66,497 File copy

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IN THE SUPREME COURT
OF FLORIDA

CASE NUMBER: 66-497

FILED
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APR 16 1985
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ERNEST WILLIAM DAVIS,

Plaintiff-Appellant,

vs.

PYROFAX GAS CORPORATION, etc.,
and GOSS, INC., etc.,

Defendant-Appellees.

APPELLEE'S ANSWER BRIEF

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REQUEST FOR ORAL ARGUMENT

Appellee, GOSS, INC., requests oral argument before this Court.

DESIGNATIONS IN BRIEF

References herein to this record when referring to the record on appeal will be (R-). References to Appellant's brief will be designated as (B-), and when referring to the transcript will be (T-). Appellant was the Plaintiff in the District Court and Appellees, GOSS, INC., and PYROFAX GAS CORPORATION were the Defendants in the trial court below.

CERTIFIED QUESTION

Prior to the April 25, 1984 revision of Florida's long-arm statute, was a non-resident manufacturer or wholesaler of a product subject to the jurisdiction of the Florida courts where (1) the manufacturer or wholesaler engages in business activities in Florida; and (2) the product was purchased in another state and brought into Florida by the purchaser; and (3) the product caused injury to the purchaser in Florida?

STATEMENT OF THE CASE

The Appellant, WILLIAM DAVIS, filed his Amended Complaint in the United States District Court, Middle District of Florida, Orlando Division, on August 23, 1983, (R-102-154). Among the allegations in Appellant's Complaint, there is stated:

> 13. On or about November 13, 1975, Appellant, ERNEST WILLIAM DAVIS, purchased the following from Appellee, PYROFAX GAS CORPORATION, at 722 Imlay City Road, Lepeer, Michigan:
> (a) One (1) vented, gas space heater, manufactured by Defendant, GOSS, INC., model No. S-500 (referred to below as heater.)
> (R-105).

Appellees, PYROFAX GAS CORPORATION and GOSS, INC., timely moved to dismiss Appellant's Amended Complaint. (R-61). On October 21, 1983, a hearing was held before the District Court on Appellees' Motions to Dismiss. (T-2). At the hearing before the trial Court, counsel for GOSS, INC., argued that there was not sufficient connexity nor sufficient pleading of a connexity for the United States District Court, Middle District of Florida, to have jurisdiction over the Appellee, GOSS, INC. (T-13). In all candor, counsel for GOSS, INC., stated that Appellee,did sell two heaters of the type as alleged in Appellant's Amended Complaint in the state of Florida in the year 1975. (T-11-12).

On November 4, 1983, the District Court entered an Order

dismissing Appellant's Amended Complaint against both Appellees on two grounds:

1. For lack of in personam jurisdiction over the Defendants.

2. For failure of the Plaintiff to gain proper service of process over the Defendants. (R-223).

On December 5, 1983, Appellant, ERNEST WILLIAM DAVIS, filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit from the Order granting Appellees' Motion to Dismiss the Amended Complaint.

Oral argument was held before the Eleventh Circuit Court of Appeals and on February 1, 1985. That Court certified the following question to this Honorable Court:

> Prior to the April 25, 1984 revision of Florida's longarm statute, was a non-resident manufacturer or wholesaler of a product subject to the jurisdiction of the Florida courts wherein (1) the manufacturer or wholesaler engages in business activities in Florida, and (2) the product was purchased in another state and brought into Florida by the purchaser, and (3) the product caused injury to the purchaser in Florida?

Although not certified within the above question, the issue of whether the Appellant obtained proper service of process over Appellees was nonetheless argued before the 11th Circuit Court of Appeals. Being a procedural matter, this issue remains before that Court. Appellee, GOSS, INC., does not waive the issue by solely addressing the certified question.

SUMMARY OF THE ARGUMENT

Before the April 25, 1984 revision of S. 48.193 Fla. Stat. (1983), Appellee, GOSS, INC., contends that Florida courts did not have jurisdiction over a non-resident manufacturer engaged in business activities in Florida where the product of the manufacturer was purchased outside of Florida, subsequently brought into Florida by the purchaser and thereby caused injury to the purchaser. General Tire and Rubber Company v. Hickory Springs Manufacturing Company, 388 So.2d 264 (Fla. 5th DCA 1980). Before the revision, the plain meaning of 48.193 required "connexity," i.e., whether the cause of action "arose from" the Defendant's activities within the state. Florida had elected not to extend the reach of its long-arm statute to the outer limits of due process. Therefore, in personam jurisdiction should not be allowed over this Appellee pursuant to S. 48.193 in effect at the time when the cause of action accrued since the purchase of the product occurred outside of the state and, the product was brought into Florida by the Appellant.

