

Adkins
O. a. 10-10-85

66,497

IN THE SUPREME COURT
OF FLORIDA

ERNEST WILLIAM DAVIS,
Plaintiff-Appellant,

vs.

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

Defendant-Appellees.

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MAR 25 1985
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CASE NO. 66-497

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Contents	i
Table of Citations	ii
Designations in Brief	iii
Certified Question	1
Statement of the Case and Facts	2-5
Summary of the Argument	6
Argument	7-14
Conclusion	15
Certificate of Service	16

CITATIONS OF AUTHORITY

	<u>PAGE</u>
<u>Coulter v. Sears, Roebuck and Company</u>	
426 F.2d 1315 (5th Cir. 1970)	10
<u>Electroengineering Products Company, Inc. v. Lewis</u>	
352 So.2d 862 (Fla. 1977)	11
<u>Ford Motor Company v. Atwood Vacuum Machine Company</u>	
392 So.2d 1305 (1981) appeal dismissed, cert. denied 101 S.ct. 3024, 452 U.S. 901, 69 L.Ed.2d 401	12
<u>Gray v. American Radiator and Standard Sanitary Corp.</u>	
22 Ill.2d 432, 176 N.E.2d 761 (1961)	11
<u>International Shoe Co. v. Washington</u>	
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945)	7, 13
<u>Kravitz v. Gebrueder Pletscher Druckguss Warenfabrik</u>	
442 So.2d 985 (Fla. 3d DCA 1983)	6, 7
<u>Oswalt v. Scripto, Inc.</u>	
616 F.2d 191 (5th Cir. 1980)	10
<u>Shoei Safety Helmet Corp. v. Conlee</u>	
409 So.2d 39 (Fla. 4th DCA), dismissed 421 So.2d 518 (Fla. 1982)	8
<u>Wass v. American Safety Equipment Corp.</u>	
573 F.Supp 38 (D.Me. 1983)	9
<u>World-Wide Volkswagen Corp. v. Woodson</u>	
444 U.S. 286 (1980)	13
 <u>STATUTES</u>	
Fla. Stat., §48.193	3, 6, 12
Fla. Stat., §48.193(1)(f)2	7, 8
Fla. Stat., §48.193(a) & (f)	9

DESIGNATIONS IN BRIEF

Reference herein to this record when referring to the Record on Appeal will be (R-), when referring to the Supplemental Record on Appeal will be (Supplemental Record-) and when referring to the transcript will be (T-). Appellant was the Plaintiff in the District Court and Appellees were the Defendants, GOSS, INC., and PYROFAX GAS CORPORATION.

CERTIFIED QUESTION

Prior to the April 25, 1984 revision of Florida's Long-arm Statute, was a nonresident 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

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) Defendants, PYROFAX GAS CORPORATION and GOSS, INC., moved to dismiss Plaintiff's Amended Complaint. (R-61) The District Court was of the opinion that two issues raised in the Motions to Dismiss had merit. One of those issues directed to Plaintiff's Complaint was "lack of in personam jurisdiction".

DAVIS' allegations in his Amended Complaint as to in personam jurisdiction over PYROFAX GAS CORPORATION and GOSS, INC., are as follows:

7. Defendant, PYROFAX GAS CORPORATION, is a corporation existing under the laws of the State of Michigan as a citizen of the State of Michigan and not a citizen of the State of Florida.
8. Defendant, GOSS, INC., is a corporation organized and existing under the laws of the State of Pennsylvania and not a citizen of the State of Florida.
9. There is complete diversity of citizenship between the Party Plaintiff and Party Defendants and the amount in controversy exceeds the sum of TEN THOUSAND DOLLARS (\$10,000.00), exclusive of interests and costs.
10. This Court has original jurisdiction pursuant to Title 28 U.S.C.A., Section 1332(a).

11. The Defendant, PYROFAX GAS CORPORATION, is a foreign corporation, subject to the jurisdiction of Florida Courts in that the Defendant manufactured or sold a product which was used within this State in the ordinary course of commerce and trade and which injured a person in this State; this personal jurisdiction is based upon Florida Statutes 48.193. The Defendant was engaged in the business activity of manufacturing, marketing, distributing or selling gas appliance equipment such as the product which is the subject of this lawsuit for use by the citizens of Florida and other states in that:

(a) The Defendant has a nationwide marketing program for the purpose of selling its products throughout the United States for use in Florida and other states.

