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COURT OF APPEALS

STATE OF NEW YORK

DANIEL WILLIAMS AND EDDIE WILLIAMS,

Appellants,

-against-

NO. 25

BEEMILLER, INC., ET AL.,

Respondents.

20 Eagle Street
Albany, New York
March 20, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is Williams v. Beemiller. Counsel?

3 MR. LOWY: May it please the court, my name is
4 Jonathan Lowy with Brady. I'm here with Jim Grable of
5 Connors LLP on behalf of plaintiffs-appellants, Daniel and
6 Eddie Williams. May I reserve three minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: Three, sir?

8 MR. LOWY: Three, yes.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. LOWY: Thank you, Your Honors. This case can
11 be decided on one piece of evidence from page 458 of the
12 record. That is where Defendant Brown testifies under oath
13 that before he sold the eighty-five handgun purchase, which
14 included the gun used to shoot Daniel Williams, he's
15 explaining to federal law enforcement his understanding of
16 what would happen with those guns were he to choose to sell
17 them.

18 And what he said is, "Upshaw", who was the buyer,
19 "was planning - - - was going into business that, you know,
20 they planned on opening a store in Ohio, one in Buffalo."
21 "They planned on opening a store in Ohio, one in Buffalo."
22 That was before Defendant Brown made this sale.

23 So that is testimony of him actually considering
24 - - - in personal jurisdiction terms - - - whether to
25 purposefully avail himself of the New York market; and he



1 decided to. He didn't have to. And in fact, another gun
2 dealer - - -

3 CHIEF JUDGE DIFIORE: So is that an expectation -
4 - -

5 MR. LOWY: - - - chose not to - - -

6 CHIEF JUDGE DIFIORE: - - - or speculation? Is
7 that what you're - - -

8 MR. LOWY: It's far more than that - - -

9 CHIEF JUDGE DIFIORE: So why - - - why - - -

10 MR. LOWY: - - - Your Honor. I mean, this is a
11 plan. This is every bit as firm, particularly on summary
12 judgment, as if this were a sale to a legal distributor who
13 was go - - - who also would have a plan - - -

14 JUDGE WILSON: It's a --

15 MR. LOWY: - - - to distribute, that is resell
16 the guns in the New York area.

17 JUDGE WILSON: It's a plan without a license to
18 do that and without a store or even a location. So isn't
19 it somewhat inchoate?

20 MR. LOWY: Well, Your Honor, that goes to the
21 fact that, in fact, this was a gun trafficker. It was an
22 illegal reseller. And that, if anything, helps our case,
23 not hurts it.

24 New York's authority to exert jurisdiction over
25 Brown should not be diminished because Brown chose to deal



1 with someone who was quite obviously an illegal trafficker
2 rather than a legal one.

3 JUDGE WILSON: Except that you're sort of saying
4 that - - - that - - - that Brown knew that what he was
5 being told was a lie. And in which case, how can we rely
6 on it for the guns going to New York?

7 MR. LOWY: On summary judgment, Your Honor, of
8 course the court must look at the record from the - - - the
9 best standpoint for the plaintiff. A court cannot weigh -
10 - -

11 JUDGE STEIN: So - - - so - - -

12 MR. LOWY: - - - credibility in the - - -

13 JUDGE STEIN: - - - so from that standpoint, one
14 way - - - how - - - I think you see - - - what I understand
15 you arguing is, is that Brown knew - - - this is from - - -
16 this is in the light most favorable to the plaintiffs - - -
17 Brown knew that some or all of these guns might someday
18 find their way into the State of New York, right?

19 MR. LOWY: Much stronger - - -

20 JUDGE STEIN: That's what - - -

21 MR. LOWY: - - - than that - - -

22 JUDGE STEIN: - - - that's what - - -

23 MR. LOWY: - - - Your Honor. I mean, this isn't
24 might one day, this is not someone who is saying I'm buying
25 180 Saturday night specials for my personal use, and one

1 day, maybe when I retire, I'm going to resell them.

2 Brown knew from the outset, from his own
3 testimony, that the - - - the - - - these - - - the - - -
4 these sellers were buying inventory. They're - - - the
5 only reason they were buying these - - -

6 JUDGE STEIN: Right, but - - - but - - -

7 MR. LOWY: - - - were to resale - - -

8 JUDGE STEIN: - - - they didn't - - - but they
9 don't know that - - - that that would ever come to
10 fruition, that - - - that store in Buffalo. In fact, as
11 far as we know, it never did come to fruition. So what - -
12 - he - - - he's selling to an Ohio resident, right, who
13 says - - - they have a long conversation, as I understand
14 it - - - that - - - that - - - you know, about opening up a
15 gun shop in Ohio.

16 And then it's sort of an afterthought that he
17 says, you know, and - - - and I'm from - - - I'm originally
18 from Buffalo, and you know what, I - - - I might like to
19 open up a store there too.

20 But when he's selling these guns, he doesn't know
21 if they're going to stay in - - - in Bostic's basement in -
22 - - in Ohio forever or until he opens the store in Ohio or
23 maybe someday he'll open a store in Buffalo.

