1991

Paul Arguello v. Industrial Woodworking Machine Company, Inc. : Brief of Appellee

Utah Supreme Court

James R. Hasenyager; Martin W. Custen; Marguardt, Hasenyager & Custen; Attorneys for Appellant.
Douglas B. Thomas; Van Cott, Bagley, Cornwall & McCarthy; Attorney for Appellee.

IN THE SUPREME COURT OF

STATE OF UTAH

PAUL ARGUELLO, Plaintiff and Appellant, vs. INDUSTRIAL WOODWORKING MACHINE COMPANY, INC., Defendant and Appellee,	)	Case No. 910046 Priority Classification: 16

BRIEF OF APPELLEE

Appeal from the Second Judicial District Court of Weber County, State of Utah, the Honorable David E. Roth, District Judge.

DOUGLAS B. THOMAS (5550)
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
2404 Washington Boulevard
Suite 900
Ogden, UT 84401

Attorney for Appellee

JAMES R. HASENYAGER
MARTIN W. CUSTEN
MARQUARDT, HASENYAGER & CUSTEN
2661 Washington Boulevad, #202
Ogden, UT 84401

Attorneys for Appellant

IN THE SUPREME COURT OF

STATE OF UTAH

PAUL ARGUELLO, Plaintiff and Appellant, vs. INDUSTRIAL WOODWORKING MACHINE COMPANY, INC., Defendant and Appellee,	)	Case No. 910046 Priority Classification: 16

BRIEF OF APPELLEE

Appeal from the Second Judicial District Court of Weber County, State of Utah, the Honorable David E. Roth, District Judge.

DOUGLAS B. THOMAS (5550)
VAN COTT, BAGLEY, CORNWALL & McCARTHY
2404 Washington Boulevard
Suite 900
Ogden, UT 84401

Attorney for Appellee

JAMES R. HASENYAGER
MARTIN W. CUSTEN
MARQUARDT, HASENYAGER & CUSTEN
2661 Washington Boulevad, #202
Ogden, UT 84401

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE SUPREME COURT OF

STATE OF UTAH

PAUL ARGUELLO, Plaintiff and Appellant, vs. INDUSTRIAL WOODWORKING MACHINE COMPANY, INC., Defendant and Apellee,	)	Case No. 910046 Priority Classification: 16

BRIEF OF APPELLEE
INDUSTRIAL WOODWORKING MACHINE COMPANY, INC.

JURISDICTION

This court has jursidiction over this case under Utah Code Ann. §78-2-2-(3) (j) (1987).

ISSUES PRESENTED FOR REVIEW

1. Did Mr. Arguello's claim "arise from" Industrial Woodworking Machine Company, Inc.'s ("IWM Co.") conduct toward Utah as required by Utah's long-arm statute, Utah Code Ann. §78-27-24 (1987)? Pre-trial jurisdictional decisions based on documentary evidence are reviewed de novo by appellate courts. Anderson v. Am. Soc. of Plastic & Reconstructive Surgeons, 807 P.2d 825, 827 (Utah 1990).

2. Did the trial court err in ruling that defendant and appellee, IWM Co., did not have the necessary minimum

contacts with Utah to allow Utah courts to acquire personal jursidiction over IWM Co.? Pre-trial jursidiction decisions based on documentery evidence are reviewed de novo by appellate courts. Id.

DETERMINATIVE CONSTITUTIONAL AND STATUTES

Utah Code Ann. §78-27-24.

> **Jurisdiction over nonresidents - Acts submitting person to jurisdiction.**
>
> 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:
> . . .
> (3) the causing of any injury within this state whether tortious or by breach of warranty...

U. S. Const. Amend. XIV, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from an order of the lower court (R.74) dismissing Mr. Arguello's complaint based on IWM Co.'s lack of sufficient minimum contacts with Utah necessary to subject IWM Co. to the personal jurisdiction of this forum.

B. Disposition of the Case Below. Mr. Arguello commenced this action by filing a complaint against IWM Co. seeking damages for personal injuries. (R.1). IWM Co. then filed a motion to dismiss plaintiff's complaint based on this forum's lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Utah Rules of Civil Procedure. (R.44). Both parties submitted memoranda in support of their positions regarding IWM Co.'s motion. Judge David E. Roth thereafter granted IWM Co.'s motion to dismiss. (R.74).

STATEMENT OF THE FACTS

Mr. Arguello brought this action against IWM Co. based on personal injuries that allegedly occurred when he operated a used finger jointing machine that originally had been manufactured by IWM Co. The plaintiff's alleged injuries occurred in July of 1987 while he was working for Weathershield, Inc., of Logan Utah. The finger jointing machine, Serial No. 6-3470-Q-4-10771 (hereinafter simply "the machine") originally had been built for and sold to Pickering Lumber Co. ("Pickering") located in Standard, California in 1971. (Affidavit of Gale Y. Cromeens, ¶10, R.18-20). The invoice of the sale to Pickering (attached to Cromeens' affidavit as Exhibit "A", R.21-23) shows that the machine contained numerous additions and appears to have been custom made to Pickering's specifications. The cost of the machine in 1971 was $81,473.50. (R.23). In addition, the invoice reveals that Pickering was charged $4,073.68 in state sales tax,

another indication that Pickering was the intended end user. (R.23).

