IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTOPHER S. BARRETT,

Plaintiff-Adverse Party,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Relator.

Multnomah County Circuit Court Case No. 15cv27317

Supreme Court No. S063914 (Control)

LILLIAN FIGUEROA,

Plaintiff-Adverse Party,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Relator.

Multnomah County Circuit Court Case No. 15cv13390

Supreme Court No. S063929

MANDAMUS PROCEEDING

REPLY BRIEF ON THE MERITS FOR DEFENDANT-RELATOR BNSF RAILWAY COMPANY

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ARGUMENT ON REPLY

Plaintiff does not even attempt to defend the trial court's ruling that BNSF's "systematic and continuous presence" and "uniquely long history of extensive operations" in Oregon qualify as "exceptional" facts that permit Oregon courts to exercise general personal jurisdiction over BNSF on claims completely unrelated to Oregon. ER-70. Plaintiff's apparent concession of error is correct. In *Daimler AG v. Bauman*, __ US __, 134 S Ct 746, 761, 187 L Ed 2d 624 (2014), the Supreme Court rejected as "unacceptably grasping" the notion that a corporate defendant is subject to general jurisdiction on the ground that it "engages in a substantial, continuous, and systematic course of business" in a state. That is because, under the Due Process Clause of the Fourteenth Amendment, a state court has authority to exercise general personal jurisdiction *only* if the defendant is "at home" in the state. *Id*. *Daimler* instructed that a corporate defendant ordinarily is "at home" only in its place of incorporation and principal place of business, *id.* at 760, absent "exceptional" facts, such as where the defendant has established a surrogate center of operations in a forum state, *id.* at 756 n 8, 761 n 19. BNSF's continuous operations in Oregon—which are far smaller than its operations in many other states—are not "exceptional" circumstances that permit Oregon courts to exercise general jurisdiction.

Recognizing that the trial court's jurisdictional ruling is contrary to *Daimler*, plaintiff hypothesizes alternative grounds for the exercise of personal jurisdiction over BNSF in this case. None has merit. BNSF did not "consent" to be sued in Oregon on claims with no connection at all to the state. Oregon does not require consent to general jurisdiction as a price for registering to do business in Oregon; instead, Oregon's business-registration statutes ensure that out-of-state companies can be sued here with respect to their activities *here*. Even if Oregon law did attempt to mandate consent to general personal jurisdiction, such a requirement would be an unconstitutional condition in light of the federal due-process protections described in *Daimler*.

The Federal Employers' Liability Act ("FELA"), 45 USC § 51, also provides no basis for upholding the trial court's exercise of general jurisdiction. Section 56 of FELA governs venue for cases filed in *federal* court, and it confers concurrent *subject-matter* jurisdiction on state courts. 45 USC § 56. No decision of the Supreme Court has ever held that FELA affects state courts' authority to exercise *personal* jurisdiction, which is a matter of state law subject to the constraints of federal due process. And even if FELA did purport to confer general jurisdiction on state courts, such a statutory provision would be unconstitutional because Congress cannot authorize state courts to exercise personal jurisdiction contrary to the Due Process Clause.

Finally, the trial court's exercise of personal jurisdiction over BNSF cannot be upheld based on specific jurisdiction. Plaintiff acknowledges that she never argued specific jurisdiction to the trial court, and never disputed BNSF's contention that the trial court lacked specific jurisdiction in this case. Nor did plaintiff introduce any facts in the trial-court record to support specific personal jurisdiction, even though it was her burden to do so. No authority supports plaintiff's attempt to rely on documents outside of the trial-court record to belatedly assert specific jurisdiction after failing to raise it below. Even if plaintiff's arguments were not waived, the asserted basis for specific personal jurisdiction fails on the merits because plaintiff's claim did not arise as a result of BNSF's activities in Oregon.

Oregon courts lack personal jurisdiction over BNSF to decide plaintiff's claim in this case. Because federal due process requires dismissal, this Court should issue a peremptory writ of mandamus directing the trial court to dismiss plaintiff's complaint.

