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Jurisdiction Exists Over Taiwanese Company, Oregon Court Says, Distinguishing *Nicastro*

The Taiwanese manufacturer of a wheelchair component will seek to put its personal jurisdiction defense to a wrongful death suit back before the U.S. Supreme Court following an adverse ruling in Oregon, the company's attorney said August 1 (*Willemsen v. Invacare Corp.*, Ore., No. SC S059201, 7/19/12).

The state supreme court, responding to the U.S. Supreme Court's request that it examine the case in light of its June 2011 decision in *J. McIntyre Machinery Ltd. v. Nicastro,* held July 19 that Oregon courts may exercise jurisdiction over the Taiwanese company, China Terminal & Electric Corp., which is blamed for a fatal fire.

The Oregon Supreme Court looked at CTE's sales data in rejecting the company's challenge to jurisdiction on due process grounds. It used the data to differentiate the case from the one decided by the U.S. Supreme Court, as other courts have also done.

In affirming the lower court's conclusion that claims against CTE by the sons of decedent Karlene J. Willemsen could proceed, the unanimous state supreme court focused on Justice Stephen G. Breyer's concurring opinion in *Nicastro*, 131 S. Ct. 2780 (2011) (39 PSLR 687, 7/4/11). There, Breyer expressed the ''narrowest grounds'' for the decision—the appropriate focus in a splintered decision like *Nicastro*, the Oregon court said.

Breyer found British manufacturer J. McIntyre's single sale of a machine in New Jersey, via an Ohio distributor, insufficient to establish minimum contacts with New Jersey, where an injured worker sued it, through a ''regular course of sales'' there or by other means.

By contrast, the sale of 1,102 Invacare Corp. wheelchairs with CTE battery chargers in Oregon over a two-year period constitutes a regular course of sales, the state supreme court said here in an opinion by Justice Rives Kistler.

The exercise of jurisdiction over CTE by Oregon courts is also reasonable, the court said, again addressing Breyer's concern in *Nicastro* about small manufacturers with few product sales in a state.

Jonathan M. Hoffman, an attorney for CTE, told BNA that CTE will file a petition for review with the U.S. Supreme Court.

Professor Nicholas Wittner of Michigan State University's School of Law told BNA Aug. 1, ''Nobody knows what Justice Breyer meant; I struggle with what he meant. The guidance isn't there. Does *Nicastro* really help us in deciding this case? It's very difficult.''

Referring to the plurality's comment that several more J. McIntyre machines may have reached New Jersey, Wittner added, ''All we know is you need something more than five machines. What more, we don't really know.''

Another case the U.S. high court remanded for state court review in light of *Nicastro*, *Dow Chemical Canada ULC v. Fandino* (39 PSLR 690, 7/4/11), is back before the justices in Washington, D.C., after a no-jurisdiction ruling in the California Court of Appeal, Second Appellate District (*Dow Chemical Canada ULC v. Superior Court of Los Angeles County*, 202 Cal. App. 4th 170 (Cal. Ct. App. 2011)). The certiorari petition in that case was filed July 16, 2012.

Some other courts applying *Nicastro* have taken the same approach as the Oregon Supreme Court. In December 2011, an Illinois appeals court distinguished *Nicastro* based on the volume of sales (40 PSLR 75, 1/16/12), as did a federal court in Alabama in April 2012 (40 PSLR 509, 4/30/12).

The Oregon Supreme Court has engaged in a back-and-forth with the U.S. Supreme Court before, notably in a tobacco case over punitive damages, *Williams v. Philip Morris Inc.* (37 PSLR 380, 4/6/09).

''It's interesting to note that there seems to be a pattern and practice,'' Wittner said, ''when the Supreme Court grants [certiorari] and vacates a decision of the Oregon Supreme Court, the Oregon Supreme Court goes right back and decides what it originally decided.''

Plaintiffs' Mother Could Not Escape Fire. Karlene Willemsen, an Oregon resident with multiple sclerosis and limited mobility, purchased an Invacare motorized wheelchair with a CTE battery charger, according to the court and U.S. Supreme Court briefs. The record did not indicate whether the chargers were integrated into the wheelchairs, or separate but supplied together with the wheelchairs, the court said. In February 2008, a fire in Willemsen's home caused her death.

Her sons, Jeffrey Willemsen and James Willemsen, sued a number of entities, including Invacare and CTE. Jeffrey Willemsen also represented his mother's estate. The Willemsens asserted design defect and negligence claims against CTE, alleging that the battery charger caused the fire, spreading from the wheelchair to the bed where Karlene Willemsen died.

