

1980

Deseret Company v. JSJ Corp : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DESERET COMPANY, a Delaware :
corporation, :
 :
Plaintiff-Appellant, :
 :
v. :
 : Case No. 16992
JSJ CORPORATION, a Delaware :
corporation, :
 :
Defendant-Respondent. :

BRIEF OF PLAINTIFF-APPELLANT

DESERET COMPANY

On Appeal From the Third Judicial District In and For
Salt Lake County, Utah
The Honorable Bryant H. Croft

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STATEMENT OF THE NATURE OF THE CASE

This case involves the sale of certain industrial machinery to plaintiff by defendant. The machinery has never functioned properly, and plaintiff brought suit charging breach of express and implied warranties. Plaintiff seeks a return of the money paid for the defective machine, and seeks to have defendant remove the machine from plaintiff's premises.

DISPOSITION IN LOWER COURT

On February 19, 1980, the trial court granted defendant's motion to quash service of process for lack of personal jurisdiction over defendant. That order was modified on March 5, 1980, by agreement of the parties.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the trial court's granting of a motion to quash service of process on defendant, and seeks to have the matter remanded for a trial on the merits.

STATEMENT OF FACTS

Plaintiff is a Delaware corporation authorized to do business and doing business in Utah. Defendant is a Delaware corporation with its principal place of business in Michigan.

In 1975, representatives of plaintiff, in response to magazine advertising placed by defendant, contacted defendant at its Grand Haven, Michigan, headquarters to inquire about purchasing a certain large, custom-made packaging machine. Defendant sent its general manager, Lee S. Kihnke, to plaintiff's plant in Sandy, Salt Lake County, Utah to pursue the discussion, Affidavit of James C. Loveless, Record on Appeal at 38. The visit was followed by correspondence and telephone calls consisting of the submissions of proposals, quotations of prices, revisions of specifications, etc.

Eventually, those negotiations ripened, and on November 29, 1977, Mr. Kihnke mailed a revised proposal to plaintiff's Sandy office, id. Included was a document called the "Dake Installation Policy," Record at 46, in which defendant agreed to provide "factory trained technicians" to supervise installation of the machine at the Sandy plant.

On February 17, 1978, plaintiff accepted the offer by mailing a check for \$22,861.25 to defendant as a down payment on the machine, the total purchase price of which was \$91,445, Loveless affidavit, Record at 39. Defendant acknowledged receipt of the order, and proposed a July delivery date, Record at 57. Plaintiff sent a truck to Michigan to pick up the machine, and on August 28, 1978, defendant's "factory-trained specialist," Robert Wydeck, arrived in Utah

to supervise the installation, Loveless affidavit, Record at 39. Since that time, however, the machine has never worked properly. In November of 1978, two of the defendant's employees came to Utah, and spent several days trying to repair the machine, but without success, id. at 40. Therefore, plaintiff sought a refund of payments made for the machine, and also sought its removal. When the parties were unable to agree on a remedy, this lawsuit was filed.

ARGUMENT

I.

JURISDICTION OVER DEFENDANT WAS PROPER UNDER UTAH LAW AS IT EXISTED AT THE TIME OF THE RULING BELOW.

A. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANT BECAUSE IT CONTRACTED TO PROVIDE SERVICES IN THE STATE OF UTAH.

Utah's long-arm statute, Utah Code Ann. §78-27-24, provides in pertinent part:

Any person . . . 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 . . . to the jurisdiction of the courts of this state as to any claim arising from:

(1) . . .

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

Defendant's action falls within this provision of the long-arm statute, and defendant is subject to the in personam jurisdiction of this court because it contracted to provide a "factory trained service technician" to supervise the installation of the machine in Utah which plaintiff purchased from defendant. The installation was clearly a service, and the contract to provide such a

service in Utah places defendant squarely within the ambit of the long-arm statute.

B. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANT BECAUSE IT TRANSACTED BUSINESS IN THIS STATE AND CAUSED INJURY WITHIN THE STATE BY BREACH OF WARRANTY.

Utah's long-arm statute also provides that a non-resident submits himself to the jurisdiction of Utah's courts by the transaction of any business within this state, or by the causing of any injury within this state by breach of warranty. Utah Code Ann. §78-27-24.

The words "transaction of business within this state" are defined in Utah Code Ann. §78-27-23 as:

Activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the State of Utah.

