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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GENUINE PARTS COMPANY, Defendant Below, Appellant, v. RALPH ALLEN CEPEC and SANDRA FAYE CEPEC, Plaintiffs Below, Appellees.	)))))))))))	No. 528, 2015 On Appeal from the Superior Court of the State of Delaware, in and for New Castle County C.A. No. N15C-02-184 ASB

BRIEF OF *AMICUS CURIAE* DELAWARE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS* AND OF ITS AUTHORITY TO FILE BRIEF

The Delaware Trial Lawyers Association ("DTLA") is a Delaware not-for-profit corporation. As its mission, DTLA seeks to champion the cause of those who deserve redress for injury to person or property. One of DTLA's core principles is to protect the rights of victims injured by another's negligence. Whether the Delaware registration statute is interpreted in such a manner so as to deny a victim of another's negligence their day in court in their chosen forum is of vital interest to DTLA.

Authority for DTLA to file its *amicus* brief is found in Supr. Ct. R. 28.

ARGUMENT

Introduction

Almost thirty years ago, in *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), this Court expressly held that a foreign corporation consents to general jurisdiction in Delaware by registering to do business in Delaware and appointing a Delaware agent to accept service of process. A Delaware federal court had reached the same conclusion somewhat earlier in *D'Angelo v. Petroleos Mexicanas*, 378 F.Supp. 1034 (D. Del. 1974). This Court's decision in *Sternberg* rested upon a two-part determination: (1) that jurisdiction by consent remained constitutionally valid after the advent of "minimum contacts" analysis in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); and, (2) that 8 Del. C. §§ 371 & 376 ("registration statutes") provide that a corporation expressly consents to general personal jurisdiction in Delaware by registering and appointing an agent. The matter at hand involves whether or not the Supreme Court's decision in *Daimler AG v. Bauman*, --U.S.--, 134 S.Ct. 746 (2014) alters that first consideration. The position that it does not is well presented in Plaintiffs-Appellees' briefing, and those arguments will not be repeated here.[1]

This brief will focus more upon the second consideration from *Sternberg*—how Delaware's registration statute is interpreted—and what bearing such matters

[1] This brief does include some short, additional points concerning Daimler and the continuing viability of jurisdiction by consent, which were not otherwise presented.

have upon this case. The short answer is that that statute should not now be open to reinterpretation on policy grounds unrelated to constitutional due process. In asking this Court to overturn *Sternberg*, Defendant-Appellant and its amici have made arguments that go beyond the proper focus of the constitutional inquiry, such as accusations of forum shopping and the need to curtail a hypothetical flood of out-of-state asbestos cases.

Point I
The Public Policy Issues Raised By Defendant-Appellant And Defense Amici Are For The Legislature And Have No Bearing On Personal Jurisdiction Due Process

The issue now before this Court is whether or not, after *Daimler*, it remains constitutionally permissible to exercise general jurisdiction based upon a corporation's expressly consenting to such jurisdiction as part of registration in accordance with the statutes. That constitutional inquiry does not involve reinterpreting the registration statutes in light of policy considerations that are wholly irrelevant to the issue of constitutional due process. Indeed, "[a] fundamental canon of statutory construction states that '[t]he long time failure of [the legislature] to alter [a statute] after it has been judicially construed … is persuasive of legislative recognition that the judicial construction is the correct one.'" *State v. Barnes*, 116 A.3d 883, 892 (Del. 2015) (*quoting Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940)). *See also Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991). Thus, "when [such] prior judicial interpretation was subject to being overturned by the operation of the legislative process and was not overturned, the justification for departing from *stare decisis* is even more tenuous." *Id*. (*quoting Harvey v. City of Newark*, 2010 WL 4240625, *7 (Del. Ch. 10/20/2010)). In other words, the General Assembly by not legislatively altering the decision in *Sternberg* has made the policy determination that Delaware

should exercise general jurisdiction over all corporations registering to do business here to the extent consistent with due process.