In July of 1982, Weathershield contact IWM Co. and requested that IWM Co. send a service representative to examine certain machinery in Utah that Weathershield somehow had acquired. (Cromeens affidavit at ¶10, R.18-20). This was the only occasion during the last nine years when IWM Co. has sent a service representative to Utah. (Cromeens affidavit, ¶10, R. 20).

The service representative found that the machine had been substantially modified during the ten-year period since it had left IWM Co.'s possession . (R.19). Specifically, the lug system had been modified causing the wood to pop out. (R.19). The service representative advised Weathershield that the modifications needed to be corrected before the machine would work properly. (R.19). Most importantly, the service representative did <u>not</u> perform any service or work on the machine. (R.19). He merely responded to Weathershield's inquiry comcerning the operation of the machine. (Cromeens affidavit, ¶10, R. 18-19). There is no evidence that the service representative was requested by Weathershield to perform repairs or otherwise work on the machine.

IWM Co.'s contacts with Utah are few, insubstantial and totally unrelatd to plaintiff's claimed injuries. IWM Co. maintains no office in Utah. (R.17). IWM Co. has never employed personnel in Utah. (Cromeens affidavit ¶5, R.17).

IWM Co. sends no sales personnel to Utah to market its products. (R.17). The only advertising done by IWM Co. which may or may not have reached Utah has consisted of occasional small advertisements placed in four national trade publications. (R.17-18). None of these advertisements dealt with machinery of the type which allegedly injured the plaintiff. (Cromeens affidavit, ¶6, R.17-18). IWM Co.'s sales to Utah during each of the last nine hears have averaged $13,153.00, a figure that represents approximately three-tenths of one percent (0.3%) of IWM Co.'s total sales volume. (Cromeens affidavit, ¶3, R.17). In contrast, this average annual sales figure amounts to less than one-sixth of the sales price of the single finger joint machine sold to Pickering Lumber in 1971.

The products sold by IWM Co. to Utah have consisted primarily of parts, not equipment, and have resulted from Utah customers calling IWM Co. to order its products. (Cromeens affidavit, ¶4, R.17). IWM Co. generally sells directly to the user of its products. (R.18). IWM Co. has not attempted to market its products in this state or to place its products into a distribution newtork or "stream of commerce" designed to carry IWM Co.'s products here. (Cromeens affidavit., ¶7, R.18). IWM Co. has no history of utilizing Utah's court system or other services. (Cromeens affidavit, ¶8, R.18). In short, IWM Co. possesses few contacts with this state and those contacts are totally unrelated to plaintiff's alleged injuries.

SUMMARY OF ARGUMENT

IWM CO. does not have substantial connections with Utah. Mr. Arguello, accordingly, has based his jurisdictional claim on Utah's long-arm statute, Utah Code Ann. §78-27-24. However, because Mr. Arguello's claims do not "arise from" IWM Co.'s few, minor connections with this state, the long-arm statute fails as a basis for Utah's exercise of personal jurisdiction.

Similarly, IWM Co. does not possess sufficient minimum contacts with Utah such that this forum's assertion of personal jurisdiction over IWM Co. would satisfy the due process clause of the 14th Amendment to the United States Constitution. IWM Co. has very few connections with this state and these have resulted from Utah residents reaching out to IWM Co. in Texas. IWM Co. does not target Utah to sell or distribute its products, or otherwise take advangage of the benefits and protections of this state. Plaintiff's claims are not related to, nor do they arise from, any IWM Co. activity directed toward this forum.

Finally, the machine that injured plaintiff was not placed into the "stream of commerce" for ultimate distribution to Utah. Nor does IWM Co. utilize a distribution network that targets this state. IWM Co. sold the machine for use in California and did not participate in or facilitate the machine's removal to Utah. Therefore, IWM Co. has insufficient minimum contacts with Utah, either direct or indirect, to

satisfy the due process requirements of the 14th Amendment and the decison of the trial court should be affirmed.

ARGUMENT

The legitimate exercise of personal jurisdiction over a nonresident defendant based on Utah's long-arm statute requires that two criteria be satisfied. First, the defendant's conduct must fall within the ambit of the long-arm statute as contained in Utah Code Ann. §78-27-24. Second, the defendant must have sufficient minimum contacts with the forum such that maintenance of a suit does not offend traditional notions of fair play and substantial justice within the constraints of the 14th Amendment to the United States Constitution. International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L. Ed. 95 (1945). Neither of these criteria are satisfied in the instant action.

The only evidence submitted in the proceedings below were the affidavit of Gale Y. Cromeens (R.16-20) and the exhibits attached thereto (R.21-26) submitted by IWM Co. Mr. Arguello did not contest this evidence nor submit any countering affidavits, exhibits or other evidence. Accordingly, this court's review of the trial court's decision is limited to the evidence contained in the Cromeens affidavit and its supporting exhibits. See Roskelly & Co. v. Lerco, Inc., 610 P.2d 1307, 1310 (Utah 1980). The affidavit and exhibits are attached to this brief as Addendeum 1.