I. The Supreme Court's decision in *Daimler* requires dismissal.

Plaintiff does not dispute that ORCP 4 A(4) is unconstitutional in light of *Daimler* and that dismissal is required unless an alternative basis for personal jurisdiction exists. *Amicus curiae* Oregon Trial Lawyers Association ("OTLA") disagrees, relying on its own recitation of jurisdictional allegations

outside the pleadings and the trial-court record. According to OTLA, *Daimler* merely "applied the existing law" of federal due-process limits on general jurisdiction to a case involving defendants from foreign countries. OTLA Br at 3. OTLA and the plaintiff in *Barrett* urge that, notwithstanding *Daimler*, state courts are free to exercise general personal jurisdiction over any defendant engaged in "substantial" activities in a forum state, without any assessment of the magnitude of those activities as compared to the defendant's activities in other states. *Id*. at 5–6; *see also Barrett* Pl Br 5, 18 (arguing same). Those arguments have no merit.

First, no support exists for the position that the federal due-process limitations on general jurisdiction in *Daimler* are confined to cases involving "defendants who were incorporated in foreign countries." OTLA Br at 3; *see also id.* at 2, 8 (arguing same); *Barrett* Pl Br at 4, 20, 23 (same). *Daimler* and *Goodyear* both expressly explained that, in the law of personal jurisdiction, a "foreign" corporation refers to a corporation based either in a "sister-state" or a "foreign-country." 134 S Ct at 754; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 919, 131 S Ct 2846, 180 L Ed 2d 796 (2011) (state courts "may assert general jurisdiction over foreign (sister-state or foreign-country) corporations" to hear claims arising outside the state only when the defendant is "at home" in the state). The holding in *Daimler* applies fully to domestic

corporations like BNSF, as multiple courts have held. *See, e.g.*, *Magill v. Ford Motor Co.*, __ P3d __, 2016 WL 4820223, at ¶ 19 (Colo Sept. 12, 2016) ("Whether a nonresident corporate defendant is a resident of another country or another state is irrelevant to the general jurisdiction inquiry."); *Brown v. Lockheed Martin Corp.*, 814 F3d 619, 629−30 (2d Cir 2016) (there is "no sound basis for restricting *Daimler*'s (or *Goodyear*'s) teachings to suits brought by international plaintiffs against international corporate defendants").

OTLA and the plaintiff in *Barrett* also are wrong that the test for general jurisdiction is whether BNSF is engaged in "continuous and systematic" operations in Oregon. OTLA Br at 5; *see also id.* at 1, 6, 9 (arguing same); *Barrett* Pl Br at 22 (same). *Daimler* expressly held to the contrary, explaining that "the words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate." 134 S Ct at 761. Unlike specific jurisdiction, general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n 20. The *Barrett* plaintiff is similarly wrong that what matters for general jurisdiction is the size of the defendant compared to other businesses in the state. *Barrett* Pl Br at 18. What matters to due process, the Supreme Court has held, is whether this state is the defendant's home state. OTLA's and the *Barrett* plaintiff's contrary arguments misunderstand the

purpose of general jurisdiction, which is merely to provide a "safety valve" of at least "one clear and certain forum" in which to sue a corporate defendant on all claims. *Daimler*, 134 S Ct at 758 n 9, 760. Virtually every other court to consider these arguments has rejected them and construed *Daimler* to prohibit the exercise of general jurisdiction even over parties with substantial operations in the forum state. *See, e.g.*, *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, 489 SW3d 369, 386 (Tenn 2015) (holding same), *cert den*, 136 S Ct 2511 (2016); *Brown*, 814 F3d at 628–29 (same); *see also* BNSF Br 29–32 (listing cases).

OTLA contends that BNSF should be deemed "at home" in Oregon for purposes of general jurisdiction because its Oregon activities are "essential and necessary" to its nationwide operations. OTLA Br at 9; *see also id.* at 1, 10 (arguing same). But again, no support exists for OTLA's position. In *Daimler*, the Supreme Court never asked whether the defendant's activities in the forum were "essential" to its overall operations. If it had, the Supreme Court surely would have answered yes, as the defendant's operations in the forum state were some of its most important in the United States. *See Daimler*, 134 S Ct at 752. OTLA's theory continues to repeat the mistake of arguing that a corporation can be at home in multiple states. *See id.* at 762 n 20.