24 I just - - - I don't see how that is anything
25 more than - - - than speculation.



1 MR. LOWY: A couple things, Your Honor. One is,
2 Brown's testimony is inconsistent. He does not have a
3 story straight. And actually, if - - - in 2005 when he was
4 deposed, he - - - is when he is always mentioning Buffalo
5 as where the - - - the guns could be sold. It's not until
6 2014, the deposition, when personal jurisdiction is at
7 issue, when he begins saying, oh, now I remember, fourteen
8 years later, that the guns were only going to be sold in
9 Ohio.

10 And - - - and Your Honor, the court cannot pick
11 and choose which statement of Brown's to - - - to believe.
12 That's why the - - - the statement on 458 of the record
13 must be accepted. You could ignore all the other
14 statements - - -

15 JUDGE STEIN: You can't take it at - - - no, you
16 can't take it out of context. You don't have to accept
17 every word. You - - - you have to - - - you look at all of
18 the evidence and you view it in the light most favorable to
19 the plaintiff.

20 MR. LOWY: Except - - -

21 JUDGE FEINMAN: Well, and more importantly, his
22 own words is "they plan". People plan a lot of things that
23 never come to fruition.

24 MR. LOWY: But Your Honor, this was a concrete
25 plan. To - - - to reject personal jurisdiction on due



1 process grounds on this record, I think the court would
2 have to say - - -

3 JUDGE FEINMAN: Well - - -

4 MR. LOWY: - - - you need a stronger - - -

5 JUDGE FEINMAN: - - - to - - - to even get to due
6 process, don't you have to first go through the statute and
7 figure out if it satisfies the statute? I mean, I think at
8 the Appellate Division, there was - - - level anyway,
9 originally there was a lot of discussion about whether even
10 the statute in - - - in your Appellate Division briefs - -
11 - was satisfied.

12 MR. LOWY: The Appellate Division found that
13 there was jurisdiction under New York law, and that's issue
14 is not appealed.

15 JUDGE FEINMAN: Well, so - - - so - - -

16 MR. LOWY: So the only issue before the court is
17 whether there's due process.

18 JUDGE FEINMAN: But - - -

19 JUDGE WILSON: Where - - - where do you fit under
20 the statute?

21 MR. LOWY: Well, again, that's not an issue on
22 appeal. But we fit under both - - - as the trial court
23 found - - - both under 302(a) - - -

24 JUDGE FEINMAN: So when you say - - -

25 MR. LOWY: - - - (3)(i) and (ii), both of them.



1 JUDGE FEINMAN: - - - when you say it's not on
2 appeal, how - - - how do you even engage in the due process
3 argument if the statute isn't satisfied?

4 MR. LOWY: Well, the statute was satisfied. The
5 Appellate Court - - - the trial court and the Appellate
6 Division both found it was satisfied. Brown chose not to
7 appeal that decision. Therefore, the only issue before
8 this court is whether exercising New York jurisdiction in
9 this case is contrary to due process.

10 And I would say that - - - that to find that on
11 summary judgment - - -

12 JUDGE FEINMAN: Well, you - - - it's - - -

13 MR. LOWY: - - - the statement that - - -

14 JUDGE FEINMAN: - - - discussed in your briefs
15 here on both sides whether the statute - - -

16 MR. LOWY: It is. On - - - for - - - for
17 context. Because I think it's important for context, but
18 it is not - - - and Brown says in their brief they did not
19 raise the issue on appeal. So it's simply - - - it's
20 simply not a question - - -

21 CHIEF JUDGE DIFIORE: Let's assume it was before
22 us, counsel, under the statute 302(a)(3)(i), where we say
23 "or derives substantial revenue from goods used or consumed
24 in our state", what is the standard for determining
25 "derives substantial revenue"?



1 MR. LOWY: Receives substantial revenue. And
2 Brown received revenue of - - - over a third of his sales
3 in 2000, were of products used - - -

4 JUDGE STEIN: What if it's the total - - -

5 MR. LOWY: - - - used in New York.

6 JUDGE STEIN: - - - sales were \$10, so a third of
7 his sales was \$3.33, is that substantial revenue?

8 MR. LOWY: That would be a different case. Maybe
9 it would. I mean, our case we have - - -

10 JUDGE FAHEY: But that's - - -

11 MR. LOWY: - - - we have 180 guns and - - -

12 JUDGE FAHEY: - - - that's an - - -

13 MR. LOWY: - - - 15,000 dollars.

14 JUDGE FAHEY: - - - that's an interesting
15 question. First on - - - on romanette (i), I thought the
16 Appellate Division - - - you can correct me if I remember
17 wrong - - - ruled in your favor on romanette (i). Is that
18 correct?

19 MR. LOWY: That's correct.

20 JUDGE FAHEY: All right. So they determined, as
21 a matter of fact, that - - - that there was substantial
22 revenue derived here, right?

