

1975

Korma Kocha v. Gibson Products Company and Maytex Manufacturing Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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Dec 6 1975

NORMA KOCHA,

Plaintiff,

vs.

BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

GIBSON PRODUCTS COMPANY,
A Utah Corporation, and MAYTEX
MANUFACTURING COMPANY,
A Texas Corporation,
Defendants.

MAYTEX MANUFACTURING COM-
PANY, A Texas Corporation,
Third-Party Plaintiff Appellant,

Case No.
13887

vs.

UNIVERSAL CARRIER COMPANY,
A Corporation,
Third-Party Defendant-Respondent.

RESPONDENT'S BRIEF ON APPEAL

Appeal from a Decree of the
Third Judicial District Court of Salt Lake County.
Honorable Maurice D. Jones, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

NORMA KOCHA,

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MAYTEX MANUFACTURING COM-

PANY, A Texas Corporation,

Third-Party Plaintiff Appellant,

vs.

UNIVERSAL CARRIER COMPANY,

A Corporation,

Third-Party Defendant-Respondent.

Case No.

13887

RESPONDENT'S BRIEF ON APPEAL

STATEMENT OF NATURE OF CASE

This is an action brought by the Maytex Manufacturing Company, Defendant and Third-Party Plaintiff-Appellant, against Universal Carrier Company, Third-Party Defendant-Respondent wherein the Maytex Manufacturing Company, hereinafter referred to as Maytex, was named as a Defendant in a personal injury action brought by Norma Kocha for injuries allegedly suffered

by that Plaintiff as a business invitee on the premises of the Gibson Discount Center. Maytex thereafter brought this action against the Universal Carrier Company, hereinafter referred to as Universal, for indemnity in the event that the Plaintiff successfully recovered against the Defendant Maytex.

DISPOSITION IN THE LOWER COURT

Upon the filing of Defendant Maytex's Third-Party Complaint against Universal, Universal, by SPECIAL APPEARANCE made a MOTION TO DISMISS FOR LACK OF JURISDICTION. The trial court with the Honorable Maurice D. Jones, sitting as a Judge of the Third Judicial District, granted Universal's Motion to Dismiss and ruled that jurisdiction over Universal was lacking.

RELIEF SOUGHT ON APPEAL

Respondent Universal Carrier Company seeks an affirmance of the Order of the District Court dismissing the Third-Party Complaint of the Appellant Maytex, for lack of jurisdiction.

STATEMENT OF FACTS

Respondent takes strong exception to Appellant's Statement of Facts.

Because of the matters set forth in Point I of Respondent's Argument hereinafter, the Respondent respectfully submits that the Statement of Facts contained

in Appellant's brief are without support in the record. Appellant cites as facts in its Statement of Facts, matters which are purely and totally speculative and without support in the record on appeal, or in the record available to the trial court. The only facts existence in the record are that certain pleadings, with certain allegations, were filed with the court (though those allegations amount to little more than hearsay); and that an Affidavit properly attested to and notarized was submitted by David J. Moorehead, Chairman of the Board of the Third-Party Defendant Universal Carrier Company. No Counter-Affidavits were filed by the Third-Party Plaintiff-Appellant.

Attention is drawn to Point I of Respondent's Argument for the support of prior decisions of this Honorable Court setting the standard for the determination of what items are to be considered facts on a motion such as Universal's Motion to Dismiss for Lack of Jurisdiction. In accordance with those prior guidelines of the Supreme Court of the State of Utah, the following are submitted as the facts existing in this case:

(a) That the Plaintiff Norma Kochoa filed a Complaint in the District court of Salt Lake County, State of Utah, on or about the 4th day of April, 1974, against Gibson Products Company and the Maytex Manufacturing Company in which it was *alleged* that she, as a business invitee, was injured on a wire merchandise rack owned by the Defendant Gibson and designed and manufactured by the Defendant Maytex.

(b) That the Defendant Maytex filed an Answer on or about the 10th day of June, 1974, in which it *alleged* that "This defendant is a Texas Corporation, not doing business in the State of Utah, and that the above-entitled Court is without jurisdiction," and entered a general denial of the allegations of Plaintiff's Complaint and entered other affirmative defenses against the Plaintiff.

