

No. 17-733

**In The
Supreme Court of the United States**

—◆—
MURCO WALL PRODUCTS, INC.,

Petitioner,

v.

MICHAEL D. GALIER,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Court Of Civil Appeals
Of Oklahoma, First Division**

—◆—
BRIEF IN OPPOSITION
—◆—

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**COUNTERSTATEMENT OF
QUESTION PRESENTED**

Did the Oklahoma Court of Civil Appeals properly find in its unpublished opinion that Oklahoma has personal jurisdiction over Petitioner Murco Wall Products, Inc. based on the evidence, as found by the jury, that the injuries suffered by Oklahoma resident Michael D. Galier arose from his repeated exposure to asbestos-containing products sold by Murco in Oklahoma?

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INTRODUCTION

Petitioner Murco Wall Products, Inc. (“Murco”) has grossly distorted the facts underlying Oklahoma’s exercise of personal jurisdiction in this case. Murco fails to acknowledge the critical fact that Respondent Michael Galier (“Galier”) was injured by Murco joint compound products in the state of Oklahoma as a consequence of Murco’s direct sales of those products to Oklahoma. Every relevant event in this case occurred in Oklahoma. The jury found that Galier developed malignant mesothelioma, an asbestos-related cancer, as a result of his repeated exposure to asbestos from Murco joint compound products at construction sites in Oklahoma City. Galier’s product liability claims against Murco arose from Murco’s substantial sales activity in Oklahoma. This is a textbook case of specific personal jurisdiction.

Given the highly fact-specific nature of this case and the unremarkable legal issues presented, the Oklahoma Court of Civil Appeals affirmed the jury’s verdict for Galier in an unpublished decision. Under the Rules of the Oklahoma Supreme Court, unpublished decisions lack persuasive or precedential value and cannot be cited.

Murco has failed to identify a single compelling reason for this Court to grant certiorari. There is no error for this Court to correct. There is no conflict between the decision below and the decisions of any other state or federal court. The decision below was by an intermediate appellate court, not even a state court of

last resort (the Oklahoma Supreme Court denied review). The facts found by the jury establish that Murco had substantial contacts with Oklahoma and that Galier's injury arose from those contacts. As specific personal jurisdiction exists in this case, and the lower court opinion lacks any persuasive or precedential value, Murco's Petition for Writ of Certiorari ("Petition") should be denied.



COUNTERSTATEMENT OF THE CASE

I. Michael Galier was exposed to Murco products in Oklahoma.

In 1970, Michael Galier moved to Oklahoma City as a young boy. Tr. of Proceedings, Afternoon Session, at 11, 13-14, *Galier v. Murco* (May 8, 2015). Not long after the move, Michael's father, Victor Galier, started a general contracting business, Town Craft Homes. *Id.* at 18-19. Until the business shut down around 1975, Victor Galier built 25 or so homes in the Oklahoma City area. *Id.* at 19, 21-22. Galier and his brothers visited their father's jobsites three or four times a month for a few hours at a time. Tr. of Proceedings, Afternoon Session, at 158-59, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Morning Session, at 15-16, *Galier v. Murco* (May 11, 2015). Victor Galier put the boys to work sweeping and picking up the empty boxes and bags lying around on the site. Tr. of Proceedings, Morning Session, at 12, 22, *Galier v. Murco* (May 11, 2015);

Tr. of Proceedings, Morning Session, at 94, *Galier v. Murco* (May 13, 2015).

The evidence at trial established that Galier was exposed to Murco's asbestos joint compound while helping his father with Town Craft. Tr. of Proceedings, Afternoon Session, at 18, 77, 88-98, 92-93, *Galier v. Murco* (May 11, 2015). He was sometimes present when drywall workers mixed and sanded the joint compound, and Galier himself regularly swept up after the drywallers to make the site clean for the next set of tradesmen. *Id.*

