Dedicated to improving our civil justice system

IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

FALL 2015 VOL. XVII, No. 3

Find us on Facebook, Twitter & LinkedIn

Book v. Voma Tire Corp: The Iowa Supreme Court Takes An Expansive View of Personal Jurisdiction in a Product Liability Case

by Kevin M. Reynolds and Sarah S. James, Whitfield & Eddy, PLC, Des Moines, IA

Kevin Reynolds

Sarah James

The Iowa Supreme Court decided *Book v. Voma Tire Corp.*, 860 N.W.2d 576 (Iowa 2015) on March 6, 2015. *Book* was the first case in which the Iowa Supreme Court discussed personal jurisdiction in the product liability context in light of a 2011 U.S. Supreme Court case on the same subject, *J. McIntyre Mach., Ltd. v. Nicastro*, __ U.S. __,131 S. Ct. 2780, 180 L.Ed.2d 765 (2011). *Book* is also the first Iowa products case to discuss personal jurisdiction since the 1981 case of *Svendsen v. Questor Corp.*, 304 N.W.2d 428 (Iowa 1981). In a 7-0 opinion authored by Justice Waterman, *Book* considered the parameters of "stream of commerce" and "purposeful availment" as they bore upon the sufficient minimum contacts test of personal jurisdiction. In *Book*, the district court had dismissed Doublestar, a Chinese tire manufacturer who had no contacts with Iowa, from the case based on lack of specific personal jurisdiction.

Continued on page 4

WHAT'S INSIDE

IDCA President's Letter

Noel McKibbin
IDCA President

A good many years ago James Pugh asked me if I was interested in joining the Iowa Defense Counsel Association. Shortly thereafter, I replaced Treasurer DeWayne Stroud and joined the editorial board of the Defense Update. Last September, I was honored and humbled by being elected the President of the Iowa Defense Counsel Association.

During these two decades of being a member of IDCA I have met and developed friendships with the most respected defense attorneys, insurance professionals, and corporate counsel in the State of Iowa and extending nationally. Many of these beneficial relationships would not have presented themselves but for IDCA. Thank you for allowing me to serve as your President.

In my experience with IDCA, a lasting impression of the organization has been the desire to serve its members. We will continue this effort by using our business model which is engaged to support, engage, and promote our members and their interests.

The committee structure is designed to encourage participation in the organization. These committees provide opportunities to advance member skill sets, provide input to the organization, to develop a network of resources, and develop lasting relationships with colleagues. Our committees and the committee chairs are as follows:

Annual Meeting Planning Committee
Chair: Richard K. Witty

Board of Directors – Defense Update Committee
Chair: Tom Read

Commercial Litigation & Product Liability Committee
Chairs: Jason Casini and Kevin Reynolds

Employment Law & Professional Liability Committee
Chair: Frank B. Harty

Legislative Committee
Chair: Stephen Doohen

Membership Committee
Chair: Kami L. Holmes

Tort and Insurance Law Committee
Chairs: Lisa Simonetta and Mark Wiedenfeld

Webinar Committe
Chair: Theresa Davis

New Lawyers Committee
Chairs: Katie Graham and Dustin Zeschke

Women in Law Committee
Chair: Kimberly Hardeman

If you are not a member of a committee, please consider the opportunity of contributing to the organization and to promote your own professional development. The contact information for the chair person(s) may be found on the IDCA website.

Another component of our business model designed to serve our members is our Board of Directors. Our Board members represent each of the judicial districts as well as at large representatives. This year's Board members are as follows:

District I: Andrew Van Der Maaten
District II: Joel Greer
District III: René Charles Lapierre
District IV: Jacob Langeveld
District V: Mark Wiedenfeld
District VI: Theresa Davis
District VII: Diana Reinsch
District VIII: Michael Moreland
At-Large: Lisa Simonetta
At-Large: Kami Holmes
At-Large: William Roemerman
At-Large: Chris Owenson
At-Large: Frank B. Harty
New Lawyers: Katie Graham
New Lawyers: Dustin Zeschke
DRI State Representative: Sharon Greer

As intended, these positions represent Iowa as a whole to better serve our members. Contact information on these members may be obtained from the IDCA website.

To further our purpose of representing you, our members, we have an Executive committee comprised of the following officers:

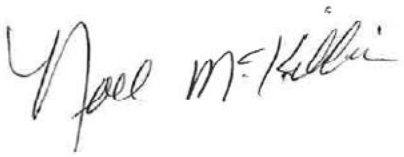
President: Noel McKibbin
Immediate Past President: Christine Conover
President-Elect: Richard Whitty
Secretary: Kevin Reynolds
Treasurer: Michele Hoyne
Executive Director: Heather Tamminga, CAE

The Executive committee meets two times a quarter (and more frequently, if necessary) to review initiatives, business issues, and to develop plans of action relevant to serving our members. The Board of Directors meet once a quarter for discussion of a prepared agenda as well as items relative to their respective districts, committee reports and initiatives, and the general business of IDCA.

Consequently, your input as a member through committee work, establishing contact with your respective Board member, Executive Director, or Executive Committee member is encouraged. Ample opportunity has been created for member participation and career development. Please do join in.

The upcoming year will be an active one. Among our initiatives will be growing membership with an emphasis on corporate, new lawyers and insurance professional prospective new members, developing proactive legislative platforms, continuing excellent CLE opportunities with our webinar and Annual Meeting agendas, and to continue organizational planning to maintain the excellence of the IDCA.

Best to you for your holiday season,



Noel McKibbin

Continued from Page 1

On appeal, the Supreme Court reversed and remanded the case for trial. In doing so it adopted a relaxed standard of "purposeful availment" along the lines of Justice Ginsburg's dissent in *Nicastro*. Any practitioner in Iowa who works on products cases involving foreign manufacturers should be aware of *Book* and its implications for future motions to dismiss based on lack of personal jurisdiction.

1. Introduction to *Book v. Voma Tire Corp.*

Dylan Book, a popular 17-year old high school student and aspiring stock car racer, was seriously injured while mounting a 16 inch tire (the "Accident Tire") onto a 16 ½ inch rim at his father's business, Alley Auto Sales, in Adel, Iowa. While trying to mount the mismatched tire onto the rim, the bead of the tire fractured and the tire exploded. Plaintiffs brought products liability claims against multiple defendants in the chain of distribution of the Accident Tire, including Iowa Tire, Inc. (the company that sold the Accident Tire to Alley Auto Sales), Holt Sales and Service, Inc. (an Iowa-based wholesaler that sold the Accident Tire to Iowa Tire), Voma (a Tennessee company that owned the Treadstone brand and that imported the Accident Tire into the United States), and Doublestar, the tire's manufacturer. Plaintiffs also sued the maker of the tire mounting machine that was being used at the time of the accident. Plaintiffs alleged that the tire and mounting machine were defectively manufactured, defectively designed, and that Defendants failed to warn or instruct Plaintiffs.

Doublestar, domiciled in the People's Republic of China, filed a motion to dismiss for lack of personal jurisdiction. After a period of jurisdictional discovery was requested and granted, the district court granted Doublestar's motion. The remaining case proceeded to trial against the other Defendants. After those Defendants settled, the Plaintiffs appealed from the dismissal of Doublestar. The Iowa Supreme Court reversed and found that specific personal jurisdiction existed over Doublestar, notwithstanding the fact that the subject tire found its way to Iowa through the state of Tennessee and through several intermediaries, all of whom were separate and distinct entities from Doublestar.

A. The district court's ruling found no jurisdiction because there was no "purposeful availment" by Doublestar.

The district court, the Honorable Bradley McCall presiding, made the following findings of key facts related to Doublestar and Voma:

> Doublestar is a Chinese corporation with its principal place of business in that country. Doublestar has no agents or employees physically present in Iowa and does not do any advertising in the State of Iowa. There is no showing in the record that Doublestar has had any direct contact with Holt [Sales], the Iowa corporation that acted as wholesaler for the accident tire.
>
> Voma is a Tennessee corporation with its principal place of business in Tennessee. Voma designed, and Doublestar manufactures, a number of different tires, including the 10-ply Treadstone tire at issue in this case. The tires are all manufactured by Doublestar, at its facility in Shiyan City, China, according to specifications provided by Voma. After manufacturing various tires, Doublestar transports them to a port in Wuhan, China, where they are loaded into containers and then onto a ship, destined for the United States.

