

2105, 2106, 2107, 2108, 2109, 2110, 2111 EDA 2016

Superior Court of Pennsylvania

**Kenneth Murray, Robert Schnall, Michael Scott, John Senese,
John Shurina, John Signorille, Kevin Sokol, Anthony
Tricarico, Frank Ventrella, Joseph Vitale, Patrick Vogt, Henry
White, William White, Thomas Woska, and William
Youngston, Appellants,**

v.

American LaFrance, LLC and Federal Signal Corporation

Appeal from the final order entered on May 25, 2016, in the
Philadelphia County Court of Common Pleas,
November Term 2015, No. 2536

**Brief of Amicus Curiae the United States Chamber of
Commerce in Support of Appellee Federal Signal
Corporation**

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STATEMENT OF INTEREST

The United States Chamber of Commerce (“U.S. Chamber”) is the world’s largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. More than 96% of the U.S. Chamber’s members are small businesses with 100 or fewer employees. An important function of the U.S. Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus briefs in cases that raise issues of concern to the nation’s business community.

Most U.S. Chamber members conduct business in states other than their states of incorporation and principal places of business. That gives them a substantial interest in whether registering to do business subjects them to general personal jurisdiction in those states.

No person or entity other than the U.S. Chamber, its members, or counsel (i) paid in whole or in part for the preparation of this brief or (ii) authored this brief in whole or in part.

ARGUMENT

In general, the Constitution permits states to assert general jurisdiction over a corporation only where it is “at home” – that is, with very limited exceptions, in its state of incorporation and principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). The panel held that this Fourteenth Amendment restriction does not apply to foreign corporations registered to do business in Pennsylvania because a state statute deems such registration to constitute blanket consent to general personal jurisdiction. *See Murray v. American LaFrance*, No. 2105 EDA 2016, 2018 PA Super 267, slip op. at 10-12 (Pa. Super. Sept. 25, 2018) (withdrawn) (“Panel Op.,” attached as **Appendix A**); 42 Pa.C.S. § 5301(a)(2)(i).

Having concluded that registration equals consent, the panel much too quickly distinguished *Daimler*. Although *Daimler* was not a consent-by-registration case, the Supreme

Court made clear that the Constitution prohibits nationwide general jurisdiction. But that is exactly what registration-based jurisdiction leads to for many corporations. In fact, consent by registration is even more expansive than the standard that *Daimler* rejected as “unacceptably grasping” because it leads to general jurisdiction wherever a corporation does business.

Deeming registration as a foreign corporation to be consent also forces foreign corporations to choose between preserving their due process right not to be haled into Pennsylvania state court for all claims, and doing business in the Commonwealth. As a result, any purported “consent” is illusory. Such coerced consent is not only invalid, it violates the unconstitutional conditions doctrine.

Finally, consent by registration is bad policy. It deprives foreign corporations of the predictability they need to structure their businesses. And it gains nothing for Pennsylvanians. Local plaintiffs may already invoke *specific* jurisdiction to sue foreign corporations in Pennsylvania state court for harms they cause within the Commonwealth. Blanket consent by registration

only discourages foreign corporations from participating in Pennsylvania's economy.

I. "Consent" by registration results in nationwide general jurisdiction, contrary to *Daimler*.

Treating mandatory registration as consent to general personal jurisdiction effectively negates the jurisdictional limits articulated in *Daimler*. The Supreme Court made clear that the Constitution permits general jurisdiction over a corporation only where it is "at home." 571 U.S. at 138-39. "Accordingly, the inquiry ... is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'" *Id.* at 138-39 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Absent exceptional circumstances (such as relocation of a company's manager during war, *see id.* at 129-30, 139 n.19), a corporation is at home only in its state of incorporation and principal place of business. *Id.* at 137. "Those affiliations have the virtue of being unique – that is, each ordinarily indicates

only one place – as well as easily ascertainable. ... These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.” *Id.* Because Pennsylvania’s jurisdictional statute violates this restriction, it is unconstitutional as applied to obtain general jurisdiction over foreign corporations.

The panel distinguished *Daimler* because it did not involve general jurisdiction by consent. (Panel Op. at 10); *see also Webb-Benjamin, LLC v. International Rug Group, LLC*, 192 A.3d 1133, 1138 (Pa. Super. 2018) (similarly distinguishing *Daimler*). To be sure, *Daimler* did not disturb the principle that personal jurisdiction may rest on *genuine* consent. For example, a party may waive jurisdictional objections by appearing in court anyway, or it may agree to a forum-selection clause. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972).

But treating mandatory registration as consent would end-run *Daimler*, even if it did not expressly discuss consent. Since every state requires foreign corporations to register in

order to do business there, consent by registration is incompatible with *Daimler* because it still leads to general jurisdiction in every state where a corporation does business. *See Genuine Parts Co. v. Cepec*, 137 A.3d 123, 143 (Del. 2016). The Supreme Court rejected that possibility, declaring it “unacceptably grasping” to hold that every state where a corporation “engages in a substantial, continuous, and systematic course of business” has general jurisdiction. *Daimler*, 571 U.S. at 138. The Court explained that such an “exorbitant” exercise of personal jurisdiction is “barred by due process constraints on the assertion of adjudicatory authority.” *See id.* at 121.

It would be even more exorbitant to hold that general jurisdiction lies wherever a corporation does business (and therefore has to register). If registration were enough to confer general jurisdiction, then “*Daimler’s* ruling would be robbed of meaning by a back-door thief.” *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016); *see also, e.g., Keeley v. Pfizer, Inc.*, No. 4:15-cv-00583, 2015 WL 3999488, at *4 (E.D. Mo. July 1,

2015); *Chatwal Hotels & Resorts, LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015).

Consent by registration also violates *Daimler*'s theoretical underpinnings. Appellants rely on the Supreme Court's "hoary, but still valid" decision in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). (Appellant Supp. Br. at 3.) When the Supreme Court decided *Pennsylvania Fire Insurance*, a "strict territorial approach" to personal jurisdiction remained good law. See *Daimler*, 571 U.S. at 125-26 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Under *Pennoyer*, a state's courts had jurisdiction "no farther than the geographic bounds of the" state. *Id.* at 125. Thus, it was necessary to indulge the fiction that registration equaled presence in a state in order for a corporation to be sued there. See *Cepec*, 137 A.3d at 146.

That changed with *International Shoe*, which made "the relationship among the defendant, the forum, and the litigation ... the central concern of the inquiry into personal jurisdiction." *Daimler*, 571 U.S. at 126 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) and referencing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). The idea that registration alone justifies

personal jurisdiction "cannot be divorced from the outdated jurisprudential assumptions of [the pre-*International Shoe*] era" and "has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler*." *Brown*, 814 F.3d at 639; see also *Cepec*, 137 A.3d at 142 n.103.

Some courts have nonetheless held that even if registration does not generally equal consent to general personal jurisdiction, it does in Pennsylvania. See, e.g., *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 296-97 (M.D. Pa. 2018); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653-56 (E.D. Pa. 2016); *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 175-77 (D.N.J. 2016). These courts reason that Pennsylvania is unique because the jurisdictional consequence of registration is expressly stated in its statutes. Therefore, the argument goes, foreign corporations registered in Pennsylvania expressly consent to general jurisdiction here.

This theory of consent is wrong for two reasons. For starters, the relevant statute's language suggests that "qualification as a foreign corporation" is not "consent," because each is listed as a distinct basis for general jurisdiction.

See 42 Pa.C.S. § 5301(a)(2)(i), (ii). It would be superfluous to separately list “qualification as a foreign corporation” if it was just another form of “consent.” *See* 1 Pa.C.S. § 1922(2) (“[T]he General Assembly intends the entire statute to be effective and certain.”)

More importantly, consent by registration still undermines *Daimler* regardless of the statute’s wording. Consent by registration subjects foreign corporations to general jurisdiction in states where they are not at home, exceeding the limits of due process. Thus, businesses will face the same problems that the Supreme Court sought to ameliorate in *Daimler*.

