

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

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

Docket No. 2019-12110

Plaintiffs,

**AFFIRMATION IN
OPPOSITION**

— 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 AYBA and
JESENIA AYBAR as Administrator of THE
ESTATE OF T.C.,

Plaintiffs-Respondents,

— against —

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

Defendant-Respondent.

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

Third-Party Plaintiff Respondent,

— against —

THE GOODYEAR TIRE & RUBBER COMPANY, and
FORD MOTOR COMPANY,

Third-Party Defendants-Appellants,

— and —

GOODYEAR DUNLOP TIRES NORTH AMERI, LTD,

Third-Party Defendant.

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JAY L. T. BREAKSTONE, an attorney duly admitted to practice before the courts of the State of New York, affirms, upon penalty of perjury, as follows:

INTRODUCTION

1. I am associated with and appellate counsel to Parker Waichman LLP, attorneys for plaintiffs-respondents (“plaintiffs”), and am fully familiar with the facts and circumstances of this matter as they pertain to the application at bar.

2. This affirmation is submitted in opposition to the motion of third-party defendants-appellants (“appellants”) The Goodyear Tire & Rubber Company (“Goodyear”) and Ford Motor Company (“Ford) for reargument of the Court’s Opinion and Order (“Order”), affirming the order of Supreme Court denying appellants’ motions to dismiss the third-party complaint. 2022 NY Slip Op 06099, 2022 WL 16626087 [2d Dept Nov. 2, 2022] affg 65 Misc 3d 932 [Sup Ct, Queens County 2019]. In the alternative, appellants seek leave to appeal to the Court of Appeals.

3. Plaintiffs are aware of the opposition to appellants’ motion filed by defendant-respondent U.S. Tires and Wheels of Queens, LLC (“U.S. Tires”) and joins in those arguments to the extent that they are consistent with those made here. *See* Affirmation of Lester Chanin, Esq., dated December 9, 2022 (“Chanin Afm”).

PRELIMINARY STATEMENT

4. U.S. Tires is quite correct when it postures appellants' essential problem on this application. The Order below "neither misapprehended the relevant facts or law" and raised no novel issue justifying leave to appeal. Chanin Afn at ¶ 3. The rationale, therefore, for this motion must be otherwise — and it is.

POINT I

THERE IS NO REASON OFFERED THAT WOULD JUSTIFY FURTHER REVIEW

5. The threat of corporate registration and consent to state jurisdiction is paramount in appellants' mind. Indeed, it is a common mind, possessed by all corporations who believed that the United States Supreme Court's decisions in *Goodyear*, *BNSF*, *Bristol-Meyers*, and *Daimler*¹ destroyed state jurisdiction over corporate defendants who were not "at home" in those states, leaving general jurisdiction to only a corporation's state of incorporation or the state where it maintains its principal place of business. *Aybar v. Aybar*, 37 NY 3d 274, [2021] ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction because these are places where a corporation is fairly regarded as at home," citing *Daimler*, 571 U.S. at 137. [citation cleaned]).

6. Practically speaking, this left corporations in a windfall litigation position. Individual plaintiffs who had claims against a corporation registered a

¹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 [2011]; *Daimler AG v. Bauman*, 571 US 117 [2014]; *BNSF Railway Co. v. Tyrell*, 581 US 402 [2017] and *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 US ___, 137 SCt 1773 [2017].

plaintiff's home state to do business in that state, earn money in that state, and enjoy the economic advantages of that state were not subject to the general jurisdiction of suit in that state, even if the plaintiff was a co-resident of that same state. Rather than being an artificial "person" under the law, a corporation was an "über mensch", a superman, able to leap over state jurisdictions in a single bound. *Daimler* "grant[ed] a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions." *BNSF Ry. Co. v. Tyrell*, 581 US 402, 137 SCt 1549, 1560 [2017] (*Sotomayor, J., consenting in part; dissenting in part*)

7. However, the Court in *Aybar* carefully limited its opinion to only the question of general jurisdiction, saying nothing that would imperil New York's ability to reach a corporate defendant, registered to do business in New York or not, under CPLR 302. "To begin, we clarify what issues are—and are not—presented here," the Court cautioned. *Aybar* at 282.² Until now, specific jurisdiction in the modern era has not been part of the *Aybar* litigation.

