IN THE STATE OF FLORIDA
SUPREME COURT

UPON CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES WHITE and
ROSANNA SANTINI,

Plaintiffs-Appellants,

-vs-

PEPSICO, INC., a Delaware
corporation,

Defendant-Appellee,

snd

ALUMINUM COMPANY OF AMERICA, a
Pennsylvania corporation d/b/a
ALCOA; and DESNOS & GEDDES, LTD.,
a Dutch Antilles corporation,

Defendants.
_____________________________________/

Case No.: 73,784

United States Court of
Appeals No.: 88-5135

United States District
Court No.: 87-10038-
CIV-KING

BRIEF ON APPEAL ON BEHALF OF
PLAINTIFFS-APPELLANTS. CHARLES WHITE
AND ROSANNA SANTINI

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INDEX OF AUTHORITIES

CASES PAGE

Bloom v A.H. Pond Co, Inc,
519 F2d 1162 (S.D. Fla. 1981) 13

Cassidv v Ice Oueen Int'l, Inc,
390 SO2d 465 (Fla. 3rd DCA (1980) 10, 11

Confederation of Canada Life Insurance Co v Veaa v Arminan,
144 SO2d 805 (Fla. 1962) 11

Cert. denied, 320 SO2d 392 (Fla. 1975) 11

Dombroff v Eaale-Picher Industries, Inc,
450 SO2d 923 (Fla. 3rd DCA 1984) 10, 12

Durkin v Costa Armatori,
S.P.A. 481 SO2d 506 (Fla. 3rd DCA 1985) 12

388 SO2d 264, 266 (Fla. 5th DCA 1980) 13

Hoffman v Air India,
393 F.2d 507 (5th Cir. 1968), Cert. denied,
393 U.S. 924, 89 S.Ct. 225, 21 L.Ed.2d 260 (1968) 12

Junction Bit and Tool Co v Institutional Mortaaae Co,
240 So2d 879 (Fla 4th DCA 1970) 9, 11, 14

Killinasworth v Montaomerv Ward and Co,

Manus v Manus,
193 SO2d 236 (Fla. 4th DCA 1966) 13

581 F Supp 1551 (S.D. Fla. 1984) 13

Ranaer Nationwide, Inc v Cook,
519 So2d 1087 (Fla. 3rd DCA 1988) 11

Younablood v Citrus Association of
New York Cotton Exchanae, Inc,
276 SO2d 505 (Fla. 4th DCA 1973) 13

STATUTES

Section 48.081, Fla. Stat. (1973). 2,3,4,5,6,7-10,12,13

Section 48.181 Fla. Stat. (1973). 4,12

Section 48.193 Fla. Stat. (1973). 4,9,12

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STATEMENT OF THE CASE

In this products liability action removed from the 16th Judicial Circuit of Florida to the United States District Court, Southern District of Florida, Southern Division, Plaintiffs Charles White and his wife, Rosanna Santini, appeal from an Order of the United States District Court dismissing the Plaintiffs' claims against Defendant-Appellee Pepsico, Inc. for want of personal jurisdiction, entered on December 4, 1987. The matter is presently before the Florida Supreme Court pursuant to an Order of Certification entered by the United States Court of Appeals, 11th Circuit on February 27, 1989.

This action arose from an accident in Jamaica where, on May 5, 1983, a Pepsi bottle exploded in Mr. White's face, causing him to permanently lose sight in one eye.

On or about April 7, 1987, Plaintiffs filed their Complaint in this matter (see: Complaint). The Complaint was originally filed in the 16th Judicial Circuit of Florida, in and for the County of Monroe. Thereafter, the action was removed to the United States District Court, Southern District of Florida, Southern Division (see: Petition for Removal; Bond for Removal; Notice of Filing Petition for Removal). Jurisdiction in the District Court rested on diversity of citizenship.

On or about July 2, 1987, Defendant, Pepsico, Inc., filed a Motion to Dismiss/Motion to Strike/Motion for More Definite Statement (see: Motion to Dismiss/Motion to Strike/Motion for More Definite Statement and Memorandum). On July 21, 1987, the

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Plaintiffs filed their Brief in Opposition to Defendant Pepsico, Inc.'s Motion to Dismiss/Motion to Strike/Motion for More Definite Statement. Plaintiffs also filed their First Amended Complaint. The Plaintiffs' First Amended Complaint contains allegations of negligence, breach of warranty, strict liability and loss of consortium (see: Plaintiffs' First Amended Complaint).