Directly contrary to *Daimler*, consent by registration will result in nationwide general jurisdiction. Even if Pennsylvania’s statute is considered unique, other states could (and quite likely would) amend their statutes to mirror it. “Human experience shows that ‘grasping’ behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good.” *Cepec*, 137 A.3d at 143. Thus, “[t]he fact that some [states] may choose not to assert registration-based

general jurisdiction does not provide a basis for concluding that a corporation actually has a legitimate choice in the matter” in those states that do. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 *Cardozo L. Rev.* 1343, 1390 (2015).

II. Coerced consent by registration is invalid and violates the unconstitutional conditions doctrine.

Because it is involuntary, consent by registration as a foreign corporation is neither valid nor constitutional. Under Pennsylvania law, “a foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department [of State].” 15 Pa.C.S. § 411(a). The penalty for not filing is that the unregistered business “may not maintain an action or proceeding in this Commonwealth.” 15 Pa.C.S. § 411(b).

That presents a foreign business with a false choice – either “consent” to general jurisdiction or completely forego doing business in the Commonwealth. “Extorted actual consent and equally unwilling implied consent are not the stuff of due process.” *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882 (S.D. Tex. 1993) (quotation marks omitted). Instead, consent by

registration is more like signing a contract under duress, or agreeing to a contract of adhesion. *See Monestier, supra*, at 1391. Like a party acting under duress, “there are no good [choices], only less bad ones.” *Id.* And, as Judge Bowes noted in dissent, many corporations may not even be aware of the jurisdictional consequences of their registration. (*See Dissening Op.*, attached as **Appendix B**, at 15.)

Coerced consent is not only invalid, it is also unconstitutional when made a condition of a registrant’s right to do business. The unconstitutional conditions doctrine bars a state from “requir[ing] [a] corporation, 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.*, 570 U.S. 595, 607 (2013) (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)). For example, the Supreme Court has held that a state’s “vain” enactment of a law that barred a company from exercising its right of removing a suit to federal court in exchange for the privilege of doing business in the state was “unconstitutional and void.” *Denton*, 146 U.S. at 207.

Similarly, in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 894 (1988), the Supreme Court relied on its dormant Commerce Clause jurisprudence to invalidate an Ohio statute that gave nonresident corporations the choice between being subject to general jurisdiction in the state by appointing an in-state agent for service of process or being subject to a tolling of the statute of limitations on claims against them. *See also Davis v. Farmers' Co-Op Equity Co.*, 262 U.S. 312 (1923) (holding that statute providing for service on registered agent of foreign common carrier violated Commerce Clause).

Amicus curiae the Pennsylvania Association for Justice (“PAJ”) insists that “Pennsylvania’s statutory scheme is not actually coercive” and that “[t]here is no enforcement mechanism.” (PAJ Br. at 5, 7.) Instead, PFA suggests that businesses merely face a “business decision” about whether to register “based on the importance they attach to being able to file a lawsuit involving issues beyond debt collection or enforcing mortgages or security interests.” (PAJ Br. at 8.) But that is the same type of false choice that the Supreme Court held was unconstitutional in *Denton* and *Bendix*: an out-of-state

corporation must either surrender its federal due process right to avoid general personal jurisdiction in states other than its state of incorporation and principal place of business, or else give up other legal rights.

III. Consent by registration is bad policy for the Commonwealth's employees and consumers.

It is bad policy to coerce foreign businesses into consenting to personal jurisdiction. The due process limits on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). A corporation's place of incorporation and principal place of business – the jurisdictions in which it is subject to general jurisdiction under *Daimler* – "have the virtue of being unique." *Daimler*, 571 U.S. at 137. "[T]hat is, each ordinarily indicates only one place" – a forum that is "easily ascertainable." *Id.* *Daimler's* rule thus allows corporations to anticipate that they will be subject to general jurisdiction in

only a few (usually one or two) well-defined jurisdictions. This “[p]redictability is valuable to corporations making business and investment decisions.” *Hertz Corp. v Friend*, 559 U.S. 77, 94 (2010).

The approach to general jurisdiction embodied in Section 5301(a)(2)(i) undermines that predictability, making it impossible for corporations to structure their affairs to limit the number of jurisdictions in which they can be haled into court on any claim by any plaintiff residing anywhere. Many corporations do some amount of business in a large number of states; thus, if merely qualifying to do business in a forum were deemed sufficient to give rise to general jurisdiction, a corporation could be sued throughout the country on claims arising anywhere.

Further, Pennsylvania has little interest in subjecting foreign corporations to *general* jurisdiction in its courts. We no longer “live in a time when states have no effective bases to hold foreign corporations accountable for their activities within their borders.” *Cepac*, 137 A.3d at 137. Foreign corporations may already be sued in Pennsylvania in connection with injuries that

they cause within Pennsylvania on the basis of *specific* jurisdiction. Pennsylvania does not benefit from allowing out-of-state corporations to be sued in its already congested courts for causes of action that have no connection to Pennsylvania. Consent by registration will only encourage the type of forum shopping that *Daimler* intended to end. *See Monestier, supra*, at 1409-10 (citing *Reynolds & Reynolds Holdings, Inc. v. Data Supplies, Inc.*, 301 F. Supp. 2d 545, 551 (E.D. Va. 2004)).

Some businesses may decide to run the risk of doing business in Pennsylvania without being registered to do so in order to avoid the greater risk of facing costly and unpredictable litigation in a forum that may be distant from their operations. But that just illustrates “the perverse result of subjecting foreign corporations that lawfully do business in [Pennsylvania] to an overreaching consequence – general jurisdiction – that does not apply to foreign corporations that do business in [Pennsylvania] without properly registering and are only subject to specific jurisdiction in [Pennsylvania].” *Cepec*, 137 A.3d at 140.

Finally, many businesses – particularly smaller businesses located far from Pennsylvania – might reasonably decide to forego doing business in Pennsylvania entirely, rather than be subject to suit here in connection with their actions anywhere in the world. “Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in [Pennsylvania], they rightly may choose not to do so.” *Cepac*, 137 A.3d at 142.

CONCLUSION

This Court should hold that registration as a foreign corporation does not constitute a basis for general personal jurisdiction in Pennsylvania and that 42 Pa.C.S. § 5301(a)(2)(i) is unconstitutional as applied to obtain general jurisdiction over foreign corporations, and it should affirm the trial court’s order.

Respectfully submitted,

/s/ Robert L. Byer

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March 4, 2019

CERTIFICATION OF WORD COUNT

I certify that this brief is 2,791 words long and therefore complies with the limitation stated in Pa.R.A.P. 531(b)(3).

March 4, 2019

/s/ Robert L. Byer

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

March 4, 2019

/s/ Robert L. Byer

APPENDIX A

Panel Opinion in *Murray v. American LaFrance*, No. 2105 EDA 2016,
2018 PA Super 267 (Pa. Super. Sept. 25, 2018)

KENNETH MURRAY, ROBERT SCHNALL,
MICHAEL SCOTT, JOHN SENESE, JOHN
: SHURINA, JOHN SIGNORILE, KEVIN
SOKOL, ANTHONY TRICARICO, FRANK
VENTRELLA, JOSEPH VITALE, PATRICK
VOGT, HENRY WHITE, WILLIAM WHITE,
THOMAS WOSKA AND WILLIAM
YOUNGSON,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION,

Appellees

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 2105 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 02536

ANDREW BURNS, DOUGLAS
KALBACHER, MICHAEL KOZAK, KEVIN
KUBLER, JAMES LEMONDA, JOSEPH
LOCHER, PATRICK LYONS, JOHN P.
MALLEY, JOE MASTERSON, BRIAN
MCDADE, KEVIN MCENERY, WILLIAM
MONTEVERDE, VINCENT MOSCA,
GERARD MURTHA, KEITH PALUMBO,
JOEL PATTI, RICHARD PEITLER, DONALD
REILLY, MARIO ROSATO, ROBERT RYAN
AND FRANCIS TRAPANI,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

