D/a 1-30-87

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.

/

PETITIONER'S INITIAL BRIEF

MATHEWS, OSBORNE, McNATT,
GOBELMAN & COBB

Harris Brown, P.A.
Robert B. Guild, Esquire
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202
(904) 354-0624

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In this brief, references to the Record on Appeal will be made by use of the designation "R:" followed by the appropriate page number. The parties will generally be referred to by name, Aetna Life & Casualty Co. ("Aetna") and Therm-O-Disc, Inc. ("Therm-O-Disc"), but may be referred to as petitioner and respondent, respectively.

STATEMENT OF THE CASE

This case is before the Supreme Court for review of a decision of the First District Court of Appeal reported as Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 488 So.2d 83 (Fla. 1st DCA 1986), in which the district court reversed the trial court Order granting respondent's motion to dismiss for lack of jurisdiction and remanded the cause to the trial court. 488 So.2d at 88-89. After the issuance of the district court's initial opinion, the petitioner filed a motion for rehearing which was denied by the district court. Id. at 89-91. Petitioner thereafter petitioned this Court, seeking the discretionary review of the decision of the district court because of direct and express conflict between that decision and a prior decision of the Fourth District Court of Appeal on the same question of law. This Court granted review of this matter by order dated October 15, 1986.

STATEMENT OF THE FACTS

In its amended complaint, the petitioner alleged that its insured, Energy Conservation Unlimited, Inc. ("ECU"), was a Florida

corporation and that Therm-O-Disc was a foreign corporation with its principal place of business in the State of Ohio. R:17-30. It was further alleged that Therm-O-Disc sold and delivered switches to ECU in the State of Florida and engaged in a business activity in the State of Florida; that a sales contract existed between Therm-O-Disc and ECU for the delivery of switches in Florida; that ECU sustained damages in the State of Florida as a result of the breach of the sale agreement in that the switches were defective; and that Therm-O-Disc was the manufacturer of switches which were used within the State of Florida in the ordinary course of commerce. (R:17-30).

The switches provided by Therm-O-Disc were incorporated in energy conservation units by ECU and were distributed to various consumers including the United States government for use at military base housing projects in Georgia and South Carolina. R:18-19. As a direct result of a defect in the switches provided by Therm-O-Disc, substantial property damage was sustained at the government facilities in Georgia and South Carolina. R:19. Petitioner paid the damages for which its insured, ECU, was liable to the United States government and, as a result of this payment, became subrogated to the rights of ECU and brought this subrogation action. R:23-24.

The amended complaint was in five counts and alleged theories of negligence, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose and strict liability. Therm-O-Disc

thereafter filed a motion to dismiss for lack of jurisdiction. R:31-32. The trial court granted respondent's motion, finding that there were insufficient allegations to bring the respondent within the provisions of the Florida long-arm jurisdiction statute, section 48.193, Florida Statutes (1981). R:35-36. Petitioner thereafter filed a timely Notice of Appeal to the First District Court of Appeal. R:37.

In its initial opinion, the district court recognized that the amended complaint sought to establish jurisdiction under sections 48.193(1)(a), (f) and (g). 488 So.2d at 87. The court found, however, that the allegations that respondent was engaged in a business venture in Florida were insufficient to establish in personam jurisdiction under subsection 1(a). The court further found that jurisdiction had not been established under subsection 1(f) because that section applied "where physical injury has occurred to persons or property within the state, not, as here, where physical injury to property outside the state has resulted in financial injury to a Florida corporation or its subrogee." Id. (Citing Hyco Manufacturing Company v. Rotex Industrial Corporation, 355 So.2d 471 (Fla. 3d DCA 1978) (emphasis in original)). The court held, however, that the petitioner had sufficiently plead jurisdictional facts to establish jurisdiction for breach of a contract in Florida under section 48.193(1)(g). The complaint alleged that respondent had contracted to deliver switches in Florida, said switches did not conform to the specifications and

requirements set forth in the contract for sale, and the breach of contract, therefore, occurred in Florida. 488 So.2d at 87.