(c) That the Defendant Maytex Manufacturing Company, on or about the 10th day of June, 1974, filed a Third-Party Complaint against the Third-Party Defendant, Universal in which it *alleged*:

(1) That the plaintiff had filed a complaint against the defendant Maytex,

(2) That the wire merchandise rack in question was designed and manufactured by Universal and sold by the third-party defendant to the third-party plaintiff,

(3) That if the plaintiff's allegations were true, jurisdiction existed over the third-party defendant Universal, and,

(4) That in the event that plaintiff was successful against the defendant Maytex that Universal would be liable to Maytex for the full amount of any such judgment.

(d) That the Third-Party Defendant Universal was served with a copy of the Complaint and with a Summons *in Texas* on the 26th day of June, 1974, by a deputy of the Dallas County Sheriff's Department.

(e) That by SPECIAL APPEARANCE, the Third-Party Defendant Universal made a Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction.

(f) That the Third-Party Defendant-Respondent Universal acting through its Chairman of the Board, David J. Moorehead, filed an Affidavit, under oath, and properly notarized, with the Court which set forth the following *facts*:

(1) That he is the chairman of the board of Universal Carrier Company which has its place of business at 614 Easy Street, Garland, Texas.

(2) That at all times pertinent hereto, Universal Carrier Company was a Texas corporation which was not licensed to do business in the State of Utah, and which in fact does not sell its products to any buyers within the State of Utah.

(g) That thereafter a Memorandum in Support of Universal Carrier Company's Motion to Dismiss was filed and an argument thereon was held on the 12th day of August, 1974, at the hour of 2:00 P.M., and that, thereafter, the Court entered an Order dismissing the Third-Party Plaintiff-Appellant Maytex's Complaint on the grounds that the court does not have jurisdiction over the Third-Party Defendant, Universal Carrier Company.

No other facts appear in the record, and no other facts were presented by counsel for the parties.

ARGUMENT

Appellants contend in the Statement of Facts section of their brief, that the only issue on appeal is whether an intermediate seller (such as a wholesaler or distributor) of a allegedly defective product causing injury in Utah, can invoke long-arm jurisdiction over the designer and manufacturer from which it purchased the product outside of the State. Respondent disagrees.

There is no evidence in this case to the effect that the Appellant is "an intermediate seller" let alone a "wholesaler and distributor." Beyond that there is the issue of whether or not any evidence was presented to support the Appellant's position in the trial court which could have justified the trial court and finding other than it did.

Therefore, Respondent contends that there are two issues on appeal. First the question of what facts were available to the trial court judge, and second, whether or not the long-arm statute conveys jurisdiction over the Third-Party Defendant-Respondent.

POINT I.

LOWER COURT HAD NO FACTS BEFORE IT DURING CONSIDERATION OF THIRD-PARTY DEFENDANT'S MOTION, OTHER THAN THIRD-PARTY DEFENDANT'S AFFIDAVIT.

As indicated previously, the only Affidavit or other verified or attested to facts available to the court was the Affidavit of David J. Moorehead, Chairman of the Board of the Respondent. No affidavits, depositions,

answers to interrogatories or any other such materials were filed by the Appellant Maytex. The Appellant Maytex is apparently relying on the allegations set forth in its Complaint, and in the Complaint of the Plaintiff Norma Kocha, as though they were facts. Under previous cases of the Supreme Court of the State of Utah, and under the Utah Rules of Civil Procedure, they are not allowed to do so.

Rule 6D and Rule 43E of the Utah Rules of Civil Procedures provide for the filing of Affidavits on motions such as Universal's Motion to Dismiss in this matter. Rule 56E with reference to similar affidavits, states as follows:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit the affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment, and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, a summary judgment, if appropriate, shall be entered against him."