ARGUMENT

BEFORE THE APRIL 25, 1984 REVISION OF FLORIDA'S LONG-ARM STATUTE, FLORIDA COURTS DID NOT HAVE JURISDICTION OVER A NON-RESIDENT MANUFACTURER ENGAGED IN BUSINESS ACTIVITIES IN FLORIDA WHERE THE PRODUCT OF THE MANUFACTURER WAS PURCHASED OUTSIDE OF FLORIDA, YEARS LATER BROUGHT INTO FLORIDA BY THE PURCHASER, AND THEREAFTER CAUSES INJURY TO THE PURCHASER IN FLORIDA.

While Appellant spends a great deal of time on constitutional due process considerations, those are simply not relevant, as the only issue presented is one of statutory construction. The issue is whether Appellant's cause of action arose from the Appellee's alleged activities within this state, so that in personam jurisdiction could be obtained over Appellee pursuant to Fla. Stat. 48.193(1)(a) or (1)(f) (1983). The issue is thus not whether Appellant's Complaint is sufficient to satisfy the due process test of minimum contacts since it is clear that S. 48.193, Fla. Stat. (1983) is more restrictive than what is required by constitutional due process.

In construing Florida's long-arm statute before the April 25, 1984 revision thereto, several general principles regarding statutory construction should be considered. First, once the state has provided for jurisdiction over a nonresident, "the jurisdiction so imposed can extend no further than the statutory basis provided for by the foreign state," regardless of the constitutional due process considerations governing the reach of the long-arm statute. Bloom v. A.H. Pond Co., Inc., 519 F. Supp. 1162, 1165 (S.D. Fla. 1981);Barrett v. Browning Arms Co., 433

F.2d 141 (5th Cir. 1970). Second, Florida's long-arm statutes are strictly construed. American Baseball Cap, Inc. v. Duzinski, 308 So.2d 639 (Fla. 1st DCA 1975).

Appellant contends that he has sufficiently alleged jurisdiction over out-of-state manufacturer of the product (GOSS, INC.) pursuant to S. 48.193(1)(a), or S. 48.193(1)(f), Florida Statutes, (1983).

S. 48.193(1), Florida Statutes (1983) provides:

> "(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection, thereby submits this person and if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of the following: (Emphasis added)
>
> (a) Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state."

However, the plain language of S. 48.193(1)(a), in effect at the time of the alleged accident, clearly requires that the Appellant's cause of action "arise from" the Appellee's "doing business" within the state of Florida. General Tire and Rubber Company v. Hickory Springs Manufacturing Company, 388 So.2d 264 (Fla. 5th DCA 1980). Even under S. 48.181, Fla. Stat. (1981), where no such requirement was specifically mandated, Florida courts have consistently held that the statute requires "that the cause of action be related to the business activities of the foreign corporation." General Tire and Rubber Co. v. Hickory Springs Manufacturing Company, supra; Bradford White Corp. v.

Aetna Insurance Co., 372 So.2d 994 (Fla. 3rd DCA 1979); Manus v. Manus, 193 So.2d 236 (Fla. 4th DCA 1966).

In the instant case, Appellant has failed to allege that the cause of action "arose from" the Appellee's doing business within this state and therefore, has failed to allege sufficient facts to obtain personal jurisdiction over Appellee, GOSS, INC., pursuant to F. S. 48.193(1)(a). Indeed, Appellant does not allege that Appellee, GOSS, INC., was conducting business in this state "at the time of the injury" as required.

