

257 Ga. 129
GUST, et al.

v.

FLINT.

No. 44150.

Supreme Court of Georgia.

June 4, 1987.

Georgia buyers of truck brought tort and breach of contract actions against Wisconsin sellers. The Superior Court, Habersham County, Jack N. Gunter, J., dismissed. The Court of Appeals, 180 Ga. App. 904, 351 S.E.2d 95, reversed. After granting certiorari, the Supreme Court, Weltner, J., held that Georgia courts did not have long-arm jurisdiction over Wisconsin sellers who placed advertisement in trade paper published in Nebraska and who were contacted by telephone call from Georgia by Georgia buyers who responded to the advertisement.

Reversed.

Gregory, J., filed a concurring opinion in which Bell, J., joined.

Smith, J., filed dissenting opinion.

Courts ⇐12(2.30)

Georgia courts could not exercise long-arm jurisdiction over Wisconsin sellers of truck and trailer who placed advertisement in trade paper which was published in Nebraska and mailed to Georgia, where it was read by buyer who placed telephone call to sellers in Wisconsin. O.C.G.A. § 9-10-91.

William R. Oliver, Oliver & Oliver, Clarkesville, for Roger W. Gust, et al.

Ernest H. Woods III, Clarkesville, for George H. Flint.

WELTNER, Justice.

George Flint, a resident of Georgia, responded to an advertisement printed in a trade paper published in Nebraska and mailed to Flint in Georgia. Roger Gust and Twin Grove Trailers & Pate Tractor,

Inc., of Madison, Wisconsin, had inserted the advertisement for a customized truck and trailer which attracted Flint's interest, and by long distance telephone the parties struck a bargain, pursuant to which Flint sent a \$6,000 deposit toward the purchase price of the truck and trailer. After the deposit was received the sellers informed Flint that they could not deliver the truck and trailer he had ordered and attempted to persuade Flint to accept a substitute. When Flint refused to do so, the sellers refused to return his deposit.

Flint filed suit against the sellers in Georgia, predicated personal jurisdiction over the Wisconsin parties on OCGA Section 9-10-91, this state's long-arm statute. The out-of-state defendants, who were served personally in Wisconsin, moved to dismiss Flint's complaint, contending that under Georgia's long-arm statute they were not subject to personal jurisdiction in this state. The affidavits filed in support of the motion to dismiss, which were not traversed, showed that the defendants: (1) did not regularly do business or solicit business within the State of Georgia, (2) did not engage in any persistent course of conduct within the State of Georgia, (3) did not derive substantial revenue from services rendered within the State of Georgia, (4) the only business done by them in the State of Georgia is the transaction which is the subject of the instant action, (5) the only communications or connection they have had with the State of Georgia had been via telephone communication, (6) that neither they nor any of their employees have ever been located within the State of Georgia, (7) the corporate defendant is not domiciled in or authorized to do business in the State of Georgia and does not manufacture goods or produce any services in the State of Georgia. Thus, they demonstrated that they had done none of the acts which OCGA Section 9-10-91 requires as a basis for personal jurisdiction. (Flint later amended his complaint to add a claim for breach of contract.)

The trial court sustained the motion to dismiss. The Court of Appeals reversed, holding that the trial court had personal jurisdiction of the tort claim but not the

claim for breach of contract, *Flint v. Gust*, 180 Ga.App. 904, 351 S.E.2d 95 (1986). We granted certiorari to determine whether the issue in this case is controlled by *Coe & Payne Co. v. Wood-Mosaic Corp.*, 230 Ga. 58, 195 S.E.2d 399 (1973), and *Clarkston Power Flow, Inc. v. Thompson*, 244 Ga. 300, 260 S.E.2d 9 (1979), that is to say, by a literal construction of Georgia's long-arm statute.

The un rebutted affidavits filed in support of the out-of-state defendants' motion to dismiss clearly establish that the defendants have done none of the acts set forth in OCGA Section 9-10-91 which must be done in order to subject them to personal jurisdiction of a Georgia court. We need not discuss the relative merits of a "New York rule" or an "Illinois rule." The rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction. Where, as here, it is shown that no such acts were committed, there is no jurisdiction.

Judgment reversed.

All the Justices concur, except SMITH, J., who dissents.

GREGORY, Justice, concurring.

I agree with the judgment of the majority opinion and its analysis. However, I suggest there may be a valid reason to pursue the relative merits of the "New York rule" versus the "Illinois rule." To do so might tend to focus public attention on the contrary philosophies underlying each. For my part, I fail to see why Georgia would not want its courts to have the maximum jurisdiction permissible within constitutional due process. A legislative act simply extending the jurisdiction of the Georgia courts to the maximum limit permitted within the restraints of due process of law would accomplish this result.

I am authorized to state that Justice BELL joins in this concurring opinion.

SMITH, Justice, dissenting.

