



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 4, 2018

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Re: *Volkswagen "Clean Diesel" Litigation*, CL-2016-9917

Dear Counsel:

This matter came before the Court on August 31, 2018, for argument on the German Defendant's Special Appearance and Motion to Dismiss for Lack of Personal Jurisdiction. At the conclusion of the hearing, the Court took the matter under advisement.

BACKGROUND

Volkswagen Group of America, Inc. ("VWGoA") is a subsidiary of Volkswagen Aktiengesellschaft ("VW AG") and Audi Aktiengesellschaft ("Audi AG") (collectively "German Defendants"), which also owns Audi of America, LLC ("Audi"). The underlying case involves the VW Clean-Diesel Litigation arising from the recall of VW vehicles in December of 2014, and subsequent disclosure to the Environmental Protection Agency ("EPA") and the California

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Air Resources Board ("CARB") that it had installed a cheat device on certain fraudulent vehicles to comply with American emission standards. VWGoA is headquartered in Herndon, Virginia, within the county of Fairfax. This matter comes before the Circuit Court of Fairfax on VW AG and Audi AG's Special Appearances and Motion to Dismiss Non-Virginia Plaintiffs' Claims for Lack of Personal Jurisdiction. A hearing was held on the 31st day of August, 2018.

ARGUMENTS

Defendants' Motion to Dismiss

The German Defendants primarily base their motion in the 2017 Supreme Court case, *Bristol-Myers*. Defendants allege that *Bristol-Myers* require that the non-Virginia Plaintiffs trace the German Defendants' conduct to an injury that occurred in Virginia. *See Dubose v. Bristol-Myers Squibb*, 137 S. Ct. 1773, 1780 (2017). The German Defendants assert that there is no connection between themselves and the Commonwealth. Instead, the non-Virginia Plaintiffs' claims involve conduct initiated by VWGoA, and not the German Defendants. The German Defendants argue that the marketing scheme for the fraudulent vehicles was developed by VWGoA, and not the German Defendants. Further, the German Defendants allege that they have made no significant contacts with Virginia that gave rise to the specific claims at issue.

Additionally, the German Defendants dispute the Plaintiffs' claims that VWGoA acted as their agent or alter ego. The German Defendants state that Plaintiffs fail to prove that there was "undue domination and control exercised by the parent corporation over the subsidiary," and that such control "was exercised in such a manner as to defraud and wrong the complainant." *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634 (2002). Plaintiffs use standard contractual importer agreements that fail to demonstrate that VWGoA was unduly controlled by the German Defendant. The German Defendants argue that neither a simple distributor relationship nor a complete ownership of a subsidiary is enough to establish personal jurisdiction. *See Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 495 (1975).

Plaintiffs' Opposition to the Motion to Dismiss

Plaintiffs argue that the Supreme Court's decision in *Bristol-Myers* does not require that non-resident plaintiffs be injured in the forum state. Virginia's long-arm statute was created to assert jurisdiction over "nonresidents who engage in some purposeful activity in this State to the extent permissible under the due process clause." *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.*, 512 S.E.2d 560, 562 (Va. 1999). Plaintiffs argue that their contact with the forum state is irrelevant in a personal jurisdiction matter because it is the contact of the defendant that "drive[s] the jurisdictional analysis." *See Walden v. Fiore*, 571 U.S. 277, 289-90 (2014). *Bristol-Myers* stated no rule that a plaintiff must reside in or be injured in the forum state. *See* 37 S. Ct. at 1780. *Bristol-Myers* only established that plaintiffs cannot bootstrap their claims to other resident plaintiff claims to garner personal jurisdiction. *See id.* at 1778.