Under this definition, there is little question that defendant transacted business in the State of Utah by coming here to solicit plaintiff's business, by communicating with plaintiff by telephone and through the mails, by selling plaintiff a machine worth some \$90,000 knowing that it would be used in Utah, and by sending its employees and representatives here to install, service and attempt to repair the machine. Nothing could more directly "affect persons or businesses" within Utah than the malfunctioning of a piece of machinery essential to a Utah business.

Defendant is also subject to the jurisdiction of this court because plaintiff has properly alleged that defendant caused injury by breach of both implied-in-law warranties and the express warranty contained in the contract.

There can be no doubt that Utah's long-arm statute purports to reach the defendant in this case on all three grounds discussed. The question then is whether subjecting this defendant to suit in Utah is consistent with due process, which is satisfied so long as the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice," International Shoe Co. v. Washington, 326 U.S. 310 (1945).

C. DUE PROCESS IS NOT OFFENDED BY SUBJECTING THIS DEFENDANT TO TRIAL IN UTAH.

To establish the purpose of the long-arm statute, the legislature codified the following language:

It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

Utah Code Ann. §78-27-22 (emphasis added). The preamble to the long-arm statute continues:

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

Utah Code Ann. §78-27-22. In addressing the application of those provisions, Justice Crockett stated:

We consider it our responsibility to give effect to that objective by extending the jurisdiction of our courts as far as the limitations of fairness

and established law will permit. . . . It is suggested, and there seems to be validity to the idea, that when the activity or conduct out of which the claimed liability arose occurs in the forum state, for example, where the contract was executed, or is to be performed, in whole or in part, or where an alleged tort occurred, courts are generally more disposed to apply the "minimal contacts" test and to find jurisdiction.

Producers Livestock Loan Co. v. Miller, 580 P.2d 603, 605 (Utah 1978) (emphasis added). Justice Crockett added that in order to assert jurisdiction over a party, the defendant must be engaged in substantial activities beyond mere transitory matters

so that it is reasonable and just to assume that he has had the benefit of the protections and advantages of the laws and institutions of the state to the extent that it is within the concept of fairness and due process that he be subjected to the jurisdiction of its courts.

Id. He gave three examples of transitory matters which help define the limitations imposed on long-arm jurisdiction by considerations of due process:

where a person buys stock in a corporation, such as U.S. Steel or General Motors, where the enterprise is located in and carried on in another state; or where a manufacturer advertises and distributes his products for sale through independent dealers or retailers in other states; or where persons who are merely traveling through or vacationing in other states engage in single and transitory transactions for the purpose of normal subsistence and activities. (emphasis added).

Id. That guidance is instructive and shows that this court's jurisdiction over the defendant in this case does not violate notions of due process. In each of the examples given, the unfairness of exercising jurisdiction is obvious. A huge public corporation cannot reasonably restrict the sale of its stock only

to citizens of certain states -- that would violate the "privileges and immunities" clause of the United States Constitution, Art. IV § 2. Nor can it possibly foresee where it might be subject to suit if it could be haled into any forum where an aggrieved stockholder happened to be domiciled. Justice Crockett's distinction has since been recognized by the United States Supreme Court, which stated that a pivotal element in the due process inquiry is whether

the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.

World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559, 567 (1980).

Similarly, it would be unfair to predicate jurisdiction on the acts of an independent, autonomous distributor over whom a defendant could exercise no control. Finally, subjecting a traveler to the exercise of jurisdiction in any state where he made a small, isolated transaction would leave the traveler at the mercy of unscrupulous merchants who could file bad-faith actions, secure in the knowledge that the small amounts involved would probably force a default. Such a situation would, as a practical matter, so discourage travel as to intolerably burden interstate commerce.

In this action, defendant contracted to perform the contract at issue, at least in part, by coming to Utah and installing and servicing the machine in question. The forum-state activity was more than foreseeable, it was inevitable. There was no place other than Utah that the installed machine could be used, or

where its failure could cause injury. And it is clear that defendant's activity was not transitory but rather substantial. Unlike Justice Crockett's example of an insubstantial contact by a manufacturer who acts only through an independent dealer or retailer in the forum state, defendant here did not have an independent dealer or retailer in Utah through which it dealt with plaintiff, but rather it dealt with plaintiff directly. Its officers and employees came to Utah on numerous occasions and they also communicated directly with plaintiff by telephone and through the mail. Nor was defendant "merely traveling" through the state for the purpose of engaging "in single and transitory transactions for the purpose of normal subsistence and activities." Clearly, defendant's actions went beyond Justice Crockett's examples of insubstantial activity and by so acting defendant has subjected itself to the jurisdiction of this court.