After 1975, Victor Galier began working for local real estate developers, selling lots to local builders. Tr. of Proceedings, Afternoon Session, at 35-36, 38-39, *Galier v. Murco* (May 8, 2015). He visited the building sites frequently, and Galier and his brothers accompanied their father to hundreds of sites. *Id.* at 36; Tr. of Proceedings, Afternoon Session, at 75-76, 156, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Morning Session, at 99-100, *Galier v. Murco* (May 13, 2015). As before, the boys spent time sweeping up when they were there with their father. Tr. of Proceedings, Morning Session, at 12, 20-21, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Afternoon Session, at 10, *Galier v. Murco* (May 11, 2015). Galier and his brothers also spent time playing with Murco's asbestos joint compounds found on residential construction sites in their own neighborhood. Tr. of Proceedings, Morning Session, at 20-21, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Afternoon Session, at 13-14, 76, 84, 161,

Galier v. Murco (May 11, 2015); Tr. of Proceedings, Morning Session, at 93, *Galier v. Murco* (May 13, 2015).

Murco's skepticism about Galier's memory of Murco joint compound products, expressed in its Petition, was a consistent theme at trial. The jury decided this factual issue in Galier's favor. Galier recalled five different joint compound products, including Murco, even though he was only a child when he was around those products. Tr. of Proceedings, Afternoon Session, at 98, 156, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Afternoon Session, at 150-51, *Galier v. Murco* (May 12, 2015); Tr. of Proceedings, Morning Session, at 51, *Galier v. Murco* (May 13, 2015). He also recalled the names of a lot of other things from his childhood, including lumber stores, paint products, and homebuilding companies, as well as the brands of breakfast cereals he ate. Tr. of Proceedings, Afternoon Session, at 85, 96-97, *Galier v. Murco* (May 11, 2015). His brothers Andrew and Tony were unsurprised that Galier could recall these things. Tr. of Proceedings, Afternoon Session, at 22, *Galier v. Murco* (May 11, 2015); Tr. of Proceedings, Morning Session, at 98, *Galier v. Murco* (May 13, 2015). Galier wanted to become a contractor like their father, (Tr. of Proceedings, Afternoon Session, at 49, *Galier v. Murco* (May 8, 2015)), and he paid close attention to things he saw on the building sites so he could learn from them. Tr. of Proceedings, Afternoon Session, at 22, *Galier v. Murco* (May 11, 2015).

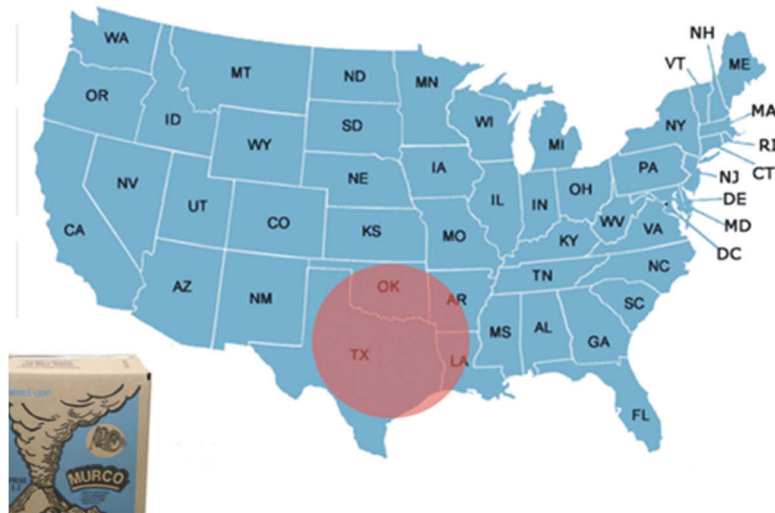
Galier was diagnosed with malignant mesothelioma at the age of 48. Maddox Video Tr., 1/22/15, at

83. Testimony from Galier's causation experts established that his exposure to asbestos from Murco joint compound products was a cause of his mesothelioma. Maddox Depo. Tr., 1/22/15, at 9-15, 140-41; Tr. of Proceedings, Morning Session, at 9-10, *Galier v. Murco* (May 6, 2015); Tr. of Proceedings, Afternoon Session, at 13-14, *Galier v. Murco* (May 6, 2015). These exposures were causative because they were significantly above background asbestos levels, repetitive for a number of years, and within the appropriate latency period for malignant mesothelioma. Maddox Depo. Tr., 1/22/15, at 140-41. Exposure during childhood increased Galier's risk of malignant mesothelioma because young children are more susceptible to the effects of toxins. Maddox Depo. Tr., 1/22/15, at 137-39, 141.