I. MR. ARGUELLO'S CLAIM DID NOT "ARISE FROM" IWM CO.'S CONDUCT TOWARD THE FORUM AS REQUIRED BY UTAH'S LONG-ARM STATUTE.

The relevant provision of Utah's long-arm statute relied upon by Mr. Arguello to assert jurisdiction over IWM Co. explicitly provides that the plaintiff's claim must "arise from" the defendant's causing of injury within the state. Utah Code Ann. §78-27-24 (3). The Utah Supreme Court explained the criteria that must be met to satisfy the "arising from" provision of Utah's long-arm statute in Roskelly & Co. v. Lerco, Inc.. P.2d 1307, 1311 (Utah 1980) as follows:

> [I]f the action is brought pursuant to the long-arm statute because defendant is not doing substantial business in the forum state, plaintiff must show that his claim arises out of some contact defendant has with the forum state, some action undertaken by defendant by which it can be shown that defendant has in fact "purposefully availed himself of the privilege of conducting activities within the forum state" and it does not here assist the plaintif to show the contacts defendant has with the forum, if the specific litigation at bar does not arise out of those contacts.

Id. (citations omitted) (emphasis in original text).

This view is consistent with the requirement established by the United States Supreme Court that the cause of action must "arise out of" the defendant's activities toward the forum state to satisfy due process considerations unless the defendant has substantial ties to the forum. See Hansen v. Denckla, 357 U.S. 235, 253, 789 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). One commentator has summarized this concept as follows: "The United Staes Supreme Court has used the arising

out of concept to describe siutations where the plaintiff's claim came into existence as a result of, and bears a close relationship to, the non-resident defendant's foreign-state activities." Strachan, In Personum Jurisdiction in Utah, 1977 Utah L. Rev. 235, 253; see Hansen v. Denckla, 357 U.S. at 251-53, 78 S.Ct. at 1237, 2 L.Ed.2d at 1296-98.

In the case at bar, Mr. Arguello's claim is totally unrelated to any IWM Co. activity directed toward Utah. The machine was custom manufactured for use by a California lumber company and was not sold for distribution here. (R.18). Similarly, the machine was not advertised in Utah or in any publications that could reach Utah. (R.17-18). IWM Co.'s few small advertisements in national trade magazines involved entirely different products. (R.18). IWM Co. was not responsible for the machine's entry into Utah and is unaware how it came into Weathershield's possession here. (R.19). During the service representative's sole visit here nine years ago, he merely advised Weathershield to correct modifications that had been made to the machine since it had left IWM Co.'s control (R.19). He performed no work on the machine, nor is there any evidence that he was requested to do so by Weathershield. (R.19).

In short, Mr. Arguello's alleged injuries simply did not arise from IWM Co.'s activities in Utah within the meaning of the long-arm statute. His injuries did not come into existence as a result of, or bear a close relationship to, IWM

Co.'s conduct in or toward Utah. Therefore, Mr. Arguello may not assert the long-arm statute as a basis for jurisdiction.

II. IWM CO. DOES NOT HAVE SUFFICIENT MINIMUM CONTACTS TO SUBJECT IT TO PERSONAL JURISDICTION IN UTAH.

A. IWM Do. does not have sufficient direct minimum contacts wth Utah to enable this forum to assert jurisdiction.

The due process clause of the 14th Amendment of the United States Constitution requires that a non-resident defendant must have sufficient minimum contacts with the forum state such that the defendant should "reasonably anticipate being haled into court there." World-wide Volkswagen v. Woodson, 444 U.S. 286, 295-298, 100 S. Ct. 559, 556-67 62 L.Ed.2d 490 (1980). The defendant must have "purposefully availed itself of the privilege of conducting activities within the forum state." Parry v. Ernst Home Center Corp., 779 P.2d 659, 662 (Utah 1989) (quoting Hansen v. Denckla, 357 U.S. at 253, 78 S.Ct. at 1240, 2 L.Ed.2d. at 1298). The relationship of the defendant, the forum and the litigation to each other is central to this inquiry. Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1110 (Utah 1985). Specifically, the cause of action should arise out of or have a substantial connection with the defendant's activity in the forum (as discussed in Section I above). In addition, any balancing of the convenience of the parties and interests of the state should weigh in favor of the exercise of jurisdiction before due process concerns are satisfied. See Mallory Engineering v. Ted

R. Brown & Assocs., 618 P.2d 1004, 1008 (Utah 1980), cert. denied, 449 U.S. 1029, 101 S.Ct. 602, 66 L.Ed.2d 492 (1980).

The application of these due process requirements can best be seen by analyzing relevant case law. A case closely analogous to the instant action was addressed by the United States Court of Appeals for the Tenth Circuit in Fidelity & Casualty Co. of N.Y. v. Philadelphia Resins Corp., 766 F.2d 440, 447 (10th Cir. 1985), cert. denied, 75 U.S. 1082, 106 S. Ct. 853 (1986), which required an analysis of Utah personal jurisdiction law in a products liability setting. In Philadelphia Resins, the manufacturer of synthetic fiber cable was sued for injuries sustained when a cable attached to a helicopter broke resulting in substantial damage to the equipment. The cable had been sold to an Arkansas helicopter pilot who ordered it prior to coming to Utah to perform a delivery contract. The pilot had read about the cable in a national trade publication. The pilot ordered it specifically for use in performing the contract in the Rocky Mountan region and so informed an employee of the manufacturer. The defendant manufacturer had sold its products in all fifty states, including Utah, but between 1978 and 1980 the defendant's sales to Utah amounted to approximately one tenth of one percent (0.1%) of the defendant's gross sales volume.

