O/A 3-6-87

IN THE SUPREME COURT OF FLORIDA

No. 68,933

AETNA LIFE AND CASUALTY COMPANY,
as subrogee of Energy Conservation,
Unlimited, Inc.,

Petitioner,

vs.

THERM-O-DISC, INC.,

Respondent.

FILED
NOV 21 1986
CLERK, SUPREME COURT
By ___ Deputy Clerk

RESPONDENT'S ANSWER BRIEF

COKER, MYERS & SCHICKEL, P. A.

for DANIEL C. SHAUGHNESSY, ESQUIRE
P. O. Box 1860
10 South Newnan Street
Jacksonville, Florida 32201
(904) 356-6071
Attorneys for Respondent.

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT AND STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT JURISDICTION OVER THE NON-RESIDENT RESPONDENT DOES NOT ATTACH BY OPERATION OF FLORIDA STATUTES, §48.193(1)(f)(1982) IN THAT NO INJURY TO PERSONS OR PROPERTY HAS OCCURRED WITHIN THE STATE OF FLORIDA. IN ANY EVENT, RESPONDENT WAS NOT ENGAGED IN ANY SOLICITATION OR SERVICE ACTIVITIES AT THE TIME NOR WERE PRODUCTS MANUFACTURED BY THE RESPONDENT USED OR CONSUMED WITHIN THE STATE.	5
II. THE DISTRICT COURT OF APPEAL CORRECTLY FOUND INSUFFICIENT EVIDENCE REFLECTING BREACH OF A CONTRACT IN FLORIDA BY VIRTUE OF RESPONDENT'S FAILURE TO PERFORM SOME ACT REQUIRED BY THE CONTRACT TO BE PERFORMED WITHIN THE STATE SO AS TO SATISFY THE REQUIREMENTS OF FLORIDA STATUTES, §48.193(1)(g)(1981). EVEN IF THE RECORD REFLECTS THE FACIAL APPLICABILITY OF THIS STATUTE, THERE ARE INSUFFICIENT MINIMAL CONTACTS OF RESPONDENT WITH THE STATE OF FLORIDA TO SUPPORT THE EXERCISE OF PERSONAL JURISDICTION AND SATIFSY THE REQUIREMENTS OF DUE PROCESS.	11
CONCLUSION	19
CERTIFICATE OF SERVICE	22

TABLE OF CITATIONS

	PAGE
Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 488 So.2d 83, at p. 85-86 (Fla. 1st DCA 1986)	1
Burger King Corporation v. Rudzewicz, 471 U.S. ___, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1985)	17,20
Canron Corporation v. Holt, 444 So.2d 529 (Fla. 1st DCA 1984)	13
Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956)	20
Harlo Products Corp. v. J. I. Case Co., 360 So.2d 1328 (Fla. 1st DCA 1978)	15
Hyco Manufacturing Co. v. Rotex International Corp., 355 So.2d 471 (Fla. 3rd DCA 1978)	7,8,9
International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	15,18
Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130 (Fla. 1st DCA 1977)	14,15
Jacobson v. Neuensorger Korbwaren-Industrie F.K., K.-G., 1109 So.2d 612 (Fla. 3rd DCA 1959)	12
Jones v. Jack Maxton Chevrolet, Inc., 484 So.2d 43, (Fla. 1st DCA 1986)	10
Lakewood Pipe of Texas, Inc. v. Rubaii, 379 So.2d 475 (Fla. 2nd DCA 1979); cert. denied, 105 S.Ct. 2181, 85 L.Ed. 2d 540 (1985)	14
Maschinenfabrik Seydelmann v. Altman, 468 So.2d 286 (Fla. 2nd DCA), Petition for rev. denied, 476 So.2d 672 (1985)	10
Norwest Bank Minneapolis, N.A. v. American Centennial Ins. Co., ___ So.2d ___, 11 FLW 1957 (Fla. 4th DCA 1986)	10
Osborn v. University Society, Inc., 378 So.2d 873 (Fla. 2nd DCA 1979)	15
Pennington Grain and Seed, Inc. v. Murrow Brothers Seed Co., Inc., 400 So.2d 157 (Fla. 1st DCA 1981)	8,9

