No.

In the Supreme Court of the United States

MURCO WALL PRODUCTS, INC.,

Petitioner,

v.

MICHAEL D. GALIER,

Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that a state court can exercise specific personal jurisdiction over a non-resident defendant with respect to a plaintiff's cause of action consistent with the Due Process Clause of the Fourteenth Amendment only when (1) the defendant has sufficient minimum contacts with the State that show that it has purposefully availed itself of the privilege of conducting activities in the State; (2) the plaintiff's cause of action arises out of or relates to those forum contacts; and (3) the exercise of personal jurisdiction would comport with traditional notions of fair play and substantial justice. *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1024-1025 (2021). In this case, the Oklahoma Supreme Court found this standard satisfied solely because there was evidence that the defendant made a small number of sales of some of its allegedly defective products to customers based in Oklahoma even though there was no evidence that those customers used or resold the products in Oklahoma.

The questions presented are:

1. Whether the "minimum contacts" requirement for specific jurisdiction is satisfied whenever a defendant has made limited sales of products to customers based in the forum State, even when there is no evidence that those customers used or resold those products in that State.

2. If the answer to question 1 is yes, whether a plaintiff's cause of action can be said to relate to or arise out of the defendant's forum contacts in the absence of evidence about which of the defendant's products allegedly caused the plaintiff's injury.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Murco Wall Products, Inc., was defendant/appellant before the Oklahoma Supreme Court. Murco Wall Products, Inc., has no parent corporation. No publicly held company owns 10% or more of its stock.

Respondent Michael D. Galier was plaintiff/appellee before the Oklahoma Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Murco Wall Products, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court (App., *infra*, 1a-18a) is reported at 2022 OK 85. The opinion of the Oklahoma Court of Civil Appeals (App., *infra*, 19a-52a) is not reported. An earlier relevant opinion of the Oklahoma Court of Civil Appeals (App., *infra*, 55a-77a) is unreported, as is an earlier relevant journal entry of the District Court of Oklahoma County (App., *infra*, 78a).

JURISDICTION

The Oklahoma Supreme Court issued its opinion on October 25, 2022. App., *infra*, 1a. On January 12, 2023, Justice Gorsuch extended the time for filing a petition for a writ of certiorari in this Court to and including February 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

This is the second time that this products-liability action has reached this Court, and the second time that the Oklahoma courts have adopted an unacceptably overreaching approach to personal jurisdiction. The first time, this Court granted, vacated, and remanded for further consideration in light of its then-

recent decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017). The Court should step in again now.

Respondent Michael Galier, a citizen of Oklahoma, alleges that he was exposed to asbestos-containing products manufactured by petitioner Murco Wall Products, Inc., a company based in Texas. Galier sued Murco in state court in Oklahoma. Initially, the Oklahoma Court of Civil Appeals held that the trial court could exercise general personal jurisdiction over Murco. This Court vacated that decision in light of *Bristol-Myers*. On remand, the Oklahoma appellate court switched tack, holding that the trial court could exercise specific personal jurisdiction. The Oklahoma Supreme Court affirmed, holding that Murco's limited sales to a handful of Oklahoma-based customers was sufficient to show that it had purposefully availed itself of the Oklahoma market, and that respondent's claim arises out of or relates to those sales even though he could not identify which of Murco's products allegedly caused his injury.

Both aspects of the Oklahoma Supreme Court's decision warrant this Court's review. The state court's purposeful-availment holding typifies the confusion among the lower courts about when a defendant can be said to have purposefully availed itself of the privilege of doing business in a forum State based on its sale of products that end up in the State. This Court has twice granted review to address that issue, but on both occasions no position commanded a majority of the Court. See *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 885-886 (2011) (plurality op.); *id.* at 888-889 (Breyer, J., concurring); *Asahi Metals Indus. Co.* v. *Superior Ct.*, 480 U.S. 102, 108-112 (1987) (lead op. of O'Connor, J.); *id.* at 116-117 (Brennan, J., concurring). That lack of a definitive resolution has led the

lower courts to adopt expressly conflicting approaches. Those conflicting approaches include the foreseeability-based approach effectively employed by the court below, under which the existence of personal jurisdiction can depend solely on the independent actions of third parties, an approach that provides no warning or certainty to defendants. The Court should grant review to resolve this impasse once and for all.

The Oklahoma Supreme Court's second holding, that respondent's claim arises out of or relates to Murco's purported Oklahoma contacts, also warrants review. It runs roughshod over this Court's admonition that there must be a "close," "significant," and "strong" relationship among the defendant, the forum, and the litigation. *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1028, 1030, 1032 (2021). In effect, the court below held that respondent's claim was sufficiently related to Murco's forum contacts merely because some of Murco's products used in Oklahoma may have contained asbestos, and respondent is claiming exposure to asbestos. That is the type of "anything goes" approach that this Court rejected in *Ford*. *Id*. at 1026. The Court should grant review to nip this unwarranted expansion of specific personal jurisdiction in the bud.

STATEMENT

A. Factual Background

1. Murco is a family owned and operated company that has been a supplier of drywall materials, tools, and other supplies since 1971. It is incorporated in Texas and maintains its principal place of business in Fort Worth, Texas. App., *infra*, 3a. Murco's product line included joint compound products, some of which contained asbestos from 1971 until 1978, when the sale of such products was prohibited by the Consumer

Product Safety Commission ("CPSC"). Tr. of Proceedings, Afternoon Session 53-54, 164, *Galier* v. *Murco Wall Prods., Inc.*, No. CJ-2012-6920 (Okla. Dist. Ct. May 5, 2015).

Murco has never had any offices, employees, agents, or property in Oklahoma. App., *infra*, 22a; see Okla. Sup. Ct. ROA 47-48. It has never advertised in Oklahoma, has never registered to do business in Oklahoma, and has never had any affiliates in that State. *Ibid.* Instead, all of its offices, employees, and operations, including its sole manufacturing plant, have always been in Texas. *Ibid.*

Respondent relies on two purported connections between Murco and Oklahoma. See App., *infra*, 3a-4a. First, in the 1970s, eight of Murco's customers had Oklahoma addresses. *Ibid.* Between 1972 and 1973, when Murco had just four employees, Murco made 43 sales to seven of those customers; one customer did not buy anything from Murco. *Id.* at 23a-24a; see Okla. Sup. Ct. ROA 82-89; Tr. of Proceedings, Afternoon Session 104, *Galier*, *supra* (May 6, 2015).[1] Those sales were for 14 different products, only some of which contained asbestos. See App., *infra*, 23a-24a; Okla. Sup. Ct. ROA 82-89. For one of its customers, Flintkote, Murco sold both products packaged with the customer's private label and products packaged with its own label. App., *infra*, 4a, 24a n.2; see Okla. Sup. Ct. ROA 268-270, 273-277. There is no evidence in the record as to where any of those customers placed their orders (Oklahoma or Texas), as to whether Murco shipped the orders to Oklahoma or

[1] The courts below converted those 43 sales into "units," meaning individual boxes, bags, or buckets of joint compound. See App., *infra*, 3a-4a, 23a n.1. The resulting number gave the appearance of a far greater degree of commercial activity.

whether the customers picked up the orders in Texas, or as to whether the customers used or resold the products in Oklahoma.

Second, in 1977, Murco's founder wrote a letter to the CPSC, in which he stated that Murco "has one salesman, covering about a 300 mile radius of Fort Worth." App., *infra*, 4a (cleaned up). That statement describes an area that mainly consists of northern, eastern, and central Texas, as well as parts of Oklahoma, Arkansas, and Louisiana:

Map Developers, *Draw a Circle*, https://perma.cc/SCV6-5KQG?type=image (created Feb. 5, 2023). The evidence showed that Murco had chosen the 300-mile radius due to shipping costs. App., *infra*, 23a. There is no evidence in the record as to whether that salesman actually visited any State other than Texas as part of his duties, much less as to whether the salesman made any sales in Oklahoma.

2. Respondent injured himself at work and was diagnosed with a hernia in April 2011. Tr. of Proceedings, Afternoon Session 124-125, *Galier*, *supra* (May 11, 2015). After he underwent hernia surgery in March 2012, the excised hernia sac was sent for routine pathology, where it tested positive for mesothelioma. *Id.* at 125. Respondent has never exhibited any symptom of mesothelioma. *Id.* at 141. Respondent has been tested for mesothelioma several times since that result; all of the tests were negative. *Id.* at 126-139. More recently, against medical advice, respondent has declined to take subsequent tests or seek any treatment for mesothelioma. *Id.* at 138-139.

Respondent's theory is that he contracted mesothelioma due to asbestos exposure as a child. Respondent's father was a general contractor and real estate agent. Tr. of Proceedings, Afternoon Session 31, *Galier*, *supra* (May 11, 2015). Respondent asserts that, between 1969 and 1979, he visited his father's jobsites in Oklahoma, where he was exposed to joint compounds that contained asbestos. *Id.* at 151; see App., *infra*, 4a-5a.

Respondent has never provided any details as to what Murco products allegedly caused his injury. During his deposition, respondent recited an alphabetical list of joint compound brands he recalled seeing as a child. Tr. of Proceedings, Afternoon Session 98, *Galier*, *supra* (May 11, 2015). He initially did not include Murco, after which his lawyer demanded a break. *Ibid*. After prompting from his lawyer during the break, respondent added that he also remembered seeing Murco's name on boxed joint compound as a child in the 1970s. *Id.* at 99. He could not say whether that product contained asbestos. *Id.* at 109; see App.,

infra, 4a n.2. He has never claimed to have been exposed to asbestos from products packaged with Flintkote's private label. App., *infra*, 4a n.1.

B. Proceedings Below

1. In November 2012, respondent brought a personal-injury suit in the District Court for Oklahoma County against petitioner and 17 other manufacturers of asbestos-containing products. Pet. 1, *Galier*, *supra* (Nov. 1, 2012). Murco moved to dismiss the claim against it for lack of personal jurisdiction. See App., *infra*, 22a. The trial court denied that motion, holding that it could exercise general personal jurisdiction over Murco. *Id.* at 78a. Murco sought interlocutory review, to no avail.

By the time of trial, only three of the original defendants remained, with the others having settled or been dismissed from the case. See App., *infra*, 33a. The jury ultimately returned a verdict in favor of respondent and awarded him $6 million in damages for his asymptomatic mesothelioma. *Ibid.* Although respondent sued at least 18 companies, and although respondent testified that he recalled several different products being present at job sites, the jury assigned 40% of the liability to Murco – and 60% to Murco's codefendant. *Ibid.* Inexplicably, the jury did not assign any liability to the several other manufacturers that respondent specifically identified during his testimony. *Ibid.*

2. Murco appealed the judgment to the Oklahoma Court of Civil Appeals, arguing (among other things) that the judgment was void because the trial court had lacked personal jurisdiction over it. App., *infra*, 74a. That court held that the "totality" of Murco's con-

tacts with Oklahoma was sufficient to support the exercise of personal jurisdiction. *Id.* at 75a. The Oklahoma Supreme Court denied review. *Id.* at 54a.

Murco filed for a petition for a writ of certiorari in this Court. See Pet., *Murco Wall Prods., Inc.* v. *Galier*, 138 S. Ct. 982 (2018) (No. 17-733). Murco's petition argued that the Oklahoma appellate court's "totality" approach was inconsistent with this Court's precedents on personal jurisdiction. *Id.* at 12-14. The Court granted the petition, vacated the Oklahoma Court of Civil Appeals' judgment, and remanded the case to that court for further consideration in light of *Bristol-Myers*. App., *infra*, 53a.

3. On remand, the Oklahoma appellate court again affirmed the trial court, this time concluding that the trial court could exercise specific personal jurisdiction over Murco. App., *infra*, at 29a-33a.

First, the Oklahoma Court of Civil Appeals concluded that Murco "purposefully targeted its asbestos joint compound into Oklahoma because it was within its calculated profitability zone." App., *infra*, 32a. It based that conclusion on only two facts: (i) that Murco had picked a 300-mile radius for its salesman because of shipping costs and much of Oklahoma is within a 300-mile radius of Fort Worth, Texas; and (ii) that Murco had sold joint compound to a handful of customers with Oklahoma addresses. *Id.* at 31a-32a. The court then stated that respondent's claim "ar[ose] out of and related to" Murco's sales that were "purposefully directed toward the State of Oklahoma." *Id.* at 32a.

The Oklahoma Court of Civil Appeals next concluded that the exercise of personal jurisdiction would be reasonable. App., *infra*, 32a. It stated that Murco's headquarters is "relatively close to Oklahoma County"

and that Oklahoma citizens have an interest "in determining whether products sold into their state are dangerous, and whether the manufacturer breached a duty." *Ibid.*

4. The Oklahoma Supreme Court granted Murco's petition for a writ of certiorari on the personal-jurisdiction issue, and affirmed. App., *infra*, 3a.

First, the court concluded that Murco had "purposefully availed" itself of the "privilege of conducting activities within Oklahoma." App., *infra*, 11a-12a. The court principally relied on Murco's sales to customers with Oklahoma addresses. *Ibid.* It placed particular weight on Murco's sales of products with Flintkote's private label. *Ibid.* The court also relied on the 300-mile radius that Murco had set for its salesman; the court said that this choice of radius "disclosed [Murco's] intent to sell its product to the majority of the state of Oklahoma." *Id.* at 11a.

Next, the Oklahoma Supreme Court concluded that respondent's claims arise out of or relate to Murco's purported Oklahoma contacts. App., *infra*, 12a-16a. The court acknowledged that respondent could not identify which Murco product allegedly caused his injury or when he had been exposed to that product, much less to whom and where Murco had sold the product, but held that respondent did not need to make that showing. *Id.* at 4a n.2, 16a. The court held that it was enough that Murco had sought to "serve the market for asbestos joint compound in Oklahoma" and that respondent was alleging that exposure to asbestos joint compound caused his injury. *Id.* at 16a.

Finally, the Oklahoma Supreme Court concluded that the trial court's exercise of specific personal jurisdiction was reasonable. App., *infra*, 16a-17a. It stated

that the burden on Murco was minimal because the trial "occurred within Murco's own chosen radius for conducting business sales"; that Oklahoma had a substantial interest in adjudicating the case because the alleged exposure occurred in Oklahoma to an Oklahoma resident; and that respondent had an interest in "convenient relief." *Ibid.* The court further stated that it would be inefficient for the Texas courts to readjudicate this case. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted both on the question whether Murco's limited sales to Oklahoma customers constituted purposeful availment of the Oklahoma forum, as well as on the question whether respondent's claim arises out of or relates to those sales despite his inability to identify which Murco product allegedly caused his injury.

I. THE COURT SHOULD GRANT REVIEW OF THE PURPOSEFUL-AVAILMENT QUESTION

Lower courts are hopelessly divided on when a defendant can be held to have sufficient contacts with a forum State because its products ended up in that State. The courts have tried to make sense of the fractured opinions in *Asahi* and *Nicastro*, but have come to expressly conflicting conclusions. Some courts have held that it is enough if it was foreseeable that the defendant's products would end up in the forum State through the regular flow of commerce, while others require something more, such as a showing that the defendant intentionally targeted the forum State.

The decision below is on the wrong side of this divide. The Oklahoma Supreme Court previously had stated that it requires intentional targeting, but this case demonstrates that the court, in effect, equates

foreseeability with targeting. This Court has explained that the due-process limits on personal jurisdiction principally protect defendants by ensuring that they have fair warning of where they might be sued. A foreseeability-based approach does not adequately protect defendants: It allows them to be haled into inhospitable foreign forums based solely on the conduct of third-party customers.

The Court should grant review to finally settle this important issue. Companies across the nation and the world need clarity on the rules regarding where they can be sued, so that they can structure their affairs accordingly. And this case presents an ideal opportunity for this Court to provide the needed guidance.

A. State And Federal Courts Are Profoundly Divided On The Question Presented

1. The Due Process Clause limits a state court's power to exercise personal jurisdiction over a defendant. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 290 (1980). For a defendant that is not "essentially at home" in the State (and thus not subject to general personal jurisdiction), the state court may exercise specific personal jurisdiction only when three requirements are met. *Ford*, 141 S. Ct. at 1024. First, the defendant must have sufficient minimum contacts that show that it "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Id.* at 1024-1025 (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958)). Second, the plaintiff's cause of action must "arise out of or relate to" the defendant's forum contacts, such that there is a strong "affiliation between the forum and the underlying controversy." *Id.* at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780). Last, the exercise of specific personal jurisdiction must be consistent with "traditional notions

of fair play and substantial justice." *Id.* at 1024 (quoting *International Shoe* v. *Washington*, 326 U.S. 310, 316-317 (1945)); see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476-478 (1985). These requirements ensure that defendants are treated fairly and protect interstate federalism. *Ford*, 141 S. Ct. at 1025.

One question that has repeatedly arisen is whether a seller of products purposefully availed itself of a forum State when its products foreseeably ended up in that State through the regular flow of commerce. This is often referred to as the "stream of commerce" theory. *E.g.*, 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 1067.4 (4th ed. 2022) ("WRIGHT & MILLER"). This Court has granted review three times to address that question, but in the two more recent cases no position commanded a majority of the Court.