In a thorough, carefully reasoned opinion that examined the development of the constitutional due process requirements of personal jurisdiction, the court held that

because it was never specifically foreseeable that the cable was destined for the Utah market, the defendant lacked the necessary minimum contacts with the forum for Utah to exercise personal jurisdiction. The court stated:

> If a defendant's product comes into the forum state as a result of deliberate, although perhaps indirect, effort of the defendant to serve the forum state's market, then that defendant is subject to jurisdiction there. Placing one's product into the "stream of commerce" with the expectation of distribution into particular areas is the classic example of such an indirect effort. If, however, the defendant's product comes into the forum state as a result of the actions of an unconnected third party, or of fortuitous events over which the defendant has no control, then the defendant is not subject to jurisdiction in the forum state.

Id. at 446.

Philadelphia Resins provides a similar fact pattern to the case at bar concerning the defendant's contacts to the forum. In the instant case, IWM Co.'s sales to Utah have amounted to approximately three tenths of one percent (0.3%) of its gross sales over the last nine years. (R.17). The majority of these sales have involved parts and have been unrelated to the machinery that allegedly injured the plaintiff. (R.17). The few sales that have occurred in Utah have been initiated by Utah customers and have not occurred through IWM Co.'s efforts to sell its products here. (R.17).

The machine that allegedly injured the plaintiff was originally built for and supplied to a California lumber company approximately 16 years prior to the time when the plaintiff claims to have been injured. (R.19). The machine

had not been placed into the stream of commerce for distribution or resale here. The machine was modified and came to Utah solely through the actions of unconnected third parties or fortuitous events over which the defendant had no control.

Indeed, IWM Co. actually had considerably less opportunity to foresee that the product in question would be used in Utah than did the defendant in Philadelphia Resins. Unlike the cable manufacturer, IWM Co. had not advertised the product in question in national trade publications and IWM Co.'s employees had no knowledge that the particular product possibly would be used here by the buyer. Therefore, the instant action actually provides a much stronger case for dismissal than that described in Philadelphia Resins. See also, Jones v. North American Aerodynamics Co., Inc., 594 F.Supp. 657 (D.Maine 1984).

The court in Philadelphia Resins also emphasized the importance of the cause of action arising from the defendant's conduct toward the forum. The court indicated "the instant cause of action arose, ultimately, from PRC's successful advertising efforts in Arkansas, together with the fortuitous transport of a PRC product into Utah; not from any effort PRC may have made to sell its products in Utah or to transport its product into Utah." Philadelphia Resins, 766 F.2d. at 446.

In the case at bar, the plaintiff's alleged injuries simply did not arise from the defendant's activities in Utah. Any injuries arose, ultimately, from a third party's

modification of a machine that originally had been sold for use in California. The machine's fortuitous transport to Utah was totally unrelated to IWM Co.'s nominal contacts with this state.

The sole connecton between the defendant's activities in Utah and the machine that allegedly caused plaintiff's injury was the single visit here nine years ago by an IWM Co. service representative that looked, and only looked, at the machine. The representative did not perform service, maintenance or repairs on the machine and was not requested to do so by Weathershield. (R.19). The representative merely informed Weathershield that the machine had been modified by others since leaving IWM Co.'s plant and that these modifications were causing the problems with the machine. (R.19). In no possible sense can the plaintiff's injuries be construed as "arising out of" the service representative's visit and the plaintiff's complaint does not so allege. Contrary to plaintiff's implications, the representative had neither the duty, nor even the right, to work on the machine without a contract to do so with Weathershield.

If the representative had performed service on the machine and the plaintiff was injured as a result of the representative's repairs, then perhaps the required nexus between the defendant's conduct and the plaintiff's injuries would be present. However, because the defendant did absolutely nothing concerning the machine other than inform Weathershield that modifications made on the machine were

causing a problem, there remains no connection between the plaintiff's injuries and the defendant's limited activities in this state.

Therefore, the constitutionally mandated nexus between the plaintiff's claimed injuries and the defendant's contacts with Utah remains unsatisfied by the facts of this case. The due process requirements of the 14th Amendment mandate that Mr. Arguello's suit be dismissed.

B. IWM Co. has not indirectly established minimum contacts with Utah by placing the finger joint machine into the stream of commerce.

Plaintiff mischaracterizes this case as involving stream of commerce issues. Stream of commerce is a "term used to describe goods which remain in interstate commerce though held within a state for a short period of time. If such goods remain in the stream of commerce, they are not subject to local taxation." Black's Law Dictionary, 1921 (6th ed. 1990). The term implies the flow of goods through a distribution system between a manufacturer and the ultimate retail purchaser of the goods. As Justice Brennan stated in his concurring opinion in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 117, 107 S.Ct. 1026, 94 L.Ed.2d 92, 107 (1987), "[t]he stream of commerce refers not to unpredictable currents or eddies but to the regular and anticipated flow of products from manufacturer to distribution to retail sale."

