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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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STATE OF WEST VIRGINIA *ex rel.*, HISTORIC ARMS CORPORATION,

Petitioner

v.

**THE HONORABLE C. CARTER WILLIAMS, Judge of the Circuit Court of
Hardy County, West Virginia; DARRICK J. GUST AND EMILY GUST**

Respondents

***From the Circuit Court of
Hardy County, West Virginia
Civil Action No. 20-C-25***

PETITION FOR WRIT OF PROHIBITION

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Dated: March 21, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv, v
I. QUESTIONS PRESENTED	2
II. STATEMENT OF THE CASE	2
III. SUMMARY OF THE ARGUMENT	8
1. The Doctrine of Issue Preclusion bars the Circuit Court from asserting personal jurisdiction over a foreign corporation based on allegations of a single in-state act by the foreign corporation that the Circuit Court previously rejected	8
2. The allegation of a single occasion when Historic Arms purportedly gave the Fuse to Starer who then provided the Fuse to Historic Arms' 100% subsidiary in West Virginia acting as its agent, does not subject Historic Arms to personal jurisdiction under the "Stream of Commerce" Theory	9
3. The Circuit Court committed reversible error when it found personal jurisdiction over Historic Arms based on the Plaintiffs' allegations regarding Historic Arms' contact with West Virginia, that were not supported by affidavits, depositions, nor other proper evidence, and which allegations were refuted by Starer's and Historic Arms' sworn affidavits	9
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	10
V. ARGUMENT	10
1. Standard for issuance of a Writ of Prohibition	10
2. Historic Arms has no other adequate means, such as a direct appeal, to obtain relief and Historic Arms will be damaged and prejudiced in a way that is not correctable on appeal if the case is allowed to proceed	11
3. Each of the Circuit Court's various theories of personal jurisdiction violate Federal Due Process	11
4. The Doctrine of Issue Preclusion bars the Circuit Court's assertion of personal jurisdiction over Historic Arms	13
5. The stream of Commerce Theory does not support the Circuit Court's finding of personal jurisdiction over Historic Arms	15

6.	The Circuit Court committed reversible error to the extent it found federal Due process was satisfied based on the alleged presence of a majority of the elements in <i>Bowers v. Wurzburg</i> , 202 W. Va. 43 (1998)	17
7.	The Circuit Court committed reversible error when it found personal Jurisdiction over Historic Arms established based on the Plaintiffs' allegations regarding Historic Arm's contact with West Virginia, that were not supported by affidavits, depositions, nor other proper evidence, which contradicted Starer's and Historic Arms' sworn affidavits	18
VI.	CONCLUSION	19

TABLE OF AUTHORITIES

United States Supreme Court Cases:

<i>Asahi Metal Industry Co. v. Superior Court of California</i> , 480 U.S. 102, 117 (1987)	15, 17
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) ...	16
<i>Taylor v. Sturgell</i> , 553 U.S. 880, 892 (2008)	13
<i>Walden v. Fiore</i> , 571 U.S. 277 n. 6 (2014)	12
<i>World-Wide Volkswagen Corp. v. Woodsen</i> , 444 U.S. 286, 297 (1980)	16

West Virginia Supreme Court of Appeals Cases:

<i>Abbot v. Owens-Corning Fiberglas Corp.</i> , 191 W.Va. 198, 444 S.E.2d 285 (1994)	11, 16, 18
<i>Bowers v. Wurzburg</i> , 202 W. Va. 43 (1998)	17, 18
<i>State ex. Rel. Bell Atl.-W. Virginia, Inc., v. Ranson</i> , 201 W. Va. 402, 415-15 (1997)	19
<i>State ex rel. City of Huntington v. Lombardo</i> , 149 W. Va. 671, 143 S.E.2d 535, 541 (1965) .	10
<i>State ex rel. Ford Motor Co. v. McGraw</i> , 237 W.Va. 573, 589, 788 S.E. 2d 319, 315 (2016)	
.....	11, 12, 13
<i>State ex rel. Ford Motor Co. v. Nibert</i> , 35 W.Va. 235, 777 S.E. 2d 1 (2015)	11
<i>Hill v. Showa Denko, K.K.</i> , 188 W. Va. 650, 654 (1992)	15, 16, 17
<i>State v. Knapp</i> , 143 W.Va. 896, 913, 105 S.E.2d 569, 579 (1958)	10
<i>State ex rel. McGraw v. Johnson & Johnson</i> , 704 S.E. 2d 677, 688 (W.VA. 2010)	13
<i>New Hampshire v. Maine</i> , 532 U.S. 742, 749 (2008)	13
<i>State v. Muntzing</i> , 146 W.Va. 349, 359, 120 S.E.2d 260, 266 (1961)	10
<i>State ex rel. Third-Party Defendant Health Plans v. Nines</i> , 244 W.Va. 184,	
852 S.E. 2d 251, 260 (2020)	12
<i>State ex rel. Wiseman v. Henning</i> , 201 W.Va. 128, 132, 569 S.E.2d 204, 208 (2002)	11