This Court first addressed the stream-of-commerce theory in *World-Wide Volkswagen*, which involved a car sold in New York that caught fire while the owners were driving through Oklahoma. 444 U.S. at 288. The Oklahoma Supreme Court upheld the state court's exercise of personal jurisdiction over the car's distributor (which operated solely in New York, New Jersey, and Connecticut) and dealer (which operated solely in New York) on the theory that it should have been foreseeable to them that the car would be used in Oklahoma. *Id.* at 288-290. This Court reversed, explaining that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction." *Id.* at 295. The Court held that the owner's unilateral decision to drive the car to Oklahoma did not show that either the distributor or the dealer purposefully availed itself of that State. *Id.* at 298.

The Court revisited the issue in *Asahi*, which involved a suit against a Japanese manufacturer of tire

valves following a tire malfunction in California. 480 U.S. at 106. The tire-valve manufacturer had sold thousands of valves to a tire manufacturer in Taiwan, which in turn had sold finished tires to stores in the United States (including in California). *Id.* at 106-107. This Court held that the California state court could not exercise personal jurisdiction over the tire-valve manufacturer consistent with due process, *id.* at 108, but no opinion on the purposeful-availment requirement commanded a majority of the Court.

Writing for four Justices, Justice O'Connor took the position that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," even if it was foreseeable that the product might end up in the State. *Asahi*, 480 U.S. at 112 (lead op. of O'Connor, J.). For Justice O'Connor, there needed to have been additional conduct that indicated an "intent or purpose to serve the market in the forum State," such as designing the product for that market or advertising in that forum. *Ibid.*

In contrast, Justice Brennan, also writing for four Justices, took the position that no additional showing beyond "the regular and anticipated flow of products" into a State was required. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part). In his view, it would be enough that the defendant had been aware that its product was regularly being sold in the forum. *Ibid.*

Justice Sevens, writing for himself and two of the Justices who also had joined Justice Brennan's opinion, took the position that it was unnecessary to decide the purposeful-availment issue. *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part).

The Court returned to the issue in *Nicastro*, but again was unable to form a majority. That case involved a metal-shearing machine manufactured in England that had allegedly malfunctioned in New Jersey. 564 U.S. at 878 (plurality op.). The evidence showed that the manufacturer sold its machines in the United States exclusively through an independent nationwide distributor and had never visited New Jersey to advertise its machines, and that only one machine (and at any rate no more than four) had likely ended up in New Jersey. *Ibid.*

Justice Kennedy, writing for four Justices, recognized that the jurisdictional rules were "unclear" following *Asahi*. *Nicastro*, 564 U.S. at 877 (plurality op.). He would have cleared up the confusion by expressly adopting Justice O'Connor's position in *Asahi*. *Id.* at 883-886. Applying that position, Justice Kennedy concluded that the manufacturer was not subject to personal jurisdiction in New Jersey. *Id.* at 886-887.

Justice Breyer, writing for himself and Justice Alito, did not take a position on *Asahi*. *Nicastro*, 564 U.S. at 889-890 (Breyer, J., concurring in the judgment). In Justice Breyer's view, the manufacturer's sale of a single machine into New Jersey would not have been sufficient under any of the approaches set out in *Asahi*, and he did not go further. *Id.* at 889-893.

Justice Ginsburg, writing for three Justices, dissented. *Nicastro*, 564 U.S. at 893 (Ginsburg, J., dissenting). In Justice Ginsburg's view, the manufacturer had purposefully availed itself of the nationwide market and therefore could reasonably be sued in a State where its machine allegedly had caused injury. *Id.* at 905-906.

As a leading treatise notes, "[t]he three opinions in *Nicastro* provide no more authoritative guidance to

the lower courts on the stream-of-commerce question than did the three opinions in *Asahi*." 16 MOORE'S FEDERAL PRACTICE – CIVIL § 108.42[4][b] (2022). The Court clearly has rejected the view that a single isolated sale can constitute sufficient minimum contacts, but the Court's guidance is lacking on what volume of "regular" sales would be sufficient, whether additional conduct is required, and, if so, what type of conduct and how extensive it must be.

2. Lacking definitive guidance from this Court, the federal courts of appeals and state courts of last resort have adopted expressly conflicting positions.

The courts principally fall into two camps. In one camp are the courts that broadly hold that a seller of products purposefully avails itself of a forum State if its products foreseeably end up in the State through the regular flow of commerce. This camp includes the Fifth and Seventh Circuits, along with (at least) the highest courts of Alabama, Colorado, Idaho, Iowa, Oregon, Vermont, Washington, West Virginia, and Wisconsin. See *Ainsworth* v. *Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013); *J.S.T. Corp.* v. *Foxconn Interconnect Tech. Ltd.*, 965 F.3d 571, 575-576 (7th Cir. 2020); *Ex Parte Edgetech I.G., Inc.*, 159 So. 3d 629, 642 (Ala. 2014); *Align Corp. Ltd.* v. *Allister Mark Boustred*, 421 P.3d 163, 171 (Colo. 2017); *Griffin* v. *Ste. Michelle Wine Ests. Ltd.*, 491 P.3d 619, 635 (Idaho 2021); *Book* v. *Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 594 (Iowa 2015); *Willemsen* v. *Invacare Corp.*, 282 P.3d 867, 874 (Ore. 2012); *State* v. *Atlantic Richfield Co.*, 142 A.3d 215, 223 (Vt. 2016); *State* v. *LG Elecs., Inc.*, 375 P.3d 1035, 1042 (Wash. 2016); *State ex rel. Ford Motor Co.* v. *McGraw*, 788 S.E.2d 319, 342 (W. Va. 2016); *Kopke* v. *A. Hartrodt S.R.L.*, 629 N.W.2d 662, 675 (Wis. 2001).

In the second camp are the courts that have adopted a narrower approach and require evidence that the seller did something more to intentionally target the forum State. This camp includes the First, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits, as well as (at least) the highest courts of Minnesota, Missouri, Tennessee, Texas, and the District of Columbia. See *Knox* v. *MetalForming, Inc.*, 914 F.3d 685, 692 (1st Cir. 2019); *Shuker* v. *Smith & Nephew, PLC*, 885 F.3d 760, 780 (3d Cir. 2018); *ESAB Grp., Inc.*, v. *Zurich Ins.*, 685 F.3d 376, 392 (4th Cir. 2012); *Bridgeport Music, Inc.* v. *Still N The Water Publ'g*, 327 F.3d 472, 480 (6th Cir. 2003); *Dever* v. *Hentzen Coatings, Inc.*, 380 F.3d 1070, 1075 (8th Cir. 2004); *LNS Enters. LLC* v. *Continental Motors, Inc.*, 22 F.4th 852, 860 (9th Cir. 2022); *XMission, L.C.* v. *Fluent LLC*, 955 F.3d 833, 843 (10th Cir. 2020); *Rilley* v. *MoneyMutual, LLC*, 884 N.W.2d 321, 334 (Minn. 2016); *State ex rel. LG Chem, Ltd.* v. *McLaughlin*, 599 S.W.3d 899, 904 (Mo. 2020); *State* v. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 760 (Tenn. 2013); *Luciano* v. *SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 10 (Tex. 2021); *Holder* v. *Haarmann & Reimer Corp.*, 779 A.2d 264, 273 (D.C. 2001). Further, the Eleventh Circuit has applied the something-more standard without expressly adopting it. *Madara* v. *Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990); see *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014) (assuming that the Eleventh Circuit would follow that approach).

There also are a number of courts that have not expressly adopted either position and that instead assess personal jurisdiction on a case-by-case basis. These courts include the Second, D.C., and Federal Circuits, along with (at least) the highest courts of Illinois and Louisiana. See *Kernan* v. *Kurz-Hastings,*

Inc., 175 F.3d 236, 244 (2d Cir. 1999); *Williams* v. *Romarm, SA*, 756 F.3d 777, 784 (D.C. Cir. 2014); *AFTG-TG, LLC* v. *Nuvoton Tech. Corp.*, 689 F.3d 1358, 1364 (Fed. Cir. 2012); *Russell* v. *SNFA*, 987 N.E.2d 778, 794 (Ill. 2013); *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 889 (La. 1999).

This circuit split is widely acknowledged, is firmly entrenched, and will not resolve itself without this Court's intervention. See, *e.g.*, *J.S.T. Corp.*, 965 F.3d at 575 (acknowledging that "circuit courts have split on the issue"); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 586 (5th Cir. 2014) (expressly disagreeing with the Fourth Circuit's approach); WRIGHT & MILLER § 1067.4 ("Each approach finds considerable representation in lower federal court decisions."). Indeed, the Illinois Supreme Court has stated that it will not revisit the issue without "more definitive guidance from a majority" of this Court. *Russell*, 987 N.E.2d at 794; see also, *e.g.*, *Book*, 860 N.W.2d at 596 (awaiting "further guidance from the fractured United States Supreme Court").

B. The Decision Below Is Incorrect

1. In the decision below, the Oklahoma Supreme Court employed what was, in effect, the broader foreseeability-based approach – even though it had previously rejected that approach.

In *Montgomery* v. *Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018), the court said that it was joining the narrower, "something more" camp. In that case, the court rejected the view that a defendant's sales through the regular flow of commerce amounted to purposeful availment. *Id.* at 833. The court instead indicated that it was adopting a requirement that the defendant have taken "direct and specific conduct" in Oklahoma. *Id.* at 834; see *ibid.* (defendant had not

purposefully availed itself of Oklahoma because it "did not aim the products at Oklahoma markets").

But in the decision below, the Oklahoma Supreme Court – with five new members and only one member of the *Montgomery* majority participating – demonstrated that its understanding of intentional targeting is in practice no different than mere foreseeability. The court held that Murco had "purposefully directed" its products at the Oklahoma *market* based principally on its isolated and sporadic sales to seven Oklahoma-based *customers*. App., *infra*, 11a-12a. But this Court has explained that contact with a forum resident does not amount to a contact with the forum itself. *Walden* v. *Fiore*, 571 U.S. 277, 285 (2014). A sale of a product to a forum resident, at most, makes it foreseeable that the resident might use the product in the forum; it does not show an intention to target the forum itself.

The court also relied on the 300-mile radius Murco had set for its salesman. App., *infra*, 11a. But there was no evidence that the salesman actually visited Oklahoma; Murco's description of his territory did not expressly identify any State other than Texas. *Id.* at 4a. Respondent presented no evidence that Murco's salesperson actually visited Oklahoma, and in any event the Oklahoma appellate courts had no ability to make that factual determination in the first instance. *Evers* v. *FSF Overlake Assocs.*, 77 P3d. 581, 587 (Okla. 2003). The salesman's radius suggests at most that it was foreseeable that Murco's products might find their way into Oklahoma, given the close distance between Fort Worth and the Oklahoma border.

There was no other indication that Murco targeted Oklahoma. Justice O'Connor provided examples of "additional conduct" that "may indicate" an intent to target a forum State in her opinion in *Asahi*, 480 U.S.

at 112 (lead op. of O'Connor, J.); each is absent here. Murco did not "design[]" its joint compound for Oklahoma; "advertis[e]" in that State; "establish[] channels for providing regular advice to customers" in that State; or "market[]" its joint compound "through a distributor who has agreed to serve as the sales agent" in that State. *Ibid.*; see App., *infra*, 22a (Murco "has never directed advertising to Oklahoma," "has never had an office, phone listing, or mailing address in Oklahoma," and "has never had any * * * agents in Oklahoma").[2]

Thus, although the Oklahoma Supreme Court has said that it requires intentional targeting, the decision below shows that in practice the court equates foreseeability with targeting. Indeed, the decision below is more consistent with decisions applying the broader foreseeability approach (see, *e.g.*, *Griffin*, 491 P.3d at 636-638 (manufacturer purposefully availed itself of Idaho because its bottles foreseeably "wended their way into Idaho")) than with decisions applying the narrower "something more" approach (see, *e.g.*, *McLaughlin*, 599 S.W.3d at 903-904 (manufacturer did not purposefully avail itself of Missouri even

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[2] The Oklahoma Supreme Court noted that Murco had private-labeled some of its products for Oklahoma-based Flintkote. App., *infra*, 11a. That does not amount to designing products for Oklahoma. First, Murco labeled the products at Flintkote's request; it did not do it as part of its own strategy to target Oklahoma. Second, Murco merely changed the label on existing products; it did not change the product itself. Cf. *Russell*, 987 N.E.2d at 794-795 (concluding that the defendant intentionally targeted the forum because it had designed the products at issue specifically for a forum resident, and only for that resident). Further, even if that labeling amounted to a cognizable contact with Oklahoma, it was irrelevant here since respondent did not base his claims on exposure to Flintkote's products. App., *infra*, at 4a n.1.

though its batteries foreseeably were distributed in that State)).

2. The Oklahoma Supreme Court's decision cannot be squared with this Court's personal-jurisdiction precedents and the rationales that underlie them.

Starting with the doctrine: This Court has explained that the focus of the specific-personal-jurisdiction analysis is the *defendant*'s contacts with the forum State, not that of the plaintiff or of third parties. *Burger King*, 471 U.S. at 475; *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 417 (1984). This is because the "[d]ue process limits" on a State's exercise of personal jurisdiction "principally protect the liberty of the nonresident defendant," not "the convenience of plaintiffs or third parties." *Walden*, 571 U.S. at 284-285. But when a defendant's products merely foreseeably entered a forum State through the regular flow of commerce, the relevant forum conduct is that of third parties (*e.g.*, customers or distributors), not the defendant. The defendant has not "manifest[ed] an intention to submit to the power" of that State, so the exercise of personal jurisdiction would violate due process. *Nicastro*, 564 U.S. at 882 (plurality op.).

Turning to the rationales: The Court has explained that the specific-personal-jurisdiction rules ensure that defendants are treated fairly and protect interstate federalism. *Ford*, 141 S. Ct. at 1025. Specific personal jurisdiction reflects a *quid pro quo*: In return for "enjoying the benefits and protections of its laws," the State "may hold the company to account for related misconduct." *Ibid.* (cleaned up). Relatedly, the specific-personal-jurisdiction doctrine provides a defendant with "fair warning" of where it might be sued, allowing it the opportunity to "structure its primary conduct" to avoid exposure to a particular

State's courts. *Ibid.* (cleaned up). And the doctrine ensures that "States with little legitimate interest in a suit do not encroach on States more affected by the controversy." *Ibid.* (cleaned up).

The Oklahoma Supreme Court's decision is at odds with those principles. To begin with, there is no *quid pro quo* when a defendant's products end up in a forum State without the defendant having intentionally targeted that State – the defendant does not benefit from the State's laws. Here, for example, Murco never sought or enjoyed the "benefits and protection" of Oklahoma laws (*International Shoe*, 326 U.S. at 319): It has never sought the "enforcement of [any] contracts" in Oklahoma, the "defense of [any] property" in Oklahoma, or the "formation of [any] effective markets" in that State (*Ford*, 141 S. Ct. at 1029). The most that can be said is that Murco derived a limited and indirect financial benefit from sales to customers who may have then resold or used its products in Oklahoma. Yet this Court has held that "financial benefits * * * from a collateral relation to the forum State" are "far too attenuated" to support personal jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 299.

Under the decision below, the defendant also lacks fair warning of where it is likely to be sued. The defendant, in effect, is at the mercy of the independent decisions of third parties, such as customers and distributors, as to where to use the defendant's products. Here, if Murco's products ended up in Oklahoma, it was because its customers chose to bring its products to that State; it is undisputed that it did not advertise in Oklahoma. App., *infra*, 22a.

Relatedly, under the decision below, the defendant lacks the ability to structure its conduct to avoid particular States' courts. Here, for Murco to avoid being subject to personal jurisdiction in Oklahoma, it would

have needed to screen all potential customers and entered contracts with distributors expressly forbidding them from selling products in Oklahoma or to Oklahoma-based customers. Cf. *Align*, 421 P.3d at 172 (upholding exercise of personal jurisdiction in part because defendant "placed no limitation" on where its distributor could sell its products). Even then, it could not assure itself that a Texas-based customer would not use its products on a jobsite in neighboring Oklahoma. Given the close proximity of the two States, it would be foreseeable that some of Murco's products would end up in Oklahoma, no matter what efforts Murco might make.

Further, the decision below gives short shrift to the federalism concerns underlying this Court's personal-jurisdiction precedents. To be sure, Oklahoma has an interest in adjudicating claims by its citizens involving alleged injuries in that State. But Texas also has interests here: It has an interest in regulating its citizens' products and conduct, as well as an interest in ensuring that its citizens are not dragged into inhospitable forums.[3] Under the type of foreseeability-based approach employed by the court below, those interests do not register.

In sum, the approach employed by the court below represents an unduly expansive view of specific personal jurisdiction that finds no support in this Court's

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[3] There should be little doubt that the forum in this case was inhospitable. Respondent was awarded millions of dollars for an always-fatal condition that he showed (and continues to this day to show) no signs of having. And the jury found no fault against the many companies that respondent specifically identified as having supplied asbestos-containing products to his father, while at the same time finding 40% fault against Murco, a company that he had to be prompted by counsel to even remember.

precedents. This Court should grant review to repudiate that errant approach.

C. This Is An Ideal Case For The Court To Resolve This Important Issue

1. The proper approach to the purposeful-availment requirement in the context of a defendant's sales of products through the regular flow of commerce is unquestionably important. This Court has recognized that on three occasions, when it granted review in *World-Wide Volkswagen*, *Asahi*, and *Nicastro*. The time has come for this Court to provide answers to the questions it left unresolved in *Asahi* 36 years ago.

