ORIGINAL

In the

Supreme Court of the United States

WORLD-WIDE VOLKSWAGEN CORPORATION, ET AL.,

PETITIONER

V.

CHARLES S. WOODSON, DISTRICT JUDGE OF CREEK COUNTY, OKLAHOMA, ET AL.,

RESPONDENTS.

No. 78-1078

Washington, D. C.
October 3, 1979

Pages 1 thru 39

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Petitioners,	:	
v.	:	No. 78-1078
CHARLES S. WOODSON, DISTRICT JUDGE OF CREEK COUNTY, OKLAHOMA, ET AL.,	:	
Respondents.	:	

Washington, D. C.

Wednesday, October 3, 1979

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

Before:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HERBERT RUBIN, ESQ., Herzfeld & Rubin, 40 Wall Street, New York, New York 10005; on behalf of the Petitioners.

JEFFERSON G. GREER, ESQ., 206 Beason Building, Tulsa, Oklahoma 74103; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in World-Wide Volkswagen Corporation against Woodson.

Mr. Rubin, you may proceed whenever you are ready.

ORAL ARGUMENT OF HERBERT RUBIN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. RUBIN: Mr. Chief Justice, and may it please the Court:

This case presents a further variation on the issues which were examined by this Court in International Shoe, McGee, Hanson v. Denckla, Shaffer and Kulko cases, the Kulko case most recently, just last year.

The order which is appealed from is a final order on a writ of prohibition, and this Court has jurisdiction.

The issues necessarily raised by this appeal are issues which go to questions of minimum contacts and purposeful activity, and therefore, I think, we should refer briefly to the facts and the record in this case. I think Your Honors will find that the facts and the record are discreet and limited.

We have in this case, first, merely the pleadings. We have a motion in which it was moved that the proceeding be dismissed on jurisdictional grounds. There was an opportunity for a hearing under the Oklahoma statute. At the hearing, under Oklahoma law, the Plaintiff had the burden of proving the

jurisdictional facts. No facts were adduced at the hearing. All that we have in the record then, Your Honors, is the pleading and there are affidavits which were interposed on behalf of the Petitioners here, which will be found in the Appendix at pages 16 and 18. And that's all there is.

Now, the facts indicate, Your Honors, that the Plaintiffs are New York residents; that is alleged in the complaint and it was determined again in the Federal Court when there was an application to remove and the Plaintiffs protested the removal and claimed that there was no diversity because they were New York residents.

The complaint recites that Defendant Seaway is a New York corporation which does business in Massina, New York. Your Honors will be familiar with the fact that Massina is a community in the northern reaches of New York State.

QUESTION: It is by the St. Lawrence, isn't it?

MR. RUBIN: That is right, Your Honor.

It also recites that World-Wide is a New York corporation. World-Wide has its offices in Orangeburg, New York. The Seaway Company is a local dealer which engages in sale of automobiles in Massena. World-Wide is a wholesaler which has responsibility for the sale of automobiles to dealers in three States, New York, New Jersey and Connecticut.

QUESTION: Do you think any distinction can be drawn between those two parties, so far as the issue of this case is

concerned, that is, is the distributor thinking, "Well, the things I sell are more likely to be used in Oklahoma, as contrasted with Seaway who is pretty local," or would you -- I take it you classify them together?

MR. RUBIN: I would classify them together, Your Honor. I take into account the language of the Court which talks in terms of the differences have to be differences in quality and not merely a matter of more or less. In terms of quality, I don't think there is any difference.

Especially, Your Honor, I would like to call your attention again to the record and the affidavit which appears in the Appendix at page 16, in which World-Wide expressly states that its business is limited to those three States, that it has no intention of doing any business outside of those three States, and specifically has no intention of doing business in Oklahoma.

QUESTION: But if this accident had happened on the Pennsylvania-New York border, it would be a somewhat different case than this one, would it not?

MR. RUBIN: I think that there might be other considerations, Your Honor. It would go to the question of minimum contact which exists, and I think you would have to look at the facts under those circumstances.

QUESTION: At least here, your accident was in Oklahoma.

MR. RUBIN: Here, the accident was in Oklahoma --

QUESTION: So, witnesses to the accident are likely to be there, in contrast to Justice Rehnquist's hypothetical, had the accident happened on the Pennsylvania Turnpike.

MR. RUBIN: That's right. The accident was in Oklahoma and it is clear from the record -- totally undisputed -- that neither of the parties, which are the Petitioners here, had any connection with Oklahoma, no business, no property, never went into Oklahoma. And, indeed, in the Seaway affidavit which is part of the Appendix -- page 18, I believe it is -- it is recited that they never foresaw that the car would go to Oklahoma.

QUESTION: Does the record show why the other Defendants submitted to Oklahoma jurisdiction?

MR. RUBIN: If Your Honor please, the other Defendants, that is Audi N.S.U. and Volkswagen of America, have submitted to jurisdiction in Oklahoma.

QUESTION: Does the record show why?

MR. RUBIN: No, Your Honor.

