IN THE SUPREME COURT,
STATE OF FLORIDA

CASE NO. 66-497

ERNEST WILLIAM DAVIS,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.
_______________________________/

APPELLEE PYROFAX GAS CORPORATION'S ANSWER BRIEF

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NOTE

For purposes of appeal, the following references shall be used. All citations to the record shall be indicated as "(R ___)". All references to Appellees, PYROFAX GAS CORPORATION and GOSS, INC., shall be referred to as Defendants or Defendant or shall be referred to singularly by name. All references to the Appellant, ERNEST WILLIAM DAVIS, shall be referred to as Plaintiff or by name.

CERTIFIED QUESTION

Prior 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?

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals has certified to the Florida Supreme Court a question regarding the application of Florida Statute 48.193(l)(f) 2 (1983). Defendant PYROFAX GAS CORPORATION, the out-of-state retailer of a product brought to Florida by the Plaintiff, asserts that Section 48.193 (l)(f) 2 does not apply to PYROFAX GAS CORPORATION under the facts of the instant case. This is so not only because of correct statutory interpretation of Section 48.193(l)(f) 2, but additionally in light of Florida's due process clause contained in Article I, Section 9 of the Florida Constitution.

A correct interpretation of Section 48.193(l)(f) 2 requires a plaintiff allege and prove that a defendant "processed, serviced or manufactured" an article that was "used or consumed within this state in the ordinary course of commerce trade or use". Since the ultimate facts in the Amended Complaint only alleged that PYROFAX GAS CORPORATION sold the article to the Plaintiff in Michigan, neither of these requirements were met.

Section 48.193(l)(f) 2 is limited to defendants who "process, service or manufacture" articles out of state and does not refer to an out-of-state retailer who does not do one of these enumerated acts. Section 48.193(l)(f) 2 has consistently only been applied to foreign manufacturers or foreign manufacturers of component parts.

Additionally Section 48.193(l)(f) 2 requires that the product enter the state in the ordinary course of commerce, trade or use. This allegation is not satisfied by a plaintiff

who purchases a product out of state and brings the product into Florida himself. By requiring the article involved in the cause of action to arrive in Florida in the ordinary course of interstate commerce is the legislature's chosen way of comporting with the constitutional due process consideration.

Such a construction is supported by an analysis of Section 48.182, the precursor to Section 48.193(1)(f) 2. It is also supported by an analogy to every other Florida long-arm provision contained in Section 48.193(1)(a) through (g). Finally, it is supported by logic in that the Plaintiff's alternative construction of the statute makes an entire clause of the statute a nullity.

Finally, such a construction comports with the inherent connexity requirement found under the constitutional due process "minimum contacts" analysis. Article I, Section 9 of the Florida Constitution provides a separate constitutional basis for upholding the trial court in the instant case. Constitutional due process analysis establishes that where there is no connexity between a defendant's acts within a forum and the defendant's acts giving rise to a cause of action, minimum contacts with the forum are ordinarily not satisfied absent a substantial and compelling relationship between the defendant and the forum.

For all the foregoing reasons, the trial court correctly determined it did not have in personam jurisdiction over the Defendants. Specifically, Section 48.193(1)(f) 2 does not provide in personam jurisdiction over the defendant where the defendant did not process, service or manufacture an article

which arrived in Florida in the ordinary course of commerce trade or use and once there injured a person. Therefore the Florida Supreme Court should answer the question certified by the Eleventh Circuit Court of Appeals in the negative.

ARGUMENT

INTRODUCTION

Defendant, PYROFAX GAS CORPORATION, was the alleged seller of the space heater involved in the instant case. Therefore in regard to this Defendant, the question certified by the Eleventh Circuit Court of Appeals can be restated as follows:

> Prior to the April 25, 1984 revision of Florida's Long-Arm Statute, was a non-resident retailer of a product subject to the jurisdiction of the Florida courts where (1) the retailer 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?

A careful analysis of the statute and constitutional provisions involved establish the correct answer to the certified question is "No".