(b) The Defendant advertises its products in publications with nationwide or regional circulation, including the State of Michigan where the product which is the subject of this lawsuit was sold and the State of Florida where this product was used.

(c) The Defendant maintained a list of its Florida customers who had purchased gas appliance products from the Defendant.

(d) In its regular course of business, the Defendant operates numerous business locations or branches within the Middle District of Florida, for the sale of gas appliances such as the product which is the subject of this lawsuit.

12. The Defendant, GOSS, INC., is a foreign corporation, subject to the jurisdiction of Florida Courts in that the Defendant manufactured or sold a product which was used within this State in the ordinary course, commerce and trade and which injured a person in this State; this personal jurisdiction is based upon Florida Statutes 48.193. The Defendant was engaged in the business activity of manufacturing, marketing, distributing, and selling gas appliance equipment such as the product which is the subject of this lawsuit for use by the citizens of Florida and other states in that:

(a) The Defendant has a nationwide marketing program for the purpose of selling its products throughout the United States for use in Florida and other states.

(b) The Defendant advertises its products in publications with nationwide or regional circulation, including the State of Michigan where the product which is the subject of this lawsuit was sold and the State of Florida where this product was used.

(c) The Defendant maintained a list of its Florida customers who had purchased gas appliance products from the Defendant.

(d) Prior to the date of the incident which is the subject of this lawsuit, the Defendant shipped gas heaters to its distributors in the Middle District of Florida for sale to Florida customers.

13. On or about December 24, 1980, the Plaintiff and his family were using the HEATER which was attached to a twenty (20) pound propane gas cylinder, located inside the Plaintiff's mobile home on Cow Creek Road in Edgewater, Florida. The HEATER was fueled by propane gas purchased from retail outlet or distributor for PYROFAX GAS CORPORATION, located in New Smyrna Beach, Florida. (R-103-105)

The Court was also of the opinion that the Defendants' contention as to the service of process, "failure of the Plaintiff to gain proper service of process of Defendants", had merit.

On October 21, 1983, a hearing was held before the Court on Defendants' Motions to Dismiss Plaintiff's Amended Complaint. (T-2) On November 4, 1983, the Court dismissed Plaintiff's Amended Complaint against both Defendants 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)

As part of the record in this case, counsel for Defendant, GOSS, INC., stated at the hearing on October 21, 1983, that Defendant, GOSS, INC., did sell a heater of the type as alleged in Plaintiff's Amended Complaint in the State of Florida in the year, 1975. (T-11-12) At the hearing and on the record before this Court, counsel 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 Defendant, GOSS, INC. (T-13) Neither Defendant filed any affidavit or any supporting evidence whatsoever with the District Court to factually establish a lack of in personam jurisdiction.

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

On September 20, 1984, oral arguments were held before the Eleventh Circuit Court of Appeals. On February 1, 1985, the Eleventh Circuit Court of Appeals pursuant to Florida Rule of Appellate Procedure 9.150, certified the following question to this Honorable Court:

Prior to the April 25, 1984 revision of Florida's long-arm statute, was a nonresident manufacturer or wholesale 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 THE ARGUMENT

The Florida Courts should have jurisdiction over any manufacturer or wholesaler who engages in the sale of products in the State of Florida and where an identical product not purchased in Florida causes injury to persons in the State of Florida. This Court should support the decision of the Third District Court of Appeals for Florida in Kravitz v. Gebrueder Pletscher Druckguss Warenfabrik, 442 So.2d985 (Fla. 3d DCA 1983). When a manufacturer or wholesaler comes to Florida and engages in business activities, i.e. The sale of products to consumers in Florida, and an identical product manufactured by the same company is purchased outside of Florida but used within Florida and said product causes injury within Florida; the manufacturer or wholesaler has sufficient contacts with the State of Florida for the Florida Courts to acquire in personam jurisdiction pursuant to Florida's long-arm statute. §48.193, Fla. Stat. (1977). Therefore, the certified question presented to this Court should be answered "yes".

ARGUMENT

This Court should hold that a manufacturer or wholesaler of a product is subject to the jurisdiction of the Florida Courts when that manufacturer or wholesaler engages in business activities in the State of Florida and the product of the manufacturer or wholesaler causes injury to persons in the State of Florida, even though the product, which is also sold in Florida, was purchased in another state and brought to Florida by the person who was injured.