Allegations in a Complaint or an Answer are not evidence. Defendant and Third-Party Plaintiff Maytex's Third-Party Complaint in this matter is signed by the

attorney for the Third-Party Plaintiff and it is not a verified Complaint. The information contained therein is at best hearsay, and it would not be admissible at time of trial.

Rule 11 of the Utah Rules of Civil Procedure provides:

"The signature of an attorney constitutes a certificate by him that he had read the pleading; that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay."

An attorney does not attest that all items contained in the Complaint, or other pleading signed by him, are true. Indeed in nearly all instances such signings of pleadings are based on hearsay information received from clients or other sources.

The court has often had occasion to deal with and discuss affidavits or other testimony-type discovery matters where the evidence adduced by them would not be admissible at trial. In the 1972 case of *Western States Thrift & Loan Company vs. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019, the court held that an Affidavit opposing a Motion for Summary Judgment must be made on the personal knowledge of the affiant and set forth facts which would be admissible in evidence. The court determined that the Affidavit in question was based on hearsay and based on information and belief and that it thus did not conform to the requirements of the Rule to create a genuine issue of fact for trial sufficient to preclude the entry of a Summary Judgment in favor of the Plaintiff.

In the 1971 case of *A & M Enterprises, Inc. vs. Hunsaker*, 25 Utah 2d 363, 482 P.2d 700, a similar result was held where the discovery device was Interrogatory Answers. In that matter the court held that Interrogatory Answers which were based upon hearsay statements and conclusions, and not based on personal actual knowledge, should not be considered in determining whether or not there was a disputed issue of material fact.

In the 1969 case of *Rainford vs. Rytting*, 22 Utah 2d 252, 451 P.2d 769, the court refused to accept a Defendant's Affidavit which consisted of inadmissible parole evidence, and on that basis granted a Summary Judgment in favor of the Plaintiffs. In that case the court stated as follows:

"The action of the trial court in the instant case must be sustained, since appellant's affidavit consisted entirely of inadmissible parole evidence, submitted for the purpose of varying and adding to the terms of the written agreement of the parties. An affidavit in opposition to a motion for summary judgment to be effective must set forth such facts as would be admissible in evidence." (At Page 255.)

See also *Walker vs. Rocky Mountain Recreation Corporation*, 29 Utah 2d 274, 508 P.2d 538 (1973).

The Third-Party Plaintiff-Appellant apparently feels that the mere assertion of an allegation in its Third-Party Complaint raises that as a "fact" to be considered in any judicial determination relating to the case. Under the Utah case law, this is not so. This question was squarely faced in the 1966 case of *Dupler vs. Yates*, 10

Utah 2d 251, 351 P.2d 624. In that case, an action by purchasers of interests in oil wells to recover damages for alleged fraud and deceit and breach of fiduciary relationship, the court held that *allegations in pleadings are not sufficient to raise issues of fact*. The court in the *Dupler* case stated as follows:

“Certainly, if the summary judgment procedure is to be effective, it must be held that when adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact.”

The court went on to spell out its reasons and justification for that general rule as follows:

“Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movent’s case or specify in an affidavit the reason why he cannot do so.

Where as in the instant case the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails either to offer counter affidavits or other materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party.

The record made by the defendant in support of his motion for summary judgment, controverted the unverified allegations in the plaintiff’s amended complaint and therefore, in the absence of counter affidavits, no genuine issues of material fact were created.”

See also 6 Moore, Federal Practice (2d Ed), at page 2067.

This position has been upheld in more recent Utah Supreme Court cases such as *Montoya vs. Berthana Investment Corporation*, 21 Utah 2d 37, 439 P.2d 853 (1968); and *Pioneer Finance and Thrift Company vs. Powell*, 21 Utah 2d 201, 443 P.2d 389 (1968).

Most recently in the 1973 case of *Clegg vs. Lee*, 30 Utah 2d 242, 516 P.2d 348, the court adhered to the rule set out in the *Dupler* case and stated on page 247 as follows:

“A matter may be determined on summary judgment upon facts given in a party’s deposition. Under Rule 56(e), U.R.C.P., an adverse party may not rely on mere allegations or denials in his pleadings, but he must set forth the facts showing that there is a genuine issue as to a material fact for trial.”

