SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

JOSE AYBAR and JOSE AYBAR as Administrator of THE ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs,

and

ORLANDO GONZALES, JESENIA AYBAR as Administrator of THE ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as Legal Guardian on behalf of K.C., a minor, ANNA AYBAR and JESENIA AYBAR as Administratrix of THE ESTATE OF T.C.,

Plaintiffs-Respondents,

v.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

Docket No.
2019-12110

Queens County Clerk's
Index No. 703632/17

REPLY BRIEF IN SUPPORT OF THIRD-PARTY DEFENDANT-APPELLANT FORD'S MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

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U.S. TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff-Respondent,

v.

THE GOODYEAR TIRE & RUBBER COMPANY and FORD MOTOR COMPANY,

Third-Party Defendants-Appellants,

and

GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD,

Third-Party Defendant.

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PRELIMINARY STATEMENT

Ford sought reargument on two grounds and, in the alternative, leave to appeal on two grounds. Mot. 4-5. U.S. Tires[1] entirely ignores Ford's arguments for reargument: that this Court mistakenly concluded that Ford conceded the existence of minimum contacts and that this Court based its long-arm-act analysis on an indemnification claim dismissed by the Supreme Court and abandoned by U.S. Tires on appeal. U.S. Tires also ignores Ford's request for leave to appeal the question of whether the Due Process Clause's requirement for a connection between the defendant, the forum, and the litigation prevents the exercise of specific personal jurisdiction in this case.

U.S. Tires instead trains its fire on just one quarter of Ford's motion: that, by basing long-arm jurisdiction over Ford on Ford's general business in New York and U.S. Tires' negligence in New York, this Court misapplied Court of Appeals precedent and raised an important and novel question that the Court of Appeals should resolve. Even then, however, U.S. Tires misses the mark. U.S. Tires does not try to explain why the relevant transaction here is the one between U.S. Tires and Jose Aybar. Nor does it explain how this Court's long-arm-act analysis is

[1] This reply responds to both U.S. Tires' and Plaintiffs' affirmations in opposition. Because Plaintiffs' opposition adopts U.S. Tires' arguments (Plaintiffs Opp. 2), for simplicity's sake, Ford refers to just U.S. Tires except where Plaintiffs have made arguments different from U.S. Tires.

consistent with Court of Appeals precedent; its halfhearted attempt to distinguish *McGowan v. Smith*, 52 N.Y.2d 268 (1961), only confirms that leave to appeal is warranted.

At bottom, U.S. Tires argues that there are good policy reasons for exercising long-arm jurisdiction over Ford in this case. There are not. But to the extent this Court concludes that the unique policy considerations at issue in this third-party action favor exercising personal jurisdiction over Ford, this Court and others would benefit from the Court of Appeals having the chance to address this open issue.

This Court should grant Ford's motion for reargument and, on reargument, reverse the Supreme Court's order. In the alternative, it should grant leave to appeal.

ARGUMENT

I. U.S. TIRES DOES NOT MEANINGFULLY RESPOND TO THREE QUARTERS OF FORD'S MOTION.

A. Beyond broadly asserting that this Court "neither misapprehended the relevant facts or law," U.S. Tires Opp. 3, U.S. Tires does not respond to Ford's two grounds for reargument. U.S. Tires does not defend the Court's holding that Ford conceded minimum contacts, even though the entirety of Ford's constitutional argument was that it lacked sufficient minimum contacts with New York. Mot. 10-14. Nor does U.S. Tires defend this Court apparently basing its long-arm-act

analysis on the dismissed-and-abandoned indemnification claim given that this Court referred to indemnification as being part of "the subject of this appeal." Mot. 15-17 (discussing slip op. 8).

U.S. Tires does not meaningfully oppose Ford's grounds for reargument, presumably because there is no opposition to be mustered. Accordingly, this Court should grant reargument to consider Ford's constitutional arguments as presented to this Court. To the extent its long-arm-act analysis turns on indemnification, this Court should also grant reargument to analyze whether long-arm jurisdiction exists over Ford as to the contribution claim. And on reargument, it should reverse the Supreme Court's order.

