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Abbott G. M. Disel, Inc. v. Piper Aircraft Corporation et al : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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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.	)	

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REPLY BRIEF OF PLAINTIFF-APPELLANT

* * * * * * *

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY ENTERED BY THE HONORABLE MARCELLUS K. SNOW

* * * * * * *

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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ABBOTT G. M. DIESEL, INC., a Delaware Corporation Plaintiff and Appellant -vs- PIPER AIRCRAFT CORPORATION, a Corporation; and PIPER CORPORATE AIRCRAFT CENTER WEST, a Corporation, aka CORPAC-WEST,	)	REPLY BRIEF OF PLAINTIFF-APPELLANT CASE NO. 15016

* * * * * * *

STATEMENT OF THE NATURE OF THE CASE

DISPOSITION IN THE LOWER COURT

RELIEF SOUGHT ON APPEAL

STATEMENT OF FACTS

Please refer to Plaintiff-Appellant's initial brief for its Statement of the Nature of the Case, Disposition in the Lower Court, Relief Sought on Appeal, and Statement of Facts.

ARGUMENT

RESPONDENT'S CITED CASES ARE

CLEARLY DISTINGUISHABLE

In the presentation of its argument, Respondent has failed to recognize the significant factual differences between the instant action and Respondent's cited cases. This Court has repeatedly noted that the jurisdictional facts of each case must be closely scrutinized. The principle

was well stated in Foreign Study League v. Holland-American Line, 27 U.2d 442, 443, 497 P.2d 244, 244 (1972):

> The question here, that of whether a non-resident is doing business in the State, is strictly a factual one, and each case, therefore must be determined on its own peculiar and significant facts to determine if the local forum has jurisdiction to try and adjudge the claims or obligations of one domiciled elsewhere.

Thus, rules promulgated from other cases by definition apply only to facts similar to those cases and, if the facts upon which those rules are based can be distinguished from the facts of the present case, the rules of former cases will be of compartively little value in determining jurisdiction over the foreign corporation in the present case.

Respondent cites Pellegrini v. Sachs & Sons, 522 P.2d 704 (1974) for the proposition that a plaintiff must show that a foreign corporation must be engaged "in some substantial activity which constitutes a purposeful minimal contact with the state" in order to assert in personum jurisdiction over it. Respondent's Brief at 21. The Pellegrini case, however, involves the purchase of an automobile by the Plaintiff (a resident of California) from the Defendant (an automobile dealer doing business solely in California) in a transaction which took place wholly within California. The only connection with Utah was Plaintiff's subsequent move to this state and Plaintiff's claim that Defendant should have anticipated that the automobile might be removed to another state.

The Pellegrini Court, in setting down the standard

to be applied, makes a clear distinction between manufacturers and dealers:

> We are cognizant that our ruling herein makes what may be regarded as a somewhat technical distinction between those adjudications as to manufacturers, and the situation presented here, concerning a dealer. But we think that distinction is both correct under the law and justified as a matter of policy. Differing from the manufacturer, a dealer has little or no interest in the sale of similar products in the foreign state. While it is true that he may reasonably expect that the car will go into other states, that does not seem overly important. The counterpoint is that it is also to be expected that most of the products he sells will be used where he is most of the time; and that even if one does leave it will likely return, so that in the great preponderance of instances, the discharge of his duties as to the product will be where he is. It is more significant to note that he does not go into the foreign state to take advantage of its business climate or the protection of its laws. 522 P.2d 707.

Contrary to Pellegrini, Piper in this case clearly seeks to take advantage of the business climate within the foreign state (Utah) and the protection of its laws in the general distribution of its manufactured product.

The Defendant Piper, being a manufacturer conducting nationwide advertising and solicitation, falls under the rules set forth in Gray v. American Radiator and Sanitary Corporation, 22 Ill.2d 432, 176 N.E.2d 761 (1961) and Atkins v. Jones and Laughlin Street Corporation, 258 Minn. 571, 104 N.W.2d 888 (1960), which cases deal with the liabilities of manufacturers who send products into foreign states. These cases are cited with approval in Pellegrini (supra) and hold that where a manufacturer sends a product

into a foreign state while retaining a substantial and continuous interest in the sale and distribution of said product through its agents, such acts are sufficient to meet the minimum contacts test of International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Respondent cites Union Ski Company v. Union Plastics Corp, 548 P.2d 1257 (1976) for the proposition that a Plaintiff must show that the defendant engaged with some continuity in substantial activity within the forum state. Respondent's Brief at 21. This case involves a Utah plaintiff suing a California manufacturer for breach of contract under which defendant was to supply plaintiff with ski boots. The Court did not find jurisdiction since the evidence did not show the defendant sought to take general advantage of Utah's business climate, giving the following reasons: (1) defendant did no advertising whatsoever within the State of Utah; (2) defendant had no sales within the State of Utah (all sales were made in California); (3) all contracts were made in California and all shipments of the defendant's product were made f.o.b. defendant's California plant; and (4) by mutual agreement of the plaintiff and the defendant, the laws of California were made to apply to all facets of the sale.