As to jurisdiction under section 48.193(1)(g), the district court reversed the trial court order granting the motion to dismiss for lack of jurisdiction. 488 So.2d at 87-89. In so ruling, the district court held that jurisdiction pursuant to section 48.193(1)(g) depended on whether delivery of respondent's product occurred in Florida. The court determined that the record was unclear as to whether the switches were, in fact, delivered in Florida. Although the petitioner had alleged that the switches were delivered in Florida, the invoices accompanying the switches indicated that the switches were to be shipped F.O.B. at Therm-O-Disc's plant in Ohio. Id. at 87. The court stated that this could indicate that delivery and, therefore, the breach of contract had occurred in Ohio. Id. (Citing Canron Corp. v. Holt, 444 So.2d 529 (Fla. 1st DCA 1984)). Accordingly, the district court remanded the cause to the trial court for an evidentiary hearing and determination of the place at which the non-conforming goods were delivered. Id.

In its motion for rehearing, the petitioner argued that the district court erred in finding that section 48.193(1)(f) only applied where physical injury occurred to persons or property within the state and not where injury outside the state resulted in financial injury within the state. Petitioner asserted that the district court misapprehended the Third District Court of Appeal's

decision in Hyco Manufacturing, supra, and overlooked the Fourth District Court of Appeal decision in Yale Industrial Products, Inc. v. Gulfstream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla. 4th DCA 1986), in which the district court held that section 48.193(1)(f) applied to situations involving financial injury. Petitioner also argued that the district court incorrectly determined that an issue existed as to the place of delivery of the defective switches. Specifically, petitioner contended that the boilerplate language "F.O.B." on the shipping invoice had no significance in a determination of whether Therm-O-Disc committed sufficient acts such as would constitute a breach of contract in the State of Florida. Stated otherwise, petitioner asserted that the shipment of the goods in consummation of the contract was the significant issue, rather than the technical place of delivery.

Although the district court denied the motion for rehearing, it did address the issues raised by petitioner. 488 So.2d at 89-91. The district court recognized the conflicting interpretation given section 48.193(1)(f) by the Fourth District Court of Appeal in Yale Industrial, supra, but adopted what it considered to be "the more logical interpretation of section 48.193," which restricted the application of subsection 1(f) to situations in which actions or omissions outside the state resulted in personal injury or property damage within the state. 488 So.2d at 91. The district court also rejected petitioner's argument with regard to the court's ruling concerning jurisdiction under Section 48.193(1)(g). Id.

SUMMARY OF ARGUMENT

The district court of appeal erred in holding that section 48.193(1)(f), Florida Statutes (1981), only applies where physical injury occurs to persons or property within the State of Florida and not where injury to property outside the state results in financial injury within the state. The district court's interpretation of section 48.193(1)(f) is contrary to the plain meaning of the statutory language in said statute and is unsupported by relevant case law. The plain language of section 48.193(1)(f) indicates that jurisdiction will lie over a defendant whose out-of-state actions cause injury to persons or property within the state. The statute contains no requirement that the injury to persons or property within the state be physical injury. Further, cases interpreting the statute do not make a distinction between physical and financial injury. Rather, they have applied section 48.193(1)(f) to establish jurisdiction where the only injury suffered within the state has been non-physical in nature.

In addition, the district court erred in determining that an issue of fact was presented for purposes of establishing jurisdiction under section 48.193(1)(g), Florida Statutes (1981), with regard to whether the delivery of nonconforming goods took place in Ohio or Florida based upon the unilateral boilerplate language "F.O.B." used in the shipper's invoice accompanying the shipment of goods from Therm-O-Disc to ECU in Florida.

Section 48.193(1)(g) provides that jurisdiction will lie against a defendant when said defendant breaches a contract in

Florida by failing to perform acts required by the contract to be performed in Florida. In the instant case, the petitioner's complaint stated that Therm-O-Disc knew that its product would be shipped to the purchaser in Florida and would be incorporated into a finished product in Florida. Further, Therm-O-Disc shipped its product to Florida and breached the contract by shipping nonconforming goods.