Appellee

No. 2106 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 02494

MIGUEL MORENO, NEIL MULLINS, JOHN
NEVOLA, ROBERT O'FLAHERTY, JAMES
O'ROURKE, MICHAEL PAGLIUCA,
SAMUEL PANASCI, RONALD PATTILIO,
JOEL PERECA, DANIEL PERITORE,
VINCENT PINTO, CHRISTOPHER RAMOS,
ROBERT REICH, ROCCO RINALDI, JAMES
RUSSO, GREGORY SALONE, JAMES
SAVARESE, WILLIAM SCHEU, KENNETH
SMITH, JOHN SULLIVAN AND WARREN
TERRY,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION,

Appellees

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 2107 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 02522

MICHAEL FELDMAN, RONALD FERRANTE,
CHARLES FEYH, DONALD FLORE, JOHN
FORTUNATO, FRANK GACCIONE,
ROBERT GLEISSNER, JAMES HELFRICH,
FRANK INGOGLIA, ROBERT LABATTO,
JOHN LILLIS, THOMAS LYONS, EUGENE

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

MAHLSTED, JAMES MASONE, EDWARD
MAURO, SEAN MCCOYD, JOHN
MCGONIGLE, EUGENE MCGOWAN, JR.,
JOHN MCLAUGHLIN, ERIC MICHELSEN
, AND PAUL MILLER,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

Appellee

No. 2108 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 02514

RICHARD BARBARISE, JAMES
BERGHORN, STEVEN BERNIUS,
VASILIOS CHRISTODOULOU, GAETANO
DIMAURO, JOHN FLYNN, WILLIAM
GRAHAM, PETER GUNTHER, THOMAS
LORELLO, JAMES MANGRACINA,
NORMAN MARSTON, JOSEPH MAURER,
ROBERT MCGUIRE, ROBERT MOCCIA,
JOHN MORABITO, WILLIAM MUNDY,
STANLEY PEACOCK, SALVATORE
ROSINA, DONALD RUDDEN, THOMAS
SCALLY, ROBERT SCHULTZ, PATRICK
SCHWEIGER, RICHARD SCOTT, FRANK
SFORZA, PATRICK SHANNON, EDMUND
SULLLIVAN, FREDERICK SUTTON,
FRANCIS ULMER, RICHARD
WALIGOVSKA, PAUL WEIS, JUSTIN
WERNER AND RUDY WICKLEIN,

Appellants

v.

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

Appellee

No. 2109 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: December Term, 2015 No. 000187

ROOSEVELT ADAMS, ANTHONY ASARO,
EUGENE BIANCONE, SALVATORE
BONGIOVANNI, STEPHEN BROWN,
MICHAEL CAIN, ROBERT CANZONERI,
MICHAEL CARLIN, RAYMOND CLANCY,
CASEY COLWELL, ROBERT CONDON,
CHRISTIAN CORBIN, THOMAS
COURTENAY, DANIEL COYLE, RAYMOND
CREEDE, AUSTIN CSORNY, FRANK
DEANGELO, PATRICK DIMICHELE, JOHN
DRISCOLL AND KENNETH ERB,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

Appellee

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 2110 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 002490

RICHARD ABBOTT, VINCENT ANZELONE,
RICHARD BURBAN, DANIEL BUTLER,
EDWARD CACHIA, VICTOR CARLUCCI,
JOSEPH CLERICI, DERMOTT CLOWE,
FRED CORTESE, ANTHONY CUMMO,
STEVEN FERRARO, ROCCO FERTOLI,

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

DAVID FISCHBEIN, CHARLES FORTIN,
STEVEN GRECO, GARY HOEHING,
WILLIAM HOPKINS, GREGORY HORAN,
SCOTT HUMMEL, JOSEPH INGRISANI
AND RONALD PATTILIO,

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

Appellee

No. 2111 EDA 2016

Appeal from the Order May 25, 2016
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: November Term, 2015 No. 002492

BEFORE: BOWES, J., LAZARUS, J., and PLATT, J.*

OPINION BY PLATT, J.:

FILED SEPTEMBER 25, 2018

Appellants, Kenneth Murray, et al., Andrew Burns, et al., Miguel Moreno, et al., Michael Feldman, et al., Richard Barbarise, et al., Roosevelt Adams, et al., and Richard Abbott, et al.,¹ appeal from the trial court's May 25, 2016 orders sustaining the preliminary objections of Appellee, Federal Signal Corporation, and dismissing Appellants' complaints² for lack of personal jurisdiction. Specifically, Appellants claim that Appellee consented to

* Retired Senior Judge assigned to the Superior Court.

¹ We have listed the names of all plaintiffs in the caption for each of these consolidated cases. We only list the name of the lead plaintiff here for brevity.

² Appellants' seven cases were consolidated by this Court on March 13, 2017.

jurisdiction in Pennsylvania when it registered as a foreign corporation. We are constrained to agree, thus we vacate the May 25, 2016 orders and remand these cases to the trial court.

We take the relevant factual and procedural history of these cases from our review of the certified records. Appellants filed complaints alleging that they suffered hearing loss as a result of excessive sound exposure from fire engine sirens while working for the New York Fire Department. Specifically, they asserted claims of strict liability and negligence against Appellee, a manufacturer of sirens for use in fire apparatus.

On March 4, 2016, Appellee filed preliminary objections to Appellants' complaints, arguing that the court lacked personal jurisdiction over it because: its principal place of business is in Illinois; it does not have corporate offices in Pennsylvania; it is not a Pennsylvania domestic company; it does not own or lease real property in Pennsylvania; it does not have bank accounts in Pennsylvania; it does not design or manufacture any products in Pennsylvania; and its contacts with Pennsylvania are minimal. (**See** Brief in Support of Preliminary Objections, 3/04/16, at 2). On May 25, 2016, the trial court, concluding that Appellee was not "at home" in Pennsylvania, sustained its preliminary objections and dismissed all claims against it. (**See** Orders, 5/25/16; Trial Court Opinion, 10/25/16, at 4). This timely appeal followed.³

³ The trial court did not order Appellants to file a concise statement of errors complained of on appeal. It entered its opinion on October 25, 2016. **See** Pa.R.A.P. 1925.

Appellants raise one issue on appeal: “Whether the [t]rial [c]ourt made an error of law in sustaining []Appellee’s [p]reliminary [o]bjections and dismissing the action based on lack of personal jurisdiction[?]” (Appellants’ Brief, at 4).

Preliminarily, we must address Appellee’s assertion that Appellants waived this issue by failing to argue before the trial court, in response to preliminary objections, that personal jurisdiction is proper based on a statute or consent. (**See** Appellee’s Brief, at 5-10).⁴ Specifically, Appellee maintains that Appellants argued only that jurisdiction was proper because of continuous and systematic contacts, **see** 42 Pa.C.S.A. § 5301(a)(2)(iii), before the trial court; thus, they waived any claim of jurisdiction based on either registration as a foreign corporation, **see id.** at § 5301(a)(2)(i), or consent, **see id.** at § 5301(a)(2)(ii). We disagree.

Although under Pennsylvania Rule of Appellate Procedure 302(a) issues not raised below are waived, our Supreme Court has held that “[t]here is no requirement in the Rules of Civil Procedure that the non-moving party respond to a preliminary objection, nor must that party defend claims asserted in the complaint. Failure to respond does not sustain the moving party’s objections by default, nor does it waive or abandon the claim.” **Uniontown Newspapers, Inc. v. Roberts**, 576 Pa. 231, 839 A.2d 185, 190 (2003). . . .