Finally, there is no support for OTLA's argument that, because BNSF acquired other railroads in the past, it is subject to general personal jurisdiction in every state where "its acquired properties maintain an operational hub." OTLA Br at 2; *see also id.* at 4 (arguing same). *Daimler* nowhere suggested that general personal jurisdiction may be based on the homes of corporate predecessors, and neither has any other case before or since *Daimler*. Rather, *Daimler* held that a corporate defendant is "at home" for general jurisdiction *only* in its place of incorporation or principal place of business (absent exceptional facts, such as where the company establishes a surrogate headquarters). 134 S Ct at 760. None of OTLA's or the *Barrett* plaintiff's arguments based on *Daimler* supports the trial court's exercise of general jurisdiction.

II. Registering to do business in Oregon is not consent to general personal jurisdiction on out-of-state claims.

ORCP 4 A(5) also does not support the trial court's exercise of general jurisdiction in this case. Under ORCP 4 A(5), Oregon state courts may exercise general personal jurisdiction in cases involving out-of-state claims only when a foreign defendant has "expressly consented" to jurisdiction. BNSF never consented—expressly or otherwise—to be subject to *general* jurisdiction in Oregon courts.

A. Oregon does not require foreign corporations to consent to general personal jurisdiction.

The purpose of state statutes requiring a foreign corporation to register to do business and appoint an agent for service of process "is primarily to secure local jurisdiction in respect to business transacted *within the* [*s*]*tate.*" *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 US 213, 215–16, 42 S Ct 84, 66 L Ed 201 (1921) (emphasis added). Oregon's statutes serve that same purpose, as this Court has repeatedly said. *See, e.g.*, *Enco, Inc. v. F.C. Russell Co.*, 210 Or 324, 337, 311 P2d 737 (1957) (service on authorized representative creates jurisdiction here as long as the claim "aris[es] out of the corporation's activities within the state of the forum"); BNSF Br 40.

Nothing in the Oregon business-registration statutes that plaintiff quotes (at 9–10) "expressly" states that a foreign corporation consents to suit in Oregon on claims with no connection at all to the state. The fact that a foreign corporation registered to do business in Oregon is subject to "the same duties, restrictions, penalties and liabilities" as "a domestic corporation of like character," ORS 60.714, means that the corporation is bound by the laws of this state. Nothing in that statutory text provides that a corporation consents to be sued here on claims arising anywhere in the world.

Other courts interpreting similar business-registration statutes also have rejected this argument. *See, e.g.*, *Bristol-Myers Squibb v. Superior Court*, __

P3d __, 2016 WL 4506107, at *8 (Cal Aug 29, 2016) (the "designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction"). Indeed, although plaintiff points to Delaware as having "identical" laws (at 9), the Delaware Supreme Court recently and emphatically held that those laws do *not* require foreign corporations to consent to general personal jurisdiction. *Genuine Parts Co. v. Cepec*, 137 A3d 123, 138−44 (Del 2016). The Delaware Supreme Court pointed out that plaintiff's interpretation is not consistent with the text or purpose of the relevant statutes, and it would produce the absurd result of rendering the entire long-arm statute irrelevant except as to illegal, unregistered corporations. *Id.* at 139–41. But most important of all, the Delaware Supreme Court held that interpreting the business-registration code to mandate general jurisdiction would be inconsistent with federal due-process limits on state courts. *Id.* at 142−43. All of the Delaware Supreme Court's many reasons for rejecting plaintiff's interpretation of the business-registration statutes apply in this case.