PYROFAX originally moved to dismiss DAVIS' Amended Complaint on several grounds. These grounds included insufficiency of service of process and lack of personal jurisdiction, with jurisdiction being attacked both for failure to comply with Florida's Long-Arm Statutes and on constitutional due process grounds. (R 182-94) The trial court ultimately dismissed the Amended Complaint based on both the Plaintiff's failure to gain proper service of process over the Defendants and the court's lack of in personam jurisdiction over the Defendants. (R 223)

Correct jurisdictional analysis first requires a court to analyze a state statute to determine whether the legislature

has granted the court the ability to obtain personal jurisdiction over a defendant in a given situation. Assuming it has, this ostensible jurisdiction must next be analyzed to determine whether it comports with constitutional due process. In the instant case, the service of process issue and the federal constitutional implications (part of the second step jurisdictional analysis referred to above) remain pending before the Eleventh Circuit. The Eleventh Circuit seeks guidance from this court in interpreting the state long-arm jurisdictional provision contained in Florida Statutes, Section 48.193(1)(f) 2 (1983). However this court should take this opportunity to not only interpret this statute but also address the statute in light of Florida's Due Process clause contained in Article I, Section 9, Florida Constitution.

STATUTORY CONSTRUCTION OF SECTION 48.193(1)(f) 2, FLORIDA STATUTES (1983)

Notwithstanding DAVIS failed to attempt service of process pursuant to Section 48.194, Florida Statutes (1983) as required by Section 48.193(2), Florida Statutes (1983), the personal jurisdiction over PYROFAX is sought in the instant case pursuant to Section 48.193(1)(f) 2. This section 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 that 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 injury to persons or property within this state arising out of an act or omission outside of this state by the

> defendant, provided that at the time of the injury . . .:
>
> * * *
>
> (2) Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use or consumption resulted in the injury.

Since long-arm statutes are strictly construed, See, e.g., Tucker vs. Dianne Electric, Inc., 389 So.2d 683 (Fla. 5th DCA 1980); American Baseball Cap, Inc. vs. Duzinski, 308 So.2d 639 (Fla. 1st DCA 1975), this provision should be analyzed as to the constituent elements it requires to be pled and proved in order to acquire jurisdiction. Specifically the statute requires:

> (1) The defendant caused injury to persons or property
>
> (2) within this state
>
> (3) arising out of an act or omission
>
> (4) outside of this state by the defendant,
>
> (5) provided that at the time of the injury
>
> (6) products, materials, or things
>
> (7) processed, serviced or manufactured by the defendant
>
> (8) were used or consumed within this state in the ordinary course of commerce, trade, or use, and
>
> (9) the use or consumption resulted in the injury.

By comparing the above separate elements to the allegations of ultimate fact contained in DAVIS' Amended Complaint (R 102-54) it is evident that Elements 1, 2, 3, 4, 6 and 9 were pled.

However, the complaint fails to make any allegation as to the relative time of the Defendant's activities and the Plaintiff's injuries (Element 5). Finally, the Amended Complaint specifically alleged that the Plaintiff purchased from PYROFAX a heater manufactured by Defendant GOSS and that this purchase was made in Lapeer, Michigan. Consequently, the ultimate facts alleged in the Amended Complaint conclusively established that Elements 7 and 8 were missing and that this deficiency could not be rectified by amendment. Lacking these elements, it will be shown the allegations regarding PYROFAX did not sufficiently invoke the statute.

By the plain wording of the statute, Section 48.193(1)(f) 2 only applies to products (or materials or things) which are processed, serviced or manufactured by the defendant (Element 7). While this phrase is broad enough to encompass several related types of activities, it does not and should not encompass a simple sale of an article. The phrase "processed, serviced or manufactured" obviously connotes some action of the defendant in the nature of hands-on manipulation of the article in question. However none of these words, read separately or together in context, refer to the actions of a retailer in selling an unaltered and finished product to a purchaser. In such a situation the seller acts simply as a conduit between the manufacturer of a good and the ultimate purchaser. While no Florida case has specifically analyzed this particular phrase of the long-arm statute, most Florida cases that have construed Section 48.193(1)(f) 2 have done so in the context of a foreign manufacturer of an article, See, e.g., Electro Engineering Products Co., Inc.

vs. Lewis, 352 So.2d 862 (Fla. 1977); Kravitz vs. Gebrueder Pletscher Druckgusswaremfabrik, 442 So.2d 985 (Fla. 3d DCA 1983); Shoei Safety Helmet Corp. vs. Conlee, 409 So.2d 39 (Fla. 4th DCA 1982), or have involved manufacturers of component parts. See, e.g., Ford Motor Co. vs. Atwood Vacuum Machine Co., 392 So.2d 1305 (Fla. 1981); General Tire Rubber Co. vs. Hickory Springs Manufacturing Co., 388 So.2d 264 (Fla. 5th DCA 1980); Aero Mechanical Electronic Craftsmen vs. Parent, 366 So.2d 1268 (Fla. 4th DCA 1979); Hyco Manufacturing Co. vs. Rotext International Corp., 355 So. 471 (Fla. 3d DCA 1978).