Companies across the country and the world need those answers. That need only has grown since *Asahi* as the channels of commerce have become ever more interconnected and accessible. Now, even a "retired guy in a small town in Maine" can "carve[] decoys and use[] a site on the Internet to sell them" nationwide. *Ford*, 141 S. Ct. at 1028 n.4 (cleaned up). Indeed, every business that sells tangible items potentially is affected.

The continued division among the lower courts has real-world consequences. A clear illustration of this point is that the Supreme Courts of Missouri and Mississippi came to opposite results in two cases involving the same products sold by the same defendant (LG Chem), which had entered those States through the regular flow of commerce, even though the defendant had not acted any differently with respect to one State compared to the other. Compare *McLaughlin*, 599 S.W.3d at 904 (holding that LG Chem had not purposefully availed itself of Missouri), with *Dilworth* v. *LG Chem, Ltd.*, — So. 3d —, 2022 WL 7274532, at *4 (Miss. Oct. 13, 2022) (holding that LG Chem had purposefully availed itself of Mississippi). So this is not a

situation in which courts have adopted different words but apply them the same way in practice. The split matters.

The split is particularly problematic because some state courts apply different tests from the ones applied by the federal courts of appeals for the circuits in which they are located. For example, the West Virginia Supreme Court is firmly in the regular-flow-of-commerce camp, whereas the Fourth Circuit equally firmly is in the "something more" camp – a fact that the West Virginia Supreme Court has acknowledged. *McGraw*, 788 S.E.2d at 341-342 (citing *Lesnick* v. *Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994)). The same conflict exists between Iowa and the Eighth Circuit; Idaho, Oregon, and Washington and the Ninth Circuit; and (relevant here) Colorado and Oklahoma and the Tenth Circuit. See pp. 15-16, *supra*. Conversely, the opposite conflict exists between Texas and the Fifth Circuit. *Ibid.*

These different approaches give plaintiffs a reason to bring suit in the courthouse they believe will be more receptive to their claims. That is particularly easy to do in products-liability suits like this one; a plaintiff's attorney often will be able to name an in-forum defendant who has had some contact with the product and thereby destroy complete diversity. This potential for "[f]orum shopping" is "a substantial reason for granting certiorari." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992).

2. This case presents an ideal opportunity for the Court to resolve this important, recurring question. The personal-jurisdiction issue was the only issue addressed by the Oklahoma Supreme Court. See App., *infra*, 3a. There are no antecedent state-law issues; Oklahoma's long-arm statute extends the jurisdiction of the state courts to the outer limits of the federal

Constitution. Okla. Stat. tit. 12, § 2004(F); see *State ex rel. Edmonson* v. *Native Wholesale Supply*, 237 P.3d 199, 205 (Okla. 2010). And the purposeful-availment question has the potential to be outcome-determinative.

Granting review in this case also would afford the Court the opportunity to provide particularly meaningful guidance to lower courts. The Court's most recent decisions involving the purposeful-availment requirement in products-liability cases have addressed two extremes. In *Ford*, the defendant intentionally and extensively marketed, sold, and serviced its products in the forum States – to the extent that the defendant "d[id] not contest" that it had sufficient minimum contacts with those States. 141 S. Ct. at 1026. In contrast, it was undisputed in *Nicastro* that the defendant never targeted the forum State, and the record suggested that just one of its products ended up in that State. 564 U.S. at 878 (plurality op.).

But this case, like many of the cases faced by the trial courts day in and day out, lies somewhere in between those two extremes. Granting review in this case would allow the Court to provide lower courts with much-needed direction for how to handle the gray areas. The Court should do so.

II. THE COURT SHOULD GRANT REVIEW OF THE ARISE-OUT-OF-OR-RELATE-TO QUESTION

The Oklahoma Supreme Court's holding that respondent's claim arises out of or relates to Murco's contacts with Oklahoma also warrants this Court's review. That holding is in serious tension with a decision of the Ninth Circuit. It also is wrong, and represents an unwarranted expansion of specific personal jurisdiction beyond what the Court set out in *Ford*.

1. Lower courts already are struggling to apply the "arise out of or relate to" standard this Court set out in *Ford*.

In *Ford*, the Court explained that a plaintiff's cause of action can arise out of or relate to a defendant's forum contacts even when the contacts were not a but-for cause of the plaintiff's claims. 141 S. Ct. at 1026. But, the Court warned, the standard nonetheless requires a "strong" connection between the defendant's forum contacts and the plaintiff's cause of action. *Id.* at 1028. The Court explained that there must be "real limits" in order to "adequately protect defendants foreign to a forum." *Id.* at 1026.

In particular, in the context of products-liability cases, the Court made clear that the specific product at issue matters. The Court upheld the exercise of personal jurisdiction in *Ford* even though Ford had not sold the particular cars alleged to be defective in the forum States, because Ford had "advertised, sold, and serviced" the *same exact* models of cars in those States "for many years." 141 S. Ct. at 1028. That provided the required "strong relationship" between the plaintiffs' claims and Ford's in-state activities. *Ibid* (cleaned up). But, the Court warned, the analysis could be different if the plaintiffs' claims involved car models that Ford had marketed only outside the forum States. *Ibid*. That makes sense: For there to be a strong (yet non-causal) link between a defendant's sale of products into a forum and a plaintiff's claim, the claims logically must involve one of the exact types of product the defendant sold.

The Ninth Circuit has taken the Court's admonishment to heart, holding that a plaintiff's claims must involve the exact model of product the defendant serviced in the forum State. *LNS*, 22 F.4th at 864. In *LNS*, following a plane crash in Arizona, the plaintiff

sued the successor of the plane's manufacturer in federal court in Arizona. *Id.* at 857. The successor had sufficient contacts with Arizona, because it operated a service center in Arizona where it serviced various types of planes. *Id.* at 864. But the successor had not serviced the particular plane at issue at its Arizona service center, and there was no allegation that it had serviced the same model of plane at that service center. *Ibid.* In light of this Court's warning in *Ford* about the closeness of the connection required, the Ninth Circuit held that the plaintiff's claims did not sufficiently relate to the successor's operation of the service center. *Ibid.*

The Ninth Circuit's decision hinged on the identity of the specific model of plane that formed the basis of the plaintiff's claim. It is clear that, without that information, the court would not have been able to assess the arise-out-of-or-relate-to requirement; and it certainly would not have held that the requirement was satisfied. See *LNS*, 22 F.4th at 864.

The approach taken by the Oklahoma Supreme Court in this case is in serious tension with the Ninth Circuit's approach in *LNS*. Here, respondent could not name the specific Murco product or products to which he allegedly was exposed. App., *infra*, 4a n.2. All he knew was the general category of product – joint compound – but it was undisputed that Murco sold many different types of joint compound products, some of which did not include asbestos. See *id.* at 23a & n.1; Okla. Sup. Ct. ROA 82-89. So respondent's assertion that he was exposed to Murco joint compound, without more, is akin to the plaintiff in *LNS* saying that its claims involved a "plane" without specifying the model. That clearly would not have been sufficient for personal jurisdiction in *LNS*.

But the Oklahoma Supreme Court was unbothered by the fact that respondent had not identified the specific Murco joint compound product on which he based his claims. See App., *infra*, 16a. For the court below, it was enough that respondent claimed exposure to asbestos in joint compound and that Murco had sold to Oklahoma customers joint compound that may have contained asbestos. See *ibid.* The court seemed to take the view that demanding any greater specificity would be too onerous and would not be required by *Ford*. See *ibid.* That cannot be squared with the approach taken by the Ninth Circuit in *LNS*, which appeared to interpret *Ford* to require that the plaintiff's claims involve the exact model of plane that the defendant serviced in the forum State. See 22 F.4th at 864. There thus already is confusion among the lower courts on how to apply the standard set out in *Ford*.

2. The Ninth Circuit's approach reflects a faithful application of *Ford*; the decision below does not.

For the arise-out-of-or-relate-to requirement to incorporate "real limits" on a state court's exercise of personal jurisdiction (*Ford*, 141 S. Ct. at 1026), the plaintiff's claims and the defendants' forum contacts should involve the same *model* or *specific kind* of product. Otherwise, if the question whether a plaintiff's claim is related to a defendant's forum contacts is framed at too high a level of generality, it will be all too easy for a court to answer yes: As Justice Scalia observed, "everything is related to everything else." *California Div. of Lab. Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

The decision below provides a stark example of how broadly courts will sweep. By relieving respondent of having to prove which specific Murco product allegedly caused his injuries, the Oklahoma Supreme

Court was able to say that respondent's claim is related to *all* of Murco's sales of joint compound to Oklahoma-based customers. App., *infra*, 16a. That included the sales of private-labeled products to Flintkote that the court held was so critical to establishing purposeful availment, see *id.* at 12a – even though respondent expressly acknowledged that he was not alleging exposure to any Flintkote products, see *id.* at 4a n.1. In contrast, if the court below had required respondent to prove the specific Murco product to which he had been exposed, that necessarily would have restricted the arising-out-of-or-related-to analysis to just Murco's Oklahoma-linked sales of that product (if any).

The Oklahoma Supreme Court believed that *Ford* supported its approach, but it was cherry-picking from that decision. The court below took this Court's rejection of a strict causal standard in *Ford* as meaning that respondent did not need to show a "direct link between Murco's sales to Oklahoma buyers and [his] exposure." App., *infra*, 16a. But the court below ignored this Court's repeated warnings that the connection still must be "significant," "strong," and "close," and must incorporate "real limits." *Ford*, 141 S. Ct. at 1026, 1028, 1030, 1032. Left unchecked, the decision below could quickly lead to the type of "anything goes" approach that this Court expressly rejected in *Ford*. *Id.* at 1028. The Court should grant review to head off this troubling development at the pass.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2023

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APPENDIX A

2022 OK 85

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

<table>
<tr><td>MICHAEL D. GALIER

Plaintiff/Appellee/Respondent

v.

MURCO WALL PRODUCTS, INC.,

Defendant/Appellant/Petitioner,

and

WELCO MANUFACTURING CO.
and RED DEVIL CORPORATION,

Defendants.</td><td>)
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ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I

¶0 Michael Galier brought a negligence and products liability action against Defendant/Appellant/Petitioner Murco Wall Products, Inc., a Texas manufacturer, alleging exposure to Murco's products caused him to contract meso-

thelioma. The Oklahoma County District Court denied Murco's motion to dismiss for lack of personal jurisdiction and, following a jury trial, granted judgment to Galier. The Court of Civil Appeals affirmed. This Court denied certiorari. The United States Supreme Court granted certiorari, vacated the Court of Civil Appeals' decision, and remanded for reconsideration in light of *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). The Court of Civil Appeals reaffirmed the district court. We previously granted certiorari to address whether the Court of Civil Appeals properly found that Oklahoma possesses specific personal jurisdiction over Murco.

AFFIRMED.

Clyde A. Muchmore, Harvey D. Ellis, Jr., Cullen D. Sweeney, Crowe & Dunlevy, Oklahoma City, Oklahoma, and Gregory L. Deans (*pro hac vice*) and Katherin H. Stepp (*pro hac vice*), Deans & Lyons, LLP, Dallas, Texas, for Defendant/Appellant/Petitioner, Murco Wall Products, Inc.

Steven T. Horton, Horton Law Firm, Oklahoma City, Oklahoma, and Jessica M. Dean (*pro hac vice*), Charles W. Branham, III (*pro hac vice*), and Lisa White Shirley (*pro hac vice*), Dean Omar Branham & Shirley, Dallas, Texas, for Plaintiff/Appellee/Respondent, Michael D. Galier.

OPINION

DARBY, C.J.,

¶1 Oklahoma resident, Michael Galier was exposed to asbestos in Oklahoma in the 1970s. At that time, Murco sold asbestos joint compound into Oklahoma. In 2012, Galier was diagnosed with mesothelioma. This cause arises from that injury. The question before this Court is whether Oklahoma possesses specific personal jurisdiction over the nonresident Defendant, Murco. We answer in the affirmative.

I. BACKGROUND

¶2 Murco is a Texas corporation with its principal place of business in Fort Worth. Murco started making drywall joint compound in 1971. The company began with three to five employees and by 1976 had ten to twenty employees. Murco maintains limited records from its sales during the 1970s. Murco's extant records note each sale by the number of units sold, rather than purchase price. We therefore use the term "unit" throughout this opinion as a generic reference to the amount of joint compound packaged in one container; depending on the product, a unit refers to a bag between 25 and 50 pounds, a 4 gallon box, or 5 gallon bucket.

¶3 Murco first sold drywall joint compound to Oklahoma customers in 1972. During its early years, eight of Murco's eighty-five customers were located in Oklahoma. *See* ROA 8255, Vol. II PM Tr. of Jury Trial 109:11 (May 5, 2015). From 1972 to 1973, Murco sold at least 245,599 units of product. ROA 81. Of those, 232,516 units contained asbestos. *Id.* And from 1972 to 1973, they sold at least 24,951 units of products containing asbestos to Oklahoma. ROA 82-89. From 1972 to 1974, that number jumps to a total of over

forty thousand units of asbestos joint compound that Murco sold among eight different customers with Oklahoma addresses. *See* ROA 266-77. For one of those customers, Flintkote of Oklahoma City (a distributor), Murco packaged its asbestos-containing product two ways. Some were packaged with only Murco's label, and some were packaged with only the customer's private "Flintkote" label; both were available for resale in Oklahoma City.[1] Between 1972 and 1974, Murco sold 23,089 units of asbestos products to Flintkote; of those, only 2,962 were labeled as a Flintkote product. ROA 268-70, 273-77. Murco sold 20,127 units of asbestos products to Flintkote labeled with Murco's label. *Id*.

¶4 In 1977, Murco's founder and president wrote a letter to the Consumer Products Safety Commission which stated: "Murco has one salesman, covering about a 300 mile radius of Fort Worth." Def.'s Trial Ex. 6. Murco's self-declared sales radius included most of Oklahoma. After 1978, Murco discontinued using asbestos in its drywall joint compound.

¶5 Throughout the 1970s, Galier saw Murco's name on products at various construction sites. From 1971 to 1975, Galier visited many of his father's building plots around Moore, Oklahoma, to play or help clean up after subcontractors.[2] To help clean up,

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[1] Galier does not base his claims of exposure on any product packaged with Flintkote's private label.

[2] Galier did not know the specific source of the Murco products he saw on construction sites or whether the Murco drywall joint compound he was exposed to contained asbestos or not.

The records for Town Craft Homes, Galier's father's company, are nonextant due to a tornado; so there is no record of any worker it hired, product it used, or location where it may have purchased any building materials.

Galier would sweep, dust, pick up, or throw things away, often getting on his hands and knees to scrape up clumps of dried drywall joint compound off the floor. Galier and his brothers would play on the construction sites by throwing the dried clumps of drywall joint compound at each other or placing the drywall dust they had swept up (created by sanding drywall joint compound) into paper bags to throw at each other as "grenades." Later in the 1970s, Galier and his brothers accompanied their father to other building locations and swept up after the workers.

¶6 In March 2012, doctors diagnosed Galier with mesothelioma following an unrelated surgery and biopsy, performed in Oklahoma.

II. PROCEDURAL HISTORY

¶7 On November 1, 2012, Galier sued Murco under theories of negligence and products liability, alleging he was harmed by exposure to Murco's products.[3] Before trial, Murco moved to dismiss based on lack of personal jurisdiction. After an initial hearing on the motion, the trial court granted additional discovery. At the second hearing on the motion to dismiss, Galier argued both general and specific jurisdiction. Galier asserted that Murco should be subject to Oklahoma jurisdiction because he, an Oklahoma resident, was

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Galier's exposure to asbestos was a fact question the jury answered in Galier's favor and is not an issue before this Court.

[3] Galier also sued Welco Manufacturing (drywall joint manufacturer) and Red Devil Corporation (caulk manufacturer). The jury found Welco Manufacturing 60% responsible for Galier's injury and Red Devil Corporation not liable. Welco Manufacturing was part of the initial appeal to the Court of Civil Appeals, but did not appeal to the United States Supreme Court or participate in further appeals after remand.

injured in this State by Murco's asbestos joint compound, and Murco sold similar products to customers located in Oklahoma during the same period in the 1970s.

¶8 The district court denied Murco's motion, ruling Oklahoma had general jurisdiction. *See* Tr. of 2d Mot. Hr'g 32-33 (June 21, 2013). After a two-week trial in May 2015, the jury found that Murco was forty percent responsible for Galier's injury and awarded damages. The district court granted judgment to Galier on July 6, 2015.

¶9 Murco appealed and the Court of Civil Appeals affirmed the district court on February 3, 2017. This Court denied certiorari on June 19, 2017. On the same day, the United States Supreme Court issued *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. ——, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), clarifying specific personal jurisdiction. Murco petitioned the United States Supreme Court for certiorari on the issue of personal jurisdiction, which the Court granted on February 3, 2018. The United States Supreme Court vacated the Court of Civil Appeals decision and remanded the case for reconsideration in light of the newly issued *Bristol-Myers* opinion.