As the Third-Party Defendant-Respondent’s Motion to Dismiss for Lack of Jurisdiction was a Motion that could be, and in fact became, dispositive of the case, it had to be approached on much the same grounds as would a Motion for Summary Judgment. The Third-Party Defendant-Respondent filed an Affidavit, the only factual documents so submitted in this matter, and in so doing, contravened and cut across any and all allegations relating to jurisdiction set out by the Plaintiff or Third-Party Plaintiff-Appellant. Third-Party Plaintiff-Appellant had opportunity to submit Counter Affidavits prior to the hearing of the matter, or during the period the court had the matter under advisement before decision, and they failed to do so. Thus the only facts present in the record in this regard, are that the Third Party Defendant-

Respondent has its principal place of business in Texas and that it is not licensed to do business in Utah and in fact, does not sell its products to any buyers in the State of Utah.

Appellant Maytex's statement of facts contains the following statement, "nor is there anything in the affidavit indicating that Universal did not purposefully intend its products to come into the State of Utah. Nor is there anything to indicate that the sale in question involved an isolated transaction; for all we know from the state of the record, the respondent may well have thousands of its manufactured products in use in stores throughout the State of Utah. All of these facts would have to be considered in the light most favorable to Maytex for the purpose of the motion to dismiss." We contend that these items *cannot* be considered in a "light most favorable to Maytex" because they are *not* facts. They are the purest kind of speculation without any evidentiary support whatever and, indeed, without even a previously stated allegation. The Third-Party Plaintiff-Appellant had an opportunity to produce Counter Affidavits or other evidence to the effect, that they could be obtained, and they failed to do so. There are no allegations, supported or unsupported as to the intent of Universal; there are no allegations, supported or unsupported, with reference to Universal's regular business practices; there are no allegations, supported or unsupported, that Universal has any other of its products in Utah; and there are no allegations, supported or unsupported, setting forth the Third-Party Plaintiff-Appellant's version of how this item might have come in to the State of Utah.

To the respondent's knowledge there is only one case in Utah in which it was held that allegations in a Plaintiff's Complaint stood, as facts, in opposition to averments in the Affidavits supporting a defendant's motion thus raising a controverted issue of fact. This was in the 1963 case of *Christensen vs. Financial Service Company*, 14 Utah 2d 101, 377 P.2d 1010. That case said that an adverse party on a Motion for Summary Judgment may serve opposing Affidavits but is not required to do so and that his pleadings could raise issues of fact precluding Summary Judgment. However, the *Christensen* case was recognized as being in opposition to the accepted and general rule nation-wide and the Supreme Court of the State of Utah in the 1968 case of *United American Life Insurance Company vs. Willey*, 21 Utah 2d 279, 444 P.2d 755, case virtually overruled the decision in the *Christensen* case.

In the *United American Life Insurance Company* case the court cited the *Christensen* case and stated as follows:

"When that case was decided, it placed Utah all by itself among the States of the Nation, and the sole associate it had in that regard was in the Third Federal Circuit. . . . Quite aside from having the distinction of causing Utah to be the only Soldier in the Nation to be 'in step' the case is now no authority for the claim made by appellants for the reason that Rule 56(e) was amended in 1956. . . ."

Thus, it can be seen that nearly all of the evidentiary statements contained in appellant's brief on appeal are totally unsubstantiated by evidence.

This is true of many of the statements made in Appellant's STATEMENT OF FACTS as well as numerous such statements appearing in Appellant's ARGUMENT section.

On page 9 of Appellant's brief, it states that Universal purposefully placed the rack in interstate commerce and that it was foreseeable that an injury could result in Utah. There is no evidence, nor even an allegation, to support that statement.

Also on page 9 of Appellant's brief, it states: "It is undisputed that the Respondents are engaged in interstate commerce and are thus beneficiaries of the protection of the Utah State Laws." There is no evidence, nor even an allegation, in support of that statement.

