

1980

Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Brief In Support of Appellant Valad's Petition For Rehearing

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. William J. Cayias and Quentin Alston; Attorneys for Respondent Mallory Engineering, Inc. Allen H. Tibbals; Attorney for Respondent and Appellant Ted R. Brown & Associates Godfrey P. Schmidt and Robert B. Sykes, attorneys for Appellant Valad Electric Heating Corp.

Recommended Citation

Petition for Rehearing, *Mallory Engineering v. Brown & Associates*, No. 15530 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,)
Plaintiff and Respondent,)
vs.)
TED R. BROWN & ASSOCIATES,) Supreme Court No. 15530
INC.,)
Defendant, Crossclaimant,)
Respondent, Defendant to)
Valad's Counterclaim and)
Appellant,)
and)
VALAD ELECTRIC HEATING CORP.,)
Defendant, Cross-Defendant,)
Counterclaimant and)
Appellant.)

BRIEF IN SUPPORT OF APPELLANT VALAD'S
PETITION FOR REHEARING

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County,
the Honorable Hal Taylor, Judge

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FILED

APR 18 1980

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NATURE OF THE CASE

This is a contract action wherein plaintiff ordered certain electrical heaters from defendant Brown who in turn ordered heaters from defendant Valad. The heaters were later claimed to be defective.

DISPOSITION ON MAIN APPEAL

This case was tried by the lower court on January 19, 1976, through January 29, 1976, the Honorable Hal Taylor, District Judge, presiding. The matter was appealed after an adverse ruling to defendant Valad. This court upheld the lower court's decision in an opinion filed on March 6, 1980. That decision was founded entirely upon considerations of in personam jurisdiction over a non-resident.

A petition for rehearing was filed on March 21, 1980, with an extension to file this brief.

RELIEF SOUGHT ON RE-HEARING

Defendant Valad strongly contends that this court neglected the principles and holding set forth in World-Wide Volkswagen Corp. v. Woodson, __U.S.__, 100 S. Ct. __, 62 L.Ed. 2d 490 (1980). Defendant Valad also contends that this court failed to consider at least two material points in the case dealing with contract formation and measure of damages. This court should rehear its decision on the main appeal, and reverse the lower court, or remand for entry of the correct measure of damages.

FACTUAL BACKGROUND

On March 6, 1980, this court filed a decision in this cause, holding that defendant Valad was subject to in personam jurisdiction under the Utah long-arm statute. On March 21, 1980, defendant Valad filed a petition for a rehearing and secured an ex parte extension of time in which to file the brief in support of that petition.

All of the points set forth in the petition have been raised previously. Berg v. Otis Elevator, 64 U. 518, 231 P. 832 (1924).

Valad made seven points in its brief on appeal, and three points in its reply brief. However, it would appear that only the point dealing with personal jurisdiction and the long-arm statute was considered by the court in the original hearing. Rehearing is justified because this court failed to consider certain important points with respect to Valad's arguments on the theory of damages and the application of the elements of contract law, and therefore erred in its conclusion. Additionally, the court based its decision with respect to long-arm jurisdiction on some erroneous principles of law in light of the United States Supreme Court decision in World-Wide Volkswagen Corp. v. Woodson, supra.

Therefore, on rehearing this court should reverse its decision with respect to the findings of lia-

bility against Valad under the long-arm statute or reduce the damages in this case to comport with the Utah Uniform Commercial Code and the standard measure of damages.

ARGUMENT

POINT I

THIS COURT'S HOLDING ON JURISDICTION IS VIOLATIVE OF DUE PROCESS OF LAW IN LIGHT OF THE RECENT U. S. SUPREME COURT CASE OF WORLD-WIDE VOLKSWAGEN CORP. V. WOODSON. THIS COURT HAS OVERLOOKED THE FACT THAT VALAD'S ACTIVITIES CONSTITUTED AN ISOLATED OCCURRENCE.

The Mallory Test

In the main decision, this court seemed to find jurisdiction over Valad on the basis of the alleged facts that the heating units were required by Brown and Mallory to meet certain specified requirements "...which involved modifications by Valad of its basic catalog models." Mallory v. Brown, No. 15530, p. 6 (March 6, 1980). According to the opinion, Valad was "contracting to supply goods in the state of Utah...by its modification of general heating models and their shipment to Utah..." Valad, the Court reasoned, purposely availed itself of the privilege of conducting activities in the forum state of Utah, thus invoking the benefits and protection of its laws. This act supplied the requisite minimum factual nexus or "minimum contacts", according to the court's

opinion. Id. at 7.