¶10 Following remand, the Court of Civil Appeals determined that the Supreme Court did not intend "to establish a general rule that a plaintiff must present evidence tracing the path of an allegedly dangerous product from manufacturer to end user in order to establish specific personal jurisdiction." COCA Op. ¶ 21, July 19, 2018. COCA stated that it was not persuaded that Galier needed to present proof to the degree of specificity urged by Murco and further stated that Murco's products "did not arrive in the forum by chance or the random flow of commerce." *See id.*, at

¶¶ 20, 22. The court noted that Murco "desired to exploit a feasible market," had "significant sales of its asbestos joint compound to Oklahoma customers," "considered shipping costs[,] and then purposefully targeted its asbestos joint compound into Oklahoma because it was within its calculated profitability zone." *Id.*, at ¶ 22. COCA concluded by explicitly finding that Oklahoma properly exercised specific personal jurisdiction over Murco and affirming the district court again. *Id.*, at ¶¶ 25, 72. We granted certiorari.

¶11 Murco argues that the Court of Civil Appeals acknowledged *Bristol-Myers* and *Montgomery v. Airbus Helicopters*, 2018 OK 17, 414 P.3d 824, but nevertheless essentially applied the same analysis upon which it originally affirmed the district court's determination of personal jurisdiction. Murco asserts that a nonresident's sales to third parties located in the forum, even if substantial and continuous, do not amount to specific jurisdiction unless the plaintiff can show his claimed injury arises directly from those contacts which the nonresident purposefully created in the forum. Murco emphasizes that Galier provided no evidence to show where or how any of Murco's sales contacts occurred, only that Murco had sales to third-party Oklahoma customers. Further, Murco postulates that the reference to a salesperson with a territory inclusive of Oklahoma offers no proof that this unidentified person ever created a relevant contact in Oklahoma, nor for that matter, provides any information regarding the salesperson's actions, or whether he or she ever set foot in Oklahoma, or created any sale in the forum. As a result, Murco argues that the injury did not arise out of its forum contact in order to permit Oklahoma to assert specific personal jurisdiction over it in this case. In response, Galier

argues that Murco's sales ledger from 1972 to 1973 demonstrated Murco sold its products to Oklahoma customers and knew such customers would ultimately sell to subcontractors or other Oklahoma residents down the line.

III. STANDARD OF REVIEW

¶12 A trial court's determination of personal jurisdiction is a question of law, which we review *de novo*. *Montgomery*, 2018 OK 17, ¶ 17, 414 P.3d at 829; *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 9, 237 P.3d 199, 205. We search the record for proof that the nonresident party has sufficient contacts with this state to assure that traditional notions of fair play and substantial justice will not be offended if this state exercises *in personam* jurisdiction. *Montgomery*, 2018 OK 17, ¶ 17, 414 P.3d at 829.

IV. ANALYSIS

¶13 "To establish personal jurisdiction over a nonresident defendant, both the State's long-arm statute and the requirements of federal due process must be satisfied." *Native Wholesale Supply*, 2010 OK 58, ¶ 10, 237 P.3d at 205. Oklahoma's long-arm statute[4] extends the jurisdiction of this State to the outer limits of the Oklahoma Constitution and the Constitution of the United States. *Ibid*.; 12 O.S. Supp. 2017, § 2004(F). "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant."[5] *World-Wide Volkswagen Corp. v. Woodson*,

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[4] "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." 12 O.S. Supp. 2017, § 2004(F).

[5] The Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, § 1, provides that no state shall "deprive

444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980).

¶14 Due process requires that a nonresident defendant possess "certain minimum contacts" with the forum such that the "maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice" in order to "subject a defendant to a judgment *in personam*." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) (internal citation omitted). The United States Supreme Court has long focused on the nature and extent of "the defendant's relationship to the forum State" when applying that formulation. *Bristol-Myers*, 137 S. Ct., at 1779. As such, the United States Supreme Court has recognized two types of personal jurisdiction: general and specific. *See Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011).

¶15 A state court may exercise general jurisdiction when a defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires*, 564 U.S., at 919. For a corporation, the "paradigm" bases for general jurisdiction are its place of incorporation and principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 760, 187 L. Ed. 2d 624 (2014).[6] Thus general jurisdiction over Murco attaches in Texas, not in Oklahoma.

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any person of life, liberty, or property without due process of law."

[6] "The exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as

¶16 Specific jurisdiction may be exercised over defendants who are less intimately connected with the state, but only as to a narrower class of claims. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 592 U.S. ——, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021). The defendant must perform "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958).

> The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L.Ed.2d 790 (1984). They must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. *Walden v. Fiore*, 571 U.S. 277, 285, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014) (internal quotation marks and alterations omitted).

Ford Motor, 141 S. Ct. at 1025. The act by which the nonresident defendant purposefully avails himself of the privilege of conducting activities in Oklahoma, "may be shown by circumstances from which such fact may be reasonably inferred." *Crescent Corp. v. Martin*, 1968 OK 95, ¶ 30, 443 P.2d 111, 118; *see also Marathon Battery Co. v. Kilpatrick*, 1965 OK 212, ¶¶ 3, 37, 418 P.2d 900, 903, 910.

¶17 Murco contends that even though it actively sold asbestos joint compound to Oklahomans for

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to render the corporation at home in that State.'" *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558, 198 L. Ed. 2d 36 (2017).

years, Oklahoma lacks personal jurisdiction over them. Murco further claims that Galier failed to trace the Murco asbestos joint compound that he was injured by, in Oklahoma, to one of the documented sales of Murco product to Oklahoma customers. We do not agree that Galier's burden is so high because the United States Supreme Court has made it clear that the law of personal jurisdiction does not require a "tracing" as described by Murco.

¶18 Murco's contacts with Oklahoma were not random, isolated, or fortuitous. Rather, Murco chose to reach out beyond Texas and deliberately exploit the market in Oklahoma by selling over twenty-four thousand units of harmful asbestos joint compound to numerous Oklahoma customers over the course of two years. Murco also worked with a local Oklahoma company, Flintkote, to place Flintkote's label on Murco's asbestos joint compound for resale in Oklahoma. Although Galier could not produce evidence of negotiations for that contact, circumstances evince that the custom labeling was purposefully directed towards Oklahoma. Murco later disclosed its intent to sell its product to the majority of the state of Oklahoma when it purposefully assigned to one salesperson an area of Oklahoma from the southern border to within fifteen miles of Kansas.

¶19 A state may hold a nonresident company "to account" for related misconduct "[w]hen (but only when) a company 'exercises the privilege of conducting activities within a state'—thus 'enjoy[ing] the benefits and protection of [its] laws.'" *Ford Motor*, 141 S. Ct., at 1025 (alterations in original). This doctrine "provides defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.' A defendant can thus 'structure [its] primary conduct' to lessen or avoid exposure

to a given State's courts." *Ibid.* (alterations in original) (citations omitted). During the years of evidenced sales into Oklahoma, Murco enjoyed the benefits and protection of our laws—"the enforcement of contracts, the defense of property, the resulting formation of effective markets." *See id.*, at 1029-30. Murco's continued sales into Oklahoma for several years made it foreseeable that Murco should reasonably anticipate being haled into court here. *See World-Wide Volkswagen*, 444 U.S., at 297; *see also Ford Motor*, 141 S. Ct., at 1030. Murco could have chosen to not avail itself of the privilege of conducting activities within Oklahoma to avoid potential liability if it was concerned the risks were too great. *See World-Wide Volkswagen*, 444 U.S., at 297; *see also Ford Motor*, 141 S. Ct., at 1030. But Murco chose to exploit the market for its product in this State, and it is not unreasonable to subject Murco to suit now that its merchandise was the source of injury in Oklahoma to an Oklahoma resident. *See World-Wide Volkswagen*, 444 U.S., at 297. Perhaps even more than Murco's sales to subcontractors, Murco's sales relationship with Flintkote, wherein Murco sold its normal product and also went the extra mile to custom label its product with a Flintkote label for resale in Oklahoma—clearly not a passive sale—shows an intent on the part of Murco to avail itself of the benefits of this forum.

¶20 Even when the defendant has purposefully availed himself of the state, the plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum in order for the state to exercise jurisdiction. *Bristol-Myers*, 137 S. Ct., at 1780 (quoting *Daimler*, 571 U.S., at 127) (alterations omitted). Murco's argument that Galier must trace the exact product he was injured by from Murco's plant in Texas to the point of exposure in Oklahoma appears to be

based on a misinterpretation of *Montgomery* and *Bristol-Myers*.

¶21 *Montgomery* involved a Texas defendant who sold a helicopter to a Kansas company. 2018 OK 17, ¶¶ 4-5, 414 P.3d 824, 826. The Kansas company hired an Oklahoma pilot and crew to operate the helicopter in the region. *Id.*, at ¶ 3, 414 P.3d at 826. The helicopter was delivered to the Kansas company in Texas. *Id.*, at ¶ 5, 414 P.3d at 826. This Court found that the Kansas company's *sua sponte* act of bringing the helicopter into Oklahoma was not a basis for Oklahoma assuming personal jurisdiction over the Texas company. *Id.*, at ¶ 36, 414 P.3d at 834.

¶22 In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, the United States Supreme Court stated that the nonresident plaintiffs had not cited any evidence to show how the pills they took were distributed to the pharmacies which sold them the pills. 137 S. Ct. 1773, 1783, 198 L. Ed. 2d 395 (2017). *Bristol-Myers* involved resident and nonresident plaintiffs with similar claims against a nonresident defendant. The nonresident plaintiffs were not prescribed pills in the forum, did not purchase pills in the forum, did not ingest pills in the forum, and were not injured by pills in the forum. The Court found that the "mere fact that other plaintiffs were prescribed, obtained, and ingested [pills in the forum]—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Bristol-Myers*, 137 S. Ct., at 1781. The nonresident plaintiffs showed zero connection of their own to the forum. The Court noted that "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Bristol-*

Myers, 137 S. Ct., at 1781. The United States Supreme Court "found jurisdiction improper in Bristol-Myers because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims." *Ford Motor*, 141 S. Ct., at 1031.

¶23 Galier is a resident of Oklahoma. He was exposed to the defective product in Oklahoma. He suffered injuries from the product in Oklahoma. In sum, Galier "brought suit in the most natural State—based on an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place' there." *See Ford Motor*, 141 S. Ct., at 1031 (quoting *Bristol-Myers*, 137 S. Ct., at 1781). Murco admits that it had contacts with Oklahoma. Murco essentially questions whether those contacts are related enough to Galier's suit.

¶24 Recently, the United States Supreme Court clarified in *Ford Motor Co. v. Montana Eighth Judicial District*, the type of connection required and elucidated the meaning of the phrase "arise out of or relate to." *See Ford Motor*, 141 S. Ct. 1017. The Supreme Court clarified that "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." *Ford Motor*, 141 S. Ct., at 1026. The Court explained that the first part of the arise out of or relate to standard "asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Ford Motor*, 141 S. Ct., at 1026. The Court noted that

> indeed, [it] has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volks-*

wagen, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. 444 U.S., at 295, 100 S.Ct. 580. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):

> "[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 [several or all] 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, 100 S.Ct. 580.

Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. *Ibid.* And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or,

> if the risks are [still] too great, severing its connection with the State." *Ibid.*

Ford Motor, 141 S. Ct., at 1027.

¶25 Here, Murco's sales to Oklahoma customers were not isolated, but rather related to Murco's efforts to serve the market for asbestos joint compound in Oklahoma. Murco deliberately extended its business into Oklahoma, purposefully availing itself of Oklahoma's market. Murco's contacts with Oklahoma regarded only the sale of their drywall product. Galier's cause of action related to those contacts. The cases do not require a direct link between Murco's sales to Oklahoma buyers and Galier's exposure to the asbestos.

¶26 Even when the defendant has purposefully availed himself of the forum and the case arises out of or relates to those contacts, the court must still consider a variety of "reasonableness" interests to determine if personal jurisdiction is present. *World-Wide Volkswagen*, 444 U.S. at 292. These gestalt factors include the burden on the defendant to litigate there, the forum state's interest in adjudicating the dispute, the plaintiffs interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. *Ibid.*; *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92 (1987).

¶27 The burden on Murco to defend in Oklahoma is minimal. The trial occurred within Murco's own chosen radius for conducting business sales. Oklahoma has a substantial interest in adjudicating this case; Oklahoma has an interest in protecting its citizens,

and the exposure and resulting diagnosis both occurred in Oklahoma to an Oklahoma resident. Galier's interest in convenient relief is also substantial as he lives in Oklahoma and he was injured in Oklahoma. Further, the judicial system's interest in efficient resolution of the controversy demands upholding the ruling on personal jurisdiction as re-starting this litigation in Texas would be an unwarranted drain on their judicial system.

V. CONCLUSION

¶28 For all the reasons we have given, the connection between Galier's claim and Murco's sales to Oklahomans—or otherwise said, the "relationship among the defendant, the forum, and the litigation"—supports specific jurisdiction. *See Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014) (internal quotation marks omitted). The judgment of the Court of Civil Appeals is vacated and the trial court is affirmed.

AFFIRMED.

Darby, C.J., Kane, V.C.J., Winchester, Edmondson, Gurich, Rowe, Kuehn **(by separate writing)**, JJ. and Lewis, S.J., concur;

Kauger, J., recused;

Combs, J., disqualified.

KUEHN, J., SPECIALLY CONCURRING:

¶1 I agree with the Majority that specific personal jurisdiction lies here. Murco's minimum contacts with Oklahoma establish that it purposefully availed itself of the Oklahoma forum, and there is sufficient connection between those contacts and the cause of action to

satisfy the requirement that the suit arises from or relates to Murco's activities within the forum. *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. ___, 141 S.Ct. 1017, 1026 (2021); *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. ___, 137 S.Ct. 1773, 1780 (2017).

¶2 The Majority extensively quotes language from *Ford* involving the phrase "arises from or relates to." All the Justices in *Ford* agreed that, no matter how one reads that phrase, its requirement was met. The same is true of this case. I would reserve discussion of this phrase for a case where any possible jurisprudential distinction between and "arise" and "relate" would affect the outcome.

¶3 However, I tend to agree with Justice Gorsuch's broad observation in Ford that, given the rise of national and multinational corporations and the Internet, it may be time to reexamine the overall test for corporate jurisdiction. *Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring). In my view, we can resolve most of these disputes by using common sense: if you bring your toys to the sandbox, you play by the sandbox rules. If a corporation purposefully avails itself of a state forum, and if the plaintiff or injury is connected to that forum, then the corporation is subject to suit there. For example, Corporation actively does business in Oklahoma, Kansas, and Nevada. Plaintiff is an Oklahoma citizen who crosses the border to Kansas, and buys and is injured by Corporation's product there. Under sandbox rules, Plaintiff may sue Corporation in Oklahoma, where Plaintiff lives and Corporation does business, or in Kansas, where Corporation does business and Plaintiff was injured. But Plaintiff can't sue in Nevada; neither Plaintiff nor the injury have any connection to that forum. I believe that this captures the essence of both *Ford* and *Bristol-Myers*.

APPENDIX B

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS STATE OF OKLAHOMA

JUL 19 2018

JOHN D. HADDEN
CLERK

MICHAEL D. GALIER	)	
	)	
Plaintiff/Appellee	)	
	)	
v.	)	Case No. 114,175
	)	(Consol. w/114,183)
MURCO WALL PRODUCTS, INC., and WELCO MANUFACTURING COMPANY,	)	
	)	
Defendants/Appellants,	)	
	)	
and	)	
	)	
Red Devil Corporation,	)	
	)	
Defendant.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON, TRIAL JUDGE

<u>AFFIRMED</u>

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Welco Mfg. Co.

OPINION BY BRIAN JACK GOREE, PRESIDING JUDGE:

¶1 On appeal is the validity of a district court judgment on a jury's verdict awarding damages for personal injury caused by exposure to asbestos. The issues are (1) whether Oklahoma has personal jurisdiction over a Texas corporation, (2) whether the trial court erroneously entered judgment on an allegedly defective jury verdict, (3) the constitutionality of a statute relating to noneconomic damages, and (4) whether the verdict was sustained by admissible evidence. We affirm the trial court's judgment.

I

¶2 Michael Galier was exposed to asbestos-containing products while he was a child playing on construction sites in his father's business. At the age of 48 he was diagnosed with peritoneal mesothelioma, a fatal disease caused by asbestos exposure. He commenced an action in Oklahoma County District Court against numerous manufacturers of asbestos products alleging negligence and manufacturers' products liability. At trial he pursued three defendants, Murco, Welco, and Red Devil Corporation. The jury returned a verdict in favor of Galier and against Murco and Welco. It found Galier had sustained damages totaling $6 million and it apportioned 40% of the liability to Murco and 60% to Welco.

¶3 This Court filed an opinion on February 3, 2017, finding personal jurisdiction over Murco. On June 19, 2017, the Oklahoma Supreme Court denied petitions for certiorari, and on that same date, the United States Supreme Court clarified the law of specific personal jurisdiction in *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco, et al.*, 582 U.S. __, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017). The

United States Supreme Court vacated this court's February 3, 2017 opinion and remanded it for further consideration in light of *Bristol-Myers*. The Oklahoma Supreme Court re-assigned the case to the Court of Civil Appeals, Oklahoma City, for further consideration.

II

¶4 Murco is a Texas Corporation with its principal place of business in Fort Worth. It has never had any officers, directors, employees, or other agents in Oklahoma. It has never owned property in Oklahoma, and it has never directed advertising to Oklahoma. Murco has never had an office, phone listing, or mailing address in Oklahoma.