23 MR. LOWY: Yes.

24 JUDGE FAHEY: All right. So taking it to the
25 next step, Judge Stein raises an interesting point.



1 Obviously one gun would not establish minimum contacts, and
2 10,000 guns would establish anyone's perception of minimum
3 contacts. You'd agree with that? Let's say he sold 10,000
4 guns to Mr. Bostic and - - - and those guns were eventually
5 transported to New York, it'd be really hard to argue that
6 it wasn't, right?

7 MR. LOWY: Yes.

8 JUDGE FAHEY: So our question for us is what
9 constitutes "minimum"; isn't that really what we're down to
10 here?

11 MR. LOWY: Well, I - - - I don't, Your Honor.

12 JUDGE FAHEY: Because you - - - you seem - - -

13 MR. LOWY: Because - - -

14 JUDGE FAHEY: - - - to have some facts in your
15 favor as to minimum. You have the forty-five-minute
16 conversation that he had. You have the 181 guns. You have
17 the thirty-five percent of his 2000 revenue - - - or his
18 2000 sales went to Mr. Bostic and went to the city of
19 Buffalo, and then you have 15,000 in total revenue.

20 So those factors all seem to weigh in your favor.
21 It's not just the conversation. Isn't there more in the
22 record?

23 MR. LOWY: That - - - that is - - - that's
24 absolutely correct, Your Honor.

25 JUDGE FAHEY: Um-hum.



1 MR. LOWY: And - - - and - - - and the due
2 process question for minimum contacts is did Brown
3 purposely - - -

4 JUDGE FAHEY: So is there any - - -

5 MR. LOWY: - - - avail himself - - -

6 JUDGE FAHEY:

7 JUDGE RIVERA: - - - is there any case law - - -
8 is there any New York case anywhere that says that - - -
9 where there's a factual situation where it says that
10 thirty-five percent of your revenue is not enough for
11 minimum due process; that twenty percent isn't enough for -
12 - - for minimum due process - - - minimum contacts for due
13 process?

14 MR. LOWY: Well, just the opposite. I mean,
15 there's LaMarca - - - I believe it was 2.8 percent - - -

16 JUDGE FAHEY: Um-hum.

17 MR. LOWY: - - - of revenue, of that Texas
18 company was from New York, and - - - and there was
19 jurisdiction under the statute, and it comported with due
20 process, and that - - -

21 JUDGE FAHEY: So let - - - let's - - -

22 MR. LOWY: - - - by the way - - -

23 JUDGE FAHEY: - - - assume, then - - - then that
24 the sales themselves are sufficient, then we're really down
25 to the question that you initially started with, which is



1 whether or not the record is sufficient to - - - for you to
2 argue that he purposely availed himself of jurisdiction.

3 Aren't we back to that?

4 MR. LOWY: Exactly, Your Honor. Yes.

5 JUDGE FAHEY: And it's really an interpretation -
6 - - a factual determine - - - determination, as to whether
7 or not his remarks constitute purposeful availment.

8 And then we get into the standard of what applies
9 in summary judgment.

10 MR. LOWY: That's correct, and - - - and - - -
11 and what you need is foreknowledge and then acting on that
12 - - - voluntarily acting on that. And Brown was told of
13 the plan - - -

14 JUDGE FAHEY: Well - - -

15 MR. LOWY: - - - and - - - and then he acted on
16 it.

17 JUDGE FAHEY: - - - one of the - - - one of the
18 difficulties in - - - in the case is - - - is in the way
19 the Appellate Division analyzed it, they looked at the
20 Alden v. Fiore case - - - Walden v. DiFiore (sic) case.
21 And the facts there seem to be substantially different than
22 what we have there.

23 It's pretty clear there was no contact there, and
24 I'd have to agree with Judge Thomas in - - - in the
25 determination.



1 Is there other federal jurisprudence that would
2 support your version of applying minimum contacts here?
3 Because the Appellate Division pretty much relied on Walden
4 alone. So I'm thinking about they had a CF cite there to
5 the Burger King case. You're familiar with that?

6 MR. LOWY: Yes, Your Honor. And Burger King, I
7 think, has very favorable language. I mean - - -

8 JUDGE FAHEY: Like what?

9 MR. LOWY: For one, Burger King says, the due
10 process - - - that due process may not be wielded as a
11 territorial shield to avoid interstate obligations that
12 have been voluntarily assumed.

13 I may have missed a word or two, but that's the
14 gist of it: voluntarily assumed. That gets at what
15 purposeful availment is, the choice Brown had - - -

16 JUDGE FAHEY: It has some language before there -
17 - -

18 MR. LOWY: - - - he was a - - -

19 JUDGE FAHEY: - - - where it talks about purpose
20 - - - purposefully derived benefit from their interstate
21 activities, an individual must in order to establish
22 jurisdiction. So once again, we're back. And it seems to
23 me this case really narrows down to the question of
24 purposeful availment, not the amount of sales, not the
25 revenues, but fundamentally purposeful availment and



1 whether or not there's record support for that argument.