Justice Crockett's opinion in Producers Livestock followed by a month an opinion on in personam jurisdiction by Justice Wilkins, Abbott GM Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (1978). Justice Crockett's opinion amplified the criteria identified by Justice Wilkins in addressing the due process aspects of personal jurisdiction. Justice Wilkins stated that in order to "infuse full vitality into the mandate by our Legislature to apply the long-arm statute to the fullest extent permitted by the Fourteenth Amendment," 578 P.2d at 854, an inquiry should be made of:

1. The nature and quality of the defendant's acts;

2. Whether defendant is engaged in purposeful, rather than unintentional, acts in order to avail itself of the privileges and protections in Utah; and
3. Any other relevant matters.

The first and third elements are fairly general and somewhat undefined. Presumably, Justice Crockett's discussion in Producers Livestock is an expansion on these elements, and as we have argued, the defendant J.S.J. Corporation in this action falls within these elements for due process purposes. In addition, this defendant also clearly satisfies the second element identified by Justice Wilkins, since the acts in question were purposeful.

The question is not whether defendant's advertising alone was a sufficiently purposeful act to justify haling it into court. The point here is that the sale of a custom-made machine for installation and use exclusively in Utah is without a doubt sufficiently purposeful. Had defendant wished to avoid Utah jurisdiction, it could have declined to send plaintiff the offer to sell. But defendant ought not complain when a forum which it found to be a fair and convenient place to transact a substantial piece of business asks it to appear and defend an action involving that same large and expensive machine. Defendant had a choice, and by consenting to transact business in this forum it thereby submitted itself to jurisdiction of its courts. The motion to dismiss should have been denied.

II.

CONTROLLING UTAH CASE LAW, ANNOUNCED SINCE THE RULING BELOW, REQUIRES THE EXERCISE OF JURISDICTION OVER DEFENDANTS AND A REMAND OF THIS CASE FOR TRIAL ON THE MERITS.

The defendant's motion to quash was granted on February 19, 1980, and amended by stipulation of the parties on March 5. On March 4 and March 6 of 1980, this Court handed down two decisions that dramatically and unmistakably mandated an expansive interpretation of the long-arm statute. Even if plaintiff concedes, arguendo and contrary to the fact, that the trial court's decision in this case correctly reflected then-prevalent Utah law, it is apparent that the subsequent decisions require a contrary result, since the facts of this case fall squarely within the ambit of those cases.*

In the first of those cases, Burt Drilling, Inc. v. Portadrill, 608 P.2d 244 (Utah 1980), the facts were strikingly similar to the present case. There, a Utah firm initiated contact with a California manufacturer of drilling equipment. The defendant delivered the equipment to Denver, Colorado, from where the plaintiff took it to a job site in New Mexico. When the equipment began malfunctioning,

*

The fact that the trial court's decision was rendered prior to these cases does not, of course, prevent this Court from applying the new law to this appeal.

It is the general rule that when there is a change of law by judicial decision between the time of trial and the time of appeal the appellate court will dispose of the case according to the law prevailing at the time of the appellate disposition and not according to the law prevailing at the time of rendition of the judgment appealed.

Arnold v. Knettle, 10 Ariz. App. 509, 460 P.2d 45, 47 (1969).

the defendant sent repair crews to the New Mexico site. Subsequently, plaintiff, for the first time, transported the machine into Utah, where it again malfunctioned on a job despite further repair efforts by one of the defendant's employees. In the ensuing litigation, jurisdiction over the defendant was predicated on the long-arm statute. The trial court granted a motion to quash, holding the contacts between the manufacturer and the Utah purchaser insufficient to support the exercise of personal jurisdiction.

On appeal, this Court reversed and remanded to trial. This Court conceded at the outset that the defendant was not "doing business" within the State of Utah, and noted that there was no evidence that the defendant had ever sold any other product to any other Utah resident. However, this Court then observed that the long-arm statute is meant to govern those situations in which the non-resident defendant is not doing business within Utah, and that it "pertains to jurisdiction over persons concerning claims against them arising from certain 'minimum contacts' between those persons and this State." 608 P.2d at 246. That statute, then, was held to reach the facts of the Burt case, so long as the exercise of jurisdiction would be constitutional.