Book v. Voma Tire Corp. et al., No. LACV036392, Ruling on Motion to Dismiss by Doublestar-Dongfeng Tyre Co., Ltd. at p. 3 (Iowa Dist. Ct. Dallas County May 13, 2013).

The district court also made findings of critical facts regarding the Accident Tire:

> [T]he "accident tire" . . . was manufactured by Doublestar, based on specifications provided by Voma. *The tire was then shipped from Wuhan, China to Voma's warehouse in Memphis, Tennessee.* From there it was sent by *Voma* to Holt Sales, located in Des Moines, and ultimately made its way to Dylan's father's shop.

Id. at 3–4 (emphasis added). The district court concluded that "[i]t is undisputed that the [A]ccident [T]ire came to Iowa through Voma's facilities in Tennessee" and there was "no evidence in the record to establish that Doublestar targeted Iowa in the distribution of any tires with the same allegedly defective attributes as the accident tire." *Id.* at 7 (emphasis added). In fact, "at no time has a 10-ply Treadstone tire been shipped from China directly to Iowa." *Id. at 4.* In other words, the small percentage of shipments that Voma requested Doublestar to ship from Wuhan directly to Iowa were of different model tires. Based on these facts, the district court granted Doublestar's motion to dismiss for lack of personal jurisdiction.

B. Who is Doublestar Dongfeng Tyre Co. Ltd.?

Doublestar manufactures tires and is located in Central China, about 1,000 miles southwest of Beijing. Between January 2009 and September 2009 (the nine months before the accident), Doublestar produced a total of 3,198,169 tires for export and domestic sales. About 50 percent of these tires were sold in China, 20 to 30 percent were sold in the United States, and the remainder of tires were sold to other countries. The fact that Doublestar was a mass producer of products that could, under certain circumstances, be dangerous, was a key fact in the Supreme Court's analysis.

Doublestar did not have any employees or agents in the United States, and did not distribute marketing materials in the United States. None of its employees traveled in the United States, it had no staff dedicated to the American market, and did no U.S. marketing. Doublestar had only two customers in the United States, Voma

(based in Tennessee) and Greenball Tire Corporation (based in California).

i. Doublestar had little contact with Iowa.

Doublestar had very little by way of contact with Iowa. Doublestar neither designed nor manufactured products in Iowa, nor had it ever sold even one single tire, or any other product, to any customer in Iowa. Doublestar had no employees, offices, or customers in Iowa, and it never advertised its products or sent marketing materials to Iowa. Doublestar had no direct distributors in Iowa and derived no income from any sales of its tires in Iowa. At Voma's direction, Doublestar did ship a small percentage of tires directly to Iowa. Doublestar never shipped the type of tire at issue in this case directly to Iowa and the Accident Tire was shipped through Tennessee. Even considering this tenuous contact, under the "stream of commerce" test of personal jurisdiction, the Iowa Supreme Court found that because Voma shipped 16,700 of the 180,000 tires it purchased from Doublestar to Iowa, that Doublestar at least indirectly served the Iowa market through Voma and had the "expectation that [its tires] would be purchased by consumers in [Iowa]." *Book,* 860 N.W.2d at 596. The Court held that this was sufficient contact.

ii. Doublestar's arm's length relationship with Voma.

Although Doublestar had no common ownership or other connection to Voma, the Supreme Court ultimately found that Doublestar was using Voma as an intermediary in an attempt to serve the Iowa, as well as other, markets. Voma was only one of Doublestar's customers and Doublestar was only one of Voma's suppliers of tires. About 25 to 30 percent of Voma's sales were of tires manufactured by Doublestar. Voma sold tires manufactured by Doublestar, and other companies, to its customers across the United States. Voma began ordering tires from Doublestar after representatives from each company met in 2007 at Voma's office in Beijing, China. Most of Voma's sales of tires manufactured by Doublestar were to its customers in other states, such as Indiana, North Carolina, and Oklahoma. Voma also sold tires manufactured by Doublestar to smaller customers, such as Holt Sales.

Voma did not tell Doublestar of the ultimate destination of shipments of tires it orders, the names of its customers, or the locations within the United States where the tires are sold. The information for shipping from China to North America, which was provided by Voma and passed on to the shipping company by Doublestar, included an initial port of entry and first stop for a shipment, but it did not include any information regarding where or to whom Voma actually sold the tires. To Doublestar's knowledge, the shipment may be divided up and sold in many states, or all of the tires may be stocked in Voma's warehouse and sold individually to customers from Memphis, Tennessee. Doublestar does not track the places in the United States where Voma initially directs its shipments. As found by the district court, "[D]oublestar's business ends when the goods were loaded on the ship at Wuhan," at which point Voma formally accepts the tires and directs shipments to ports in North America. *Book v. Voma Tire Corp. et al.*, No. LACV036392, Ruling on Motion to Dismiss by Doublestar-Dongfeng Tyre Co., Ltd. (Iowa Dist. Ct. Dallas County May 13, 2013). At that point, the tires are owned by Voma. Doublestar had no control over where Voma shipped the tires and did not have authority to change the shipping destination designated by Voma. Thus, when Voma sold Treadstone tires to Holt Sales (or to its other customers) from its warehouse, Voma did not send Doublestar a copy of the packing list or otherwise inform Doublestar of the sale. Voma did not even tell Doublestar the names of its customers. Indeed, before this lawsuit, Doublestar was never informed that any Treadstone tires, including the Accident Tire, ever ended up in Iowa. Even so, Doublestar's ignorance of the fact that its tires were ending up in Iowa did not persuade the Iowa Court that personal jurisdiction did not exist

iii. Holt Sales, an Iowa tire wholesaler, had no contacts with Doublestar.

Doublestar also had no business relationship with Holt Sales, the tire wholesaler located in Iowa. Doublestar had never sold tires to Holt Sales, nor had Doublestar ever contacted Holt Sales or sent marketing materials to Holt Sales. During jurisdictional discovery, Holt Sales confirmed that it did not have, nor has it ever had, any relationship or communications with Doublestar. No representative from Holt Sales ever had any contact with Doublestar. Holt Sales never received any marketing materials from Doublestar. In summary, Holt Sales was Voma's customer and was only one of the many customers to whom Voma sold Doublestar tires.

C. Other tires sold by Doublestar to the United States.

Between January 2009 and September 2009 (the nine months before the accident), Doublestar produced a total of 3,198,169 tires for export and domestic sales. The sheer number of tires manufactured by Doublestar held sway with the Iowa Court and strongly supported jurisdiction based on a "stream of commerce" analysis. During this time period, only a small fraction of Doublestar's shipments to Voma and a negligible percentage of Doublestar's total worldwide sales actually ended up in Iowa. Doublestar argued it was important that it played no role in directing those tires (tires that Voma sold to its customers in Iowa) towards the State of Iowa.

Voma did not tell Doublestar that it was directing any shipments to Iowa. When Voma placed an order for tires with Doublestar,

Voma provided the destination port for the shipment; and Voma paid for the cost of the shipping from the port in Wuhan, China to North America. Doublestar had no authority to change Voma's shipping plan, including the destination port. Doublestar copied and pasted the shipping instructions from Voma into a form for the shipping company (paid by Voma) and then filed the form with the shipping company. Doublestar then transported the tires to the port in Wuhan, China, where the tires were loaded into containers. Doublestar received the same "FOB price" regardless of where Voma shipped the tires, whether the tires were shipped to Memphis or elsewhere.

Although Voma did direct a limited number of shipments of tires from China to Iowa in 2008, by 2009 shipments slowed to less than a trickle. In fact, during the first nine months of 2009 (the months preceding the accident), Voma ordered 78 shipments of tires from Doublestar. Of those 78 shipments, Voma directed only one shipment to Iowa, and that shipment contained a different model than the Accident Tire— 761 Trail Express tires, which was 1/10 of 1 percent of all 3,198,169 tires that Doublestar produced during that time period.

At or about the time of the accident there was not even one single instance of Doublestar sending the same model tire (a Treadstone 10-ply tire) to Iowa. In other words, Doublestar never once shipped this product at issue in the Book litigation to Iowa. All of the tires were different models or different brands than the Accident Tire.