On pages 9 and 10 of Appellant's brief, they contend that while both the Appellant and Respondent are Texas corporations, their contacts with Utah are greater than any other sister state. There is no evidence, nor even an allegation, in support of that statement.

On page 11 of Appellant's brief, it states, "The manufacture of products sold in interstate commerce such as display racks for large merchandising stores has a substantial and continuing interest in marketing its products beyond the boundaries of the state where the manufacturing took place." There is no evidence, nor even an allegation, that that situation would apply to the Respondent Universal.

On page 12 of Appellant's brief on appeal, it states that Universal's product found its way into Utah in a "natural, foreseeable and purposeful manner." There is no evidence, nor even allegation, in support of that statement either.

The trial court in this matter had no evidence of the kind eluded to and referred to in Appellant's brief. The evidence and the record reflects no such facts. The trial court had only one evidentiary document. That was Mr. Moorehead's Affidavit. As such, the trial court had no alternative, with the facts made available to it, other than to rule in favor of the Third-Party Defendant Universal and to decide that jurisdiction did not lie in matter. Respondent herein submits that the situation has not changed since it was so reviewed by the trial court, and that, with the information available to it, the Supreme Court is also left with no alternative but to affirm the decision of the trial court.

POINT II.

THE PROVISIONS OF CHAPTER 27 TITLE 78
U.C.A. (LONG-ARM STATUTE) DO NOT GIVE
JURISDICTION OVER THE THIRD-PARTY DE-
FENDANT TO THE DISTRICT COURT.

Universal's initial motion in this regard took the position that the Utah long-arm statute, 78-27-24, U.C.A. (1953) as amended in 1969, did not apply as an application that would include this service over Universal would not come within the guidelines of the Utah Supreme Court case setting out the requirements for "minimal contacts" and "due process of law." Indeed the Utah

State Legislature placed a limit on the boundaries of the long-arm statute by citing the due process clause directly. Respondent agrees with the statement in Appellant's brief that the long-arm statute was intended to "serve jurisdiction over the non-resident defendants to the fullest extent permitted by the due process clause. . . ." However, the respondent contends that the Utah cases on the matter have determined the boundaries of this application.

The question then is two-fold: First did the action of Universal constitute the sufficient "minimal contact" to hold this court's jurisdiction as constitutional and within the express scope of the Utah Long-Arm Statute; and Second, does the wire rack *allegedly* manufactured by Universal after passing through intermediate hands and subsequently finding its way to Utah, create such a situation as to be included in those enumerated acts which subject a non-resident to the jurisdiction of this state's courts?

If the only facts accepted in this action are the facts set forth in Respondent's Statement of Facts, in accordance with Point I of Respondent's argument herein, there could be no question but that those requirements are *not* satisfied, and that jurisdiction over this defendant does not lie. That would be so because the only facts in evidence are that Universal is a Texas corporation, not doing business in Utah.

However, even if we were to consider the *actual* allegations of Plaintiff's Complaint and of Third-Party Plaintiff-Appellant's Complaint in this matter, there

would still not be a justification for holding that the Utah State Courts have jurisdiction over the Respondent.

Hypothetically, if we accept the allegations of Third-Party Plaintiff Maytex's Complaint, and to the extent that they are applicable the allegations of plaintiff Kocha's Complaint, the most extensive contentions we would have would be as follows:

1. That a wire merchandise rack injured the plaintiff in Murray, Utah.
2. That Universal (or Maytex) designed and manufactured the rack.
3. That Universal sold the rack to Maytex.

(There are no allegations relating to how the rack came into Utah, or where the rack was sold by Universal to Maytex, or that Universal intended that the rack come into Utah, or that Universal is engaged in interstate commerce, or that any other of the products manufactured by Universal are existent in the State of Utah.) Even if such items as are alleged in the above-referenced Complaints were admitted, they would still not meet the requirements of due process set out by the United States Supreme Court and the Supreme Court of the State of Utah.