In the instant action, the machine clearly was not

placed into the stream of commerce. It was sold and delivered directly to the intended user, Pickering Lumber Co., in California (R.18-19). The machine appears to have been custom made for Pickering and Pickering was charged sales tax, further indicating that Pickering was the intended user of the machine. (R.21-23). Similarly, IWM Co. generally sells all its products directly to the user rather than through any distribution network. (R.18). In short, there has been no regular or anticipated flow of IWM Co.'s products from manufacturer to distribution to retail sale in Utah. Accordingly, the use of the stream of commerce theory is an inappropriate basis to analyze this case.

It is noteworthy that Mr. Arguello apparently concedes that the machine was manufactured and sold for use by Pickering Lumber Co. in California. (Appellant's brief at 5). Mr. Arguello has not asserted that the machine originally was intended for resale by Pickering to Utah, nor would the evidence support such an assertion.

Rather, Mr. Arguello argues that because the machine originally cost $85,000.00 it was foreseeable that the machine eventually would be resold as used equipment in Utah. He apparently asserts that the foreseeability of the machine's possible resale as used equipment provides for personal jurisdicton under a stream of commerce theory. Appellant's brief at 9. This premise totally lacks any foundation in evidence or logic and is contrary to controlling case law.

Mr. Agruello failed to introduce any evidence in the proceedings below showing the existence of a secondary market or indicating that it was likely or even foreseeable that the machine would be resold in Utah. He also failed to show why an $85,000.00 finger jointing machine was likely to find its way into another state, particularly Utah, simply based on its cost. Logic would dictate that a custom built machine manufactured for use by a California lumber company likely would remain with the lumber company throughout the machine's useful life.

Even assuming that it was foreseeable that the machine eventually could be sold as used equipment in another state, case law clearly has established that this type of foreseeability alone has never been a sufficient bench mark for personal jurisdiction under the due process clause. World-wide Volkswagen Corp. v. Woodson, 444 U.S. at 296-97, 62 L.Ed.2d at 500-01. The plaintiff's usage of "foreseeability" stretches its meaning to the point where all manufacturers would be amenable to suit wherever their products happened to go throughout the products' existence. The United States Supreme Court has specifically rejected such a meaning of foreseeability as satisfying the due process requirements for personal jurisdiction. In World-wide Volkswagen Corp. v. Woodson, the court stated:

> If foreseeability were the criterion [for asserting personal jurisdiction], . . . every seller of chattels would in effect appoint the

> chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of Harris v. Balk, that the interest of a creditor in a debt could be extinguished or otherwise affected by any state having transitory jurisdiction over the debtor. Having interred the mechanical rule that a creditor's amenability to a quasi in rem action travels with his debtor, we are unwilling to endorse an analogous principle in the present case. . . .
>
> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

Id. (citations omitted). In the present case, Mr. Arguello's assertion that IWM Co.'s amenability to suit traveled with the finger jointing machine based on the machine's $85,000.00 cost obviously is contrary to the guidelines established above by the United States Supreme Court.

It simply was not foreseeable, as that term applies in due process analysis, that the machine would end up in Utah subjecting IWM Co. to suit here. It was not foreseeable because IWM Co's conduct in selling the machine or in otherwise establishing connections with Utah were not such that IWM Co. should reasonably have anticipated being haled into court here. Accordingly, Mr. Arguello's stream of commerce theory has no basis in fact or law and is inappropriate to the present action.

Even assuming, arguendo, that this case involved stream of commerce considerations, IWM Co. still would not be

subject to suit here under Utah law. In the recent case of Parry v. Ernst Home Center, 779 P.2d. 659 (Utah 1989), this court held that a Japanese manufacturer and a Japanese distributor of a maul that allegedly had caused injury to a Utah plaintiff were not subject to this state's personal jurisdiction. The maul originally was sold by a retailer in Idaho to a customer that had given it to her father in Utah. The Japanese defendants had dealt primarily with a California distributor, although they were informed of potential sales throughout the western United States. The Utah Supreme Court held that:

> [A]n intentional and knowing distribution of the product in the western United States is not necessarily sufficient to satisfy the "minimum contacts" requirement. . . . Without a showing of "additional conduct," we are unable to find that the eventual sale of a product in Utah justifies personal jurisdiction.

Id. at 667.

In the instant action, the case against asserting personal jurisdiction over IWM Co. is much stronger than existed in Parry because IWM Co. had no knowledge that its product might be resold and used in Utah. Therefore, even if a stream of commerce theory is applied to the facts of this case, controlling case law mandates that Utah may not exercise personal jurisdiction over IWM Co. because IWM Co. has not established sufficient minimum contacts wth this forum. The District Court's dismissal of Mr. Arguello's suit based on the

lack of personal jurisdiction over the defendant, accordingly, should be affirmed.