The second part of the test applied by this court examined whether it is reasonable and fair to require Valad to conduct its defense in this state, based upon an analysis of the quality and nature of its activities. If the legal dispute arises out of, or has a substantial connection with, the activity in the state (i.e. modifying the heaters for a Utah customer), the court need only look at the convenience of the parties and the interest of the state in assuming jurisdiction. Id.

The World-Wide Test

This test as set forth in Mallory, and especially as applied to Valad, flies in the face of the legal principles established in World-Wide, supra. In that case, the U.S. Supreme Court held that a state cannot exercise jurisdiction over a non-resident defendant unless there are sufficient "minimum contacts" between the defendant and the forum state. International Shoe Co. v. Washington, 326 U.S. 310, at 316, 90 L.Ed. 95, 66 S. Ct. 154, 161 ALR 1057 (1945). "Minimum contacts" are required to protect a defendant against the burdens of litigating in an inconvenient forum and to "insure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." World-Wide at 498. The

World-Wide court specifically held that there are not sufficient minimum contacts where there is a scant or fortuitous connection between the defendant and the forum state, or if the relationship between the defendant and the forum state is that of an "isolated occurrence". Id. at 501. With respect to an isolated occurrence, the U.S. Supreme Court stated:

...if the sale of a product of a manufacturer or distributor...is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States.... The 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. (Emphasis added) World-Wide at 501-2.

The decision in this cause unfairly says that Utah may reach out its "long-arm" beyond the limits imposed by the federal system. It completely ignores the isolated nature of this transaction. It disregards the facts of the case, which clearly show that Valad was itself solicited in New York, and did not solicit the contract in Utah. Reversal on rehearing is justified since the Due Process Clause "does not contemplate that a state

may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations". (emphasis added) International Shoe at 319, as cited in World-Wide at 499.

The Contacts Were In New York

All of the significant "contacts" in this case were in New York; consequently, a judgment against Valad strikes at due process under the federal system. This contract resulted from the efforts of Ted R. Brown, (hereinafter "Brown") not Valad, to supply goods to Malory. (T. 407; see Brief of Valad, ops. 15-18). The early contacts in this matter, unsolicited by Valad, were made in April, 1972 by telephone to Valad in New York. The evidence is undisputed that at no time did Valad ever have any offices, sales representatives, traveling salesmen, a telephone number, any direct advertising, or any other similar "contacts" in the state of Utah. (T. 360; R. 4-5). There simply was no effort of Valad to "serve directly or indirectly" the market for the state of Utah. Valad did nothing more than pick the phone up and answer the calls when Brown's representatives dialed from Utah. Valad was solicited; it was not the solicitor.

It is true that Brown asked Valad to modify some of its heaters for sale to Brown. However, the mod-

ifications were to take place in New York, pursuant to Brown's specifications sent to New York. Where, then, is the purposeful availing of the privileges and benefits of the law in the state of Utah necessary to establish personal jurisdiction?

The final acceptance of the offer to manufacture these heaters came in New York when Valad received the final drawings from Brown and accepted them in binding contract fashion by beginning manufacture in New York. These drawings were approved by Mallory and Brown. These points were undisputed at trial and there is no evidence to the contrary. (See main brief, pp. 44-47).

The Mallory decision, at p. 7, finds that the modification in New York of the general heating models and their shipment to Utah constituted a purposeful availing by Valad of the privileges and benefits of the forum state (Utah). But it is actually quite the contrary, because all of the modifications and actions with respect thereto took place in New York, and not in Utah. Instructions on manufacture were directed to Valad by telephone and mail in New York. There was no purposeful, direct or indirect development of the market in Utah. This court's test as developed in Mallory might be valid if Valad were manufacturing products and putting them into the stream of commerce with the expectation that they

would end up in Utah. However, it was Valad's undisputed testimony that these particular heaters were approved for construction by Mallory and Brown and were designed pursuant to that approval by Valad in New York. (T. 411-12; 429-30; 451-53; Exs 20, 83; main brief pps. 19, 23) Under those circumstances, it is difficult to see "that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." World-Wide at 501.

Mallory Conflicts With World-Wide

The Mallory test of "whether the cause of action arises out of or has a substantial connection with the activity" is overly expansive and thus will violate due process, the federal system and the limitations of World-Wide in many instances. This is partly because Mallory completely ignores the elements of "reasonable anticipation" and "isolated occurrence". Under Mallory, it is difficult to imagine any cause of action that could not be said to "arise out of (or have) a substantial connection with the activity" (Mallory, p. 7) regardless of whether or not the activity is isolated. The reason is simple: "activity" is very broadly defined and in this case, includes "modification of general heating models (note: in New York) and their shipment to Utah." (com-

ments added) Id. Under that standard, no matter how isolated the manufacture of these modified heaters may be, no matter how unanticipated a "haling" into Utah courts may be, there will always be a substantial connection between the action filed and the suspect activity (modification of heaters). Mallory is, in effect, a statement that any manufacturer of a chattel who sells and ships the same into Utah is subject to the jurisdiction of Utah courts (assuming that the balancing of the convenience test is also met), because the manufacturer has purposely availed himself of privileges and benefits of Utah law, establishing the minimum factual nexus. Thereafter, the alleged damage would always arise out of or have a substantial connection with the activity of shipping the modified chattel. However, in World-Wide, the court condemned this philosophy, saying that:

Every seller of chattels would in effect (be) appoint(ing) the chattel his agent for service of process. His (the seller's) amenability to suit would travel with the chattel. World-Wide at 501. (Parentheticals and emphasis added)

Isolated Transaction

The isolated nature of this transaction (T. 360) is further shown by the undisputed fact that Valad refused to come to Utah in early May at Mallory's urging

to supposedly rectify the situation. Valad felt that it had no contacts in Utah and was under no obligation in Utah. Although the whole transaction had taken place through the mails and over the telephone, performance had occurred in New York. The only contact with Utah was the isolated act of interstate shipping. This was Valad's only Utah transaction. (T. 360) There was no regular or systematic shipping into Utah. World- Wide at p. 502.

This court is taking the position that Valad purposely availed itself of the privileges and benefits of Utah law by agreeing to manufacture in New York some heaters which were designed in New York pursuant to specifications sent by Brown to New York, where Valad had no agents or salesmen soliciting in Utah. Its advertisements of its products were placed in trade journals and not designed or intended to specifically solicit in Utah but on the contrary, implicitly invited inquiries in New York. (Exs. 42-45).

In this context, the due process question must be addressed by this court: Who should bear the litigation risk of doing interstate business under these circumstances? Should Valad bear the risk when it was solicited in New York to build specialized heaters in New

York, when the solicitors (Brown and Mallory) had foreknowledge that Valad would test the heaters in New York, not in situ in Utah?* Why should Valad assume this risk when all it did was pick up the phone and respond to inquiries? The entire range of the responses of Valad emanated from New York and were conceived in New York. It directed only mail and telephonic correspondence to Utah before using the mails to ship the final product. Either Mallory or Brown could have insisted as part of the contract that Valad come to Utah, "spec out" the environmental chambers, and perform certain tasks in Utah to insure proper operation. They chose not to do this, but to direct and complete actions in New York. Mallory and Brown should therefore take the litigation risk in this context of an isolated transaction.

Recommended Approach

It is suggested that the proper "minimum contacts" test in Utah should embrace the following steps:

1. The factual question must be asked as to who solicits or initiates the contact.

* The testimony at trial was undisputed that Valad did not know where or how the heaters were to be used, in any specific manner, except that they would be placed in some vaguely defined "environmental chamber." The specific details of their use were known only to Mallory and Brown. (T. 6-7; 10, 13; main brief, pps. 11-17).

2. If a business not otherwise involved in Utah is solicited to perform some unique task in another state, such as modifying heaters in New York, the solicitor should ordinarily take the risk associated with the transaction.

3. Jurisdiction for breach of contract in this type of case should be in the foreign jurisdiction unless the nature of the non-resident's business and contacts are such that he would normally do enough business in Utah to expect to be haled into court here.

This suggested approach complies with due process.

POINT II

THE TRIAL COURT'S AWARD OF \$30,840.60 AS OVERHEAD OR "INDIRECT COSTS OR DAMAGES" AGAINST VALAD IS WITHOUT PRECEDENCE OR JUSTIFICATION. THIS COURT MUST HAVE FAILED TO CONSIDER THIS POINT AND SHOULD AT LEAST RULE ON THE MATTER.

The lower court awarded \$10,647.80 as direct costs and damages sustained by the plaintiff, of which approximately \$8,072 represented "cover" and the balance, incidental and consequential damages. However, damages in this entire transaction are governed by the Utah Uniform Commercial Code, U.C.A., 1953, §§70A-2-711 and 712. Assuming that Mallory is entitled to prevail, these damages are justifiable.

However, the lower court's award of overhead or "indirect costs or damages" in the amount of \$30,840.60 is totally without precedent in law or equity and very unjust.

The main decision in this case does not even treat the issue of damages. This would not be so bad if the issue were simply that of a proverbial "cat fight" between the parties as to what the evidence showed as to the amount of damages. However, the matter is far more serious in that the lower court is, by its award of overhead damages, staking out an entirely new theory of law as it pertains to damages.

If this court wishes to fundamentally change the law in the state of Utah as to the measure of damages, it may probably do so. Valad has some doubt that this court really so intended. This court should, however, at least address the issue in a written opinion, showing precisely why and under what standards such a novelty will hereafter be employed, if such was intended. Otherwise, there should be a remittitur on damages.