	PAGE
Pestana v. Karinol Corp., 367 So.2d 1096 (Fla. 3rd DCA 1979)	12
Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975)	14
Sea Lift, Inc. v. Refinadora Costarricense, De Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986)	16
Yale Industrial Products, Inc. v. Gulfstream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla. 4th DCA 1986)	8,9
OTHER AUTHORITIES:	
Florida Statutes, §48.193(1)(f)(1982)	2,4,5,10,19
Florida Statutes, §48.193(1)(g)(1981)	3,4,11,14, 16,19

PRELIMINARY STATEMENT AND STATEMENT OF THE CASE

Respondent adopts the Preliminary Statement and Statement of the Case stated at page 1 of Petitioner's Initial Brief and incorporates the same herein by reference.

STATEMENT OF THE FACTS

To a large extent, Respondent adopts and agrees with the Statement of the Facts stated by Petitioner in his Initial Brief at pages 1-5 with the exception that Respondent does not adopt the argument contained therein nor, specifically, the emphasis and interpretation placed upon the Opinion of the First District Court of Appeal below.

In that regard, Respondent adopts and incorporates herein as its own Statement of Facts, the Statement of Facts set forth by the First District in its opinion in the case below. Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 488 So.2d 83, at p. 85-86 (Fla. 1st DCA 1986). With respect to matters of interpretation of the meaning and effect of the Opinion of the Court below, Respondent submits that the Opinion speaks for itself and needs no further interpretation here as a matter of fact.

SUMMARY OF ARGUMENT

Petitioner avers error in the failure of the First District Court of Appeal to find personal jurisdiction over the non-resident Defendant under Florida Statutes, §48.193(1)(f)(1982). This Statute, by its clear terms, would require a finding of jurisdiction only where a non-resident Defendant, by its act outside the state, caused "injury to persons or property within this state." In addition, this Section of the Statute requires that the non-resident Defendant, at or about the time of the injury, either be engaged in solicitation or service activities within the state or that products manufactured by the Defendant are used or consumed within the state during the appropriate period of time.

It is submitted that the facts of the case, even as outlined by Petitioner, do not even begin to satisfy the clear language of the Statute. As alleged, injury to property has certainly occurred. Equally as certainly, this injury to property occurred in the States of Georgia and South Carolina. Even if this were not the case, it is abundantly clear from all of the evidence in the case that Defendant was not engaged in any "solicitation or service activities within this state." This is unrebutted in the record. In addition, there is no record evidence whatsoever that any products manufactured by this Defendant were being "used or consumed within this state" at or about the time of the injury.

Of course, it is Respondent's contention that, once challenged,

it was the burden of Petitioner to produce in the trial court below that record evidence which would show an injury to persons or property within the state while this Defendant was engaged in solicitation or service activities within the state or while the products manufactured by this Defendant were being used or consumed within the state. The record is totally deficient in this regard.

In addition, Petitioner asserts error on the part of the First District Court of Appeal for its failure to find jurisdiction over this Respondent under Florida Statutes, §48.193(1)(g)(1981). In this regard, Petitioner alleges breach of a contract in this state by Respondent's failure to perform acts required by the contract to be performed within the state. In this regard, Petitioner alleges Respondent's delivery of non-conforming goods within the state.

Respondent submits that Petitioner has failed in its duty to provide sufficient record evidence to show the breach of some material term of the contract by Respondent which was required to be performed in the State of Florida. In this regard, Petitioner asserts that delivery of the goods alone in Florida is sufficient to establish the breach of the necessary performance within Florida by Respondent, assuming that the goods delivered were non-conforming. However, there is a complete lack of record evidence to support that assertion.

Rather, the totality of the evidence shows that there was a simple agreement between commercial parties for the purchase

and sale of certain goods. No contract terms as to delivery are shown by the record evidence, other than those terms reflected on the invoice produced by Petitioner, evidencing delivery of the goods "F.O.B. Mansfield, Ohio." This being the sole evidence of record of the agreement of the parties, it is controlling.