With respect to the few shipments that went to "Des Moines, IA," Doublestar merely copied and pasted that information from Voma, along with other information, into the shipping form. There was evidence in the district court that it is not general knowledge in China that "IA" stands for Iowa. Mr. Chen, the person in charge of the shipping department and the individual responsible for making reservations with the shipping company for shipments to Voma, testified that he did not know that "IA" stands for Iowa and that the employees in his department did not know the meaning of "IA." To Doublestar, all shipments of tires purchased by Voma were sent to the customer, Voma, and their ultimate purchasers were unknown. Ultimately, the Iowa Supreme Court rejected Doublestar's argument, and found the manufacturer's knowledge or understanding of what the addresses on the shipping label mean to be irrelevant. *Book,* 860 N.W.2d at 596.

2. Under settled Iowa and Federal law, specific jurisdiction requires actions purposefully directed at the forum and litigation arising out of those actions. Doublestar argued that both elements were absent in *Book*.

Because Iowa's long arm rule "authorizes the widest jurisdictional parameter allowed by the Due Process Clause[,]" the focus of any personal jurisdiction dispute is due process. *Capital Promotions, L.L.C. v. Don King Prods.*, 756 N.W.2d 828, 833 (Iowa 2008). Due process "protects the liberty interest of an individual from becoming bound to a judgment of a state court where there is no meaningful contacts or relations with the state." *Ross v. Thousand Adventures of Iowa*, 675 N.W.2d 812, 815 (Iowa 2004).

Due process requires that "[b]efore a defendant can be made to defend a lawsuit in a foreign jurisdiction, his or her contacts with the forum state must be such that the defendant should reasonably anticipate being haled into court there." *Capital Promotions,* 756 N.W.2d at 833 (citation and quotation marks omitted). The "minimum contacts must show a sufficient connection between the defendant and the forum state so as to make it fair and reasonable to require the defendant to come to the state and defend the action." *Id.* (citation and quotation marks omitted). The minimum contacts "test makes it essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Ross,* 675 N.W.2d at 815–16, quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L. Ed.2d 1283 (1958). "Random or attenuated contacts do not meet this test." *Id.* at 816. Doublestar argued in *Book* that this test of personal jurisdiction was not met, and that the district court dismissal should be affirmed.

3. "Specific" personal jurisdiction v. "general" personal jurisdiction.

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed.2d 404 (1984) was the case that established the "specific" v. "general" analytical framework for personal jurisdiction. The difference between the two was important in *Book.* While general jurisdiction "refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose[,]" specific jurisdiction "refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state[.]" *Capital Promotions,* 756 N.W.2d at 833 (citation and quotation marks omitted). In *Book*, Plaintiffs conceded that "general jurisdiction" was not at issue, and that only specific jurisdiction was involved.

Doublestar argued in *Book* that specific personal jurisdiction had not been shown because none of its actions resulted in the Accident Tire finding its way to Iowa. For specific jurisdiction the plaintiff must show first, that "the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 834, quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-73,

105 S.Ct. 2175, 85 L. Ed.2d 528 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed.2d 404 (1984). And second, that "the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* (citation and quotation marks omitted). In making the second determination, courts may consider the burden on the defendant, the plaintiff's interest in obtaining "convenient and effective relief," the forum's interest in deciding the case, and international comity. *Id.*; see also *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 114, 107 S.Ct. 1026, 94 L. Ed.2d 92 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

Moreover, it is not enough that a defendant has "purposely directed" its activities at the forum; the litigation at issue must "result[] from alleged injuries that arise out of or relate to those activities." *Roquette Am., Inc v. Gerber,* 651 N.W.2d 896, 899 (Iowa Ct. App. 2002); see also *Percival v. Bankers Trust Co.*, 494 N.W.2d 658, 658–60 (Iowa 1993) ("The minimum contacts requirements demand conduct having to do with the state itself; they are not satisfied from a mere 'effect' felt by a plaintiff within his or her state of residence."). Doublestar argued in *Book* that it neither "purposefully directed its activities at Iowa," nor did the Accident Tire wind up in Iowa from any of its own conduct. This argument, however, was rejected by the Iowa Supreme Court.

When assessing a defendant's contacts with the forum, courts "consider not only the quantity of the contacts but their nature and quality." *Bankers Trust Co. v. Fidata Trust Co. New York*, 452 N.W.2d 411, 414 (Iowa 1990). "[T]rifling" contacts are insufficient. *Id.* at 414–15. For example, while mail sent to Iowa can in the right circumstances be sufficient to confer jurisdiction, it is insufficient if the "mailing was merely a ministerial act." *Id.*

Further, the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson*, 357 U.S. at 253, 78 S.Ct 1228, 2 L. Ed.2d 1283; see also *Helicopteros,* 466 U.S. at 417, 104 S. Ct. 1868, 80 L. Ed.2d 404 ("[U]nilateral activity of another party or a third person" cannot grant personal jurisdiction). Instead, the activities must be "by the defendant himself that create a 'substantial connection' with the forum State." *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174, 85 L. Ed.2d 528 (emphasis in original); see also *Asahi,* 480 U.S. at 109, 107 S.Ct. 1026, 94 L. Ed.2d 92 ("[M]inimum contacts must be based on an act of the defendant[.]"). The Iowa Supreme Court just last year reaffirmed that principle when it held that the contacts of one who assigns a contract cannot be imputed to one receiving the assignment. *Ostrem v. PrideCo Secure Loan Fund,* LP, 841 N.W.2d 882, 905 (Iowa 2014). Doublestar argued that the Accident Tire found its way to Iowa due to the unilateral actions of Voma, an independent company. This argument was also rejected by the Iowa Supreme Court in *Book*. Instead the Iowa Supreme Court went into great detail in *Book* about its interpretation of the "stream-of-commerce" test as it relates to products cases.

Even under the stream-of-commerce notion of personal jurisdiction, the defendant must be "aware that the final product is being marketed in the forum State." *Asahi,* 480 U.S. at 117, 107 S.Ct. 1026, 94 L. Ed.2d 92 (Brennan, J., concurring). Merely placing products in the stream is not enough; they must be placed "with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 298, 100 S.Ct. 559, 62 L. Ed.2d 490 (1980). *World-Wide Volkswagen* remains good law to this day, since it was not changed by the plurality opinions in *Asahi* and *Nicastro*.

4. What was Doublestar's "expectation" with respect to its tires going to Iowa, and what was the proof on this issue in *Book*?

In *Book* there was no record evidence that Doublestar "expected" that its tires would end up in Iowa. Indeed, Doublestar had never heard of Iowa, much less was it aware that its tires were being sold there by third parties. The facts of *Book* arguably would not have even supported the "non-test" test of "foreseeability." Thus, even under the "expectation test" of purposeful availment, an argument could be made that personal jurisdiction over Doublestar was not established. This is important because the "expectation test" of purposeful availment was established in *World-Wide Volkswagen* and was a part of Justice Breyer's concurring opinion in *Nicastro*. Both sides agreed in *Book* that Justice Breyer's concurrence was the controlling precedent from that decision, since it was an opinion that joined the most Justices of the Court on the narrowest ground. In fact, defense counsel in *Book* argued that the dismissal could be affirmed by "staying within the four corners of Justice Breyer's concurrence" in *Nicastro*. Indeed, this position was necessary since Breyer's concurrence was the controlling law from that decision. Notwithstanding this fact, the actions of others to steer products into one tributary or another cannot be considered, for "the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* (citation and quotation marks omitted). At the very least an "expectation" by Doublestar that its tires would end up in Iowa must be shown, and in *Book*, there was a strong argument that this was never established.

In *Book*, it was *Voma,* and not *Doublestar*, that was steering tires to Iowa customers. Since Voma directed tires to Iowa customers the Iowa court would have jurisdiction over Voma, and in fact,

Voma was a party-defendant to the case and never raised lack of personal jurisdiction as a defense. Doublestar's position was that Voma's unilateral conduct was not enough to establish "purposeful availment" by *Doublestar* under the "expectation test" set forth in *World-Wide Volkswagen* and its progeny, and that the dismissal in the district court should be affirmed.