CONCLUSION

IWM Co. has engaged in very few, insubstantial contacts with the State of Utah. Accordingly, Mr. Arguello's alleged injuries must arise from those contacts before a basis exists for this forum to exercise personal jurisdiction over IWM Co. under either Utah's long-arm statute or the due process clause of the 14th Amendment. The alleged injuries, however, were caused by a machine that was built for and sold to a California lumber company by IWM Co. approximately 16 years prior to the time of Mr. Arguello's alleged mishap. IWM Co. participated in no activity that facilitated either the machine's fortuitous transport to Utah or Mr. Arguello's unfortunate mishap after the machine arrived here. Therefore, no legitimate basis exists to subject IWM Co. to the exercise of this state's personal jurisdiction and the ruling of the trial court should be affirmed.

DATED this 15 day of May, 1991.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By Douglas B. Thomas

Douglas B. Thomas
Attorneys for Appellee
2404 Washington Boulevard,
Suite 900
Ogden, Utah 84401
Telephone: (801) 394-5783

ADDENDUM

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Douglas B. Thomas - #~~550~~ 5550
Attorneys for Plaintiff
2404 Washington Boulevard, Suite 900
Ogden, Utah 84401
Telephone: (801) 394-5783

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

PAUL ARGUELLO, PLAINTIFF, vs. INDUSTRIAL WOODWORKING MACHINE CO., INC.,	AFFIDAVIT OF GAIL Y. CROMEENS Civil No. 900900492P1 (Judge David E. Roth)

STATE OF TEXAS)
: ss.
COUNTY OF)

GAIL Y. CROMEENS, being first duly sworn, deposes and says:

1. I am a resident of the State of Texas, am over the age of eighteen (18) and otherwise competent to make this affidavit.

2. I am Executive Vice President of Industrial Woodworking Machine Co., Inc. ("the Company") located in Garland, Texas. I have been employed at the company in the time periods between 1974 through 1980 and 1985 through the present.

3. I have thoroughly reviewed the company's records regarding the company's sales for the last nine years, including all sales made to customers in Utah during that time period. These records indicate that the company has had an average of $13,153.00 sales to Utah customers in each of the last nine years, a figure that represents approximately three-tenths of one percent (0.3%) of the Company's total sale volume.

4. The products sold to Utah during the last nine (9) years consist almost exclusively of parts, rather than equipment or machinery. These parts were sold to Utah customers that telephoned in their orders to the Company's Texas location. On two occasions a Utah sales person contacted the Company to purchase a single chop saw (unrelated to a finger joint machine) that may have been for resale. These are the only two instances that I am aware of where the Company's products were purchased for resale in Utah and these instances did not occur through any initiative of the Company.

5. I have also reviewed the Company's records concerning advertising and sales calls for the last three years. The Company has employed no sales people in Utah and no sales representatives have been sent to Utah during this time period. To my knowledge, the Company has never had a single employee that was located in Utah. Our records also show no contracts were written in Utah during the last three years.

6. The Company has occasionally placed small advertisements in as many as four trade publications during the

last three years that may or may not have reached Utah. The advertisements have not dealt with finger joint machinery similar to the fingerjoint machine used by Weathershield.

7. The company generally sells directly to customers who use our parts or machinery. I am unaware of sales to any entity that has been distributing or reselling our products to Utah customers. To my knowledge, the Company has never utilized a distribution network directed at Utah. The Company generally ships its products directly to its customers by common carrier.

8. I have reviewed the Company's records concerning previous litigation and collection efforts. The Company has no record of any previous involvement in a court case in Utah or of utilizing Utah's services and resources for debt collection or other purposes.

9. To my knowledge, my review of the Company's records is representative of the Company's contacts with Utah since the Company's inception. I am unaware of any time period when the Company's sales in Utah or contacts with Utah would have been either numerically or proportionately greater than the time period that I examined.

10. I have examined the Company's records regarding the sale of fingerjoint machine, Model 3470, Serial No. 6-3470-Q-4-10771. This machine was made for and sold to Pickering Lumber Company in Standard, California. The machine was shipped to Pickering on July 9, 1971, as indicated by the copy of the invoice

attached hereto as Exhibit "A". I am unaware how the machine came into Weathershield's possession in Logan, Utah.

Generally, the Company has not sent service personnel to perform maintenance or service on machinery in Utah. However, in July of 1982, Weathershield contacted the Company and requested it to send a service representative to examine certain machinery in Weathershield's possession in Utah that had been manufactured by the Company. One of the items examined was finger joint machine, Model 3470, Serial No. 6-3470-Q-4-10771, that Weathershield had somehow acquired. This machine had been substantially modified during the ten-year period since it had left the Company's possession. The service representative discovered that the biggest problem with the machine involved the back-up lugs coming out of square causing the wood to pop out. The machine had been modified to use Zeigelmeyer lugs rather than the lug system that the Company originally provided. The service representative advised Weathershield that the lug system needed to be reworked to hold squareness on before the machine would perform properly. The service representative did not perform any service or work on the machine and merely responded to Weathershield's inquiry concerning the operation of the machine. A copy of the service representative's report is attached as Exhibit "B". The highlighted portion deals with the fingerjoint machine.

To my knowledge, during the last nine years this is the only occasion when the Company has sent a service representative to Utah.

DATED this 11 day of April, 1990.