The scarcity of appellate opinions dealing with applying §48.193(1)(f) 2 to out-of-state retailers is a consequence of a correct construction of Element No. 8, referred to above. As set out in No. 8 above, §48.193(1)(f) 2 specifically requires that the product be used or consumed within this state in the ordinary course of commerce, trade or use. This phrase has consistently been construed to mean "in the ordinary course of interstate commerce. (emphasis added) Life Laboratories, Inc. vs. Valdes, 387 So.2d 1009, 1011 (Fla. 3d DCA 1980); Aero Mechanical Electronic Craftsmen vs. Parent, 366 So.2d 1268, 1270 (Fla. 4th DCA 1979).

In other words, while a product may be manufactured outside the state of Florida, if it arrives in Florida through the ordinary retail chain of distribution (i.e., manufacturer sells the product to a wholesaler who, in turn, sells the product to a Florida retailer who ultimately sells the product to the consumer in Florida) then, assuming

sufficient minimum contacts, jurisdiction may be acquired pursuant to §48.193(1)(f) 2. Thus where the particular product which allegedly caused an injury to a person within the state of Florida arrived in Florida through the normal channels of retail distribution, Florida courts have acquired jurisdiction pursuant to §48.193(1)(f) 2. _See, e.g._, _Ford Motor Co. vs. Atwood Vacuum Machine Co._, 392 So.2d 1305 (Fla. 1981) (in a suit filed by plaintiff against a foreign car manufacturer and _Florida_ car retailer for allegedly defective door hinge, third party action against foreign door hinge manufacturer was allowed under §48.193(1)(f) 2); _Electro Engineering Products Co., Inc. vs. Lewis_, 352 So.2d 862 (Fla. 1977) (where foreign manufacturer utilized wholesale houses, mail order outlets and other outlets for the sale of its product and product was purchased _in Florida_ as a result of advertising within the state of Florida, plaintiff acquired jurisdiction pursuant to §48.193(1)(f) 2); _Shoei Safety Helmet Corp. vs. Conlee,_ 409 So.2d 39 (Fla. 4th DCA 1982) (where manufacturer of product placed product in channel of commercial trade whereby product ultimately reached _Florida retailer_ who sold the product to plaintiff, jurisdiction over manufacturer could be acquired pursuant to §48.193(1)(f) 2). Consequently to invoke jursidiction pursuant to §48.193(1)(f) 2, a plaintiff must plead and ultimately prove that the particular article alleged to be defective originally arrived in Florida through the retail distribution chain of interstate commerce. (As such the sale of the product to the ultimate purchaser

occurs in Florida and §48.193 allows jurisdiction over a retailer in such a situation pursuant to other subparagraphs. See, e.g., §48.193(1)(a), (b) or (g).)

In the instant case, the allegations of the Amended Complaint clearly establish that the article involved in the instant case was purchased by the Plaintiff from PYROFAX in Lapeer, Michigan and was brought to Florida by the Plaintiff himself. (R 105) Thus the allegations establish that the article did not arrive in Florida in the ordinary course of interstate commerce and §48.193(1)(f) 2 does not apply. Notwithstanding this fatal omission, DAVIS contends he has alleged sufficient facts to confer jurisdiction under §48.193(1)(f) 2 because he has alleged he used this product within Florida and that this use caused him injury.

