No. 121281

IN THE SUPREME COURT OF ILLINOIS

ASPEN AMERICAN INSURANCE CO., as subrogee of Eastern Fish Company,

Plaintiff-Appellee,

vs.

INTERSTATE WAREHOUSING, INC.,

Defendant-Appellant.

On Appeal From the Appellate Court of Illinois, First Judicial District, No. 1-15-1876.
There Heard on Appeal from the Circuit Court of Cook County, No. 14 L 7376.
The Honorable John P. Callahan, Jr., Judge Presiding

ILLINOIS TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE'S JOINT *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE, ASPEN AMERICAN INSURANCE COMPANY

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POINTS AND AUTHORITIES

II.

Introduction

This appeal is not as straight forward as it seems. The Court's decision in this seemingly innocuous subrogation appeal could have wide-ranging impact on innumerable personal injury actions, ranging from strict product liability claims to claims involving asbestos manufacturers, to claims arising under the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 *et seq*. Clearly, that is why three asbestos manufacturers have filed a joint *amicus* brief on behalf of the defendant warehouse manufacturer and the Illinois Trial Lawyer's Association (ITLA) and the American Association for Justice (AAJ) are filing a joint brief on behalf of an insurance company!

Narrowing personal jurisdiction is a significant goal of manufacturers in the United States. Keeping access to the courts available to injured persons is primary to ITLA and AAJ. However, since the United States Supreme Court held, in *Daimler AG v. Bauman*, 571 U.S. ___, 134 S.Ct. 746, 758 (2014), that under the Due Process Clause, a corporation is subject to general jurisdiction only where it is "essentially at home," the state and federal courts have been bombarded with litigation over the requirements for showing personal jurisdiction.

Indeed, the United States Supreme Court has recently allowed *certiorari* in two matters involving general and specific personal jurisdiction. *See*, *Tyrrell v. BNSF Ry. Co.*, 383 Mont. 417 (2016), *cert granted* January 19, 2017, 2017 WL 125672 (FELA action where the Supreme Court of Montana held that a nonresident

defendant railroad was subject to the general jurisdiction of that state in an FELA action where it maintained substantial or continuous and systematic contacts with Montana even though the cause of action was unrelated to the defendant's activities within Montana); *Bristol-Myers Squibb Company v. Superior Court of San Francisco County*, 1 Cal.5th 783, 206 Cal.Rptr.3d 636, 377 P.3d 874 (2016), *cert granted*, January 19, 2017, 2017 WL 215687[1] (the Supreme Court of California held that Bristol-Myers, a non-resident defendant, was subject to specific personal jurisdiction of the state court because its California activities were sufficiently related to the plaintiff's claims). Further, the Supreme Court of Missouri very recently ruled, on February 28, 2017, on a general and specific personal jurisdiction issue in an original proceeding in prohibition in an FELA matter. *State Ex Rel. Norfolk Southern Railway Co. v. The Honorable Colleen Dolan*, __ SW3d. __, 2017 WL 770977 SC 95514. And, in August of 2016, the United States District Court for the Southern District of Florida decided *Waite v. AII Acquisition Corp et al.*, 2016 WL 2346743, holding, on a motion for reconsideration, that it did not have personal jurisdiction over Union Carbide in a personal injury action arising

[1]In the Supreme Court of California, the following organizations filed *amicus* briefs on behalf of the petitioner, Bristol-Myer Squibb: Chamber of Commerce of the United States of America, California Chamber of Commerce and Pharmaceutical Research and Manufacturers of America, Generic Pharmaceutical Association, American Tort Reform Association, National Association of Manufacturers, National Federation of Independent Business and Juvenile Products Manufacturers Association and Washington Legal Foundation. The American Association for Justice and Consumer Attorneys of California filed *amicus* briefs on behalf of the Real Parties in Interest.

out of exposure to "asbestos dust" from products that Union Carbide manufactured, where the plaintiff was exposed to them in Massachusetts.