Gail Y. Cromeens

GAIL Y. CROMEENS

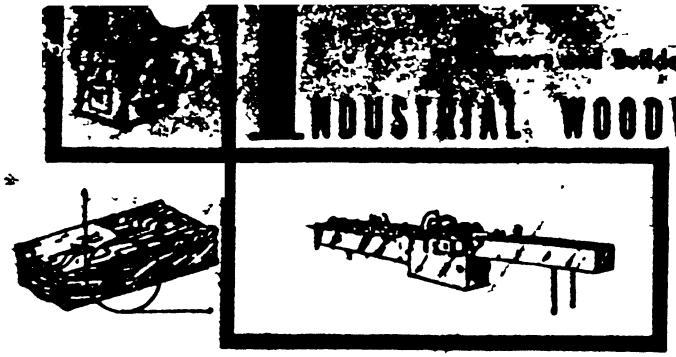
SUBSCRIBED AND SWORN to before me this 11th day of April, 1990.

Bridget M. Henley

NOTARY PUBLIC
Residing at: Garland, Texas

My Commission Expires:

3-5-93



"Designers and Builders of Special Purpose Machinery"

INDUSTRIAL WOODWORKING MACHINE CO., INC.

549 NORTH FIFTH STREET
GARLAND, DALLAS COUNTY, TEXAS
TEL. AR. 6-6567 - P. O. BOX 1466

SHIP TO: Pickering Lumber Company
Stanislaus, California 95375

PURCHASE ORDER NO. 2660
INDUSTRIAL QUOTATION NO. 72-1008 (3-1-72) #1660
INDUSTRIAL LAYOUT DWG. NO.

SHIP VIA: Motor Freight

DATE ISSUED	PART OR MODEL NO.	SERIAL NUMBER	SCHEDULED SHIPPING DATE	DATE SHIPPED	DATE COMPLETED
4-20-72	6-24700	6-2470-6-4-20972	6-11-72	7-9-72	

QUANTITY	DESCRIPTION	UNIT SELLING PRICE	TOTAL SELLING PRICE
	7-2		

ITEM #1
Model 6-24700 Dual Finger Joint Shaper less starter equipment. Industrial to furnish special machine mounted cabinet for misc. controls, junction boxes and wiring diagram. Detailed information to be furnished later.
ADD for 15 HP outboard motors in lieu of 10 HP
ADD for 5 HP twin run motors in lieu of 3 HP
ADD for legs furnished on 7" centers
ADD for 2 direct 3 HP routing arm assemblies, [redacted] positions #2, 4, 5, less starter equipment
ADD for [redacted] Assembly
Mtr. S/N: 527569PC 10 HP, Mfr.: LIMA MOTOR
Mtr. S/N: IL33M3D2163-3L-15 15 HP, Mfr.: SPINDLE MOTOR (Pos. 7)
Mtr. S/N: IC15M3A4463-D3-R-15 15 HP, Mfr.: SPINDLE MOTOR (Pos. 6)
Mtr. S/N: I15M3D2163-R-D3 5 HP, Mfr.: SPINDLE MOTOR (Pos. 1)
Mtr. S/N: IL5M3D2163-D-D3 5 HP, Mfr.: SPINDLE MOTOR (Pos. 2)
Mtr. S/N: I3M3D2163-D-D3 3 HP, Mfr.: SPINDLE MOTOR (Pos. 3)
Mtr. S/N: I3M3D2163-R-D3 3 HP, Mfr.: SPINDLE MOTOR (Pos. 4)
Mtr. S/N: I3M3D2163-D-D3 3 HP, Mfr.: SPINDLE MOTOR (Pos. 5)
Wired: 440/60/3

(CONT'D.)

THIS WORK ORDER AUTHORIZES MANUFACTURE OF ABOVE ITEMS

FORM #105

[redacted] WOODWORKING MACHINE CO., INC.

549 NO. 5th ST. • P. O. BOX 1466 • BR 6-8567 • GARLAND, TEXAS 75040

DATE 7-11

TO. _____

Pickering Lumber Company
Standard, California 95375

SHIP TO

Same

ACCT. NO.	DATE	INV. NO.	CUSTOMER ORDER NO.	SHIP VIA	
07107	7-9-71	9534	2460	Time D C	[redacted]

QTY	EACH	PRICE TO	EXT. TO	DESCRIPTION	AM
1				Model PCH1 3-1/2-15-HP Powered Case Roll Conveyor	$ 3,1
1				Model 518 Two Post Pallet Tilt Life less starter	2,9
1				Model S-3453 Spreader Conveyor less starter equipment	1,9
1				Model 12L18-80 Gross Belt Conveyor less starter equip	1,2
1				Model 8770 Cross over Finish	
1				Model 6-3700 Dual Finger Joint Shaper less starter ADD for 15 HP cutterhead motors in lieu of 10 HP ADD for 5 HP trim saw motors in lieu of 3 HP ADD for legs furnished on 9' centers ADD for three 3 HP guiding saw assemblies ADD for No-Mark Assembly	32,7
4	1,318.25			10-1/2" s.c., 8 knife Finger joint cutterheads	5,2
1				Model S-3518 Rotary Slip Tilt	1,7
1				Model ASP-28 [redacted] Feeder less starter equip	5,5
1				Model S-[redacted]-16 Assembly machine less starter equip ADD for 1-1/2 HP infeed motor in lieu of 1 HP ADD for 7-1/2 HP saw motor in lieu of 5 HP	16,2
1				Model S[redacted]608 Side Head Jointing Assembly less starter	9
2	195.00			3" long x 6 knife pocket type, x 6" s.c. round cutterhead, 1-1/4" straight bore with beveled ends	3

Thank You!