Therm-O-Disc cannot unilaterally insert the term "F.O.B." in its shipping invoice so as to avoid submitting to jurisdiction in Florida when it, in fact, shipped its goods to Florida. The shipping term "F.O.B." is used only to determine the point at which the risk of loss during shipment is shifted from the seller to the purchaser. Such technical point of delivery is immaterial for purposes of establishing jurisdiction under section 48.193(1)(g).

The district court's erroneous interpretation of section 48.193(1)(f) and creation of an issue of fact with regard to the delivery of nonconforming goods based upon the unilateral use by the shipper of the term "F.O.B." mandates that this Court quash the decision herein. The district court's decision is contrary to the plain meaning of the long arm statute and is unsupported by relevant case law.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 48.193(1)(f), FLORIDA STATUTES (1981), ONLY APPLIES WHERE PHYSICAL INJURY OCCURS TO PERSONS OR PROPERTY WITHIN THE STATE AND NOT WHERE INJURY TO PROPERTY OUTSIDE THE STATE RESULTS IN FINANCIAL INJURY WITHIN THE STATE.

The district court below erroneously held that section 48.193(1)(f), Florida Statutes (1981), only applied where physical injury occurs to persons or property within the state and not where injury to property outside the state results in financial injury within the state. Such interpretation is not supported by either an examination of the specific statutory language in question or relevant case law. Section 48.193(1)(f) states that jurisdiction under the long arm statute is proper when injury occurs to persons or property within the state as a result of an act outside the state. Said statute contains no requirement that the "injury" suffered must be a "physical injury." Petitioner respectfully submits that the district court's restrictive interpretation of section 48.193(1)(f) is unwarranted and contrary to the plain meaning of the statutory language and relevant case law applying such language.

The only other Florida court to expressly address this specific issue has reached a result directly opposite to that of the district court below. Although the court perhaps did not, at the time of its original decision herein, have the benefit of the Fourth District Court of Appeal's decision in Yale Industrial, supra, which

was decided on January 29, 1986, it is submitted that the result reached in that case represents the proper interpretation of section 48.193(1)(f) and case law construing said section.

In Yale Industrial, the plaintiff alleged injury in the form of replacement cost of defective equipment and lost production time caused by the out-of-state defendant's supply of defective equipment. 481 So.2d at 1305. The defendant specifically contended that section 48.193(1)(f) did not apply to situations involving financial injury. The district court rejected this argument, finding that Florida case law did not support such a narrow construction. Id. at 1306. Accordingly, the court expressly held that section 48.193(1)(f) applied to situations involving financial injury. Id.

In so ruling, the Yale Industrial court cited the First District Court of Appeal decision in Pennington Grain & Seed, Inc. v. Murrow Brothers Seed, Co., 400 So.2d 157 (Fla. 1st DCA 1981), in support of its finding that section 48.193(1)(f) applied to situations involving financial injury. In Pennington, the First District Court of Appeal found jurisdiction under section 48.193(1)(f) where a breach of warranty was alleged as a result of the out-of-state defendant's sale of seed that did not germinate, apparently resulting in financial injury within the state. 400 So.2d at 159. The district court in Yale Industrial found that the Pennington court had approved the application of section 48.193(1)(f) in a suit involving purely financial injury. 481 So.2d at 1306.

Based on the above, it is submitted that the district court herein has erroneously failed to follow the decisions in Yale Industrial and Pennington, wherein the courts recognized the application of section 48.193(1)(f) to situations involving financial injury. The instant decision has, therefore, created interdistrict conflict with the Fourth District Court of Appeal decision in Yale Industrial and intradistrict conflict based on the Pennington decision.

Further, in ruling that section 48.193(1)(f) did not apply to financial injuries, the court cited the Third District Court of Appeal decision in Hyco Manufacturing Company v. Rotex Industrial Corporation, 355 So.2d 471 (Fla. 3d DCA 1978). It is respectfully submitted that Hyco Manufacturing does not stand for the proposition that section 48.193(1)(f) does not apply where an act outside the state results in financial injury within the state.