Unlike in *Bristol-Myers*, Plaintiffs are alleging that the German Defendants are "derivatively liable" for VWoA's conduct in Virginia and engaged in relevant acts *together* with

VWoA in Virginia. *See id.* Not only were there regularly occurring sales, but VWoA is a wholly-owned subsidiary of the German Defendants, and there are allegations that the German defendants perpetuated the fraud through their contacts with Virginia. Plaintiffs' complaints allege that the underlying controversy, which is the fraud count based on the misleading advertisements, occurred in Virginia pursuant to the agency relationship by the German Defendants sending its own agents to Virginia to perpetuate the fraud. *See* Plf.'s Compl. at ¶ 91, 92, 104. Specifically, Plaintiffs claim that the head of marketing and sales for Audi AG came to Virginia for the launch of one of the fraudulent vehicles and disseminated false and misleading information from Virginia. *See* Plf.'s Compl. at ¶ 101. Additionally, Plaintiffs cite another instance where expatriate officers and employees, including Michael Horn, came to Virginia to continue the fraud. *See* Plf.'s Compl. at ¶ 110.

Plaintiffs argue that this matter is not bootstrapping, but is a matter focused on forum-related contacts of the German Defendants. The forum-related contacts include the facts that the German Defendants' employees entered into Virginia to perpetrate the fraud and directly participated in the marketing, promotion, sale, and distribution of the vehicles from the headquarters in Virginia. In direct contrast to *Bristol-Myers*, the German Defendants controlled and used VWoA to carry out the fraud and everything of significance occurred in this forum state.

ANALYSIS

The main issue to be determined on Defendants' Motion to Dismiss is whether or not this Court can exert personal jurisdiction over the non-resident defendants based on the non-resident plaintiffs' cause of action. Examination requires an analysis of Virginia's long-arm statute and due process requirements.

Standard

A plaintiff needs to establish a *prima facie* case of personal jurisdiction to survive a motion to dismiss. *See Massey Energy Co. v. UMW*, 69 Va. Cir. 118, 120 (Va. Cir. Ct. 2005) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 180 (1936)). The court "must draw all reasonable inferences and resolve all factual disputes in Plaintiff's favor." *Id.* In non-resident defendant issues involving personal jurisdiction, a two-step inquiry is required: (1) "whether Virginia's long-arm statute reaches . . . given the cause of action alleged and the nature of the defendant's contacts" and (2) whether due process requirements are met. *Id.* at 121.

Virginia's Long-Arm Statute

Virginia's long-arm statute requires only a single act of an individual or company to render it subject to jurisdiction in Virginia courts.¹ "A court may exercise personal jurisdiction

¹ "Numerous Virginia cases hold that Va. Code 8.01-328.1, often referred to as Virginia's "long-arm statute," enables trial courts to assert personal jurisdiction over individual and corporate non-residents to the fullest extent permissible under the Due Process Clause of the United States Constitution." *Azzure Denim, LLC v. E&J Lawrence Corp.*, 69 Va. Cir. (Va. Cir. Ct. 2006). *See also Nan Ya Plastics v. DeSantis*, 237 Va. 255, 260 (1999).

over a person, who acts directly or by an agent, as to a cause of action arising from the person's transacting any business in this Commonwealth . . . causing tortious injury by an act or omission in this Commonwealth." VA. CODE § 8.01-328.1. It is evident that this Court has jurisdiction through Virginia's long-arm statute because of the German Defendants allegedly disseminating fraudulent advertising within the Commonwealth. The next inquiry this Court must address is whether due process requirements are met.

The German Defendants Created Substantial Contacts with Fairfax County to Subject them to this Court's Specific Jurisdiction

"Specific jurisdiction, on the other hand, must be based on activities that arise out of or relate to the cause of action, and can exist even if the defendant's contacts are not continuous and systematic." *Autogenomics v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009); *see also Freedom Hawk Kayak, LLC v. Ya Tai Elec. Appliances Co.*, 908 F. Supp. 2d 763, 770 (W.D. Va. 2012). "Specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). The crucible for the determination of specific jurisdiction is whether there is some act "by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 925 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). *Bristol-Myers* reaffirmed settled principles of specific jurisdiction; specifically, there must be an "affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that places in the forum state." *Bristol-Myers*, 137 S. Ct. at 1781. The basis for specific jurisdiction must be rooted in the connection between the defendants and the forum state, and not the plaintiff's contacts.