However, even if it is construed that the acts of the parties satisfy the requirements of subsection (1)(g), it is still abundantly clear from the record that there are insufficient minimal contacts of this Respondent with the State of Florida to support the exercise of personal jurisdiction over this Respondent. Such a finding would violate the requirements of due process and would not be consonant with the constitutional requirements for the establishment of jurisdiction over non-resident defendants in state courts.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT JURISDICTION OVER THE NON-RESIDENT RESPONDENT DOES NOT ATTACH BY OPERATION OF FLORIDA STATUTES, §48.193(1)(f)(1982) IN THAT NO INJURY TO PERSONS OR PROPERTY HAS OCCURRED WITHIN THE STATE OF FLORIDA. IN ANY EVENT, RESPONDENT WAS NOT ENGAGED IN ANY SOLICITATION OR SERVICE ACTIVITIES AT THE TIME NOR WERE PRODUCTS MANUFACTURED BY THE RESPONDENT USED OR CONSUMED WITHIN THE STATE.

Petitioner alleges that the State of Florida is entitled to exercise jurisdiction over this non-resident Respondent under Florida Statutes, §48.193(1)(f)(1982) apparently because this Respondent has caused injury to persons or property within this state arising out of an act or omission by this Respondent outside of the state.

While Respondent agrees that any of its alleged acts or omissions occurred outside of this state, it is patently clear that no cause of action has arisen from such actions causing injury to persons or property within this state. The unrebutted allegations of Petitioner itself and all the other evidence or record clearly indicates that damage to property has occurred and that it has occurred in the States of Georgia and South Carolina.

It is unrebutted and agreed between the parties that Respondent sold certain switches to Petitioner and that Petitioner ultimately installed these switches as a component part of certain energy conservation units attached to realty in Georgia and South Carolina. Subsequently, upon the alleged failure of these switches, damage to the units themselves and to the realty was incurred when

the switches allegedly failed to function. Petitioner has been called upon to compensate the third parties in those states who suffered the property losses.

Petitioner now advances the novel theory that, since it is a Florida resident, and since it has suffered a financial loss in providing that compensation, the courts of the State of Florida should be able to exercise jurisdiction over the non-resident manufacturer of the component parts which allegedly caused the property damage.

This reviewer has discovered no cases which support or even discuss the theory advanced. Simply stated, no "injury to persons or property within this state" has occurred within the clear meaning of the language of this statute. Equally as clearly, the injury to property has occurred without the State of Florida.

Petitioner attempts to distinguish between the situs of "physical" injury and some other unstated injury. Clearly, the statute does not address itself to the occurrence of "physical" injury, but merely to "injury to persons or property within this state." However, Petitioner fails to define the alternative to "physical" injury. It would appear that Petitioner is attempting to establish some type of intangible injury as the basis for jurisdiction. Such intangible injury would, apparently, not have a situs related to an actual injury to person or property but would be something further removed, a "financial injury."

According to Petitioner's argument, such a financial injury

occurs when (and, more importantly, where) anyone loses money as the result of an actual injury to person or property. Such a lack of definition, while perhaps convenient for argument, is neither enlightening nor realistic.

In accordance with the argument advanced by Petitioner with respect to financial injury and its ability to trigger jurisdiction over non-resident defendants, it would appear that any plaintiff adversely affected in a financial manner by the actions of another would be entitled to bring suit in his own state of residence simply because of the adverse financial effects experienced there. If this is the case, it would be consistent to say that a single Florida shareholder was entitled to bring suit against a non-resident corporation on grounds that the corporation was poorly managed and the corporate directors had breached their fiduciary duty. The shareholder would be entitled to bring such suit in the State of Florida simply because of the depreciation in the value of his shares and the financial effects on him as a resident of that state. Likewise, if a building were negligently constructed in the State of Iowa and subsequently collapsed, and if the owner of the building resided in Florida, the exercise of Florida jurisdiction would automatically follow because of the owner's financial loss.

To this reviewer's knowledge, there is no such theory of "financial loss" which would support the exercise of jurisdiction by any state. Petitioner relies upon the case of Hyco Manufacturing Co. v. Rotex International Corp., 355 So.2d 471 (Fla. 3rd DCA

1978), in support of its theory. However, the clear facts in Hyco, supra., involve personal injury suffered in Ecuador and the clear is holding in the case that Florida jurisdiction will not attach in those circumstances. The case does not discuss, in any way, a theory of "financial loss" which would support a finding of jurisdiction.