II. Murco made direct sales to Oklahoma.

Joan Murphy Benton, Murco's president since 1997, testified that Murco manufactured asbestos joint compound from 1971 until 1978. Tr. of Proceedings, Afternoon Session, at 29, 53, 164, *Galier v. Murco* (May 5, 2015). In 1971 or 1972, Murco began selling its asbestos products in Oklahoma. *Id.* at 108.

Murco is based in Fort Worth, Texas, and that is where its plant is located. *Id.* at 66. Murco only sold its joint compound products within a 300-mile radius of Fort Worth, which includes Oklahoma City. *Id.* at 65-66, 105. A map depicting only a 200-mile radius from Fort Worth shows that virtually the entire state of Oklahoma is in the heart of Murco's sales area:



Id. at 105-106.

Although Murco’s records are incomplete,¹ they show that in just a one-year period from 1972 to 1973, Murco sold 23,737 units of asbestos joint compound to Oklahoma professional drywall contractors and distributors. *Id.* at 110, 112-17. Records located by Galier’s counsel showed that in a later year there were sales of 15,760 units of asbestos-containing joint compound to a company in Oklahoma City, Flintkote. *Id.* at 111-12. Based only on these records, Benton agreed that there were “tens of thousands of sales just in a two year period that are directed to Oklahoma, most of them to Oklahoma City.” *Id.* at 113.

¹ There are entire months and years for which Murco has no records. *Id.* at 107-08.

Murco sold to at least eight different contractors and distributors in Oklahoma, five of which were in Oklahoma City. *Id.* at 109, 114. Murco knew that those Oklahoma distributors were selling to Oklahoma residents. *Id.* at 112-13.

III. Result below.

After a two-week trial, the jury returned a verdict against Murco and another joint compound manufacturer, Welco Manufacturing Company (“Welco”). App. to Pet. for Cert. 4a. Both companies were found liable under negligence and product liability theories, and the jury further found that they acted with gross negligence, reckless disregard, intentionally, and with malice. *Id.* at 5a. The jury awarded \$6 million in compensatory damages and no punitive damages. *Id.* at 4a, 7a.

Murco and Welco appealed to the Oklahoma Court of Civil Appeals, which affirmed on all issues in an unpublished decision dated February 3, 2017. The Oklahoma Supreme Court denied review on June 19, 2017. Thereafter, Welco chose to pay the judgment against it, while Murco has petitioned this Court for a writ of certiorari on the issue of personal jurisdiction.



REASONS FOR DENYING THE PETITION

I. The Oklahoma Court of Civil Appeals properly concluded that personal jurisdiction exists over Murco in this case.

There can be no doubt that Murco is subject to specific personal jurisdiction in Oklahoma given that Galier’s injuries arise out of his repeated contact with Murco’s asbestos-containing joint compound products in Oklahoma City over a period of many years and that Murco sold those products directly to distributors in Oklahoma that it knew would sell to Oklahoma residents.²

Oklahoma law provides that “[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.” Okla. Stat. Ann. tit. 12, § 2004(F). “The intent of § 2004(F), which is referred to as a long-arm statute, ‘is to extend the jurisdiction of Oklahoma courts over non-residents to the outer limits permitted by the Oklahoma Constitution and by the due process clause of the United States Constitution.’” *Lively v. IJAM, Inc.*, 114 P.3d 487, 493-94 (Okla. App. 2005) (quoting *Hough v. Leonard*, 867 P.2d 438, 442 (Okla. 1993)).

² This case does not involve general personal jurisdiction – neither Galier nor the Oklahoma Court of Civil Appeals have taken that position. To the extent the trial court concluded that there is “general jurisdiction” over Murco, this appears to be a typographical error. As Murco acknowledges, Galier relied only on specific jurisdiction in the trial court. Pet. for Cert. 4.