2 MR. LOWY: I agree.

3 CHIEF JUDGE DIFIORE: Your time has expired,
4 counsel, but I know that Judge Garcia has a question for
5 you.

6 JUDGE GARCIA: Thank you, Chief Judge.

7 I would like to go back, actually, to
8 302(a)(3)(i). And the issue I'm having with the Appellate
9 Division, is they seem to have counted all of the revenue
10 from guns that wound up in New York - - - New York State.
11 And I don't see that as being consistent as a way courts
12 have applied - - - I'm not arguing that that - - - those
13 guns were sold in New York - - - but the way we've applied
14 that romanette (i), it's almost - - - it's a lesser doing
15 business type test. And we've always looked to some type
16 of volition.

17 So again, you have to kind of take this hook of
18 maybe he was going to open a store or he was going to open
19 a store in - - - in Buffalo and in - - - in Ohio. But it's
20 not the type of "I'm selling it to a distributor who's
21 distributing in New York", and it almost was assuming the
22 sales and then assuming jurisdiction. And I can't find a
23 case where any court has applied romanette (i) in that way.

24 MR. LOWY: Well - - -

25 JUDGE GARCIA: Without this kind of volitional



1 element. It's like a bike store in a local town, somebody
2 comes by, buys a lot of bicycles, winds up selling them in
3 New Jersey, you know, or - - - or vice versa, that person
4 had no idea. I'm a local store. I sell to local
5 customers. The person had New York plates, they wind up
6 selling these bikes in - - - in New York. Can they get
7 hauled into court under romanette (i) for that?

8 MR. LOWY: I - - - I - - -

9 JUDGE GARCIA: Because they're used in New York?

10 MR. LOWY: The language of the statute is "used".
11 And Your Honor, this is - - - should be no different than
12 if Bostic and Upshaw were actually legal gun dealers in
13 Buffalo, going to Ohio, saying I want to buy guns to stock
14 my store.

15 The only difference is these were criminal gun
16 traffickers, and - - - and that increases - - -

17 JUDGE GARCIA: Well, you keep bringing - - -

18 MR. LOWY: - - - the interest - - -

19 JUDGE GARCIA: - - - it back to that - - -

20 MR. LOWY: - - - it does not diminish it.

21 JUDGE GARCIA: - - - putting aside they're
22 criminal gun dealers, let's just look at what happened
23 here. And I think we've gotten - - - and I've read that
24 page of the transcript in 458, and it says Buffalo and
25 Ohio.

1 But you know, it's again: I'm planning to do
2 this; I may do this. He's selling these guns in Ohio to an
3 Ohio person. And yes, they - - - assume for this purpose,
4 they wind up in Buffalo. But that - - - I mean, in order
5 to interpret it as they just show up there, I think that
6 would be a reading of romanette (i) that would cause
7 significant due process problems.

8 MR. LOWY: Your Honor, I think the - - - the
9 facts are analogous to LaMarca, where you had a Texas
10 corporation with a factory in Virginia that said New York
11 should not have jurisdiction over me because I sold goods
12 in Virginia to a distributor who then - - -

13 JUDGE GARCIA: To a New York distributor.

14 MR. LOWY: - - - resold in - - - in New York.

15 JUDGE GARCIA: But they knew it was a New York
16 distributor.

17 MR. LOWY: They knew every bit - - - the word
18 "planned", Your Honor, to - - - to find that the word
19 "planned" is not sufficient - - -

20 JUDGE GARCIA: It's not even "I'm planning to
21 sell them,", it's "I'm planning to open a store". He
22 doesn't have a license to do that. So you're believing - -
23 - in one sense you're asking us to believe, oh, he
24 understood that this "criminal" was going to open a legal
25 store in Buffalo, but he's also saying he's going to do



1 that in Ohio, which would seem to me a lot easier
2 proposition.

3 So it's not I'm selling to a distributor who's
4 distributing in New York, it's I'm selling to somebody who
5 told me I'm - - - I'm planning to open a store - - - at
6 best, I'm planning to open a store in Ohio and New York.

7 MR. LOWY: Well, the - - - the plan to open the
8 store in New York and Ohio was completely tied to the
9 reason why they're buying the guns. Those weren't
10 independent.

11 The only reason these people were buying guns was
12 in order to resell them. And the fact that it was - - -
13 whether it was legal or illegal or - - -

14 JUDGE FAHEY: Well, is there any - - -

15 MR. LOWY: - - - is not of - - -

16 JUDGE FAHEY: - - - is there any proof in the
17 record - - - you say that. Is there any proof in the
18 record that shows what happened to these guns after they
19 went to Buffalo?

20 MR. LOWY: Yes. The record is - - -

21 JUDGE FAHEY: Beside - - - besides the incident -
22 - -

23 MR. LOWY: - - - all of the - - -

24 JUDGE FAHEY: - - - besides this incident itself.

25 MR. LOWY: Every single one of them - - - the



1 record - - - and it's in - - - it's in Bostic's criminal
2 papers, which are part of the record - - - that every
3 single one of these guns was used in New York. Bostic
4 brought every single one of them and sold them on the
5 criminal market in Buffalo.