CTE sought dismissal for lack of personal jurisdiction, saying its sale of battery chargers to Invacare in Ohio did not show it purposefully availed itself of the privilege of doing business in Oregon. The trial court denied the motion and the state supreme court declined to act on CTE's request for a writ of mandamus.

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CTE petitioned the U.S. Supreme Court for review. In October 2011, the high court granted the petition, vacated the order, and remanded the case to the Oregon Supreme Court with instructions to consider the case in light of *Nicastro* (39 PSLR 1109, 10/10/11).

Minimum Contacts. On remand, the Oregon Supreme Court described the plurality, concurring, and dissenting opinions in *Nicastro*. But only the ''position taken by those [justices] who concurred in the judgmen[t] on the narrowest grounds'' represents a holding of the court in fragmented cases, according to guidelines set down in U.S. Supreme Court precedents, the Oregon court said.

''Justice Breyer's rationale was narrower than the plurality's and, as a result, controls our resolution of this case on remand,'' Kistler wrote for the Oregon Supreme Court.

And Breyer was troubled by the New Jersey Supreme Court's ruling in favor of jurisdiction over J. McIntyre because there was ''no 'regular . . . flow' or 'regular course' of sales in New Jersey,'' and no other effort by the British manufacturer to market and sell in New Jersey, Kistler said, quoting Breyer's concurrence.

''In our view,'' Kistler wrote, ''the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a ' ''regular . . . flow'' or ''regular course'' of sales' in Oregon. . . . The sale of the CTE battery charger in Oregon that led to the death of plaintiffs' mother was not an isolated or fortuitous occurrence.''

CTE's argument relied on the plurality opinion in *Nicastro* but it is Breyer's opinion that is controlling, the court said.

''Following [Breyer's] opinion, we hold that the volume of sales in this case was sufficient to show a 'regular course of sales' and thus establish sufficient minimum contacts for an Oregon court to exercise specific jurisdiction over CTE,'' Kistler wrote.

The court rejected CTE's arguments against minimum contacts based on *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the U.S. Supreme Court's splintered 1987 personal jurisdiction case involving a Japanese manufacturer of tire valves.

First, Kistler said, the holding of the *Asahi* court—that no jurisdiction existed over Asahi Metal Industry Co.—was on reasonableness grounds, not minimum contacts. The justices did not hold Asahi's contacts insufficient for jurisdiction in that case, he said.

Also, although there was some discussion of Asahi's sales of valve assemblies to a Chinese company, it was unclear how many Asahi valve assemblies were sold in California, making it unhelpful for purposes of comparing the facts of the cases, Kistler said.

Jurisdiction Found Reasonable. Turning to the reasonableness of exercising jurisdiction, Kistler said Oregon has ''a strong interest in providing a forum for its residents who are injured in this state to recover for their injuries.''

And Breyer's concerns in *Nicastro* about small manufacturers are not matched in this case, Kistler said. CTE is not necessarily small, with over $2 million in revenue just from Invacare over a two-year period, he said.

CTE's contract with Invacare promised compliance with federal, state and local laws. ''CTE thus voluntarily undertook to bring its battery chargers into compliance with the laws of the various states in which Invacare sold them,'' Kistler wrote.

Finally, as evidenced by a contractual promise to obtain insurance, ''CTE anticipated the need to defend against the very sort of claim that plaintiffs have brought here,'' he said.

Consequently, ''[r]equiring CTE to appear in Oregon does not offend traditional notions of fair play and substantial justice and thus does not preclude the trial court from exercising jurisdiction over CTE as a result of its contacts with this forum,'' Kistler wrote.

Wittner criticized some of the court's reasoning, calling the company's contractual promises to comply with laws and to obtain insurance ''a thin reed on which to establish jurisdiction.''

Attorneys for the plaintiffs could not be reached for comment.

Kathryn H. Clarke, who practices in Portland, Ore., and Jeffrey A. Bowersox of the Bowersox Law Firm PC in Lake Oswego, Ore., represented the Willemsens.

Hoffman, Joan l. Volpert, and Mary-Anne S. Rayburn of Martin, Bischoff, Templeton, Langslet & Hoffman LLP in Portland represented CTE.

BY MARTINA S. BARASH

The opinion is available at http://op.bna.com/pslr.nsf/r?Open=mbah-8wqt99.

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