5. Doublestar's analysis of the "fairness prong" of personal jurisdiction.

The Iowa Supreme Court relied heavily on the "fairness" prong of personal jurisdiction and held that it militated in favor of the Plaintiffs, since it would be unfair or burdensome to force them to litigate their claims in Tennessee (where Voma, Doublestar's customer, was located). Since Doublestar dealt directly with Voma, it was implicit that there would be jurisdiction over Doublestar in Tennessee. Two points regarding fairness are worthy of note. First, the fairness test is *in addition to, and not a replacement for, sufficient minimum contacts*. In *Book*, Doublestar's primary argument was that specific personal jurisdiction could not be established because Plaintiffs could not establish Doublestar's "purposeful availment" conduct aimed at Iowa. If sufficient minimum contacts do not exist, then that is the end of the inquiry, and there is no need to employ the "fairness" test. On the other hand, if minimum contacts *do* exist, then the fairness test is employed in order to determine whether the exercise of jurisdiction is fair to the putative defendant (here, *Doublestar*), not the Plaintiffs. Second, it is respectfully submitted that the Iowa Court's analysis of fairness from the standpoint of *Plaintiffs' remedy* (and what jurisdiction would entertain their claim) essentially put the burden on *Doublestar* to establish that litigating the subject claim in some other jurisdiction *would be fair to Plaintiffs.* In reality, the burden to establish jurisdiction was on Plaintiffs, and not Doublestar.

Finally, even if the "fairness" test of personal jurisdiction were analyzed from standpoint of the Plaintiffs, there is no reason to believe that their claims could not fairly tried and adjudicated in Tennessee. Most of the percipient fact witnesses were the friends of Plaintiffs; presumably they might be willing to travel to Tennessee to testify in person, or at the very least, would give videotaped testimony by way of deposition that could be shown to the Tennessee jury at trial. In the litigation of product liability cases, this is done virtually every day. The bottom line is this: "fairness" to the plaintiff does not "trump" sufficient minimum contacts and allow a court to find that specific personal jurisdiction exists where it would not otherwise exist. However, *Book* demonstrates that this line is often subjective and difficult to predict with any certainty.

6. Doublestar's indirect financial gain from the sale of tires in Iowa is not enough.

Under *World-Wide Volkswagen* "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." *Id.* at 289–90, 100 S.Ct. 559, 62 L. Ed.2d 490. This is important since the *Svendsen* case in Iowa was based on *World-Wide Volkswagen* and the Iowa Court specifically reaffirmed it as good law in *Book*. Here, it was not good enough to say that Doublestar "indirectly benefitted" financially when Voma sold tires to Iowa customers. Doublestar's payment was the same regardless of where Voma ultimately elected to sell the tires purchased from Doublestar.

7. An Eighth Circuit products case based on Iowa law supported Doublestar.

Doublestar argued that *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709 (8th Cir. 1984) was directly supportive of Doublestar's position. In that case, the passengers in a car accident sued many of the companies in the car's chain of production, including a Japanese seat maker by the name of Arakawa. *Id.* at 710. The seats it sold to Toyota, the car seller, were made according to Toyota's design and specifications. *Id.* Arakawa delivered seats to Toyota in Japan, which in turn installed them on cars sold, through the stream of commerce, to the entire United States. *Id*. Toyota decided how to market and distribute the car, and did not involve or notify Arakawa about those decisions. *Id.* Arakawa had no contacts with the United States, and its manufacturing process took place entirely outside of America. *Id.*

The United States District Court for the Northern District of Iowa dismissed Arakawa for lack of personal jurisdiction, a decision the Eighth Circuit dubbed "well-reasoned" and adopted in full. *Id.* The court found that there was no "doubt that Arakawa could have foreseen that its product would find its way into the United States and Iowa, however, it is doubtful that Arakawa could reasonably have anticipated being haled into court in Iowa." *Id.*, citing *Humble*, 578 F. Supp. 530, 533 (N.D. Iowa 1982). Arakawa did not advertise or solicit business in Iowa; instead it merely made seats according to Toyota's specifications and delivered them to Toyota in Japan. *Id.* at 710. Even though a substantial portion of Arakawa's sales were to Toyota, it "would be manifestly unjust" to require Arakawa to defend in Iowa. *Id.*

Beyond the factual similarities between *Humble* and *Book v. Doublestar*, it is noteworthy that *Humble* was decided four years after *World-Wide Volkswagen* introduced the stream-of-commerce theory. The *Humble* plaintiffs explicitly made a stream-of-commerce argument. *Id.* The Eighth Circuit squarely rejected the notion that placing a product in the commercial stream, without more, was enough. The Iowa Supreme Court found *Humble* to be

distinguishable because Doublestar shipped some products directly to Iowa (even though this was at Voma's direction). *Book*, 860 N.W.2d at 588.

8. *Capital Promotions* is a leading Iowa Supreme Court case, but the Plaintiffs never addressed it and the Court, in its decision, said it didn't apply because it was not a "stream of commerce" case.

A recent and leading Iowa Supreme Court decision addressing specific personal jurisdiction is *Capital Promotions*, 756 N.W.2d 828 (Iowa 2008). That case centered on Tye Fields, an Iowa-born prizefighter who was the subject of a bitter dispute between two promoters. *Id.* at 831. The first was Capital, an Iowa promoter. It signed Fields to a promotional rights agreement when Fields was living in Missouri. *Id.* Under the agreement Capital had the exclusive right to stage Fields's fights and sell his merchandise. *Id.*

Eventually Fields won a world-heavyweight title and gained the attention of Don King and his Delaware-incorporated, Florida-based promotion company, Don King Productions, Inc. ("King Productions," for short). *Id.* On three separate occasions, employees of King Productions called Capital asking about Fields. *Id.* After those calls, the President of Capital called Don King himself to say that he had no interest is relinquishing his rights to Fields. *Id.*

A few months after that last call, King and Fields's Las Vegas-based manager arranged for a fight in Missouri between Fields and a boxer promoted by King. *Id.* at 832. In the agreement arranging the fight, Fields represented that he was not under contract with any other promoter. *Id.* The discussions leading to that agreement did not take place in Iowa. *Id.*

Capital then brought suit in Iowa. *Id.* King Productions had never staged a fight in Iowa and had no offices, employees, bank accounts, property, or registered agents in Iowa. *Id.* at 831. It therefore moved for summary judgment on the grounds that it was not subject to jurisdiction in Iowa. *Id.* at 832.

When the case reached the Iowa Supreme Court, it concluded that King Productions was indeed not subject to personal jurisdiction in Iowa. *Id.* at 833. Capital conceded that King Productions was not subject to general jurisdiction in Iowa; it instead based its claim on specific jurisdiction. *Id.* Specific jurisdiction, the Court held, requires two things. First, the defendant must have "purposefully directed" its activities at residents of Iowa and the alleged injuries must "arise out of or relate to those activities." *Id.* at 834 (citation and quotation marks omitted). Second, the assertion of jurisdiction must "comport with fair play and substantial justice[,]" considering facts like the burden on the defendant, the State's interest in adjudicating the dispute, the plaintiff's interest in a convenient forum, and efficiency. *Id.* (citation and quotation marks omitted).

Applying those principles, the Court first "looked for any purposeful conduct by King Productions directed to Iowa." *Id.* at 835. The phone calls between the two promotion companies related to the "cause of action insofar as they could be used as evidence to establish King Productions' knowledge that Capital held the promotional rights to Fields at the time of those phone calls." *Id.* "These calls did not, however, constitute the interference of which Capital complains in this lawsuit." *Id.* So although the calls had "some relevancy" to the case, the Court could not "say that Capital's injuries arose out of or are related to those contacts so as to support specific jurisdiction over King Productions." *Id.* Nor could the Court consider phone calls Capital made to King Productions, because "only the defendant's purposeful forum-state contacts matter." *Id.*, n.1.

Perhaps recognizing that the phone calls alone were insufficient to grant personal jurisdiction, Capital contended that the phone calls combined with the injuries in Iowa were sufficient. *Id.* The Iowa Supreme Court rejected the contention. Injury in Iowa is only sufficient to support specific jurisdiction, it held, if: "(1) the defendant's acts were intentional; (2) these actions were uniquely or expressly aimed at the forum state; and (3) the brunt of the harm was suffered in the forum state, and the defendant knew the harm was likely to be suffered there." *Id.* (citation omitted). Although the harm might have been suffered in Iowa, the allegedly-tortious acts were aimed at Fields and his manager (who were both living in Nevada) and concerned a fight in Missouri. *Id.* Capital's presence "in Iowa was unrelated to King Productions' allegedly tortious conduct, and consequently, Iowa played a fortuitous role in the alleged interference." *Id.*

A. Justice Kennedy's *Nicastro* opinion was consistent with *Capital Promotions*.

Given that *Capital Promotions* was the most recent pronouncement on specific jurisdiction from the Iowa Supreme Court prior to *Book*—and given that it played a central role in the district court's decision below—it was remarkable that Plaintiffs in *Book* did not cite it in their appeal briefs, let alone try to explain it.