Finally, Oregon *never* has interpreted its business-registration statutes to require foreign corporations to consent to general jurisdiction. As BNSF showed in its brief (at 40), plaintiff's argument (at 10–12) simply mischaracterizes this Court's precedents. This Court's decision in *Ramaswamy*

v. Hammond Lumber Co., 78 Or 407, 410–11, 152 P 223 (1915), involved a plaintiff injured in Oregon and a defendant whose principal place of business was Oregon. Personal jurisdiction was clear in *Ramaswamy*, and this Court had no occasion to determine whether a *foreign* corporation consented to be sued in Oregon on claims having no connection to this state. The same was true in *Aldrich v. Anchor Coal & Development Co.*, 24 Or 32, 34–35, 32 P 756 (1893), which involved a contract made and entered in Oregon with Oregon residents, and *Farrel v. Oregon Gold-Mining Co.*, 31 Or 463, 466–68, 49 P 879 (1897), which involved an Oregon resident who sued for unjust enrichment based on services rendered in Oregon.

The only case cited by plaintiff that does not involve a claim arising in Oregon is *Hamilton v. North Pacific S.S. Co.*, 84 Or 71, 164 P 579 (1917). But that case concerned a choice-of-law issue, not personal jurisdiction. *Id.* at 73 (stating the "question presented" is "does the California statute or the Oregon statute apply for the purpose of fixing the time within which plaintiff was required to bring his action?"). If anything, *Hamilton* is critical of attempts, like plaintiff's attempt in the case, to gain advantage from Oregon's procedures: "It is contrary to the policy of the law to encourage the litigation in our courts of controversies which are litigated here for the sole reason that" this state's procedural rules are "more liberal than that of the jurisdiction in which the

controversy arose." *Id.* at 81; *compare* ER-36 (acknowledging that "[p]laintiff has chosen this forum for her convenience" and stating preference for "not litigating this case in Washington, where interrogatories and expert discovery are allowed"). No authority supports plaintiff's consent argument.

B. The Due Process Clause does not allow a state to mandate general personal jurisdiction for corporations.

This Court also should be skeptical of plaintiff's consent argument because it would require this Court to confront a serious constitutional question: Can the states eviscerate *Daimler*'s limitations on general personal jurisdiction by simply declaring that the mandatory act of registering to do business constitutes "consent"? The California Supreme Court, the Delaware Supreme Court, and the Second Circuit have all strongly suggested the answer is "no." *See Bristol-Myers Squibb*, 2016 WL 4506107, at *8 ("[A] corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions."); *Genuine Parts*, 137 A3d at 133 (concluding same); *Brown*, 814 F3d at 639–41 (same). Not a single state or federal appellate court since *Daimler* has accepted plaintiff's contrary argument.

The Supreme Court cases cited by plaintiff (at 12–14) also do not support her position. Unlike this case, all of those cases (with one exception) involved some connection to the forum state; those cases did not discuss whether a state

may require a foreign corporation to consent to *general* personal jurisdiction. The only Supreme Court case at all supporting plaintiff's consent argument is *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 US 93, 37 S Ct 344, 61 L Ed 610 (1917). But *Daimler* has now resolved the split over whether that case remains good law: *International Shoe* overruled cases—like *Pennsylvania Fire*—decided in the prior "era" when personal jurisdiction was based on doing business in the forum. *See* 134 S Ct at 761 n 18.

Plaintiff tears down a straw man by arguing (at 18–22) that *Daimler* did not eliminate personal jurisdiction by consent. *Daimler* does not prohibit consent to personal jurisdiction based on free choice, but it does prohibit states from restoring nationwide "doing-business" jurisdiction by making consent a condition of registration to do business—a mandatory act. Plaintiff responds (at 23) that "states may condition their permission for a foreign corporation to do business within the state as they see fit." But the Supreme Court has rejected that position and held that a state may not require a party, "as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Koontz v. St. Johns River Water Mgmt. Dist.*, __ US __, 133 S Ct 2586, 2596, 186 L Ed 2d 697 (2013); *see also S. Pac. Co. v. Denton*, 146 US 202, 207, 13 S Ct 44, 36 L Ed 942

(1892) (holding same). It is the Constitution that secures BNSF's right not to be sued in Oregon on a claim like this one with no connection to Oregon.

III. The Federal Employers' Liability Act does not, and cannot, override the federal due-process limits on state courts' personal jurisdiction.