While the issue presented here – whether an Illinois court has personal jurisdiction against Interstate Warehousing, Inc. (Interstate), a warehouse company that is incorporated and has its principal place of business in Indiana, for a loss that occurred when a warehouse roof collapsed in Michigan, where it has a 12,077,000 cubic foot warehouse in Joliet, with 44,304 pallet positions, promotes itself as having a Chicago presence, and has a registered agent in Chicago – is important to the parties, the particular case does not provide a good vehicle for providing the bench and bar with guidance on the larger issue or personal jurisdiction. Accordingly, these *amici* believe the ruling in this case should be narrowly confined to the specific facts presented.

Here, it is undisputed that plaintiff made a *prima facie* case for personal jurisdiction. It is likewise undisputed that Interstate *elected not to present a factual record* that could have, at least theoretically, defeated the showing. Based on these plain facts, this Court should not reward the defendant's obvious gamesmanship by writing a wide-ranging opinion on personal jurisdiction. For this reason alone, the appellate court's decision should be affirmed.

But there is more. The appellate court's decision should be affirmed for other reasons as well. Interstate is clearly "at home" in Illinois and it consented to jurisdiction by having a registered agent in Chicago.

Argument

I.

THE LOWER COURTS PROPERLY DECIDED THIS CASE WHERE PLAINTIFF MADE A *PRIME FACIE* SHOWING OF JURISDICTION AND DEFENDANT DID NOT DEFEAT THAT SHOWING.

The law is fully-settled as to the procedure to be followed when a defendant such as Interstate seeks dismissal of a cause of action for lack of general personal jurisdiction: the plaintiff need only establish a *prima facie* basis to exercise personal jurisdiction over a defendant, and any factual conflicts must be resolved in the plaintiff's favor. *Russell v. SNFA*, 2013 IL 113909 at ¶ 28. Once the plaintiff meets the minimal *prima facie* showing for jurisdiction, the burden shifts to the defendant to prove jurisdiction in Illinois is unreasonable. *Flanders v. California Coastal Cmtys., Inc.*, 356 Ill.App.3d 1113, 1117 (5th Dist. 2005).

The trial court applied these settled rules in the case at bar. Plaintiff made a *prima facie* showing of jurisdiction and the defendant did not defeat that showing. It made no effort at all to show that jurisdiction in Illinois was unreasonable.

The Appellate Court applied these settled rules as well. It reviewed the trial court's ruling *de novo* and affirmed the trial court's ruling denying Interstate's motion to dismiss. There was no flaw in the lower courts' analysis of the jurisdictional issue.

Most significantly, the defendant does not even argue that the lower courts applied the wrong rules.

Instead, the defendant asks the Court to change the rules and apply them to this case. It seeks to contort and revise the established burden of proof. It argues that the plaintiff should "bear the burden of producing evidence demonstrating that the defendant's activities in Illinois are so substantial compared with its activities nationwide that defendant may properly be considered 'at home' in this State." (Interstate Br. at 1.) Shifting the burden of proof to plaintiff in this case would be unconscionable.

This Court can take judicial notice of the fact that Interstate is not a publicly traded company. *People v. Davis*, 65 Ill. 2d 157, 161 (1976) ("matters susceptible of judicial notice include facts 'capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy'" (internal citations omitted.)) Due to the private nature of defendant's business, plaintiff was obviously crippled in its ability to obtain detailed financial information about Interstate. It did its best by submitting information about the extent of Interstate's business in Illinois from Interstate's own advertising. Interstate's internet site showed that Interstate boasts of its Chicago connections. Plaintiff also presented evidence that Interstate had a registered Illinois agent, CT Corp., in Chicago. (A75; SR 48.)

In seeking dismissal, Intestate made a calculated decision to provide no evidence to the court to defeat plaintiff's claim. At the argument on the motion, "the trial court asked defense counsel about the volume of business transacted in Joliet, and the square footage of the Joliet warehouse, but counsel was unable to respond to either question." *Aspen v. Interstate*, 2016 IL App (1st) 151876, ¶ 59. Interstate alone had this information.[2] *Id.* Interstate refused to provide it.

As this Court stated long ago, "Something more than the morals of a medieval market place may reasonably be expected in the conduct of litigation." *Elfman v. Evanston Bus Co.*, 27 Ill.2d 609, 615 (1963), quoted approvingly in *Ruggiero v. Attore*, 51 Ill.App.3d 139, 144 (1st Dist. 1977). *See also, Jansma Transport, Inc. v. Torino Baking Co.*, 27 Ill.App.2d 347, 354 (1st Dist. 1960) (same). Interstate's morals were lacking.