A straightforward application of this Court’s precedents demonstrates that Oklahoma’s exercise of personal jurisdiction over Murco is consistent with due process limits. The Due Process Clause of the Fourteenth Amendment requires that a nonresident defendant possess “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The “constitutional touchstone” has long been whether the defendant “purposefully established” such minimum contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

For specific jurisdiction, the defendant must purposely direct his activities at residents of the forum and the litigation must result from alleged injuries that “‘arise out of or relate to’” those activities. *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Where a corporation purposefully avails itself of the forum and the privilege of conducting activities within a State, it enjoys the benefits and protection of the laws of that State. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Int’l Shoe*, 326 U.S. at 319. The tradeoff for these benefits is the obligation to respond to suits arising out of or connected with the defendant’s activities in the forum state. *Int’l Shoe*, 326 U.S. at 319.

The requirement that a defendant purposely direct conduct at the forum state ensures that the

defendant's connection with the forum is sufficient to cause the defendant to "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The "purposeful availment" requirement ensures that "a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks omitted). The Due Process Clause thereby "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

Burger King held that the defendant's contacts with the forum must "result from actions by the defendant *himself*" with the forum state. *Burger King*, 471 U.S. at 475. This was not a new principle established in the recent case of *Walden v. Fiore*, 134 S. Ct. 1115 (2014), as Murco suggests. Rather, *Walden* simply reinforced this principle in a case where the defendant had no contacts whatsoever with the forum state. *Id.* at 1124. In *Walden*, none of the defendant's conduct occurred in the forum state of Nevada. *See id.* It was merely alleged that he had caused harm to Nevada residents while they were present in the defendant's home state of Georgia. *See id.* In holding that jurisdiction could not be exercised in such circumstances, the Court explained that the proper inquiry for specific jurisdiction is "whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125.

Jurisdiction may be established over defendants who reach into the forum state, and “physical entry into the State – either by the defendant in person or through an agent, *goods*, mail, or some other means – is certainly a relevant contact.” *Id.* at 1122 (emphasis added).

The lower court decision in this case is not at odds with *Walden* or with *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), as Murco claims. *Walden* recognized that the sale of goods in the forum state is a “relevant contact” for establishing specific jurisdiction. 134 S. Ct. at 1122. While the defendant in *Walden* had no contact with the forum itself, here Murco has engaged in extensive direct sales of its products to Oklahoma.

Moreover, in *Bristol-Myers Squibb*, it was a given that personal jurisdiction existed over the defendant in states where Plavix had been sold to residents who were injured by that drug. The defendant did not even challenge the jurisdiction of California with regard to the claims of California residents who had taken Plavix. See *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 878 (2016). This Court, in reversing and finding that there was not personal jurisdiction over the nonresidents’ claims, repeatedly pointed out that the nonresidents had not purchased Plavix in California or been injured by Plavix in California, suggesting this was the decisive factor in the case. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778, 1781. The Court also noted that plaintiffs who reside in other states, such as Texas or Ohio, could group together and bring suit in

their home states. *Id.* at 1783. That is precisely what Galier did: he brought suit in the state where Murco's products were sold and he was injured.

It is well-established that a defendant's product sales and distribution in the forum state creates personal jurisdiction over the defendant for torts arising from those activities. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984). Jurisdiction is particularly proper over a defendant that "continuously and deliberately exploited" a state's market. *Id.* at 781. In *Keeton*, this Court upheld New Hampshire's assertion of specific jurisdiction over the Ohio corporation, Hustler Magazine ("Hustler"), for a libel suit brought by a New York resident. *Id.* at 772. Hustler was headquartered in California and its contacts with New Hampshire consisted of some 10 to 15,000 copies of Hustler magazine distributed in-state each month. *Id.* This Court readily upheld personal jurisdiction based on these contacts, as they evidenced a deliberate exploitation of the New Hampshire market such that Hustler could reasonably foresee being haled into New Hampshire court. *Id.* at 781. It was stressed that New Hampshire had an interest in resolving disputes involving torts committed within its state, such as Hustler's distribution of libelous products to New Hampshire residents. *Id.* at 776-77.