Plaintiffs instead spent the bulk of their brief discussing *J. McIntyre Machinery, Ltd v. Nicastro*, 131 S.Ct. 2780, 180 L. Ed.2d 765 (2011). Plaintiffs were correct that Justice Kennedy's lead opinion does not represent the Court's holding. But they were incorrect to suggest that it held no value. First, it is consistent with *Capital Promotions*. Just as *Capital Promotions* required "purposeful[] direct[ion]," 756 N.W.2d at 831, Justice Kennedy's opinion required that a defendant "purposefully avail[] itself of the privilege of conducting activities within the forum State," *Nicastro*, 131 S.Ct. at 2787 (quotation omitted). Just as *Capital Promotions* held that jurisdiction was proper only when a defendant's "actions were uniquely or expressly

aimed at the forum state," 756 N.W.2d at 835, so Justice Kennedy found jurisdiction proper only when "the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *Nicastro*, 131 S.Ct at 2788. Justice Kennedy's opinion, therefore, was consistent with settled Iowa law.

Second, his opinion reaffirmed a number of principles applicable to *Book.* Justice Kennedy reiterated that "[a]s a general rule, the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 2785, quoting *Hansen v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L. Ed.2d 1283 (1958)).

B. Six Justices in *Nicastro* agreed that foreseeability was insufficient to establish "purposeful availment."

Despite the fractured nature of the *Nicastro* Court, distinct positions can be identified. First, six Justices—the four who signed Justice Kennedy's decision and the two who concurred—agreed that placing a good into the stream of commerce alone is insufficient to grant specific jurisdiction. *Id.* at 2789; *Id.* at 2792 (Breyer, J., concurring) (it is not enough that a "defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place."). This was essentially the situation presented in *Book*. Those same six Justices also agreed that foreseeability alone is inadequate. *Id.* at 2789 (rejecting a "rule based on general notions of fairness and foreseeability"); *see also id.* at 2793 (Breyer, J., concurring) (rejecting a rule subjecting a product seller to jurisdiction wherever it reasonably knows they might be sold); *see also Roquette*, 651 N.W.2d at 900 ("[M]ere foreseeability of injury to a citizen of a forum is not sufficient; but rather, the injury must be caused by activity intentionally directed by defendants at the plaintiff and his or her forum."); *Burger King*, 471 U.S. at 474, 105 S.Ct 2174, 85 L. Ed.2d 528 ("Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction") (emphasis in original).

One important takeaway for future defendants in products cases in Iowa is that in *Book* the Iowa Supreme Court reaffirmed *Svendsen*, a 1981 "foreseeability" case, as "good law and controlling precedent." 860 N.W.2d 576, at 593. This is notwithstanding the fact that a veritable legion of cases since *World-Wide Volkswagen,* including Iowa cases, *see, e.g., Smalley v. Dewberry*, 379 N.W.2d 922 (Iowa 1986), have made it clear that mere "foreseeability" that a product will wind up in a particular jurisdiction *does not establish* purposeful availment.

Six Justices of the U. S. Supreme Court in *Nicastro* squarely rejected the holding of the New Jersey Supreme Court that "courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Id.* at 2785. For all intents and purposes, this is tantamount to the "foreseeability" or "expectations" test of purposeful availment. Doublestar argued that this was the situation presented in *Book*. However, the Iowa Supreme Court found that jurisdiction existed over Doublestar because a small percentage of its tires were finding their way to Iowa and because Doublestar had, at Voma's direction, directly shipped some tires (even though they were not the type of tire at issue in the litigation) from China to Iowa.

As an illustration of how the Iowa Supreme Court's decision is in conflict with *Nicastro*, consider how that case would have been resolved under the opposing argument. In *Nicastro,* the plaintiff seriously injured his hand while using a metal-shearing machine. 131 S.Ct. at 2786. The machine was made by the defendant in England. I*d.* The defendant's United States distributor sold at least one and possibly as many as four machines in New Jersey. *Id.* The New Jersey Supreme Court concluded that the defendant knew or reasonably should have known that its machines were sent into a nationwide distribution system that could see them wind up in any state. *Id. On those facts, six Justices held jurisdiction lacking.* In *Book*, the Iowa Supreme Court found the opposite, and cited to Justice Ginsburg's dissent with approval. 860 N.W.2d 576, at 592–93. This was a result that was not required by *Nicastro* or any precedent of the U.S. Supreme Court.

9. Doublestar did not purposefully direct any of its actions to Iowa.

To establish specific jurisdiction, Plaintiffs must show that their claims "arise out of or relate to" actions taken by Doublestar that were "purposefully directed" at Iowa. *See Capital Promotions*, 756 N.W.2d at 834 (citations omitted). Thus, the Plaintiffs in *Book* were required to establish that Doublestar "targeted the forum" by purposefully transmitting the Accident Tire to Iowa. *See Nicastro*, 131 S. Ct. at 2788; *see also Asahi Metal Indus. Co.*, 480 U.S. at 102 (specific jurisdication requires *"an action of the defendant purposefully directed toward the forum state"* (emphasis in original)). Doublestar argued that Plaintiffs could not meet this burden.

In *Book*, the district court's factual determination that the Accident Tire was not shipped directly from China to Iowa but rather, was shipped from China to Tennessee was correct. The jurisdictional discovery confirmed that the chain of distribution of the Accident Tire was as follows: (1) the Accident Tire was manufactured in central China by Doublestar and then sent to the port in Wuhan,

China; (2) the Tire was shipped from Wuhan to Voma's warehouse in Memphis, Tennessee; and (3) the Tire was then transported by truck from Voma's warehouse to its customer Holt Sales in Des Moines, Iowa. The path of the Accident Tire is shown through the records of Voma and Holt Sales regarding Holt Sales' purchases or 10-ply Treadstone tires and through Doublestar's own records.

10. Plaintiffs' injuries did not arise out of, nor were they related to, any activity that Doublestar purposefully directed at Iowa.

The undisputed facts of *Book* established that Plaintiffs' claims did not "arise out of or relate to" any activity that Doublestar "purposefully directed" at the State of Iowa. *See Capital Promotions*, 756 N.W.2d at 834; *see also Burger King*, 471 U.S. at 472–73. Rather, Plaintiffs' claims arose out of and related to Doublestar's activities in central China, more than 7,000 miles from Iowa. This is in stark contrast to *Svendsen,* where a defective pool table was made in Missouri and was involved in an accident in southwest Iowa.

A. Nearly all facts Plaintiffs cited in *Book* were irrelevant to specific jurisdiction.

Plaintiffs made much of the fact that some tires, though not the Accident Tire, were shipped by Voma from the port in Wuhan, China, to Des Moines, Iowa. This argument missed the mark for several reasons.

Most importantly, the Accident Tire was accepted by Voma in China and then shipped by Voma to Voma's warehouse in Tennessee. The Book litigation simply did not "arise out of or relate to" any activity that Doublestar "purposefully directed" at the State of Iowa. *See Capital Promotions*, 756 N.W.2d at 834. The "arise out of or relate to" language is a fundamental element of specific personal jurisdiction, and it is lacking in Book. The only way that unrelated tire shipments—which include different model tires than the Accident Tire—would be relevant to the Court's jurisdictional analysis would be if they established *general* jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761, 187 L. Ed. 2d 624 (2014). But the parties and the Court had long agreed that only specific jurisdiction over Doublestar was at issue and in any event, the relatively few shipments that were sent from China to Iowa fell well below the minimum contacts necessary to establish general jurisdiction. *See Goodyear,* 131 S. Ct. at 2851, quoting *International Shoe Co. v. Washington*, 326 U.S, 310, 317 (1945) (A court may assert general jurisdiction over a foreign corporation only where its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State").

Even accepting Plaintiffs' numbers in *Book* as true, only a small fraction of Doublestar's shipments to Voma and a negligible percentage of Doublestar's total worldwide sales actually made their way into Iowa. Again, Doublestar played no role in directing those tires (tires that Voma sold to its customers in Iowa) towards the State. Although Voma did direct a limited number of shipments from China to Iowa in 2008, by 2009, shipments slowed to less than a trickle. In fact, during the first nine months of 2009 (the months preceding the accident), Voma ordered 78 shipments of tires from Doublestar. Of those 78 shipments, Voma directed only one shipment to Iowa which contained a different model than the Accident Tire. That shipment contained 761 Trail Express tires, which is 1/10 of 1 percent of all 3,198,169 tires that Doublestar produced during that time period.