On or about August 5, 1987, the Defendant, Pepsico, Inc., filed another Motion to Dismiss/Motion to Strike/Motion for More Definite Statement and Memorandum. Thereafter, the United States District Court Judge James L. King entered an Order which referred the motion for a hearing and granted oral argument. On August 24, 1987, Plaintiffs filed their Brief in Opposition to the Defendant's motion.

In its Memorandum of Law, Defendant argued that the Florida long arm statutes applicable to actions accruing prior to April 25, 1984, required a connection between the cause of action and the foreign corporate Defendant's activities in Florida in order for the court to properly exercise personal jurisdiction over that Defendant (see: Memorandum in Support of 'Motion to Dismiss/Motion to Strike/Motion for More Definite Statement).

In response, Plaintiffs argued that the trial court acquired personal jurisdiction over the Defendant under Section 48.081(3)(1983), Fla. Stat. because, pursuant to that statute, Pepsico was qualified to do business in Florida and was

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properly served through its designated resident agent. The Plaintiffs further argued that Section 48.081(3) did not contain a requirement of connexity between the cause of action being sued upon and the corporate Defendants' Florida business activities (Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss/Motion to Strike/Motion for More Definite Statement).

On September 15, 1987, the United States Magistrate William C. Turnoff issued his report and recommendation (see: September 15, 1987 Magistrate Report). Magistrate Turnoff held that in 1984, the Florida Legislature amended Sections 48.081(5), 48.081(3) and 48.193 Fla. Stat. to eliminate the connexity requirement previously imposed upon jurisdiction conferred by the long arm statutes. The Magistrate further concluded that all causes of actions accruing prior to 1984 must have arisen out of a connection with the foreign Defendant's activities within Florida. Based upon these findings, the Magistrate concluded that the District Court lacked personal jurisdiction over the Defendant. The Magistrate therefore recommended that the Defendant's Motion to Dismiss be granted (see: September 15, 1987 Magistrate's Report).

On September 30, 1987, Plaintiffs filed their Objections to the Magistrate's Report and Recommendation. In objecting the Plaintiffs relied upon case law holding that service of process upon a resident agent of a corporate defendant under

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Section 48.081(3) confers in personam jurisdiction upon the court over the foreign corporation without a showing that the cause of action against the corporation arose out of its activities within the State of Florida. The Plaintiffs further argued that although there are cases holding that connexity is required under Section 48.181 and Section 48.193, the requirement does not apply to jurisdiction obtained pursuant to Section 41.081(3) (Objections to Magistrate's Report and Recommendations dated September 30, 1987).

Thereafter, on October 9, 1987, Pepsico filed its Response to Plaintiffs' Objections. Here, Pepsico argued that Section 481.081(3) was not intended to prescribe manners in which personal jurisdiction may be obtained over a defendant.

On December 4, 1987, Judge King entered an Order accepting and adopting the Magistrate's Report, and thereby dismissing Plaintiffs' claims against Defendant Pepsico, with prejudice (see: December 4, 1987 Order).

Plaintiffs filed an appeal from the December 4, 1987 Order to the United States Court of Appeals, 11th Circuit.

In their Brief on Appeal, dated July 26, 1988, Plaintiffs again emphasized that case law published by the Florida District Court of Appeals uniformly hold that service of process upon a resident agent under then Section 481.081(3) conferred upon Florida courts in personam jurisdiction over the foreign corporation.

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Defendant responded in a Brief dated September 19, 1988, that service upon a resident agent does not confer personal jurisdiction over foreign corporations, absent the required connexity.

Plaintiffs filed their Reply Brief on or about October *6*, 1988, arguing that none of the cases cited by Defendants addressed service upon a resident agent under Section 48.081(3) but, rather, merely interpreted other long arm statutes unrelated to this action.

Oral arguments were conducted at the 11th Circuit in Miami, Florida, on January 9, 1989. Subsequently, on February 27, 1989, the United States Court of Appeals issued its Opinion. The court declined to address the merits of the issue before it and, instead, certified the issue for review before the Florida Supreme Court. (Opinion and Order of Certification, dated February 27, 1989). Particularly, the 11th Circuit certified the following question:

> WHETHER, IN ACTIONS THAT ACCRUED BEFORE 1984, SERVICE ON A REGISTERED AGENT PURSUANT TO FLA. STAT. ANN. SECTIONS 48.081(3) AND 48.091(1) CONFERRED UPON A COURT PERSONAL JURISDICTION OVER A FOREIGN CORPORATION WITHOUT A SHOWING THAT A CONNECTION EXISTED BETWEEN THE CAUSE OF ACTION AND THE CORPORATION'S ACTIVITIES IN FLORIDA.
>
> Opinion and Order of Certification, dated February 27, 1989.