Dixon v. Nw. Mut., 146 A.3d 780, 783–84 (Pa. Super. 2016). Here, Appellee filed the preliminary objections, thus Appellants were the non-moving party. Accordingly, they did not waive their personal jurisdiction claim by failing to

⁴ Appellants did not address Appellee’s waiver argument in their reply brief.

argue before the trial court that jurisdiction was proper under sections 5301(a)(2)(i) or (ii). **See id.** Therefore, we turn to the merits of Appellants' claim that the trial court erred when it sustained the preliminary objections.

Our standard of review of a trial court's order sustaining preliminary objections is well-settled.

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt, and this Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or an abuse of discretion.

Haas v. Four Seasons Campground, Inc., 952 A.2d 688, 691 (Pa. Super. 2008) (citations omitted). Moreover,

when deciding a motion to dismiss for lack of personal jurisdiction[,], the court must consider the evidence in the light most favorable to the non-moving party. This Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or an abuse of discretion. Once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.

Schiavone v. Aveta, 41 A.3d 861, 865 (Pa. Super. 2012)[, affirmed, 91 A.3d 1235 (Pa. 2014)] (citation omitted).

Sulkava v. Glaston Finland Oy, 54 A.3d 884, 889 (Pa. Super. 2012), *appeal denied*, 75 A.3d 1282 (Pa. 2013).

In their issue, Appellants claim that the trial court erred when it sustained Appellee's preliminary objections for lack of personal jurisdiction. (**See** Appellants' Brief, at 11-15). Specifically, they argue that Appellee's registration as a foreign corporation in Pennsylvania under 42 Pa.C.S.A. § 5301(a)(2) constitutes consent to general personal jurisdiction in Pennsylvania. (**See id.**). We agree.

"For Pennsylvania courts to acquire general personal jurisdiction over foreign corporations, one of the following must apply: the business must have been incorporated in Pennsylvania, must consent to the exercise of jurisdiction, or must carry on a continuous and systematic part of its general business in the Commonwealth." ***Moyer v. Teledyne Cont'l Motors, Inc.***, 979 A.2d 336, 349 (Pa. Super. 2009), *affirmed*, 28 A.3d 867 (Pa. 2011) (citation and quotation marks omitted). Pennsylvania's general personal jurisdiction statute provides:

(a) General rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

* * *

(2) Corporations.—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

* * *

42 Pa.C.S.A. § 5301(a)(2)(i)-(iii).

In ***Daimler AG v. Bauman***, 134 S. Ct. 746 (2014), the Supreme Court of the United States considered the issue of general personal jurisdiction over a foreign corporation.⁵ It held that due process did not permit exercise of general personal jurisdiction over a corporation in a state where that corporation was not “at home.” ***Daimler, supra*** at 762. ***Daimler*** did not discuss consent to general jurisdiction based on business registration laws.

We observe that whether a foreign corporation consents to general personal jurisdiction in Pennsylvania by registering to do business in the Commonwealth is a matter of first impression in this Court. Our review of the caselaw has revealed that neither this Court nor our Supreme Court has had the occasion to determine whether, post-***Daimler***, registering to do business as a foreign corporation in the Commonwealth constitutes consent for the purposes of exercising general personal jurisdiction. However, ***Bors v.***

⁵ Specifically, it considered whether the Due Process Clause precluded the court from exercising jurisdiction over Daimler in a complaint wherein Argentinian residents brought suit against Daimler in California arguing that the Argentinian Daimler subsidiary was complicit with government atrocities in Argentina’s Dirty War. ***See Daimler, supra*** at 750-51.

Johnson & Johnson, 208 F. Supp. 3d 648 (E.D. Pa. 2016), provides a persuasive, well-reasoned analysis and we cite it with approval.⁶

In **Bors, supra**, the district court considered whether **Bane v. Netlink, Inc.**, 925 F.2d 637 (3d Cir. 1991),⁷ remained good law or whether **Daimler** eliminated consent by registration under section 5301 as a basis for jurisdiction. **See Bors, supra** at 653-54. The **Bors** court reasoned that “Pennsylvania’s statute specifically advises the registrant of the jurisdictional effect of registering to do business[,]” and concluded that “[c]onsent remains a valid form of establishing personal jurisdiction under the Pennsylvania registration statute after **Daimler.**” **Id.** at 655; **see also Hegna v. Smitty’s Supply, Inc.**, 2017 WL 2563231, at *4 (E.D. Pa. filed June 13, 2017) (“conclud[ing] that, by registering to do business under § 5301, Smitty’s consented to general personal jurisdiction in Pennsylvania and that its consent is still valid under **Goodyear [Dunlop Tires Operations, S.A. v. Brown,** 564 U.S. 915 (2011),] and **Daimler.**”).

⁶ Although this Court is not bound by the decisions of federal courts, we may look to them for guidance to the degree we find useful. **See Krentz v. Consol. Rail Corp.**, 910 A.2d 20, 37 (Pa. 2006); **Eckman v. Erie Ins. Exch.**, 21 A.3d 1203, 1207 (Pa. Super. 2011).

⁷ In **Bane**, the Third Circuit Court of Appeals considered whether it had jurisdiction over a foreign corporation based solely on the fact that it registered as a foreign corporation and obtained authorization to conduct business in Pennsylvania. **See Bane, supra** at 638-39. The court held that “such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts.” **Id.** at 640.

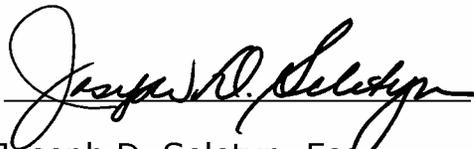
In this case, Appellee registered as a foreign corporation to do business in Pennsylvania. (**See** Preliminary Objections, Exhibit B, at 1). In doing so, we hold that it consented to general personal jurisdiction in Pennsylvania. **See Sulkava, supra** at 889; **Bors, supra** at 655; **see also Bane, supra** at 640. Therefore, based on the relevant caselaw, and the language of section 5301(a), we conclude that the trial court erred when it dismissed these actions for lack of personal jurisdiction.⁸ Accordingly, we vacate the orders sustaining the preliminary objections, and remand these cases to the trial court.

Orders vacated, cases remanded, jurisdiction relinquished.

Judge Lazarus joins the Opinion.

Judge Bowes files a Dissenting Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/25/2018

⁸ Because we hold that Appellee consented to jurisdiction, we decline to consider whether general jurisdiction would have existed based on its continuous and systematic contacts with the Commonwealth.

APPENDIX B

Dissenting Opinion in *Murray v. American LaFrance*, No. 2105 EDA 2016,
2018 PA Super 267 (Pa. Super. Sept. 25, 2018)

KENNETH MURRAY, ROBERT	:	IN THE SUPERIOR COURT OF
SCHNALL, MICHAEL SCOTT, JOHN	:	PENNSYLVANIA
SENESE, JOHN SHURINA, JOHN	:	
SIGNORILE, KEVIN SOKOL,	:	
ANTHONY TRICARICO, FRANK	:	
VENTRELLA, JOSPH VITALE, PATRICK	:	
VOGT, HENRY WHITE, WILLIAM	:	
WHITE, THOMAS WOSKA AND	:	
WILLIAM YOUNGSON,	:	No. 2105 EDA 2016

Appellants

v.

AMERICAN LAFRANCE, LLC AND	:
FEDERAL SIGNAL CORPORATION	:

Appeal from the Order May 25, 2016
 In the Court of Common Pleas of Philadelphia County Civil Division at
 No(s): November Term, 2015 No. 02536

ANDREW BURNS, DOUGLAS	:	IN THE SUPERIOR COURT OF
KALBACHER, MICHAEL KOZAK,	:	PENNSYLVANIA
KEVIN KUBLER, JAMES LEMONDA,	:	
JOSEPH LOCHER, PATRICK LYONS,	:	
JOHN P. MALLEY, JOE	:	
MASTERSON, BRIAN MCDADE,	:	
KEVIN MCENERY, WILLIAM	:	
MONTEVERDE, VINCENT MOSCA,	:	
GERARD MURTHA, KEITH	:	No. 2106 EDA 2016
PALUMBO, JOEL PATTI, RICHARD	:	
PEITLER, DONALD REILLY, MARIO	:	
ROSATO, ROBERT RYAN AND	:	
FRANCIS TRAPANI	:	

Appellants

v.