Both plaintiffs in these consolidated appeals, as well as *amicus curiae* Academy of Rail Labor Attorneys ("ARLA"), are wrong that FELA provides general personal jurisdiction over BNSF. Pl Br 27–32; *see also Barrett* Pl Br 27–36 (arguing same); ARLA Br in *Barrett*, at 3–5 (same). FELA does not purport to affect the personal jurisdiction of state courts. And in any event, no statute, state or federal, could override constitutional due-process limits on state courts' exercise of personal jurisdiction. Although ARLA argues (at 8–9) that FELA should be liberally construed, no statute ever can be construed in a way that would authorize a state court to exercise personal jurisdiction in violation of the Fourteenth Amendment.

In arguing that FELA authorizes general personal jurisdiction, plaintiff first objects (at 29) to BNSF's description of Section 56 of FELA as a "venue" statute, citing FELA's legislative history. But as the Supreme Court explained after examining that history, Section 56 "establishes venue for an action in the *federal courts*." *Baltimore & Ohio R.R. Co. v. Kepner*, 314 US 44, 52, 62 S Ct 6, 86 L Ed 28 (1941) (emphasis added). Neither plaintiff nor ARLA identifies anything in the text of the statute or its legislative history that suggests an intent

to alter the personal jurisdiction of state courts. To the contrary, the purpose of Section 56 was to expand the venue of *federal courts* to entertain FELA claims, *see id.* at 52–53, and to correct erroneous decisions that had interpreted FELA to withdraw *subject-matter* jurisdiction over FELA claims from state courts, *see Second Employers' Liability Cases*, 223 US 1, 56, 32 S Ct 169, 56 L Ed 327 (1912) (Section 56 rebuts any argument that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts").

In urging that FELA confers personal jurisdiction, plaintiff argues that Section 56 was enacted so that injured rail employees would not suffer the "injustice" of being forced to bring suit far "away from their homes" and those of relevant witnesses. Pl Br 29; *see also* ARLA Br 5 ("an employee should not be forced to bring a FELA case many miles away from his/her home"). But again, the statutory text and its history do not show any intent to affect the personal jurisdiction of state courts. Before Section 56, FELA cases were limited to "the district in which the defendant is an inhabitant." Pl Br 30 n 2 (quoting 45 Cong Rec 4034 (1910)). Congress fixed that by authorizing venue in any federal "district court *of the United States*" where the railroad is doing business, 45 USC § 56 (emphasis added). In *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3, 71 S Ct 1, 95 L Ed 3 (1950), the Supreme Court

treated it as a given that a FELA case may be brought only where "the State has acquired jurisdiction over the defendant."

Moreover, because of *International Shoe*'s subsequent creation of specific personal jurisdiction, plaintiff's argument based on inconvenience has no merit because a plaintiff always may sue in the state court where a case arises. This appeal in particular has nothing to do with any "injustice" to plaintiff, who chose to *leave* her home state of Washington—which is where her claim arose and the key witnesses and evidence are located—to sue in Oregon in an act of admitted forum shopping.

Plaintiff contends that the Supreme Court has "repeatedly affirmed the exercise of personal jurisdiction by state courts" over railroads "based solely on the doing of business in the forum state." Pl Br 30. But as BNSF's brief demonstrated (at 49–50), no authorities support that contention. Not a single one of the cases cited by plaintiff (at 30–32) so much as mentioned personal jurisdiction under the Due Process Clause. ARLA even admits (in a footnote, at 6 n 1) that these cases considered the entirely different question "whether the forum chosen by the plaintiff created an undue burden on interstate commerce."[1]

[1] Three of the four cases cited actually addressed a different issue—namely, the equitable power of state courts to enjoin allegedly vexatious lawsuits in neighboring states. *See* BNSF Br 50.

Even if plaintiff were right that these FELA cases implicated personal jurisdiction, she still has no answer to *Daimler*, which held that cases decided in the "era" before *International Shoe* "should not attract heavy reliance today." 134 S Ct at 761 n 18. But plaintiff is not right. Rather, as BNSF explained, the Supreme Court has explicitly held that Congress did not attempt through FELA "to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 US at 56.