Based on Interstate's conduct alone, the Appellate Court's decision should be affirmed.

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[2]Rather surprisingly, in its brief, Interstate infers that the court was asking plaintiff's counsel for these answers, not defense counsel: "Interstate noted that plaintiff presented no evidence answering any of these questions." (Interstate Br. at 3.) Interstate is obviously disingenuous.

II.

JURISDICTION OVER INTERSTATE IS PROPER AND CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

No matter how this Court analyzes the facts of this case, all analyses lead to the same conclusion – jurisdiction over Interstate in Illinois in this case is consistent with over one hundred years of "traditional notions of fair play and substantial justice." *Daimler AG v. Bauman*, 571 U.S. __, 134 S.Ct. 746 (2014); *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). There is no constitutional impediment to having Interstate answer to Aspen in Illinois. To the extent there are questions regarding whether Illinois is the *best* forum for this case, the longstanding doctrines of *forum non conveniens*, venue, and choice-of-law fully address these concerns – as they have for centuries – without implicating constitutional concerns.

A. Interstate consented to personal jurisdiction in Illinois by registering an agent for service of process within the state and continuously conducting intrastate business in Illinois.

Since personal jurisdiction represents an individual right, it "can, like other such rights, be waived." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). A traditional way of obtaining consent that the United States Supreme Court and other courts have recognized is registration of an agent for service of process in accordance with a state statute requiring registration to conduct substantial intrastate business. *Railroad Co. v. Harris*, 79 U.S. 65, 81 (1871); *Ex parte Schollenberger*, 96 U.S. 369, 374 (1877); *Pennsylvania Fire Ins.*

Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917) (Court likened the appointment of an agent to accept service of process to a vote by the corporation to accept service of process; both acts are voluntary submissions to a court's personal jurisdiction over even transitory causes of action.) *Pennsylvania Fire* has never been overruled. *See also*, *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (assigning an agent for service of process in a state makes a corporation subject to suit in that state's court, including federal courts sitting within the same states, even for injuries occurring outside that state); *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, n.4 (1952) (same); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 441 (1946) (same). The Second Restatement also recognizes the validity of consent jurisdiction. Restatement (Second) of Conflict of Laws § 44 (Am. Law Inst. 1971).

A foreign corporation is only required to register to do business in Illinois, if its Illinois activities involve a real presence in the State and amount to doing intrastate business. See 805 ILCS 5/13.75 (expressly excluding from registration requirement those corporations whose activities are limited, temporary and/or entirely interstate in nature). In other words, a corporation need not register and thereby consent to general jurisdiction unless its presence and activities here approach being "at home" in the first place. Illinois guards against overextending its general jurisdictional reach by setting a meaningful threshold for registration and by not compelling a foreign corporations to register just to set foot in Illinois.

The Illinois' Business Corporation Act has more to say on jurisdiction of foreign corporations. It also grants foreign corporations who conduct intrastate business in Illinois, like Interstate, the rights of Illinois corporations and assigns them the same duties:

> A foreign corporation which shall have received authority to transact business under this Act shall…*enjoy the same, but no greater, rights and privileges as a domestic corporation* organized for the purposes set forth in the application pursuant to which such authority is granted; and…*shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character.*

805 ILCS 5/13.10 (emphasis added). It is unquestionable that a "duty" of an Illinois domestic corporation is to defend lawsuits in which it is named in Illinois. This contract with the state allows Interstate to participate fully in the Illinois economy. Interstate has taken advantage of that status by conducting business and employing workers in Joliet for its own benefit. Interstate cannot now legitimately claim its constitutional rights are somehow violated by defending this suit in Illinois. Such a claim is baseless.

Illinois courts have long since recognized the duty of registered foreign corporations to respond to lawsuits in Illinois. In *Hannibal & St. Joseph R.R. Co. v. Crane*, 102 Ill. 249, 255 (1882), this Court stated that when an Illinois statute "subjects foreign corporations to all of the *liabilities, restrictions and duties*" that are imposed on domestic corporations, "they may be sued and served with process in the same manner." (emphasis added). *See also*, *Walrus Mfg. Co v. New*

Amsterdam Cas. Co, 184 F.Supp. 214, 218 (S.D. Ill. 1960) ("consent in writing to be sued in Illinois as a prerequisite to issuing a certificate of authority to do business in this State" has been required "since the early history of this State"). If this Court were to find that foreign corporations with Illinois agents are not subject to Illinois jurisdiction, this Court would be overturning more than a century of Illinois precedent.