In *Bristol-Myers*, the Court found that the nonresidents' claims lacked specific jurisdiction based solely on *Bristol-Myers*' decision to contract with a California company to distribute the drug, Plavix, nationally. *See id.* at 1782. The nonresidents were not prescribed Plavix, did not ingest Plavix, and were not injured by Plavix in California. *See id.* at 1781. Instead, the nonresident plaintiffs based their claims upon the mere fact that other plaintiffs, who sustained the same injuries, were prescribed, obtained, and ingested the drug in the forum state. *See id.* Contrary to the German Defendants' insistence, *Bristol-Myers* did not upend decades of jurisprudence, but relied on "settled principles" regarding specific jurisdiction. *Id.* Settled principles, then, guide this decision.

Determination of specific jurisdiction is not based on a sliding-scale, but an analysis of the Defendants' contacts with the forum state. *See Bristol Myers*, 137 S. Ct. at 1781. The contacts of the German Defendants with the Commonwealth are looked at in the aggregate, and not in isolation. Taken as a whole, the German Defendants have established sufficient contacts with the Commonwealth to subject them to this Court's specific jurisdiction. Employees and agents of the German Defendants entering the forum state, the marketing and advertising schemes allegedly developed by the German Defendants in the Commonwealth, and the alleged agency; are enough to establish specific jurisdiction over the German Defendants.

The strongest allegations advanced by Plaintiffs are that employees of the German Defendants entered the Commonwealth to perpetuate the fraud through advertising schemes. The Complaint alleges that Christian Klinger, the head of marketing and sales for VW AG, came to Virginia to promote the launch of the Jetta and "disseminated false and misleading information about the fraudulent vehicles from Virginia." Compl. at ¶ 56. Plaintiffs also allege that an expatriate program was used extensively by the German Defendants to appoint employees at the corporate headquarters and participate in the fraud. *See* Compl. at ¶ 65. Specifically, an individual named Michael Horn was appointed by VW AG as VWGoA's CEO. *Id.* Not only is it alleged that German employees were appointed to corporate headquarters, but a "significant portion of false and misleading representations about the fraudulent vehicles were developed in, and disseminated from" corporate headquarters. Compl. at ¶ 64. The advertising content used to market the fraudulent vehicles is alleged to have emerged from the German Defendants' work in Fairfax County. *See* Compl. at ¶ 64.

These facts distinguish the German Defendants from many non-resident defendants found not to be subject to a court's jurisdiction because there was no connection made by the non-resident defendants with the forum state. In *PBM Capital Inves., LLC v. Gen. Elec. Co.*, which the German Defendants cite for support, the facts are clear that non-resident defendants had no contacts with the forum state to form the basis for plaintiff's claim. No. 3:15CV00037, 2016 U.S. Dist. LEXIS 96055, at *3 (W.D. Va. July 22, 2016). PBM purchased Breas from a Swedish subsidiary of GE, and PBM signed an irrevocable offer letter in Charlottesville, Virginia, finalizing the sale. *See id.* at *4. Prior to the sale, GE became aware of a problem with the product and doctored findings to ensure the sale of Breas. *See id.* The plaintiffs tried to establish jurisdiction over GE because it wholly owned the Swedish subsidiary at the heart of the contract and it maintained two "brick and mortar facilities" in Virginia. *See id.* at *11. The court found that it lacked personal jurisdiction because GE lacked contact with the Commonwealth. *See id.* The misrepresentation made by GE occurred outside the Commonwealth, and the "alleged doctoring of the investigation report" also occurred elsewhere. 2016 WL 3982590 at *7. Additionally, plaintiffs did not allege that GE made any representations in the Commonwealth or that it entered into anything related to the contract negotiation. *See id.* The brick and mortar facilities were only incidental to the claim and not related to the substance of the claim to grant specific jurisdiction. *See id.* at *11.

