at hand requires that, in order to assert general jurisdiction over Ford and require Ford to respond in West Virginia to lawsuits even unrelated to its contacts in West Virginia, Ford must have “systematic and

continuous” contacts in West Virginia, with such a determination being reserved for the courts of the State of West Virginia, and such contacts cannot be based solely on purchases. Application of this rule here demonstrates that Ford is subject to general jurisdiction in West Virginia.

Just as the Court in *International Shoe* relied on such contacts as engaging salesmen in the forum State, paying salesmen commissions in the forum State, and soliciting business in the forum State, *see* 326 U.S. 310, 320, 66 S. Ct. 154, 160, so too the Circuit Court has the authority to find that Ford is subject to general jurisdiction based on its contacts involving the financing of dealerships in West Virginia, contracting with dealerships in West Virginia, and soliciting business in West Virginia. Among other things, Ford also finances consumer purchasers of its vehicles in West Virginia; sends representatives to West Virginia for goodwill and warranty repairs; trains and certifies mechanics and dealerships in West Virginia; signs indemnity contracts with dealerships in West Virginia; and sends recall notices to owners of its vehicles in West Virginia. When compared to what was needed in order to satisfy the “systematic and continuous” standard in *International Shoe*, here Ford’s contacts are much more systematic.

Ford’s contacts are also much more “continuous” than the contacts that were relied upon in *Perkins*. 342 U.S. 437, 72 S. Ct. 413. In *Perkins*, the U.S. Supreme Court determined that general jurisdiction could be asserted over a Phillipines’ corporation, even when absolutely none of its principal business (mining) was being conducted in Ohio; the only business being conducted in Ohio involved executive-type activities, and these activities were only being carried on temporarily. 342 U.S. 437, 447-48, 72 S. Ct. 413, 419-20. On the other hand, in the present case, Ford has been carrying on its primary activities (of selling automobiles) in West Virginia for decades, and therefore has much stronger contacts with West Virginia than the defendant in *Perkins* had with Ohio.

According to U.S. Supreme Court precedent, the Circuit Court has appropriately found that general jurisdiction over Ford exists. Ford has the requisite “systematic and continuous” contacts to be haled into court in West Virginia even on unrelated causes of action.

**b. Daimler AG v. Bauman does not overrule long-standing U.S. Supreme Court precedent, and moreover it is distinguishable**

*Daimler AG v. Bauman*, a recent U.S. Supreme Court decision that entertains the issue of general jurisdiction, does not reject any of the rules or rationales employed in *International Shoe*, *Perkins*, or *Helicopteros* as relating to application of general jurisdiction. See 134 S. Ct. 746, 187 L.Ed.2d 624 (2014). Nowhere in the *Daimler* decision does the Court state that it is overruling prior precedent; the Court in fact re-affirms those cases. *Daimler AG*, 134 S. Ct. at 754 (“The canonical opinion in this area remains *International Shoe*...”); 134 S. Ct. at 758 (“With this background [referring to *Perkins*, *Helicopteros*, and *Goodyear Dunlop Tires Opers., S.A. v. Brown*, 564 U.S. ----, 131 S. Ct. 2846, 180 L.Ed.2d 796 (2011)], we turn directly to the question whether Daimler’s affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State’s courts.”). Moreover, Ford does not contend that these cases have been overruled. Accordingly, application of the U.S. Supreme Court’s long-held jurisprudence, which demonstrates that the Circuit Court has authority to assert jurisdiction over Ford in West Virginia, is controlling. Nonetheless, because Petitioner argues that *Daimler* prevents this Court from obtaining jurisdiction over Ford, the case is examined in detail below.

Contrary to Petitioner’s belief, the facts and rationale present in *Daimler AG* are crucially dissimilar and inapplicable to the matter here, and thus the U.S. Supreme Court’s conclusion in *Daimler AG* does not require this Court to grant Ford’s Writ. In *Daimler*, a group of plaintiffs from Argentina sued Daimler, a German Corporation, in the federal District Court for the Northern District of California, alleged that Mercedes-Benz Argentina, Daimler’s subsidiary,

collaborated with state security forces in Argentina to “kidnap, detain, torture, and kill certain [Mercedes-Benz] Argentina workers” during Argentina’s “Dirty War” of 1976-1983. 134 S. Ct. at 751-52. Plaintiffs named Daimler alone as a defendant and alleged that Daimler was vicariously liable for the actions of Mercedes-Benz Argentina in Argentina. *Id.* at 751-52. The occurrences which gave rise to the cause of action happened entirely abroad. *Id.* at 754.