¶5 Mr. Galier moved to Oklahoma City when he was a young boy, and in the early 1970's he accompanied his brothers to their father's job sites three or four times a month for a few hours at a time. They helped out by sweeping and picking up empty boxes. After 1975, Galier and his brothers visited hundreds of their father's construction sites and spent time playing with asbestos joint compounds. Galier recalled the names of five different joint compound products, and Murco was one of them.

¶6 Murco filed a motion to dismiss Galier's suit on grounds the court lacked specific personal jurisdiction; it argued his cause of action did not arise out of any forum-related activities. After a hearing, the district court directed the parties to conduct discovery pertaining to the jurisdictional question, and the parties supplemented their briefs. Galier produced a few ledger pages of Murco's sales in the early 1970s. These pages indicate Murco sales to customers with Oklahoma addresses. Galier also attached a tran-

script of the deposition of Murco's corporate representative, Joan Benton. Ms. Benton testified concerning the ledger sheets.

¶7 Murco, by Ms. Benton's testimony, stated that in 1977 it had a salesperson for a market that was comprised of a 300-mile radius of its manufacturing plant in Fort Worth. Oklahoma City is within that boundary. Later, at the trial, Benton explained that the 300-mile limitation for product sales was due to the fact that joint compound is a heavy product and they could not afford to pay the freight for the product to be shipped beyond 300 miles. When she was asked about the sales ledger sheets, Benton agreed that Murco sold its product where it had a market, and it had a market in Texas and "a little bit in Oklahoma." Murco admitted that the invoices demonstrate the sale of its products to Oklahoma:

Q. And you don't dispute that these are records of Murco sales to various different businesses in Oklahoma, correct?

A. Correct.

Murco agreed that the ledgers reference invoices demonstrating the following:

- In 1973, Murco sold 2,590 units of asbestos joint compound invoiced to B & B Drywall, 5901 Meridian Place, Oklahoma City, Oklahoma, 73106.[1]
- In 1972, Murco sold 6,218 units of joint compound invoiced to Dundall Paint Co., 4110 North McArthur, Oklahoma City, Oklahoma,

[1] A "unit" is the generic reference to a container of product which, depending on the product, could be a box, a bag, or a bucket of various sizes.

73122. Ninety-eight of those units did not contain asbestos, but the rest contained asbestos.

- In 1973, Murco sold 7,330 units of asbestos joint compound invoiced to Flintkote Company, 24 North McCormick, Oklahoma City, Oklahoma 73125.[2]
- In 1973, Murco sold 320 units of asbestos joint compound invoiced to Ralph Hoilard, Route 1, Stonewall, Oklahoma 74871.
- In 1972, Murco created an invoice to Leon Ragland Drywall Co., 435 Southeast 53rd Street, Oklahoma City, Oklahoma. Between 1972 and 1973, Murco sold approximately 3,200 units of asbestos joint compound invoiced to Don McBee, McBee Enterprises, Inc., 1506 North 44th, Lawton, Oklahoma.
- In 1973, Murco sold 2,067 units of asbestos joint compound invoiced to Sooner Drywall, 410 Northeast, Duncan, Oklahoma 73433.
- In 1973, Murco sold 2,006 units of asbestos joint compound invoiced to Standard Material Corp., 6 NW 26th Street, P.O. Box 60150, Oklahoma City, Oklahoma 73106.

Galier argues that the Oklahoma court had jurisdiction because he sued Murco for exposing him to asbestos joint compound, a product that it sold to Oklahoma customers. Murco argues that third-party subcontractors could have purchased their products at its Fort Worth plant, and ledger sheets bearing Oklahoma mailing addresses for such third-parties do not

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[2] The corporate representative also stated that Murco agreed to place Flintkote's label on its (Murco's) joint compound product so that it could be sold under the Flintkote name.

create an adequate link to justify specific personal jurisdiction.

III

¶8 Oklahoma courts may exercise jurisdiction on any basis consistent with the Constitution of this State and the Constitution of the United States. 12 O.S. §2004 (F) (2011). Because a state court's assertion of jurisdiction exposes defendants to its coercive power, it is subject to review for compatibility with the Due Process Clause of the Fourteenth Amendment. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011).[3]

¶9 In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 LEd. 95 (1945), the court devised the "minimum contacts" approach to analyzing whether a state court's assertion of jurisdiction was permissible under the 14th Amendment.[4] The minimum contacts concept serves two functions, protecting nonresident defendants against the burdens of litigating in distant forums, and ensuring that the States "do not reach out beyond the limits imposed on

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[3] U.S. Const. Amend XIV, §1 provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] "[I]n order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154, citing *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940).

them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292, 100 S.Ct. 59, 62 L.Ed.2d 490 (1980).

¶10 Following *International Shoe*, courts have come to recognize two categories of personal jurisdiction: general (sometimes called "all-purpose") jurisdiction and specific (sometimes called "case-linked") jurisdiction. *Goodyear*, 564 U.S. at 919, 131 S.Ct. 2846. A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state. *Id.* By contrast, a court may assert specific jurisdiction only as to claims that arise out of, or are related to, the contacts with the state. *Daimler AG v. Bauman*, 571 U.S. 117, 127, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014).

¶11 Whether a state court may exercise personal jurisdiction can be a complicated endeavor. "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154. In *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 LEd.2d 404 (1984), the court noted that it was leaving undecided the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary" to a determination that the requisite connection exists for specific jurisdiction. *Id.* at 415, 104 S.Ct. 1868.

¶12 *Bristol-Myers* clarified the requirements for specific jurisdiction: "In order for a court to exercise

specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State." *Bristol-Myers*, 582 U.S. at __, 137 S.Ct. at 1779 (internal quotation marks omitted). In *Bristol-Myers*, a group of more than 600 plaintiffs joined in eight separate actions that were filed in California. They claimed their health was damaged by the drug Plavix. Only 86 of those plaintiffs resided in California. The U.S. Supreme Court found there were inadequate links between the claims of the non-resident plaintiffs and the drug manufacturer. There could be no personal jurisdiction over Bristol-Myers Squibb (BMS) as to the claims of plaintiffs who did not reside in the forum, did not receive their prescriptions in the forum, and were not injured in the forum. Neither could those plaintiffs living outside the state rely on the defendant's contacts with other plaintiffs who were California residents. Furthermore, the fact that one of the defendants, a California company named McKesson, was a nationwide distributor of Plavix was insufficient. During oral argument one of the parties stated: "It is impossible to trace a particular pill to a particular person . . . . it's not possible for us to track particularly to McKesson." The Court held: "The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State." *Id.* at __, 137 S.Ct. at 1783. In sum, there must be adequate links between the State and the nonresident's claims.

¶13 The Oklahoma Supreme Court recently applied *Bristol-Myers* in *Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, 414 P.3d 824. *Montgomery* involved a helicopter crash that occurred in Oklahoma. The widow of the pilot and a passenger filed suit against Airbus, a French company who manufactured

the helicopter, and Soloy, a Washington company that provided the engineering and design specifications for installing a replacement engine. Airbus assembled the helicopter in Texas but it did not ship the aircraft into Oklahoma. There was evidence, however, that Airbus was aware the end user intended to operate it in Oklahoma. Citing *Bristol-Myers*, the court in *Montgomery* held there were no direct contacts between Airbus and Soloy and the Oklahoma plaintiffs. *Id*. at 30, 414 P.3d 824. The defendants' only direct contacts were with a third-party, EagleMed, who was also a non-resident.

¶14 In the wake of *Bristol-Myers*, evaluating minimum contacts based on the flow of a manufacturer's products into a forum, often referred to as a stream of commerce analysis, has been rejected by the Oklahoma Supreme Court as a valid test for specific jurisdiction. *Montgomery*, 2018 OK 17, ¶36, 414 P.3d 824, 833. A defendant must purposefully "reach out beyond" their state into another or "deliberately exploit" a market in the forum state. *Walden v. Fiore*, 571 U.S, at 285, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014), citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

¶15 A two step evaluative process was enunciated in *Daimler*, 571 U.S. at 139, n. 20, 134 S.Ct. 746, to analyze specific personal jurisdiction: First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case. We follow *Montgomery* in this regard and apply its state-

ment of the law: "If a defendant has purposefully directed activities at the residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, specific jurisdiction over a nonresident defendant may exist unless jurisdiction would be unreasonable or would offend the traditional notions of substantial justice and fair play." *Montgomery*, 2018 OK 17, ¶16, 414 P.3d 824, 829.

IV

¶16 In his First Amended Petition, Galier alleged he was exposed to asbestos-containing products manufactured and/or sold by several identified defendants including Murco's joint compound. He claims he contracted asbestos-related malignant mesothelioma through the inhalation of the asbestos fibers contained in the products manufactured, sold, and/or distributed by each defendant. He notified the parties in his pleading that he was asserting their liability based on several theories including negligence, unreasonably dangerous products, and intentional misconduct. In the light of *Bristol-Myers*, as guided by *Montgomery*, we must consider whether these claims arise out of or relate to activities that Murco purposefully directed to Oklahoma.[1]

¶17 We are convinced there is a relationship between Murco's asbestos-containing joint compound and Galier's claimed harm. The sufficiency of that connection is the pivotal issue.

¶18 Murco urges that there is no adequate link such that Galier's harm could be said to "arise out of" its sales in 1972 and 1973. It was years later, in 1977,

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[1] The parties submitted excellent supplemental briefs. At oral argument, all counsel were exceptionally well prepared and their presentations were of great assistance to this court.

when a letter described its sales radius of 300 miles. Murco points out that there is no evidence any of the eight customers with Oklahoma addresses resold its joint compound to a contractor who in turn supplied it to a job site where Galier inhaled asbestos fibers. According to Murco, the circumstances are no different from *Bristol-Myers* where the plaintiffs were unable to trace Plavix pills from California to their out-of-state local pharmacies. *See Bristol-Myers*, 582 U.S. at __, 137 S.Ct. at 1783.

¶19 Galier argues that the relational test for specific personal jurisdiction does not require him to trace a particular asbestos-containing product to a specific job site where he was exposed. He emphasizes that he resides in Oklahoma and was harmed in Oklahoma, distinguishing *Bristol-Myers* on that basis. Galier acknowledges that Murco's 300-mile sales radius is evidenced by a letter written in 1977, but he asserts this does not foreclose the existence of that marketing strategy before that date.

¶20 Murco maintains that it is Galier's burden to prove evidence of jurisdiction and he is not entitled to inferences. It is true that in personam jurisdiction over a non-resident defendant cannot be inferred, but instead must affirmatively appear from the trial court record, and the burden of proof in the trial court is upon the party asserting that jurisdiction exists. *Montgomery*, 2018 OK 17, ¶17, 414 P.3d 824, 829. However, we are not persuaded that Galier must present proof to the degree of specificity urged by Murco in order to demonstrate specific jurisdiction in this case.

¶21 In *Bristol-Myers*, the non-California residents claimed injury occurring outside California. *See Bristol-Myers*, 582 U.S. at __, 137 S.Ct. at 1782. They were not claiming that the drug they took was dispensed to

them in California. *See Montgomery*, 2018 OK 17, ¶24, 414 P.3d 824, 830. Therefore, they could hardly argue that there was a link between Plavix sales in California and their alleged harm outside California. In an argument which the Supreme Court termed a "last ditch contention" the non-resident plaintiffs attempted to show the requisite connection by arguing that a distributor, McKesson, had a contract to distribute Plavix nationally. *Bristol-Myers*, 582 U.S. at __, 137 S.Ct. at 1783. The court disposed of that argument by stating that a relationship with a third party, standing alone, is an insufficient basis for jurisdiction. *Id*. citing *Walden*, 571 U.S, at 286, 134 S.Ct. 1115. The relationship between *Bristol-Myers* and McKesson was not enough to bridge the gap between the sale of Plavix pills in California and harm caused by Plavix outside California. In that context, the Supreme Court observed there was no additional evidence that might have demonstrated an adequate link, such as identifying how or by whom the drug taken outside California was distributed to the out-of-state residents. We conclude that the Supreme Court did not intend by its decision in *Bristol-Myers* to establish a general rule that a plaintiff must present evidence tracing the path of an allegedly dangerous product from manufacturer to end user in order to establish specific personal jurisdiction.

¶22 Our canvas of the record reveals that Murco desired to exploit a feasible market for its asbestos joint compound. According to its corporate representative, and at some unspecified point in time, it reasoned that shipping its product within a radius of 300 miles was cost effective but beyond that region would be cost-prohibitive due to the weight of joint compound. Murco's representative testified that Oklahoma was part of its market. Murco's ledger sheets

itemize significant sales of its asbestos joint compound to Oklahoma customers located in Oklahoma City as well as Lawton, Duncan, and Stonewall. Murco's asbestos joint compound did not arrive in the forum by chance or the random flow of commerce. Murco considered shipping costs and then purposefully targeted its asbestos joint compound into Oklahoma because it was within its calculated profitability zone.

¶23 Galier, an Oklahoma resident, alleged that he suffered harm in Oklahoma arising out of and related to Murco's sales of asbestos-containing joint compound which it purposefully directed toward the State of Oklahoma. We must next consider whether the Oklahoma County District Courts exercise of jurisdiction over Murco would offend traditional notions of justice and fair play.

V

¶24 "In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiffs forum choice. But the primary concern is the burden on the defendant. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum." *Bristol-Myers*, 582 U.S. at __, 137 S.Ct. at 1779 (internal citations and quotation marks omitted). Murco has never argued that defending itself in Oklahoma would be impractical or burdensome. Its headquarters in Fort Worth is relatively close to Oklahoma County. Oklahoma citizens have an interest in determining whether products sold into their state are dangerous, and whether the manufacturer breached a duty.

¶25 We conclude that the Oklahoma County District Court properly exercised specific personal jurisdiction over Murco Wall Products.

VI

¶26 Galier sued under the theories of negligence and manufacturers' products liability. At trial he pursued only three of the defendants: Murco, Welco, and Red Devil Corporation. The jury reached a verdict and nine of its members signed a six-page verdict form. Before the court is the issue of whether the trial court erroneously accepted the written verdict after the foreman asked a question that suggested the verdict did not express the jury's intent.

¶27 The jury found Galier failed to prove his claims against Red Devil but succeeded in proving his claims against Murco and Welco. It found Galier sustained actual damages totaling $6 million, comprising $1.5 million in economic damages and $4.5 million in noneconomic damages. It apportioned 40% of Galier's damages to Murco and 60% to Welco. Thirteen nonparties were identified on the verdict form and the jury apportioned zero percent liability to each of them.

¶28 Because the jury trial was in a civil action claiming bodily injury, the verdict form included answers to interrogatories pursuant to 23 O.S. §61.2 (2011). Section 61.2 limits compensation for noneconomic loss to $350,000 unless the finder of fact concludes a defendant's actions met a specified degree of culpability. The jury found Galier proved by clear and convincing evidence that Murco and Welco acted with gross negligence, in reckless disregard of the rights of others, and intentionally and with malice. These findings authorized the trial court to enter judgment for noneconomic compensatory damages in excess of the $350,000 limit. 23 O.S. §61.2 (E). The same findings

also served as the predicate for the jury to consider punitive damages in a second stage of the trial. 23 O.S. §9.1 (2011).[2]

¶29 After the verdict was announced, the jury's foreman asked the judge a question about the damages awarded and the judge polled the jury:

Foreman Jacobs:	We understood we had awarded punitive damages and medical damages. Is that not correct?
The Court:	Sir, you found by clear and convincing evidence that there was. So, yes, that puts you into the punitive damages stage. So we're going to a Stage II.
Foreman Jacobs:	Well, maybe it wasn't written up correctly. We intended to award 1.5 million for medical and 4.5 for punitive. Did we not put that down right?
The Court:	You cannot award punitive damages at this stage, sir. That's what the jury instructions told you.
Mr. Moore:	[Counsel for Welco] Your Honor?
The Court:	Maybe we'd better poll the jury.

[2] A portion of Instruction No. 24 advised the jury, "If you find that any Defendant or Defendants whom you found liable and responsible for damages acted either with reckless disregard for the rights of others or intentionally and with malice, you have determined that Plaintiff may be entitled to an award of punitive damages. The amount of any award for punitive damages is not presently before you for decision but would be determined in a later stage of the trial if you indicate by your finding that such an award is warranted."

Mr. Moore:	‘Counsel for Welco] Yes. My motion, Your Honor.

The judge then summarized the findings as stated on the verdict form and continued:

The Court:	So I’m going to ask each and every juror who has signed this if that is your verdict in this case. Mr. Jacobs, you have signed the verdict as Foreman of the Jury. Is that your verdict in this case?
Foreman Jacobs:	Yes, it is, with the exception of the wording we didn’t understand correctly.
The Court:	Okay. It either is or - -
Foreman Jacobs:	How do we correct that?
The Court:	- - it is not. Okay.
Foreman Jacobs:	Well, that was my vote, yes. But . . .
The Court:	Okay.[3]

The judge then proceeded to ask the same question of the other eight jurors who signed the verdict form and each affirmed the verdict as their own without equivocation. The judge then accepted the verdict of Stage I and Defendants objected.[4]

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[3] It is impossible to conclude from the transcript whether Foreman Jacobs voluntarily terminated his response or the Court interrupted him.