QUESTION: Does the record disclose any contractual limitations on the Petitioners as to the areas in which they may carry on their activities?

MR. RUBIN: There is nothing in the record on that subject, Your Honor, except for the express statement by Seaway that its business is a local business and did not contemplate doing business outside the State, and the express statement by

World-Wide to the same effect, that it did not contemplate doing business outside the three States in which it was a wholesaler.

QUESTION: Mr. Rubin, did you represent the other Defendants?

MR. RUBIN: I, personally, did not. My firm has connections with the other Defendants.

QUESTION: But then your firm chose not to resist jurisdiction in Oklahoma for them?

MR. RUBIN: That's right, Your Honor.

QUESTION: Mr. Rubin, on that subject, you said the record doesn't show why the other companies did not resist. But the record does contain the complaint which alleges that they advertise nationally, and specifically in Oklahoma. And that allegation is undenied. So, isn't it fair to assume that that's the reason that jurisdiction could be asserted over them?

MR. RUBIN: Mr. Justice Stevens, I don't know that that was the reason, and frankly --

QUESTION: Well, if that allegation is in the record and it is undenied?

MR. RUBIN: There is such an allegation, and there is no -- for the purpose --

QUESTION: Whereas, there is denial as to the clients before the Court.

MR. RUBIN: As to these Petitioners, there is certainly a disavowal, a denial that there is any advertising --

local advertising -- in Oklahoma, or even participation in any national advertising or national television. They expressly disclaim that.

So that all that we have in this case is a recital that the Plaintiff was driving in Oklahoma in a car which was purchased from Seaway, and was involved then in an accident in Oklahoma.

QUESTION: If he wasn't a resident of Oklahoma, it might as well have been Arizona, hadn't it?

MR. RUBIN: Well, Your Honor, the record doesn't even talk about Arizona. That has been interposed in the briefs, but the record merely talks of the Plaintiff, so far as I understand it, as a New York resident.

QUESTION: Driving through Oklahoma?

MR. RUBIN: Driving through Oklahoma, that's right, Your Honor.

Now, the Oklahoma statute provides for actions against nonresidents. Interestingly enough, it refers to two categories of cases where it will take jurisdiction, one with respect to tortious injuries in Oklahoma, one where it is caused by acts or omissions in Oklahoma, and the second where it it caused by acts or omissions outside Oklahoma, if the Defendant regularly does or solicits business or engages in any other persistent course of conduct.

You have a tracking, pretty much, of language which

we have in the International Shoe case. It goes on to say, "or derives substantial revenue from goods used or consumed or services rendered in the State.

Now, the Oklahoma Supreme Court in its decisions first determined that the first section did not apply. There was no act by the Defendants within the State. It also determined that there was no act or omission outside the State which related to regular solicitation of business or persistent course of conduct. Then by some kind of a magnum leap in logic it says, "On the other hand, we can say that because this car was in Oklahoma, that these Defendants derive substantial revenue from goods used or consumed or services rendered in the State," because this car must have cost a lot of money. It is an item of great cost and therefore it must be deemed that these Defendants derive substantial revenue from goods used or consumed.

We respectfully submit that that reasoning is totally untenable. The conclusion rests upon a decision of the District Court of New Jersey in the Phil Tolkan case, which I think is patently wrong. The Tolkan case was a case of an automobile supply dealer, if you will, in Wisconsin, that sold the jack to somebody who put it into his car and drove to New Jersey. In New Jersey he was using this jack and the jack failed and an accident occurred. It was then sought to sue the automobile supply dealer in Wisconsin, in New Jersey, by reason of this conduct. New Jersey said they had jurisdiction.

I believe, Your Honors, that the connection -- the so-called contacts were so attenuated that it could not possibly sustain jurisdiction.

I think the same must be found to be true in this case. Because what this Court has done when it removes the abstractions, the fictions (?) in Penora-Neff and Harrison-Bork, this Court was seeking to find something more objective, more real on which decisions could be made, so in International Shoe there was formulated the concept of minimum contacts. And we had the concept of purposeful activity. We are talking about action, movement, something real. But it seems to me that the position which the Respondents here take is a kind of movement back to the abstraction, to the fictions which this Court is trying to sweep away. They talk in terms of what is fair. They talk about what is reasonable. And what they are doing is ignoring the specific fact patterns which gave rise to the annunciation of the doctrines which we find now as the doctrines set forth by this Court in the cases which we have mentioned.

I don't have to review, of course, the facts which underlie the decisions in the International Shoe case. But, of course, there was persistent and regular solicitation and there was a showing, hotel showing, in which the Defendant came into the State.

In McGee, of course, you had the insurance policy which was being serviced. And in Hanson, you had where the

Court found there were insufficient contacts, despite the communications which went between the trust company in Delaware and the settler in Florida. And in Shaffer you have a discreet contact, presumably. You have the stock certificates which were owned by the Defendants. The courts said that was not sufficient. Then, in Kulko, the Court went even further, it seems to me. Kulko is kind of an a fortiori case.