The Third District Court of Appeals in Florida decided a case that involves facts which are identical to the facts as alleged in the case before the bar. The Third District held that the defendants sales to an independent Florida distributor of the same type of product which causes injury to a person within the State of Florida constitutes sufficient minimum contacts for the purpose of jurisdiction under Section 48.193 (1)(F)2, Florida Statutes (1981), and does not offend traditional due process requirements as set forth in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Kravitz v. Gebrueder Pletscher Druckguss Warenfabrik, 442 So.2d 985 (Fla. 3d DCA 1983) (hereinafter cited as Kravitz). Kravitz sued a Switzerland based manufacturer of bicycle racks for negligence, implied warranty and strict liability. Kravitz purchased the allegedly defective bicycle rack in Illinois and was injured in Florida when the rack splintered and became embedded in his leg following an automobile accident. Kravitz, 442 So.2d 986. The Third District

reversed the trial courts decision which dismissed the case for lack of personal jurisdiction.

In support of its position Pletscher argued that there must be shown a "connexity" between the specific bicycle rack which caused injury to Kravitz and Defendants' business activities in Florida. Kravitz, 442 So.2d at 987. The Third District Court refused to adopt that argument, relying on Shoei Safety Helmet Corp. v. Conlee, 409 So.2d 39 (Fla. 4th DCA), dismissed, 421 So.2d 518 (Fla. 1982). The Court found that the connexity requirement was met because the Defendant engaged in the business of promoting and soliciting their products in Florida, both at the time of sale to Kravitz and at the time of the injury. Shoei Safety Helmet Corp. v. Conlee, 409 So.2d 39 (Fla. 4th DCA), dismissed, 421 So.2d 518 (Fla. 1982). In Kravitz, the court held that sufficient minimum contacts for the purpose of jurisdiction under 48.193(1)(F)2 were met when Pletscher made sales of similar products to an independent distributor in Florida. Kravitz, 442 So.2d at 987.

This Court is faced with a factual situation identical to the Kravitz case. DAVIS has alleged that he purchased the product outside the State of Florida and suffered injuries from said product in the State of Florida. (R-105)

DAVIS has further alleged that Defendants have advertised, solicited and were engaged in the business of manufacturing, marketing, distributing and selling these products to Florida customers. (R-103-105) Defendant, PYROFAX GAS CORPORATION, also maintained a retail outlet or distributor in New Smyrna Beach, Florida, from whom DAVIS purchased the propane gas that

fueled the heater which caused the death of DAVIS' wife and two minor children. (R-105) GOSS, INC., admitted to the Court at the Motion to Dismiss hearing, that they sold similar heaters in Florida. (T-11- 12) These allegations and admission of Defendant, GOSS, INC., satisfy the jurisdictional requirements of Fla. Stat. §48.193(1)(a) and (f) which state:

"(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:

(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.

...

(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 either:

1. The defendant was engaged in solicitation or service activities within this state which resulted in such injury; or

2. Products, materials, or things processed, services 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."

In Wass v. American Safety Equipment Corp.,

573 F.Supp. 38 (D.Me. 1983) the Court held that:

"Although Defendant is a New York corporation with its principal place of business in Michigan, has no sales people in Maine, owns no property in Maine, and is not registered to do business in Maine, its contacts with Maine satisfy the minimum contacts requirement of the due process clause of the Fourteenth Amendment. Defendant sold seatbelts to a Maine airplane refurbishing company and to Delta Airlines which regularly serves Maine with intrastate and interstate flights, and also sold automotive seatbelts to Chrysler, Ford and American Motors which presumably caused the belts to arrive in Maine."

The contacts between GOSS, INC. and PYROFAX GAS CORPORATION with the State of Florida are much more significant than those set out in the Wass decision.

The Fifth Circuit Court of Appeals has held that a manufacturer can be subjected to in personam jurisdiction as a result of a distribution system whereby its products arrive in the forum state. Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) The Court stated in its opinion that the manufacturer had reason to know or expect that its product would reach the forum state in the course of the distribution chain, and, therefore, was subject to in personam jurisdiction in the forum state when the product malfunctioned and caused injuries to the Plaintiff. Oswalt v. Scripto, Inc., 616 F.2d at 200 (5th Cir. 1980).