Illinois is hardly the only state to interpret the "duties, restrictions, penalties, and liabilities" language in its registration statute as conferring jurisdiction on registering corporations. In *Werner v. Wal Mart Stores, Inc.*, 116 N.M. 229, 861 P.2d 270, 272-73 (Ct. App. 1993), the New Mexico Court of Appeals held the familiar "duties, restrictions, penalties, and liabilities" language put corporations choosing to register for the right to conduct intrastate business on notice that they will be subject to jurisdiction in New Mexico's courts. *See also, Allstate Ins. Co. v. Klein*, 262 Ga. 599, n.2 (Ga. 1992) (same); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (Minnesota's statute contains the "rights and privileges" language also contained in Section 13.10 and the Eighth Circuit held that such language constituted the consent of registering corporations).

The United States Supreme Court has never required a minimum contacts, or "at home" analysis when personal jurisdiction is obtained by consent. The voluntary choice of the corporation to enter the state and conduct intrastate business does not invoke due process concerns. The Supreme Court has only undertaken a minimum

contacts analysis when a defendant has *not* consented to personal jurisdiction. *International Shoe*, 326 U.S. at 317; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011). Even *Daimler* and *Goodyear* expressly analyze defendants who have *not consented* to jurisdiction. *Daimler*, 134 S.Ct. at 756; *Goodyear Dunlop Tires Op., S.A. v. Brown*, 564 U.S. 915, 928 (2011).

In sum, while conducting its jurisdictional analysis, this Court should *first* determine if there is a traditional means of jurisdiction and, if not, *only then* move forward with a minimum contacts analysis. *See, e.g., Perkins*, 342 U.S. at 439. Therefore, this Court need not undertake a minimum contacts analysis because of Interstate's intentional consent to Illinois' jurisdiction by registration and intrastate business under the Act.

B. Illinois has general jurisdiction in this case because Interstate has chosen to make itself "at home" in Illinois.

The conclusion that jurisdiction over Interstate in Illinois is constitutionally proper remains the same if the Court applies the "at home" framework from *Goodyear* and *Daimler*. Interstate has made itself at home in our state through systematic, regular and intrastate contacts with Illinois. Interstate's attempt to latch onto a tenuous reading of *Daimler* to shield itself from Illinois jurisdiction cannot erase its clear corporate residence in Illinois. Fair play and substantial justice require finding general personal jurisdiction over Interstate.

If this Court determines that analysis beyond Interstate's registration and consent to jurisdiction is warranted, the Court should find that Interstate has "certain minimum contacts" with Illinois such that the maintenance of suit purportedly not related to Interstate's activity in Illinois does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The Court reiterated this jurisdictional touchstone in *Daimler*, holding general jurisdiction is proper when a corporation has such continuous and systematic business contacts that it is rendered "at home" in the forum." *Daimler*, 134 S.Ct. at 754; *see also Goodyear*, 564 U.S. at 919. To the extent "a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state." *International Shoe*, 326 U.S. at 319; *See also Perkins*, 342 U.S. at 444 ("The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation.")

From all that can be gleaned from the limited information Aspen and the trial court could unearth, Interstate's contacts with Illinois demonstrate that it has made itself "at home" in Illinois. It chose to become a corporate resident in Illinois and registered with the Illinois Secretary of State. It set up shop here, just like any other Illinois corporate citizen. It built one of its largest warehousing sites in our state, where it employs Illinois workers. Its Joliet warehouse is 12,077,000 cubic feet with 44,304 pallet positions. It ostensibly takes advantage of the benefits of Illinois, including ambulatory services, police services and the court system. *See*

Burnham v. Superior Court of California, Cty. of Marin, 495 U.S. 604, 637-38 (1990) (jurisdiction proper over defendant who avails himself to state's police, fire, and emergency medical services, is free to travel the state's roadways, and "likely enjoys the fruits of the State's economy.") (Brennan, concurring).