I know that some members of the Court felt that there were sufficient contacts in that case, and there were contacts. There was the father who sent the child to California, the father who had the benefit, it was argued, of the law of California, support from California, things of that sort. And yet, in Kulko that was insufficient.

But in this case, we don't have any of those contacts. Here we have merely the fact that a car that was sold in New York by a local dealer, went to Oklahoma and had an accident. And so far as World-Wide is concerned, it seems to me that the most that the Respondents can say about World-Wide -- they don't even say they knew it existed at the time the transaction was entered into. It becomes a major argument of theirs that the name of this company is World-Wide, and so it must have anticipated, somehow, that it would be subject to jurisdiction.

I respectfully submit that that can't be a basis on which this Court can find minimal contacts or purposeful activity.

QUESTION: Mr. Rubin, do you quarrel with the statement

of the Supreme Court of Oklahoma, on page 6A of the Petition for the Writ of Certiorari, where it says in the first full paragraph on that page, "The evidence presented below demonstrated that goods sold and distributed by the Petioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given retail value of the automobile, that the Petioners derived substantial income from automobiles which from time to time are used in the State of Oklahoma"?

MR.RUBIN: I certainly quarrel with that, Your Honor. It seems to me that that is totally illogical. All the Court says is that because this car was in Oklahoma involved in the accident, that that shows that there was a use of automobiles in Oklahoma which have -- It says, "Given the retail value of the automobile, that Petitioners, therefore, derived substantial income from automobiles which from time to time are used in the State of Oklahoma."

It seems to me there is no logic to that, whatsoever, Your Honor.

QUESTION: What if the wholesaler had been located in southern Kansas, and although his territory was not Oklahoma it included Kansas, so that it would be foreseeable that cars sold in Kansas would, on occasion, be driven into Oklahoma? Would that be a different case?

MR. RUBIN: I think it would be quite a different case. I think foreseeability is one element in the question

of what there is purposeful activity. The issue which has to be addressed, I think, is whether there is purposeful activity on the part of these Defendants. I believe the record shows there is no purposeful activity.

QUESTION: What kind of purposeful activity would satisfy the minimum contacts test?

MR. RUBIN: I think there would have to be a showing that there was a direction of the energy of this Defendant to getting the benefits of the laws of the State -- of the forum.

QUESTION: What benefit would he get? Once the car is sold and is owned by somebody else, what benefit does the seller get from the laws of another State, if that car happens to be driven by its then owner into another State?

MR. RUBIN: Well, Your Honor, I think that the concept is one of -- if this seller intends to localize its activities, intends to isolate itself from being involved in lawsuits in other jurisdictions, and simply restricts its activity, then it says, "I want to have the benefit of the laws of my State, to the exclusion of the laws of some other State."

QUESTION: What about Mr. Justice Rehnquist's example, then, why would it be a different case? Why would the seller there perhaps be subject to suit in Oklahoma?

MR. RUBIN: Well, if the seller, for example, considered that to be part of his market, considered that people who were coming from that State were buying its cars, and it was appealing

to those people, its advertising, certainly, would be the kind of activity which might subject it to jurisdiction in that other State and then its obtaining the benefit of the laws of that other State, getting economic -- its deriving economic benefits from --

QUESTION: What if it doesn't advertise or anything, but some Oklahoma people just happen to come up there and buy some cars?

MR. RUBIN: I think, Your Honor, that that would bring us to a situation where the involvement of the forum is the result of purely unilateral action on the part of people outside.

QUESTION: And then he wouldn't be subject to suit, is that it?

MR. RUBIN: I think if it is purely unilateral he would have a situation which is very analogous to Kulko, where --

QUESTION: And this case, you think?

MR. RUBIN: In this case, depending again on the quality of the contacts and the purposefulness of the activity.

QUESTION: Well, you don't think then it is just enough to anticipate that the cars you sell will be driven in another State?

MR. RUBIN: I think, Your Honor, that any product can be anticipated to be found in another State. There are very few products that are found, in our economic life, which one would

not contemplate will find their way somewhere into another State. Whether you are talking about peanuts or cotton or lettuce or babies' pajamas, they are going to find their way into another State. I don't think the contemplation here is that the lines of State jurisdiction simply should be wiped out.

I think that is one of the major issues which is before the Court. It is the idea, somehow, that is being suggested by the Respondent that the State court lines, that the Federal system is somehow an historical anachronism.

QUESTION: Well, if the seller in Kansas sells to a traveling salesman, sells it to his next-door neighbor whom he knows is a traveling salesman who travels once a week to Oklahoma, and he knows the car is going to go to Oklahoma, your position is that that certainly doesn't subject him to suit in Oklahoma because all it is is an anticipation that the car will be used in Oklahoma.

MR. RUBIN: If it is merely an anticipation, Your Honor, I don't think that that would be sufficient. I think that the foreseeability that something will be in another State is not enough to confer jurisdiction. I think that all of that has to be coupled with some affiliating acts which indicate an intention to get the benefits of being in this other State.