6 So they were a hundred percent, all 182 of them,
7 used - - - that is consumed - - - in New York.

8 CHIEF JUDGE DIFIORE: Thank you, Mr. Lowy.
9 You'll have your rebuttal time, sir.

10 MR. LOWY: Okay, thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. BRAUM: Thank you, Chief.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. BRAUM: Good afternoon, Your Honors. Scott
15 Braum on behalf of the respondent, Charles Brown.

16 One thing I'd like to start out with is, Your
17 Honor, based on the conversation you were just having, with
18 respect to what the Appellate Court actually did below, and
19 it - - - it's kind of interesting they went - - - the way
20 they went through that long-arm analysis, then they got to
21 minimum contacts and federal due process, and then they
22 circled back up with long-arm.

23 And so as Your Honors know, under 302(a)(3), the
24 first thing that you have to do is get through the 303 - -
25 - 302(a)(3) language. Then you have to meet either (i) or



1 (ii). So - - -

2 JUDGE RIVERA: So it's your position that we have
3 to get through 302 - - - the long-arm statute, before we
4 get to the due process question?

5 MR. BRAUM: Yes, ma'am. Absolutely.

6 JUDGE RIVERA: Okay.

7 MR. BRAUM: And so the court went through
8 302(a)(3), the court went through - - -

9 JUDGE RIVERA: So does the case turn on whether
10 or not the comment - - - or as Brown understood it, what he
11 repeats to a federal agent, which of course would be a
12 crime if he lies, that his understanding is that this large
13 number of guns - - - as he said, the largest number he had
14 ever sold - - - never sold that many guns at one time - - -
15 was for the purpose of resale? That's the purpose:
16 resale. And the resale is going to be out of shops in Ohio
17 and Buffalo. Does it - - - does it turn - - - does the
18 whole case turn on that, whether or not there's minimum
19 contacts, whether or not that satisfies 302(a)(3)?

20 MR. BRAUM: That would certainly be an
21 influential fact. I would think - - - I - - - the context
22 - - -

23 JUDGE RIVERA: Why isn't it dispositive? Why is
24 it influential?

25 MR. BRAUM: Well, because you have to look very -



1 - - very clearly and specifically at exactly what those
2 words were. And there were - - -

3 JUDGE RIVERA: Let's say it's what Mr. Brown
4 tells a federal agent.

5 MR. BRAUM: Correct.

6 JUDGE RIVERA: They're buying large numbers of;
7 I've never sold this many; I want to - - - dash all the Ts,
8 dot all my Is, I want to make sure it's fine. And there -
9 - - you know, they're buying these to resell out of a store
10 in Ohio, out - - - I'm sorry, he called them shops - - -
11 out of a shop in Ohio, out of a shop in New York.

12 MR. BRAUM: Correct. And again, I - - -

13 JUDGE RIVERA: Assume for one moment that's
14 what's said.

15 MR. BRAUM: I don't think that even remotely
16 comes close to getting - - -

17 JUDGE RIVERA: Okay, so why is that not enough?

18 MR. BRAUM: Because that - - - that clearly,
19 going back through International Shoe, World-Wide
20 Volkswagen, up through Walden, that - - - that's
21 speculation and future possibilities that just simply don't
22 meet those tests, because - - - on twofold.

23 JUDGE RIVERA: Let's try my hypothetical.

24 MR. BRAUM: Okay.

25 JUDGE RIVERA: Not - - - not - - - not the way



1 you're asking us to read the record. Let's just try this
2 hypothetical. Customer comes in and says I want to buy
3 these eighty-five guns at one time - - - I think it's
4 eighty-five at one time - - - I'm going to resell them in
5 New York. Here's my ID. They do the criminal background
6 check. Is that enough? Just with respect to the long-arm
7 statute, wouldn't - - - I'm not asking you about the due
8 process analysis.

9 MR. BRAUM: Conceivably that might be, depending
10 on the rest - - -

11 JUDGE RIVERA: Romanette (i), romanette (ii), or
12 both?

13 MR. BRAUM: Well, you know, the - - - those tests
14 go to substantial revenue derived from, and so you still
15 need to look beyond those mere words and get to the facts
16 of what's actually going on.

17 JUDGE RIVERA: Um-hum.

18 MR. BRAUM: And so that - - - you can't answer
19 that just based on - - - on that mere fact pattern - - -

20 JUDGE RIVERA: Um-hum.

21 MR. BRAUM: - - - because there's more to it,
22 just under the constitutional analysis.

23 JUDGE RIVERA: But if - - - but if we read the
24 record as he having said that his understanding was that
25 these were guns to be resold in a New York shop, you're



1 saying that possibly satisfies 302(a)(3).

2 MR. BRAUM: Well, if that's what was said. But
3 respectfully, Your Honor, I don't believe that's what the
4 record - - -

5 JUDGE RIVERA: Well, it's in the transcript,
6 right?

7 MR. BRAUM: Correct, it is. And there were three
8 mentions of that. And - - - and I think they're critical
9 for purpose of - - - purposes of our analysis, because if
10 the test was, was the word "Buffalo" spoken, we would lose.