In that regard, the opinion articulated the following standard:

Due process requires that defendant's contacts with this State be purposeful on the part of the defendant so that it can be said that the defendant reasonably knew that he submitted himself to this jurisdiction to answer for any harm caused by him

Id. (emphasis added). In applying that standard to the Burt facts, the Court said:

Here, the allegations of plaintiffs' complaint show that their claims arise out of defendant's contacts with this State, which were: (1) defendant purposefully contracted with a resident of this State, knowing that it was a resident, and (2) defendant purposefully undertook to supply goods to that resident reasonably knowing or anticipating that those goods would be used in this State Further, the allegations of the complaint are that part of the injury caused by the defective goods was sustained here. Defendant, therefore has had sufficient contacts with this State to meet the provisions of [the long-arm statute].

Id. at 247 (emphasis added).

Thus, the Court said, it was proper for Utah to exercise jurisdiction over the defendant, even though the Utah plaintiff initiated the contact, even though the machinery was delivered to Colorado and used in New Mexico, and even though only a part of the injury occurred in Utah. Under the Burt tests, knowingly supplying equipment to a Utahn for use in Utah would sustain jurisdiction. In the present case, defendant must concede that those tests are satisfied.

In his concurrence, Justice Stewart distinguished Burt from previous cases involving items that would normally be used in the locality where they were purchased.* He noted that while it

* Specifically, Justice Stewart discussed Pelligrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974), in which a Utah immigrant sought to sue a California automobile dealer for injuries sustained in Utah as a result of alleged mechanical defects. She purchased the car while still a California domiciliary. The defendant in that case had no control over where the purchaser might take the car, and Justice Stewart noted that the dealer was not engaged in an interstate business - he sold cars only in California. In Burt and in the present case, however, the defendants actively solicited interstate business, and knew that the particular products involved were to be used in Utah.

would be unfair to subject the vendor to the jurisdiction of a forum to which "the vendor had no reasonable expectation that his products might be transported," he concluded that a manufacturer of industrial goods stands in a different position. He said:

Large nationwide or multistate businesses, which make great efforts to sell their products to as broad a population as possible, purposefully make use of the free channels of commerce and should be held accountable for legal actions arising out of their use of the nation's channels of commerce.

608 P.2d at 256.

The facts here argue more compellingly than did those of Burt for the exercise of jurisdiction. There, the equipment, though bulky, was portable; the mere fact of foreseeable use in Utah was an adequate factual basis for jurisdiction. Here, the large machine involved was installed on the plaintiff's premises by the defendant. Use in Utah was far more than foreseeable; there was no other possible place in which the machine could be used.

In the second relevant case, Mallory Engineering, Inc. v. Brown, No. 15530 and 15544 (Utah, March 6, 1980), this Court sustained a trial court's denial of a motion to quash service made by a non-resident defendant. Again, the case involved the furnishing of an allegedly defective product for use in Utah. This Court adverted to the evolutionary aspect of Utah decisions, and it reiterated the Burt criteria for applicability of the long-arm statute: the purposeful act of manufacture and sale of an item where its use in Utah is foreseeable. Id., slip op. at 3. This was true despite the fact that the defendant had no office,

property or agents in Utah, nor did it advertise within the State. Under the Burt test, these once-dispositive factors became irrelevant. Id.

The Mallory opinion then considered whether subjecting the defendant to Utah's jurisdiction comported with due process, and concluded that the question involved balancing the inconvenience to the defendant against the interests of the state in assuming jurisdiction. The Court's observation is worth quoting at some length:

This Court recognizes that any litigation undertaken in a foreign jurisdiction results in some inconvenience to the non-resident defendant. The fact that [the defendant] had no general offices or operations in the State and scheduled no representation in the State, substantiate its assertions of inconvenience. However, the inconvenience to the nonresident must be viewed in relation to the importance of the conflict litigated, which, in a commercial setting, is evidenced by the amount in controversy. If the amount is trivial in comparison to the expense of litigating in the foreign forum and the possibility of the defendant defaulting reaches sufficient proportions, the demands of fair play and substantial justice dictate the reservation of the state's jurisdictional power.

. . . .

In undertaking interstate (sic) business, [the defendant] must recognize and accomodate within its operations the probability and necessity of litigating in foreign forums.

