

1977

# Abbott G. M. Diesel, Inc. v. Piper Aircraft Corporation et al : Brief of Respondent

Utah Supreme Court

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Ray R. Christensen; Attorneys for Defendant-Respondent;

John H. Snow; Attorneys for Defendant;

F. Alan Fletcher; Attorneys for Plaintiff-Appellant;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

ABBOTT G. M. DIESEL, INC., :  
A Delaware Corporation, :  
 :  
Plaintiff :  
and Appellant, :

vs. : Case No. 15016

PIPER AIRCRAFT CORPORATION, :  
A Corporation; and PIPER :  
CORPORATE AIRCRAFT CENTER :  
WEST, A Corporation, aka :  
CORPAC-WEST, :

Defendants :  
and Respondents, :

FILED

JUN 13 1977

Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

Appeal from an Order of the Third Judicial  
District Court of Salt Lake County  
Entered by the Honorable Marcellus K. Snow

RAY R. CHRISTENSEN  
Christensen, Gardiner, Jensen  
& Evans  
Attorneys for Defendant-Respondent  
Piper Aircraft Corporation  
900 Kearns Building  
Salt Lake City, Utah 84101

F. ALAN FLETCHER  
KENT W. WINTERHOLLER  
Parsons, Behle & Latimer  
Attorneys for Plaintiff-  
Appellant  
Abbott G. M. Diesel, Inc.  
79 South State Street  
Post Office Box 11898  
Salt Lake City, Utah 84147

JOHN H. SNOW  
Snow, Christensen & Martineau  
Attorneys for Defendant  
Corporate Aircraft Center West  
701 Continental Bank Building  
Salt Lake City, Utah 84101

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and Respondents, :

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RESPONDENT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff for damages allegedly resulting from breach of warranty by defendants Piper Aircraft Corporation (hereinafter Piper) and Piper Corporate Aircraft Center West (hereinafter CORPAC) in the sale of an aircraft to the plaintiff.

## DISPOSITION IN THE LOWER COURT

Defendant Piper Aircraft filed a motion to quash and to dismiss for lack of personal jurisdiction of that defendant which motion was granted by the trial court and the action as against Piper Aircraft Corporation was dismissed.

## RELIEF SOUGHT ON APPEAL

Defendant and Respondent seeks affirmance of the order below quashing the service of summons and dismissing the action against it.

## STATEMENT OF FACTS

We do not believe that the statement of facts contained in appellant's brief is complete or gives the entire factual background. Therefore, in the interest of completeness and accuracy, we restate here the entire facts.

Plaintiff contracted to purchase from defendant CORPAC, a certain Piper Aircraft. Defendant Piper was not party to the contract, although the contract, by its terms included the manufacturer's standard warranty. (R. 3, 12-)

After having owned and operated the aircraft for more than a year, plaintiff commenced this action for rescission of the contract, and damages for claimed breach of warranty. (R. 2-11.) Summons was purportedly served upon

Piper by service upon it at its place of business in Pennsylvania. (R. 40.) This clearly indicates that plaintiff was proceeding under Utah's long-arm statute.

Piper attacked the purported service of summons by a motion to quash and to dismiss. (R. 38-39.) In support of its motion, Piper filed an affidavit of John F. Leeson. The substance of that affidavit is set forth herewith for the convenience of the court:

"John R. Leeson, being first duly sworn upon oath, deposes and says:

"That he is the Treasurer of Piper . . . and . . . as such . . . executes this affidavit . . . in support of its motion to quash the service of summons and to dismiss the action on file herein. That Piper . . . is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. That it is engaged in the business of manufacturing airplanes. That it has three manufacturing plants, located in Vero Beach, Florida, Lakeland, Florida and Lock Haven, Pennsylvania. That it is not engaged in manufacturing in any other location and is not engaged in manufacturing in the State of Utah. That Piper . . . is not now and never has been qualified or authorized to do

business in the State of Utah. That it has no employees, representatives, salesmen, or other agents in the State of Utah. That it carries on no business activity in the State of Utah and maintains no records in said state. That all aircraft sold by defendant have been sold and delivered on a F.A.F. (Fly Away Basis) at its manufacturing plants in Florida or Pennsylvania. That defendant does not now maintain and never has maintained any office or physical place of business in the State of Utah. That it has no investments, debts, books, or records in the State of Utah. That it does not own or lease property of any kind in the State of Utah. That it has no goods or property stored, warehoused, or on consignment in the State of Utah. That it has no subsidiary or affiliated company or branch or regional office in the State of Utah. That it maintains no bank accounts within the State of Utah.