11 JUDGE RIVERA: Well, it says "New York".

12 MR. BRAUM: Yes, New York - - - New York. And -
13 - - and the word that was used was - - -

14 JUDGE FAHEY: Well, it wasn't Buffalo, Wyoming,
15 so - - -

16 MR. BRAUM: Correct.

17 JUDGE FAHEY: - - - everybody knows what we were
18 talking about, right?

19 MR. BRAUM: Exactly. But if that was the test,
20 we would lose, but that's obviously not the constitutional
21 test. And so you have to look at those three provisions.
22 And the first conversation is at the record at page 448.
23 All three of these are cited extensively. Mr. Brown's
24 relating a conversation that he had with his assistant,
25 based on the conversation between the assistant and Mr.



1 Bostic, the first time they met.

2 And - - - and I have those words here for
3 purposes of the record. They're at page 44- - -

4 JUDGE RIVERA: Right. But I'm referring to the
5 conversation Mr. Brown has - - - the defendant has with a
6 federal agent. I - - - I'm not talking about his
7 recollection of what someone else remembers or what someone
8 may have said to him. I'm talking about what he remembers
9 having said his representations to ensure that he was
10 complying with the law to a federal agent.

11 MR. BRAUM: Yes, ma'am. I understand that. And
12 - - - and again, that - - - there's a discussion in the
13 record. The first mention of that is at page 450 of the
14 record - - -

15 JUDGE RIVERA: Okay.

16 MR. BRAUM: - - - where Mr. Brown is discussing
17 the conversation that he had the first day he met Mr.
18 Bostic.

19 JUDGE RIVERA: Um-hum.

20 MR. BRAUM: His personal conversation with Bostic
21 in June of 2000. And that language at page 450 of the
22 record is: "What did Mr. Bostic say about his plans to
23 open a gun business?" And Mr. Brown's answer was: "He
24 said his plans were to open up a shop in Columbus, Ohio
25 somewhere. We discussed, as I recall, some of the other



1 gun shops that were around Columbus. He talked about being
2 from Buffalo and wanting, you know - - - he said he
3 wouldn't mind having a shop in Buffalo also, said he had
4 been out to several retail stores, seen how they were laid
5 out, et cetera."

6 And so I agree, the - - - the words are on the
7 page at page 458 of the record. But they can't be taken in
8 that vacuum. You have to look at everything. Under a
9 summary judgment motion, it does have to be construed in
10 the light most favorable to the plaintiff, but it also has
11 to be construed in light of the applicable law, and that
12 law, under both the long-arm statute - - - because it
13 brings in due process and minimum contacts under both (i)
14 and the first half of (ii), which is a twofold test.

15 And that's actually what the Appellate Court did.
16 After they went through the long-arm statute, they got to
17 the first half of (ii), and they said well, this - - - this
18 implicates minimum contacts. They went through the full-
19 blown minimum contacts analysis: International Shoe,
20 World-Wide Volkswagen, up through Walden, and they said
21 there aren't any minimum contacts.

22 And then they circled back around, and what the
23 court said was that even under 302(a)(3)(i), that revenue,
24 if it's not derived from constitutionally permissible
25 contacts, can't be counted. And so the Appellate Court



1 ruled that there was no jurisdiction under (i) - - -

2 JUDGE FAHEY: You know, I'm having a hard - - -

3 MR. BRAUM: - - - and (ii).

4 JUDGE FAHEY: - - - time - - - we kind of
5 narrowed the issue down before, in - - - in the discussion
6 with the other judges, and it really comes down to
7 purposeful availment. And it seems that that's where the
8 discussion was heading before.

9 For you to be successful, don't you have to
10 distinguish the analysis in the Burger King case, where the
11 court there said you can't avoid jurisdiction just because
12 a defendant did not physically enter the state, and which
13 is - - - seems to be the standard that's being promulgated
14 here, because - - - and secondly, you - - - you'd have to
15 avoid the analysis in the United States Supreme Court
16 Calder case, also - - - this is the Florida libel case - -
17 - where the question was whether or not something was - - -
18 had to be expressly directed at California in the libel
19 action.

20 Can you address those - - - try and distinguish
21 those for me, why they don't apply to - - - to - - - to
22 this case? I mean, even the Appellate Division put a CF
23 cite in for Burger King.

24 MR. BRAUM: Absolutely. And - - - and I - - - I
25 would readily admit that the fact that the defendant



1 doesn't physically enter the - - - the - - - the state,
2 that's not dispositive. It might be a factor. But you
3 have to look at all of the purposeful availment factors.

4 Jurisdiction is designed to protect the
5 defendant. He's supposed to be in charge of that. And
6 that entire line of cases with Burger King and all the
7 others it goes through mere possibility isn't enough;
8 jurisdiction doesn't travel with the chattel; it can't be
9 the conduct of a third party. It has to be - - -

10 JUDGE FAHEY: Well, that's - - - that's a - - -

11 MR. BRAUM: - - - the defendant.

12 JUDGE FAHEY: - - - good point. Let's say
13 jurisdiction doesn't travel with the chattel. Usually, in
14 that situation, that - - - that's a New York car going to
15 Oklahoma and getting in a car accident - - - like I guess
16 it was Volkswagen - - - I can't remember if it was
17 Volkswagen or International Shoe. But - - - it's been a
18 long time since law school.