Plaintiff also contends (at 32) that Congress has "confer[red] . . . general jurisdiction" on state courts in other statutes. Not so. Every statute that plaintiff cites refers to where cases may be brought in a *federal* court. *See, e.g.*, 29 USC § 1132(e)(2) ("Where an action under this subchapter is brought in a district court of the United States, it may be brought . . . ."). The "concurrent" jurisdiction that Congress conferred in FELA and other statutes always refers to *subject-matter* jurisdiction, that is, the "authority" of a state court "to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 US 455, 458, 110 S Ct 792, 107 L Ed 2d 887 (1990) (discussing the Constitution's default rule that federal causes of action may be brought in state court). "Concurrent" jurisdiction has nothing to do with a state court's *personal* jurisdiction, which Congress does not have the power to alter. *See* BNSF Br 48

(citing cases holding that FELA does not affect state courts' personal jurisdiction).

Plaintiff argues (at 34) that FELA cases are one example of *Daimler*'s "'extraordinary circumstances' exception." *See also Barrett* Pl Br at 36 (arguing same). They are not. The Supreme Court was clear in *Daimler* about what makes an "exceptional" case: facts, like those in *Perkins v. Benguet Consolidated Mining Co.*, 342 US 437, 72 S Ct 413, 96 L Ed 485 (1952), in which a corporate defendant moves to a surrogate headquarters from which "[a]ll of [its] activities" are directed. *Daimler*, 134 S Ct at 756 n 8, 761 n 19. BNSF's ordinary business operations in Oregon do not remotely resemble the extraordinary facts in *Perkins*.

Finally, the *Barrett* plaintiff contends (at 27) that FELA "recognize[s] the reality that an interstate railroad is 'at home' in any jurisdiction in which it is 'doing business.'" But no such reality is possible: The Supreme Court has held that a company cannot be at home in several different states. *See Daimler*, 134 S Ct at 762 n 20. Reliance on the Montana Supreme Court's opinion in *Tyrrell v. BNSF Railway Co.*, 373 P3d 1 (Mont 2016), also is misplaced for the reasons explained in BNSF's opening brief. BNSF Br. at 45–51. The decision in *Tyrrell* is contrary to the decisions of other courts, and it fundamentally

misapplies *Daimler*. *See id*. (listing contrary cases). FELA provides no basis for upholding the trial court's exercise of general jurisdiction.

IV. Plaintiff's new arguments for specific personal jurisdiction are untimely and meritless.

Finally, the trial court's exercise of personal jurisdiction over BNSF cannot be upheld based on specific jurisdiction. Plaintiff admits (at 36 n 3) that she "did not argue specific jurisdiction at the trial court level." Plaintiff in fact never disputed that Oregon courts lacked specific jurisdiction, either in the trial court or in responding to BNSF's mandamus petition. Now plaintiff argues that Oregon courts have specific personal jurisdiction to decide her claim arising from a fall in Washington on the ground that plaintiff worked for BNSF in Oregon over two decades ago. Pl Br at 34–44. Plaintiff's argument has no merit.

A. Plaintiff cannot rely on specific jurisdiction when she failed to raise it in the trial court.

Plaintiff claims that her failure to "pursue her specific jurisdiction argument with the trial court is of no import." Pl Br at 35 n 3. Invoking the "right for the wrong reason" doctrine, plaintiff urges (at 35) that this Court has discretion to affirm on an alternative basis not raised in the trial court as long as "the record materially [is] the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below." *Outdoor*

Media Dimensions Inc. v. State, 331 Or 634, 659–60, 20 P3d 180 (2001). But the requirements of the "right for the wrong reason" doctrine do not exist here.