In support of his position DAVIS relies on Kravitz vs. Gebrueder Pletscher Druckgusswaremfabrik, 442 So.2d 985 (Fla. 3d DCA 1983)[hereinafter Kravitz]. In Kravitz, plaintiff sought personal jurisdiction over the foreign manufacturer of a bicycle rack that was distributed for sale in several states in the United States, including the state of Florida. The plaintiff bought his particular bicycle rack in Illinois and personally brought it to Florida. When the plaintiff was injured from an alleged malfunctioning of the rack, he sued the foreign manufacturer in Florida and sought jurisdiction pursuant to §48.193(1)(f) 2. Reversing the trial court's finding of lack of jurisdiction, the appellate court held that the section did not require that the particular

product had to enter the state in the ordinary course of commerce. The court ignored the wording of §48.193(1)(f) 2 and failed to construe the statute at all. Instead the Kravitz court simply reasoned that since the manufacturer distributed the same bicycle rack in Florida through other retailers, there was sufficient minimum contacts present to suffice the constitutional due process requirement as set forth in International Shoe Co. vs. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

While Kravitz supports appellant's position, there ar several reasons why it should not be applied to PYROFAX in the instant case or followed by this court at all. First, the defendant in Kravitz was a manufacturer of the allegedly defective product. As previously argued, §48.193(1)(f) 2 should be construed to only apply to manufacturers or similar entities that "process, service or manufacture" a product. PYROFAX concededly did none of the above. Thus §48.193(1)(f) 2 should not apply to PYROFAX and Kravitz says nothing to the contrary.

Next and of more import, Kravitz appears to be an aberration of the pre-existing case law construing §48.193 (1)(f) 2. §48.193(1)(f) 2 has previously only been applied in situations where the product in question arrived in the state in the ordinary course of commerce. See, e.g., Ford Motor Co. vs. Atwood Vacuum Machine Co., 392 So.2d 1305, (Fla. 1981); Electro Engineering Products Co., Inc. vs. Lewis, 352 So.2d 862 (Fla. 1977); Life Laboratories, Inc. vs. Valdes, 387 So.2d 1009 (Fla. 3d DCA 1980); Aero Mechanical Electronic

Craftsman vs. Parent, 366 So.2d 1268 (Fla. 4th DCA 1979); Harlo Products Corp. vs. Case Co., 360 So.2d 1328 (Fla. 1st DCA 1978). Conversely, Section 48.193(1)(f) 2 has not been applied where the particular product involved in the suit did not arrive in Florida in the normal course of commerce, notwithstanding the fact that similar products did. See, e.g., General Tire & Rubber Co. vs. Hickory Springs Mfg. Co., 388 So.2d 264 (Fla. 5th DCA 1980).

Not even Shoei Safety Helmet Corp. vs. Conlee, 409 So.2d 39 (Fla. 4th DCA), cert. dismissed, 421 So.2d 518 (Fla. 1982), the case relied on by the Kravitz court for support, gives such a construction for Section 48.193(1)(f) 2. Kravitz' reliance on Shoei is misplaced for two reasons. First, the jurisdictional statute construed in Shoei was Section 48.181. Additionally, although Shoei held that the "connexity" consideration was satisfied if the foreign corporation was doing business in Florida through other corporations, the facts of Shoei indicate connexity under Section 48.193(1)(f) 2 would have been satisfied since the article involved actually reached Florida through the normal channels of interstate commerce.

The Kravitz construction of Section 48.193(1)(f) 2 also appears to depart from the legislative intent that the provision contains a connexity requirement, i.e, a connection between the defendant's acts giving rise to a cause of action and the defendant's acts which form the basis of jurisdiction. Section 48.193 was enacted by the 1973 Florida legislature. Chapter 73-179, Laws of Florida. At the same time Section 48.193 was enacted, the legislature repealed Section 48.182, Florida Statutes

(repealed 1973), the predecessor to §48.193(1)(f). Ch. 73-179, § 2, Laws of Fla. Section 48.182 provided:

> Service on nonresidents committing a wrongful act outside the state which causes injury within the state -- Any nonresident person, firm or corporation who in person or through an agent commits a wrongful act outside the state which causes injury, loss or damage to persons or property within this state may be personally served in any action or proceeding against the nonresident arising from any such act in the same manner as a nonresident who in person or through an agent has committed a wrongful act within the state. If a nonresident expects or should reasonably expect the act to have consequences in this state, or any other state or nation and derives substantial revenue from interstate or international commerce he may be served; provided that, if such nonresident is deceased, his executor or administrator shall be subject to personal service in the same manner as a nonresident; provided further that this section shall not apply to a cause of action for defamation of character arising from the act.