19 But nonetheless, they involve a single
20 instrumentality. This is clearly not a single
21 instrumentality. This is a question of whether or not they
22 entered - - - this person was conscious of entering the
23 stream of commerce that would culminate in Buffalo, New
24 York.

25 And you have to distinguish those cases,



1 otherwise we're establishing a bright-line rule that says
2 that - - - that minimum contacts have bec - - - are - - -
3 are now something much more than they ever were before in
4 New York State.

5 MR. BRAUM: And - - - and we can distinguish
6 those contacts when we look at the facts of what happened
7 here. Mr. Brown had a federal firearms license that
8 permitted him to only do business in Ohio. It's against
9 the law to do business outside of the State of Ohio.

10 Pursuant to the law, he's only allowed to sell
11 handguns to Ohio residents who provide valid, government-
12 issued, photo ID, verifying that Ohio residency.

13 And so when you look at all of that and then the
14 other factors that go along with that, of no advertising,
15 of no targeted telephones, solicitations, marketing, no
16 sales rep - - -

17 JUDGE STEIN: Counselor, if the facts of this
18 were exactly the same but - - - but Bostic had actually had
19 a legal firearms store in Buffalo, would Brown be subject
20 to personal jurisdiction in New York? Would that make any
21 difference?

22 MR. BRAUM: Not unless - - - the facts are the
23 same. Not unless that he purposely availed himself of that
24 and was aware of it and everything else.

25 JUDGE RIVERA: Let me - - - let me - - - let me



1 ask this, if I may? I know your red light went off.

2 With - - - with the Chief Judge's permission.

3 CHIEF JUDGE DIFIORE: Of course.

4 JUDGE RIVERA: Should - - - should we factor into
5 this analysis that guns are dangerous instrumentalities and
6 this is a gun trafficking process; it's an illicit market?
7 Should we factor those into the analysis, and if not, why?

8 MR. BRAUM: You can't, Your Honor, for a couple
9 of reasons. And one, I would never diminish the incident
10 that occurred here, but the law has to be applied
11 dispassionately in this and every other case that we have.
12 And the law does not provide - - -

13 JUDGE RIVERA: Well, it's not about passion.
14 It's just the - - - the cases that we're talking about are
15 all about a commercial enterprise that's lawful; it's all
16 about - - - on their face, at least - - - products that are
17 not necessarily dangerous in the way a gun is dangerous.

18 Obviously if there's a defect, they may very well
19 be dangerous, but using a gun as intended is - - - is by
20 itself, right, inherently a dangerous instrumentality. So
21 that - - - that's why I'm asking - - -

22 MR. BRAUM: Sure.

23 JUDGE RIVERA: - - - the question.

24 MR. BRAUM: Well, and so again, a - - - a felon
25 intentionally shooting somebody is - - - is clearly



1 dangerous. I would - - - I would take issue with
2 characterizing a gun as an inherently dangerous
3 instrumentality. It's a physical object.

4 JUDGE FAHEY: Well, but there's - - - there's no
5 question that - - - that this was - - - you don't advertise
6 - - - at least to my knowledge - - - you don't advertise on
7 the web to say if you want to buy guns illegally in
8 Buffalo, come to Ohio. People don't do that. I think it's
9 fair to say they don't do that.

10 We're not going to have that kind of proof to
11 establish minimum contacts. What we're going to have is
12 the direct contact that takes place at gun fairs; that's
13 how this market works, is that - - - you'd agree with that,
14 right?

15 MR. BRAUM: No, I wouldn't, Your Honor.

16 JUDGE FAHEY: So - - - so how would illeg - - -
17 you don't think that this is how illegal guns are brought
18 into - - - they're illegal in New York; they're legal in
19 Ohio. How are they brought in? They're brought in by
20 entering the stream of commerce. And so - - - so to say
21 that the bar is the establishment of a website, we're not
22 selling chocolates here - - - the nature of the product
23 mandates the nature of the stream of commerce, I guess, is
24 my point to you.

25 And so we're kind of stuck with analyzing the



1 facts in those light - - - in that light, I mean.

2 MR. BRAUM: And I would submit, Your Honor, a
3 firearm is a legal product, lawfully sold, like any other,
4 in fact, subject to much higher restrictions - - -

5 JUDGE FAHEY: Um-hum.

6 MR. BRAUM: - - - of an FBI background check, of
7 only selling in Ohio - - -

8 JUDGE FAHEY: Of course. Actually, in point of
9 fact, I have a gun license.

10 MR. BRAUM: - - - et cetera.

11 JUDGE FAHEY: So I have a gun license. I'm
12 probably the only on the court who does - - - well, I'm not
13 sure about Judge DiFiore, she might, but - - - but I had
14 one. I have my father's guns. My father was a policeman
15 in the City of Buffalo, and a police captain in the City of
16 Buffalo. I'm totally familiar with guns and the process by
17 which you obtain them.