Section 48.193 (1)(f), Florida Statutes (1983), provides as follows:

> "(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection, thereby submits this person and if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> (f) Causes injuries to persons or property within the state arising out of an act or omission out of the state by the Defendant, provided that at the time of the injury either:
>
> 1. The Defendant was engaged in solicitation of service activities within this state which resulted in such injury; or
>
> 2. Products, materials, orthings processed, serviced, or manufactured by the Defendant anywhere used or consumed within this state in the ordinary course of commerce, trade or use, and the use or consumption resulted in the injury."(emphasis added)

The plain meaning of S. 48.193(1)(f)(1) mandates that the Appellee's solicitation or service activities within this state result in Appellant's injury. It is clear this section does not apply to this case since there is no allegation in Appellant's complaint that the injuries complained of resulted from Appellee's solicitation or service activities within the state of Florida.

Even though Florida courts have generally construed S. 48.193(1)(f)(2) as broadening the bounds of Florida's jurisdiction, see, Ford Motor Company v. Atwood Vacuum Machine Company, 392 So.2d 1305 (Fla. 1981), this provision is not a "catch all" jurisdictional provision without limits. The provision requires that the product be consumed or used within the state "in the ordinary course of commerce." The phrase "in the ordinary course of commerce" has been construed to mean" in the ordinary course of interstate commerce." (Emphasis added). Life Laboratory, Inc. v. Valdes, 387 So.2d 1009, 1001 (Fla. 3rd DCA 1980). Therefore, where the particular product which allegedly caused an injury to a person within the state of Florida arrived in Florida through the ordinary channels of retail distribution, Florida courts have acquired jurisdiction, assuming sufficient minimum contacts, pursuant to S. 48.193(1)(f)(2). Ford Motor Company v. Atwood Vacuum Machine Company, supra. If the phrase "in the ordinary course of commerce" were construed to include objects manufactured and sold elsewhere but brought into Florida by the

consumer where injury occurred, the statute would, in effect, simply require the product be used within the state in contravention of the plain meaning of the phrase itself.

Life Laboratories, Inc., supra, (where nonresident manufacturer of product had no say in where the retailer distributed the product and did not anticipate the product would reach Florida, the court did not acquire personal jurisdiction under 48.193(1)(f)(2); Aero Mechanical Electronic Craftsman v. Parent, 366 So.2d 1268 (Fla. 4th DCA 1979) [where part manufacturer had no reason to believe the part, installed in finished product, would be shipped in interstate commerce to Florida, court did not acquire jurisdiction under S. 48.193(1)(f)(2)].

Appellant contends that "use" of a product in Florida causing injury is sufficient to confer jurisdiction pursuant to S. 48.193(1)(f)(2). Appellee, GOSS, INC., submits that the phrase "in the ordinary course of commerce, trade, or use," should be construed as applying to situations where the manufacturer sells a product to a wholesaler who, in turn sells the product to a Florida retailer who ultimately sells the product to the consumer in Florida. There must be more than the mere possibility that the product may eventually simply end up in Florida. Aero Mechanical Electronic Craftsman. supra. Such a construction would raise serious questionsregarding the statute's constitutionality in light of the "minimum contacts" requirement. Dinsmore v. Martin Blumenthal Assoc., 314 So.2d 561, 567 (Fla. 1975); Worldwide Volkswagon Corp. v. Woodson, 444 US 286, 100 S. Ct. 559, 62 L. Ed. 26 490 (1980). Therefore, where a foreign

manufacturer had no notice or knowledge that its particular product would arrive in Florida, the trial court did not acquire jurisdiction pursuant to S. 48.193(1)(f)(2). See, General Tire and Rubber Company v. Hickory Springs Manufacturing Company, 388 So.2d 264 (Fla. 5th DCA 1980). Furthermore, Plaintiff's Complaint reveals that Plaintiff bought the product in Michigan and years later moved to Florida, bringing the product with him which is clearly outside the "ordinary course of commerce, trade, or use,"

Under S. 48.193 Fla. Stat. (1983) there is a conflict among the Florida Appellate Courts as to whether connexity is required, i.e., whether the cause of action must "arise from" the Defendant's activities within the state. Appellant relies heavily upon Kravitz v. Gebrueder Pletscher Druckgusswaremfabrik, 442 So.2d 985 (Fla. 3rd DCA 1983), which held that there is no connexity requirement under S. 48.193. Appellee, GOSS, INC., is relying upon General Tire and Rubber Company v. Hickory Springs Manufacturing Company,which specifically held that connexity is required pursuant to the wording of S. 48.193.