Statutes:

W. Va. Code § 23-2-6a	4
W. Va. Code § 31-1-15 [1984], [2015]	11, 18
W. Va. Code § 53-1-1	10
W. Va. Code § 56-3-33 [1984], [2012]	11, 18

West Virginia Rules of Civil Procedure:

W. Va. Civil Rule 12(b)(2)	9, 10
W. Va. Civil Rule 59(c)	5

Secondary Authorities:

Restatement (Second) of Judgments, § 27	13
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I. QUESTIONS PRESENTED

1. Whether the Doctrine of Issue Preclusion bars the Circuit Court from finding personal jurisdiction over a foreign corporation based on the allegation that on one (1) occasion a foreign corporation delivered a defective explosive fuse assembly to its 100% subsidiary in West Virginia, after the Circuit Court previously found that allegation to be false?
2. Whether federal due process is satisfied under the Stream of Commerce theory when the Circuit Court asserts personal jurisdiction over a foreign corporation based on allegations of a single occasion of the foreign corporation delivering an explosive fuse assembly to its 100% subsidiary in West Virginia?
3. Whether the Circuit Court committed reversible error by finding personal jurisdiction over a foreign corporation based on the plaintiffs' allegations, not supported by affidavits, depositions, nor by other proper evidence, in response to a nonresident defendant's Rule 12(b)(2) Motion, that was supported by affidavits?

II STATEMENT OF THE CASE

This is a personal injury case in which the Plaintiffs, Darrick J. Gust and Emily Gust, husband and wife, seek damages for physical injury to the husband ("Mr. Gust") that was suffered when he was detonating an explosive device while in the course of his employment. The explosive device contained a defective fuse (the "Fuse") that detonated prematurely injuring his hand. The Plaintiffs did not sue Mr. Gust's employer, Panthera Training, LLC ("Panthera"), but did sue Panthera's manager, Robert L. Starer ("Starer"), Panthera's sole member, Historic Arms Corporation ("Historic Arms"), and others.¹ At the time of Mr. Gust's injury Panthera was a

¹ The Plaintiffs sued third-party defendants under theories not relevant to this Petition.

participant in West Virginia's Workers Compensation Act and received benefits accordingly from Panthera's Workers Compensation insurance policy.

The Plaintiffs alleged that Historic Arms "possessed and supplied/distributed" or "provided components of explosives, including the components used to create the explosive device at issue in this litigation, to its subsidiary entity, Panthera Training, LLC." (See attached Exhibit D, Amended Complaint, at ¶¶5, 8, and 16).

On July 15, 2021, Historic Arms filed a Motion to Dismiss for lack of personal jurisdiction and Brief in Support (collectively "Motion to Dismiss" attached as Exhibit E). In support of its Motion to Dismiss, Historic Arms filed an affidavit stating that (1) its business consists of being "a purveyor of old, historic, collectible, automatic weapons", (2) its business is highly regulated by the ATF and is "prohibited from conducting business anywhere other than the Commonwealth of Virginia", and (3) that it "has had no dealings with explosives whatsoever". (Exhibit E, see exhibit 1).

The Plaintiffs deposed Mr. William White, a former Panthera employee. Mr. White did not testify that Historic Arms delivered the Fuse into West Virginia, instead he only stated that the Fuse came from 2464 Plantation Creek Lane, in Cape Charles, Virginia which he admitted was Starer's home, in addition to being the corporate registered address for Historic Arms. Mr. White made no statement about Historic Arms bringing the Fuse into West Virginia. (See William White deposition transcript attached hereto as Exhibit F, at 29:21-30:3-5, 98:19-23 and 52:21-23).

Mr. Gust submitted a "Second Affidavit" wherein he stated to his knowledge that the Fuse was made with parts that came from 2464 Plantation Creek Lane, in Cape Charles, Virginia. Mr. Gust further stated that the subject parts of the explosive device "were simply given to Panthera Training" but did not state that Historic Arms provided the Fuse to Panthera. (See exhibit D to

Plaintiffs' Memorandum in Opposition to Historic Arms' Motion to Dismiss, which is attached hereto as Exhibit G, ¶¶ 2-3).