. . . . Balanced against the above considerations is the express interest the State of Utah has in ensuring protection to its residents from the unlawful acts of non-residents.

. . . .

Balancing the importance of this interest in relation to commercial transactions involving the supply of goods into the state by a non-resident manufacturer, and the relatively minor degree of inconvenience required to defend this action in Utah, we hold the district court's extension of jurisdiction over [the defendant] to be reasonable. Therefore, the district court's jurisdiction . . . did not abridge the due process clause of the Fourteenth Amendment. . . .

Id., slip op. at 4.

The due process test of Mallory, then, is satisfied in this case. The amount in controversy is over \$90,000--the cost of the machine. Surely, that will dissuade defendant from defaulting. Although the defendant in this case may not have directed its trade journal advertising specifically at Utah readers, the mere fact that it advertises nationally indicates an intention to make sales to customers in distant forums. Such an intent, as this Court has recognized, gives rise to a correlative obligation to litigate in those forums--that is an integral cost of doing business.

In the present case, a balancing of the interests involved strongly supports Utah's exercise of jurisdiction. The machine is located in Utah. Trial testimony will center around its condition, so it will no doubt have to be inspected by witnesses, and perhaps even by the trier of fact. The issue will be the condition of this particular machine, not the general integrity of defendant's manufacturing process. All this suggests that a Utah forum will be far more convenient for the witnesses. Nor do any facts suggest that a Utah forum would be any less convenient to defendant than a Michigan forum would be to plaintiff, and

equal inconvenience ought not be enough to disturb a plaintiff's forum choice. Finally, Utah has a substantial interest in providing a forum in which its residents may seek redress from a non-resident manufacturer who knows that if his product malfunctions, the resultant injury will be suffered in Utah.

SUMMARY AND CONCLUSIONS

This case involves the propriety of exercising jurisdiction over a non-resident manufacturer of a large, custom-made machine that the defendant manufacturer installed in plaintiff's Utah plant. The machine has never operated properly, and plaintiffs sought redress in Utah District Court. The trial court granted defendant's motion to quash service of process for lack of jurisdiction. This appeal is from that judgment.

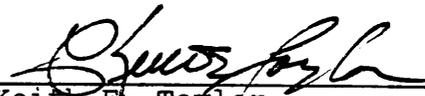
The case is squarely within the purview of Utah's long-arm statute because defendants both contracted to supply services in Utah -- namely, installation -- and because plaintiffs sustained injuries in Utah arising out of defendant's breach of both express and implied warranties. Because defendant's act of selling and installing this large and expensive machine to plaintiff was clearly purposeful, it is apparent that defendant sought to avail itself of the benefits of undertaking commercial activity within this state. Thus, the exercise of jurisdiction was proper under the Producers Livestock standard, which prevailed at the time of the trial court's ruling.

Moreover, subsequent decisions by this Court, which control this appeal, unmistakably require the exercise of jurisdiction.

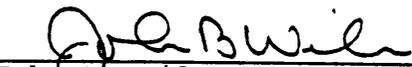
Burt Drilling, a factually similar case involving a large but portable machine, sustained jurisdiction predicated on foreseeability of the product's use in Utah. Here, the machine is not portable. It could only be used in Utah, and thus it was inevitable that any injury arising out of its malfunctioning would be sustained in Utah. The due process test of Mallory Engineering is satisfied because the amount in controversy, some \$90,000, is substantial enough to insure that defendant will not default. The interests of the plaintiff and the forum state argue for jurisdiction in Utah, as does the presence of the machine, which is the subject of this litigation and which will almost certainly have to be inspected by witnesses, if not by the trier of fact. Defendants may be somewhat inconvenienced by the Utah forum, but as this Court noted in Mallory Engineering, that is the inevitable consequence of electing to engage in interstate commerce, and is certainly insufficient, by itself, to disturb plaintiff's forum choice.

For the foregoing reasons, jurisdiction over defendant must be exercised. The motion to quash granted below should be reversed, and the case remanded for trial on the merits.

Respectfully submitted this 6th day of June, 1980.



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 1980, I caused to be served upon Gifford W. Price and Lisa M. Pearson, of and for Callister, Green & Nebeker, attorneys for defendant-respondent, Kennecott Building, Suite 800, Salt Lake City, Utah 84133, two copies of the foregoing Brief of Plaintiff-Appellant Deseret Company, by depositing the same in the U. S. mail, postage prepaid.