JOHN MCGONIGLE, EUGENE
MCGOWAN, JR., JOHN MCLAUGHLIN,
ERIC MICHELSEN AND PAUL MILLER

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORP.

Appeal from the Order May 25, 2016

In the Court of Common Pleas of Philadelphia County Civil Division at

No(s): November Term, 2015 No. 02514

RICHARD BARBARISE, JAMES
BERGHORN, STEVEN BERNIUS,
VASILIOS CHRISTODOULOU,
GAETANO DIMAURO, JOHN FLYNN,
WILLIAM GRAHAM, PETER
GUNTHER, THOMAS LORELLO, JAMES
MANGRACINA, NORMAN MARSTON,
JOSEPH MAURER, ROBER MCGUIRE,
ROBERT MOCCIA, JOHN MORABITO
WILLIAM MUNDY, STANLEY
PEACOCK, SALVATORE ROSINA,
DONALD RUDDEN, THOMAS SCALLY,
ROBERT SCHULTZ, PATRICK
SCHWEIGER, RICHARD SCOTT,
FRANK SFORZA, PATRICK SHANNON,
EDMUND SULLIVAN, FREDERICK
SUTTON, FRANCIS ULMER, RICHARD
WALIGOVSKA, PAUL WEIS, JUSTIN
WERNER AND RUDY WICKLEIN

Appellants

v.

AMERICAN LAFRANCE, LLC AND
FEDERAL SIGNAL CORPORATION

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2109 EDA 2016

Appeal from the Order May 25, 2016
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): December Term, 2015 No. 000187

ROOSEVELT ADAMS, ANTHONY : IN THE SUPERIOR COURT OF
ASARO, EUGENE BIANCONE, : PENNSYLVANIA
SALVATORE BONGIOVANNI, :
STEPHEN BROWN, MICHAEL CAIN, :
ROBERT CANZONERI, MICHAEL :
CARLIN, RAYMOND CLANCY, CASEY :
COLWELL, ROBERT CONDON, :
CHRISTIAN CORBIN, THOMAS :
COURTENAY, DANIEL COYLE, : No. 2110 EDA 2016
RAYMOND CREEDE, AUSTIN :
CSORNY, FRANK DEANGELO, :
PATRICK DIMICHELE, JOHN :
DRISCOLL AND KENNETH ERB :

Appellants

v.

AMERICAN LAFRANCE, LLC AND :
FEDERAL SIGNAL CORPORATION :

Appeal from the Order May 25, 2016
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): November Term, 2015 No. 002490

RICHARD ABBOTT, VINCENT : IN THE SUPERIOR COURT OF
ANZELONE, RICHARD BURBAN, : PENNSYLVANIA
DANIEL BUTLER, EDWARD CACHIA, :
VICTOR CARLUCCI, JOSEPH CLERICI, :
DERMOTT CLOWE, FRED CORTESE, :
ANTHONY CUMMO, STEVEN :
FERRARO, ROCCO FERTOLI, DAVID :
FISCHBEIN, CHARLES FORTIN, :
STEVEN GRECO, GARY HOEHING, : No. 2111 EDA 2016
WILLIAM HOPKINS, GREGORY :
HORAN, SCOTT HUMMEL, JOSEPH :
INGRISANI AND RONALD PATTILIO :

Appellants	:
	:
	:
v.	:
	:
	:
AMERICAN LAFRANCE, LLC AND	:
FEDERAL SIGNAL CORPORATION	:

Appeal from the Order May 25, 2016
 In the Court of Common Pleas of Philadelphia County Civil Division at
 No(s): November Term, 2015 No. 002492

BEFORE: BOWES, J., LAZARUS, J., and PLATT*, J.

DISSENTING OPINION BY BOWES, J. **FILED SEPTEMBER 25, 2018**

I respectfully dissent. This case does not involve Pennsylvania in any meaningful way. Appellants, who comprise several plaintiffs from Massachusetts, New York, and Florida, sued Federal Signal Corporation (“Appellee”), a Delaware company with its principal place of business in Illinois, for injuries that allegedly occurred in New York. Appellants’ pleading failed to establish the grounds for Pennsylvania to exercise personal jurisdiction over the out-of-state Appellee. Therefore, I believe that the trial court properly sustained Appellee’s preliminary objection to the complaint and dismissed the claims against it for lack of personal jurisdiction.¹

¹ Appellants initially sued six different companies; however, the claims against all of the defendants except Appellee were either dismissed with prejudice or withdrawn.

* Retired Senior Judge assigned to the Superior Court.

First, as Appellants neglected to assert in the trial court the particular ground for personal jurisdiction that it now raises on appeal, the current argument is waived. Thus, unlike my learned colleagues, I would not address Appellants' fresh claim that Pennsylvania has general personal jurisdiction over Appellee due exclusively to its 1969 registration with the Pennsylvania Department of State as a foreign corporation pursuant to 15 Pa.C.S. § 411(a). Second, to the extent that this issue could be construed as being properly before us notwithstanding Appellants' defective pleading and failure to raise it below, for the reasons I explain *infra*, this claim fails due to the fact that the section of the long-arm statute² that is the lynchpin of Appellants' argument did not exist when Appellee registered as a foreign corporation. Accordingly, Appellee cannot be deemed to have consented to general personal jurisdiction.

In addition to expounding upon the foregoing reasons for my dissent, I write independently to highlight the incompatibility of the jurisdiction-by-registration construct where, as here, Pennsylvania has absolutely no connection to either party or the cause of action. I concede that jurisdiction via registration was affixed to our jurisprudence following this Court's recent holding in ***Webb-Benjamin, LLC v. International Rug Group***, ___ A.3d ___, 2018 PA Super 187 (filed June 28, 2018), which adopted the consent analysis first proffered by the Third Circuit Court of Appeals in ***Bane v. Netlink, Inc.***,

² 42 Pa.C.S. § 5301(a)(2)(i), defined *infra*.

925 F.2d 637 (3d Cir. 1991), and reiterated by a Pennsylvania district court in ***Bors v. Johnson & Johnson***, 208 F.Supp.3d 648 (E.D. Pa. 2016). However, I believe that the present case underscores the conceptual flaw in perpetuating a legal fiction that blindly equates the administrative act of registration as a foreign corporation with express consent to general personal jurisdiction.

Stated plainly, I believe that the federal jurisprudence underpinning the ***Webb-Benjamin*** Court's decision is flawed. The core principle therein, that registration is tantamount to consent to personal jurisdiction, is incongruous with the fundamental aspect of due process that our Supreme Court first highlighted in ***International Shoe Co. v. Washington***, 326 U.S. 310, 319 (1945), *i.e.*, protecting an individual's liberty interest against being subjected to binding judgments in a foreign forum with no meaningful relationship. In my view, our current jurisprudence, which founds general personal jurisdiction upon a foreign corporation's compliance with a mandatory registration requirement, falls short of this constitutional threshold.

Principally, I believe that Appellants' current argument is waived pursuant to Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). I reject the majority's explanation for excusing Appellants' failure to assert this novel basis for personal jurisdiction at any point before the trial court dismissed their complaint. In overlooking Appellants' omission below, the majority elected to

frame the issue in relation to Appellee's preliminary objections. Essentially, it reasoned that since Appellee was the moving party, Appellants were not required to proffer any response to Appellee's preliminary objections. **See** Majority Opinion at 7-8 (citing ***Dixon v. Northwestern Mutual***, 146 A.3d 780 (Pa.Super. 2016)) (regarding a nonmoving party's ability to challenge on appeal the basis for sustaining a preliminary objections in the nature of a demurrer). The majority's statement of the law is accurate as it relates to the parties' respective burdens during preliminary objections. However, its abridged analysis is incomplete insofar as that rationale ignores the controlling question regarding Appellants' obligation to plead a proper basis for Pennsylvania to exercise personal jurisdiction over the foreign corporation, which they inarguably failed to do.