In Oswalt, the Fifth Circuit looked to its earlier decision in Coulter v. Sears, Roebuck and Co., 426 F.2d 1315 (5th Cir. 1970) when it reiterated its position that:

"It is sufficient to impose jurisdiction over a foreign manufacturer if he introduces his product into the stream of commerce with reason to know or expect that its product would eventually be brought into the forum state."

The decision in Oswalt to sustain in personam jurisdiction was reinforced by Gray v. American Radiator and Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) (hereinafter referred to as Gray). The facts of Gray are as follows: the defendant corporation manufactured a valve in Ohio and subsequently the valve was incorporated into a hot water heater in Pennsylvania. The hot water heater was then sold in the course of commerce and eventually reached Illinois where it caused injuries. Gray, 22 Ill.2d 432, 176 N.E.2d 761 (1961) The Illinois Supreme Court held that where the alleged liability arises from the manufacture of products, presumably sold in contemplation of use in the forum state, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant brought the product into the forum state. Gray, 176 N.E.2d at 766.

This Court has upheld the constitutionality of Florida's long-arm statute in Electroengineering Products Company, Inc. v. Lewis, 352 So.2d 862 (Fla. 1977), where the Court's position on this point was clearly stated:

"To acquire jurisdiction of a non-resident pursuant to this section of Florida's Long Arm Statute, the Plaintiff must initially allege in the Complaint sufficient jurisdictional facts to show that the non-resident manufactured or services the product which was used within the State in the ordinary course of commerce and trade and which injured a person in this State." 352 So.2d at 864.

Neither the statute itself or the case law addressing the statute require the product to be manufactured or purchased inside Florida, so long as the product was used in the State and caused injury in the State.

Yet, Defendants GOSS and PYROFAX would urge this Court to hold that a manufacturer or wholesaler engaged in the business of selling products in the State of Florida should not be subject to the jurisdiction of the Florida Courts when a person purchases an identical product in another state, brings that product to Florida and sustains an injury in Florida as a result of an alleged defect of said product.

In reviewing F.S. 48.193 (1977), this Court makes it abundantly clear that this statute is not as narrow and limited as GOSS and PYROFAX urge.

In Ford Motor Company v. Atwood Vacuum Machine Company, 392 So.2d 1305 (1981) appeal dismissed, cert. denied 101 S.Ct. 3024, 452 U.S. 901, 69 L.Ed.2d 401, this Court held that there is no basis for a limitation on a State's jurisdiction over a non-resident who manufactures a component part outside the State and takes no part in the sale, distribution or marketing of the finished product in the State. Clearly, Florida courts will allow this statute to reach Defendants who

place their products in the stream of commerce in such a way that the arrival and use of the product in the forum state is not so unforeseeable as to negate an expectation on the manufacturer's part that this would occur.

It is clearly alleged in DAVIS' Amended Complaint that GOSS, INC., and PYROFAX GAS CORPORATION knew or had reason to know that this type heater would reach Florida. (R-103-105) They intended for this product to reach Florida or they would not have solicited or advertised for its sales in Florida. (R-103-105) There is no question that Defendant, GOSS, INC., knew this type heater was being marketed and sold in Florida. (T-11,12)

The Supreme Court settled the "minimum contacts" dispute when it decided World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (hereinafter cited as Woodson). The Supreme Court held:

A state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, id., at 316, 66 S.Ct., at 158, and the relationship between the defendant and the forum must be such that is it "reasonable...to require the corporation to defend the particular suit which is brought there," id., at 317, 66 So.Ct., at 158. The Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." Id., at 319, 66 S.Ct., at 159. Pp. 564-566. Woodson, 444 U.S. 286.


This Court should uphold the reasoning of the Third District and state that when a manufacturer or wholesaler of a product engages in the business activity of selling that product in Florida, they will be subject to the jurisdiction of the Florida Courts when an identical product causes injury to a person in Florida, even though the product that caused the injury was not purchased in the State of Florida.

CONCLUSION

Appellant, DAVIS, respectfully requests that this Court find that when a manufacturer or wholesaler of a product engages in the business of selling their products in Florida and an identical product purchased outside Florida, causes injury within Florida that the manufacturer or wholesaler be subject to the jurisdiction of the Florida Courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by United States Mail, this 21st day of March, 1985, to ROBERT HANNAH, ESQUIRE, Post Office Box 20154, Orlando, Florida 32802, and to WILLIAM E. JOHNSON, ESQUIRE, Post Office Box 2867, Orlando, Florida 32802.



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