"That there are some independent businessmen and corporations in the State of Utah which hold themselves out as dealers in airplanes, and a number of such businesses sell Piper aircraft. That this defendant owns no interest in such dealers, does not control their operation, and has no business arrangement with them. That there is an

independent corporation in the State of Utah known as Intermountain Piper Incorporated which acts as a distributor of Piper aircraft and sells such Piper aircraft to dealers. That this defendant owns no interest in said corporation. That said corporation acts as an independent contractor with respect to all transactions between them. That from time to time said distributor orders aircraft from defendant, and on such occasions the order is always accepted at defendant's offices in Florida or in Pennsylvania. That all aircraft sold by defendant to said distributor are sold F.A.F. defendant's plants to Vero Beach, Florida, Lakeland, Florida and Lock Haven, Pennsylvania." (Emphasis added.)

In response to this plaintiff filed an affidavit of Robert G. Abbott, president of plaintiff corporation, the substance of which is as follows:

"2. That for a number of years Affiant has received numerous communications and sales literature from Defendant Piper . . . such communications and literature being forwarded to Plaintiff from Defendant Piper Aircraft Corporation's offices at Lockhaven, Pennsylvania and directed to Plaintiff at its business address in Salt Lake County,

State of Utah; attached hereto as Exhibit 'A' and by this reference made a part hereof are true and correct copies of such communications and literature received by Affiant on about the dates indicated on the correspondence, said communication and literature are representative samples of others previously received by Affiant.

"3. Affiant is a member of the Aircraft Owners' Pilots' Association (AOPA) which association publishes a monthly magazine entitled 'The AOPA Pilot'; said magazine distributed nationwide by mail to aircraft owners, aircraft pilots, and the public who are members of AOPA; said magazine is similarly distributed within the State of Utah.

"4. Attached hereto as Exhibit 'B' and by this reference made a part hereof are true and correct copies of advertisements found at pages 12 and 95 of the August, 1970 issue of 'The AOPA Pilot', which advertisements are representative of advertisements regularly placed by Defendant Piper . . . in each issue hereof.

"5. 'Flying' magazine is an independent, general circulated magazine written and printed for the use and enjoyment of the general public, and in particular that portion of the public which is general aviation oriented;

said magazine is nationally circulated by mail and newsstand sales on a monthly basis and is generally distributed within the State of Utah.

"6. Attached hereto as Exhibit 'C' and by this reference made a part hereof are true and correct copies of advertisements found at pages 82, 83, 102-105 of the September, 1976 issue of 'Flying' magazine, which advertisements are representative of similar advertisements regularly published by Defendant Piper . . . in said magazine.

"7. Attached hereto as Exhibit 'D' is a true and correct copy of an Affidavit executed by William R. Farley, a substantial stockholder in Defendant CORPAC-WEST, which Affidavit was made and executed by the said William R. Farley and filed . . . in a case entitled Milton Bauermeister Plaintiff, v. Piper Aircraft Corporation, a corporation . . . upon information and belief, Affiant states that the statements contained in said Affidavit were true and correct when made, August 30, 1972, and that the statements contained therein remain true as of the date hereof.

"8. Defendant Piper . . . employs a Regional Sales Representative and a Regional Service Representative both of whom reside outside the State of Utah who, as a part

of their employment, regularly visit the State of Utah at five to six week intervals to promote customer relations confer with Defendant Piper's sales outlets with respect sales and service matters."

As appears from the affidavit of Abbott he adjo by reference an affidavit executed by William R. Farley the case known as Bauermeister v. Piper Aircraft Corporation et al. A copy of the substance of that affidavit is here set forth:

"1. That he is the President of Intermountain Piper, Inc., a corporation duly authorized under the laws the state of Utah and having its principal place of business in Salt Lake County, State of Utah.

"2. That Intermountain Piper, Inc., is an authorized distributor of Piper Aircraft products, manufactured by Piper Aircraft Corporation, of Lock Haven, Pennsylvania, Vero Beach, Florida, and that Intermountain Piper, Inc., duly organized September 23, 1958, as Thunderbird Aviation Corporation and later changed its name to Intermountain Piper, Inc., on September 19, 1967, and presently has its offices at 230 North 2300 West, Salt Lake City, Utah.