Significantly, neither ***Dixon*** nor the case that this Court cited in support of its holding therein, ***Uniontown Newspapers, Inc. v. Roberts***, 839 A.2d 185, 190 (Pa. 2003) (overruling the Commonwealth Court order entered in original jurisdiction action that sustained preliminary objection in the nature of a demurrer), addressed Rule 302(a) waiver in relation to personal jurisdiction. ***Dixon*** concerned the waiver of an argument challenging a demurrer to potentially incompatible causes of action in a civil complaint. Therein, we reiterated our High Court's ensconced holding in ***Uniontown Newspapers*** that the non-moving party to preliminary objections is not required to defend the legal sufficiency of the claims actually raised in the

complaint. We continued, “as long as a plaintiff asserts in a complaint a cause of action, the plaintiff may assert any legal basis on appeal why sustaining preliminary objections in the nature of a demurrer was improper.” *Id.* at 784. I believe that the above-cited principle is inapplicable where, as here, the issues relate to a trial court’s fundamental authority to enter judgment against a defendant, as opposed to a demurrer or the legal sufficiency of a pleading that is at least facially compliant.

As we explained in *Sulkava v. Glaston Finland Oy*, 54 A.3d 884 (Pa. Super. 2012), when addressing a challenge to personal jurisdiction, the trial court considers the evidence in the light most favorable to the non-moving party. However, “[o]nce the moving party supports its objections to personal jurisdiction, **the burden of proving personal jurisdiction is upon the party asserting it.**” *Id.* at 889 (emphasis added); *see also Webb-Benjamin, supra* at *2 (same). Thus, the non-waiver principles discussed in *Dixon* and *Uniontown Newspapers* are inapposite. Stated another way, regardless of whether Appellants were compelled to respond to Appellee’s preliminary objection, once Appellee supported its objection to the Pennsylvania court’s personal jurisdiction over it as an out-of-state defendant, the burden shifted to Appellants to prove otherwise. The consequence of Appellants’ failure to satisfy **their** burden of proving this Commonwealth’s personal jurisdiction was the dismissal of their claim. Hence, in this context,

the majority's invocation of **Dixon** and **Uniontown Newspapers** is unavailing.

Presently, Appellants' pleadings asserted jurisdiction based upon Appellee's alleged continuous and systematic contacts with Pennsylvania. However, as the trial court accurately determined, those contacts simply do not exist. As Appellants failed to assert any valid grounds for Pennsylvania to exercise personal jurisdiction over Appellee, including the grounds Appellants seek to assert for the first time on appeal, the trial court properly dismissed the claims against Appellee. Having failed to establish personal jurisdiction below, I believe that Rule 302(a) prohibits Appellants from attempting to assert for the first time on appeal an alternative basis for the court to invoke jurisdiction.

Moreover, assuming *arguendo* that **Dixon** did somehow shield Appellants from waiver, I believe that it is improper to manufacture general personal jurisdiction over an out-of-state corporation from a single, statutorily mandated, organizational document that was filed with the Commonwealth approximately forty-seven years ago. As I outlined *supra*, the exercise of general jurisdiction based solely on the mandatory registration to conduct business in a state treads perilously close to violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, rather than the wholesale adoption of the federal court's jurisprudence outlined in **Bors** and **Bane**, unquestioningly and without critical analysis, I would require

Appellants to adduce some evidence of contacts with Pennsylvania that comport with the due process requirements that the United States Supreme Court highlighted in ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462 (1985).

In ***Burger King***, the High Court explained that the Due Process Clause restricted a state's authority to exercise personal jurisdiction over non-resident defendants. ***Id.*** at 471-72. The Court emphasized that a state's personal jurisdiction over a foreign defendant is dependent upon "the nature and quality of the defendant's contacts with the forum state." ***Id.*** at 474. Accordingly, in the absence of some "meaningful contacts, ties or relations," the forum state cannot exercise general personal jurisdiction over a foreign defendant. ***Id.*** The High Court explained,

By requiring that individuals have 'fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign,' the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Id. at 472-73.

Thus, pursuant to those constitutional principles, a foreign company situated similarly to Appellee cannot be subjected to the personal jurisdiction of a forum state unless it has "fair warning that a particular activity" will expose it to jurisdiction. ***Id.*** at 473. In my view, the Pennsylvania registration requirement, which we now treat as now synonymous with "consent," fails to provide the requisite warning that our High Court envisioned as satisfying due process in ***Burger King***.

I begin with a primer on the relevant statutory framework. Section 411(a) of the Pennsylvania Associations Code (“Associations Code”), 15 Pa.C.S. §§ 101-419, requires a foreign corporation or limited liability company to register with the Pennsylvania Department of State prior to conducting business in the Commonwealth. Section 411 of the Associations Code provides, in pertinent part, as follows:

(a) Registration required.--Except as provided in section 401 (relating to application of chapter) or subsection (g), a foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department under this chapter.

. . . .

(e) Governing law not affected.--Section 402 (relating to governing law) applies even if a foreign association fails to register under this chapter.

15 Pa.C.S. § 411(a) and (e).

Notwithstanding the conclusions of our federal courts in *Bors*, and *Bane*, which I examine *infra*, foreign businesses do not expressly consent to personal jurisdiction in Pennsylvania during the registration process. Indeed, as referenced above, the pertinent sections of the Associations Code does not broach the subject of jurisdiction at all. At most, the Associations Code provides that a foreign corporation “shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed on domestic entities,

to the same extent as if it had been formed under this title.”³ 15 Pa.C.S. § 402. Clearly, that is not an expression of consent to the general personal jurisdiction by the Commonwealth for all cases regardless of the remoteness of that forum to any aspect of the lawsuit.

While the Associations Code does not impose personal jurisdiction upon foreign corporations as a consequence of registration, our version of a long-

³ Section 402(d) of the Associations Code governs the rights and responsibilities of foreign associations. That proviso states:

(d) Equal rights and privileges of registered foreign associations.--Except as otherwise provided by law, a registered foreign association, so long as its registration to do business is not terminated or canceled, shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed on domestic entities, to the same extent as if it had been formed under this title. A foreign insurance corporation shall be deemed a registered foreign association except as provided in subsection (e).

15 Pa.C.S. § 402(d).

While § 402(d) indicates that foreign corporation will be subject to the same liabilities, restrictions, duties and penalties as domestic corporations, these general references to corporate responsibilities do not spell out the jurisdictional consequences of registration. To the extent that the reasoning underlying *Bors* and *Bane* would extrapolate notice of consent to jurisdiction from the list of responsibilities enumerated in § 402(d), I highlight that § 402 purports to apply to foreign corporations regardless of actual registration. *See* 15 Pa.C.S. § 411(e). Thus, notwithstanding the express application of § 402(d) to non-registered foreign corporations, it would be illogical to purport to impute personal jurisdiction over a non-registered foreign corporation with no contacts to the Commonwealth. In my view, it is equally untenable to implicitly broaden the responsibilities in § 402(d) in relation to a foreign corporation with no contacts simply because it filed the state-mandated paperwork.

arm statute does. The long-arm statute, 42 Pa.C.S. §§ 5321-5329, which authorizes the exercise of personal jurisdiction to the fullest extent permitted under the Due Process Clause, is designed to further the Commonwealth's interest in providing its residents a forum to sue nonresidents for injuries caused by nonresidents. **See** § 5322(b) ("Exercise of full constitutional power over nonresidents"); ***Leonardo Da Vinci's Horse, Inc. v. O'Brien***, 761 F.Supp. 1222 (E.D. Pa. 1991). As it relates to the case at bar, § 5301(a)(2)(i) extends the Commonwealth's general personal jurisdiction over, *inter alia*, entities that "[qualify] as a foreign corporation under the laws of this Commonwealth." 42 Pa.C.S. § 5301(a)(2)(i). Specifically, that statute provides,

(a) General rule.--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

. . . .