The connection with the forum state is not incidental, like the brick and mortar facilities in *PBM*, but directly related to the basis of Plaintiffs' claims—the fraudulent advertising. *See PBM*, 2016 U.S. Dist. LEXIS 96055 at *11; Compl. at ¶ 56, 61. Plaintiffs' claims in this case directly involve the misrepresentation of the fraudulent vehicles allegedly marketed and advertised under direction of the German Defendants. *See* Compl. at ¶ 61, 64. Unlike the defendants in *PBM* who directed the doctoring of reports outside the Commonwealth, there are allegations that the German Defendants created the false advertising content at the corporate headquarters in Fairfax. *See* 2016 WL3982590 at *7; Compl. at ¶ 64. Drawing all reasonable inferences in favor of the Plaintiffs, this Court can easily infer that there was some contact with the Commonwealth arising from the marketing of the fraudulent vehicles.

The presence of the German Defendants' employees in VWGoA's headquarters directly relates to the advertising giving rise to Plaintiffs' claims. In *Volkswagen Aktiengesellschaft v. Jones*, the presence parts distribution center in Florida was not "related to the conduct giving rise to this action." See 227 So. 3d 150, 157 (Fla. Dist. Ct. App. 2017). The plaintiff in *Jones* filed a suit alleging development of mesothelioma as a result of asbestos exposure in a VWGoA manufacturing plant. See *id.* at 152. The court rejected specific jurisdiction over VW AG finding that there was a dearth of contacts with Florida, including: no offices, manufacturing plants, services centers, or other facilities; lack of a general manager; no person or subsidiary who exercises control over VW AG; no employees, sales representatives, corporate offices, or directors; no registered agent to accept service; and that the parts distribution center was not related to the asbestos exposure. See *id.* at 157, 159. The court could not grant jurisdiction when VW AG did not create contacts with the forum state relating to the cause of the action.

Unlike in *Jones*, the German Defendants here created contacts with the Commonwealth that relate to the Plaintiffs' claims of fraud. See Compl. at ¶ 64. While the German Defendants do not maintain offices or facilities like the defendants in *Jones*, employees of the German Defendants entered into the Commonwealth to disseminate information from VWGoA's headquarters. See *Jones*, 227 So. 3d at 157; Compl. at ¶ 56. Importantly, it is the location of VWGoA's headquarters, where employees such as Christian Klinger and Michael Horn, created the false advertising schemes and distributed the fraudulent vehicles with the update to trick the emission tests, that provides the basis of the Plaintiffs' underlying claims. See Compl. at ¶ 65. Plaintiffs are not alleging that the dissemination of fraudulent information happened singularly in another forum, which is in contrast to the plaintiff in *Jones* failing to tie his claims of asbestos exposure to VW AG's Florida distribution plant. See *Jones*, 227 So. 3d at 159; Compl. at ¶ 56, 65. Further, Virginia's long-arm statute requires only a single act to subject a person to Virginia court's jurisdiction as long as it comports with due process requirements. The German Defendants entering the Commonwealth to disseminate false information is enough to satisfy both the long-arm statute and due process requirements for specific jurisdiction.

Due Process is not satisfied if internet advertising, alone, is the basis for a claim. In *Barnett v. Surefire Med. Inc.*, plaintiff sued a drug company for problems with the design of an anti-reflux catheter. See No. 17-1332, 2017 U.S. Dist. LEXIS 156928, at *1 (D. Md. Sept. 25, 2017). The drug company sold products throughout the United States, did not maintain an office in Maryland, did not own or rent property in Maryland, did not maintain a bank account in Maryland, and never did business in Maryland. *Id.* at *2. Further, the clinical trials and the research for the catheter was not conducted in Maryland. *Id.* The plaintiff attempted to establish specific jurisdiction over the drug company by including print-outs from websites, indicating that the catheter would be used in a Maryland study. See *id.* at *12. The drug company rebutted the print-outs with an affidavit explaining it was not involved in the clinical study and the study was not used to develop any of the company's products or technology. See *id.* It was further established that the limited collaboration with the plaintiff only involved a singular article, which "ended in 2010." *Id.* at *13. The Maryland court reasoned that the website's contents, rebutted by defendant, were not enough to establish a *prima facie* case of specific jurisdiction. See *id.* at *12-*13.