QUESTION: Mr. Rubin, if I understand your argument correctly, you really didn't have to answer Mr. Justice Rehnquist the way you did. Although you think the Supreme Court of

Oklahoma is illogical, if I understand your position, what you are saying is that even if the Oklahoma Supreme Court is right, that use in Oklahoma was foreseeable, nevertheless, there was still no jurisdiction, because -- It is really the same case, in legal terms, as if the customer said, "I am going to drive the car to Oklahoma," and the dealer said, "I don't care where you drive it, as long as you pay for it," and then he drove it to Oklahoma. You would still say there is no jurisdiction.

MR. RUBIN: I would say, Your Honor, that is correct, that foreseeability alone is not enough.

QUESTION: So, we could assume foreseeability and still accept your argument. I know you are asking us not to, but --

MR. RUBIN: Except in this case, Your Honor, the record indicates to the contrary, that there is no foreseeability.

What is sought to be done here, Your Honor, I think, is to blur the idea of the Federal system of limitation on jurisdiction of State courts. We have the very eloquent language which was articulated by Judge Sobilef (?) in the Erlanger case. I don't have to repeat it. I think it is very much in point here. There are arguments to the effect that there are advantages, somehow, that there are efficiencies that may occur if somehow or other you blur the idea of jurisdiction in venue, that somehow or other it may be less complicated if you just

forget about these concepts of jurisdiction. And it may be cheaper or not so difficult for people to get together, if somehow or other you wipe out the concept of jurisdiction.

This Court has already said and Mr. Justice Marshall in the Shaffer case indicated that if the price of ignoring jurisdiction is that, then it is just too high a price.

I think that is what we have here. We are in an area where we seek to ignore jurisdictional lines, where we seek to ignore the intention on the part of someone who opted to be a businessman in Massena or someone who opted to be a businessman in Orangeburg, and that --

QUESTION: Mr. Rubin, do you suppose it would be different in the Kansas-Oklahoma example, the car that was in the accident that came from Kansas was a rental car and the Defendant was Hertz?

MR. RUBIN: I think there probably would be a difference.

QUESTION: You mean that Hertz would be subject to suit because it anticipates its car would be protected by Oklahoma law?

MR. RUBIN: That's right, Your Honor.

QUESTION: Well, what about the automobile dealer who sells cars in Kansas to his next-door neighbor who is a traveling salesman, and he takes a mortgage? He has a chattel mortgage on the car. And his neighbor is paying it off over time, so he

has an interest in the car.

MR. RUBIN: He may have an interest in the car, but I would think that you have a question whether you don't have an attenuated situation merely to indicate that there is a minimum contact, by reason of the fact that he has a mortgage.

QUESTION: What about the lessor of a car? What if you lease the car to the user?

MR. RUBIN: The lessor of the car has liability. He is the owner, he knows he can be sued wherever that car goes.

QUESTION: You just answered the whole case then on the lessor case. You think the lessor would be subject to suit in Oklahoma?

MR. RUBIN: I think a lessor would, where he anticipates that the car is going to be going out of the State, if it is rented -- We are talking now about Hertz -- I would say that the lessor would be liable, would be subject to jurisdiction.

QUESTION: Because that is activity of the Defendant lessor.

MR. RUBIN: That is his business, that is what he is looking for. He is looking to lease his car and have it travel throughout the entire country. That's not the business of a person who sells this car.

I would like to reserve the remaining time for rebuttal.

QUESTION: Of course, some of these rental leases

have a geographical limitation. Do you think the presence of such a contractual provision would change the result?

MR. RUBIN: I think it would, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Greer.

ORAL ARGUMENT OF JEFFERSON G. GREER, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. GREER: Mr. Chief Justice, may it please the Court:

This appears to be the first case to reach this Court involving the interpretation of a long-arm statute for a product when a physical injury was involved.

Changes in the modern society have required the expansion of State court jurisdiction, and with the advent of automobiles, which are certainly unique in American life, it has required the expansion of State court jurisdiction. This has given rise, first of all, to the Nonresident Motorist Statute, which perhaps started the evolution of the expansion of State court jurisdiction.

As far back as 1927, the Court recognized the uniqueness of the automobile in American life, when they carved out the automobile exception to the search and seizure requirements of the Fourth Amendment. And it has long been recognized in criminal law that you can commit an assault with a dangerous or a deadly weapon by use of the automobile. So it is unique.

Today, we have a National Highway Transportation

Safety Administration within the Department of Transportation, who does nothing but promulgate standards and enforce them, because of the dangerous nature of the automobile.

As the progress has progressed in technological areas and in interstate commerce, travel by airplane and automobile have made it easier to move from one State to another; this has enabled the litigants to defend in foreign jurisdictions with far less trouble than they would have before.

QUESTION: That's a two-way street, isn't it?

MR. GREER: Yes, sir, in some instances it is.

QUESTION: In every instance, is it not? Modern travel, if it makes it easier for the defendant to come to Oklahoma, makes it essier for the Oklahoma resident to go to some other jurisdiction.