Plaintiffs-Appellants now submit their Brief on Appeal to the Florida Supreme Court.

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SUMMARY OF THE ARGUMENT

Section 48.081 Fla. Stat. - as it existed at the time this action accrued - and the case law interpreting it provide that when a foreign corporation is qualified to transact business and process is served on its designated resident agent, such service confers upon the court in personam jurisdiction over the foreign corporation, even without a showing that the cause of action against the corporation arose out of its activities in the State of Florida. The Magistrate's Report, holding to the contrary, is erroneous in that it relies upon case law interpreting long arm statutes inapplicable to the facts of the instant case. The Order of the United States District Court adopting the Magistrate's Report and dismissing Plaintiffs' cause of action against Defendant Pepsico, Inc. must be reversed, the action must be reinstated and the case remanded to the United States District Court for discovery and other proceedings.

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ARGUMENT

THE UNITED STATES DISTRICT COURT ERRED IN ADOPTING THE MAGISTRATE'S REPORT RECOMMENDING DISMISSAL OF PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION WHERE UNDER FLORIDA LAW, A COURT ACQUIRES PERSONAL JURISDICTION OVER A FOREIGN CORPORATION WHERE THE CORPORATE DEFENDANT IS QUALIFIED TO TRANSACT BUSINESS IN FLORIDA AND THE CORPORATE DEFENDANT'S DESIGNATED RESIDENT AGENT IS SERVED IN FLORIDA.

Defendant was served with process in this action through its appointed resident agent, the CT Corporation, pursuant to then Section 48.081(3), Fla. Stat. At the time this action accrued in May of 1983, Section 48.081(3) (1973) stated in its entirety:

> (1) Process against any private corporation, domestic or foreign, may be served;
>
> (a) On the president or vice-president, or other head of the corporation;
>
> (b) In the absence of any person described in paragraph (a), on the cashier, treasurer, secretary, or general manager;
>
> (c) In the absence of any person described in paragraph (a), or paragraph (b), on any director; or
>
> (d) In the absence of any person described in paragraph (a), paragraph (b), or paragraph (c), on any officer or business agent residing in the state.
>
> (2) If a foreign corporation has none of the foregoing officers or agents in this state, service may

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be made on any agent transacting business for it in this state.

(3) **As an alternative to all of the foregoing, process may be served on the agent designated by the corporation under S. 48.091. However, if service cannot be made on registered agent because of failure *to* comply with S. 48.091, service of process shall be permitted on any employee at the corporation's place of business.**

(4) This section does not apply to service of process on insurance companies.

(5) When a corporation has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to this business being transacted within the state.

Fla. Stat. Annot., Section 48.081 (1973).

In several published cases, the Florida District Court of Appeals has addressed the issue of whether service of process upon a foreign corporate defendant's resident agent pursuant to this statute confers personal jurisdiction upon a Florida court over the corporation. In all these instances, the Court of Appeals has uniformly held that service upon a resident agent does indeed establish in personam jurisdiction, notwithstanding

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the language of other long arm statutes which, at the time this action accrued, required connexity - or a nexus between the claim and the corporation's activities within the state (see, e.g., Section 48.193, Fla. Stat.).

In Junction Bit and Tool Co v Institutional Mortgage Co, 240 So2d 879 (Fla 4th DCA 1970), the Florida Court of Appeals confronted the same issue. The Court stated as follows:

> Under F.S. 1969, Sec. 48.091, F.S.A., when a foreign corporation qualified to transact business in this state, it must appoint a resident agent upon whom process may be served F.S. 1969, Sec. 48.081(3), F.S.A., provides that process may be served on a foreign corporation by serving such resident agent. The question presented here is whether service of a summons on such an agent under the authority of F.S. 1969, Sec. 48.081(3), F.S.A., confers on the court in personam jurisdiction over the foreign corporation without a showing that the cause of action against the corporation arose out it activities in the State of Florida. We answer the question in the affirmative.