On July 30, 2021, Starer filed an Answer and Affirmative Defenses to the Amended Complaint wherein he admitted that he brought the Fuse into West Virginia while acting "in his capacity as manager of Panthera Training." (See Starer's Answer attached hereto as Exhibit H, at ¶ 16).

On July 30, 2021, Starer also filed a Motion for Summary Judgment and Brief in Support (collectively "Starer's Motion" attached hereto as Exhibit I). In support of Starer's Motion, Starer filed an affidavit wherein he stated that he was acting in his capacity as manager of Panthera when he brought the Fuse into West Virginia to be incorporated into explosive devices to be used by Panthera as it conducted training courses at its West Virginia facility. (See Starer's July 30, 2021 affidavit attached hereto as Exhibit J, at ¶¶4-6). The Plaintiffs did not provide any affidavits, depositions, nor any other evidence contradicting Starer's sworn statement that he was acting in his capacity as the manager of Panthera, and not acting on behalf of Historic Arms, when he brought the Fuse into West Virginia.

In Starer's Motion, Starer claimed immunity from civil liability for damages suffered by Mr. Gust, an employee of Panthera, pursuant to West Virginia Code § 23-2-6a since Starer brought the Fuse into West Virginia while acting in his capacity as manager of Panthera. (See attached Exhibit I).

Following briefing, oral arguments on Historic Arms' Motion and on Starer's Motion were presented to the Circuit Court in a hearing held on August 27, 2021. On November 10, 2021, the Circuit Court issued an order granting Starer's Motion for Summary Judgment. (the "Starer Order" attached hereto as Exhibit C). As it granted summary judgment in favor of Starer, the

Circuit Court found and determined that it could “discern no alternative, practical or logical reason for Mr. Starer’s (the manager’s) actions regarding the fuse assemblies other than acting in furtherance of Panthera’s business”. (Exhibit C, at ¶¶11 and 12). The Circuit Court specifically focused on the purpose of Starer’s actions in providing the Fuse to Panthera when it determined what “hat” he was wearing at the time in question (i.e. whether Starer brought the Fuse into West Virginia as agent for Historic Arms or was he acting in his capacity as Panthera’s manager). (Exhibit C, at ¶13). The Circuit Court concluded by finding and determining “that no genuine issue of material fact exists that Defendant Starer was acting as manager of Panthera during the time in question”. (Exhibit C, at ¶14).

On December 3, 2021, the Circuit Court issued its order Denying Historic Arms’ Motion to Dismiss for Lack of Jurisdiction. (See the “Historic Arms’ Order” attached hereto as Exhibit B). Contradicting the specific findings, determinations, and conclusions stated in its prior Starer Order, in the Historic Arms’ Order, the Circuit Court found that personal jurisdiction over Historic Arms was properly established because the Plaintiffs’ claims “arise directly and specifically from the conduct of Historic Arms in West Virginia” based on allegations that Historic Arms, via Starer as its agent, rather than Starer acting as Panthera’s manager, provided the component parts of explosive (including the Fuse) into West Virginia. (See Exhibit B, at ¶¶23, 26, and 42 – emphasis added).

On December 13, 2021, Historic Arms timely filed a Motion to Amend Judgment (See “Motion to Amend” attached hereto as Exhibit K) pursuant to West Virginia Civil Rule 59(e). Therein, Historic Arms addressed the Circuit Court’s prior factual findings and determinations when it granted Starer’s Motion for Summary Judgment, that Starer was acting in his capacity as Panthera’s manager, not as Historic Arms’ agent, when he provided the Fuse to Panthera in West

Virginia. Historic Arms pointed out that the act of bringing the Fuse into West Virginia was the only alleged act committed within West Virginia that could establish personal jurisdiction over Historic Arms in compliance with federal due process. Historic Arms further argued that the Doctrine of Issue Preclusion prevented the Circuit Court from finding personal jurisdiction based on the Plaintiffs' allegations that Starer was acting as agent for Historic Arms when he provided the Fuse to Panthera into West Virginia after the Circuit Court previously found and determined in the Starer Order that it could "discern no alternative, practical or logical reason for Mr. Starer's (the manager's) actions regarding the fuse assemblies other than acting in furtherance of Panthera's business". (Exhibit C, at ¶¶11 and 12, emphasis added).

On February 22, 2022, the Circuit Court issued its Order Denying Historic Arms' Motion to Amend. (See the "Order Denying Motion to Amend" attached hereto as Exhibit A). Therein the Circuit Court advanced three (3) theories in support of its continued assertion that Historic Arms was subject to the Circuit Court's personal jurisdiction.