Petitioner also relies on the case of Pennington Grain and Seed, Inc. v. Murrow Brothers Seed Co., Inc., 400 So.2d 157 (Fla. 1st DCA 1981). However, in this case it is abundantly clear that the injury to property occurred in the State of Florida. Certain Florida residents purchased seed from a non-resident supplier and, when the seed was planted in Florida, it failed to germinate and produce a crop. Without further discussion, it is quite clear from the facts of this case that the damaged property, the failure of the crop, occurred in Florida and was an actual occurrence, not merely a "financial injury" which occurred within the state.

Petitioner also relies upon the case of Yale Industrial Products, Inc. v. Gulfstream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla. 4th DCA 1986). Again, the facts in Yale, supra., reveal that a Florida purchaser suffered losses, in Florida, as a result of the malfunction of certain machinery purchased from a non-resident supplier. The nature of the damages was damage to the machine which was itself the subject of the contract and loss of production time, in Florida, by the Florida purchaser. Again, there is no indication in the facts of the

case of any damage or injury to persons and property occurring outside the state resulting in "financial injury" to a Florida resident.

Respondent submits that the difficulty in concept and language in Yale, supra., and Pennington, supra., is occasioned not by a theory of "financial loss" but by the difficulty which the courts experienced in dealing with the difference between contractual damages and consequential damages. Obviously, this was not a problem in Hyco, supra., inasmuch as that case involved strict liability in tort and the court found that damages occurring outside the state would not result in the exercise of Florida jurisdiction.

Even if Petitioner could, in some way, torture the record facts in this case into showing that some injury to persons or property within the State of Florida has occurred, it is abundantly clear from the unrebutted record in this case that Respondent was engaged in no solicitation or service activities within the state at the time of the injury, and it is equally clear that there is a complete absence of any record evidence indicating that any products manufactured by Defendant were used or consumed within the state at or about the time of the injury. All of these are elements which Petitioner has the duty to support before jurisdiction will attach.

It is axiomatic that, when a plaintiff seeks to obtain jurisdiction over a non-resident defendant based upon the long-arm statutes, the plaintiff has not only the burden of initial

allegation, but also the ultimate burden of proving the existence of jurisdiction once the defendant has submitted evidence contesting the bare allegations of the complaint. Norwest Bank Minneapolis, N.A. v. American Centennial Ins. Co., ___ So.2d ___, 11 FLW 1957 (Fla. 4th DCA 1986); Jones v. Jack Maxton Chevrolet, Inc., 484 So.2d 43 (Fla. 1st DCA 1986); Maschinenfabrik Seydelmann v. Altman, 468 So.2d 286 (Fla. 2nd DCA) Petition for rev. denied, 476 So.2d 672 (1985). This Petitioner has failed to do.

Even if one were to accept Petitioner's novel theory with respect to "financial injury," the unrebutted evidence in the record indicates that this Respondent was engaged in no solicitation or service activities within the state at any time material to this cause of action. The unrebutted record evidence in the case also indicates no use or consumption of this Respondent's products within the state at any time material to this cause of action. Either of these omissions in the record are fatal to Petitioner's assertion of jurisdiction.

Petitioner has advanced no facts or circumstance which would reasonably support jurisdiction under subsection (1)(f) of the statute. Instead, Petitioner has advanced a theory of jurisdiction previously unrecognized and based upon "financial injury." In essence, this theory would allow the imposition of jurisdiction by any forum state so long as one of its residents had suffered pecuniary loss, regardless of the source of that loss and regardless of the actual damages giving rise to the loss. Once applied, this theory would be the end of any jurisdic-

tional law as we now know it and would have no relationship whatsoever to any requirements of due process or any restrictions upon the sovereign jurisdiction of the several states set forth in our Constitution.

II. THE DISTRICT COURT OF APPEAL CORRECTLY FOUND INSUFFICIENT EVIDENCE REFLECTING BREACH OF A CONTRACT IN FLORIDA BY VIRTUE OF RESPONDENT'S FAILURE TO PERFORM SOME ACT REQUIRED BY THE CONTRACT TO BE PERFORMED WITHIN THE STATE SO AS TO SATISFY THE REQUIREMENTS OF FLORIDA STATUTES, §48.193 (1)(g)(1981). EVEN IF THE RECORD REFLECTS THE FACIAL APPLICABILITY OF THIS STATUTE, THERE ARE INSUFFICIENT MINIMAL CONTACTS OF RESPONDENT WITH THE STATE OF FLORIDA TO SUPPORT THE EXERCISE OF PERSONAL JURISDICTION AND SATISFY THE REQUIREMENTS OF DUE PROCESS.