MR. GREER: Except that, as this Court has pointed out in the recent denial of certiorari, it is very difficult to defend a personal injury action several hundred miles away from the scene of the accident, where all of the witnesses and the scene of the accident, record, doctors, and so forth, are located.

QUESTION: Mr. Greer, what if it had been a toaster that was sold in Massena in Upstate New York, rather than a VW?

MR. GREER: Yes, sir, I think that we must consider the nature of the product, and I think the important thing here is that this is a mobile product. That's been recognized in the Nonresident Motorist Statute. That is the very reason for

them, is because --

QUESTION: Chattel is mobile, is it not? And long before the automobile, traveling salesmen back in the days since the 19th Century have been riding trains, and whether it be the shoes they wear or the toothbrush in their suitcase, or whatever, every chattel is mobile.

MR. GREER: Yes, sir, but in the case of an automobile, we can anticipate its use. As a matter of fact, it is for the purpose --

QUESTION: You can anticipate that a toothbrush is a very mobile product, and is going to be carried by its owner from State to State.

MR. GREER: That is true, and I think that is a factor that should be considered. If a corner grocer, for example, is selling a toothbrush, he cannot anticipate, he should not foresee that he would be called upon, perhaps, to defend that --

QUESTION: Why any less so than the Defendants in this case? People have always traveled, long before the automobile. Maybe there is more of it now, quantitatively, but since the 19th Century, certainly, there has been a great deal of interstate travel, ever since we have had railroad trains and traveling salesmen, among others, and businessmen of other kinds.

MR. GREER: Yes, sir.

The automobile, of course, is considered a dangerous instrumentality. As far back as Hess v. Pulosky, the first

nonresident motorist case, this Court recognized that it was dangerous, even when used carefully.

QUESTION: What if it were a chain saw, which is, certainly, no less dangerous than an automobile?

MR. GREER: Well, our argument is that when a seller places a dangerous product, or a product that can produce danger, in interstate commerce, with reasonable foreseeability that it will be used in foreign jurisdictions, then he should be called upon to defend.

QUESTION: Okay, so what if in this case a dealer in Massena, New York, sells a chain saw to a resident of Massena? A year later the resident of Massena moves with chain saw and all of his other bodily, physical possessions to Oklahoma City. He thereafter injures himself with the chain saw. Can the dealer in Massena be called upon to defend?

MR. GREER: Well, again, we don't think that if you are considering foreseeability as an element here, and it has been considered, at least touched upon by the Court in these decisions, I don't think that he can reasonably foresee that. In the case of an automobile it is different. There is more movement of automobiles. They move on interstate highways, financed by the Government. The very purpose of the automobile is transportation.

QUESTION: But suppose the manufacturer of the chain saw is a national distributor. He manufactures them in Massena

and he ships them all over the country. He ships one batch to dealers in Oklahoma, and they are sold there and the user hurts himself. Well now, talk about foreseeability, it is not only foreseeability, he knows his chain saw is going to be used in Oklahoma because he shipped them there. Is he subject to suit in Oklahoma?

MR. GREER: Yes, I believe so.

QUESTION: Mr. Greer, I am interested in the practicalities of this lawsuit. You have other defendants, do you not?

MR. GREER: Yes, sir, we have the --

QUESTION: Is this an insurance case? Is this what it amounts to? Is this an insurance defense case? Is this really what is in the background?

MR. GREER: I assume there is insurance, but of course we are in the State court and we have not discovered that.

This is a German manufacturer. It is the manufacturer Audi NSU Aktiengesellschaft. The importer is Volkswagen of America who distributes all over the United States. World-Wide Volkswagen distributes in three States.

QUESTION: I understand all the facts, but I am interested in why you have to have these two additional defendants when you have the other ones.

MR. GREER: Yes, sir. If we lose these two defendants,

we lose any tactical advantage. If you do not join all in the chain of distribution, you are faced with a defense -- "Well, somebody down the line altered this product, or made some change in it or misused it in the chain of distribution." So, that is why we join all those in the chain of distribution. We would lose that here.

Of course, there would be two trials then, with possibly inconsistent results, one in Oklahoma and one in New York. Either way the Law of Oklahoma applies here. The law of the forum is no different from New York. We gain no advantage by applying the Law of New York.

QUESTION: If you get a judgment in Oklahoma against some of them and collect it, you are not interested in a New York trial, are you?

MR. GREER: No, sir, not if we get a judgment in New York against the manufacturer. I would assume that it is collectible. They are a large manufacturer.

QUESTION: Mr. Greer, you mentioned the fact that the accident happened in Oklahoma. Where do you allege that the tort occurred?

MR. GREER: Well, the act of the Defendant occurred in New York, when he placed it in the stream of interstate commerce, when he put it in the market place. It had its effect in Oklahoma, that is true. He started a chain of events which culminated in this tragic accident in Oklahoma.

QUESTION: But you allege a defective part of the automobile. Where was the automobile manufactured?

MR. GREER: It was manufactured in Germany and imported.

QUESTION: Is that where the tort was committed? There may have been other torts, perhaps, if somebody knew about the defect or, as you suggest, some change was made. What do you allege?