First, the Circuit Court theorized that Starer "utilized his knowledge as Vice President of Historic Arms to identify and produce the component parts Panthera needed to craft" the subject explosive device. Accordingly, the Circuit Court stated "it is logical to determine that Mr. Starer was actively operating in both roles [as Panthera's manager and as Historic Arms' vice president] during the time in question, because the knowledge obtained from both roles was necessary to complete the act at issue in this case, the procurement and transport of the component parts from Virginia to West Virginias." (Exhibit A, at ¶ 13). The Circuit Court did not state what knowledge of explosives Starer purportedly obtained from Historic Arms' especially in light of Historic Arm's affidavit stating its limited scope of business which excluded dealing with explosives. The Circuit Court then, contrary to its findings in the Starer Order, nevertheless concluded; "when Mr. Starer's

dual role is recognized, his act on behalf of Historic Arms in transporting the component parts of the explosive from Virginia to West Virginia” represents its contact with West Virginia. (Exhibit B, at ¶ 14). As addressed below, Historic Arms vigorously contends that the Doctrine of Issue Preclusion barred the Circuit Court from making this critical and inconsistent finding after previously finding and determining when it granted Starer’s Motion for Summary Judgment that it could “discern no alternative, practical or logical reason for Mr. Starer’s (the manager’s) actions regarding the fuse assemblies other than acting in furtherance of Panthera’s business”. (Exhibit C, at ¶¶ 11 and 12).

Second, the Circuit Court asserted that even if its prior finding, that Starer was acting in his capacity as manager of Panthera when he provided the Fuse to Panthera in West Virginia, precludes a subsequent finding that he was instead acting on behalf of Historic Arms, nevertheless, Historic Arms is subject to personal jurisdiction based on its alleged ownership, maintenance, inspection and distribution of the Fuse. (Exhibit A, at ¶ 15, referencing its earlier finding as it denied Historic Arms’ Motion to Dismiss. (Exhibit B, at ¶¶ 15-17.)). As addressed below, in its Order Denying Historic Arms’ Motion to Dismiss, the Circuit Court acknowledged its prior finding that Historic Arms did not bring the Fuse into West Virginia, via Starer as its agent, but rather that Starer was acting “as an agent of Panthera in transferring them [the Fuse] to West Virginia” when it granted Starer’s Motion for Summary judgment. (Exhibit C, at ¶ 16). However, illogically and contradicting its earlier statement, the Circuit Court nevertheless found that the Plaintiff’s claims “arise directly and specifically from the conduct of Historic Arms in West Virginia.” (See Exhibit B, at ¶ 26, emphasis added).

Finally, the Circuit Court asserts that in any event, Historic Arms’ alleged transportation of the fuse assemblies into West Virginia, via Starer as its agent, on one (1) occasion, to its 100%

owned subsidiary, subjected Historic Arms to personal jurisdiction in West Virginia under the “stream of commerce” theory. (See Exhibit A, at ¶ 16).

III. SUMMARY OF THE ARGUMENT

1. The Doctrine of Issue Preclusion bars the Circuit Court from asserting personal jurisdiction over a foreign corporation based on allegations of a single in-state act by the foreign corporation that the Circuit Court previously rejected.

In their Amended Complaint, the Plaintiffs alleged that Historic Arms, a foreign corporate defendant, brought the Fuse into West Virginia via Starer as its agent. However, in its order granting summary judgment to Starer, the Circuit Court found that there was no discernable alternative, practical, or logical reason for Starer to have brought the Fuse into West Virginia, other than in his capacity as the manager of Panthera, not as an agent of Historic Arms. The act of bringing, providing, distributing, or supplying the Fuse to its subsidiary in the State of West Virginia on one (1) occasion constitutes the only alleged act by Historic Arms within the State of West Virginia that would constitute a minimum contact so as to support a finding of personal jurisdiction consistent with the United States Constitution’s Fourteenth Amendment’s Due Process clause.

The Doctrine of Issue Preclusion bars the Circuit Court from finding a contact with West Virginia that satisfies Federal Due Process based on allegations that Starer was acting as agent for Historic Arms when he brought the Fuse into the state after previously specifically finding and determining that there was no discernable alternative, practical, or logical reason for Starer to have brought the Fuse into West Virginia other than in his capacity as the manager of Panthera - not as an agent of Historic Arms.

The Doctrine of Issue Preclusion also bars the Circuit Court from asserting personal jurisdiction over Historic Arms based on a finding that Starer was wearing two (2) “hats”, acting as an agent for Historic Arms while also acting as Panthera’s manager, when he brought the Fuse

into the State of West Virginia. This follows because in its previous order granting Summary Judgment in favor of Starer, the Circuit Court addressed the Plaintiffs' argument that exactly which "hat" Starer was wearing was in dispute (i.e. whether he brought the Fuse into the State of West Virginia while acting on behalf of Panthera or Historic Arms). The Circuit Court unambiguously found and determined that "no genuine issue of fact exists that Defendant Starer was acting as manager of Panthera". (Exhibit C, at ¶ 14).