The United States Supreme Court in *International Shoe Company vs. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, (1945) set the standard as to what connections the non-resident must have with the forum state before that state can exercise jurisdiction over the

non-resident via its state courts. The court held that the due process clause required that the non-resident have certain minimal contacts with the forum state. The court said:

“... due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimal contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

The corporation in *International Shoe* seeking to defeat jurisdiction was a shoe manufacturing company and the court found jurisdiction based on the activities of the corporation in Washington State and accordingly its activities differ greatly from our situation, for in that case, *International Shoe* had salesmen in the State and such activities were regular and continuous, thus making the corporation amenable to process. In our situation, there are no salesmen, warehouses, outlets, manufacturing or other activities which create any contact with the State of Utah. The only factor is that a wire rack ended up in Utah, not at the direction of the Universal, and it had passed through independent hands. Such a remote and isolated incident could not be construed as systematic and continuous so as to make Universal Carrier Company subject to the jurisdiction of the Utah Courts.

The Court stated, in *International Shoe, supra*, with respect to irregular and casual contact:

“... it has been generally recognized that the casual presence of the corporate agent or of activi-

ties in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there."

The court continued:

"To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

The mere fact that a wire rack happened to end up in Utah does not constitute systematic and continuous operating within the State and so the "minimal contacts" requirement is not met under *International Shoe*. Upholding jurisdiction would exceed the bounds of due process and would certainly offend the "notion of fair play and substantial justice."

The Utah Supreme Court has ruled on the scope and extent of the Long-Arm Statute, and it has stated its position on four occasions.

In *Conn. vs. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959), a suit to enforce an Illinois judgment against a Utah resident, the court deals with the question of what constituted the "transaction of business" as it relates to due process. The court found that the actions of the Utah resident as they related to Illinois did not constitute the "transaction of business" and, therefore, subjecting the Utah resident to Illinois service of process and jurisdiction did not conform with due process requirements. The actions of the Utah resident were conducted by mail and

were a response to a solicitation via the mails from an Illinois resident to purchase a horse. The court found that these actions, including the inspection of the horse by a friend of the defendant in Illinois, did not constitute sufficient contact so as to invoke jurisdiction under the Illinois Long Arm Statute.

Admittedly, in the *Conn.* case, the court was not construing the Utah statute. However, they were discussing the due process requirements involved in personam jurisdiction. This case set the stage for the case of *Hill vs. Zale Corporation*, 25 Utah 2d 357, 482 P.2d 332, which followed in 1971.

In the case of *Hill vs. Zale Corporation*, the Utah Supreme Court directly dealt with and examined Utah's Long Arm Statute. That case also involved a Texas corporation. In that case the plaintiff filed an action against the defendant seeking to recover for wages, an incentive award, vacation pay and moving expenses, totalling about \$2,500 which he claimed were due for services rendered to the defendant in Anchorage, Alaska. In that case the defendant corporation brought an action to dismiss on the grounds that there had been no proper service of summons and upon a lack of jurisdiction. The trial court, the Honorable Gordon R. Hall presiding, dismissed the action stating:

"That the defendant is a corporation duly organized and existing under the laws of the State of Texas and is not subject to service of process within the State of Utah."

The Supreme Court agreed with the trial court's view of the law but, in a review of the facts surrounding the defendant's motion, ruled that the legal requirements were satisfied by the facts as shown in affidavits. Nonetheless, the court stated the rule setting forth the requirements of due process as follows:

"It is appreciated that the language just quoted is necessarily a broad sounding generality; and that it must be so interpreted and applied as to conform with basic concepts of fairness and due process of law. *This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this state or may be purchased and sold by others herein.*" (Emphasis added).

Later, in the 1972 case of *Hydroswift Corporation vs. Louie's Boats and Motors*, 27 Utah 2d 233, 494 P.2d 532, the Supreme Court held that a defendant corporation which allegedly committed a conversion of a domestic corporation's property in Oregon was not subject to suit under Utah's Long Arm Statute. In that case the Court recognized the due process requirements of *International Shoe vs. Washington*, *supra*, and held that in this tort action there were not significant contacts to impose jurisdiction even under Utah's broadly worded Long Arm Statute. The specific section of Utah's Long Arm Statute which was used to support the plaintiff's contention that jurisdiction did lie in Utah was the precise section upon which the third-party plaintiff, Maytex Manufacturing, seeks to assert jurisdiction against the third-party defendant, Universal Carrier Company. That

section is Section 78-27-24 (3), Utah Code Annotated, 1953. More specifically, the court recognized the basis of the claim as involving the portions of 78-27-24 relating to torts.