MR. GREER: Under Products Liability Law, certainly, of Oklahoma, and I think most States now, all those in the chain of distribution are liable as the manufacturer for a defect.

In this case, for example, these two defendants could plead over against the manufacturer and the importer. The fact that they haven't done so is, perhaps, explained by the fact that they are all part of a large marketing apparatus, extending all over the United States.

It is interesting to note when you buy an automobile they hand you an owner's manual. I think all of us have experienced that. This tells you where all the other dealers throughout the United States are located and where you can obtain service. They are, in fact, inviting you to use service facilities all over the United States. They certainly can foresee, it seems to me, that the product is going to be used other than in their little local marketing area.

QUESTION: I suppose your position also would include anybody who in Germany might have manufactured the part that ended up in the car?

MR. GREER: I believe that would follow.

QUESTION: Or designed it?

MR. GREER: This is a design defect, in this case, Your Honor, yes, sir.

QUESTION: That, I suppose, took place in Germany, didn't it?

MR. GREER: Yes, sir.

QUESTION: But it would exclude the toaster, since presumably the toaster owner's manual doesn't give you the list of all the different toaster dealers in the United States.

MR. GREER: Your Honor, I am a bachelor. I have never bought a toaster, and I am unable to answer that.

The trend, certainly, has been toward an expansion of State court jurisdiction. As the Court has pointed out, you first adopted consent as a test, then doing business, presence of the corporation, and finally minimal contacts. The emphasis has gone from power of the State in Penoyer (?), to contacts among the defendants stay in the litigation.

The State's interest in the litigation has certainly been an important factor, which has been considered by this Court. Beginning with International Shoe, the Court -- the State's taxing power there was a prime consideration. And in

McGee, the Court recognized that the State should have an effective means of redress for its residents, and had an interest in regulating the insurance industry.

QUESTION: These are residents of New York, not Oklahoma?

MR. GREER: Yes, sir, but Oklahoma has an interest in this litigation, as I point out.

QUESTION: In protecting people going through Oklahoma?

MR. GREER: Yes, sir.

These people, while residents of New York, were en route to Arizona, and so they were still residents of New York until they reached their new home. That is the reason they were still residents of New York.

But in Shaffer, again talking about State's interest, you recognized the strong interest in the marketability of property and providing a procedure for peaceful resolution of disputes, and also Justice Brennan recognized in the Shaffer case the unusually powerful interest of the State over corporations domesticated there, and the importance of insuring the availability of a convenient forum for litigating claims involving duplicity of corporate officers.

This Court has used different language in describing the relationship of the Defendant to the State. You have used minimal contacts in International Shoe. You have also spoken of contacts, ties and relations, and you spoke of affiliating

circumstances and substantial connections in the McGee case.

This is a somewhat uncertain definition, as Justice Marshall has pointed out in the Kulko case. Beginning with Hanson, we see the purposeful activity language, that is that the Defendant must have taken some purposeful act by which he avails himself of the privileges of the forum State.

We take the position that when a seller has taken some action in his home State, such as placing a dangerous instrumentality in the stream of commerce or in the market place, he has taken purposeful activity, and he thus meets the test.

QUESTION: If you pursue that, the manufacturer of a chain saw, which is per se a dangerous instrumentality, I guess, is liable to -- is subject to the jurisdiction of every State and Territory of the United States. Is that your position?

MR. GREER: If the manufacturer could foresee its distribution there.

Of course, this Court has recognized, in an opinion, that the automobile is a dangerous instrumentality. I don't know that this Court has done that for the chain saw.

QUESTION: What about skate boards?

MR. GREER: Well, I don't know about skate boards either. I am a little old for that, Judge.

QUESTION: What about medicine and drugs? You have probably taken some medicines and drugs.

MR. GREER: Yes, I have to do that. I think,

certainly, a drug, is liable to produce death. Certainly it would apply in that case, if he can foresee the distribution of the drug.

Here we have a purchaser, of course, that took the automobile into the jurisdiction himself. But we think that is different from the ordinary goods in that it is more apt -- it is for the very purpose of transporting people from one coast to the other. We have transcontinental highways running cost to coast. And Route 66, where this accident occurred, is the most heavily traveled road, I believe, in the world, and we can anticipate more movement of autmobiles --

QUESTION: What about an automobile repair shop or gas station on Route 66, where you have nothing but tourists going by? I take it that gas station operator is probably subject to jurisdiction every place that the people who buy gas from him, and so forth, may travel. If he just fixes a flat tire, say, on a car that is on its way across the country. He therefore subjects himself to jurisdiction at the destination of the customer.

MR. GREER: Yes, sir. Let us say a gas station operator in Oklahoma fixes a tire and he messes up the job.

QUESTION: And it blows in Alaska.

MR. GREER: Okay. He looks at the license and he sees the guy has an Alaska license, he should anticipate --

QUESTION: He should say, "I am sorry, sir, I am not

going to fix your flat tire, because I don't want to do business in Alaska."

MR. GREER: He may very well do that.