Petitioner asserts a cause of action for which there is jurisdiction in the courts of Florida based upon Florida Statutes, §48.193(1)(g)(1981). By the terms of this statute, Petitioner must allege and show a cause of action arising from the breach of a contract in Florida by the failure of a non-resident defendant to perform acts required by the contract to be performed within the state. In this regard, Petitioner alleges the existence of a contract for which no evidence is shown. It should be noted that, with respect to all terms of this contract, no record evidence has been advanced by Petitioner. However, Petitioner alleges that one of the terms of this ephemeral contract was the delivery of certain switches at Petitioner's place of business in Longwood, Florida. It is not here disputed that Respondent agreed to ship certain of its switches to Petitioner's place of business in Florida. However, no further terms of any agreement

between the parties has been set forth.

In that regard, Petitioner produced before the trial court certain invoices, as evidence of the agreement or contract between the parties. Those invoices reflect the term, "F.O.B. Mansfield, Ohio."

Such a term, whether it is characterized as "boilerplate" or merely a "shipping" term, clearly establishes that responsibility for the goods in question shifted from the seller to the buyer at Mansfield, Ohio. This was not merely a shifting of the ultimate financial responsibility for any loss or damage to the goods but was an actual transfer of equitable and legal title to the goods from the buyer to the seller at Mansfield, Ohio. Pestana v. Karinol Corp., 367 So.2d 1096 (Fla. 3rd DCA 1979); Jacobson v. Neuensorger Korbwaren-Industrie F.K., K.-G., 109 So.2d 612 (Fla. 3rd DCA 1959).

Without further argument, it should be noted that in the absence of the F.O.B. term, there is no other contractual term advanced by Petitioner which would evidence the agreement of the parties. In other words, there is no evidence indicating any agreement of the parties which is contrary to the evidence indicating a delivery to Petitioner and a transfer of title to Petitioner at Mansfield, Ohio.

Significantly, no other terms of the contract are set forth in the record evidence. Behind all of the verbiage and argument, it appears that the only record evidence in this case indicates that there was a simple order initiated by Petitioner for certain

switches and a shipment by Respondent of those switches to Petitioner for a price agreed upon by the parties. Any further interpretation of the "contract," agreement or understanding of the parties is wholly unsupported by the record.

On this thin record, Petitioner attempts to establish jurisdiction by simply alleging, against the record evidence, that a material term of a contract between these parties required delivery of certain switches in Longwood, Florida and that, upon this delivery, a breach of the contract occurred because the switches delivered did not conform to the specifications contained in that contract between the parties. If this court is having difficulty establishing <u>any</u> terms of the contract, including any terms pertaining to contract specifications and delivery, this is understandable. No such contract terms are shown in the record. The record simply shows an order for goods and the shipment of those goods under certain commercial terms.

Petitioner relies heavily upon the case of <u>Canron Corporation v. Holt</u>, 444 So.2d 529 (Fla. 1st DCA 1984). Even a cursory examination of that case reveals that the court held that Florida jurisdiction would attach upon a finding that the defendant had substantial and continuing contacts with the State of Florida and that there was connexity between the cause of action alleged and the contract breached within the state. That case is inapposite to the instant case. It is unrebutted in the record in the instant case that Respondent has no significant contacts with the State of Florida arising out of its sales or solicitation

activities or arising out of any physical presence within the state. In fact, it is abundantly clear that Petitioner asserts jurisdiction based upon the single isolated transaction which is the contract alleged to be the cause of action in this case. In this regard, Respondent submits that even this isolated transaction does not fulfill the requirements of the clear language of subsection (1)(g) in that there is no record showing of the breach of a contractual term by Respondent required to be performed in the State of Florida, as is more fully set forth above.