In Hyco Manufacturing, the plaintiffs purchased a truck with dump trailer in Florida. Plaintiff suffered damages when the truck turned over while being used in Ecuador. 355 So.2d at 472. The plaintiffs alleged that the manufacturer of the dump trailer, a foreign corporation licensed to or doing business in Florida, had sold the dump trailer to a Florida corporation which incorporated the dump trailer into the truck which caused the injury. Without making reference to a specific statutory provision, the plaintiffs alleged that the court had jurisdiction pursuant to section 48.193 and "other applicable Florida statutes." Id. at 473.

The district court held that the complaint was insufficient to establish jurisdiction in that no facts were set forth except that the manufacturer sold the dump trailer to a Florida corporation. 355 So.2d 473. The district court noted that such an allegation was not a sufficient basis for jurisdiction over a foreign defendant. In addition, the court noted that

> Under one of the provisions of Section 48.193, Florida Statutes (1975), the activities of [the manufacturer] outside of the state may subject it to the jurisdiction of the Florida courts where such acts cause injury to persons or property within the state. It is clear on the face of the complaint that the injury and/or damage herein occurred in the country of Ecuador on December 16, 1974.

Id.

Apparently, the district court below cited Hyco based upon the language in the above paragraph. Relying on this language, the court held that section 48.193(1)(f) does not apply where physical injury to property outside the state results in financial injury in the state. Petitioner submits that the district court in Hyco did not expressly rule on this issue and that the court's reliance on Hyco is, therefore, misplaced. In Hyco, there were no facts alleged in the complaint to show what type of injury was sustained in Ecuador or who suffered a loss. Certainly, Hyco contains no facts showing a loss, financial or otherwise, in the State of Florida.

In contrast to Hyco, the complaint in this case clearly states that financial damage has been sustained by a Florida

corporation in Florida. The district court in Hyco clearly did not address the issue presented in this case and, accordingly, the district court, in citing Hyco, has misapprehended the holding in Hyco.

The specific question before the district court in the present case was whether section 48.193(1)(f) applied to establish jurisdiction over a defendant whose out-of-state actions resulted in financial injury in the State of Florida. A plain reading of the statutory provision supports the position that jurisdiction should lie under such circumstances. Section 48.193(1)(f) provides that Florida courts have jurisdiction over a defendant whose out-of-state actions cause injury to persons or property within the state. Neither the statute nor cases interpreting the statute make a distinction between physical and financial injury. Accordingly, it is respectfully submitted that the district court misapprehended and misconstrued the plain language of section 48.193(1)(f) as applied to this case. The district court's restrictive interpretation of section 48.193(1)(f) is not supported by relevant case law. Petitioner submits, therefore, that the decision of the district court herein should be quashed.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT AN ISSUE OF FACT WAS PRESENTED AS TO JURISDICTION UNDER SECTION 48.193(1)(g), FLORIDA STATUTES (1981), WITH REGARD TO WHETHER THE DELIVERY OF NONCONFORMING GOODS TOOK PLACE IN OHIO OR FLORIDA BASED UPON THE UNILATERAL BOILERPLATE LANGUAGE "F.O.B." USED IN A SHIPPER'S INVOICE ACCOMPANYING THE SHIPMENT OF GOODS TO FLORIDA.

The district court below held that jurisdiction could be established pursuant to section 48.193(1)(g) if petitioner could show that delivery of the nonconforming goods occurred in Florida. Since the invoices for the shipment of the subject goods stated that the goods were shipped F.O.B. Mansfield, Ohio, the district court held that a question of fact was presented as to whether the delivery of nonconforming goods took place in Ohio or Florida. 488 So.2d at 87-88. Notwithstanding that the petitioner's complaint clearly stated that Therm-O-Disc knew that its product would be shipped to Energy Conservation Unlimited, Inc. in Florida and would be incorporated into a finished product in Florida, the district court held that an issue was presented as to the technical point of delivery. Petitioner respectfully submits that the term "F.O.B." is a shipping term used only to determine the point at which risk of loss during shipment is shifted from one party to another. Ladex Corp. v. Transportas Aeroes Nacionales, S.A., 476 So.2d 763 (Fla. 3d DCA 1985); Pestana v. Karino L. Corp., 367 So.2d 1096 (Fla. 3d DCA 1979). In holding that (1) the technical point of delivery is an issue, and (2) that unilateral boilerplate language used in a

shipper's invoice has weight in determining where a "delivery" occurs for purposes of establishing jurisdiction pursuant to section 48.193(1)(g), the district court misconstrued the language and intent of section 48.193(1)(g), Florida Statutes, and has created an additional artificial requirement for jurisdiction not contained in that statute.