(2) Corporations.—

(i) *Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.*

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S. § 5301(a)(2)(i)-(iii) (emphasis added).

The **Webb-Benjamin** Court relied upon the foregoing legislative structure, by way of the federal courts' analysis in **Bors**, to conclude that the foreign defendant consented to the trial court's exercise of personal jurisdiction simply by registering as a foreign business in compliance with § 411(a).⁴ The flaw with that rationale is that it is founded on an *ipso facto* formulation that equates mandatory registration with consent. From my perspective, classifying something as consent does not make it so. Indeed, as I previously highlighted, the Association Code does not address jurisdiction or consent at all. Thus, I disagree with my esteemed colleagues on the basic principle that complying with a mandated registration requirement in the Associations Act is tantamount to a statement of consent under an unrelated statute, which the registrant may not be aware exists because it is not referenced in the registration statute explicitly. I believe the High Court's articulation of due process in this context demands more.

⁴ Notwithstanding my reasoned objections to the **Webb-Benjamin** Court's indiscriminate endorsement of **Bors**, I agree that we are unquestionably bound by *stare decisis* to follow that precedent when applicable. Nevertheless, as noted in the body of my dissent, consent-by-registration does not apply to this case because the statutory predicate for that construct did not exist in 1969, when Appellee registered as a foreign corporation. I also highlight that the facts underlying **Webb-Benjamin** are distinguishable from the facts of the case at bar insofar as the plaintiff therein, Webb-Benjamin, was a Pennsylvania company who filed suit against a Connecticut company based upon breach of contract. Thus, in contrast to the instant scenario, that case validates the purpose of the long arm statute's extension of personal jurisdiction to a foreign corporation that is alleged to have injured a Pennsylvania company. That key dynamic is missing herein.

Read in *para materia*, the registration requirement in the Associations Code and the extension of personal jurisdiction over foreign registrants in the long-arm statute effectively snare foreign corporations and draw them into the Commonwealth's jurisdiction, presumably for the benefit of its residents. However, in a situation like the current case, where no nexus exists between the lawsuit and Commonwealth or its residents, the reason for extending jurisdiction remains unmet. In fact, rather than benefit a Pennsylvania resident, the present application of the jurisdiction-by-registration paradigm diverts the Commonwealth's resources to non-resident litigants and hinders the resolution of civil actions over which the Commonwealth has a legitimate interest in exercising jurisdiction. This result is indefensible.

Thus, rather than invoke the long-arm statute to subject foreign corporations with no connections with Pennsylvania to general jurisdiction based exclusively upon an administrative action, I would construe a foreign corporation's decision to register pursuant to § 411(a) as its acknowledgment that the Commonwealth may exercise personal jurisdiction over lawsuits that stem from the corporation's suit-related activities within the Commonwealth. Stated another way, the act of registration should be interpreted as conferring specific, as opposed to general, jurisdiction over a corporation in relation to its in-state activities. This narrow view of consent by registration corresponds with the rationale for exercising jurisdiction under the minimum contacts standard the High Court discussed in ***Daimler AG v. Bauman***, 134 S.Ct. 746

(2015), and it avoids the due process concerns that I believe proliferate in the federal courts' analyses in **Bane** and **Bors**.

Next, I summarize the development of the salient case law in order to explain my view that the absence of express notice in the Associations Code and the lack of a viable alternative for a foreign business to avoid "consent" undercut the notion that jurisdiction by registration satisfies the "fair warning" standard that our High Court articulated in **Burger King, supra** at 472-73 ("Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit") or the constitutional protections outline in **International Shoe, supra** at 319 (protection of liberty interest against being subjected to binding judgments in foreign forum with no meaningful relationship).

In **Bane**, the Third Circuit Court of Appeals confronted an issue similar to the case at bar and reversed the federal district court's order dismissing an age discrimination complaint filed in the Eastern District of Pennsylvania due to the lack of personal jurisdiction over the foreign defendant, Netlink, Inc. In rejecting the district court's analysis, the **Bane** Court held that under § 5301(a)(2)(i), the mere act of registration "carries with it consent to be sued in Pennsylvania courts." **Id.** at 640. The court reasoned that, by registering to do business in Pennsylvania, Netlink "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the

benefits and protections of its laws.” *Id.* (quoting *Burger King Corp., supra* at 475). Significantly, the *Bane* Court neglected to reference the actual registration requirements under the Associations Code—as that statute does **not** inform foreign corporations of the consequences of compliance. Instead, referencing only § 5301(a)(2)(i) of the long-arm statute, it concluded that Pennsylvania had general personal jurisdiction over Netlink. *Id.*

Subsequently, in *Daimler*, the U.S. Supreme Court honed its due process jurisprudence in the determination of whether a state has general personal jurisdiction based upon a non-resident’s contact with that forum. As the High Court framed the issue, “the inquiry . . . is not whether a foreign corporation’s in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation’s affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.” *Id.* at 139 (quotation marks omitted) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Thereafter, in *Bors*, a Pennsylvania federal district court invoked the *Bane* Court’s rationale in order to conclude that exercising jurisdiction over a registrant pursuant to § 5301(a)(2)(i) was not constitutionally infirm. Again, equating the registration requirement with consent, the *Bors* Court reasoned that, since consent remained a valid basis to invoke personal jurisdiction after *Daimler*, a foreign corporation cedes to jurisdiction “by registering to do

business under a statute which specifically advise the registrant of its consent by registration.” *Id.* at 655.

In ***Gorton v. Air & Liquid Systems Corp.***, 303 F.Supp.3d 278 (M.D. Pa. 2018), the federal district court drafted a comprehensive, in-depth analysis of the nuanced effect that ***Daimler*** has upon Pennsylvania jurisprudence. The ***Gorton*** Court highlighted that the majority of jurisdictions have interpreted the ***Daimler*** Court’s holding as a statement that mere compliance with a registration statute is not a sufficient basis to exercise personal jurisdiction over a foreign corporation. *Id.* at 296-97 (collecting cases). However, the ***Gorton*** Court acknowledged that, where the registration statute provides express notice of the consequences of registration, a foreign registrant consents to general jurisdiction. *Id.* Thus, imputing knowledge of § 5301 of Pennsylvania’s long-arm statute upon a registrant under the Associations Code, the ***Gorton*** Court concluded that the long-arm statute establishes consent. It stated, “Without the express language of section 5301 the court would not have a sufficient basis to conclude that the defendant knowingly and voluntarily consented to the general jurisdiction of Pennsylvania courts.” *Id.*

Most recently, in ***Webb-Benjamin***, this Court cited ***Bors*** and ***Gorton*** approvingly in a similarly-succinct adoption of the principle first articulated in ***Bane***, *i.e.*, that consent by registration is a valid basis to exercise personal jurisdiction. *See Webb-Benjamin, supra* at *4,*5. Specifically, the ***Webb-***

Benjamin Court concluded that the **Daimler** Court's holding did not eviscerate consent as a mechanism to obtain general personal jurisdiction. **Id.** at *5. Fundamentally, that statement is an accurate reiteration of established law. Importantly, however, the issue is not whether **Daimler** precludes jurisdiction by consent; clearly it does not. Rather, the problem posed by the application of § 5301(a)(2)(i) in the case at bar is whether consent that is coerced as a consequence of registration under a separate statute satisfies the due process concerns the United States Supreme Court highlighted in **International Shoe**. In my view, it does not. Stated more eloquently, "[c]oerced consent [is] an oxymoron [that] cannot legitimately form the basis . . . of general jurisdiction over a corporation." Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 *Cardozo L. Rev.* 1343, 1348 (2015).