"3. That Intermountain Piper, Inc., is a party to a written contract between Piper . . . and Intermountain

Piper, Inc. wherein Intermountain Piper, Inc., is the distributor for Piper Aircraft and other Piper products within the 'Area of primary responsibility', which includes the State of Utah.

"4. That said written contract allows Intermountain Piper, Inc., to establish a dealer organization for Piper . . . for the sale of its aircraft and other products within the State of Utah and elsewhere, as described in the contract as 'area of primary responsibility.'

"5. That approximately four years ago Piper . . . initiated a program known as Piper Flite Centers for the purpose of flight training in and rental of Piper aircraft. Said program has been and is now available to Piper aircraft dealers and other qualified airport fixed base operators through Piper . . . distributors throughout the various states, including Utah.

"6. That Piper . . . encourages its distributors to establish Piper Flite Centers within their areas of primary responsibility, and that at the present time there are five Piper Flite Centers in the State of Utah; namely, St. George, Provo, Ogden and two in Salt Lake City.

"7. That a uniform type of emblem and sign formed in the character style of 'Piper Flite Center' has been

established by Piper . . . to be displayed by 'Piper Flite Center' operators to advertise Piper aircraft services.

"8. That affiant has encouraged the establishment of Piper Flite Centers by:

(a) Disseminating information, pamphlets, and other literature concerning Piper Flite Centers provided by Piper . . . .

(b) Ordering, transporting, and delivering Piper Flite Center signs to various Piper dealers in Utah and elsewhere; said signs are the property of Intermountain Piper, Inc., but become the property of Piper . . . upon termination of the Intermountain Piper, Inc., distribution

"9. That affiant has recommended, encouraged and handled for transfer to Piper . . . such written contracts which have authorized and established various dealer franchises for the use of said Piper Flight Center format, design, program, system, lesson plans, emblems, trademark, insignia or otherwise; said Piper . . . has impliedly or expressly authorized said dealers to use any one or more of the same in encouraging residents of the State of Utah to use by rent, sale, lease, recommend, or purchase of Piper Aircraft products.

"10. That affiant through his position as President of Intermountain Piper, Inc., has handled for transmittal to Piper . . . various warranty items for Piper . . . products from and through the aforementioned dealership's organization existing within Intermountain Piper, Inc.'s 'area of primary responsibility' and in addition thereto has transmitted in behalf of Piper . . . back to said dealers various credits on the warranty of said items previously described at the approval thereof of Piper . . . .

"11. That Piper . . . employees have from time to time personally inspected various Piper dealers' facilities in Utah, appointed for the purpose of approving the facility as a Piper . . . designated maintenance facility, aka Piper Service Centers, and that dealer/Piper Service Centers have been and are now located within the State of Utah.

"12. That Piper . . . regularly distributes through the mail certain notices of suggested, mandatory or otherwise significant nature, affecting its products and known as 'service letters, service bulletins, or service directives' to registered Piper Aircraft owners within the State of Utah.

"13. That in addition, Piper . . . has from time to time and on various occasions requested help of affiant

in his business as President of Intermountain Piper, Inc. in securing addresses or disseminating said service letters, directives or suggestions to the owners of said Piper aircraft products within the State of Utah where the proper and correct address of said aircraft owner has been unavailable to said Piper . . . ." (Emphasis added.)

It should also be observed that there are no allegations in the complaint that Piper did anything in the State of Utah which gave rise to plaintiff's claim.

In summary, the affidavit of Leeson establishes without dispute that Piper is a Pennsylvania corporation, not qualified to engage in business in the State of Utah. It has only three manufacturing plants, all located in Florida and Pennsylvania. It has no manufacturing operations in Utah or in any other state. It is conceded by plaintiff that Piper has no resident employees or salesmen within the State of Utah but the affidavit of Abbott tends to establish that employees of Piper visit Utah for business purposes at intervals of five to six weeks.