Stated otherwise, section 48.193(1)(g) contemplates that jurisdiction exists in Florida when a breach of contract occurs as a result of an interstate shipment of goods. No Florida court, or court in any other jurisdiction, has held that the technical place of delivery has significance in determining whether a breach of a contract has occurred due to an interstate shipment of goods which prove to be nonconforming. Petitioner contends that the district court misapprehended section 48.193(1)(g) by injecting the concept of delivery as an additional requirement for establishing jurisdiction under that statute.

In support of its decision, the district court cited Canron Corporation v. Holt, 444 So.2d 529 (Fla. 1st DCA 1984). In Canron, the district court held that the evidence was sufficient to establish that Canron was doing business in Florida under section 48.193(1)(a), Florida Statutes (1981). Among the business activities of Canron in Florida was the sale and delivery of machinery to Seaboard System Railroad, Inc., in Florida. 444 So.2d at 530.

The district court, in the instant case, stated that the Canron court appeared to have determined that the subject machinery

in that case was delivered by Canron to Seaboard in Florida, notwithstanding the fact that the goods were shipped F.O.B. Canron's facility in South Carolina. 488 So.2d at 87-88 at n.2. Petitioner respectfully submits that the district court's interpretation of Canron is consistent with petitioner's contention that F.O.B. language in a shipping invoice is irrelavant in determining jurisdiction. Moreover, the Canron court was not concerned with the delivery of goods in Florida for purposes of establishing jurisdiction pursuant to section 48.193(1)(g). Rather, the issue presented was whether Canron was "doing business" in Florida for purposes of Section 48.193(1)(a).

In determining whether Canron was doing business in Florida, the Canron court stated:

> While the fatal accident occurred in Georgia, the purchase order for the trac-gopher came from the Jacksonville offices of Seaboard System Railroad, Inc., and the machine was shipped to Seaboard's Tampa facility, at F.O.B. Canron's South Carolina plant.

444 So.2d at 530.

Accordingly, the only portion of the Canron case discussing this issue makes no mention whatsoever of the concept of "delivery." The opinion merely discusses shipment and disregards the F.O.B. language in the invoice. The district court's citation of Canron on this point (1) misconstrues the plain language of the Canron opinion which does not discuss delivery, and (2) cites Canron as holding that delivery has significance when, in fact, that

decision did not even discuss the significance of delivery or shipment.[1]

Petitioner also notes that the district court in its opinion on Motion For Rehearing states that "until appellant can convince the trial judge that the term "F.O.B." is merely boilerplate, it has a serious jurisdictional problem." 488 So.2 at 91. In support of this statement, the district court cites section 672.319(1)(a), Florida Statutes. However, that statute is a portion of the Uniform Commercial Code governing the relationship between a buyer and seller in the shipment of goods. Specifically, section 672.319 regulates the manner in which a buyer and seller of goods control the risk of loss during shipment. Said statute has no bearing on a determination of where a breach of contract relating to the quality of the goods occurs.

The Eighth Circuit Court of Appeal, in a case similar to that under consideration herein, found jurisdiction in a breach of contract action notwithstanding the use by the shipper of F.O.B. language. In Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8th Cir. 1969), the circuit court applied Minnesota law to find jurisdiction under facts remarkably similar to those in the

---

[1]The district court below correctly stated that the holding in Canron was limited only to whether the manufacturer was doing business in the State of Florida pursuant to section 48.193(1)(a). Accordingly, statements in Canron concerning shipment of the goods and F.O.B. are dicta and certainly cannot be viewed as valid precedent for the district court's holding in this case.

present case. In that case, a Texas manufacturer sent a product to a Minnesota corporation which brought suit in Minnesota under various theories of liability including breach of contract and breach of warranty. The facts concerning the relationship of the Texas corporation to Minnesota are set forth in that opinion as follows:

> The defendant never had an officer, employee or agent in Minnesota, never maintained an office or any physical facility in Minnesota, never advertised directly in Minnesota, and never qualified to do business in Minnesota. The defendant was not obligated to send a representative to Minnesota to install the receiver-transmitters or to service the units under the warranty. The transaction involved here is the only one between the parties.