Indeed, systematically sending defective products into the forum state is well-established as a means of subjecting oneself to the law of the forum state. Personal jurisdiction is proper when "the sale of the product of a manufacturer . . . is not simply an isolated

occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly the market for its product in other States. . . .” *World-Wide Volkswagen*, 444 U.S. at 297. In such cases, “it is not unreasonable to subject [the manufacturer] 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.*

This standard for personal jurisdiction was reiterated by a plurality of this Court in *J. McIntyre Machinery Ltd. v. Nicaastro*, 564 U.S. 873 (2011). There, a plaintiff brought a personal injury suit in New Jersey against the British manufacturer of a metal shearing machine that had a U.S. distributor. *Id.* at 878 (plurality opinion). Justice Kennedy, writing for a plurality, noted that one of the ways a nonresident defendant may purposefully avail itself of the privilege of conducting business in the forum, and thereby manifest its intention to submit to the authority of the forum’s courts, is “by sending its goods rather than its agents.” *Id.* at 882. To support jurisdiction, the defendant must target the forum for the sale or distribution of its goods. *Id.* A case-specific analysis is required to determine “whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.” *Id.* at 884. In *Nicaastro*, the defendant had not targeted the forum state of New Jersey in any way – only one of its

machines had ever been sold in the State, and that was through a national distributor. *Id.* at 878.

The instant case presents exactly the kind of targeted sales that establishes specific personal jurisdiction under *World-Wide Volkswagen*, *Keeton*, *Nicastro*, *Walden*, and other precedents. Murco directly sold tens of thousands of its products in Oklahoma, to at least eight different contractors and distributors, over a period of several years. Oklahoma was part of Murco's primary sales territory during the time period when Galier recalled being around Murco's products on construction sites in Oklahoma City. Murco intentionally took advantage of Oklahoma's market for joint compound products, thereby invoking the protections and benefits of Oklahoma law. At trial, the jury found that the products Murco sold in Oklahoma caused Galier to develop cancer. Because its purposeful and targeted sales to Oklahoma caused injury in that State, Oklahoma had the right to require Murco to answer for its tortious conduct in its court system.

Murco does not strongly argue that jurisdiction is lacking in this case. Rather, its primary complaint is that the Oklahoma Court of Civil Appeals utilized an incorrect legal standard. The Oklahoma appellate court did focus on the purposeful availment component of specific jurisdiction, analyzing Murco's systemic sales of its joint compound products to Oklahoma during the relevant time period. App. to Pet. for Cert. 22a-23a. This emphasis was, in fact, proper given this Court's longstanding concern with ensuring that jurisdiction only be exercised when the defendant has

purposefully engaged in conduct aimed at the forum state. *See, e.g., Walden*, 134 S. Ct. at 1122, 1126; *Burger King*, 471 U.S. at 472-76; *World-Wide Volkswagen*, 444 U.S. at 296-97; *Hanson*, 357 U.S. at 253; *Int'l Shoe Co.*, 326 U.S. at 319.

Murco complains, however, that the lower court should have also analyzed whether Murco's contacts with Oklahoma were "suit-related." Pet. for Cert. 13. In reality, the connection between Murco's joint compound sales to Oklahoma and Galier's product liability claims was a key aspect of this case. As the Oklahoma Court of Civil Appeals found in another part of its opinion, "[t]his record presents competent evidence to support the jury's finding of a significant probability that Galier was regularly and significantly exposed to Murco's asbestos-containing product." App. to Pet. for Cert. 20a. There was simply no question that Murco's joint compound sales in Oklahoma were related to the product liability claims brought against it.

Given this Court's established precedent, it strains credulity for Murco to contend that it could not predict that its years of sales to Oklahoma would subject it to suit in Oklahoma if those products caused injury to a resident of the state. Its contention that there is uncertainty over what conduct would subject it to suit in Oklahoma is belied by its purposeful conduct in setting up a substantial customer base and making regular sales in the Oklahoma market.