This section was consistently construed to require some connexity between the act giving rise to the cause of action and the acts giving rise to jurisdiction over the defendant. See, e.g., John Blue Co. vs. Roper Pump Co., 324 So.2d 147 (Fla. 3d DCA 1976); American Baseball Cap, Inc. vs. Duzinski, 308 So.2d 639 (Fla. 1st DCA 1975); Youngblood vs. Citrus Association of N.Y. Cotton Exchange, Inc., 276 So.2d 505 (Fla. 4th DCA), cert. denied, 285 So.2d 26 (Fla. 1973). This connexity requirement was brought forward in §48.193(1)(f) 2 by requiring the specific article giving rise to the cause of action to arrive in the state through the normal channels of retail distribution and thus hopefully satisfy any constitutional "minimum contacts" problems.

This construction of §48.193(1)(f) 2 in particular, finds support in an analysis of §48.193 as a whole. A general connexity requirement runs throughout the other provisions

of Section 48.193(1)(a) - (g). Each of the other provisions of the act (including Section 48.193(1)(f) 1) specifically require that the act of the foreign entity which gives rise to the cause of action be the same act which provides the minimum contacts necessary to comply with constitutional due process. Such consistency among the other provisions of Section 48.193 indicates the Florida legislature did not intend the Kravitz construction of Section 48.193(1)(f) 2 when it passed the statute.

Finally, Plaintiff's construction of Section 48.193(1)(f) 2 simply reads the phrase "in the ordinary course of commerce, trade or use" out of the statute. Under this construction DAVIS need only show that he used the product within the state and that its use resulted in injury. Under this construction the phrase "in the ordinary course of commerce, trade or use" has no meaning and is therefore superfulous. Since the legislature could easily have adopted the Plaintiff's construction by eliminating this phrase, the fact that it was included gives rise to the inference that it was intended to be substantive.

In summary, a strict instruction of Section 48.193(1)(f) 2 requires a plaintiff allege certain facts before a court may acquire personal jurisdiction over a defendant; specifically a plaintiff must show that the defendant "processed, serviced or manufactured" the particular article giving rise to the suit and that the particular article arrived in Florida in the normal course of commerce. This construction has been followed in the overwelming majority of appellate decisions addressing the statute. This construction also comports with the legislative intent expressed in Section 48.193(1)(f) 2's predecessor and

its companion long-arm jurisdiction Sections 48.193(1)(a) through (g). Finally, any alternative construction deprives these clauses of any meaning and substantially alters the plain meaning of the statute. For the foregoing reasons, it is submitted the certified question should be answered "No".

CONSTITUTIONAL CONSTRUCTION OF ARTICLE I, SECTION 9, FLORIDA CONSTITUTION

As noted in the introduction, the federal constitutional question of whether or not applying Florida's long-arm statute to the instant facts would comport with due process remains pending before the Eleventh Circuit Court of Appeals and need not be addressed unless Section 48.193(1)(f) 2 is construed to apply to the facts of the instant case. However while the federal constitutional question is not before this court, Article I, Section 9 of the Florida Constitution also provides that "no person shall be deprived of life, liberty or property without due process of law . . .". Therefore there are state constitutional due process considerations applicable to the instant case. Being a state constitutional provision, it is most appropriately interpreted by this court.

Few Florida cases analyze Article I, Section 9 of the Florida Constitution separate from the United States Constitution, Amendment XIV. In point of fact, the clauses are worded substantially the same and have been construed as imposing the same standard. See, e.g., Florida Canners Assoc. vs. State Department of Citrus, 371 So.2d 503 (Fla. 2d DCA 1979), affirmed, 406 So.2d 1079 (Fla. 1982), appeal dismissed sub. nom., Kraft, Inc. vs. Florida Dept. of Citrus, 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d 1297 (1982); Florida High School Activities Assoc. vs. Bradshaw,

369 So.2d 398 (Fla. 2d DCA 1978). Therefore although the following analysis utilizes case law from the United States Supreme Court, it is urged as the correct approach to be taken in construing the state constitutional provision as well.

It is generally conceded that the due process clause provides an "outer boundary" or a constitutional limitation on a state's right to exercise jurisdiction over persons or entities beyond its boarders. In an effort to determine when a state's exercise of long-arm in personam jurisdiction comports with due process, the United States Supreme Court in International Shoe Company vs. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) embraced an analysis that has come to be referred to as the "minimum contacts test".