Unlike the *Barnett* case, Plaintiffs are not relying on advertising content garnered from websites, but advertising content that was specifically developed in the Commonwealth by the German Defendants. *See* 2017 U.S. Dist. LEXIS 156928 at *12; Compl. at ¶ 61, 64. Additionally, certain individuals from the corporate structure of the German Defendants entered into the Commonwealth to promote the launch of specific fraudulent vehicles. *See* Compl. at ¶ 56, 65. There are multiple instances of contact by the German Defendants with the Commonwealth compared to the drug company in *Barnett* that maintained no presence within Maryland. *See* 2017 U.S. Dist. LEXIS 156928 at *1; Compl. at ¶ 60, 62, 64. Corporate headquarters of VWGoA, the wholly-owned subsidiary of the German Defendants, is in Fairfax, a dealer network to be used by VWGoA and the German Defendants was developed in the Commonwealth, and the false advertising and misinformation is alleged to have cumulated in Fairfax. *See* Compl. at ¶ 60, 62, 64. Compared to scant jurisdiction claims of a plaintiff over a non-resident company in Maryland, Plaintiffs allege substantial contacts with the Commonwealth that form the basis of their claims.

Plaintiffs' allegations not only tie VWGoA's contacts with the German Defendants, but with the Commonwealth itself. Simply being a partner of another defendant that subjects itself to personal jurisdiction would not suffice. *See RCI Contrs. & Eng'rs, Inc. v. Joe Rainero Tile Co.*, 666 F. Supp. 2d 621, 623 (W.D. Va. 2009). In *RCI*, a plaintiff attempted to establish jurisdiction over a defendant based singularly on the fact that another defendant partner had subjected itself to personal jurisdiction in Virginia. *See id.* The non-resident defendant had no employees, registered agents, or facilities in Virginia. *See id.* at 622. Further, the non-resident defendant did not manufacture, advertise, or distribute the product at the basis of the complaint. *See id.* The Western District Court of Virginia found that, due to the lack of any contacts with Virginia, it could not exercise personal jurisdiction over the non-resident defendant. *See id.* at 624.

There must be some contact by the defendant within the forum state to establish specific jurisdiction. The German Defendants, unlike the non-resident defendant in *RCI*, sent employees to corporate headquarters to disseminate false information, which was used in an advertising scheme originating in the Commonwealth. *See* Compl. at ¶ 56, 60. There is not a singular fact of partnership, or agency, as alleged in *RCI*, but multiple contacts created by the German Defendants. *See RCI*, 666 F. 2d at 623; Compl. at ¶ 56, 60. Creating contacts with the Commonwealth directly ties to the false advertising scheme at the heart of the Plaintiffs' Complaint. *See* Compl. at ¶ 64, 65. The advertising scheme used to market the vehicles was alleged to have been developed in headquarters and then the German Defendants controlled the details of the marketing, sales, and public relations of the vehicles from within Virginia. *See* Compl. at ¶ 61, 64. Due process would not be offended by subjecting the German Defendants to the reach of this Court.

Traditional notions of fair play and substantial justice are not violated by allowing Plaintiffs' suit to proceed against the German Defendants. A substantial contact of employees and an extensive distribution network has been found to be sufficient for specific jurisdiction. An Illinois Court of Appeals case involved Giant Manufacturing, a Taiwanese corporation, which filed a motion to dismiss for lack of personal jurisdiction. *See Kowel v. Westchester Wheel, Inc.*, 89 N.E.3d 807, 810 (Ill. App. Ct. 2017). The plaintiff, an Illinois resident, was injured as a result

of a defect in a Giant brand bicycle manufactured by Giant Manufacturing. *See id.* Giant brand bicycles were distributed exclusively through Giant Bicycle, a Virginia corporation. *See id.* The plaintiff had purchased the bicycle from Westchester, an Illinois corporation and retailer of Giant Bicycle. *Id.* Giant Bicycle was a wholly-owned subsidiary of another one of Giant Manufacturing's wholly-owned subsidiary. *See id.* at 812. Additionally, Giant Manufacturing was informed that Giant Bicycle entered into agreements with other retailers in Illinois for the sale of Giant Brand bicycles. *See id.* at 812. Giant Manufacturing also maintained a distribution warehouse in Illinois and hired individuals to work there. *See id.* "[T]he only way that Giant Manufacturing's bicycles would ever reach a final consumer in [the] United States was through Giant Bicycle and its authorized retailers." *Id.* at 818. The court reasoned that there were enough minimum contacts and conduct directed at the forum state to establish personal jurisdiction. *See id.* at 819.