The U.S. Supreme Court narrowly addressed “whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad.” *Id.* The Court held that in order to obtain general jurisdiction over a foreign corporation, its affiliations with the forum must be “continuous and systematic” so as to render it “essentially at home in the forum State.” *Id.* at 749 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851, 190 L.Ed.2d 796 (2011)); *Id.* n. 19 (citing to *Perkins*, that a foreign corporation may be “at home” in a forum regardless of where it is incorporated or where its principal place of business is located). The Court concluded that, even assuming that Daimler’s USA subsidiary, Mercedes-Benz USA, was at “home” in California and that such contacts are deemed the contacts of Daimler, “there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler’s slim contacts with the State hardly render it at home there.” *Id.* at 760.

*Daimler AG* is distinguishable from the case at hand. Here, this Court must address the issue whether Ford, a corporation established in Michigan, which does business in all 50 states, including West Virginia, is subject to personal jurisdiction in West Virginia for a defective vehicle that was distributed by Ford and caused injury in West Virginia. Ford distributes vehicles directly to dealerships in West Virginia; Ford advertises directly within West Virginia; Ford finances companies and dealerships directly in West Virginia; Ford finances vehicle purchases

by residents directly in West Virginia; Ford pays personal property taxes for vehicles it uses for doing business directly in West Virginia; Ford sends out recall notices to residents who own Ford vehicles directly in West Virginia; Ford sends out technical service bulletins to its dealerships directly within West Virginia; Ford contracts with its dealers in West Virginia to defend lawsuits on their behalf against plaintiffs for defective vehicles, directly in West Virginia; and Ford operates and maintains websites directed to West Virginia residents for its dealers in West Virginia. Given these contacts, it is clear that Ford has more than sufficient continuous and systematic affiliations with West Virginia to be considered “at home” in this state.

At least one court has agreed with this reasoning. In *Magill v. Ford Motor Co.*, the District Court for the city and county of Denver, Colorado, rejected Ford Motor Co.’s argument that the decision in *Daimler AG* operates to prevent every state besides Michigan or Delaware (where its principal place of business and state of incorporation are located) from obtaining personal jurisdiction over Ford in a situation like the one presented by Plaintiffs here. *Magill*, No. 2015-CV-32019 (Dist. Ct. Denver County Dec. 1, 2015) (Order denying Ford’s Motion to Dismiss for Lack of Personal Jurisdiction), attached to Resp’t’s App. 205-215. There, like here, a products liability action was brought by Colorado plaintiffs injured as a result of a defective Ford vehicle in the forum State. *Id.*, Resp’t’s App. 206. The court, in its reasoning, stated:

First, this Court disagrees with Ford that *Daimler* is dispositive as it is factually and procedurally distinguishable than what is presented here (*e.g.*, all malfeasance complained of occurred in another country; claims involving only foreign plaintiffs, agency theory, etc.)... Second, unlike in *Daimler*, Ford has more than “slim contacts” with Colorado. As alleged, Ford aggressively markets and sells its vehicles by and through over thirty dealerships throughout Colorado... Ford maintains several offices and businesses in Colorado including the Ford Motor Company Service School, and Ford Motor Credit Co., LLC... Ford is registered with the Colorado Secretary of State and has designated an authorized agent to accept service of process in Colorado; trains and certifies mechanics to specially perform services on behalf of Ford for consumers in Colorado; works directly with dealerships, collision repair centers, and consumers in Colorado on warrant

and goodwill claims... Ford has actively litigated, as both plaintiff and defendant in cases in Colorado.

*Id.*, Resp't's App. 212-13. Just as the court found in *Magill*, here this Court may find that Ford's contacts with West Virginia are extensive, certainly "continuous" and "systematic," and are more than sufficient to find that Ford is "at home" in West Virginia. Accordingly, Defendant Ford is subject to general jurisdiction in West Virginia and its Writ of Prohibition should be denied.

Although Ford argues that only in the "exceptional case" may a corporation be subject to suit under general jurisdiction, the reality is that the U.S. Supreme Court precedent establishes what it takes to assert general jurisdiction, and Ford's contacts with West Virginia are sufficient. Accordingly, the Respondent respectfully requests that this Honorable Court deny Ford's Writ.