Most, if not all, of the arguments presented by defense amici Coalition for Litigation Justice ("CLJ") and American Insurance Association ("AIA") involve policy considerations going to their view of how asbestos litigation should be handled in Delaware. Such arguments have no bearing on the constitutionality of including express consent to jurisdiction as an aspect of statutory registration. They are little more than a thinly-veiled, impermissible request for this Court to use *Daimler* as an excuse to curtail asbestos litigation in Delaware for reasons that would necessarily tread upon the prerogative of the legislature. Where the matter is one within the legislative purvey, it is for the legislature—not the courts—to consider and decide public policy. *See Shea v. Matassa*, 918 A.2d 1090, 1094 (Del. 2007) ("General Assembly is in a far better position than this Court to gather the empirical data and to make the fact finding necessary to determine what the public policy should be…"). *See also Riedel v. ICI Americas Inc.*, 968 A.2d 17, 21 (Del. 2009). ("General Assembly decides these matters of social policy, not the courts"); *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 940 (Del. 1996) ("[i]t is not [the courts'] role to assume the prerogative of the General Assembly and change the comprehensive statutory framework crafted by it…") (*quoting Kofron v. Amoco Chem. Corp.*, 441 A.2d 226, 231 (Del. 1982)).

In particular, amici suggests that, if Delaware holds that out-of-state corporations are subject to general jurisdiction by registering and appointing agents, other states will retaliate by subjecting Delaware corporations to the same rules. First, such possibility has nothing to do with due process. Second, such consideration is precisely the kind of policy determination that the legislature should make. Finally, there is no logical reason why other states would be more prone to such retaliation after *Daimler*, than they were before. As one federal court has noted, the majority (but not unanimous) view among federal courts prior to *Daimler* was that a state *could* require consent to general jurisdiction, but that not all states had chosen to do so. *See Lanham v. Pilot Travel Centers, LLC*, 2015 WL 5167268 (D. Ore. 9/2/2015) (declining to reach due process issues because Oregon registration statute did not include consenting to general jurisdiction). It is not as if this Court is being asked to expand general jurisdiction to encompass consent under the registration statute. Delaware has already exercised such jurisdiction for thirty to forty years without prompting every other state to do the same.[2]

[2] As the court in *Lanham* observed, some states have registration statutes that include consent to general jurisdiction; others do not. If, as Plaintiffs-Appellees here have cogently explained, *Daimler* has not affected consent jurisdiction, there is no reason to believe that holding as much now will prompt more states to amend their registration statutes to exercise consent jurisdiction.

Point II
Delaware Courts Have Routinely Rejected
The Accusations And Concerns Raised Here

To the extent that the litany of speculative foreboding raised by defense amici have any bearing on the issues presented here, such concerns have been as routinely rejected as they have been routinely raised. Nearly identical arguments were first presented to, and rejected by, Judge Joseph Slights of the Superior Court almost a decade ago in his comprehensive ruling on *forum non conveniens* for asbestos litigation by nonresidents. *See In re Asbestos Litigation*, 929 A.2d 373 (Del.Super.Ct. 2006).[3] In response to a noticeable increase in the number of asbestos personal injury cased filed by nonresidents, several defendants brought similar *forum non conveniens* motions seeking to dismiss most such cases. Three representative cases were selected to be briefed, argued and decided.

In asking the court to overrule Delaware's "overwhelming hardship" standard for *forum non conveniens*, the defendants there accused plaintiffs of "blatant forum shopping." 929 A.2d at 379. They raised the same speculative gloom-and-doom predictions about Delaware being inundated with out-of-state asbestos cases—and, as they do now, used Madison County, Illinois as the

[3] Indeed, the arguments made by defense amici would be more appropriate to the issue of *forum non conveniens*, rather than personal jurisdiction.

paradigm example of that so-called problem.[4] The court concluded that the accusations and apprehensions raised by defendants "[did] not justify rewriting or even refining now settled principles of Delaware law." 929 A.2d at 382. In particular, the court observed that "[a]ccusing the plaintiffs of forum shopping may offer some rhetorical satisfaction, but it does little to advance the defendants' legal position, even if true." 929 A.2d at 388.