The affidavit of Leeson further establishes without dispute that all aircraft sold by the defendant are sold on a "fly away" basis at its manufacturing plants in Florida

and Pennsylvania. Piper does not maintain any office or physical place of business in Utah. It owns no real property here and has no investments, debts, books or records in the State of Utah. It has no goods or property stored or warehoused in the State of Utah, but it appears from the affidavit of Farley that it may have a contingent remainderman's right to certain personal property. It has no subsidiary or affiliated company in the State of Utah and it maintains no bank accounts here.

Intermountain Piper, Incorporated is an independent distributor in which defendant Piper Aircraft owns no interest. Intermountain Piper in turn has dealerships at various places in the state in which Piper Aircraft has no interest. Despite frequent assertions by plaintiff in its brief that Intermountain Piper is an agent of Piper, the affidavit of Leeson states that "Intermountain Piper is an independent contractor" and this is undisputed and uncontradicted in the record before the court.

There is no evidence that Piper advertises in any of the local news media or in any newspapers or magazines published in Utah. There is evidence that it advertises in certain national publications, some of which find their way

into Utah, and that it does correspond with owners and potential owners of Piper Aircraft in Utah. We specifically disagree with that portion of plaintiff's statement of facts on pages 3 and 4, wherein it is stated Piper has entered into a number of written contracts with Utah residents, has established Piper Flite Centers in Utah, property located in Utah, and is regularly, consciously, carefully directing and controlling the sale and use of Piper manufactured products in this State, and that Piper through agents performs warranty services in this State, that Piper regularly seeks the aid of Utah residents in promoting its business in Utah. Although appellant furnishes record citations in support of them, our examination of those citations fails to disclose any factual support for them.

We also note our disagreement with the statement on page 6 of appellant's brief that Piper contracts on a continuous, ungoing, basis with local Utah business firms in order to have sales and service outlets in Utah, and that these local businesses are tightly controlled by Piper for the purpose of fostering the sale and service of Piper products in this state. These statements are simply unsupported by the record.

## ARGUMENT

Piper is not doing business in Utah, does not have those "minimal contacts" with Utah which would make it subject to the jurisdiction of the Utah courts, and is not subject to the jurisdiction of the Utah courts. Plaintiff has broken its argument into two separate points, first claiming that Piper is doing business in Utah, and alternately claiming that if it is not doing business in Utah that it is subject to the jurisdiction of the Utah courts under the long-arm statute. We believe that this approach simply confuses the issue. Either Piper is subject to the jurisdiction of the courts of this state, or it is not.

At page 11 of its brief, appellant claims that Piper is subject to the jurisdiction of the Utah courts under the terms and provisions of Section 78-27-24, subparts (1) through (3), which read as follows:

"Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within the state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

. . . ."

It appears from the affidavit of Mr. Leeson that this defendant has not transacted any business within the State of Utah, nor has it contracted to supply services or goods in this state. Plaintiff's claim of long-arm jurisdiction therefore, must rest on subpart (3).

The parties are agreed that the case of Hilly v. Dale Corporation, 25 Ut.2d 357, 482 P.2d 332, is the leading case in this jurisdiction and furnishes the main guidepost on which this case must be decided. This court there said:

"If there is any difference between what is stated as the 'doing business' and the 'minimal contacts' tests it is probably more in semantics than in substance. In practical application they are essentially the same. When the problem arises, its solution depends on whether it can fairly be said that the corporation is doing business within the State in a real and substantial sense. This involves the analysis of a number of factors, none of which is alone the sine qua

non to establish a business presence in the State, but from a consideration of the total picture as to the existence or absence of them the answer to that critical question is to be found:  
. . . ."

Following the above quotation the court set forth seven criteria to be applied to determine whether a defendant in a particular case is subject to the jurisdiction of the courts of this state. Those criteria are quoted in appellant's brief. We set them forth again here, and following each criterion our summary of what the record shows with respect to it:

"1. Whether there are local offices, stores or outlets;" The uncontradicted affidavit of Leeson shows that there are none.

"2. The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties;" It is conceded by plaintiff that Piper had no employees residing in the state; however, there is evidence that employees of this defendant made visits into the state at intervals of approximately every five to six weeks.

"3. The manner of holding out to the public by way of advertising, telephone listing, catalogs, etc.;"

There is no evidence that defendant advertises over any radio or television stations, or that it advertises in local newspapers, magazines or other media. It has no telephone listings. It does, however, advertise in national publications, some copies of which find their way into the State of Utah.