However, more to the point, even if the acts or omissions of this Respondent can be said to fulfill the terms of the statute, there is no showing that this Respondent has those minimum contacts with the State of Florida which would allow the exercise of jurisdiction over this Respondent and would comport with the due process requirements of the Fourteenth Amendment of the United States Constitution.

It has repeatedly been held that,

> "Even where there is facial jurisdiction under the Florida long-arm statute, the party over which jurisdiction is asserted must have had sufficient minimum contacts with Florida to satisfy due process requirements." Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975); Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130 (Fla. 1st DCA 1977).

Lakewood Pipe of Texas, Inc. v. Rubaii, 379 So.2d 475 (Fla. 2nd DCA 1979); cert. denied, 105 S.Ct. 2181, 85 L.Ed. 2d 540 (1985). Under any circumstances, it is required that the non-resident defendant have minimum contacts with the forum state such that

the maintenance of a suit against the non-resident does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Thus, regardless of the terms of the particular state statute, an underlying determination must be made as to whether a non-resident defendant has those sufficient minimum contacts. The mere compliance with a long-arm statute is insufficient. Not only the applicability of the statute, but the applicability of the due process requirements of the Constitution must be considered. Therefore, it has been held,

> "Thus, under a given factual situation, even though a nonresident may appear to fall within the wording of a long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state." Harlo Products Corp. v. J.I. Case Co., 360 So.2d 1328 (Fla. 1st DCA 1978); Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130 (Fla. 1st DCA 1977).

Osborn v. University Society, Inc., 378 So.2d 873 (Fla. 2nd DCA 1979).

Stated in other terms, even when the acts of a given non-resident defendant seem to comport with the requirements of a state's long-arm statute, one must still consider whether the non-resident defendant has sufficient minimum contacts with the state to justify the exercise of personal jurisdiction. It has been repeatedly held that the mere existence of a contract between the foreign defendant and a resident plaintiff is, of itself, insufficient to establish such jurisdiction. In addition

to the applicability of the particular statute, it has been held that the non-resident defendant must have such a relationship with the forum state that it indicates that the non-resident defendant has purposefully availed itself of the privilege of conducting activities within the state and invoking the benefits and protections of its laws.

However, the mere existence of a contract between a foreign corporation and a resident plaintiff is not, of itself, sufficient to establish the necessary minimum contacts. The Eleventh Circuit has stated,

> "Nor does the existence of a contract between the foreign defendant and a resident of the forum state automatically amount to 'purposeful availment.'" [Citations omitted.]

Sea Lift, Inc. v. Refinadora Costarricense De Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986). It should be noted that this case concerned itself with the application of the Florida long-arm statutes.

Thus, it is Respondent's contention with regard to this point that the record evidence is insufficient to fit Respondent under the clear language of the Florida long-arm statute, subsection (1)(g). There is simply insufficient record evidence to indicate either the existence of a contract or the terms of that contract in such a way as would indicate with any certainty that Respondent had breached the term of a contract required to be performed within the State of Florida.

However, beyond this point, it is Respondent's position that even if the statute applied on its face, there are insufficient

minimum contacts of this Respondent with the forum state upon which to base jurisdiction which would satisfy due process requirements.

Effectively, Petitioner has alleged and, to some very small extent shown, a contract or agreement of largely unstated terms between this Respondent and itself. Whether such a single, isolated occurrence should be sufficient for the attachment of jurisdiction is not only a matter of state law, but also a matter of federal constitutional law. Ultimately, the question is whether a single, isolated transaction, even if it is construed to be a contract and there is considered to be a breach of that contract, is sufficient for the exercise of state jurisdiction.

In its most recent consideration of long-arm jurisdiction in connection with contract cases, the United States Supreme Court recently stated,

> "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other parties' home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic... theories of the place of contracting or of performance.'" [Emphasis in original.] [Citations omitted.]

Burger King Corporation v. Rudzewicz, 471 U.S. ___, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1985). The state of the record in the instant case at the very least shows affirmative proof by Respondent that Respondent has no significant, continuing, substantial contacts with the State of Florida. This is unrebutted in the

record by any affidavit or proof advanced by Petitioner. In fact, the only contact advanced by Petitioner in support of jurisdiction in this case is the transaction which is the subject of this cause of action.