B. U.S. Tires also does not challenge Ford's second ground for leave to appeal: that the Court's due-process analysis broke from controlling precedent and created a split with the other Departments. Mot. 24-28. U.S. Tires does not contest that a sufficient connection between the defendant, the forum, and the litigation is no longer a constitutional requirement for the exercise of specific jurisdiction in this Department. *See id.* at 24. U.S. Tires does not contest that this is a sharp break from U.S. Supreme Court precedent. *See id.* at 25. U.S. Tires does not contest that this new approach to specific jurisdiction departs from the other Departments. *See id.* at 26. U.S. Tires does not contest that this creates an opportunity for forum shopping between New York venues. *See id.* at 27. And

U.S. Tires does not contest that this Court's new approach to specific jurisdiction raises important constitutional questions. *See id.* Given this apparent agreement between Ford and U.S. Tires, if the Court does not grant reargument, it should grant leave to appeal.

Plaintiffs at least gesture at the Due Process Clause, characterizing this Court's reasoning as "flawless." *See* Plaintiffs Opp. 5-6. But Plaintiffs then apply the same flawed due-process test this Court articulated: "long-standing and vast" contacts paired with reasonableness. *Id.* at 5; *see* Mot. 24-25. Entirely absent from Plaintiffs' opposition is a response to Ford's argument that this abbreviated test breaks from Court of Appeals and Supreme Court precedent, splits with other Departments, and raises important constitutional questions. Plaintiffs' conspicuous failure to respond to these issues highlights that leave to appeal is warranted.[2]

[2] Plaintiffs also spend a few paragraphs discussing general jurisdiction and consent by registration. *See* Plaintiffs Opp. 3-5. As Plaintiffs admits, however, this discussion is entirely irrelevant: "The Court's decision here . . . is unaffected by the vagaries of such cases." *Id.* at 5.

II. U.S. TIRES DOES NOT EXPLAIN WHY THIS COURT SHOULD NOT GRANT LEAVE TO APPEAL ON WHETHER CPLR 302(A)(1) ALLOWS THE EXERCISE OF SPECIFIC JURISDICTION OVER FORD IN THIS CASE.

This Court's identification of the relevant breach for CPLR 302(a)(1) purposes as "U.S. Tires' alleged negligence" breaks from controlling precedent. Mot. 17-20. Because U.S. Tires' only claim on appeal is for contribution, *McGowan* teaches that the relevant breach is Ford's act of manufacturing and designing an allegedly defective Ford Explorer. *Id.* at 18-19. Looking to a third-party *plaintiff*'s contacts in New York breaks from both Court of Appeals and U.S. Supreme Court precedent holding that the personal-jurisdiction inquiry looks to the *defendant*'s contacts with the forum State. *Id.* at 20.

U.S. Tires ignores all this, insisting that the relevant "transaction [is] between U.S. Tires and the Aybars." U.S. Tires Opp. 6; *see also id.* at 7. U.S. Tires cites no case holding that the relevant point of analysis in a contribution case is the transaction between the plaintiff and the original defendant, as opposed to the separate transaction between the plaintiff and the third-party defendant. At best, this lack of case law illustrates that whether the relevant act of negligence in a third-party contribution case is the third-party plaintiffs' breach or the third-party defendants' is an open question in New York. This Court should grant leave to appeal to allow the Court of Appeals to weigh in.

As for *McGowan*, U.S. Tires contends that it is distinguishable because the third-party defendant in that case had "extremely limited contact[s] in New York." U.S. Tires Opp. 8. True enough, but that only proves Ford's point. Under this Court's opinion, the third-party defendant's limited New York contacts in *McGowan* would not matter: One element of the third-party plaintiff's negligence occurred in New York. 52 N.Y.2d at 274. At most, distinguishing *McGowan* on this ground illustrates that this Court's new rule elevates some third-party plaintiffs over others—local third-party plaintiffs bringing third-party actions against large non-New York companies. Mot. 23-24. That distortion in the law warrants review.

