D/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.

REPLY BRIEF OF PETITIONER

MATHEWS, OSBORNE, McNATT,
GOBELMAN & COBB

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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 NON-CONFORMING 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.

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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 petitioner respectfully submits that the interpretation given section 48.193(1)(f) by the district court and advanced by the respondent is unsupported by relevant case law. Petitioner submits that, contrary to respondent's

assertions, a financial injury occurring within the State of Florida is not an "intangible injury" but is an injury within the proper scope of section 48.193(1)(f).

Petitioner rejects the respondent's interpretation of Yale Industrial Products, Inc. v. Gulf Stream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla. 4th DCA 1986), and Pennington Grain and Seed, Inc. v. Murrow Seed Co., Inc., 400 So.2d 157 (Fla. 1st DCA 1981), and contends that the respondent has misconstrued the plain language of said decisions. The Yale Industrial court expressly rejected the contention that section 48.193(1)(f)(2) only applied to cases involving bodily injury or physical property damage. The injuries suffered in that case consisted of lost production time and other financial losses caused by defective equipment sold by an out of state manufacturer. Nevertheless, the court found that jurisdiction attached over the out of state defendant under section 48.193(1)(f)(2).

Similarly, in Pennington Grain, supra, the injury suffered was caused by the improper germination of seed sold by the defendant. No personal injury or physical property damage was caused by the defective seed. Notwithstanding the absence of physical injury, however, the Pennington Grain court found that jurisdiction under section 48.193(1)(f)(2) was proper.

In order to avoid any misunderstanding, the petitioner is compelled to point out that, contrary to respondent's

assertion, the petitioner does not rely upon the case of Hyco Manufacturing Co. v. Rotex International Corp., 355 So.2d 471 (Fla. 3d DCA 1978), in support of its argument that section 48.193(1)(f)(2) properly applies in this case. Rather, the petitioner asserts in its initial brief that the district court misapprehended the holding in Hyco and erroneously relied upon Hyco in support of its decision herein.

Petitioner reasserts that section 48.193(1)(f)(2) is not restricted in application to situations involving physical injury to persons or property within the State of Florida. There is no support in either the language of the statute or case law interpreting the statute for such a restrictive interpretation of section 48.193(1)(f)(2).

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 NON-CONFORMING 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.

As is recognized by the respondent, it is not disputed that respondent agreed to ship certain of its switches to petitioner's place of business in Florida. It is the petitioner's contention that the switches were delivered in a defective condition which did not conform to the requirements of the contract between the parties and that such shipment of

non-conforming goods in Florida constituted a breach of contract in Florida subjecting respondent to jurisdiction in Florida pursuant to section 48.193(1)(g).

The term "F.O.B." merely designates who bears the expense and risk of shipment of the goods. Section 672.319, Florida Statutes (1981). The mere inclusion by the respondent of the term "F.O.B. Mansville, Ohio," cannot, however, be used to unilaterally determine where the contract is to be performed. The term F.O.B. has no bearing on a determination of where a breach of contract relating to the quality of the goods occurs.

III. SUFFICIENT CONNEXITY IS SET FORTH IN THE AMENDED COMPLAINT BETWEEN THE ACTS OF THERM-O-DISC IN THE STATE OF FLORIDA AND THE LOSS SUSTAINED IN THIS CASE.

The amended complaint contains sufficient allegations of connexity between the acts of Therm-O-Disc in the State of Florida and the loss sustained in this case. In addition to the requirement that a complaint set forth jurisdictional grounds pursuant to Florida Statutes, sufficient "connexity" must exist between the actions of the foreign corporation in the State of Florida and the cause of action arising out of such actions. Stated otherwise "connexity" refers to the requirement that the cause of action arise out of a transaction or operation connected with or incidental to the activities of

the foreign corporation in Florida. Kravitz v. Gebrueder Pletscher, etc., 442 So.2d 985 (Fla. 3d DCA 1983).

In the present case, Therm-O-Disc entered into a contract requiring delivery of goods in the State of Florida knowing that its product would be used in the ordinary course of commerce in the State of Florida. However, an argument could be made that "connexity" does not exist because Therm-O-Disc's products, as incorporated into Energy Conservation's product, actually failed in Georgia and South Carolina.

This precise issue was recently addressed by the First District Court of Appeal in Canron Corp. v. Holt, 444 So.2d 529 (Fla. 1st DCA 1984). In Canron, a foreign corporation shipped its product F.O.B. by means of a purchase order from South Carolina to Florida. A products liability suit against the foreign corporation arose because of an accident occurring in the State of Georgia. The court held that "connexity" existed and stated the following:

> While a 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.
>
> . . . .
>
> The evidence demonstrates that among Canron's business activities in the State of Florida was the sale and delivery of the trac-gopher involved in the instant case. There was, therefore, sufficient "connexity"

> between Canron's business activities in Florida and the cause of action.