[4] Counsel for Welco stated: “it’s clear to me from the Foreman’s comments that though he said that that was his verdict, he understood his verdict was something other than what was recorded on the verdict form . . . I don’t think you can receive this

¶30 When the trial reconvened after the weekend, Galier opted to proceed only against Murco in Stage II. After deliberating, the jury found in favor of Murco. Therefore no punitive damages were awarded.

¶31 Defendants contend that when the jury awarded $4.5 million in noneconomic damages, they mistakenly believed they had awarded punitive damages. They propose this conclusion is supported by the jury's award of zero damages after a brief deliberation in Stage II of the trial. Welco argues that the jury failed to follow instructions, resulting in a defective verdict, and the trial court abused its discretion in attempting to cure the defect by polling the jury. Murco argues the trial court was required to make a meaningful and specific inquiry into the foreman's report and take corrective action. In response, Galier argues that Oklahoma law prohibits inquiry into the jury's intent or understanding in reaching its verdict.

¶32 The questions presented for review reveal a tension between two fundamental legal principles, the confidentiality and independence of a jury's deliberation and a party's right to a just trial.[5]

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verdict. I think it's inconsistent with what the form says if that's the words from the Foreman." The Court responded that the jury was polled and all jurors assented to the verdict. Welco's counsel courteously persisted: "[C]an they at least explain to us what they understood it was to be? I mean, I think we have to do that, at least for an appellate record here." The Court declined the request and accepted the verdict.

[5] "The right of trial by jury shall be and remain inviolate." Okla. Const., Art. 2, §19. Courts have a duty to secure this right by strictly enforcing the constitutional and statutory provisions that preserve the purity of jury trial. *Fields v. Saunders*, 2012 OK 17, 1110, 278 P.3d 577, 581. Justice in the courts shall be administered without sale, denial, delay, or prejudice. Okla. Const., Art. 2, §6.

VII

¶33 A trial court has broad discretion in conducting a jury trial; we will not reverse based on its conduct unless the trial court abused that discretion. *Stephens v. Draper*, 1960 OK 69, 118, 350 P.2d 506, 510. An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence. It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable. *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, 120, 987 P.2d 1185, 1194.

¶34 A trial court should not accept the jury's verdict if it is defective. *Stephens v. Draper*, 1960 OK 69, ¶12, 350 P.2d 506, 509. If the verdict is incomplete, ambiguous, or contrary to the jury instructions, then the court should direct the jury to retire for further deliberation. *Stephens* at ¶0 (syllabus by the court). In this case, the verdict was facially valid.

¶35 Galier contends it was too late to poll the jury because the verdict was in proper form and the court had already accepted it.[6] We disagree. The decision of a jury does not become a verdict until it is accepted by the court and recorded in the case. *Wiggins v. Dahlgren*, 1965 OK 131, ¶4, 405 P.2d 1001, 1003. Until the verdict is accepted and recorded, the members of the jury are free to change their votes — even to the extent of changing the verdict. *Id.* Although the court initially accepted the Stage I verdict, it was not recorded or filed. Furthermore, the Court acknowledged

[6] After the Judge announced the jury's verdict, and before Mr. Jacobs questioned it, the Court asked whether anyone wished the jury to be polled. Counsel for some of the parties responded no. The Court then stated, 'That will be the verdict of the jury and the judgment of this Court."

the Stage I verdict before there was any suggestion that it might not be correct. We hold that the trial court retains authority to inquire of the jury concerning its verdict until the jury is discharged or the verdict has been filed in the case.

¶36 Galier also proposes in broad terms that a jury's verdict cannot be impeached. This case is different from those cited by Plaintiff where a jury's verdict could not be challenged after the trial had concluded. Here, the jury was still empaneled when the court conducted its poll. *See Cities Service Oil Co. v. Kindt*, 1947 OK 219, 118, 190 P.2d 1007,1013 (distinguishing an attack on a jury's verdict when it is returned, from cases involving testimony of jurors after their verdict has been received and filed). In *Willoughby v. City of Oklahoma City*, 1985 OK 64, 706 P.2d 883, 889, the Supreme Court examined the anti-impeachment rule under the Oklahoma Evidence Code, 12 O.S. 2011 §2606(B). This rule limits the scope of permissible testimony to inquiring whether extraneous prejudicial information was improperly brought to the jury's attention. However, §2606(B) applies only to inquiry after the verdict has been reached and recorded. *Weatherly v. State*, 1987 OK CR 28, ¶11, 733 P.2d 1331, 1334. Because the jury in this case had not been discharged, neither the common law nor §2606(B) were impediments to polling the jury.

¶37 We turn next to Welco's argument that the Court abused its discretion in attempting to cure the defective verdict by polling the jury. The procedure for polling the jury is outlined by 12 O.S. 2011 §585. It provides:

> When the jury have agreed upon their verdict they must be conducted into court, their names called by the clerk, and their verdict rendered by their

> foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or the court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out, for further deliberation.

In a separate statute, 12 O.S. 2011 §586, the Legislature provided a method for converting the jury's verdict to a written form and correcting any defects resulting from that process:

> The verdict shall be written, signed by the foreman and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court.

Juries are now uniformly instructed to complete their verdict on the written verdict forms provided. Although this has likely diminished errors in the deliberative process, it is still possible that a verdict agreed to by a juror is not accurately reflected on the form. The instant case illustrates that point.

¶38 Mr. Jacobs referred to the jury's intent to award $4.5 million for punitive damages and then suggested "maybe it wasn't written up correctly." He questioned, "Did we not put that down right?" Polling a jury can reveal whether the written verdict accurately expresses the jury's deliberative agreement. We hold that the trial court had authority to poll the jury and its decision to do so was a proper exercise of judicial discretion.

¶39 Welco argues that even if polling the jury was within the Court's discretion, doing so did not cure the defective verdict. It must be pointed out that polling a jury is not a curative act, it is a diagnostic device to ascertain whether the verdict is legally acceptable or if further deliberation is necessary. When the court polls the jury, each juror is asked "if it is his verdict." §585. If any juror answers in the negative, the jury must be sent out for further deliberation. *Id.* If all jurors assent that the written verdict is the verdict they agreed to during deliberation, then the court may accept it.[7]

¶40 When asked whether the verdict in this case was his verdict, Mr. Jacobs answered yes. But he also qualified his assent. He communicated an exception concerning his understanding of it and he also asked how it could be corrected. Finally, he agreed it was his verdict because that is how he voted and then he apparently began to qualify his answer again but did not finish.

¶41 Whether a qualified assent is equivalent to a dissent, requiring further deliberation, depends upon the character of the qualification. In *Frick v. Reynolds*, 1898 OK 9, ¶16, 52 P. 391, 394, the Supreme Court decided it was error for the court to receive the verdict instead of directing the jury to deliberate further. The questioned juror conceded he had agreed to the verdict but he was unsatisfied with it. On further examination, the juror explained he had agreed to it only to prevent a hung jury. "An assent must be an assent of the mind to the fact found by the verdict."

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[7] This assumes that the verdict is otherwise free from defects. A verdict that is incomplete, ambiguous, or contrary to jury instructions requires further deliberation regardless of whether the jurors unanimously assented to it.

Frick, at ¶18, citing *Rothbauer v. State*, 22 Wis. 468, 470 (1868).

¶42 Unlike the juror in *Frick*, Mr. Jacobs did not say he was unconvinced by the evidence. See *Frick*, ¶15. Mr. Jacobs qualified his assent because he had a misunderstanding about noneconomic damages and punitive damages. It was a misunderstanding related to wording that he apparently believed needed to be corrected.

¶43 The record reflects that Mr. Jacobs believed he had awarded punitive damages. Next, after listening again to the Court review the verdict preliminary to the poll, he assented to the verdict for noneconomic damages with remarks that he had a misunderstanding.

¶44 Had Mr. Jacobs not intended to award $4.5 million as noneconomic damages, he could have answered that it was not his verdict. But he did not dissent. He acknowledged twice that it was his verdict. We hold that the trial court would have been justified in reasoning that Juror Jacobs misunderstood noneconomic damages to be the legal equivalent of punitive damages. The jury instructions correctly stated the law, Jacobs assented to the verdict, and the possibility that he was mistaken about the law did not change his factual verdict into a dissent.[8] None of the jurors answered the poll in the negative. The trial court did not abuse its discretion in accepting the jury's verdict

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[8] We recognize that a different interpretation of Mr. Jacobs' misunderstanding might also be reasonable, but a court's discretionary act is not reversible merely because an alternative option was available.

rather than ordering the jury to recommence deliberation.[9]

¶45 Defendant Murco urges that the Court erred by failing to make a meaningful and specific inquiry into the foreman's response. Galier insists to the contrary, that a court may not inquire into the jury's intent or understanding in reaching its verdict. The question of the court's authority is settled law. "[A] trial court may make such inquiry of jurors as to enable it to understand their will and intention, and their answers to such inquiry will be looked upon as an aid in rendering of proper judgment." *First Nat. Bank & Trust Co., Muskogee v Exch. Nat. Bank & Trust Co., Ardmore*, 1973 OK CIV APP 7, 517 P.2d 805, 809 (published by order of the Supreme Court). The Court had authority to inquire of the jury beyond the statutory poll.

¶46 Because the trial court declined to ask Mr. Jacobs additional questions, it cannot be determined what precisely he misunderstood about the wording of the verdict form. However, questioning a jury about its verdict introduces risk. *West v. Abney*, 1950 OK 127, ¶11, 219 P.2d 624, 627 (holding that the action of a judge in the correction of verdicts should be taken with great caution). There is a possibility that the judge's questions could accidentally trigger improper

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[9] The trial court is not bound to accept a verdict that is not in accordance with its instructions. *Stephens*, 1960 OK 69, ¶ 12, 350 P.2d 506, 509. We disagree with Defendant Welco that the jury failed to follow its instructions. Prior to the poll Mr. Jacobs asserted that the jury intended to award punitive damages, an action inconsistent with the instructions. If Jacobs at first believed the jury had awarded punitive damages, he and all the other polled jurors later assented to a verdict to the contrary. The verdict was not inconsistent with the jury instructions.

comment by jurors concerning their confidential deliberation. A court's questions could also lead to unfair prejudice if the jury is ultimately ordered to return to deliberation. In *West*, the court noted that the trial court was very careful about the method of instructing the jury as to the form of verdict that was acceptable, without intimating as to what that verdict should be. *West* at ¶13.

¶47 The confidentiality of the jury's deliberation must be preserved and questioning jurors about their verdict beyond conducting a poll is precarious. However, a trial court's pre-discharge questioning, if it is directed toward determining whether the verdict is defective or invalid, is not statutorily impermissible. As we have already determined, the Court did not abuse its discretion by accepting the verdict rather than ordering additional deliberation. We likewise hold that the Court's judgment in declining to inquire further was not a clear abuse of discretion.

VIII

¶48 Welco next contends that the trial court erred in accepting the verdict because 23 O.S. 2011 §61.2(C) is unconstitutional. Section 61.2(C) provides,

> Notwithstanding subsection B of this section, there shall be no limit on the amount of noneconomic damages which the trier of fact may award the plaintiff in a civil action arising from a claimed bodily injury resulting from negligence if the judge and jury finds, by clear and convincing evidence, that the defendant's acts or failures to act were:
>
> 1. In reckless disregard for the rights of others;
> 2. Grossly negligent;
> 3. Fraudulent; or
> 4. Intentional or with malice.

Welco argues that §61.2(C) violates due process because (1) it allows the jury to assess punitive damages in the guise of noneconomic damages, but without the procedural safeguards applicable to punitive damages, and (2) the statutory scheme of §61.2(C) and §9.1 impermissibly exposes defendants to the threat of double recovery of punitive damages. In response, Galier argues that noneconomic compensatory damages are distinct from punitive damages, and they serve different purposes.

¶49 The purpose of an award of noneconomic damages is to compensate the plaintiff for subjective injuries . *Edwards v. Chandler*, 1957 OK 45, ¶5, 308 P.2d 295, 297. Its purpose is not to punish the defendant. That the Legislature decided to place a limit on the amount of noneconomic damages, and specified an exception to the limit, does not transform the nature of the damages when the limit is removed. Noneconomic damages are not subject to the same substantive and procedural due process limitations as punitive damages. Title 23 O.S. 2011 §61.2(C) is not unconstitutional under the due process clause.

IX

¶50 The defendants propose that the trial court erred by improperly admitting evidence. Error may not be predicated upon an evidentiary ruling unless a substantial right of a party is affected and a timely objection or offer of proof was made. 12 O.S.2001 §2104(A)(1) and (2). The trial court stands as a gatekeeper in admitting or excluding evidence based on an assessment of its relevance and reliability, and we will not disturb its ruling absent a clear abuse of discretion. *Myers v. Missouri Pacific R. Ca*, 2002 OK 60, 736, 52 P.3d 1014, 1033.

A

¶51 Welco contends it is entitled to a new trial because the trial court abused its discretion in admitting prejudicial evidence regarding Welco of Texas. Welco asserts the Texas company was a separate entity yet Galier relied on its conduct in establishing the standards imposing punitive damages or removing the limit on noneconomic damages.

¶52 The record shows that Welco's former president was one of three owners of Welco and one of four owners of the Texas company. The jury was entitled to draw legitimate inferences from these facts. *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, ¶18, 256 P.3d 1021, 1030. That the former president and part owner of both companies would have had familiarity with regulatory issues affecting the companies' common business is a legitimate inference. Welco had the opportunity to put on evidence controverting the inference, and the jury was entitled to decide which evidence to believe. *Id.* The trial court did not abuse its discretion in admitting the evidence.

B

¶53 Murco contends the trial court erred in admitting the written materials distributed at an Asbestos Symposium attended by Murco's founder, the current owner's father.

¶54 The parties agree the document was authenticated. The trial court admitted it as a business record. The subject matter of the conference was the carcinogenic action of asbestos. A s discussed above, the jury was entitled to draw a legitimate inference that Murco's founder, as an attendee at the conference, heard at least some of the matters presented and therefore was aware that asbestos had adverse health

effects. The current president of Murco was the daughter of the past president. She testified that her father would have done anything that he knew to do to act reasonably and safely in making and selling products. The conference materials were relevant to contradict her testimony. The trial court did not abuse its discretion in admitting them.

C

¶55 Murco also contends the trial court erred in admitting evidence of a ban by the Consumer Product Safety Commission on the use of asbestos in joint compound effective January 15, 1978 because the ban was not during a relevant time period.

¶56 Galier's older brother testified that their father was selling lots in developments from 1970 to 1979. He said he and his brother accompanied their father to construction sites and cleaned up dust left after the joint compound was sanded. In addition, he said they made a game of throwing dried blobs of joint compound at each other and the clumps would break apart upon impact. This evidence supports the relevance of the 1978 ban. The trial court did not abuse its discretion in admitting evidence of the ban.

X

¶57 Defendants assert the verdict is not supported by competent evidence. In an action at law, the jury's verdict is conclusive as to questions of fact. *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶3, 933 P.2d 282, 287 . If there is any competent evidence reasonably tending to support the verdict, we will not disturb the verdict or the trial court's judgment based on the verdict. *Id.* The jury acts as the exclusive arbiter of the credibility of the witnesses and the weight of the evidence. *Id.* We will determine the sufficiency of the

evidence in light of the evidence tending to support it, together with every reasonable inference that may be drawn therefrom, rejecting all conflicting evidence. *Id.*

A

¶58 Welco contends the jury's conclusion that only Welco and Murco caused Galier's alleged injury is not supported by the evidence. The verdict form listed not only the Defendants but also thirteen named non-parties, and asked the jury to apportion liability among them. The jury found each of the nonparties zero percent liable.

¶59 The jury should consider the negligence of tortfeasors not parties to the lawsuit in order to properly apportion the negligence of those tortfeasors who are parties. *Paul v. N. L. Indus., Inc.*, 1980 OK 127, ¶5, 624 P.2d 68, 69. However, in order to apportion liability to a nonparty, there must be proof of negligence on the part of the nonparty. *Gowens v. Barstow*, 2015 OK 85, 132, 364 P.3d 644, 654-55 (testimony of a dangerous intersection did not require the judge to apportion the liability of the city in absence of evidence that the city was negligent). It is the jury's role to determine whether any particular defendant or named non-party is liable for negligence. A judgment is not reversible merely because the evidence might have supported a verdict different from that rendered by the jury.

B

¶60 Murco contends the evidence was insufficient to prove that Galier was significantly and regularly exposed to Murco's asbestos compound over an extended period or that the wet-based product caused

him to contract mesothelioma. Murco argues the parties agreed to the jury instruction on direct cause stating, "There must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiff was present."

¶61 Murco's president testified that Murco manufactured asbestos joint compound from 1971 to 1978, and introduced an asbestos-free compound in 1975, but most of its sales continued to be of the asbestos compound. Galier testified that he had regular exposure between 1971 and 1975, when he accompanied his father to hundreds of job sites. He said he was on the work sites three to four times per month for a few hours at a time. He testified there was dust in the air, and he was present while drywallers sanded the dried compound. He said he scraped blobs of joint compound off the floor and swept up construction debris, including joint compound dust. He denied he was only exposed to residual debris after someone else had cleaned up. He said he saw the name Murco on boxes at the sites over the years . Murco's joint compound was a pre-mixed wet product that came in boxes with a liner.

¶62 This 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. We will not disturb its verdict.

C

¶63 Murco also contends the evidence was insufficient to support the amounts awarded as either economic or noneconomic damages, or to support the requisite finding of misconduct to remove the statutory limit on noneconomic damages.