"4. The presence of its property, real or personal or interest therein, including inventories, bank accounts etc.;" According to the affidavit of Leeson, defendant has no property in the State of Utah. According to the affidavit of Farley, it has a contingent reversionary interest in a few signs presently owned by Intermountain Piper and being used by Piper dealers at various locations in the state.

"5. Whether the activities are sporadic or transitory as compared to continuous and systematic;" It is defendant's position that any activities which it has in this state are indeed sporadic and transitory. The most that can be claimed for the evidence is that at infrequent intervals of five to six weeks an employee from outside the state comes in to render assistance to local distributors and dealers. This is nothing like a continuous day-to-day business operation in which there is a regular course of business.

"6. The extent to which the alleged facts of the asserted claim arose from activities within the state;"

So far as the claim against Piper is concerned none of the activities from which the claim arose occurred in the State of Utah. The aircraft was manufactured by Piper in a plant either in Pennsylvania or Florida. Plaintiff had no contractual relationship with Piper. Such warranty service as it received under its written warranty was rendered by Piper in Pennsylvania. It does not appear that Piper has had anything whatsoever to do with plaintiff with regard to the aircraft in question in the State of Utah.

"7. The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere." It obviously would be more convenient to plaintiff, a Utah resident, to litigate the case in Utah. That no doubt is the reason it selected the Utah courts. It seem equally obvious that it would be more convenient to defendant Piper to litigate the case in Pennsylvania or Florida where its plants are, where its personnel are, and where all of its employees who have knowledge concerning the facts of the matter are located and are readily available as witnesses.

The most recent decision of the Supreme Court of the United States dealing with this problem is Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 10. The court there said:

". . . As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. . . .

"We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. . . ."

"The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. . . ." (Emphasis added.)

A portion of that language was quoted with approval in the recent case of Pellegrini v. Sachs and Sons, et al., (Utah), 522 P.2d 704. This court in that case also said:

". . . in accordance with the authorities cited, and our discussion herein, a plaintiff must nevertheless show that the defendant, by himself or agent, engaged in some substantial activity which constitutes a purposeful minimum contact with this state upon which to predicate jurisdiction of our courts. . . ." (Emphasis added.)

In Union Ski Company v. Union Plastics Corporation, (Utah), 548 P.2d 1257, this court said:

"[T]his court has consistently held that the transaction of business within the meaning of our statute requires that the defendant has engaged in some substantial activity with some degree of continuity within this State. . . .

"In analyzing whether the plaintiff has shown that the defendant comes within that requirement, these propositions are to be considered: First, the burden was upon the plaintiff to affirmatively so demonstrate. . . ." (Emphasis added.)

We return to the criterion of Hill v. Zale Corp. supra. Can it fairly be said that defendant is doing business within the state in a real and substantial sense? We submit that this question must be answered in the negative.

The position of Piper in this case is no different from that of innumerable other national manufacturers whose products are marketed in all of nearly of the fifty states. Nearly all of these manufacturers advertise in national publications. Their products are distributed to independent distributors located regionally throughout the United States. The distributors in turn have local dealers. These corporations normally have offices and plants in only a few states. Can it be fairly said that because their products in the stream of commerce ultimately come into this state, that they, by that fact alone, submit themselves to the jurisdiction of the Utah courts? If that is so, there is hardly any national manufacturer who is not subject to the jurisdiction of the Utah courts even though it has no plant, no employees, no property, and no activities within this state. While the language of the long-arm statute is broadly worded, it cannot be interpreted beyond the confines of the Fourteenth Amendment. There must be those "minimal contacts." We submit that they are not shown to be present here.

CONCLUSION

Piper Aircraft Corporation does not have those "minimal contacts" with the State of Utah, which make it subject to jurisdiction of the courts of this state. The judgment of the trial court should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & EVANS

By \_\_\_\_\_

Ray R. Christensen  
900 Kearns Building  
Salt Lake City, Utah 84101

Attorneys for Defendant  
and Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing respondent's brief was served on F. Alan Fletcher and Kent W. Winterholler counsel for appellant, 79 South State Street, Post Office Box 11898, Salt Lake City, Utah 84147, and on John H. Snow 701 Continental Bank Building, Salt Lake City, Utah 84101, counsel for defendant CORPAC, by mailing two copies thereof postage prepaid, on the \_\_\_\_\_ day of June, 1977.

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