## **II. Ford has Consented to the Jurisdiction of the Circuit Court**

Notwithstanding that the Circuit Court has authority to assert jurisdiction over Ford pursuant to the West Virginia long-arm statutes and Due Process, Ford has consented to personal jurisdiction in this action and therefore cannot now contest that the Circuit Court lacked authority over it. Ford consented to the jurisdiction of the Circuit Court by appearing in the Circuit Court without contesting jurisdiction to file joint stipulations regarding discovery matters.

"[B]ecause the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14, 105 S. Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982) ("[T]he requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.")). Among other things, an individual may consent a court's jurisdiction by appearance, *Insurance Corp. of Ireland*, 456 U.S. at 703, 102 S. Ct. at 2105, or by submission

of a stipulation to the court, *Petrowski v Hawkeye-Security Co.*, 350 U.S. 495, 76 S. Ct. 490, 100 L.Ed. 639 (1956) (upholding personal jurisdiction on the basis of a stipulation regarding service of process entered into by the defendant).

In West Virginia, an appearance in a suit for any purpose other than to contest jurisdiction constitutes a general appearance and waiver of its challenge to the jurisdiction of the court. Syl. Pt. 1, *Stone v. Rudolph*, 127 W.Va. 335, 32S.E.2d 742 (1994). Relying on this principle, the WVSCA in *Vanscoy v. Anger*, 203 W.Va. 624, 510 S.E.2d 283 (1998), found that signing a scheduling order and moving for a continuance constituted general appearance and waiver of any challenge to jurisdiction.

Like in *Vanscoy*, here Defendant Ford appeared for matters other than to contest the jurisdiction of the court by filing stipulations regarding a protective order and access to [www.forddocs.com](http://www.forddocs.com). *See id.* This suit was remanded on September 11, 2015, *see* Pet'r's App. 135; Ford filed the joint stipulations on September 21, 2015, *see* Pet'r's App. 135; and Ford did not file its Motion to Dismiss for Lack of Personal Jurisdiction until September 23, 2015, *see* Pet'r's App. 125. Ford's filing of a protective order was in fact a request that the Circuit Court exercise its authority over the matter. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W.Va. 517, 530 n. 19, 741 S.E.2d 75, 88 n. 19 (2012) ("A circuit court's authority to issue a protective order is part of its general power to manage discovery in proceedings over which it presides."). Accordingly, Ford has consented to the jurisdiction of the Circuit Court and cannot now contest it.<sup>20</sup> Respondent respectfully requests this Honorable Court deny Ford's Writ.

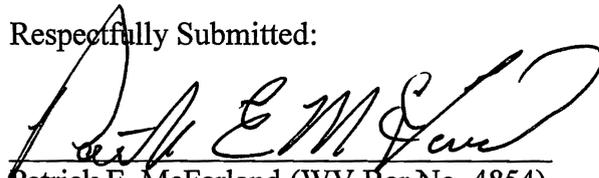
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<sup>20</sup> On the other hand, if Ford believes that it did not consent to the Circuit Court's authority over this case, it seems the Protective Order should have no effect and the hundreds of thousands of claimed highly proprietary documents that have been exchanged may be distributed to the public without consequence.

## CONCLUSION

This is a case involving a West Virginia resident who was killed in West Virginia as result of a defective automobile he purchased in West Virginia and which at one point was sold in West Virginia by an authorized Ford dealer at a time when that dealer was being financed and to some extent controlled by Ford. To suggest, as Ford does, that a West Virginia court lacks personal jurisdiction over Ford solely because the defective vehicle was initially sold in a state other than West Virginia (a factor on which neither the U.S. Supreme Court nor the West Virginia Supreme Court of Appeals has ever hinged its jurisdictional analysis) would result in an absurdity. Ford's request for a Writ of Prohibition should, therefore, be denied.

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CERTIFICATE OF SERVICE

I, Patrick E. McFarland, counsel for Danny S. Wellman, Administrator of the Estate of Jarred Wellman, deceased, certify that on December 28, 2015, I served the foregoing Respondent's Brief, *via* first class U.S. mail, postage prepaid, upon the following counsel of record:

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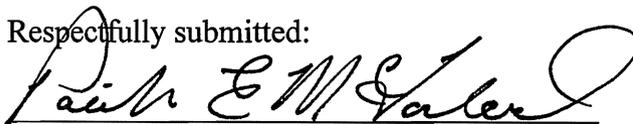
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