In the *Hydroswift* case, the courts stated the law as follows:

We disagree with the urgency of plaintiff, are unwilling to extend that case, which appears to have inspired our Long Arm Statute, and believe and hold that under the circumstances related hereinabove the plaintiff legitimately cannot claim jurisdiction that might sanction this litigation in Utah.

Under 78-27-22, it is stated that the provisions of the act apply 'to the fullest extent permitted by the due process clause of the Fourteenth Amendment. . . .' We believe that the same amendment would protect one from being subject to the jurisdiction of the courts of this state, where he allegedly committed a tort such as claimed here, or a slander or the like in a sister state, but not in Utah, on grounds of denial of due process of law.

In 1972, the Utah Supreme Court, in a decision by Justice Henriod, synopsized the relationship between the *International Shoe* case and the *Hill vs. Zale Corporation* case in the case of *Foreign Study League vs. Holland-America Line*, 27 Utah 2d 442, 497 P.2d 244. In that case though jurisdiction was found, the court made a number of significant statements. That case stressed the proposition that cases such as these are "strictly factual and dispositive by the application of case and statutory law to the fact situation presented in the instant case. . . ." It is therefore, very important and very significant that

facts be carefully presented and considered and that the evidentiary requirements to establish facts be followed. Unlike the evidence presented in the *Foreign Study League* case, there is no evidence in this action by Maytex which could give rise to a conclusion that Universal sent employees to Utah or even publications, or letters or contracts for signature. Even if we are to accept Appellant's extrapolations out of the air, Maytex contends that they bought the article in Texas and shipped it into Utah themselves.

Appellant's brief ignores all of the Utah Supreme Court decisions in this area with the exception of the case of *Pellegrini vs. Sachs & Son*, Utah 2d, 522 P.2d 104 (1974). Appellant attempts to distinguish the *Foreign Study League* case and the *Hill* case on the basis that they construe a different subsection of the long-arm statute. Though this is perhaps the case, they certainly have language in them of substantial import which is addressed to the long-arm statute as a whole. The Appellant further attempts to distinguish the *HydrosSwift Corporation* case on the ground the tortious activity did not take place in Utah. However, it could certainly be considered that the injury suffered by the Plaintiff took place in Utah. In the instant case, Maytex apparently sent the assembled rack into Utah. Thus any activity engaged in by Universal, took place in the State of Texas.

As indicated above, the Appellants have placed some reliance in their brief on the *Pellegrini* case. The *Pellegrini* case contains the following language:

"It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

The court then went on to recognize a distinction between a dealer and a manufacturer who participates "in sending their wares into foreign states." There is no evidence, nor is there any allegation, that Universal sent its products anywhere outside of Texas. The Chairman of the Board of Universal attests that they do not sell to *any* buyers within the State of Utah. Apparently the Maytex Manufacturing Company manufactures and assembles products it purchases. It is apparently the Maytex Manufacturing Company which sends their wares into foreign states.

CONCLUSION

The Universal Carrier Company submits that the facts in this matter must be construed as set forth in David J. Moorehead's Affidavit as no other facts are before the court. The facts set forth in that Affidavit contradict the allegations of jurisdiction which appear in Plaintiff's Complaint. As such, the trial court had no alternatives but to rule in favor of the Third-Party Defendant-Respondent.

Further, even if the facts were assumed to be as alleged in Plaintiff's Complaint and in Third-Party Plaintiff's Complaint, that would still not extend juris-

diction over the Third-Party Defendant-Respondent as those allegations are limited in scope and do not go to the ultimate questions which concern jurisdiction.

Therefore, the Respondent respectfully requests that the court affirm the Judgment of the trial court.

DATED this 14th day of March, 1975.


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