2. The allegation of a single occasion when Historic Arms purportedly gave the Fuse to Starer who then provided the Fuse to Historic Arms' 100% subsidiary in West Virginia acting as its agent, does not subject Historic Arms to personal jurisdiction under the "Stream of Commerce" theory.

Historic Arms is alleged, on one (1) occasion, to have "supplied/distributed" the Fuse into West Virginia via Starer as its agent, who then provided it to Historic Arm's 100% subsidiary, Panthera. Assuming *arguendo* that Starer was acting as Historic Arms' agent, and not as Panthera's manager, when he provided the Fuse to Historic Arm's subsidiary in West Virginia, this isolated transaction does not satisfy the "purposeful availment" criteria of the Stream of Commerce theory required to establish personal jurisdiction under federal due process.

3. The Circuit Court committed reversible error when it found personal jurisdiction over Historic Arms based on the Plaintiffs' allegations regarding Historic Arm's contact with West Virginia, that were not supported by affidavits, depositions, nor other proper evidence, and which allegations were refuted by Starer's and Historic Arms' sworn affidavits.

As noted above, Historic Arms and Starer submitted sworn affidavits that Starer provided the Fuse to Panthera in West Virginia in his capacity as Panthera's manager, not acting as Historic Arms' agent, and that Historic Arms' did not deal with explosives and did not transact any business in West Virginia. The Plaintiffs did not provide any affidavits, depositions, nor other proper evidence to support their conflicting allegation that Historic Arms brought the Fuse into West Virginia. It is well-established that when a nonresident defendant files a Rule 12(b)(2) Motion

supported by affidavits or depositions the party resisting the Rule 12(b)(2) Motion may not stand on its pleadings but rather must come forward with opposing affidavits, depositions, or other proper evidence specifically demonstrating personal jurisdictions.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Historic Arms does not believe oral argument is necessary pursuant to West Virginia Rules of Appellate Procedure, Rule 18(a), because the dispositive issues have been authoritatively decided.

V. ARGUMENT

1. Standard for issuance of a Writ of Prohibition.

Under West Virginia Code § 53-1-1, a Writ of Prohibition shall lie as a matter of right “when the inferior court has not jurisdiction of the subject matter in controversy”.

In an often-cited case involving a Writ of Prohibition based on lack of jurisdiction, this Court stated; “Where . . . the court or tribunal to be prohibited lacks jurisdiction to take any valid action or to enter any valid judgment, the writ of prohibition will issue against further proceedings by it, regardless of the existence and availability of other remedies.” *State ex rel. City of Huntington v. Lombardo*, 149 W.Va. 671, 143 S.E.2d 535, 541 (W.Va. 1965) citing *State v. Knapp*, 143 W.Va. 896, 913, 105 S.E.2d 569, 579 (1958).

This Court further informs; “A party seeking relief by prohibition is not required, as a prerequisite to his right to proceed by prohibition, first to go through a trial or hearing in the lower court or tribunal.” *Id.* at 541, citing *State v. Muntzing*, 146 W.Va. 349, 359, 120 S.E.2d 260, 266 (1961).

Based on the facts of the matter at hand and the established law, Historic Arms has the right to file this Petition for Writ of Prohibition based on the Circuit Court’s lack of jurisdiction.

2. Historic Arms has no other adequate means, such as a direct appeal, to obtain relief and Historic Arms will be damaged and prejudiced in a way that is not correctable on appeal if the case is allowed to proceed.

Historic Arms cannot directly appeal the Circuit Court's denial of its Motion to Dismiss for lack of jurisdiction. Further, Historic Arms will be harmed by having to incur the significant time, expense, and attorney's fees to defend itself in discovery and at trial, with the end result being the likelihood of a reversal on appeal. This Court has, on prior occasions, recognized that in such a situation the remedy of appeal is inadequate, and prohibition is therefore allowed. See *State ex rel. Wiseman v. Henning*, 201 W. Va. 128, 132, 569 S.E.2d 204, 208 (2002).

3. Each of the Circuit Court's various theories of personal jurisdiction violate Federal Due Process.

In order to address the Circuit Court's various theories of personal jurisdiction over Historic Arms, the well-established law requiring "minimum contacts" with the forum state in order to establish personal jurisdiction over a foreign corporation in compliance with federal due process must first be briefly discussed.