Nothing about the Supreme Court's opinion in *Daimler* defeats this finding. The Court in *Daimler* applied long-held jurisdictional tenets to determine that a German corporation lacked the requisite contacts to render it "at home" in California to allow general jurisdiction over an Argentinean-based dispute.[3] *Id.* at 750-54. *Daimler* noted that the "paradigm" states where corporation can be considered at home include its state of incorporation and principal place of business, but was explicit that these are not the *only* forums for general jurisdiction. *Id.* at 760. The inquiry *Daimler* requires is a determination of whether a corporation's affiliations with the State are "so 'continuous and systematic' as to render [it] essentially at home in the forum." *Id.* at 761 (citing *Goodyear*, 131 S.Ct. at 2851). *Daimler* made no attempt to define the boundaries of the "exceptional" case where a corporation's operations in a forum are so substantial that it should be considered at home in the non-paradigm states. *Id.* at n. 19. Given the unique facts of *Daimler*, no such analysis was necessary. Interstate, nevertheless, wrongly

[3] The "transnational" nature of the dispute factored into the Court's analysis in *Daimler*. *Id.* at 762. The Court has previously expressed concern for the "unique burdens" placed upon one who must defend oneself in a foreign country's legal system. *Asahi Metal Ind. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987). Interstate faces no such burden.

portrays *Daimler* as dramatically changing the concept of general jurisdiction in all factual scenarios – an interpretation that requires this Court to assume that the Supreme Court did not mean what it specifically stated in *Daimler*. That construction is wrong.

Interstate's attempt to escape jurisdiction by framing *Perkins* as evidencing a *threshold* for the exceptional circumstances warranting general jurisdiction instead of what it is: an *example* of such exceptional circumstances where general jurisdiction is proper, is fallacious. Nowhere in *Perkins* did the Court limit its ruling to corporations whose presidents are fleeing war and must manage the corporation from a makeshift control center in another state. Interstate's decision to register to do business in Illinois, build a huge warehouse here, and otherwise take advantage of all of the benefits of residence in Illinois, more than suffices for it to be considered "at home" in Illinois such that exercising general jurisdiction does not offend traditional notions of fair play and substantial justice.

Illinois has always required a corporation's contacts with the state to be so substantial that it is deemed to have "taken up residence" in Illinois for general jurisdiction. *See, e.g., Russell*, 2013 IL 113909 at ¶ 36; *Morgan, Lewis and Bockius LLP v. City of E. Chicago*, 401 Ill.App.3d 947, 953 (1st Dist. 2010). *Daimler* is fully in accord with the general jurisdiction analysis Illinois has long applied. Illinois courts have determined that, while there is no all-inclusive test, a corporation evidences its intention to be "at home" in our state by carrying out

business activity "not occasionally or casually, but with a fair measure of permanence and continuity." *Rokeby-Johnson v. Derek Bryant Ins. Brokers, Ltd.*, 230 Ill.App.3d 308, 318 (1st Dist. 1992) (citing *Cook Assoc., Inc. v. Lexington United Corp.*, 87 Ill.2d 190 (1981).)

CONCLUSION

The Appellate Court's published opinion in this case follows well-established federal and state law. This Court should affirm the Appellate Court's decision. Reversing it would reward a defendant for improper gamesmanship. Equally important, reversal would be inconsistent with long-standing law on the impact of having a registered agent in the state as well as the well-established law on personal jurisdiction.

Respectfully submitted,

By: /s/ Leslie J. Rosen

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 16 pages.

By: /s/ Leslie J. Rosen

***** Electronically Filed *****

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04/19/2017

Supreme Court Clerk

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NOTICE OF FILING

TO: See attached Service List

Please take notice that on April 11, 2017 I electronically filed the ILLINOIS TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE'S MOTION FOR LEAVE TO FILE A JOINT *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE ASPEN AMERICAN INSURANCE COMPANY along with a draft order and proposed brief. A copy of the motion, draft order and brief are attached to this motion and served on you.

/s/ Leslie J. Rosen

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CERTIFICATE OF SERVICE

Leslie J. Rosen, an attorney, served the foregoing Notice along with a copy of the motion, draft Order and brief on the individuals listed below by emailing them this April 11, 2017 before 5:00 p.m.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ Leslie J. Rosen

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