In General Tire and Rubber Co., supra, the defendant Hickory Springs made foam rubber which it sold to a mattress manufacturer in Alabama who in turn sold the finished mattresses to a Georgia company who sold them to Seminole County for use in the jail.

The court held that even though Hickory Springs did make direct sales to Florida customers, the plain language of S. 48.193 requires that there be a nexus between the Plaintiff's cause of action and the Defendant's activities within the state. The Court there stated:

> "Section 48.193 specifically limits jurisdiction to causes arising from the enumerated acts...therefore it is necessary to show first that the cause of action arose from an obligation or cause connected with the activities of the foreign corporation before reaching the question as to whether the corporation was doing business within the state. Id. at 266. (Emphasis added in original).

The Kravitz construction of S. 48.193(1)(f)(2) as argued by Appellant should not be followed or applied to Appellee, GOSS, INC., for several reasons.

First, Kravitz, clearly departs from the existing law construing S. 48.193(1)(f)(2). This Section of the long-arm statute before the April 25, 1984 revision, has consistently been construed to require that the product be consumed or used within the state in the ordinary course of interstate commerce. See e.g., Ford Motor Company v. Atwood Vacuum Machine Company, 392 So.2d 1305 (Fla. 1981); Life Laboratory, Inc. v. Valdes, 387 So.2d 1009 (Fla. 3rd DCA 1980). In this case, the product was brought into the state by an individual after he purchased the product in another state and therefore, is clearly outside the "ordinary course of commerce."

Second, the Kravitz court misplaced its reliance upon Shoei Safety Helmet Corp. v. Conlee, 409 So.2d 39 (Fla. 4th DCA),

Cert. dismissed, 429 So.2d 518 (Fla. 1982). Unlike the case at hand, the facts of Shoei indicate connexity under S. 48.193 (1)(f)(2) would have been satisfied since the product of the foreign corporation actually reached Florida through the normal channels of interstate commerce.

Third, the Kravitz construction of S. 48.193(1) (f)(2) clearly departs from the legislative intent that this Section requires connexity. The legislative intent is supported by the actions of the legislature in Senate Bill 28, which became law on April 25, 1984. The legislature removed the connexity requirement in Section 48.193 by deleting the connexity language from 48.193(1)(f)(1) and (2), and by adding 48.193(2), as follows:

> "(F) Causes injuries to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at or about the time of the injury either:
>
> (1) The defendant was engaged in solicitation or service activities within the state ~~which resulted in such injury~~; or
>
> (2) Products, materials or things processed, serviced or manufactured by the Defendant anywhere used or consumed in the state in the ordinary course of commerce, trade, or use, ~~and the use or consumption resulted in the injury~~.
>
> (2) A defendant engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, in trust state, or otherwise, shall be subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." (Words in struck through type are deletions from existing law; words underlined are additions.)

The 1984 legislative revision of 48.193 removing the connexity requirement naturally infers that connexity was part and parcel of 48.193, Fla. Stat. (1983), and intended by the legislature prior to this amendment. Further, the legislative intent before the amendment is supported by the Senate Staff Analysis and Economic Impact Statement of Senate Bill 28, dated December 6, 1983, which analyzed the new Subsection 2, S. 48.-193, as follows:

> "The addition of a new subsection (2) eliminates the connexity requirement which is imposed by current law."

Where the court is seeking to interpret the meaning of a prior statute, the court may consider subsequent legislation.- Parker v. State, 406 So.2d 1089 (Fla. 1982) and Gay v. Canada Dry Bottling Company of Florida, 59 So.2d 788 (Fla. 1952).

In Parker, the court sought to determine the meaning of Fla. Stat. 893.13. The court held:

> "Also relevant here are any amendments of Section 893.13 since the enactment of chapter 76-200, 4, "the court has the right and duty, in ariving at the correct meaning of a prior statute, to consider subsequent legislation...The subsequent legislative history of the act butresses our interpretation thereof." Id. at 1092.

In Gay, the court sought to ascertain the meaning of the Florida Revenue Act of 1949. The court held that:

> "The rule seems to be well established that the interpretation by the legislative department goes far to remove doubts as to the meaning of the law." Id. at 790.