"A Court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code 31-1-15 [2015] and W. Va. Code 56-3-33 [2012]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process." (emphasis added). Syl. Pt. 3, *State ex rel. v. Ford Motor Co. v. McGraw*, 237 W. Va. 5783 (2016) (citing Syl. Pt. 5 of *Abbot v. Owens-Corning Fiberglas Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994), superseded by statute on other grounds as stated in *State ex rel. Ford Motor Co. v. Nibert*, 235 W. Va. 235, 777 S.E.2d 1 (2015).

In the matter at hand, the Circuit Court admitted that; “The due process standard for establishing whether a court may exercise jurisdiction over a nonresident involves examination of the defendant’s contacts with the forum state. Personal jurisdiction may either be general or specific. . . Specific or case-linked jurisdiction depends on an affiliation between the forum and the underlying controversy (i.e. an activity or an occurrence that takes place in the forum state and is therefore subject to the State’s regulation.)” (emphasis added). (Citing *State ex rel. Third-Party Defendant Health Plans v. Nines*, 244 W.Va. 184, 852 S.E.2d 251, 260 (2020), quoting *Walden v. Fiore*, 571 U.S. 277 n. 6 (2014) (Exhibit B, at ¶ 18).

The Circuit Court further admitted; “Specific jurisdiction arises when the ‘in-state activities of the non-resident defendant gives rise to are or related to the cause of action sued on.” *State ex rel. Ford Motor Co., v. McGraw*, 237 W.Va. 573, 589, 788 S.E.2d 319, 335 (2016). (Exhibit B, at ¶19). (emphasis added).

As addressed in more detail below, having correctly recited the law regarding the facts required in order to establish personal jurisdiction in compliance with federal due process, the Circuit Court; (1) either ignored, or misunderstood, the Doctrine of Issue Preclusion in its Order Denying Historic Arms’ Motion to Dismiss when it found that personal jurisdiction over Historic Arms was properly established because the Plaintiffs’ claims “arise directly and specifically from the conduct of Historic Arms in West Virginia.” (Exhibit B, at ¶ 26 – emphasis added), and (2) erroneously asserted personal jurisdiction over Historic Arms under the Stream of Commerce theory based on one (1) occasion when it allegedly delivered a defective Fuse to its subsidiary in West Virginia when its denied Historic Arms’ Motion to Amend. (Exhibit A, at ¶ 16.)

4. The Doctrine of Issue Preclusion bars the Circuit Court's assertion of personal jurisdiction over Historic Arms.

"Issue preclusion . . . bars successive litigation of an issue of facts or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (footnote, and internal quotation marks omitted). (Citing *New Hampshire v. Maine*, 532 U.S. 742 (2008)). In turn, in the *New Hampshire* decision, the United States Supreme Court cited Restatement (Second) of Judgments § 27. *New Hampshire*, 532 U.S. at 749)

Restatement (Second) of Judgments § 27 states; "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

Illustration #3 under Restatement (Second) of Judgments § 27 presents a hypothetical wherein a claim arising out of an automobile accident was dismissed for lack of jurisdiction because the court found that the automobile was not being operated by or on behalf of the nonresident defendant. In a subsequent action against the defendant in its state of residence the prior finding that the automobile was not being operated by or on behalf of the defendant is conclusive.

Under West Virginia law, "Issue preclusion bars a party from relitigating an issue if: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State ex rel. McGraw v. Johnson & Johnson*, 704 S.E.2d 677, 688 (W. Va. 2010).

When it denied Historic Arm's Motion to Amend, the Circuit Court erroneously argued that the Doctrine of Issue Preclusion does not apply to the matter at hand because the first element of issue preclusion, the issue previously decided in the Starer Order, was not identical to the issue subsequently decided when it Denied Historic Arms' Motion to Dismiss. (Exhibit A, at ¶¶ 18-19). As discussed below, the Circuit Court's position is nothing less than perplexing.

The Circuit Court's position is most perplexing because when it granted summary judgment in favor of Starer, the Circuit Court found that it could "discern no alternative, practical or logical reason for Mr. Starer's (the manager's) actions regarding the fuse assemblies other than acting in furtherance of Panthera's business". (Exhibit C, at ¶¶ 11 and 12). As it authored the Starer Order, the Circuit Court specifically focused on the purpose of Starer's actions in providing the Fuse to Panthera when it determined what "hat" he was wearing at the time in question (i.e. whether Starer brought the Fuse into West Virginia as agent for Historic Arms or acting in his capacity as Panthera's manager). (Exhibit C, at ¶13). Conclusively, the Circuit Court found and determined "that no genuine issue of material fact exists that Defendant Starer was acting as manager of Panthera during the time in question". (Exhibit C, at ¶14).