QUESTION: Suppose he had an Oklahoma tag on his car, and he pulled into an Oklahoma service station, and then went to Alaska, would it still be true?

MR. GREER: Well, I think in that situation, Your Honor, he could not reasonably foresee that.

QUESTION: He couldn't foresee that a man in a car today is subject to go to any State in the Union?

MR. GREER: Yes, sir.

QUESTION: Couldn't he foresee that?

MR. GREER: I think he could.

QUESTION: Especially if he says, "Fix that tire real good, I'm going to Alaska."

So that little filling station man has to defend in Alaska, in Nome.

MR. GREER: I think when they consider foreseeability we must consider not only that something will happen there, that he will be forced to defend there. On the case of the Oklahoma license, or the Oklahoma owner, he would not anticipate that he would have to defend in Alaska. He would be more apt to think he would be defending in Oklahoma.

QUESTION: Mr. Greer, may I ask you a question about the state of the record? In your complaint, you allege that

all four of the Defendants advertised the Audi automobile in national magazines circulated in Oklahoma and on national television that appeared in Oklahoma. But in the affidavits of these two Defendants, they take issue with that statement as applied to them. May we assume for purposes of decision that they do no advertising in Oklahoma?

MR. GREER: We were not able to prove that these two Defendants advertised in Oklahoma. That is true, Your Honor.

QUESTION: So, we can assume that for our purposes?

MR. GREER: Yes, sir. The manufacturer and the importer do.

QUESTION: I would like to turn for a moment to the question of Mr. Justice Rehnquist, put to your adversary. It relates to what was said by the Oklahoma Supreme Court, on page 6A, to the effect that under the facts presented, the trial court was justified in concluding that the Petitioners derive substantial revenue from goods used or consumed in Oklahoma. What are the facts to which that opinion refers?

MR. GREER: The facts were not fully developed at the hearing. There was no evidence as to how many Audis are used in Oklahoma or how many come from New York, or anything of that nature.

QUESTION: Are there any facts that support that statement in the record?

MR. GREER: I cannot recall any, Your Honor, other than the fact that this automobile was used there.

We think that the test that has been applied, the purposeful activity test, simply does not fit the situation where a product is concerned. Goods travel routinely across State lines by different routes. They may go to a jobber in one State, to a wholesaler in another, to a distributor in another State, and on down to a retailer. It is difficult to say that the seller has any specific intent that they will be used in any particular State. And yet, he knows when he puts them in the stream of interstate commerce that they are going to be used in different States. He can anticipate that.

QUESTION: You say the seller. You mean not the manufacturer, but the retail seller?

MR. GREER: I mean any seller, or anybody in the chain of distribution, Your Honor.

QUESTION: Well, that goes right back to the manufacturer?

MR. GREER: Yes.

The sellers -- All of these in the chain of distribution have actions over. It all gets back to the manufacturer eventually.

QUESTION: But that doesn't really affect the question of in personam jurisdiction, whether someone has an action over and can protect himself under local procedure.

MR. GREER: Yes, sir.

QUESTION: What I was curious about was whether your statement affected the foreseeability of the local distributor in Massena, New York, foreseeing that a Volkswagen that he sold there would ultimately be used in Oklahoma.

MR. GREER: Well, Massena, New York, I think, is well known as a tourist area. It is ten miles from the bridge crossing the St. Lawrence Seaway and close to two Canadian provinces. He can certainly see that it is going to be used in some area, other than his own little marketing area. I think that he can certainly foresee that it is going to be used, or may very well be used. I don't think he has to absolutely know that this product is going to be used, or have some affirmative statement that it is going to be used some place else. He knows that an automobile is used to travel. Why do we have transcontinental highways? Why does the Government spend millions of dollars building transcontinental highways if it is not for driving automobiles and people over them from coast to coast?

QUESTION: Automobiles are just per se -- Automobile retail dealers are just per se suable in any one of the fifty States?

MR. GREER: I think the Court might well make a distinction between automobile, because of its uniqueness, and the place that it plays in American life. An automobile or an airplane is designed for use all over.

QUESTION: What about a truck?

MR. GREER: Same thing. Certainly trucks. Most of our goods nowadays, with the demise of the railroads, is being transported by trucks.

QUESTION: But you would put them in Brother Rehnquist's category, too?

MR. GREER: Yes, sir, I sure would.

QUESTION: Mr. Greer, your emphasis on foreseeability takes me to the facts of the next case, which are not yours. In your case, the accident took place in your State of Oklahoma.

MR. GREER: Yes, sir.

QUESTION: Would this same accident be suable in the State of Minnesota?

MR. GREER: Not under the formula we would like to propose to the Court.

QUESTION: If you are relying entirely on foreseeability, there are Audis in Minnesota also.

MR. GREER: Yes, sir. I had not considered that, sir.

QUESTION: Well, I am asking whether you are restricting your approach, and your focus in this case, to the place of the accident, as well as to the forum of the instrumentality?

MR. GREER: I think it should be restricted to where the accident occurs. That's my --

QUESTION: Certainly you don't argue to that effect, in your argument thus far today.