While the instant case bears some similarity to Union Ski, most of the factors upon which the Union Ski court based its decision are noticeably absent here:

(a) Advertising. It is undisputed in the instant case that Piper has engaged in nationwide advertising. In

fact, Piper has mailed personal solicitations to Plaintiff at its Utah business address. The extent of advertising in Utah is much more obvious in the present case than it was in Union Ski. It is also undisputed that Piper has regularly and consistently sent its marketing and service representatives to Utah. Obviously Piper is concerned with developing a market in Utah for its aircraft and with servicing its existing customers here.

(b) Regular Sales. The evidence here clearly shows that Piper regularly and continuously promotes the sale and service of its products within the State of Utah through employees visiting the state (every five to six weeks), through "Flite Centers" and through its dealers, including its Co-Defendant CORPAC-WEST. Furthermore, Piper supplies various aircraft dealers within the State of Utah with Piper aircraft parts for resale. There is simply no valid comparison between the lack of a regular sales program in Union Ski and the type of sales program carried on by Piper in the present case. Piper clearly evidences an intent to enjoy the Utah business climate and in fact does reap the benefits thereof.

(c) Contracts and Shipments Made Outside of Forum State. While in both Union Ski and the present case, the contracts with and the shipments to the respective Plaintiffs were made out of state, this fact alone is insufficient to deny jurisdiction. The rule concerning contracts and shipments made outside the forum was settled

in International Shoe Company v. Washington, supra. This Court recognized that the Utah Long-Arm Statute is apparently based upon the International Shoe decision in Foreign Study League v. Holland America Line, supra. The Court in International Shoe, in finding that the State of Washington did have jurisdiction over a non-resident defendant, stated:

> Appellant has no office in Washington and makes no contracts either for sale or purchase for merchandise there. It maintains no stock of merchandise in that state and makes no deliveries of goods in intrastate commerce. . . . The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by the appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the State. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections. 357 U.S. 313, 90 L.Ed. 100.

Piper is in a similar position to that occupied by International Shoe Company in that while contracts and shipments are made outside the state, solicitation of sales occurs within the State of Utah.

Even if it were contended that Piper's solicitations here are not by personal contact as in the case of International Shoe, the rule is not changed. The U. S. Supreme Court in McGee v. International Life Insurance Co., 355 U.S. 220, 222, 2 L.Ed. 2d 223, 226 (1957) stated:

> Looking back over this long history of litigation, a trend is clearly discernible toward expanding the permissible scope of state

> jurisdiction over foreign corporations and other non-residents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today, many commercial transactions touch two or more states, and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

The minimum contacts present in this case clearly meet the criteria set forth in International Shoe and McGee. The fact that the contract was entered into out of state and that delivery was made by Piper to its dealer out of state are insufficient bases, standing alone, upon which to deny jurisdiction.

(d) Mutual Agreement that One State's Laws Should Govern. The final criterian upon which the Union Ski case was decided was that both parties agreed that California laws should govern. In the present case, no mention was made of applicable law and the parties must be bound by the law of the forum in which jurisdiction is obtained, i.e., Utah.

Thus, upon examination of the criteria upon which this Court decided Union Ski, it is obvious that the facts of the present case are sufficiently different to warrant the application of the International and McGee doctrines rather than any precedent found in Union Ski v. Union Plastics Corporation.

Hansen v. Denkla 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d. 1283 (1958) is cited by Respondent for the proposition that "territorial limitations on the power of the respective states" are alive and well. This proposition is correct and may be properly applied to the facts of Denkla, but does not defeat jurisdiction under the facts of the present case. In Denkla it was held that the Florida Court did not acquire personal jurisdiction over a Delaware Trustee to determine the validity of a Trust established by a settlor, who (while domiciled in Pennsylvania) executed a Trust in Delaware and subsequently moved to Florida. In Denkla, the Trustee never availed itself of the privileges of engaging in activities within the forum state, thus invoking the benefits and protection of its laws. The territorial limits rule as set forth in Denkla was properly applied.

In the present case, however, Piper has voluntarily advertised within the state, solicited business within the state through the mail, supplied its manufactured products and parts to dealers within the state, and systematically sent employees into the state to supervise the sale, use and maintenance of Piper's products witin the state. Defendant has voluntarily availed itself of the business climate of Utah and has in fact engaged in activities inside the State of Utah. Therefore, the Denkla rule, while correct when applied to facts similar to those presented in Denkla, has no application to the facts of the present case.