¶64 The measure of damages for a tort claim is "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 O.S. 2011 §61. In a civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss is not subject to any limitation. §61.2(A). There is no limit on noneconomic damages if the fact-finder finds, by clear and convincing evidence, that the defendant acted in reckless disregard for the rights of others, with gross negligence, fraudulently, intentionally, or with malice. §61.2(C). If the injury is subjective and such that laypersons cannot with reasonable certainty know whether or not there will be future pain and suffering, then expert testimony is required. *Reed v. Scott*, 1991 OK 113, ¶9, 820 P.2d 445, 449. Proof of future medical expenses and permanent injury or disability also requires expert testimony. *Godfrey v. Meyer*, 1996 OK CIV APP 124, V, 933 P.2d 942, 943.

¶65 Galier's evidence of economic damages was future medical treatment. Given that he was asymptomatic, not receiving medical treatment, and his injury was a diagnosis some years earlier, expert testimony was necessary to constitute competent evidence of his subjective injuries. Plaintiffs expert testified that the cost of mesothelioma treatment could exceed $1 million. As for non-economic damages, the expert testimony established that the progression of the disease is very painful, symptoms will likely begin within ten years, and Galier likely will not survive long after he becomes symptomatic.

¶66 As evidence of misconduct, Galier points to evidence that Murco opposed the 1978 ban on asbestos, continued manufacturing asbestos products until the

day the ban took effect, and continued buying asbestos and selling asbestos products after the ban.

¶67 This record supports the jury's award of economic and non-economic damages, as well as its finding of clear and convincing evidence of culpable misconduct.

XI

¶68 In reviewing jury instructions on appeal, we must consider the instructions as a whole. *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, ¶7, 845 P.2d 187, 189. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. *Id.* The test for error in instructions is whether the jurors were probably misled regarding the legal standards they should apply to the evidence. *Id.* We will not reverse a judgment based on misdirection of the jury unless we conclude that the error probably resulted in a miscarriage of justice. 20 O.S. 2011 §3001.1.

A

¶69 Murco contends the trial court erred in refusing a limiting instruction on post-1975 laws and events because the evidence showed that Galier was not regularly exposed to asbestos-containing products at home sites after 1975. It argues that the trial court conditionally admitted the evidence, based on the representation that subsequent testimony would show that Galier was exposed to Murco's joint compound during that period. The trial court refused the requested instruction on the ground a jury question was presented. The proposed instruction stated:

LIMITING INSTRUCTION

> Testimony was offered into evidence of Michael Galier's alleged exposure to Defendants' asbestos

> containing products from 1976 to 1979. Such evidence of alleged exposure to Defendants' asbestos containing products from 1976 to 1979 was received conditioned upon evidence substantiating exposure to Defendants' asbestos containing products from 1976 to 1979.
>
> You are now instructed that you must not consider any evidence or testimony regarding any alleged exposure to Defendants' asbestos containing product subsequent to 1976. You are further instructed that you must not consider any testimony or evidence as to Murco's Wall Products, Inc.'s Welco Manufacturing Company's, or Red Devil Inc.'s alleged knowledge of asbestos, alleged use of asbestos or asbestos containing products, or any alleged ban on the use of asbestos in joint compound or caulk subsequent to 1976.

¶70 First, we note that the instruction is confusing and internally inconsistent. It acknowledges there was evidence of post-1975 exposure, but instructs the jury to ignore evidence of post-1975 exposure and events because there was not evidence substantiating post-1975 exposure. Second, Murco offers no precedential authority in support of its limiting instruction. The trial court did not err in refusing to submit the limiting instruction to the jury.

B

¶71 Murco contends the trial court erred by refusing a failure-to-mitigate instruction because Galier decided to decline further medical testing. "The duty to mitigate damages in a personal injury action merely requires the use of ordinary care to secure timely medical treatment after an injury." *James v. Midkiff*, 1994 OK CIV APP 165, ¶4, 888 P.2d 5, 6.

Galier's decision to forego testing could have no effect on his damages because there was no evidence that he could have benefitted from any treatment while he was asymptomatic. The trial court did not err in refusing the instruction.

¶72 For the foregoing reasons, the trial court's judgment is AFFIRMED.

BELL, J., and SWINTON, J. (sitting by designation), concur.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

(ORDER LIST: 583 U.S.)

TUESDAY, FEBRUARY 20, 2018

CERTIORARI - - SUMMARY DISPOSITION

17-733 MURCO WALL PRODUCTS, INC. V. GALIER, MICHAEL D.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Civil Appeals of Oklahoma, First Division for further consideration in light of *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U. S. ____ (2017).

* * *

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

MONDAY, JUNE 19, 2017

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

114,175 (cons. w/114,183)
Michael D. Galier v. Murco Wall Products, Inc. And Welco Manufacturing Company et al
Both petitions for certiorari are denied.
CONCUR: Gurich, V.C.J., Watt, Winchester, Edmondson, Colbert and Reif, JJ.
DISSENT: Wyrick, J.
NOT PARTICIPATING: Kauger, J.
DISQUALIFIED: Combs, C.J.

____
CHIEF JUSTICE

APPENDIX E

FILED

COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

FEB 3 2017

MICHAEL S. RICHIE

CLERK

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

MICHAEL D. GALIER,
Plaintiff/Appellee,
vs.
MURCO WALL PRODUCTS, INC., and
WELCO MANUFACTURING COMPANY,
Defendants/Appellants,
and
Red Devil Corporation,
Defendant.

Case No. 114,175
(Cons.w/114,183)

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON,
TRIAL JUDGE

AFFIRMED

Steven T. Horton,
HORTON LAW FIRM,
Oklahoma City, Oklahoma,
and
Jessica M. Dean,
Charles W. Branham, III,
DEAN, OMAR & BRANHAM, LLP,
Dallas, Texas,
For Plaintiff/Appellee,

Clyde A. Muchmore,
Harvey D. Ellis, Jr.,
Cullen D. Sweeney,
CROWE & DUNLEVY,
Oklahoma City, Oklahoma,
and
Gregory L. Deans,
Katherine H. Stepp,
DEANS & LYONS, L.L.P.,
Dallas, Texas
For Defendant/Appellant,
Murco Wall Products, Inc.

Monty B. Bottom,
FOLIART, HUFF, OTTAWAY & BOTTOM,
Oklahoma City, Oklahoma,
and
Michael C. Carter,
Catherine L. Campbell,
PHILLIPS MURRAH P.C.,
Oklahoma City, Oklahoma,
For Defendant/Appellant
Welco Mfg. Co.

OPINION BY BRIAN JACK GOREE, PRESIDING JUDGE:

¶1 In this consolidated appeal, Defendants/Appellants, Murco Wall Products, Inc. (Murco) and Welco Manufacturing Company (Welco), seek review of the trial court's judgment based on a jury verdict in favor of Plaintiff/Appellee, Michael D. Galier. We find no error in the conduct of the trial, and the jury's verdict is supported by competent evidence. The judgment is affirmed.

I.

Background

¶2 Galier commenced an action against numerous manufacturers of asbestos products, alleging they caused him to contract asbestos-related mesothelioma. He sued under the theories of negligence and manufacturers' products liability. At trial he pursued only three of the defendants: Murco, Welco, and Red Devil Corporation. The jury reached a verdict and nine of its members signed a six-page verdict form. The principal issue before this court is whether the trial court erroneously accepted the written verdict after the foreman asked a question that suggested the verdict did not express the jury's intent.

¶3 The jury found Galier failed to prove his claims against Red Devil but succeeded in proving his claims against Murco and Welco. It found Galier sustained actual damages totaling $6 million, comprising $1.5 million in economic damages and $4.5 million in non-economic damages. It apportioned 40% of Gailer's damages to Murco and 60% to Welco. Thirteen non-parties were identified on the verdict form and the jury apportioned zero percent liability to each of them.

¶4 Because the jury trial was in a civil action claiming bodily injury, the verdict form included answers to interrogatories pursuant to 23 O.S. 2011 §61.2. Section 61.2 limits compensation for noneconomic loss to $350,000 unless the finder of fact concludes a defendant's actions met a specified degree of culpability. The jury found Galier proved by clear and convincing evidence that Murco and Welco acted with gross negligence, in reckless disregard of the rights of others, and intentionally and with malice. These findings authorized the trial court to enter judgment for noneconomic compensatory damages in excess of the $350,000 limit. §61.2(E). The same findings also served as the predicate for the jury to consider punitive damages in a second stage of the trial. 23 O.S. 2011 §9.1.[1]

¶5 After the verdict was announced, the jury's foreman asked the judge a question about the damages awarded and the judge polled the jury:

Foreman Jacobs:	We understood we had awarded punitive damages and medical damages. Is that not correct?
The Court:	Sir, you found by clear and convincing evidence that there was. So, yes, that puts you into the pu-

[1] A portion of Instruction No. 24 advised the jury, "If you find that any Defendant or Defendants whom you found liable and responsible for damages acted either with reckless disregard for the rights of others or intentionally and with malice, you have determined that Plaintiff may be entitled to an award of punitive damages. The amount of any award for punitive damages is not presently before you for decision but would be determined in a later stage of the trial if you indicate by your finding that such an award is warranted."

	nitive damages stage. So we're going to a Stage II.
Foreman Jacobs:	Well, maybe it wasn't written up correctly. We intended to award 1.5 million for medical and 4.5 for punitive. Did we not put that down right?
The Court:	You cannot award punitive damages at this stage, sir. That's what the jury instructions told you.
Mr. Moore:	[Counsel for Welco] Your Honor?
The Court:	Maybe we'd better poll the jury.
Mr. Moore:	'Counsel for Welco] Yes. My motion, Your Honor.

The judge then summarized the findings as stated on the verdict form and continued:

The Court:	So I'm going to ask each and every juror who has signed this if that is your verdict in this case. Mr. Jacobs, you have signed the verdict as Foreman of the Jury. Is that your verdict in this case?
Foreman Jacobs:	Yes, it is, with the exception of the wording we didn't understand correctly.
The Court:	Okay. It either is or - -
Foreman Jacobs:	How do we correct that?
The Court:	- - it is not. Okay.
Foreman Jacobs:	Well, that was my vote, yes. But . . .

The Court: Okay.[2]

The judge then proceeded to ask the same question of the other eight jurors who signed the verdict form and each affirmed the verdict as their own without equivocation. The judge then accepted the verdict of Stage I and Defendants objected.[3]

¶6 When the trial reconvened after the weekend, Galier opted to proceed only against Murco in Stage II. After deliberating, the jury found in favor of Murco. Therefore no punitive damages were awarded.

¶7 Defendants contend that when the jury awarded $4.5 million in noneconomic damages, they mistakenly believed they had awarded punitive damages. They propose this conclusion is supported by the jury's award of zero damages after a brief deliberation in Stage II of the trial. Welco argues that the jury failed to follow instructions, resulting in a defective verdict, and the trial court abused its discretion in attempting to cure the defect by polling the jury. Murco argues the trial court was required to make a meaningful and specific inquiry into the foreman's report and take corrective action. In response, Galier argues

[2] It is impossible to conclude from the transcript whether Foreman Jacobs voluntarily terminated his response or the Court interrupted him.

[3] Counsel for Welco stated: "it's clear to me from the Foreman's comments that though he said that that was his verdict, he understood his verdict was something other than what was recorded on the verdict form . . . I don't think you can receive this verdict. I think it's inconsistent with what the form says if that's the words from the Foreman." The Court responded that the jury was polled and all jurors assented to the verdict. Welco's counsel courteously persisted: "[C]an they at least explain to us what they understood it was to be? I mean, I think we have to do that, at least for an appellate record here." The Court declined the request and accepted the verdict.

that Oklahoma law prohibits inquiry into the jury's intent or understanding in reaching its verdict.

¶8 The questions presented for review reveal a tension between two fundamental legal principles, the confidentiality and independence of a jury's deliberation and a party's right to a just trial.[4]

II

Validity of the Jury Verdict

¶9 A trial court has broad discretion in conducting a jury trial; we will not reverse based on its conduct unless the trial court abused that discretion. *Stephens v. Draper*, 1960 OK 69, 118, 350 P.2d 506, 510. An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence. It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable. *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, 120, 987 P.2d 1185, 1194.

¶10 A trial court should not accept the jury's verdict if it is defective. *Stephens v. Draper*, 1960 OK 69, ¶12, 350 P.2d 506, 509. If the verdict is incomplete, ambiguous, or contrary to the jury instructions, then the court should direct the jury to retire for further deliberation. *Stephens* at ¶0 (syllabus by the court). In this case, the verdict was facially valid.

---

[4] "The right of trial by jury shall be and remain inviolate." Okla. Const., Art. 2, §19. Courts have a duty to secure this right by strictly enforcing the constitutional and statutory provisions that preserve the purity of jury trial. *Fields v. Saunders*, 2012 OK 17, 1110, 278 P.3d 577, 581. Justice in the courts shall be administered without sale, denial, delay, or prejudice. Okla. Const., Art. 2, §6.

¶11 Galier contends it was too late to poll the jury because the verdict was in proper form and the court had already accepted it.[5] We disagree. The decision of a jury does not become a verdict until it is accepted by the court and recorded in the case. *Wiggins v. Dahlgren*, 1965 OK 131, ¶4, 405 P.2d 1001, 1003. Until the verdict is accepted and recorded, the members of the jury are free to change their votes — even to the extent of changing the verdict. *Id.* Although the court initially accepted the Stage I verdict, it was not recorded or filed. Furthermore, the Court acknowledged the Stage I verdict before there was any suggestion that it might not be correct. We hold that the trial court retains authority to inquire of the jury concerning its verdict until the jury is discharged or the verdict has been filed in the case.

¶12 Galier also proposes in broad terms that a jury's verdict cannot be impeached. This case is different from those cited by Plaintiff where a jury's verdict could not be challenged after the trial had concluded. Here, the jury was still empaneled when the court conducted its poll. *Cities Service Oil Co. v. Kindt*, 1947 OK 219, 118, 190 P.2d 1007,1013 (distinguishing an attack on a jury's verdict when it is returned, from cases involving testimony of jurors after their verdict has been received and filed). In *Willoughby v. City of Oklahoma City*, 1985 OK 64, 706 P.2d 883, 889, the Supreme Court examined the anti-impeachment rule under the Oklahoma Evidence Code, 12 O.S. 2011 §2606(B). This rule limits the

[5] After the Judge announced the jury's verdict, and before Mr. Jacobs questioned it, the Court asked whether anyone wished the jury to be polled. Counsel for some of the parties responded no. The Court then stated, 'That will be the verdict of the jury and the judgment of this Court."

scope of permissible testimony to inquiring whether extraneous prejudicial information was improperly brought to the jury's attention. However, §2606(B) applies only to inquiry after the verdict has been reached and recorded. *Weatherly v. State*, 1987 OK CR 28, ¶11, 733 P.2d 1331, 1334. Because the jury in this case had not been discharged, neither the common law nor §2606(B) were impediments to polling the jury.

¶13 We turn next to Welco's argument that the Court abused its discretion in attempting to cure the defective verdict by polling the jury. The procedure for polling the jury is outlined by 12 O.S. 2011 §585. It provides:

> When the jury have agreed upon their verdict they must be conducted into court, their names called by the clerk, and their verdict rendered by their foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or the court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out, for further deliberation.

In a separate statute, 12 O.S. 2011 §586, the Legislature provided a method for converting the jury's verdict to a written form and correcting any defects resulting from that process:

> The verdict shall be written, signed by the foreman and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If, however, the verdict be defective in form only, the same

> may, with the assent of the jury, before they are discharged, be corrected by the court.

Juries are now uniformly instructed to complete their verdict on the written verdict forms provided. Although this has likely diminished errors in the deliberative process, it is still possible that a verdict agreed to by a juror is not accurately reflected on the form. The instant case illustrates that point.

¶14 Mr. Jacobs referred to the jury's intent to award $4.5 million for punitive damages and then suggested "maybe it wasn't written up correctly." He questioned, "Did we not put that down right?" Polling a jury can reveal whether the written verdict accurately expresses the jury's deliberative agreement. We hold that the trial court had authority to poll the jury and its decision to do so was a proper exercise of judicial discretion.

¶15 Welco argues that even if polling the jury was within the Court's discretion, doing so did not cure the defective verdict. It must be pointed out that polling a jury is not a curative act, it is a diagnostic device to ascertain whether the verdict is legally acceptable or if further deliberation is necessary. When the court polls the jury, each juror is asked "if it is his verdict." §585. If any juror answers in the negative, the jury must be sent out for further deliberation. *Id.* If all jurors assent that the written verdict is the verdict they agreed to during deliberation, then the court may accept it.[6]

---

[6] This assumes that the verdict is otherwise free from defects. A verdict that is incomplete, ambiguous, or contrary to jury instructions requires further deliberation regardless of whether the jurors unanimously assented to it.

¶16 When asked whether the verdict in this case was his verdict, Mr. Jacobs answered yes. But he also qualified his assent. He communicated an exception concerning his understanding of it and he also asked how it could be corrected. Finally, he agreed it was his verdict because that is how he voted and then he apparently began to qualify his answer again but did not finish.