MR. GREER: The element of foreseeability has, as I said, been recognized by this Court. It has been recognized in the Kulko decision, certainly, where Justice Marshall pointed out that the Defendant could hardly expect to be hailed before a California court, under the circumstances there presented.

We think it is an entirely different situation here, where the man is selling -- These Defendants are selling automobiles for use wherever the purchaser chooses to use them, of course.

We recognize a difference between the choice of law and the jurisdictional inquiries, but we were impressed with Justice Brennan's treatment of this subject, where he urges the Court to bridge the gap. Certainly many of the choice of law factors have been touched on and mentioned, and it evidently was important to the Court, although not overtly recognizing them on the question of jurisdiction.

We, too, as Justice Brennan pointed out, maintain that when a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, the Court could very well act to minimize conflicts, confusion and uncertainty, which is inherent in this definition of minimal contacts, by adopting a liberal view of jurisdiction, unless, as he pointed out, "consideration of fairness or efficiency strongly point in the opposite direction."

We suggest that the fairness factors, certainly point to Oklahoma in this case.

Justice Marshall has mentioned the fairness considerations, where he speaks of "basic considerations of fairness as bearing on the proper form for adjudicating the case" in the Kulko decision.

And Justice Douglas remarked in the Hanson case that "the question in cases of this kind should be whether the procedure is fair and just, all things considered, considering the interests of the parties."

It seems to us that that is not a bad rule.

QUESTION: That's really not a rule, is it? It depends entirely upon the subjective reaction of the judge.

MR. GREER: Yes, sir. It requires a measurement of the fairness factors.

QUESTION: It is no rule at all.

MR. GREER: Neither, Your Honor, I submit, is minimal contacts. As this Court has pointed out, there is no mechanical application of that.

As Justice Marshall pointed out, we will seldom find the answers written in black and white. And even in the gray area there are innumerable shades. We don't have a fixed standard that you can reach in and apply with no uncertainty at the present time.

QUESTION: It makes one long for the days of Penoyer

v. Neff, with all its artificialities. At least it was a rule.

MR. GREER: I don't reminisce longingly about it at all.

QUESTION: You also reject the Roman Law Rule, I take it.

MR. GREER: Yes, sir.

In each of the Court's decisions you have spoken of fair notice and the opportunity to defend. Certainly in this case there is no contention they have not had fair notice, and they have been defending. They have certainly had an opportunity.

Convenience of the parties has been mentioned by this Court in several decisions. In the McGee case, the Court noted that while there might be some inconvenience to the Defendant corporation, in that case it was not sufficient to amount to denial of due process.

We suggest that the manufacturer and importer here apparently saw no difficulty in defending in Oklahoma, since they are not contesting jurisdiction.

QUESTION: That, of course, might be quite a different question. A world-wide manufacturer may have to be prepared to defend anywhere.

MR. GREER: Yes, sir.

I see that I have reached the end. I would like to urge the Court to consider Winton Woods' article, "Penoyer's

Demise," in the Arizona Law Review, which I believe gives this subject the best treatment of any law review article we have read, and suggests a new formula for establishing State Court jurisdiction.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr.Rubin?

REBUTTAL ORAL ARGUMENT OF HERBERT RUBIN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. RUBIN: Mr. Chief Justice, and may it please the Court:

I listened long, but I haven't heard a thing about State lines or the Federal Court System of the rights of State Courts to exist and function. And I believe that the comments by Mr. Justice Sobeloff become particularly poignant here, because what is being suggested here is precisely what he was indicating could happen. That is, that individual States could undertake, at the expense of other States, to enlarge the sphere of their authority to nationwide dimensions. "It requires no flight of fancy to foresee the resulting maze of lawsuits, adjudicating interests of persons having only the faintest, most remote link to the State exercising authority. The Due Process Clause is not effective to restrain such extensions of local power and the Federal system is likely to be transformed into something very different from anything we have known."

I think that is precisely what we have here. We have

someone who is suggesting we have some kind of an idea of fairness. It is a misunderstanding, to say the least, of what Mr. Justice Stevens referred to when he talked about fair notice. He certainly didn't talk about fair notice in terms which my friend was arguing.

I respectfully submit that this is just a case in which a State is reaching too far, and the consequences in terms of adverse results, including forum shopping, are simply rife. Therefore, the action should be dismissed. The petition should be granted.

QUESTION: Is it really forum shopping when they sue where the accident took place? Isn't that the natural place to sue?

MR. RUBIN: In this case, Your Honor, I think that is so, but the theory on which the claim is being asserted, the rationale, is one in which you could, as Your Honor suggested, go to Minnesota --

QUESTION: Yes, I have trouble with the rationale.

MR. RUBIN: That, I think, is the problem here. We are departing from any kind of an idea of firm guidelines to a complete, limitless, uncharted maze.

MR. CHIEF JUSTICE BURGER: Thank you, Gentlemen. The case is submitted.

(Whereupon, at 11:02 o'clock, a.m., the case was submitted.)