8. Whether or not general jurisdiction via voluntary corporation registration in a given state can be successfully conditioned on mandatory consent to the general jurisdiction of the sheltering state may well remain an open question notwithstanding *Daimler* and its brethren. Presently *sub judice* in the United States Supreme Court is *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, argued on

² While the Court believed that plaintiffs did not "assert below that New York courts had specific jurisdiction over Ford and Goodyear" under CPLR 302 (*Aybar* at 282), that is not precisely the case, the motion court discarding long arm jurisdiction as if in passing, in a single line, i.e., "This statue [CPLR 302] does not apply to the case at bar." *Aybar v. Aybar*, 2016 NY Slip Op 31139(U) (Trial Order), 2016 WL 3389890, *2 [Sup Ct, Queens County May 31, 2016] revd 169 AD3d 137 [2d Dept 2019] affd 37 NY 3d 274 [2021]. The question of specific jurisdiction in *Aybar v. Aybar* remains at issue, especially in light of the Court's decision in the case at bar.

November 8, 2022. The case involves the voluntary registration in and statutory consent to the general jurisdiction of Pennsylvania. It is no surprise to this Court that the Supreme Court has never rejected general jurisdiction based on express consent and the question is now poised for the modern era.

POINT II

THERE IS NOTHING UNUSUAL ABOUT THE DECISION OF THE COURT; IT RELIES ON TRADITIONAL CONCEPTS OF LONG -ARM JURISDICTION

9. The Court's decision here, however, is unaffected by the vagaries of such cases. It is based on the solid ground of long-arm jurisdiction; a foundation which is supported even by the most current of controlling authority, *Ford Motor Company v. Montana Eighth Judicial District Court*, ___ US ___, 141 SCt 1017 [2021]. The contacts with New York of Ford and Goodyear are long-standing and vast. The exercise of jurisdiction is reasonable and appellants "fail to present any reason why the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice." 2022 WL 16626087 at *7. The reasoning behind the Order affirming the court below is flawless, but stands in sharp contrast to the untenable position taken by appellants. "There is no discernible difference for companies such as Ford or Goodyear whether they defend an action in New York or Virginia, where the accident occurred. However, New York has an interest in adjudicating the dispute, as it is the residence of both Aybar and the defendant, US Tires, as well as the location of the alleged breach in this action." *Id.*

10. For the reasons stated above, the motion should be denied in all respects. The Court made no error in affirming the decision below and the issues involved here are neither novel nor compelling in any other manner. Further review by the Court of Appeals is not indicated.

WHEREFORE, plaintiffs ask that the motion be denied, and for such other and further and different relief as to the Court may seem just and proper.

Dated: Port Washington, New York
December 19, 2022



Jay L. T. Breakstone

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF NASSAU

Josephine Burgess being duly sworn, deposes and says: I am not a party to the within action, am over the age of 18 years, and reside in Nassau County, New York.

On the 19th day of December, 2022, I served the within **AFFIRMATION IN OPPOSITION**

by electronically filing said document via the New York State Court Electronic Filing system to the addressee as indicated below:

Via Email

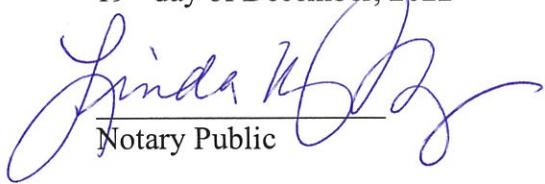
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Josephine Burgess

Sworn to before me this
19th day of December, 2022



Notary Public

LINDA R. INGBER
Notary Public, State of New York
No. 01IN4877927
Qualified in Suffolk County
Commission Expires 11/24/20 26