The Circuit Court committed reversible error when it refused to accept that pursuant to the Doctrine of Issue Preclusion, the specific findings and determinations set forth in the Starer Order (Exhibit C) are binding on the question addressed in its subsequent Order Denying Historic Arms' Motion to Amend; i.e. "whether Starer was acting in his capacity as Vice President of Historic Arms during the same time period or the question of whether Historic Arms was the owner, and therefore the supplier of the defective fuses or component parts." (Exhibit A, at ¶ 19). Inescapably, the finding and determination made in the Starer Order "that no genuine issue of material fact exists that that Defendant Starer was acting as manager of Panthera during the time

in question” (Exhibit C, at ¶14) clearly bars the Circuit Court from subsequently finding that Starer acted “on behalf of Historic Arms in transporting the component parts of the explosive from Virginia to West Virginia [which] represents a contact between Historic Arms and West Virginia.” (Exhibit A, at ¶ 14). The Doctrine of Issue Preclusion unequivocally bars the Circuit Court from finding that Starer acted “on behalf of Historic Arms” when he brought the Fuse into West Virginia after previously finding and determining; (1) that it could “discern no alternative, practical or logical reason for Mr. Starer’s (the manager’s) actions regarding the fuse assemblies other than acting in furtherance of Panthera’s business” (Exhibit C, at ¶¶11 and 12), and (2) “that no genuine issue of material fact exists that Defendant Starer was acting as manager of Panthera during the time in question”. (Exhibit C, at ¶14).

The issue of what “hat” Starer was wearing when he provided the Fuse to Panthera in West Virginia was conclusively established on November 10, 2021 when the Circuit Court issued the Starer Order. Starer was wearing the hat as Panthera’s manager, not as Historic Arms’ agent. The Doctrine of Issue Preclusion bars the contrary subsequent finding that he was wearing a hat for, or acting as agent of, Historic Arms. The Circuit Court committed clear error when it ignored its prior findings and determinations, and violated the Doctrine of Issue Preclusion.

5. The Stream of Commerce Theory does not support the Circuit Court’s finding of personal jurisdiction over Historic Arms.

As it Denied Historic Arms’ Motion to Amend, the Circuit Court asserts that “at a minimum” Historic Arms is subject to its personal jurisdiction, in compliance with federal due process, because Historic Arms placed the explosives devices including the Fuse “into the stream of commerce” by giving it to Starer as its agent who, in turn, gave it to Panthera in West Virginia. The Circuit Court supports its assertion by citing Syllabus point 2, *Hill v. Showa Denko, K.K.*, 188 W. Va. 654 (1992) (quoting *Asahi Metal Industry Co., v. Superior Court of California*, 480 U.S.

102, 117 (1987) for the proposition 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.” (Exhibit A, at ¶ 16).

However, the Circuit Court failed to acknowledge that in *Abbott v. Owens-Corning Fiberglass Corporation*, 191 W. Va. 198, 206 (1994,) this Court subsequently noted that; “Syllabus point 2 of *Showa Denko* merely provides parameters for determining whether the application of jurisdiction under our long-arm statutes comports with federal due process.” “[A] careful reading of *Showa Denko* reveals that this Court did apply the two-step analysis” required by *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286 (1980).

Understanding that there was only one (1) occasion when Historic Arms allegedly provided the Fuse to Panthera in West Virginia, the Circuit Court failed to acknowledge the relevant guidance provided by the United States Supreme Court in *World-Wide Volkswagen* relative to the Stream of Commerce theory of personal jurisdiction as it explained: “[I]f the sale of a product of a manufacturer or distributor . . . 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”. (Emphasis added) (*Id.* at 297).

In all events, the Stream of Commerce theory must be understood in the context of federal due process. In *Hill v. Showa Denko, K.K.*, 188 W.Va. 654 (1992) this Court began its analysis of personal jurisdiction over a Japanese corporation with a review of the United States Supreme Court’s decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed.

95 (1945) as it set forth the elements necessary to subject a nonresident defendant to the jurisdiction of the forum state;

In order to subject a defendant to a judgment if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”
Id. at 316.

The *Showa Denko* Court observed that the United States Supreme Court addressed the stream of commerce theory of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). (*Hill*, 188 W.Va., at 650). “The ‘substantial connection’ between a defendant and the forum state necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum State, and the mere placement of a product into the stream of commerce is not such an act, even if done with an awareness that the stream will sweep the product into the forum State absent additional conduct indicating an intent to serve the forum state market.’ (*Asahi*, 480 U.S., at 104).