The strongest evidence that Mallory could produce at trial as to a reason for awarding overhead damages is that its accounting procedure figured overhead as a part of the cost of every job. However, a company's internal accounting procedure is hardly reason enough to

stake out radically new territory in the area of damages. The court should reduce damages to \$10,647.80.

POINT III

THIS COURT FAILED TO CONSIDER AND REACH A DECISION ON A FUNDAMENTAL ISSUE OF THIS CASE REGARDING CONTRACT FORMATION AS SET FORTH IN POINTS II, IV, V, AND VI OF VALAD'S BRIEF ON APPEAL. THE LOWER COURT NEVER MADE A SPECIFIC FINDING ON CONTRACT FORMATION WHEN THE EVIDENCE COMPELLED A FINDING OF A CONTRACT WHICH VALAD FULFILLED ACCORDING TO ITS TERMS; OR IF UNFULFILLED, THAT IT WAS SOLELY DUE TO THE FAULT OF BROWN AND MALLORY.

In this case, Valad made a written offer to Mallory and Brown. Brown, in turn, slightly modified that written offer so that it became a counter offer and sent it to Valad in New York. Valad accepted the counter offer in New York without any change or proposed modification. As the American Law Institute stated in Restatement of the Law of Contracts, §228:

An agreement is integrated when the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted. * * * It is an essential of an integration that the parties shall have manifested assent not merely to the provisions of their agreement but also to the writing or writings in question as a final statement of their intentions as to the matters therein contained.

Also, in the American Law Institute's Comment

on §230 of the Restatement, these statements appear:

Where, however, they integrate their agreement, they have attempted more than to assent by means of symbols to certain things. They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive and the contract may have a meaning different than that which each party supposed it to have.

The applicable law of the State of New York coincides in these respects with the American Law Institute's Restatement of the Law of Contracts. It is not due process under the 14th Amendment to apply the law of Utah where it differs from the law of New York; since under principles of conflicts of laws, the contract was concluded in New York. The intention of the parties to a contract must be ascertained from what they have said in their written contract. Black v. United States 91 U.S. 267, 23 L.Ed. 324. No written contract is to be found in the record except the one shown in Points II, IV, V and VI of the Appellant's Brief to this Court. The obligation of such a contract is constitutionally protected even against hostile legislation. Chicago, Baltimore & Ohio Railroad Co. v. Nebraska ex rel. Omaha, 170 U.S. 57, 42 L.Ed. 948, 18 S.Ct. 513. In this case the trial court in effect cancelled, or at least completely disregarded, the only written contract between the parties. That in

itself violates due process. Atlantic Delaine Co. v. James, 94 U.S. 207, 24 L.Ed. 112.

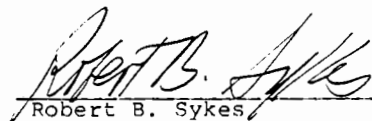
Furthermore, regardless of how the court views the issue of where the contract was formed, there can be no question that the defendants did not provide Valad with anywhere near sufficient information to build the heaters pursuant to their completely unstated expectations. In this regard, the logic and information contained in Valad's Reply Brief is inescapable, and cannot be refuted. All of the critical information that was necessary in order for Valad to build the heaters to meet Mallory's unstated expectations was omitted from the material sent to Valad. Valad, of course, has no duty, legal nor equitable, to construct heaters to conform to Mallory's and Brown's unstated expectations of performance. Points I, II, and III of the Reply Brief clearly demonstrate this principle.

The court's failure to consider and rule on these critical issues was a gross oversight.

CONCLUSION

Based upon the foregoing points, defendant Valad respectfully implores the court to reconsider its decision and reverse the judgment on jurisdiction as to Valad. In the alternative, the measure of damages should be reduced to comport to the Uniform Commercial Code and with long established formulas.

Respectfully submitted this 18th day of April,
1980.



Robert B. Sykes
Attorney for Valad

CERTIFICATE OF SERVICE

Hand Delivery

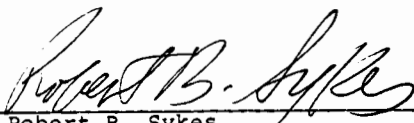
I hereby certify that I served a copy of the foregoing Brief in Support of Appellant Valad's Petition for Rehearing upon the attorneys for Mallory and Brown by causing a true and correct copy thereof to be hand delivered to said persons at their offices at the following addresses:

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Mr. Quentin Alston
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-and-

Mr. Allen H. Tibbals
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on this 18th day of April, 1980.


Robert B. Sykes
Attorney for Valad