Notably, Plaintiffs in *Book* also failed to recognize that, during the relevant time period, there was not even one single instance of Doublestar sending the same model tire (a Treadstone 10-ply tire) to Iowa. Doublestar never once shipped the product at issue in this litigation to Iowa. All of the tires noted by Plaintiffs were different models or different brands than the Accident Tire.

The crux of Plaintiffs' argument in *Book* rested on the sheer number of tires that Voma directed to Iowa. To support this argument, Plaintiffs relied on an opinion from an Oregon state court—*Willemsen v. Invacare Corp.,* 282 P.3d 867 (Ore. 2012). But Iowa courts have made clear that the personal jurisdiction analysis is necessarily based on the facts of the particular case, (*see Capital Promotions,* 756 N.W.2d at 832–33); and the facts of the Oregon case were different from *Book*. For example, in *Willemsen*, a Taiwanese manufacturer entered into a "master supply agreement" with its U.S. distributor, under which it "promised to defend, indemnify, and hold [the U.S. company] harmless for any 'claims, losses, damages, charges [and] expenses'" related to the product, and "agreed to cooperate with [the U.S. company] 'in the investigation of any actual or threatened claim, loss, damage, charge or expense.'" *Willemsen*, 282 P.3d at 870. In concluding that *Willemsen* was persuasive precedent, the Iowa Court neglected to mention this. There is no parallel indemnity agreement in *Book* between Doublestar and Voma. And unlike the Oregon case, where the Taiwanese manufacturer owned the brand for the product shipped to its U.S. distributor (*Id.*); here, the Treadstone 10-ply tire model was built off of a tire mold provided by *Voma, not Doublestar.*

In *Book* Plaintiffs also relied on a decision by the Court of Appeals of New Mexico, *Sproul v. Rob & Charles, Inc.*, 304 P.3d 18 (N.M. Ct. App. 2012). Doublestar argued that this reliance was misplaced. In *Sproul,* the defendant manufacturer used a regular distributor in the United States that served the New Mexico market and employed a full-time marketing and sales employee who was based in California and provided customer service and support to its clients in New Mexico. *Id.* at 28. No such circumstances were present in *Book*. Doublestar did not have any employees or agents in the United

States and does not market any tire in the United States.

In the wake of the U. S. Supreme Court's *Asahi* and *Nicastro* opinions, even assuming the stream of commerce theory adopted by *Willemsen* and *Sproul* is the appropriate basis to establish personal jurisdiction, a plaintiff still must show "purposeful availment" to satisfy the minimum due process requirement. *See Nicastro*, 131 S. Ct. at 2788; *Asahi*, 480 U.S. at 112. Some courts have held that this "purposeful availment" prong "requires more than placing a product into the stream of commerce"—it also requires that "[t]he substantial connection between the defendant and the forum ... 'come about by an action of the defendant purposefully directed toward the forum State.'" *See Monge v. RG Petro-Mach. (Group) Co.*, 701 F.3d 598, 619 (10th Cir. 2012), citing *Nicastro*, 131 S. Ct. at 2788–89 (emphasis original). Other courts take a more liberal view of the stream of commerce theory, but still hold that the "purposeful availment" requirement necessitates, at a minimum, that "the defendant 'is aware that the final product is being marketed in the forum State.'" *See id.*, citing *Asahi*, 480 U.S. at 117 (emphasis added).[1] Doublestar contended there was no awareness evidence on its part presented in *Book*.

Here, under either approach, Doublestar argued that Plaintiffs failed to establish the "purposeful availment" prong. Under the first approach, Doublestar argued that Plaintiffs showned no "substantial connection" between Doublestar and Iowa or that Doublestar "purposefully directed its actions toward the forum." *Id.* at 619–20. Like the defendant in *Monge*, which "expected that [the product] would go [to a state other than the forum state]," Doublestar *"expected" that the Accident Tire would go to Tennessee, not Iowa. Id.* at 620. Doublestar argued there was no jurisdiction because the Accident Tire entered Iowa through Voma's "unilateral act," not through Doublestar's "efforts to serve the market." *Id.*The Iowa Supreme Court did find personal jurisdiction in this case, notwithstanding that the Plaintiffs in *Book* failed to show that Doublestar was even aware that 10-ply Treadstone tires were being marketed in Iowa.

[1] In *Monge*, the Tenth Circuit held that the plaintiff failed to demonstrate specific jurisdiction under either approach. "He has not met the first interpretation's requirement that [the defendant] purposefully directed actions toward the forum. [The defendant] expected that the rig would go to [a consignee of its Oklahoma distributor] in Kansas.... [T]here is no jurisdiction because the product entered [Oklahoma] through [the consignee's] unilateral act, not through [the defendant's] efforts to serve the market. Moreover, as [the defendant] expected that Rig 43 would go to Kansas, [the plaintiff] has not met the second interpretation's requirement that the defendant be aware that the final product is being marketed in the forum." *Id.* at 620 (citations and quotations omitted).

Plaintiffs in *Book* failed to show that Doublestar "'purposefully directed' [its] activities at residents of the forum and litigation [has resulted] from alleged injuries that 'arise out of or relate to' those activities." *See Capital Promotions*, 756 N.W.2d at 834. Doublestar had no contacts with Iowa and no contacts with Holt Sales, Voma's customer in Iowa. Doublestar should not be haled into Iowa court "as a result of 'random,' 'fortuitous,' or 'attenuated' contacts" with the State. *See Burger King*, 471 U.S. at 475. Even if Doublestar could foresee that a few tires might be sold by Voma in Iowa, both the U. S. and Iowa Supreme Courts have long held that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. "Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

Certainly no showing was made that Doublestar targeted the Iowa market. Doublestar merely "entered into business transactions with an American company, sold that company its products, and got paid for them." Plaintiffs relied on shipments of products unrelated to the pending case sent by Doublestar (directed by Voma) directly to the forum state, and the fact that a small portion of Doublestar's tires ultimately made their way to Iowa as proof of purposeful availment. The Iowa Supreme Court ultimately concluded that this was enough to establish jurisdiction.

11. After *Book v. Voma Tire Corp.*, what is the "test" for specific personal jurisdiction in a product liability case in Iowa?

In *Book*, the Iowa Supreme Court made it clear that *Nicastro* did not change the pre-existing law of personal jurisdiction in the "stream of commerce," product liability context. The practical effect of this holding is that Justice Breyer's concurrence in *Nicastro* now controls, as does the law in existence from and after *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987). *World-Wide Volkswagen* and its stream of commerce analysis, including the additional "expectation" test of purposeful availment, remains good law. This much is clear from *Book v. Doublestar*.

Finally, based on the Court's opinion in *Book*, any statements present in *Capital Promotions* to the effect of "targeting a specific venue" will not apply to a products liability case involving the "stream of commerce" theory of personal jurisdiction. The "targeting" language set forth in *Woodhurst v. Manny's Inc.*, 832 N.W.2d 384 (Iowa Ct. App. 2013) (unpublished opinion) was something that the district court in *Book* relied upon as a basis for its decision. The "targeting" language of *Woodhurst* in defining purposeful availment is no longer good law. In the alternative, as it was used

in *Capital Promotions*, the "targeting" test may still be valid where it describes the nature of the putative defendant's conduct or actions in a contract or commercial case, but should not be applied in a products case where the "stream of commerce" test is in issue.

12. Conclusion.

The law regarding specific personal jurisdiction in a products liability cases is muddled and remains somewhat in flux. Both the U.S. Supreme Court and the Iowa Supreme *Court* have struggled to make sense out of *Asahi Metal Industry* in 1987 and *Nicastro* in 2011, two seminal cases on this issue that did not garner majority opinions. In *Book*, the Iowa Court passed on the chance to adopt a Justice O'Connor (from *Asahi*) or Justice Kennedy (from *Nicastro)* "targeting the forum" test of purposeful availment in a case involving a tire, a mass produced, commercially marketed and potentially dangerous product. In so doing, it adopted the expectation test of purposeful availment which, under the facts of *Book*, was essentially nothing more than a "foreseeability test." This test could also be described as "stream of commerce *period*," with no "plus," as in "stream of commerce, plus." This result substantially waters down the "purposeful availment" requirement of specific personal jurisdiction. The Iowa Court further muddied the waters by quoting with approval substantial portions of Justice Ginsburg's dissent in *Nicastro*. With all due respect, Justice Ginsburg was not one of the six Justices that made up the majority in Nicastro that found jurisdiction lacking in that case. The *Book* opinion should be of concern to counsel working to defend foreign manufacturers of products in Iowa. Further clarification of the law in this area will have to await further guidance by the U.S. Supreme Court.