Ford further explained that even if U.S. Tires' alleged breach is the appropriate point of analysis, leave to appeal is warranted to address this Court's relaxed articulable-nexus analysis. Mot. 20-22. Court of Appeals precedent requires a *case-specific* nexus between the claim and the defendant's New York contacts. *Id.* at 21. But according to this Court, Ford's general business transactions in New York are "tethered" to U.S. Tires' alleged negligence because Ford does business here on a "grand scale" and "undoubtably benefit[s] from the sale of replacement parts and services from third-party companies" like U.S. Tires. *Id.* at 20 (discussing slip op. 9). That is not an articulable, case-specific nexus.

Here, too, U.S. Tires fails to meaningfully argue that this Court's relaxed articulable-nexus analysis accords with Court of Appeals precedent. U.S. Tires instead tries to backfill this Court's opinion. It argues that "Ford and Goodyear have created the commercial support system which unquestionably facilitated the transactions between U.S. Tires and the Plaintiffs." U.S. Tires Opp. 7. It also contends that without Ford and Goodyear's New York contacts, "the transaction at issue in this litigation would not and could not have taken place." *Id.* at 6. But this Court did not articulate a facilitation or inducement theory, presumably because it is entirely unsupported by the record. Neither Plaintiffs nor U.S. Tires has ever alleged that Aybar went to U.S. Tires because of Ford's indirect business activities in New York. *See* R45-68 (Amended Verified Complaint); R39-42 (Third-Party Complaint). Nor is there any allegation that Ford somehow induced Aybar into purchasing the used Explorer. *See* Reply Br. 6-7. In any event, this theory would still break from Court of Appeals precedent by allowing long-arm jurisdiction over a foreign defendant based on that defendant's general and unrelated business in New York. Mot. 22 (citing *D & R Glob. Selections, S.L. v. Bodega Olegario Falcon Piniero*, 29 N.Y.3d 292, 298 (2017)).

U.S. Tires cites a few cases in support of its argument that "[t]he connection requirement of CPLR 302(a)(1) is satisfied so long as the product is marketed in New York, even if the specific product that caused the injury was not sold in New

York initially." U.S. Tires Opp. 4. As already explained in Ford and Goodyear's reply brief, that is not what those cases held. *See* Reply Br. 8-10. *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (2016), concerned claims arising out a money-laundering scheme *using New York bank accounts*. *Id.* at 329. *Singer v. Walker*, 15 N.Y.2d 443 (1965), and *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982), both concerned defendants who had shipped defective goods *directly* to New York. *See Singer v. Walker*, 21 A.D.2d 285, 287 (1st Dep't 1964); *Tonns*, 90 A.D.2d at 549. And *EMI Christian Music Grp. v. MP3tunes, LLC*, 840 F.3d 79 (2d Cir. 2016), does not discuss New York's long-arm statute at all. U.S. Tires simply has no case holding that a third-party defendant's general business in New York can constitute an articulable nexus with a third-party plaintiff's allegedly negligent act in New York.

U.S Tires finally offers a few policy reasons "supporting affirmance." U.S. Tires Opp. 7-9. Policy concerns cannot relax CPLR 302(a)(1)'s articulable-nexus requirement, which requires that "at least one element" of the cause of action "arise[ ] from the [defendant's] New York contacts." *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 341 (2012). But to the extent these "unique" policy concerns should have any role to play, U.S. Tires Opp. 8, they *support* giving the Court of Appeals the opportunity to consider whether they should factor into CPLR 302(a)(1) in a case like this one.

This Court broke from Court of Appeals precedent in identifying a third-party plaintiff's breach as relevant to the question of whether New York courts have personal jurisdiction over a third-party defendant as to the third-party defendant's separate act of negligence. And even if that were allowed, this Court departed from controlling precedent in failing to articulate a *case-specific* nexus between the third-party defendant and the third-party plaintiff's alleged breach. And as U.S. Tires' opposition illustrates, at best, there is a dearth of Court of Appeals case law addressing whether a third-party plaintiff's breach in New York can be used to secure long-arm jurisdiction over a foreign third-party defendant that does a lot of business in New York. This Court should grant leave to appeal.

CONCLUSION

For the foregoing reasons and those in Ford's motion, the Court should grant reargument, and, on reargument, reverse the Supreme Court's order. In the alternative, the Court should grant leave to appeal to the Court of Appeals.

Respectfully submitted,

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