417 F.2d at 366.

> The plaintiff was a resident buyer; they conducted negotiations for the purchase of equipment of significant value by mail and phone from Minnesota; it placed an order for the equipment in the mail in Minnesota; and it made arrangements to pay for the equipment through a Minnesota bank. The seller, a non-resident, completed the transaction with full knowledge of the buyer's residence and <u>shipped</u> the equipment directly to it.

417 F.2d at 368 [emphasis added].

The court found jurisdiction under Minnesota's long arm statute based upon the above facts. In discussing this holding, the Eighth Circuit rejected the contention that "F.O.B." had significance in determining jurisdiction and stated the following:

> All the equipment was shipped F.O.B. Texas, the defendant made arrangements for the shipment and knew that the equipment was being shipped directly to a Minnesota resident without passing through an intervening dealer.

417 F.2d at 369.

Accordingly, the court in Electro-craft found jurisdiction under a statute and set of facts remarkably similar to those in the present case. Significantly, the Eighth Circuit was confronted with the F.O.B. argument raised by respondent in the present case and rejected same, finding that the technical place of delivery in a shipping invoice is irrelevant in determining the place of a breach of contract. See also Vencedor Manufacturing Co. v. Gougler Industries, Inc., 557 F.2d 886 (1st Cir. 1977) (in contract action involving question of jurisdiction for long arm statute purposes, court held that no weight could be given to fact that plaintiff's orders were accepted by defendant and contracts were made in Ohio; no significance could be attached to fact that shipments were made to plaintiff by defendant F.O.B. Ohio); Kornfueherer v. Philadelphia Binder, Inc., 240 F.Supp. 157 (D. Minn. 1965) (though corporate seller shipped goods F.O.B. Philadelphia, the fact that goods were to be shipped to Minnesota satisfied test of Minnesota jurisdictional statute).

The district court erred in finding that the unilateral inclusion by Therm-O-Disc of the boilerplate language "F.O.B." in the shipping invoice accompanying the shipment of goods to ECU in

Florida was relevant to a determination of jurisdiction pursuant to Section 48.193(1)(g). Such holding is erroneous in that the term F.O.B. is merely a shipping term used only to determine the point at which the risk of loss during the shipment of goods is shifted from the seller to the purchaser. Further, the technical point of delivery is immaterial for purposes of Section 48.193(1)(g) in that Therm-O-Disc knew that its product would be shipped to ECU in Florida and would be incorporated into a finished product in Florida. Accordingly, the district court has misconstrued the language and intent of Section 48.193(1)(g) and has created an additional artificial requirement for jurisdiction not contained in that statute.

CONCLUSION

Based on the above, petitioner respectfully submits that the District Court of Appeal herein erred in holding that section 48.193(1)(f) only applied where physical injury occurs to persons or property within the state and not where injury to property outside the state results in financial injury within the state. Further, the court erred in holding that an issue of fact was presented for purposes of establishing jurisdiction under section 48.193(1)(g) with regard to whether the delivery of nonconforming goods took place in Ohio or Florida based upon the unilateral boilerplate language "F.O.B." used in the shipper's invoice accompanying the shipment of goods to Florida.

WHEREFORE, petitioner requests that this Court quash the District Court of Appeal decision and remand this cause to the trial court.

Respectfully submitted,

MATHEWS, OSBORNE, McNATT,
GOBELMAN & COBB

Harris Brown, Esquire
Robert B. Guild, Esquire
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202
(904) 354-0624
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Daniel C. Shaugnessy, Esquire, P. O. Box 1860, Jacksonville, Florida, 32201, this 4th day of November, 1986.

Attorney