The court's ruling and statements in *In re Asbestos Litigation* remain true today and, perhaps, ring even truer in the context of a statute-based exercise of personal jurisdiction. Whereas the standard for *forum non conveniens* is a matter for the courts, the extent to which Delaware will exert constitutionally permissible jurisdiction is for the legislature. Once the Court interpreted the registration statute as providing for express consent to general jurisdiction and in the absence of any amendment to the statute, only a 'newly recognized' constitutional infirmity would justify revisiting that decision. *See Barnes*, 116 A.3d at 892. In that regard, plaintiffs' reasons and motives for choosing a particular place to file their cases

[4] Then, as now, defendants' and their amici's primary, if not exclusive, reference for criticizing how asbestos litigation is handled in Madison County, Illinois has been the *Madison-St. Clair Record*, which is by no means an objective source of credible information. Despite its somewhat official-sounding title, the *Record* is a privately owned publication with a bias and agenda overtly sympathetic to the same interests represented by the CLJ, AIA and Chamber of Commerce. The articles cited here by defense amici are more in the nature of op-ed pieces than actual objective news reporting.

have even less bearing on personal jurisdiction and due process, than they might have on *forum non conveniens*.

This Court has, on several occasions, cited with approval to the Judge Slights' *forum non conveniens* decision in rejecting arguments based on exaggerated concerns over forum shopping or a hypothetical deluge of out-of-state asbestos cases. *See Martinez v. DuPont De Nemours and Co*., 86 A.3d 1102, 1112, n. 44 (Del. 2014) (*citing with approval* to *In re Asb. Litig.*, 929 A.2d at 388 for proposition that "the Court cannot concern itself with the plaintiffs' 'subjective motivation' in bringing their claims to Delaware"); *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 398 (Del. 2013) (Delaware courts have consistently "rejected similar hypothetical 'floodgate' arguments") (*citing In re Asb. Litig*., 929 A.2d at 380-82 and *Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832, 835 (Del. 1999)).

Amici CLJ and AIA state at page 7, note 8 of their brief that "[t]here is nothing unique about asbestos personal injury cases that exempts such cases from the precepts of *Daimler*." No one is arguing that asbestos personal injury cases in particular or tort cases in general are entitled to some special exemption. On the other hand, every argument made by these amici rests on the equally untenable proposition that the nature of asbestos personal injury cases justifies some uniquely harsh application of *Daimler*, or the injection of improper and irrelevant considerations into the jurisdictional analysis. Thankfully, this Court has rejected

such a double standard and affirmed that "[p]laintiffs in tort cases are entitled to the same respect…as plaintiffs in corporate and commercial cases receive as a matter of course in Delaware." *Blanco*, 67 A.3d at 398 (*quoting In re Asb. Litig.*, 929 A.2d at 382).[5]

[5] At least one Delaware District federal judge has held, in two corporate / commercial cases, that defendants consented to general jurisdiction by registering to do business and appointing agent for service of process. *See Novartis Pharmaceuticals Corp. v. Zydus Noveltech, Inc.*, 2015 WL 4720578 (D. Del. 8/7/2015); *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 2015 WL 186833 (D. Del. 1/14/2015). As this Court stated in *Blanco*, tort plaintiffs deserve the same respect and consideration.

Point III
These Same Accusations And Concerns
Were Rejected By A Superior Court Special Committee

In 2008, in response to a letter from the Delaware Chamber of Commerce complaining of unfairness to defendants, the Superior Court convened a special committee to review the fairness of practices and procedures in Delaware asbestos litigation in light of the increased number of cases by nonresidents. The Camber's letter raised almost exactly the same complaints and concerns that defense amici continue to assert here. The Special Committee on Superior Court Toxic Tort Litigation issued its *Report and Recommendations* on May 9, 2008, in which it concluded that such concerns and complaints were essentially unfounded.

The Special Committee noted form the outset that its mission was to objectively examine the functionality and fairness of the tort litigation system within the context of existing Delaware law. It expressly stated that it "did not view its charge to include the broadest issues of 'tort reform' presented by the Chamber's letter." *Rept. And Recom*., p. 2. Indeed, many of the issues raised then by the Chamber and reiterated here by defense amici are political 'tort reform' issues more properly addressed by the General Assembly than the courts. *See Shea v. Matassa*, 918 A.2d at 1094; *Riedel*, 968 A.2d at 21 (Del. 2009); *Konstantopoulos*, 690 A.2d at 940. As to the matters within its charge, the Special Committee concluded:

> The Special Committee has listened carefully to all views on the actual workings of the Delaware asbestos litigation. We were particularly concerned over the allegations of abuses in other jurisdictions that it was alleged may appear in Delaware because of the increased filings here. After that careful review, we are satisfied that the Delaware asbestos litigation is fairly conducted for both defendants and plaintiffs and is effectively resolving claims. It works and works very well.