Contary to Murco's contention, Oklahoma precedent in fact adheres to the distinction between general

and specific jurisdiction and the constitutional standards for personal jurisdiction established by this Court. In discussing the requirements for specific jurisdiction, the Oklahoma Supreme Court has recognized that “the ‘relationship among the defendant, the forum, and the litigation’ is essential for the exercise of specific personal jurisdiction.” *Gilbert v. Sec. Fin. Corp. of Oklahoma*, 152 P.3d 165, 174 (Okla. 2006) (quoting *Helicopteros*, 466 U.S. at 414 n.8). The Oklahoma Court of Civil Appeals has similarly discussed at length the tests for general and specific jurisdiction. *See Lively*, 114 P.3d at 494-95. There, the court held that a single online sale of a computer to an Oklahoma resident did not establish the requisite contacts for personal jurisdiction. *See id.* at 498 (“The fact that Defendants had a web site that anyone in Oklahoma could access, in and of itself is not enough to permit our courts to exercise personal jurisdiction over Defendants.”).

Murco has failed to present a compelling reason for this Court to grant review. The decision below does not exceed the Due Process limits on the exercise of personal jurisdiction. All requirements for specific personal jurisdiction are met given the jury’s findings that Murco sold asbestos-containing joint compound products in Oklahoma and Galier was injured by his exposure to those products in Oklahoma.

II. The unpublished opinion of the Oklahoma Court of Civil Appeals has no persuasive or precedential value.

The decision at issue is an unpublished opinion from Oklahoma's intermediate appellate court, the Oklahoma Court of Civil Appeals. The decision has been designated "not for official publication." App. to Pet. for Cert. 2a.

The Rules of the Oklahoma Supreme Court set forth the criteria for publication of court opinions. Okla. Sup. Ct. R. 1.200(b). Opinions will not be published unless they establish a new rule of law, involve a legal issue of continuing public interest, criticize or explain existing law, apply an established rule of law to a novel factual situation, resolve an apparent conflict of authority, or constitute a significant and non-duplicative contribution to the legal literature. *Id.* The decision is published when the majority of the judges participating in the decision find that one of these standards is satisfied. *Id.* at (c)(4).

When a decision is not designated for publication, that "mean[s] that no new points of law making the decision of value as precedent are believed to be involved." Okla. Sup. Ct. R. 1.200(c)(1). The rules further explain that unpublished decisions have absolutely no precedential value and may not be cited: "Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinion so marked shall not be considered as precedent by any court or cited in any brief or other

material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case.” *Id.* at (c)(5).

In Oklahoma, even if the Court of Civil Appeals decides to designate one of its opinions for publication, it will merely have persuasive effect. Okla. Sup. Ct. R. 1.200(d)(2). Only opinions ordered to be published by the Oklahoma Supreme Court are accorded precedential value. *Id.* “No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter.” Okla. Stat. Ann. tit. 20, § 30.5. Lest there be any doubt, the Oklahoma Supreme Court has reiterated that unpublished decisions “have neither persuasive nor precedential value.” *Bilbrey v. Cingular Wireless, L.L.C.*, 164 P.3d 131, 136 n.7 (Okla. 2007).

Murco is asking this Court to review a decision that cannot be cited as persuasive authority, much less as precedent. The judges that wrote and concurred in the opinion did not find this case to present any new or significant legal issues, or even a novel factual situation. If any party or other interested person believed the opinion to have substantial precedential value, they could have asked for publication. Okla. Sup. Ct. R. 1.200(c)(2). None did so. The opinion of the Oklahoma Court of Civil Appeals simply does not present an important and pressing issue of law that demands or deserves the attention of this Court.



CONCLUSION

The Court should deny certiorari. There are no compelling reasons for the Court to review the decision of the Oklahoma Court of Civil Appeals. That court properly found that Oklahoma has personal jurisdiction over Murco, and its decision is unpublished and lacks precedential value.

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