A plethora of legal opinions and articles have been written addressing the subject of "what constitutes sufficient 'minimum contacts' to satisfy due process?" But an analysis of certain United States Supreme Court opinions since International Shoe indicate that the proper approach is to analyze the contacts between the defendant, the forum and the cause of action. Additionally, there is an inherent connexity requirement embodied in the test such that where the events or acts giving rise to the cause of action are not related to the acts of the defendant which tie it to the forum, a much stricter approach is taken and the defendant's ties to the forum must be substantial.

The United States Supreme Court recognized the connexity requirement in International Shoe. There, the State of Washington sought to recover from a Delaware Corporation

certain unpaid contributions to the State Unemployment Compensation Fund, the contributions being a specified percentage payable annually by each employer for his employees' services in the state. 326 U.S. at 311-12, 90 L.Ed. at 99. The United States Supreme Court ultimately held that the petitioner had sufficient minimum contacts with the State of Washington such that the state's exercise of in personam jurisdiction did not violate the due process clause. That connexity between the defendant's actions in a state and the cause of action sued upon was of prime importance to the International Shoe Court is evident in the following passage:

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. . . To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process. . . .
>
> While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. . . . (Citations omitted, emphasis added) 326 U.S. at 317-18, 90 L.Ed. 102-03.

Thus, although the United States Supreme Court did not hold that connexity was an absolute requirement, where connexity was lacking a defendant's other contacts with a forum must be considered substantial.

Since International Shoe, the United States Supreme Court has, at various times, made reference to the connexity or lack of connexity between a defendant's contacts with a forum and the cause of action sued upon in determining whether jurisdiction existed or not. In Hanson vs. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the United States Supreme Court reversed Florida's attempted exercise of in personam jurisdiction over a Delaware trustee. In so ruling, the court noted "the cause of action in this case is not one that arises out of an act done or transaction consummated in the foreign state. In that respect, it differs from McGee vs. International Life Insurance Company . . . ." 357 U.S. at 251, 2 L.Ed.2d at 1296. After discussing McGee, the court concluded "Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida." 357 U.S. at 252, 2 L.Ed.2d at 1297.

Similarly, in Shaffer vs. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the United States Supreme Court struck down a state's attempt to invoke quasi-in-rem jurisdiction over intangible property whose situs was located within that state where the cause of action sought to be prosecuted did not relate to or involve the property. In Shaffer, the appellee sought to bring a shareholder's derivative suit against a corporation that was incorporated under the laws of

Delaware but had its principal place of business in Phoenix, Arizona. The quasi-in-rem aspect of the suit was the result of the Delaware court's sequestration of the non-resident's stock, the stock's situs considered to be in Delaware by law. In reversing, the Supreme Court held that the International Shoe "minimum contacts" test should be applied in assessing all types of jurisdiction including quasi-in-rem jurisdiction. 433 U.S. at 212, 53 L.Ed.2d at 703. Under International Shoe, they reasoned that the central concern to be addressed was the relationship among the defendant, the forum, and the litigation. 433 U.S. at 204, 53 L.Ed.2d at 698. In holding the jurisdiction did not have sufficient minimum contacts to comport with due process, the United States Supreme Court focused on the lack of connexity between the cause of action and the acts or facts giving rise to jurisdiction. The court noted that the presence of property in a state had some bearing on the exercise of jurisdiction by providing contacts among the forum state, the defendant and the litigation. The two examples given by the court were (1) where claims to the property itself are the source of the underlying controversy and (2) where a plaintiff is injured on property owned by a non-resident where the cause of action is otherwise related to the rights and duties growing out of that ownership. 433 U.S. at 207-08, 53 L.Ed.2d at 699-700. Finally, the court stated:

> The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware. Yet that property is not the subject matter of this litigation, nor is the underlying cause of action related to the

> property. Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists, that jurisdiction must have some other foundation. (Footnote omitted) 433 U.S. at 213, 53 L.Ed.2d at 703.

Since connexity was lacking between the cause of action and the defendant's contacts with the forum state, the state lacked minimum contacts sufficient to invoke jurisdiction.