240 So2d at 880-881 (Emphasis added).

Interestingly, the Junction Bit and Tool Court distinguished case law requiring connexity under unrelated long arm statutes on the basis that those cases involved foreign corporations which had neither qualified to do business in Florida nor appointed a resident agent for service of process. In such an instance, long arm statutes required connexity in order to satisfy due process considerations. 240 So2d at 881-882. But, where a resident agent is appointed for the special purpose of receiving service of process, service upon the agent

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will adequately notify the corporation of the suit and provide it with an opportunity to defend. Moreover, minimum contacts would be "patently established" under such circumstances. Hence, due process concerns are nonexistent. Id.

The identical issue was presented to the Court of Appeals in Cassidy v Ice Queen Int'l. Inc, 390 So2d 465 (Fla. 3rd DCA (1980). In that case, the trial court had granted defendant's motion to dismiss based upon lack of personal jurisdiction. However, on appeal, the Court of Appeals reversed and stated as follows:

> The defendant was qualified to do business in Florida and was properly served through its designated resident agent in Leon County. It was, therefore, plainly subject to the jurisdiction of the trial court.
>
> 390 So2d at 466.

Dombroff v Eagle-Picher Industries, Inc, 450 So2d 923 (Fla. 3rd DCA 1984), Pet. for Rev. Den. 458 So2d 272 (Fla. 1984), is also instructive. In that case, the court was again confronted with a foreign corporation which was qualified to do business in Florida and which had appointed a resident agent for receipt of service of process. The Court of Appeals reversed the order of summary judgment entered in favor of the defendant and stated as follows:

> (1) The trial court acquired personal jurisdiction over the defendant corporation herein under Sec. 48.081(3), Fla. State. (1981), because: (a) The said corporate defendant was qualified to do business in Florida, and (b) The corporate defendant's designated

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> resident agent was served in Dade County, Florida; Cassidv v Ice Oueen, Int'l, Inc, 390 So2d 465 (Fla. 3d DCA 1980); Junction Bit and Tool Co v Institutional Mortaaae Co, 240 So2d 879 (Fla. 4th DCA 1970); (2) this result is not changed by the fact that the cause of action sued upon: (a) does not arise from business activities conducted by the defendant corporation in Florida, Confederation of Canada Life Insurance Co v Veaa y Arminan, 144 So2d 805 (Fla. 1962); Killinasworth v Montaomerv Ward and Co, 327 So2d 50 (Fla. 2d DCA 1976), Crown Colony Club, Ltd. v Honecker, 307 So2d 889, 891 (Fla. 3d DCA) Cert. denied, 320 So2d 392 (Fla. 1975); Junction Bit and Tool. Co v Institutional Mortaaae Co, supra, at 881, and (b) arises from the defendant's business activities in the State of Maryland...
>
> 450 So2d at 923-924.

Most recently, after the 1984 amendment to the long arm statutes were enacted, the District Court of Appeals in Ranger Nationwide, Inc v Cook, 519 So2d 1087 (Fla. 3rd DCA 1988) addressed the identical jurisdictional issue and, rather than relying on the amendment to the statutes which terminated the connexity requirement where service was not obtained upon a resident agent, cited me-amendment case law and held:

> It is well-settled that a foreign corporation which voluntarily registers and qualifies to do business in Florida is subject to the process of our courts, no matter what the nature of the claim or its lack of co-called "connexity" with its Florida business.

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> 519 So2d at 1088, citing Hoffman v **Air India**, 393 F.2d 507 (5th Cir. 1968), Cert. denied, 393 U.S. 924, 89 S.Ct. 225, 21 L.Ed.2d 260 (1968); Durkin v Costa Armatori, S.P.A. 481 So2d 506 (Fla. 3rd DCA 1985); Eaale-Picher Industries, Inc v Proverb, 464 So2d 658 (Fla. 4th DCA 1985); Dombroff v Eaale-Picher Industries, Inc, 450 So2d 923 (Fla. 3rd DCA (1984), Pet. for Review Denied, 458 So2d 272 (Fla. 1984).

Here, Defendant Pepsico relies upon the same argument which was squarely rejected in all the foregoing cases: that service upon a foreign corporation's resident agent does not confer in personam jurisdiction over that corporation absent connexity.