Rept. And Recom., p. 32.

To the extent that it might have even tangential relevance to the issue now before this Court, nothing has changed since May 2008 to make the Delaware asbestos litigation less fair and effective or more burdensome. Filings by nonresident plaintiffs are no greater now than in 2008 and, most likely, below the highest level reached. Additionally, the General Assembly has not seen fit to enact any 'tort reform' legislation addressing the concerns raised by the chamber. It has not acted to curtail the ability of nonresidents to file suit in Delaware or to restrict the scope of personal jurisdiction over nonresident defendants.

The only thing that has changed since 2006 and 2008 is that the United States Supreme Court has clarified or revised the standard for minimum contacts necessary to assert general jurisdiction *in the absence of consent*. Whatever "sea change" *Daimler* may have worked with regard to minimum contacts general jurisdiction, that decision simply does not address consent to general jurisdiction and, therefore, leaves intact the existing rules and decisions for consent jurisdiction. In Delaware, those rules and decisions hold that a corporation

consents to jurisdiction by registering to do business in Delaware and appointing an agent to accept service or process.

Point IV
Daimler Has Not Changed The Law With Regard to Jurisdiction By Consent

Perhaps the most telling indication that *Daimler* was not intended to effect consent jurisdiction is the fact that none of the Court's cases involving consent jurisdiction is even mentioned in the opinion.[6] Justice Ginsberg wrote an opinion that includes a comprehensive survey of almost every Supreme Court decision concerning specific jurisdiction and minimum contacts general jurisdiction, yet she omitted to cite any decision concerning consent jurisdiction. Unless one believes that Justice Ginsberg is oblivious to that line of cases or the concept of consent jurisdiction, the only logical conclusion is that the omission was intentional and that *Daimler* was not intended to change existing law on consent to jurisdiction.

The United States Supreme Court has, in the more modern era, expressly upheld personal jurisdiction by consent in the complete absence of any minimum contacts, and in circumstances 'less voluntary' than registering to do business and appointing an agent for service of process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-13 (1985). In *Phillips Petroleum*, the putative class-action defendant objected to certification, in part, on the ground that those class members with no contacts with Kansas would not be bound by the outcome. The Court

[6] The only arguable exception might be *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), which, however, the Court in *Daimler* characterized as a "textbook case of general jurisdiction appropriately exercised over a foreign corporation that *has not consented* to suit in the forum." *Daimler*, 134 S.Ct. at 755-56 (*quoting Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S.Ct. 2846, 2856 (2011) (*emphasis added*)).

confirmed that personal jurisdiction over absent class members in accordance with due process was indeed necessary. See 472 U.S. at 807-08. The Court further held that due process was satisfied for class members having no contacts with Kansas because by declining to opt out, when given notice of the opportunity to do so, such class members had consented to personal jurisdiction. *See* 472 U.S. at 812-13.

That decision was certainly affected somewhat by the Court's application of a more relaxed due process standard in recognition of absent class members more limited participation in the process. *See* 472 U.S. at 810. Nevertheless, *Phillips Petroleum* recognizes that consent to personal jurisdiction is valid without minimum contacts and even in circumstances involving some arguable degree of coercion. Indeed, the Court rejected the argument that consent to jurisdiction had to be based on class members' affirmatively 'opting in.' *See* 472 U.S. at 812. In this regard, a corporation's choice to register to do business in Delaware is much more voluntary than an absent class member's limited choice between consenting to jurisdiction or opting out and going it alone. This is especially true where, as here and as Plaintiffs-Appellees note, consent to jurisdiction had been a known consequence of registering to do business in Delaware for almost twenty-five years before GP did so in 2012.

Basically, if individuals can consent to having their rights adjudicated in a distant forum by declining to opt out of an action, there is no reason to hold that a

multi-national, multi-state corporation cannot consent to so defending such actions when it voluntarily choses to register to do business and appoints an agent to accept service in such forum.

CONCLUSION

Respectfully, the Superior Court's decision here should be affirmed.

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Dated: December 22, 2015

CERTIFICATE OF SERVICE

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