Similarly, VWGoA is a wholly-owned subsidiary of the German Defendants with an exclusive distributor agreement. *See Compl.* at ¶ 60. The only way that the German Defendants' vehicles reach a final consumer in the United States is through VWGoA just as the only way Giant Manufacturing bicycles reached its final consumer was through Giant Bicycle. *See Kowel*, 89 N.E.3d at 818; *Compl.* at ¶ 60, 62. The German Defendants are completely aware of any agreements that VWGoA enter into with other companies because the German Defendants authorized a dealer network only managed by VWGoA. *See Compl.* at ¶ 62. The dealer network approved and handled by the German Defendants parallel the knowledge Giant Manufacturing had whenever Giant Bicycle entered into agreements with other resellers. *See Kowel*, 89 N.E. 3d at 812; *Compl.* at ¶ 62. The German Defendants created substantial contacts with the Commonwealth to find specific jurisdiction over them.

While this Court finds that the German Defendants initiated enough contacts with Virginia, alone, to be subject to its jurisdiction, the agency issue will be briefly addressed.

Claims of specific jurisdiction over the parent-company of a subsidiary, taken alone, do not warrant a grant of specific jurisdiction. The German Defendants cite a Virginia Supreme Court case that specifically claims that a "mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification to disregard their separate corporate structure." *Richfood, Inc. v. Jennings*, 255 Va. 588, 592 (1993) (citing *Southern States Coop., Inc. v. Dailey*, 167 W. Va. 920, 280 (W. Va. 1981)). However, this Court is not relying on ownership of VWGoA by the German Defendants to grant jurisdiction. There are other aspects in the Complaint that allege the separate corporate entity structure is also blurred as to the aspects of marketing and advertising—the underlying claim for Plaintiffs. *See Compl.* at ¶ 61. Not only do the German Defendants own all the stock for VWGoA, elect and control the board of directors and the chairman of the board of directors for VWGoA, but VWGoA cannot modify vehicles without written approval from the German Defendants. *See Compl.* at ¶ 64. VWGoA allegedly had no control over how the fraudulent vehicles were modified or marketed inside the Commonwealth.

Further, there is language in the importer agreement between VWGoA and VW AG, which includes that VWGoA will "see to it" that all marketing materials comply with VW AG's

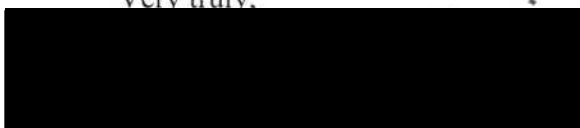
standards. *See* Plfs.' Exh. 1 at Art. 15. The language insinuates that VWGoA had no control over the marketing and advertising materials for the fraudulent vehicles at the heart of Plaintiffs' claims. *See id.* It is not singularly the wholly-owned subsidiary aspect, but the aggregate of contacts that the German Defendants made with the Commonwealth. This Court need not rule on the agency argument alleged by Plaintiffs since this Court found that the German Defendants already established enough contacts with Virginia alone.

The Court's line of reasoning follows that of the Illinois Court of Appeals; while the German Defendants are foreign corporations, they are no strangers to the American legal system. *See Kowel*, 89 N.E. 3d at 820. It may be a burden on the German Defendants to litigate in Virginia, but the other factors outweigh this point. The German Defendants sufficiently maintained contacts within this Commonwealth. It is reasonable for Virginia to exercise personal jurisdiction over the German Defendants.

CONCLUSION

For the reasons stated above, this Court finds that there is specific jurisdiction over the German Defendants, and as such, Defendants' Motion to Dismiss is denied.

Very truly,

A large black rectangular redaction box covering the signature of the court clerk.

Bruce D. White