The Law of Higher Education: A Discovery Primer For Defense Counsel

by Frank B. Harty, Nyemaster Goode, P.C., Des Moines, IA

Frank Harty

There is a popular saw that institutions of higher education operate in a separate world. The phrase "ivory tower" has a basis in fact. In Iowa and nationally there is an entire body of law – statutory, regulatory and common law, that has developed around colleges and universities. This article provides a brief overview of that law. It is intended to serve as a discovery roadmap for defense counsel handling cases that involve a college student, recent graduate or institution as a litigant.

Introduction

College students may be somewhat insulated while on campus, but they still live in the real world. As trial lawyers know, "life happens" in the real world. Defense counsel charged with defending a tort, contract or commercial claim filed by or against a college student or recent graduate may be helped or hindered by the body of law that has evolved around higher education. While it might be slightly more burdensome to conduct certain types of discovery involving students, recent graduates and institutions, this body of law also creates potentially significant evidence that might be used to defeat or reduce a claim for damages.

Student Medical Records

Many colleges and universities operate student health facilities. Whether at a simple student health clinic or an elaborate medical center, records maintained by colleges and universities are legally very different than records found at private and public hospitals and clinics.

Whenever a lawyer refers to the Health Insurance Portability and Accountability Act, this should signal that they don't know their way around collegiate health records. This is especially true if they use the mangled acronym "HIPPA" as a "hippa" is nothing but the phrase Bostonians use to describe a hippopotamus. Even if a lawyer uses the proper acronym "HIPAA" (the first "A" is for accountability) it will be informative.

Confidential college student medical records are not governed by HIPAA, they are, in fact, regulated by an entirely different statute: the Family Educational Rights and Privacy Act, or FERPA. The United States Congress enacted FERPA to protect parents' and students' "rights to privacy by limiting the transferability of their records without their consent." *United States v. Miami University,* 294 F.3d 797, 806 (6th Cir. 2002). Congress provides funds to educational institutions that comply with FERPA "on the condition that, inter alia, such agencies or institutions do not have a policy or practice of permitting the release of educational records of students without the written consent of the student and their parents. *Id.* (Quoting 20 U.S.C. §1232G(b)(1)(2000).

Though FERPA is somewhat similar to HIPAA in several respects, it also differs in important ways that relate directly to discovery involving college students and recent graduates. Student educational records can typically be obtained with a waiver. Very often when defense counsel relies upon a medical waiver to obtain a Plaintiff's medical records, colleges and universities will initially balk at providing discovery. This is generally not an attempt to be obstreperous. The institutions are concerned that they fully comply with FERPA requirements.

Of note, the U.S. Department of Education's Office for Civil Rights, the federal agency charged with overseeing many laws that apply to colleges, including FERPA and Title IX, recently signaled its intent to superimpose some HIPAA concepts in the context of FERPA. The OCR issues "Dear Colleague" letters as a means of asserting authority over colleges and universities. In a draft "Dear Colleague" letter issued August 18, 2015, the OCR signaled an intent to interpret FERPA in such a way that it would provide colleges and universities with even less flexibility. Defense counsel dealing in this area should monitor the actions of the OCR in this regard and to keep in mind its direction is intended to be guidance only.

Video Surveillance

The protections of FERPA go beyond medical records. FERPA was originally intended to protect confidential educational records. Nevertheless, it has been interpreted to protect such things as electronic communications, voice recordings and surveillance video. To qualify as an educational record, the record must contain information directly related to a student. 20 U.S.C. §1232g(a)(4)(A). Information is directly related to a student if it has a "close connection" to that student. *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851, 857 (Fla. Dist. Ct. App. 2013). The Courts have held that even campus video surveillance footage might be protected under this definition. See *Bryner v. Canyons School District*, 351 P.3d 852, 859 (Utah Ct. App. 2015).

Once a document is determined to be covered by FERPA, students are entitled to access such documents. Conversely,

such documents must be protected from review by third parties. Students rights to "inspect and review" are not unlimited. Nor is the cloak of confidentiality.

Colleges and universities are entitled and indeed obligated to heavily redact documents so as to only provide a document that relates to the requesting student. This is why defense counsel might receive documents in response to a subpoena that are so heavily redacted it looks like the institution is trying to be evasive. In fact, FERPA, and the regulations and guidances issued by the United States Department of Education direct institutions to heavily redact records. The United States Department of Education's Family Policy Compliance Office has issued guidance stating that if educational records of a student contain information on "more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child." This directive has been interpreted to prohibit a student from obtaining a videotape picturing a fight where another student is clearly shown in the combat. See Opinion of the Texas Attorney General, OR 2006-00484 (January 13, 2006). Thus in many circumstances it might be difficult to obtain unredacted video evidence without a court order.

Records Generated by Title IX

Title IX of the Education Amendments to the 1964 Civil Rights Act was passed in 1972. Title IX was intended to prevent any form of sex discrimination in educational programs at any institution receiving federal funds. At its inception, Title IX was thought to be focused entirely upon equality in athletic programs. Over the years, beginning in 1997, the Department of Education; Office for Civil Rights has aggressively interpreted Title IX such that today it deals not only with athletics, but with sexual assault and other sexual violence in any aspect of campus life. In a 2011 "Dear Colleague" letter the OCR asserted that Title IX protections applied to all students in virtually every aspect of campus life such that today there is national upheaval regarding the role of the federal government in the interactions of collegiate students.

Title IX requires an institution to stop sexual harassment, prevent further occurrences and remedy its effects. 34 CFR §106.3 (2013). Dear Colleague letter, April, 2011. It is extremely difficult to obtain records related to Title IX investigations. See *Nancy Chi Cantalupo, Burying Our Head in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 Loyola Univ.. Chi. L.J. 205, 235 (2011). Nevertheless, with Title IX creating a virtual cottage industry among plaintiffs' lawyers, personal injury plaintiffs who asserted Title IX charges while in school will typically generate substantial medical records both on and off campus.

Defense counsel should become generally familiar with the parameters of Title IX because it has asked colleges to maintain voluminous records regarding student interactions on campus. The law has caused institutions to create apparatus designed to report sexual violence, provide training on sexual assault, offer victim and survivor services, conduct investigation and hold on-campus hearings. Much of this information may be discoverable.

Violence Against Women Act of 1994

The Violence Against Women Act of 1994 (VAWA) is a federal law designed to enhance the investigation and prosecution of violent crimes against women. See Title IV, § 40001. Though aimed at domestic and sexual violence, VAWA has comprehensive applications in the collegiate setting.

As part of the Violence Against Women Reauthorization Act, (VAWRA), the Campus Sexual Violence Elimination Act (Campus SAVE Act) codified directions from the OCR. See Pub. L. No. 113-4 §304, 127 Stat. 54, 89-92 (2014). The law requires institutions to generate numerous documents, including annual reports on violence and stalking that defense counsel may find useful.

Clery Act Documents

The "Jeanne Clery Disclosure Of Campus Security Policy and Campus Crime Statistics Act" is commonly referred to as the "Clery Act." 20 USC §1092(F)(1)-(15) (2013). It is a federal law that requires colleges and universities to disclose campus security information, including crime statistics, for the campus and surrounding neighborhoods. The law requires covered institutions to immediately report violent crimes, including sex offenses. The institution has to report who was involved, what occurred, where it happened, when it happened and how it happened. The law has been interpreted to cover burglary, motor vehicle theft, arson, dating violence, stalking, liquor law violations, drug abuse violations and weapons violations.

The law requires most institutions to create a daily crime log and an annual security report. The security report is released annually and contains at least three years worth of reported crimes occurring on or near campus. See *Summary of Clery Act, CLERY CTR.* http://clerycenter.org.

Discovery of VAWA and Clery Records

Again, colleges and universities are extremely cautious about responding to demands for records that might be protected by VAWA or Clery Act dictates that colleges and universities maintain the confidentiality of personally-identifying victim information. Thus, an institution will heavily redact any records that might be covered by VAWA. See 42 U.S.C. §13925(b)(2). This restriction is not absolute. VAWA provides that personally-identifying information can

be released upon the "informed" written consent of the victim. Thus, a standard subpoena or discovery order should suffice.