Reduced to its irreducible minimum, jurisdiction-by-registration likens compliance with the § 411(a) registration mandate to an express waiver of due process. The calculus of the analysis is linear: "registration *equals* consent *equals* personal jurisdiction." Monestier, **supra** at 1379. As it is beyond cavil that a person may consent to personal jurisdiction, that side of the equation is unassailable. However, the foundational assumption of the opposing side of formula is that compulsory registration is a valid form of consent. It is not.

The fundamental fallacy with the principle of registration by consent is the idea that consent is traditionally considered volitional and deliberate, *i.e.*, it involves a choice to submit. Pursuant to the majority's view, as supported by our recent holding in ***Webb-Benjamin***, the mere act of complying with the mandated registration under § 411(a) of the Associations Code is tantamount to consent. However, as I have repeatedly highlighted, the Associations Code does not inform the registrant of the jurisdictional consequences of registration. Without providing notice of the consequences of completing the government issued form, the "consent" that the Commonwealth purportedly garners under § 411 is utterly devoid of the deliberate volition that is the hallmark of consent. In this scenario, the registrant blindly relinquishes its fundamental due process rights and is mechanically subjected to the general jurisdiction of a forum with which it has no specific relationship.

In my view, to satisfy the rigors of due process, a consent-through-registration scheme must demonstrate that a registrant understands, or at least has notice of, the jurisdictional consequences of registration. As one commenter framed this issue,

[The] absence of minimum contacts cannot be palliated by employing a consent theory. While the Supreme Court has pronounced that certain legal arrangements may actually constitute a consent to jurisdiction without regard to minimum contacts, the Court has also held that such consent is ineffective in the absence of notice. Thus, even assuming the somewhat doubtful proposition that a state may constitutionally exact consent from a nonresident corporation to suit for any and all

causes of action as a condition to registering to do business in the state, the nonresident would, at a constitutional minimum, have to be aware that its registration would result in its amenability to the state's plenary authority.

Charles W. Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, But "Specifically" Too Narrow Approach to Minimum Contacts*, 57 *Baylor L. Rev.* 135, 235 (2005) (footnotes omitted). Another author observed, "The idea that a corporation can fill out certain state-mandated forms that a court may deem to constitute consent to all-purpose jurisdiction, without the corporation knowing about that consequence in advance, is repugnant to any basic understanding of consent." Monestier, *supra* at 1388.

I agree that § 5301(a)(2)(i) of Pennsylvania's long-arm-statute states that it extends the Commonwealth's general personal jurisdiction over a registered foreign corporation. However, even presuming a foreign company's awareness of the long-arm statute at the time of registration, I would not manufacture consent from the Commonwealth's unilateral exertion of general personal jurisdiction. Short of the notice and deliberate volition that I discussed above, jurisdiction under § 5301(a)(2)(ii) is founded on no more than the prevailing legal fiction that registration equates to consent. Again, while registration may form the basis of personal jurisdiction in some circumstances where the registrant has a connection to the jurisdiction, a foreign corporation's registration under Pennsylvania's statutory rubric is not

grounded in the traditional idea of consent. Instead, it is founded upon coerced consent insofar as no viable alternative to registration exists.

Even if we interpret the collective legislation as clearly articulating the jurisdictional consequences of complying with the registration requirement, and therefore putting the registrant on notice, the assertion of general personal jurisdiction would still violate due process because it presents a foreign corporation with the Hobson's choice of either (1) submitting to general personal jurisdiction in cases where, as here, neither party nor the cause of action has any relationship with the forum; (2) violating the Association Code's registration requirements and subjecting itself to the sanction outlined in § 411(b); or (3) avoiding the state entirely. However, as Professor Monestier pointed out, even these options are inadequate when one considers that every state can assert the prevailing legal fiction that registration-based consent satisfies the dictates of due process and constitutionally compel a corporation to consent to personal jurisdiction in that forum. **See** Monestier, *supra* at 1390 ("If consent is a legitimate rationale for registration-based general jurisdiction, then all fifty states could constitutionally exercise it."). Thus, the only real options are to comply with the registration requirement and be deemed to have consented to general personal jurisdiction or flout the various registration requirements and risk the consequences of disobedience. Stated another way, "a corporation's choices--other than consenting to general jurisdiction--are limited. It can simply not

do business in the United States or it can deliberately break the law.” *Id.* This dilemma begs the question—if the essential component of consent is a genuine choice to withhold it, where a party has no alternative but to acquiesce to a forum’s exertion of personal jurisdiction, how can that consent be deemed voluntary? In my view, it cannot. If the foreign corporation wishes to avoid sanctions, it has no choice but to comply with the registration requirement and the concomitant submission to personal jurisdiction in that forum. In this scenario, the “consent” amounts to little more than a coerced waiver of due process.

A sister jurisdiction in Texas reached the same conclusion while addressing the issue of coerced consent:

The idea that a foreign corporation consents to jurisdiction . . . by completing a state-required form, without having contact with [the forum], is entirely fictional. Due process is central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. “Extorted actual consent” and “equally unwilling implied consent” are not the stuff of due process.

Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 889 (S.D. Tex. 1993).

Identical concerns permeate the consent-by-registration construct that this Court validated in ***Webb-Benjamin***.

Finally, as I referenced at the outset of this dissent, Appellants’ claim fails under the facts of this case. We cannot impute Appellee’s consent to general jurisdiction under the consent-by-registration construct herein because the predicate statute that extends general personal jurisdiction over a registrant, § 5301, did not exist during 1969, when Appellant registered as

a foreign corporation. Under these facts, notice, whether express or implied, is absent.

The **Gorton** Court addressed a similar issue and concluded that “[b]ecause the explicit general-jurisdiction language in section 5301 did not exist prior to 1978, a [foreign] defendant qualified to do business in Pennsylvania prior to that time . . . would not be subject to the personal jurisdiction of courts located in Pennsylvania based only upon that defendant’s qualification as a foreign corporation in the state.” **Gorton, supra** at 298. I agree with this legal proposition and would apply it in the present case. In addition, while I observe that the **Gorton** Court ultimately concluded that two of the foreign defendants who registered prior to the statute’s effective date consented to general personal jurisdiction retroactively because the plaintiff demonstrated that the foreign defendants “continued to make filings in Pennsylvania” after the statute’s effective date, that did not occur in this case. **Id.** at 300, 301-02.

Instantly, Appellee did not consent to general jurisdiction because its registration as a foreign corporation predated the § 5301 consent requirement by nine years. Moreover, unlike the plaintiffs in **Gorton**, Appellants failed to aver, much less document, that Appellee updated its registration status after

1978, or that it otherwise adopted the consent requirement retroactively.⁵ Thus, contrary to the majority's perspective herein, Pennsylvania law did not expressly impose the consent requirement upon foreign registrants when Appellee registered. Hence, there is no basis to conclude that Appellee knowingly and voluntarily consented to the Pennsylvania court's exercise of general personal jurisdiction.

In conclusion, I believe that Appellants' consent-by-registration argument is waived, and the majority improperly reversed the trial court's order dismissing the case based upon an argument that was not leveled below. Moreover, in my view, the mechanical application of consent-by-registration employs an unsound perspective of "consent" that ignores both the lack of notice in the Associations Code and the Supreme Court's due process concern that a foreign defendant has "fair warning" that it is exposed to a forum's jurisdiction. To remedy this situation, I would equate registration under § 411 with the necessary "fair warning" that in-forum activities would subject it to personal jurisdiction. Finally, even though we are bound by our recent holding in **Webb-Benjamin**, Appellants' claim fails because the long-arm statute that forms the foundation for that legal construct postdates Appellee's 1969

⁵ While the **Gorton** Court seemingly placed the burden on the defendant to disprove its retroactive consent to jurisdiction, it is unquestionably plaintiff's burden to overcome the defendant's initial challenge and establish the Commonwealth's authority to impose personal jurisdiction. **See Sulkava, supra** at 889 ("Once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.").

registration under the Associations Code and Appellants neglected to demonstrate that Appellees took any action to endorse the 1978 provision after the fact. For of the all of forgoing reasons, I respectfully dissent.