In circumstances such as these, it is appropriate to closely scrutinize the transaction with respect to the applicability of the Florida long-arm statute to such a transaction. Even more importantly, it is necessary to retreat from the specific terms of the statute itself and to look at the totality of the circumstances to determine whether there are those minimum contacts with the forum state which comport with due process requirements and allow the exercise of jurisdiction in accordance with the dictates of International Shoe, supra.

Not only is there silence in the record in the instant case with respect to these minimum contacts, it is affirmatively shown in the record that no such minimum contacts exist on the part of this Respondent with the State of Florida. Consequently, on this ground alone, the trial court's order dismissing this cause of action for lack of personal jurisdiction should be affirmed.

CONCLUSION

Under Florida Statutes, §48.193(1)(f), it is abundantly clear in this record that no cause of action has arisen from any act or omission on the part of this Respondent which has caused injury to persons or property within the State of Florida. Even if this were the case, under the terms of the statute, it is affirmatively shown that Respondent was not engaged in solicitation or service activities within the state at the time, or that Respondent's manufactured goods were being used or consumed within the state at the time. On any of these grounds, jurisdiction under the above cited statute should be denied.

In addition, it is also clear from the present state of the record, that there is no support for a finding of jurisdiction under Florida Statutes, §48.193(1)(g). This section of the statute would require the breach of a contract in this state by Respondent's failure to perform acts required by the contract to be performed within the state. In this regard, Petitioner advances a strained theory of breach based upon a delivery of goods required to be made in Florida, which delivery is alleged to be non-conforming. More accurately, the record shows the lack of any clearly established contract terms. While it is quite clear that the parties agreed that certain switches would be transferred from the Respondent/seller to Petitioner/buyer and, of course, that Petitioner would ultimately receive these switches in Florida, the record provides no information with respect to any binding contract agreements as to the transfer

of title or ownership of these switches or as to the situs of delivery of the switches under the terms of the contract. The only written evidence of the agreement of the parties is contained in the invoices provided to the trial court by Petitioner indicating that shipment of the switches by Respondent was "F.O.B. Mansfield, Ohio." To the extent that this is the only record evidence of the agreement of the parties, it should be considered controlling.

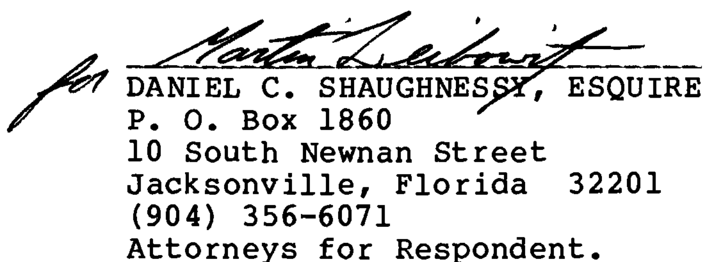
However, as the United States Supreme Court indicated in Burger King, supra., determinations of jurisdiction should not be made upon such mechanical and technical grounds. Even if the facial terms of the statute in this regard appear to be met, a further determination must be made as to whether Respondent has sufficient minimum contacts with the forum state to justify the imposition of jurisdiction in accordance with all due process requirements. Numerous courts, including the United States Supreme Court, have held that a single isolated transaction, even a contract between a non-resident defendant and the resident plaintiff, is insufficient to confer jurisdiction upon the plaintiff's state of residence. Courts have also frequently held over the years that analyses of contract to determine the technical situs of formation of the contract or the situs of breach are neither constructive nor controlling. See Burger King, supra.; Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

For all of the reasons stated above, the exercise of long-

arm jurisdiction by the State of Florida in this case is inappropriate. The same is presently clear from the record in this case. For this reason, the case should be dismissed for lack of jurisdiction without further amendment and without the necessity of further findings of fact.

RESPECTFULLY SUBMITTED,

COKER, MYERS & SCHICKEL, P. A.



DANIEL C. SHAUGHNESSY, ESQUIRE
P. O. Box 1860
10 South Newnan Street
Jacksonville, Florida 32201
(904) 356-6071
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Harris Brown, Esquire, and Robert B. Guild, Esquire, 1500 American Heritage Life Building, by U.S. Mail this 20th day of November, 1986.

Attorney