444 So.2d at 530.

Canron is directly analogous to the present case. In both cases the foreign corporation delivered its product to a Florida purchaser who sustained a loss through use of the product in another state. The sale and delivery of a product in the State of Florida was held in Canron to establish "connexity" to the State of Florida to support the jurisdiction of the Florida courts.

In summary, the "connexity" requirement under Florida law has been established by the allegations of the Amended Complaint and the respondent's argument to the contrary is without merit.

IV. THE AMENDED COMPLAINT DEMONSTRATES SUFFICIENT MINIMUM CONTACTS BETWEEN THERM-O-DISC AND THE STATE OF FLORIDA.

In addition to statutory jurisdiction and "connexity" an additional requirement must be fulfilled that a foreign corporation have sufficient minimum contacts with the forum state to satisfy the due process requirements of the United States Constitution. Petitioner submits that the actions of Therm-O-Disc as alleged in the Amended Complaint satisfy this constitutional requirement. Burger King Corp. v. Rudzewicz, 471 U.S. ___, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L.Ed.2d 490, 100

S.Ct. 559 (1980); Ford Motor Co. v. Attwood Vacuum Machine Co., 392 So.2d 1305 (Fla. 1981); A.J. Sackett & Sons Co. v. Frey, 462 So.2d 98 (Fla. 2d DCA 1985); Pennington Grain and Seed, Inc. v. Murrow Brothers Seed Co., Inc., 400 So.2d 157 (Fla. 1st DCA 1981).

The United States Supreme Court in Burger King, supra, interpreted the minimum contacts requirement as applied to section 48.193(1)(g), Florida Statutes. The Burger King case involved asserted Florida jurisdiction based upon a breach of contract action between a Florida corporation and a Michigan franchisee. The Court found that the Michigan franchisee was subject to the jurisdiction of the Florida courts and stated the following concerning the minimum contact requirement:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [footnote omitted] this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, [citation omitted] and the litigation results from alleged injuries that "arise out of or relate to" those activities . . . [citation omitted]. [Footnote omitted]. Thus, "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State . . ." 471 U.S. at _____, 85 L.Ed.2d at 541, 105 S.Ct. at _____.

Similarly, the Supreme Court of Florida recognized in Ford Motor Co., supra that a manufacturer engaged in interstate

commerce, which expects its products to be used in other states, could reasonably expect to be held subject to the jurisdiction of the courts of such other state. 392 So.2d at 1312.

The court further noted that the occurrence of a single injury in the state was a sufficient basis upon which to conclude that a non-resident manufacturer's product got there through normal commercial channels, so as to justify a conclusion that sufficient contacts exist between the non-resident and the forum state to establish jurisdiction. Id. at 1313.

Finally, the Ford Motor court cited Gray v. American Radiator and Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E. 2d 761 (1961) for the proposition that "the fact that a non-resident manufactures a component part outside the state and takes no part in the sale, distribution, or marketing of the finished product in the state is no basis for a limitation on jurisdiction." Id. at 1313.

In analogous situations, both the Sackett, supra, and Pennington Grain, supra, courts found the minimum contacts requirement to be satisfied by the single delivery of a product by a foreign corporation into the State of Florida. The court in Sackett stated:

> The Supreme Court itself in a contract action has ruled that a single transaction may be sufficient to satisfy the requirements of "minimum contacts" when the cause of action arises from the subject

> matter of the transaction. McGee v. International Life Insurance Co., 355 So.2d 220, 78 S.Ct. 199, 25 L.Ed.2d 223 (1957). Other courts have held in tort actions involving defective products that in personam jurisdiction over a non-resident manufacturer may be constitutionally obtained by virtue of the act of the manufacturer in delivering the offending product into the state. E.g., Continental Oil Co. v. Atwood S. Morrill Co., 265 F.Supp. 692 (D. Mont. 1967); Waukesha Building Corp. v. Jameson, 246 F.Supp. 183 (W.D. Ark. 1965). We hold that a non-resident manufacturer's single sale of a product in Florida provides a sufficient minimum contact with the state to permit personal jurisdiction to be obtained over the manufacturer in a products liability action arising out of that product.

462 So.2d at 99.

Based upon the above authorities, it is apparent that the delivery by Therm-O-Disc of its product to Energy Conservation in the State of Florida knowing that said product would be used in the State of Florida satisfies the minimum contact requirement of due process.

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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 15th day of December, 1986.

Attorney