In reviewing a trial court's denial of a motion to dismiss for lack of personal jurisdiction under ORCP 21 A, this Court considers only "the facts from the allegations in [the plaintiff's complaint] and the affidavits and other evidence that the parties have submitted" to the trial court. *Willemsen v. Invacare Corp*., 352 Or 191, 195 n 2, 282 P3d 867 (2012). Plaintiff's new arguments for specific jurisdiction are not based on the record before the trial court; instead, plaintiff relies entirely on documents outside of the pleadings that never were offered below.[2] *See* Pl Br at 34–44 (citing same). The "right for the wrong reason" doctrine is wholly inapplicable in these circumstances.

There is no excuse for plaintiff's failure to raise her specific jurisdiction arguments, especially because BNSF's motion to dismiss expressly argued that there was no basis for specific jurisdiction (ER-5–15), and plaintiff conceded the issue by arguing only general jurisdiction (ER-21–36). *Cf., e.g*., *Espinoza v. Evergreen Helicopters, Inc*., 359 Or 63, 94–95, 376 P3d 960 (2016) (refusing to consider arguments on appeal that Peru was an inadequate forum because the plaintiffs could have, but did not, raise arguments in trial court). Plaintiff's new

[2] By separate motion, BNSF has moved to strike those extra-record materials. (BSNF Motion to Strike, August 25, 2016.)

argument alleging specific jurisdiction is waived, and this Court should not consider it.

B. Specific jurisdiction does not exist in this case.

Even if plaintiff's argument based on specific jurisdiction were not waived, it fails on the merits. Plaintiff is a Washington resident whose regular job duties were in Washington and who was allegedly injured when she fell off a step stool in Washington. Pl Br 6; ER-1. The fact that plaintiff worked for BNSF in Oregon over two decades ago has nothing to do with her personal-injury claim in this case, and it certainly was not "reasonably foreseeable" that she would bring suit here for a fall in Washington that has no connection to Oregon. *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 594, 316 P3d 287 (2013).

In arguing specific jurisdiction, plaintiff contends (at 40) that BNSF's amended answer "invoke[d] the nature and thoroughness of [plaintiff's] training in Oregon" by asserting that plaintiff was contributorily negligent. But the answer does not even *mention* plaintiff's training, let alone put her training into question. Plaintiff's alleged Oregon contacts for BNSF are entirely incidental to the underlying action and cannot support specific jurisdiction in Oregon. *See State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 159–61, 845 P3d 461 (1993) (stating rule); *see also, e.g., Horn v. Seacatcher Fisheries, Inc.*, 128

Or App 585, 876 P2d 352, *rev den*, 320 Or 407 (1994) ("allegations pertaining to the creation of the employment relationship are immaterial to the personal injury gravamen of [a claim] and, hence, cannot support jurisdiction" (emphasis omitted)). It also is irrelevant that BNSF did not object to personal jurisdiction in a prior lawsuit by plaintiff in Oregon. Pl Br 42–43. That plaintiff previously sued BNSF in Oregon on a different claim has nothing to do with her claim in this case.

Finally, the Kansas federal court's application of Kansas's long-arm statute in *Overfelt v. BNSF Railway Co.*, 2016 WL 1045477, at *2 (D Kan Mar 15, 2016), is entirely distinguishable. *See* Pl Br 41–42. The plaintiff in *Overfelt* was a Kansas resident who normally reported to work in Kansas and whose work was overseen in Kansas, but who happened to be injured on the job in Texas. 2016 WL 1045477, at *3. Plaintiff here, by contrast, has not worked for BNSF in Oregon for over two decades, and nothing about the circumstances of her injury had anything to do with Oregon. The decision in *Overfelt* does not advance plaintiff's argument. No basis exists for the exercise of specific jurisdiction over BNSF in this case.

CONCLUSION

This Court should issue a preemptory writ of mandamus directing the trial court to grant BNSF's motion to dismiss for lack of personal jurisdiction.

DATED this 29th day of September, 2016.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in this Court's order dated September 14, 2016; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 4,979 words, which is less than the 5,000 words that this Court permitted for this brief by Order on September 14, 2016. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 29th day of September, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 29, 2016, I filed this REPLY BRIEF ON THE MERITS FOR BNSF RAILWAY COMPANY with the State Court Administrator by the eFiling system. I also certify that on September 29, 2016, I served the same on the following parties by the following means:

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