— AFTER QUANTITY INDICATES BACKORDERED PART

CUSTOMER FILE COPY

WOODWORTHING MACHINE CO., INC.

549 NO. 5th ST. P. O. BOX [illegible] BR 6-8567 GARLAND, TEXAS 75040

TO.

Pickering Lumber Company
Standard, California 95375

SHIP TO.

Same

ACCT. NO.	DATE	INV. NO.	CUSTOMER ORDER NO.	SHIP VIA	
07107	7-9-71	9534	2460	Time D C	

QTY	EACH	BIN NO	PART NO	DESCRIPTION	AMOUNT
1				Model Mill Retrim Saw Attachment less starter equip	$ 1,140.00
1					
1				Model [illegible] Cutterhead Grinder	1,860.00
					41,273.59
				5% State Sales Tax	2,073.41
					$ 45,547.00
				Less Down Payment	21,682.80
					$ 65,864.79

Thank You!

TERMS: 50% of total order due upon receipt of invoice.....$ 42,773.59

Balance due on or before 8-15-71 ..... 21,091.20

— AFTER QUANTITY INDICATES BACKORDERED PART

CUSTOMER FILE COPY

INDUSTRIAL WOODWORKING MACHINE CO., INC.

P. O. BOX 1466 GARLAND, TEXAS

SERVICE REPORT

Lile

6-3470Q-4-10771

July 29 19 82

e WEATHERSHIELD Address Logan, Utah

hines Serviced:

ce Performed:

7/20/82 - Left NICOLAI at Springfield, Oregon 2:45 PM, drove to Eugene. Took plane to Salt Lake City, arriving at 8:00 PM. Met by Bryan Jensen and Jeff Smith. Drove to Logan, Utah -- arrived 11:30 PM.

7/21/82 - In plant at 7:00 AM.

Started checking ripsaw out -- found several electrical parts on the switch console that were bad. Went over the principle of operation of the ripsaw and the function with Bryan and Jeff and the operator.

Main problem seemed to be the electrical console, and synchronization not working on the edger in relation to the rip blades. Started trying to trouble shoot. Found a few sticky valves, and adjustment of new Servo that was installed. Replaced a Skinner valve that actuates the Servo system, and it did not work. Thought there might be another problem -- could not find it -- went back to the new valve that was installed, and found that the new valve was bad. Cleaned the old valve and replaced it -- it worked a few times and then quit. Bryan said they would get another valve and install the next day.

Suggested that they need to replace the switches on the console to get an effective operation.

Met with Mike Anderson (over the finger jointing) and asked him what kind of problems they might be encountering there. Said their biggest problem was the back up lugs not staying square. These are Ziegelmeyer lugs, and he says they square them from one to two times a day -- says he can square them and only run about an hour.

EXHIBIT

INDUSTRIAL WOODWORKING MACHINE CO., INC.

P. O. BOX 1466 GARLAND, TEXAS

SERVICE REPORT

July 29 19 82

WEATHERSHIELD Address Logan, UT

ies Serviced:

Performed: (7/21/82- continued)

Went over the alignment of the machinery. Explained to them that they need to get some lugs that they can hold squareness on. If they do not want to use ours, to rework Ziegelmeyers where they can hold them square.

They were running a slower feed on their 3550 due to lumber not being square, because of back up lugs. Also cutting short lengths due to this same problem. Explained to them that if they would correct this, they could speed the machine up. Mike says that they can feed the machine faster, but they slow it down due to the pop out problems caused by the out of square joints. They said that they would correct this.

They questioned me about running 3/4 x 1-1/4 material on the assembly machine. Said that when they tried to run this it was drooping down in the saw carriage area, and also popping out in the squeeze. Explained to them how to set the squeeze anvils, and that the glue would need to have some tack to it, and get a good pre-squeeze in the roll section to run this.

Talked with John White, plant manager. Explained to him what we had done, and suggested that they need to spend the money on the ripsaw switch gangs to correct the main problems they were having out there.

The people I worked with at Weathershield were:

Bryan Jensen - Maintenance Supervisor

Jeff Smith - Cut, rip and yard foreman

Mike Anderson - finger joint lead man

INDUSTRIAL WOODWORKING MACHINE CO., INC.

P. O. BOX 1466 GARLAND, TEXAS

SERVICE REPORT

te July 29, 19 82

me WEATHERSHIELD Address Logan, UT

achines Serviced:

vice Performed: (7/21/82 - continued)

Departed for Salt Lake City. Arrived Salt Lake City at 6:30. Could not get a flight out of Salt Lake City until 10:00. Departed Salt Lake City at 10:00, arrived in Dallas at 6:15 Thursday morning.

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing Brief of Appellee to be mailed, postage prepaid, this 15th day of May, 1991, to the following:

James R. Hasenyager
and Martin W. Custen
MARQUARDT, HASENYAGER & CUSTEN
2661 Washington Blvd., #202
Ogden, UT 84401