Like VAWA, the Clery Act protects personally-identifying victim information. Reports dictated under the Clery Act are not to include victim-identifying information. See 34 C.F.R. §668.46(c)(5). The commentary on the regulations notes that "although reporting a statistic is not likely, of itself, to identify the victim, the need to verify the occurrence of the crime and the need for additional information about the crime to avoid double counting can lead to identification of the victim." 64 Fed. Reg. at 59063 (November 1, 1999).

CONCLUSION

Conducting discovery involving litigation with college students and recent graduates can be frustrating. However, once defense counsel knows the applicable laws and understands the breadth and scope of the information and documents generated under these laws, maneuvering around confidentiality requirements is difficult – but not impossible. The fruits of this hard work can sometimes be extremely rewarding.

YOUNG LAWYER PROFILE

In every issue of *Defense Update*, we will highlight a young lawyer. This month, we get to know Joshua J. McIntyre, Lane & Waterman LLP, in Davenport.

Josh McIntyre is a senior associate at Lane & Waterman LLP, where he practices primarily in the areas of intellectual property, information technology, and legal malpractice defense, including matters concerning computer fraud, data privacy, electronic discovery, domain names, and trade secrets. Raised in a military family, Josh lived in Wisconsin, Michigan, and Alaska before attending high school in Kewanee, Illinois. He graduated from Saint Ambrose University in 2008 with degrees in Computer Investigations and Economics. He earned his law degree and a certificate in Information Technology Law from the DePaul University College of Law in 2011, where he also served as an editor for the DePaul Law Review.

Josh sits on the IDCA's Employment Law and Professional Liability Committee and serves as assistant coach to the Saint Ambrose University mock trial team and a member of the university's scholarship fund-raising committee. He has written articles for the *Defense Update*, the *DePaul Law Review*, and the treatise *McGrady on Social Media,* earning citations in numerous works on data privacy, including Privacy and Data Protection in Business (LexisNexis 2012) and The Oxford Handbook of Internet Studies. Josh resides in Davenport with his wife, Ann, and enjoys travel and great fiction.

IOWA DEFENSE COUNSEL ASSOCIATION

51st Annual Meeting & Seminar

SEPTEMBER 17 – 18, 2015

IDCA: EDUCATION AND NETWORKING

IDCA held its 51st Annual Meeting & Seminar, September 17–18, 2015, at the Stoney Creek Hotel & Conference Center in Johnston. More than 150 attendees heard from national and local speakers, networked, and met one-on-one with exhibitors. The highlight of the event was the Thursday evening networking reception at the Iowa Hall of Pride.

THANK YOU TO OUR EXHIBITORS

IDCA thanks the following exhibitors for their time and contribution at this year's event. Learn more about our exhibitors online.

Case Forensics
CED Investigative Technologies, Inc.
Corvel Corporation
Crane Engineering
Engineering Systems Inc. (ESI)
Exponent
Iowa Legal Aid
Minnesota Lawyers Mutual Insurance Co.
ReMed Casualty Consultants, Inc.
Ringler Associates
S-E-A Limited
Skogen Engineering Group, Inc.
Wandling Engineering

THANK YOU TO OUR SPONSORS

Without the generous support of our sponsors, many of the IDCA events and extras would not be possible. We thank our sponsors for their continued support of IDCA. Learn more about our sponsors online!

PLATINUM SPONSORS

Minnesota Lawyers Mutual Company
Thursday Networking Reception at the Iowa Hall of Pride

Wandling Engineering
Thursday Networking Reception at the Iowa Hall of Pride

GOLD SPONSOR

Exponent Engineering and Scientific Consulting
National Speaker – Sean Carter

SILVER SPONSOR

ReMed Casualty Consultants, Inc.
Thursday Continental Breakfast

BRONZE SPONSORS

Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Thursday Morning Networking Break

CED Technologies Incorporated
Wi-Fi

Crane Engineering
Name Badges

EMC Insurance
Thursday Morning Networking Break

Grinnell Mutual Reinsurance Company
Mobile Event Website

Ringler Associates
Electronics Charging Station

S-E-A, Ltd.
Thursday Afternoon Networking Break

The IMT Group
Thursday Afternoon Networking Break

UFG Insurance
Friday Morning Networking Break

SUPPORTER SPONSOR

Simmons Perrine Moyer Bergman, PLC

IDCA GIVES BACK!

This year, IDCA partnered with the Food Bank of Iowa and asked each attendee to bring in five or more high-need items to be distributed to food pantries across the state. Those who participated were entered into a drawing for one of two iPads.

IDCA is pleased to announce that we collected **679 meals** during our Annual Meeting!

And the Award Goes To…

The IDCA Awards and Annual Business Meeting lunch was a great time for attendees to relax and celebrate the success of the past year. Congratulations to this year's award recipients.

Rising Star Awards

Katie Graham, Nyemaster Goode, P.C., Des Moines

Alex Grasso, Cartwright, Drunker & Ryden, Marshalltown

Abhay Nadipuram, Lederer Weston Craig, PLC, Cedar Rapids

Dustin Zeschke, Swisher & Cohrt, PLC, Waterloo

President's Awards

Thomas Read, Crawford Sullivan Read & Roemerman PC, Cedar Rapids

Stephen Doohen, Whitfield & Eddy, PLC, Des Moines

Joseph Happe, Davis Brown Law Firm, Des Moines

Ryan Koopmans, Nyemaster Goode PC, Des Moines

EDDIE Award

James Craig, Lederer Weston Craig, PLC, Cedar Rapids

Meritorious Service Member Award

Robert Fanter, Whitfield & Eddy, PLC, retired

Renew Your IDCA Dues Online

In November, IDCA mailed your membership dues renewal notice. **You may renew you dues online for faster processing!** A receipt is sent to you automatically.

- **Log into www.iowadefensecounsel.org.** Once logged in, you will automatically be directed to the Member Home Page.
- **Click the "Renew Now" button** found on the left side of the page. Follow the steps for renewal.
- Once renewal is complete, Update your **Member Profile.**
  - Ensure your **contact information is correct** and includes your website.
  - **Upload your professional photo.**
  - Under your photo, click Public Profile and **edit your Areas of Practice/Areas of Specialty.** This allows other IDCA members to find you. (The Public Profile is available to IDCA members only.)

IDCA has an exciting year ahead, and the Board of Directors and staff appreciate your continued support.

IDCA Welcomes 9 New Members!

William Adam Buckley
Elverson Vasey
700 2nd Ave.
Des Moines, IA 50309-1712
(515) 243-1914
Adam.buckley@elversonlaw.com

Thomas Farrens
Klass Law Firm LLP
4280 Sergeant Rd., #290
Sioux City, IA 51106
(515) 243-1914
farrens@klasslaw.com

Fred M. Haskins
Patterson Law Firm
505 Fifth Avenue, Suite 729
Des Moines, IA 50309
(515) 283-2147
fhaskins@pattersonlaw.com

Luke Jenson
McCoy, Riley & Shea, P.L.C.
327 E. 4th Street, Ste. 300
Waterloo, IA 50703
ljenson@mrs-lawfirm.com

Don McGuire, Jr.
Pharmacists Mutual Insurance Co.
PO Box 370
Algona, IA 50511-0370
(515) 295-2461
Don.mcguire@phmic.com

Lori Nichole Scardina Utsinger
Betty Neuman & McMahon, PLC
1900 East 54th Street
Davenport, IA 52807-2761
lnsu@bettylaw.com

Jessica Uhlenkamp
Heidman Law Firm
1128 4th Street
Sioux City, IA 51101-1904
(712) 222-4109
jessica.uhlenkamp@heidmanlaw.com

Michael C. Walker
Hopkins & Huebner, P.C.
100 E. Kimberly Road, Ste 400
Davenport, IA 52806-5943
mwalker@hhlawpc.com

Christopher Wertzberger
Cartwright, Druker & Ryden
112 West Church Street
Marshalltown, IA 50158
(641) 752-5467
chris@cdlaw.com

IDCA Schedule of Events

IOWA DEFENSE COUNSEL ASSOCIATION

52ND ANNUAL MEETING & SEMINAR
September 22–23, 2016
Stoney Creek Conference Center, Johnston, Iowa

September 22–23, 2016

52ND ANNUAL MEETING & SEMINAR
Stoney Creek Hotel & Conference Center
Johnston, IA

September 14–15, 2017

53RD ANNUAL MEETING & SEMINAR
Stoney Creek Hotel & Conference Center
Johnston, IA