Under our Long-Arm Statute, OCGA § 9-10-91, as interpreted by the majority today, a civil defendant from another state who has committed the intentional tort of fraud against a citizen of this state is better off than a defendant from another state who sends a negligently manufactured product to Georgia. Unfortunately, it may appear that we punish carelessness but only wink at outright deception. We should not send the wrong message to those who would launch deceptive business practices into Georgia from afar.

As Justice Gregory states in his concurrence, Georgia should have a Long-Arm Statute that fits the contours of the limits of constitutional due process. Citing *Coe and Payne Co. v. Wood-Mosaic Corp.*, 230 Ga. 58, 195 S.E.2d 399 (1973), the Fifth Circuit Court of Appeals noted that a non-resident "who simply places [a] product in the stream of commerce with reason to anticipate that it may find its way into the forum state may well be amendable to service of process if as a matter of state policy the applicable long-arm statute undertakes to go that far." *Thorington v. Cash*, 494 F.2d 582, 586-87 (5th Cir.1974). The *Thorington* court went on to state, "[w]e see no reason why the same principle is not equally applicable when a non-resident sends material misrepresentations into the forum state with the intention that they be relied upon and where they are in fact relied upon by a resident of the forum state to his detriment. Unlike many of the stream of commerce products liability cases in which the non-resident defendant merely has reason to anticipate that the product would enter the forum state, *Cash*, in a complaint that fully meets F.R.Civ.P. 8(a), is alleged to have personally transmitted the misrepresentations into Georgia either by mail or telephone or both." *Id.* at 587.

While the advertising campaign in this case could well bring the appellants within the range of our long-arm statute under an interpretation similar to that made in *Thorington*, supra, the direct telephone contact and negotiations certainly should. I would

follow such a broad interpretation and affirm the opinion of the Court of Appeals.



257 Ga. 211
STEWART

v.

The STATE.

No. 44112.

Supreme Court of Georgia.

June 4, 1987.

Reconsideration Denied.

Defendant was convicted in the Superior Court, Douglas County, Robert J. James, J., of murder. Defendant appealed. The Supreme Court, Bell, J., held that: (1) evidence was sufficient to sustain conviction; (2) defendant was not entitled to charge on retreat; (3) defendant was not entitled to charge on lawful mutual combat; and (4) defendant was not entitled to charge on voluntary manslaughter.

Affirmed.

Hunt J., filed a dissenting opinion in which Clarke, P.J., joined.

1. Homicide ⚡250

Evidence was sufficient to sustain conviction for murder when defendant stabbed victim during fight.

2. Criminal Law ⚡822(1)

Charge of malice, in context of overall charge to jury that State had burden of proving every element of crime beyond a reasonable doubt, was sufficient.

1. The crime occurred on January 17, 1986, and Stewart was indicted on April 11, 1986. Stewart was tried from May 27 to June 2, and on June 2 the jury returned its guilty verdict. Stewart filed a motion for new trial on June 11, and the court reporter certified the transcript on July 8, 1986. The hearing on Stewart's motion for new trial was held on September 23, 1986, and Stewart filed his notice of appeal on October 15.

3. Criminal Law ⚡814(8)

Defendant was not entitled in murder prosecution to charge on retreat in the absence of evidence of that issue.

4. Homicide ⚡309(6)

Evidence in murder prosecution did not warrant a charge on mutual combat; there was no evidence that victim was armed with deadly weapon at time of fight nor was there any evidence that defendant and victim mutually agreed to fight with deadly weapons.

5. Homicide ⚡309(3)

Defendant was not entitled to charge on voluntary manslaughter in murder prosecution where defendant testified that he was not mad at victim and his defense was justification, not provocation.

Kenneth W. Krontz, Edwards and Krontz, P.C., Douglasville, for Richard Calvin Stewart.

Frank C. Winn, Dist. Atty., Douglasville, J. David McDade, Asst. Dist. Atty., Michael J. Bowers, Atty. Gen., Dennis R. Dunn, Asst. Atty. Gen., for the State.

BELL, Justice.

The appellant, Richard C. Stewart, was convicted of the murder of Carlton Bowen and received a life sentence. He now appeals, and we affirm.¹

At about 7:00 p.m. on January 17, 1986, the victim and his younger brother, Melvin Bowen, went to the Cat's Den Teen Center in Lithia Springs, Georgia. Upon arriving the victim saw Michelle Mayro in the parking lot of the Cat's Den. Mayro was crossing the parking lot with Stewart and two of his friends, Klenneth Montgomery and Lathan Slaughter. They were going to a convenience store located nearby. The victim, who had previously met Mayro, asked

The trial court denied Stewart's motion for new trial on November 5, 1986. The case was docketed in this court on November 25, 1986, and submitted for decision on January 9, 1987. We note that the fact that Stewart's notice of appeal was prematurely filed does not operate to defeat his right of appeal. *Gillen v. Bostick*, 234 Ga. 308(1), 215 S.E.2d 676 (1975).