¶17 Whether a qualified assent is equivalent to a dissent, requiring further deliberation, depends upon the character of the qualification. In *Frick v. Reynolds*, 1898 OK 9, ¶16, 52 P. 391, 394, the Supreme Court decided it was error for the court to receive the verdict instead of directing the jury to deliberate further. The questioned juror conceded he had agreed to the verdict but he was unsatisfied with it. On further examination, the juror explained he had agreed to it only to prevent a hung jury. "An assent must be an assent of the mind to the fact found by the verdict." *Frick*, at ¶18, citing *Rothbauer v. State*, 22 Wis. 468, 470 (1868).

¶18 Unlike the juror in *Frick*, Mr. Jacobs did not say he was unconvinced by the evidence. See *Frick*, ¶15. Mr. Jacobs qualified his assent because he had a misunderstanding about noneconomic damages and punitive damages. It was a misunderstanding related to wording that he apparently believed needed to be corrected.

¶19 The record reflects that Mr. Jacobs believed he had awarded punitive damages. Next, after listening again to the Court review the verdict preliminary to the poll, he assented to the verdict for noneconomic damages with remarks that he had a misunderstanding.

¶20 Had Mr. Jacobs not intended to award $4.5 million as noneconomic damages, he could have answered that it was not his verdict. But he did not dissent. He acknowledged twice that it was his verdict. We hold that the trial court would have been justified in reasoning that Juror Jacobs misunderstood noneconomic damages to be the legal equivalent of punitive damages. The jury instructions correctly stated the law, Jacobs assented to the verdict, and the possibility that he was mistaken about the law did not change his factual verdict into a dissent.[7] None of the jurors answered the poll in the negative. The trial court did not abuse its discretion in accepting the jury's verdict rather than ordering the jury to recommence deliberation.[8]

¶21 Defendant Murco urges that the Court erred by failing to make a meaningful and specific inquiry into the foreman's response. Galier insists to the contrary, that a court may not inquire into the jury's intent or understanding in reaching its verdict. The question of the court's authority is settled law. "[A] trial court may make such inquiry of jurors as to enable it to understand their will and intention, and their

---

[7] We recognize that a different interpretation of Mr. Jacobs' misunderstanding might also be reasonable, but a court's discretionary act is not reversible merely because an alternative option was available.

[8] The trial court is not bound to accept a verdict that is not in accordance with its instructions. *Stephens* at 1112. We disagree with Defendant Welco that the jury failed to follow its instructions. Prior to the poll Mr. Jacobs asserted that the jury intended to award punitive damages, an action inconsistent with the instructions. If Jacobs at first believed the jury had awarded punitive damages, he and all the other polled jurors later assented to a verdict to the contrary. The verdict was not inconsistent with the jury instructions.

answers to such inquiry will be looked upon as an aid in rendering of proper judgment." *First Nat. Bank & Trust Co., Muskogee v Exch. Nat. Bank & Trust Co., Ardmore*, 1973 OK CIV APP 7, 517 P.2d 805, 809 (published by order of the Supreme Court). The Court had authority to inquire of the jury beyond the statutory poll.

¶22 Because the trial court declined to ask Mr. Jacobs additional questions, it cannot be determined what precisely he misunderstood about the wording of the verdict form. However, questioning a jury about its verdict introduces risk. *West v. Abney*, 1950 OK 127, ¶11, 219 P.2d 624, 627 (holding that the action of a judge in the correction of verdicts should be taken with great caution). There is a possibility that the judge's questions could accidentally trigger improper comment by jurors concerning their confidential deliberation. A court's questions could also lead to unfair prejudice if the jury is ultimately ordered to return to deliberation. In *West*, the court noted that the trial court was very careful about the method of instructing the jury as to the form of verdict that was acceptable, without intimating as to what that verdict should be. *West* at ¶13.

¶23 The confidentiality of the jury's deliberation must be preserved and questioning jurors about their verdict beyond conducting a poll is precarious. However, a trial court's pre-discharge questioning, if it is directed toward determining whether the verdict is defective or invalid, is not statutorily impermissible. As we have already determined, the Court did not abuse its discretion by accepting the verdict rather than ordering additional deliberation. We likewise hold that the Court's judgment in declining to inquire further was not a clear abuse of discretion.

III

Constitutionality of 23 O.S. §61.2(C)

¶24 Welco next contends that the trial court erred in accepting the verdict because 23 O.S. 2011 §61.2(C) is unconstitutional. Section 61.2(C) provides,

> Notwithstanding subsection B of this section, there shall be no limit on the amount of noneconomic damages which the trier of fact may award the plaintiff in a civil action arising from a claimed bodily injury resulting from negligence if the judge and jury finds, by clear and convincing evidence, that the defendant's acts or failures to act were:
>
> 1. In reckless disregard for the rights of others;
> 2. Grossly negligent;
> 3. Fraudulent; or
> 4. Intentional or with malice.

Welco argues that §61.2(C) violates due process because (1) it allows the jury to assess punitive damages in the guise of noneconomic damages, but without the procedural safeguards applicable to punitive damages, and (2) the statutory scheme of §61.2(C) and §9.1 impermissibly exposes defendants to the threat of double recovery of punitive damages. In response, Galier argues that noneconomic compensatory damages are distinct from punitive damages, and they serve different purposes.

¶25 The purpose of an award of noneconomic damages is to compensate the plaintiff for subjective injuries . *Edwards v. Chandler*, 1957 OK 45, ¶5, 308 P.2d 295, 297. Its purpose is not to punish the defendant. That the Legislature decided to place a limit on the amount of noneconomic damages, and specified an exception to the limit, does not transform the nature of the damages when the limit is removed. Noneconomic

damages are not subject to the same substantive and procedural due process limitations as punitive damages. Title 23 O.S. 2011 §61.2(C) is not unconstitutional under the due process clause.

IV.

Admissibility of Evidence

¶26 The defendants propose that the trial court erred by improperly admitting evidence. Error may not be predicated upon an evidentiary ruling unless a substantial right of a party is affected and a timely objection or offer of proof was made. 12 O.S.2001 §2104(A)(1) and (2). The trial court stands as a gatekeeper in admitting or excluding evidence based on an assessment of its relevance and reliability, and we will not disturb its ruling absent a clear abuse of discretion. *Myers v. Missouri Pacific R. Ca*, 2002 OK 60, 736, 52 P.3d 1014, 1033.

A.

¶27 Welco contends it is entitled to a new trial because the trial court abused its discretion in admitting prejudicial evidence regarding Welco of Texas. Welco asserts the Texas company was a separate entity yet Galier relied on its conduct in establishing the standards imposing punitive damages or removing the limit on noneconomic damages.

¶28 The record shows that Welco's former president was one of three owners of Welco and one of four owners of the Texas company. The jury was entitled to draw legitimate inferences from these facts. *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, ¶18, 256 P.3d 1021, 1030. That the former president and part owner of both companies would have had familiarity with regulatory issues affecting the companies' common business is a legitimate inference. Welco had

the opportunity to put on evidence controverting the inference, and the jury was entitled to decide which evidence to believe. *Id.* The trial court did not abuse its discretion in admitting the evidence.

B.

¶29 Murco contends the trial court erred in admitting the written materials distributed at an Asbestos Symposium attended by Murco's founder, the current owner's father.

¶30 The parties agree the document was authenticated. The trial court admitted it as a business record. The subject matter of the conference was the carcinogenic action of asbestos. A s discussed above, the jury was entitled to draw a legitimate inference that Murco's founder, as an attendee at the conference, heard at least some of the matters presented and therefore was aware that asbestos had adverse health effects. The current president of Murco was the daughter of the past president. She testified that her father would have done anything that he knew to do to act reasonably and safely in making and selling products. The conference materials were relevant to contradict her testimony. The trial court did not abuse its discretion in admitting them.

C.

¶31 Murco also contends the trial court erred in admitting evidence of a ban by the Consumer Product Safety Commission on the use of asbestos in joint compound effective January 15, 1978 because the ban was not during a relevant time period.

¶32 Galier's older brother testified that their father was selling lots in developments from 1970 to 1979. He said he and his brother accompanied their father to construction sites and cleaned up dust left

after the joint compound was sanded. In addition, he said they made a game of throwing dried blobs of joint compound at each other and the clumps would break apart upon impact. This evidence supports the relevance of the 1978 ban. The trial court did not abuse its discretion in admitting evidence of the ban.

V.

Sufficiency of Evidence

¶33 Defendants assert the verdict is not supported by competent evidence. In an action at law, the jury's verdict is conclusive as to questions of fact. *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶3, 933 P.2d 282, 287 . If there is any competent evidence reasonably tending to support the verdict, we will not disturb the verdict or the trial court's judgment based on the verdict. *Id.* The jury acts as the exclusive arbiter of the credibility of the witnesses and the weight of the evidence. *Id.* We will determine the sufficiency of the evidence in light of the evidence tending to support it, together with every reasonable inference that may be drawn therefrom, rejecting all conflicting evidence. *Id.*

A.

¶34 Welco contends the jury's conclusion that only Welco and Murco caused Galier's alleged injury is not supported by the evidence. The verdict form listed not only the Defendants but also thirteen named non-parties, and asked the jury to apportion liability among them. The jury found each of the nonparties zero percent liable.

¶35 The jury should consider the negligence of tortfeasors not parties to the lawsuit in order to properly apportion the negligence of those tortfeasors who are parties. *Paul v. N. L. Indus., Inc.*, 1980 OK

127, ¶5, 624 P.2d 68, 69. However, in order to apportion liability to a nonparty, there must be proof of negligence on the part of the nonparty. *Gowens v. Barstow*, 2015 OK 85, 132, 364 P.3d 644, 654-55 (testimony of a dangerous intersection did not require the judge to apportion the liability of the city in absence of evidence that the city was negligent). It is the jury's role to determine whether any particular defendant or named non-party is liable for negligence. A judgment is not reversible merely because the evidence might have supported a verdict different from that rendered by the jury.

B.

¶36 Murco contends the evidence was insufficient to prove that Galier was significantly and regularly exposed to Murco's asbestos compound over an extended period or that the wet-based product caused him to contract mesothelioma. Murco argues the parties agreed to the jury instruction on direct cause stating, "There must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiff was present."

¶37 Murco's president testified that Murco manufactured asbestos joint compound from 1971 to 1978, and introduced an asbestos-free compound in 1975, but most of its sales continued to be of the asbestos compound. Galier testified that he had regular exposure between 1971 and 1975, when he accompanied his father to hundreds of job sites. He said he was on the work sites three to four times per month for a few hours at a time. He testified there was dust in the air, and he was present while drywallers sanded the dried compound. He said he scraped blobs of joint compound off the floor and swept up construction debris,

including joint compound dust. He denied he was only exposed to residual debris after someone else had cleaned up. He said he saw the name Murco on boxes at the sites over the years . Murco's joint compound was a pre-mixed wet product that came in boxes with a liner.

¶38 This 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. We will not disturb its verdict.

C.

¶39 Murco also contends the evidence was insufficient to support the amounts awarded as either economic or noneconomic damages, or to support the requisite finding of misconduct to remove the statutory limit on noneconomic damages.

¶40 The measure of damages for a tort claim is "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 O.S. 2011 §61. In a civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss is not subject to any limitation. §61.2(A). There is no limit on noneconomic damages if the fact-finder finds, by clear and convincing evidence, that the defendant acted in reckless disregard for the rights of others, with gross negligence, fraudulently, intentionally, or with malice. §61.2(C). If the injury is subjective and such that laypersons cannot with reasonable certainty know whether or not there will be future pain and suffering, then expert testimony is required. *Reed v. Scott*, 1991 OK 113, ¶9, 820 P.2d 445, 449. Proof of future medical expenses

and permanent injury or disability also requires expert testimony. *Godfrey v. Meyer*, 1996 OK CIV APP 124, V, 933 P.2d 942, 943.

¶41 Galier's evidence of economic damages was future medical treatment. Given that he was asymptomatic, not receiving medical treatment, and his injury was a diagnosis some years earlier, expert testimony was necessary to constitute competent evidence of his subjective injuries. Plaintiffs expert testified that the cost of mesothelioma treatment could exceed $1 million. As for non-economic damages, the expert testimony established that the progression of the disease is very painful, symptoms will likely begin within ten years, and Galier likely will not survive long after he becomes symptomatic.

¶42 As evidence of misconduct, Galier points to evidence that Murco opposed the 1978 ban on asbestos, continued manufacturing asbestos products until the day the ban took effect, and continued buying asbestos and selling asbestos products after the ban.

¶43 This record supports the jury's award of economic and non-economic damages, as well as its finding of clear and convincing evidence of culpable misconduct.

VI.

In Personam Jurisdiction

¶44 Murco contends that the trial court erroneously denied its motion to dismiss for lack of in personam jurisdiction. We review this proposition de novo as a challenge to the validity of the judgment. In personam jurisdiction requires sufficient minimum contacts with the State of Oklahoma so that the exercise of jurisdiction does not offend traditional notions of

fair play and substantial justice. *Guffey v. Ostonakulov*, 2014 OK 6, 114, 321 P.3d 971, 975. The question is whether the totality of the contacts makes an exercise of jurisdiction proper. *Id.* at ¶19. The focus is on whether there is some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* at ¶16.

¶45 Murco is a Texas corporation and its place of business is Fort Worth, Texas. Murco's president agreed that Murco's documents showed tens of thousands of sales in a two-year period directed to Oklahoma, beginning in 1972. In the 1970's, Murco employed a salesperson who had a sales territory of a 300-mile radius from Fort Worth, Texas, with eight purchasers in Lawton, Oklahoma City, Stonewall, and Duncan. Murco also entered into an agreement with Flintkote Company in Oklahoma City whereby Murco would apply a Flintkote label onto its Murco product for resale by Flintkote.

¶46 We conclude that the State of Oklahoma had in personam jurisdiction over Murco. The totality of circumstances convinces us that Murco purposefully availed itself of the privilege of conducting activities within Oklahoma. The judgment against Murco is not void for lack of personal jurisdiction.

VII.

Jury Instructions

¶47 In reviewing jury instructions on appeal, we must consider the instructions as a whole. *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, ¶7, 845 P.2d 187, 189. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. *Id.* The test for error in instructions is whether the jurors

were probably misled regarding the legal standards they should apply to the evidence. *Id.* We will not reverse a judgment based on misdirection of the jury unless we conclude that the error probably resulted in a miscarriage of justice. 20 O.S. 2011 §3001.1.

A.

¶48 Murco contends the trial court erred in refusing a limiting instruction on post-1975 laws and events because the evidence showed that Galier was not regularly exposed to asbestos-containing products at home sites after 1975. It argues that the trial court conditionally admitted the evidence, based on the representation that subsequent testimony would show that Galier was exposed to Murco's joint compound during that period. The trial court refused the requested instruction on the ground a jury question was presented. The proposed instruction stated:

LIMITING INSTRUCTION

> Testimony was offered into evidence of Michael Galier's alleged exposure to Defendants' asbestos containing products from 1976 to 1979. Such evidence of alleged exposure to Defendants' asbestos containing products from 1976 to 1979 was received conditioned upon evidence substantiating exposure to Defendants' asbestos containing products from 1976 to 1979.
>
> You are now instructed that you must not consider any evidence or testimony regarding any alleged exposure to Defendants' asbestos containing product subsequent to 1976. You are further instructed that you must not consider any testimony or evidence as to Murco's Wall Products, Inc.'s Welco Manufacturing Company's, or Red Devil Inc.'s al-

> leged knowledge of asbestos, alleged use of asbestos or asbestos containing products, or any alleged ban on the use of asbestos in joint compound or caulk subsequent to 1976.

¶49 First, we note that the instruction is confusing and internally inconsistent. It acknowledges there was evidence of post-1975 exposure, but instructs the jury to ignore evidence of post-1975 exposure and events because there was not evidence substantiating post-1975 exposure. Second, Murco offers no precedential authority in support of its limiting instruction. The trial court did not err in refusing to submit the limiting instruction to the jury.

B.

¶50 Murco contends the trial court erred by refusing a failure-to-mitigate instruction because Galier decided to decline further medical testing. "The duty to mitigate damages in a personal injury action merely requires the use of ordinary care to secure timely medical treatment after an injury." *James v. Midkiff*, 1994 OK CIV APP 165, ¶4, 888 P.2d 5, 6. Galier's decision to forego testing could have no effect on his damages because there was no evidence that he could have benefitted from any treatment while he was asymptomatic. The trial court did not err in refusing the instruction.

¶51 For the foregoing reasons, the trial court's judgment is AFFIRMED.

BELL, J., and SWINTON, J. (sitting by designation), concur.

APPENDIX F

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MICHAEL D. GALIER

v.

BORG-WARNER MORSE TEC INC., ET AL.

CASE NO. CJ-2012-6920
JUDGE BRYAN C. DIXON

JOURNAL ENTRY

On the 21st day of June, 2013, this matter came on before me, the undersigned Judge, on Defendant MURCO WALL PRODUCTS, INC.'s Motion to Dismiss for Lack of Personal Jurisdiction, and the Court having read the various briefs, responses, and replies filed by the parties' attorneys, and having given the Motion due consideration, finds that the Court has general jurisdiction over Defendant MURCO WALL PRODUCTS, INC.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motion to Dismiss for Lack of Personal Jurisdiction of the Defendant is denied.

/s/ Bryan C. Dixon
BRYAN C. DIXON
JUDGE OF THE DISTRICT COURT