Although DAVIS cites World-Wide Volkswagen Corp. vs. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) as authority for the proposition that there are sufficient minimum contacts in the instant case, the case does not support such a conclusion. In World-Wide Volkswagen, the Supreme Court reversed an Oklahoma state court's attempt to exercise long-arm in personam jurisdiction over a New York auto retailer and wholesale distributor in a case based on products liability arising from an automobile accident in Oklahoma. Since neither of the defendants had any contacts whatsoever with Oklahoma, the attempted exercise of jurisdiction clearly violated the due process clause. Since there were no contacts between the defendants and the forum, there was obviously no connexity between those contacts and the cause of action and, therefore, that aspect of the minimum contacts requirement was not addressed by the Supreme Court. However the World-Wide Volkswagen decision is instructive in that the Supreme Court made it clear that a seller of chattels does not appoint the chattel his agent for service of process nor does a seller's amenablity to suit travel with the chattel. 444 U.S. at 296, 62 L.Ed.2d at 501.

Most recently in Keeton vs. Hustler Magazine, Inc., _____ U.S. _____, 104 S.Ct. ______, 79 L.Ed.2d 790 (1984), the Supreme Court again addressed the connexity aspect of the minimum contacts requirement. In Keeton, the petitioner sought to sue respondent for liable. The respondent was an Ohio corporation with its principal place of business in California. However the petitioner brought her suit in New Hampshire where the respondent sold between ten to fifteen thousand copies of its magazine each month. Although the lower courts had dismissed petitioner's suit for lack of personal jurisdiction, the United States Supreme Court reversed.

In reversing, the court noted the case was ostensibly brought in New Hampshire because that state's unusually long statute of limitations could combine with the "single publication rule" (a rule allowing an assessment of damages for one publication to numerous entities) and allow the petitioner to bring a claim which would otherwise be time barred. However the court noted that the proper focus should be on the relationship among the defendant, the forum and the litigation. Since the defendant's contacts with the forum (regularly monthly sales of thousands of magazines) was the very act giving rise to the plaintiff's cause of action in New Hampshire, the court held the minimum contacts requirement was satisfied. That this connexity was important to the United States Supreme Court is evident in their following discussion:

> In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction

> over a cause of action unrelated to those activities. But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire. ______ U.S. at ______, 79 L.Ed.2d at 801.

Without such connexity, the defendant's unrelated activities would not have been sufficient minimum contacts to support jurisdiction.

In the instant case, Defendant must concede that his cause of action against PYROFAX does not arise out of any act of PYROFAX in the State of Florida. As such it lacks the requisite connexity and the contacts alleged in the Amended Complaint do not, therefore, satisfy the minimum contacts requirement. Therefore, not only does the statute not apply to the facts of the instant case, applying the statute to the facts of the instant case would violate the due process clause of Article I, Section 9 of the Florida Constitution. It is submitted this is an additional state ground why the Plaintiff failed to acquire jurisdiction over the Defendant in the instant case.

CONCLUSION

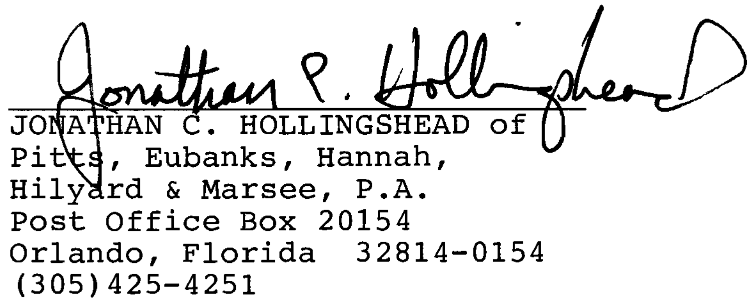
In summary, the Plaintiff has failed to invoke Section 48.193 (1)(f) 2, Florida Statutes (1983). The Plaintiff has alleged that PYROFAX was the retailer of the article in question and that this sale occurred in Lapeer, Michigan. Thus Plaintiff has failed to allege that PYROFAX "processed, serviced or manufactured" the article in question nor has Plaintiff alleged that the article was used in this state "within the ordinary course of commerce trade or use".

This requirement is not only shown in the plain language of the statute and has been so construed consistently by courts analyzing this statute, but the failure to require the element would render part of the statute a nullity. This construction is also supported by analysis of prior case law and similar long-arm jurisdiction provisions.

Finally, the Plaintiff's construction would obliterate the connexity requirement inherent in the due process clause of both the state and federal constitutions. As such, the Plaintiff's construction violates Article I, Section 9 of the Florida Constitution and should not be followed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery to: WILLIAM E. JOHNSON, Post Office Box 2867, Orlando, Florida 32802 and RONNIE H. WALKER, Post Office Box 273, Orlando, Florida 32802 this 10th day of April, 1985.



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