Additionally, the legislative intent is illustrated by analyzing Fla. Stat. 48.193 in the aggregate. A general connexity requirement flows throughout the provisions of 48.193(1)-(a)-(9), and (f)(1). Since each provision requires that the activities of a nonresident entity give rise to the cause of action, providing the requisite minimum contacts to satisfy constitutional due process, it is evident the legislature intended to enact S. 48.193(1)(f)(2) with a connexity requirement. Such consistency amongst 48.193 (1)(a)-(g), and (f)(1) indicates the legislature did not intend the Kravitz construction of S. 48.193-(1)(f)(2).

Finally, the Kravitz construction of Section 48.193(1)(f)-(2), if applied to Appellee, Goss, Inc., would violate constitutional due process standards. The 14th Amendment due process clause has been construed to require certain minimum contacts before a state court can assert personal jurisdiction over a non-resident corporation. International Shoe Corporation v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95(1945) and Worldwide Volkswagon Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L.Ed2d 490 (1980); Hanson v. Denckla, 357 US 235, 785 Ct. 2 L.Ed.2d 1283 (1958).

While connexity is but one factor in a due process analysis of long-arm jurisdiction, where it is absent, due process requires a "purposeful continuous and systematic" course of conduct within the forum state. Wolf v. Richmond Co. Hospital Authority, 745 F.2d 904 (4th Cir. 1984). To adopt the Kravitz

construction of Section 48.193(1)(f)(2) would unconstitutionally permit the exercise of personal jurisdiction over a nonresident defendant whose only contact with this state is the mere fortuitous presence of one of its products. Such a construction is in violation of Worldwide Volkswagon v. Woodson, supra; and Maschinenfabrik Seydelmann v.Altman, 10 FLW 692 (Fla. 2nd DCA Mar. 15, 1985).

It is irrelevant that at the District Court hearing, defense counsel mentioned the sale of one of Appellee's products, unconnected with the Appellant's cause of action, within the state. Where statements by Defendants are not supported by Affidavit or by other relevant materials, they are not to be considered by the court when ruling on a Motion to Dismiss. Fitchette v. Colling, 42 F. Supp. 147 (D.C.Md. 1975). Moreover, an isolated act will not subject the Appellee to the jurisdiction of a trial court. Hyco Manufacturing Company v. Rotex International Corp., 355 So.2d 471 (Fla. 3rd DCA 1978) and Maschnenfabrik Seydelmann v.Altman, FLW 692 (Fla. 2nd DCA Mar. 15, 1985).

Furthermore, there is nothing in the record to demonstrate that Appellee, GOSS, INC., was conducting business in this state "at the time of the injury" as required by S. 48.193(1)(f) Fla. Stat. (1983).

The constitutional dimensions of long-arm jurisdiction elucidated in the cases cited by the Appellant are simply not relevant. Florida has elected not to extend the reach of its long-arm statute to the outer limits of due process, but is more

restrictive and no in personam jurisdiction should be obtained over the Appellee, GOSS, INC. Given the fact that the purchase of the product occurred outside the state, this court should uphold the reasoning of the Fifth District that "connexity" is required before Florida courts can gain personal jurisdiction over this Defendant pursuant to the long-arm statute before the April 25, 1984 revision thereto.

CONCLUSION

Before the April 25, 1984 revision of S. 48.193 Fla. Stat. (1983), Florida courts did not have jurisdiction over a non-resident manufacturer engaged in business activities in Florida where the product of the manufacturer was purchased outside of Florida, subsequently brought into Florida by the purchaser and thereby caused injury to the purchaser.

The plain meaning of S. 48.193 required "connexity." The cause of action must "arise from" the Defendant's activities within the state. Florida had elected not to extend the reach of its long-arm statute to the outer limits of due process. Therefore, in personam jurisdiction should not be allowed over this Appellee pursuant to S. 48.193 in effect at the time when the cause of action accrued, since the purchase of the product occurred outside of the state and, the product was brought into Florida by the Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, this 11th day of April, 1985, to RONNIE H. WALKER, ESQ., P.O. Box 273, Orlando, Florida 32802, and to JONATHON C. HOLLINGSHEAD, ESQ., P.O. Box 20154, Orlando, Florida 32814.

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