The Oregon Supreme Court Narrowly Construes the *Nicastro* Plurality's Limitation on Stream-Of-Commerce Personal Jurisdiction

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The last two issues of Products Liability *Perspectives* have featured articles on *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. __,131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011), the United States Supreme Court's most recent decision on personal jurisdiction over foreign product manufacturers. This article discusses the Oregon Supreme Court's interpretation and application of *Nicastro* in *Willemsen v. Invacare Corp.*, 352 Or. 191, __ P.3d __ (2012).

Nicastro

In *Nicastro*, the Court sought to reconcile the competing views announced in *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), about the "stream-of-commerce" theory of personal jurisdiction as applied to a foreign product manufacturer. In *Asahi*, Justice Brennan, writing for four Justices, concluded that as long as a component part manufacturer is aware that a final product containing its component part is being marketed in the forum state, jurisdiction premised on the placement of the component part into the stream of commerce is consistent with the Due Process Clause, and no showing of additional conduct by the defendant is required. *Id.* at 116-17. Justice O'Connor, also writing for four Justices, disagreed and concluded that the mere placement of a product into the stream of commerce is insufficient. *Id.* at 112.

Nearly twenty-five years later in *Nicastro*, a four Justice plurality authored by Justice Kennedy rejected Justice Brennan's "foreseeability/stream-of-commerce" test in *Asahi*, concluding that a foreign defendant must "purposefully avail" itself of the forum state in a way that goes beyond simply placing its products into the stream of commerce. *Nicastro*, 131 S. Ct. at 2788-90. In the plurality's view, a court can exercise jurisdiction only based on evidence that the out-of-state manufacturer had "targeted" the forum state in some way. *Id.* at 2788.

In a dissenting opinion authored by Justice Ginsburg, three Justices concluded that when the foreign manufacturer "dealt with the United States as a single market" and sought to have its products distributed throughout the nation, due process did not prevent the state where the injury had occurred from holding the manufacturer accountable. *Id.* at 2801 (Ginsburg, J., dissenting).

Two Justices – Justices Breyer and Alito – would have decided *Nicastro* on a narrower ground. They reasoned that the Court's existing decisions stand for the proposition that "a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *Id.* at 2792 (Breyer, J., concurring in the judgment). Because the record in *Nicastro* revealed that only one product manufactured by the defendant found its way to New Jersey, these Justices concluded that New Jersey did not have jurisdiction over the manufacturer. *See id.* ("the relevant facts found by the New Jersey Supreme Court show no 'regular ... flow' or 'regular course' of sales in New Jersey; and there is no 'something more,' such as special state-related design, advertising,

advice, marketing, or anything else"). Justices Breyer and Alito further believed that *Nicastro* was not the proper case to announce a broader proposition of law on personal jurisdiction, because the case did not implicate "modern concerns" and the "factual record le[ft] open many questions." *Id.* at 2792-93.

Willemsen

Willemsen arose out of a house fire alleged caused by a faulty electric wheelchair battery charger manufactured by CTE Tech Corp., a Taiwanese corporation (CTE). CTE sold battery chargers to Invacare Corp., the manufacturer of the electric wheelchair, who in turn sold them throughout the United States through a network of distributors. The Oregon Supreme Court framed the issue before it as follows:

"The issue in this case arises from the fact that CTE sold its battery chargers to Invacare in Ohio with the expectation that Invacare would sell its wheelchairs together with CTE's battery chargers nationwide. CTE contends that, because Invacare (and not CTE) is the one that targeted Oregon, CTE has not purposefully availed itself of the privilege of doing business in Oregon and, as a result, the Oregon courts may not assert jurisdiction over it. CTE reasons that, under *Nicastro*, the mere fact that it may have expected that its battery chargers might end up in Oregon is not sufficient to give Oregon courts specific jurisdiction over it."

Willemsen, 352 Or. at *4.

In deciding *Willemsen*, instead of undertaking the purposeful availment analysis articulated in the *Nicastro* plurality opinion, the Oregon Supreme Court determined that the "holding" of *Nicastro* came from Justice Breyer's concurrence. The court reasoned:

"When, as in this case, 'a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds....' Applying that rule, we look to Justice Breyer's opinion concurring in the judgment for the 'holding' in *Nicastro* that guides our resolution of this case; that is, Justice Breyer's rationale was narrower than the plurality's and, as a result, controls our resolution of this case on remand."

Id. (internal citations omitted).

The Oregon Supreme Court then found that CTE met the "regular flow/regular course" test articulated by Justice Breyer:

"With that understanding of *Nicastro* in mind, we turn to the facts of this case. The trial court reasonably could have found that CTE understood that Invacare would sell its wheelchairs and CTE's battery chargers throughout the United States. CTE agreed to manufacture the battery chargers to Invacare's specifications and in compliance with federal, state, and local requirements. To be sure, nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state. In this case, however, the record shows that, over a two-year period, Invacare sold 1,102 motorized wheelchairs with CTE battery chargers in Oregon. In our view, the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a regular ... flow or regular course of sales in Oregon."

Id. at *6 (internal citations and quotations omitted).

The most interesting aspect of *Willemsen* is the Oregon Supreme Court's suggestion that if the *Nicastro* plurality's "purposeful availment" test was controlling, the plaintiffs likely would not have made that showing. *See id*. ("CTE relies primarily on the reasoning in the plurality opinion in *Nicastro*. If that opinion were controlling, it might be difficult for plaintiff to show [purposeful availment] on this record."). Based on the Oregon Supreme Court's rationale in deciding *Willemsen*, the case may well return to the United States Supreme Court. Under the "Rule of Four," only four votes are needed to grant a Petition for *Certiorari*, and the four Justices in the *Nicastro* plurality may well wish to do just that.

Author's Note: As of the time of publication, CTE is preparing, but has not yet filed its Petition for *Certiorari*.

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