Similarly, the report of recommendation by the United States Magistrate erroneously held:

> In all actions accruing prior to the 1984 Amendment under Florida law, there must be a connection between the cause of action and the defendant's activities in Florida. Absent this connexity, a complaint is fatally defective and must be dismissed for lack of personal jurisdiction. See, e.g., Firestone Steel Products Co of Canada v Snell, 423 So2d 979 (Fla. 3rd DCA 1982).
>
> Magistrate's Report, dated September 15, 1987, p 2.

Curiously, the Magistrate's holding was taken almost verbatim from the Defendant Pepsico's Memorandum of Law in Support of its Motion to Dismiss. However, it should be noted that the opinion cited in the quoted portion of the report only addresses Section 48.181 (1973) and Section 48.193 (1973). It does not address Section 48.081(3), nor provide any support for the statement that actions accruing prior to the 1984

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statutory Amendments required a connection between the cause of action and the defendant's activities in Florida. Indeed there are no cases which provide support for this statement and Defendant's argument.

In the same regard, it is expected that Defendant Pepsico will rely upon the same authority which it cited to the United States Court of Appeals, in particular, Firestone Steel Products of Canada v Snell, supra, Pollard v Steel Systems Construction Co, Inc, 581 F Supp 1551 (S.D. Fla. 1984), General Tire and Rubber v Hickory Springs, Mfg, 388 So2d 264, 266 (Fla. 5th DCA 1980), Manus v Manus, 193 So2d 236 (Fla. 4th DCA 1966), Bloom v A.H. Pond Co, Inc, 519 F2d 1162 (S.D. Fla. 1981), and Youngblood v Citrus Association of New York Cotton Exchange, Inc, 276 So2d 505 (Fla. 4th DCA 1973).

Significantly, however, in none of these cases did the court address the adequacy of service upon a resident agent under Section 48.081(3). Rather, Defendant's cases pertained to different modes of service under different and irrelevant statutes, e.g., service upon an officer of a company.

Moreover, service upon a foreign corporation's resident agent is treated as an exception to the connexity requirement because of the special status a resident agent enjoys on behalf of the corporation. When a foreign corporation employs a resident agent to accept service within a state, that corporation has anticipated and implicitly consents to be sued within that jurisdiction due to the amount of business it

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conducts therein. Consequently, it is not necessary to impose the rigid connexity requirement in such actions.

This may be distinguished from service upon, *e.g.*, an officer of the corporation who has entered the jurisdiction for a limited time and purpose. In the latter instance, the corporation has not implicitly consented to subjecting itself to the jurisdiction of courts of that state and does not necessarily have the requisite minimum contacts to satisfy due process considerations. See, *e.g.*, Junction Bit, *supra*.

In sum, the District Court of Appeals has uniformly held that service of process upon a resident agent under Section **48.081(3)** confers personal jurisdiction over a foreign corporation without a required showing of a connection between the cause of action and the Defendant's business activities within the State of Florida. Moreover, the case law relied upon by Defendant up until this time and anticipated to be relied upon in this appeal do not address service of process effectuated in this special matter. Moreover, the Magistrate's Report, holding to the contrary, is based upon case law applicable to long arm statutes unrelated to service of process upon a foreign corporation's resident agent. For these reasons, the Order of the United States District Court which adopted the Magistrate's Report and dismissed this action must be reversed, the action must be reinstated and the matter remanded to the United States District Court for discovery and other further proceedings.

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CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants, Charles White and Rosanna Santini, respectfully request this Honorable Court to reverse the December 4, 1987 Order of the United States District Court, reinstate this action and remand the matter to the United States District Court for further proceedings.

Respectfully submitted,

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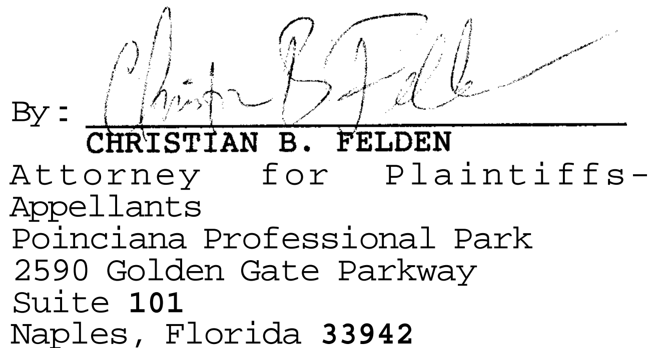

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