In conclusion, assuming *arguendo*, that on one (1) occasion Historic Arms provided explosives’ components including the Fuse to its 100% subsidiary, via Starer acting as its agent, the Stream of Commerce theory does not subject Historic Arms to the personal jurisdiction of the Circuit Court. The Circuit Court committed reversible error as it found otherwise.

6. The Circuit Court committed reversible error to the extent it found federal due process was satisfied based on the alleged presence of a majority of the elements in *Bowers v. Wurzburg*, 202 W. Va. 43 (1998).

As the Circuit Court denied Historic Arms’ Motion to Amend, it relied on its earlier finding when it denied Historic Arms’ Motion to Dismiss, stating that the presence of a significant majority of the elements addressed in *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E. 2d., 279 (1998) supported its finding that “personal jurisdiction over Historic Arms is properly established before this Court.” (Exhibit A, at ¶ 6). To the extent the Circuit Court appears to state that the presence

of a majority of the *Bower*'s factors alone supports assertion of personal jurisdiction over Historic Arms and satisfies federal due process, it is in error. If a circuit court concludes that it may properly assert personal jurisdiction over a parent corporation based on the presence of certain relevant *Bower*'s factors, "it must then apply the second prong of the *Abbott* test and determine whether such corporation's contacts with West Virginia satisfy federal due process. Syl. Pt. 5, *Abbott*." (*Bowers*, 501 S.E. 2d. at 289).

Syllabus point 5 in *Abbott v. Owens-Corning*, 191 W. Va. 198 (1994) states: "A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code, 31-1-15 [1984] and W. Va. Code, 56-3-33 [1984]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process."

The Circuit Court committed reversible error when it found personal jurisdiction over Historic Arms based on a purported presence of a majority of the *Bowers*' factors without any proper evidence that Historic Arms had sufficient minimum contacts with West Virginia to satisfy federal due process.

7. The Circuit Court committed reversible error when it found personal jurisdiction over Historic Arms established based on the Plaintiffs' allegations regarding Historic Arm's contact with West Virginia, that were not supported by affidavits, depositions, nor other proper evidence, and which contradicted Starer's and Historic Arms' sworn affidavits.


As previously argued in Historic Arm's Motion to Dismiss (Exhibit E), its Motion to Dismiss was supported by sworn affidavits. Historic Arms' sworn affidavit (See exhibit 1 attached to Exhibit E), and Starer's sworn affidavit (Exhibit J), collectively establish; (1) that Starer provided the Fuse into West Virginia acting in his capacity as manager of Panthera and not as

agent for Historic Arms, and (2) Historic Arms only transacted business in Virginia. When a nonresident defendant files a Rule 12(b)(2) Motion, thereby challenging the existence of personal jurisdiction, and offers affidavits in support of its Motion, the party resisting the Motion may not stand on its pleadings but must come forward with “affidavits or other proper evidence detailing specific facts demonstrating that the court has jurisdiction over the defendant,” *State ex. Rel. Bell Atl.-W. Virginia, Inc., v. Ranson*, 201 W. Va. 402, 415-15 (1997). In the matter at hand, the Plaintiffs did not come forward with any affidavits, depositions, or any other evidence detailing specific facts demonstrating that the Circuit Court has personal jurisdiction over Historic Arms. Rather, the Circuit Court simply relied on the Plaintiffs’ unsupported allegations. Accordingly, the Circuit Court committed reversible error.

VI. CONCLUSION

For these reasons, Historic Arms prays the Court; (1) FIND that the Circuit Court committed reversible error when it asserted personal jurisdiction over it, (2) GRANT Historic Arms’ Motion to Dismiss based on lack of personal jurisdiction, and (3) AWARD Historic Arms any additional relief that this Court deems just and appropriate.

HISTORIC ARMS CORPORATION

By Counsel 

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VERIFICATION

STATE OF VIRGINIA

CITY OF CHESAPEAKE, to-wit:

I, Douglas E. Kahle, counsel for the Petitioner, Historic Arms Corporation, being first duly sworn, state that I have read the foregoing Petition for Writ of Prohibition; that the factual representations contained therein are true, except insofar as they are stated to be upon information and belief; and that insofar as they are stated to be on information, I believe them to be true.


Douglas E. Kahle, (VSB # 15964)
Admitted to this Court pro hac vice

Taken, subscribed, and sworn to before me this 22nd day of March, 2022.


Notary Public

My Commission expires: 9/30/22
Registration Number: 197271




CERTIFICATE OF SERVICE

I, Douglas E. Kahle, hereby certify that true and correct copies of the foregoing
VERIFIED PETITION FOR WRIT OF PROHIBITION were served upon the following by
U. S. First Class Mail on this 22nd day of March, 2022:

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