It is respectfully submitted that Judge Anderson

of the United States District Court for the State of Utah has properly interpreted the provisions and intent of the Utah Long-Arm Statute. In Mountain States Sports, Inc. v. Sharman, 353 F. Supp. 613 (D.C.Utah 1972), a case involving an alleged breach of a personal service contract, Judge Anderson stated:

> Fairness and reasonableness to the present defendants may be measured by a number of factors including the foreseeability of the alleged injury in Utah, the extent to which defendants engage in interstate commerce, and to which they have sought the protection of the state, the nature and seriousness of the alleged injury and the general convenience of defending in Utah . . . While it is true that the critical events associated with the dispute apparently took place in California, the record reveals no substantial claim by the defendants that trial in the present forum would result in hardship, injustice or unusual inconevenience. Defendants are engaged in interstate business dealings which suggest the general ability to litigate matters outside of California. It is true that defendants apparently had no contact with Utah while conducting the disputed activity (although the record shows some contacts with the state resulting from exhibition and scouting ventures and nationwide telecast). Furthermore, the alleged injury is not of a personal or highly dangerous nature so as to enhance Utah's interest in serving as the forum. Nevertheless, Utah's Long-Arm Statute sufficiently evinces the state's interest in the present litigation, and coupled with the factors already recited, results in the conclusion that the requirements of fairness and reasonableness to the defendants are not offended by a finding of jurisdiction. (353 F. Supp. 616)

The factors considered by Judge Anderson are found in the instant action. Piper must have foreseen that a purchase of its aircraft by a customer residing in Utah may result in

damage in the State of Utah if the aircraft was defective; Piper's distribution methods and advertising program clearly show that it is substantially engaged in interstate commerce; Piper has neither claimed nor shown that trial in the State of Utah will cause it any hardship, injustice or unusual inconvenience.

A similar conclusion was reached in Engineered Sports Products v. Brunswick Corporation, 362 F. Supp. 722 (D.C. Utah 1973) involving a patent infringement suit against a foreign manufacturer. Judge Anderson, while speaking to the issue of minimal contacts under Utah's Long-Arm Statute and while upholding the jurisdiction of the Court over the foreign corporation, stated:

> . . . None of the defendants maintains an office, employs persons, contracts to sell goods, owns real estate or is qualified to do business in Utah. However, four of the defendants have dispatched executive officers to Utah where they have discussed and purchased plaintiff's ski boots and materials. Plaintiffs allege numerous other contacts between movants and this forum, and propose extensive discovery proceedings to establish, if possible, these allegations. However, the materials presently before the court are sufficient to support in personum jurisdiction over each of the movants. 362 F. Supp. 725

The following criteria were found to be sufficient bases for in personum jurisdiction over the foreign corporations in Engineered Sports Products: (1) introduction of the products of the foreign manufacturer into distribution channels leading to domestic markets; (2) the foreseeability of any injury following from defendant's obvious knowledge

and intention that the sale of the manufactured product to domestic distributors would lead to their resale in the forum state; (3) the place of the tort itself; (4) the initiation of a merchandising endeavor by the foreign corporation; (5) the overall amount of activity within the forum state regardless of the small percentage of the entire nationwide activity which is carried on within the forum state; and (6) the estimates of inconvenience upon the parties involved in the litigation. Judge Anderson stated:

> "Here it appears that the plaintiffs are individuals and in a relatively small local corporation and partnership, while the defendants are business entities of substantial financial muscle and international ken, thus suggesting a jurisdictional preference for the local forum." Id. at 728.

Judge Anderson has thus properly interpreted our Long-Arm Statute to provide that the placing of materials in the current of nationwide commerce, national advertising, and foreseeable injury in the forum state are grounds upon which to warrant in personum jurisdiction notwithstanding the fact that the foreign corporation has no office, employees, contracts, sales or real estate within the forum state.

As indicated by Judge Anderson in each of the above cases, the basic criteria to be considered are "fairness and reasonableness." Can it be said that it is either fair or reasonable for Piper, through a national advertising campaign and personal solicitation, to induce Plaintiff to purchase an aircraft through Piper's dealer, then hide behind the skirts of that dealer and claim it has no interest in that sale? No. Piper has, through its voluntary and

intentional acts, reaped the benefits of the economic climate of this state and must now answer to the Courts of the state.

CONCLUSION

Piper, having purposely availed itself of the economic climate of Utah and having profited from the sale of its product through its dealer organization, must be found to have subjected itself to the jurisdiction of the Utah courts. The trial court should be reversed and this action reinstated as against Piper.

RESPECTFULLY SUBMITTED this 13th day of July, 1977.

F. Alan Fletcher

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CERTIFICATE OF SERVICE

I hereby certify that I served two true and accurate copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT, by deposit with the United States Postal Service, upon Ray R. Christensen, Esq., Attorney for Defendant-Respondent Piper Aircraft Corporation, 900 Kearns Building, Salt Lake City, Utah 84101; and upon John H. Snow, Esq., Attorney for Defendant Corporate Aircraft Center West, 701 Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid, this 7th day of July, 1977.