IN THE SUPREME COURT OF FLORIDA

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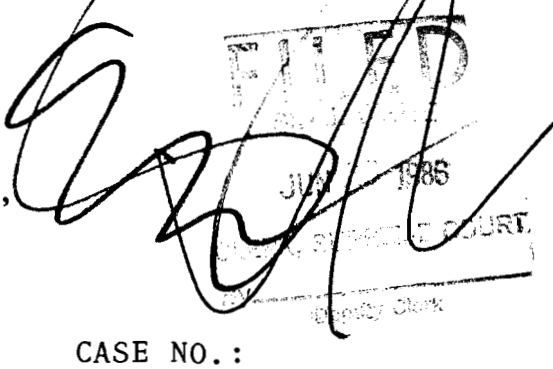

AETNA LIFE AND CASUALTY COMPANY,
as subrogee of Energy Conservation,
Unlimited, Inc.,

Petitioner,

vs. CASE NO.:

THERM-O-DISC, INC.,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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

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PRELIMINARY STATEMENT

In this brief, references to the appendix will be made by use of the symbol "A:" followed by the appropriate page number. References to the Record on Appeal will be made by use of the designation "R:" followed by the appropriate page number.

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 11 F.L.W. 388 (Fla. 1st DCA Feb. 21, 1986), in which the court reversed the trial court Order granting respondent's Motion To Dismiss for lack of jurisdiction and remanded the cause to the trial court. A:1-3. After the issuance of the district court's initial opinion, the petitioner filed a Motion For Rehearing which was denied by the district court. A:4-5. Petitioner now respectfully requests this Court to review 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.

STATEMENT OF THE FACTS

In its Amended Complaint, the petitioner alleged that Energy Conservation Unlimited, Inc. ("ECU"), is a Florida corporation and that Therm-O-Disc, Inc. ("Thermo-O-Disc"), is a foreign corporation with its principle 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; 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 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. R:23-24. As a result of this payment, petitioner became subrogated to the rights of ECU and brought this subrogation action. R:23-24.

The Amended Complaint was in five counts based on the facts set forth above, alleging 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 long-arm statute. R:35-36. Petitioner 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). 11 F.L.W. at 389. 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 under section 48.193(1)(g), based upon the allegation 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. Id.

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. 11 F.L.W. at 389. However, because the court found that the record was unclear as to whether the switches were, in fact, delivered in Florida, the court remanded to the trial court for an evidentiary hearing and a determination of the place at which the allegedly nonconforming goods were delivered. Id. at 390.

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 results in

financial injury within the state. ::6-10. 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 Fourth District Court of Appeal held that section 48.193(1)(f) applied to situations involving financial injury.

Although the district court denied the Motion For Rehearing, it did address the issues raised by petitioner. A:4-5. 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. 11 F.L.W. at 389.

SUMMARY OF ARGUMENT

The District Court of Appeal decision herein expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Yale Industrial Products, Inc. v. Gulf Stream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla. 4th DCA 1986), on the issue of the application of section 48.193(1)(f) to situations involving acts or omissions outside the State of Florida which result in financial injury within the State of Florida. This conflict was acknowledged by the First District in its Opinion denying petitioner's Motion For Rehearing.

ARGUMENT

The district court below held that section 48.193(a)(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 has resulted in financial injury within the state. 11 F.L.W. at 389; 11 F.L.W. at 1165. The only other Florida Court to address this specific issue has reached a result directly opposite to that of the district court below. Although the district perhaps did not 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 having to replace 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 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 upheld 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. Accordingly, the Fourth District Court of Appeal 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, the court cited the Third District Court of Appeals 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 suffered damages when a 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.

In reviewing the trial court order upholding jurisdiction over the dump trailer manufacturer, the district court noted that the Complaint was insufficient 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, this 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 submit that the district court in Hyco did not expressly rule on this issue. 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. In contrast to Hyco, the complaint in this case clearly states that financial damage has been

sustained to 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 misapprehended the holding in Hyco.

The specific question before the 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, in relevant part, that jurisdiction will lie 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. In so doing, the district court created express and direct conflict with the Fourth District Court of Appeal decision in Yale Industrial, supra.

CONCLUSION

Based on the above, it is respectfully submitted that the district court in the instant case created direct and express conflict with the Fourth District Court of Appeal decision in Yale Industrial, supra, on the issue of whether section 48.193(1)(f) applies to situations in which acts or omissions outside the State of Florida cause financial injury to persons or property within the state. This express and direct conflict was recognized by the district court below wherein the court expressly rejected the

interpretation given section 48.193(1)(f) by the Fourth District Court of Appeal. As a result, this Court has discretionary jurisdiction pursuant to Article V, Section 3 of the Florida Constitution and Rule 9.030 of the Florida Rules of Appellate Procedure. The question of law presented is significant both in the context of this case and more broadly as affecting the law of the State of Florida as a whole in that the decision of this Court will effect the scope of the application of the Florida long-arm statute. Accordingly, this Court should exercise its discretionary jurisdiction and review the decision of the First District Court of Appeal below.

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 25th day of June, 1986.

Attorney