18 But I'm - - - I'm not concerned about guns here,
19 actually, I'm concerned about the minimum contact standard.
20 Because I say to myself, what if this wasn't a gun? What
21 if it was a child's pajamas that wasn't properly
22 fireproofed? What if it was food that was improperly
23 packaged? And what if it was any number of articles that -
24 - - that could be sold and result in harm in my community
25 as a result of the way they entered the stream of contest



1 (sic) - - - or market and stream of commerce and were used?

2 So it's not the guns. I think - - - I think
3 that's incorrect here. I think it's really the - - - the
4 profound legal question is what's the nature of minimum
5 contacts? What's minimum, I guess is, in my mind, the
6 profound question.

7 MR. BRAUM: Agreed. And I think that circles
8 right back to where we started of the - - - that line of
9 cases going back through International Shoe and World-Wide
10 Volkswagen, where you look at this issue the same way - - -

11 JUDGE FAHEY: Do you understand my point, though?
12 Is - - - for - - - for your argument to sway - - - I'm only
13 speaking for myself - - - to sway me, you had to
14 distinguish those cases, and I haven't seen that; that's
15 why I'm asking it.

16 MR. BRAUM: Well, and again, Your Honor, I - - -
17 I just - - - the - - - the facts of those cases are so
18 radically different from what we have here, I don't believe
19 it's a matter of - - - of the legal propositions that they
20 stand for.

21 When you apply them to what we have in this
22 particular instance, that just simply doesn't rise to the
23 bar, and you have to circle back to that jurisdiction is a
24 concept designed to protect the defendant not the
25 plaintiff's convenience. And that's why we have to go



1 through this analysis before you can haul somebody into
2 court in a foreign state like this.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. BRAUM: Thank you, Judges.

5 CHIEF JUDGE DIFIORE: Counsel, respondent
6 described Mr. Brown's business as a local business. And
7 assuming his description is accurate, is that what our New
8 York State legislature intended to capture when it enacted
9 the long-arm jurisdiction statute?

10 MR. LOWY: Well, first of all, Your Honor, it's
11 not exactly local. And there are charts in the briefs that
12 go into out-of-state sales to - - - to law enforcement and
13 long guns to people outside of Ohio. But more - - -

14 CHIEF JUDGE DIFIORE: So you challenge the
15 factual basis?

16 MR. LOWY: Yeah. It's - - - well, it's not - - -
17 it's not totally local. But - - - but most importantly,
18 Your Honor, in LaMarca, if the - - - the manufacturer in
19 that case had a license which said I can - - - you can only
20 sell the product - - - I'm forgetting what the product was
21 - - - in Virginia, the facts wouldn't have been - - - the
22 case would not have turned out any differently, because
23 somebody came to Virginia, bought the product in Virginia,
24 and resold it in New York. And there was personal
25 jurisdiction and it complied with due process.



1 That's the same thing here as in - - -

2 JUDGE RIVERA: But that - - - that - - - that was
3 the company's distributor, right? It's a New York
4 distributor. It's more obvious on its face that you are,
5 indeed, seeking to penetrate the New York market, because
6 you've got a New York distributor. Right.

7 Unlike this situation where you have someone
8 who's at a gun show. It doesn't matter to him if someone's
9 coming and says I want to resell it in Jersey or I want to
10 resell it in Massachusetts. Right? It's fortuitous,
11 whatever they may say is the place where they're eventually
12 going to resell it, if they even say that to him.

13 MR. LOWY: The question is, do you - - - did
14 Brown voluntarily assume to supply the New York market?
15 And that's what he did.

16 JUDGE STEIN: Let me ask you this - - -

17 MR. LOWY: And Your Honor's - - -

18 JUDGE STEIN: Let me ask you this question.
19 Suppose I walk into a little corner grocery store, mom and
20 pop store, and I buy a box of candy bars, and I - - - and I
21 do this several times. And I tell - - - I tell the owner
22 that I'm doing this because I have this eBay business, and
23 I have a customer in Florida who can't get these candy bars
24 in Florida.

25 So you know, I do it two or three times. And



1 then - - - and then the customer in Florida ends up choking
2 - - - there's some defect with the candy bar, and ends up
3 choking. Is - - - is the owner of the mom - - - mom and
4 pop store subject to Florida jurisdiction on those facts?

5 MR. LOWY: I think it would be a factual
6 determination, and - - -

7 JUDGE STEIN: Well, on those facts?

8 MR. LOWY: - - - and - - - and it would be much
9 weaker than our case. But there would be - - - the
10 argument would be are those - - -

11 JUDGE STEIN: Why is it weaker if the person
12 selling the candy bars knows that - - - that I'm sending
13 them in to Florida? Why is that any different from what we
14 have here?

15 MR. LOWY: There - - - there might be. There
16 might be - - - there might be jurisdiction.

17 Here, though - - - and I think if - - - Your
18 Honor's - - - this question hit the nail on the head, that
19 if Bostic actually had a store in New York and Ohio, and
20 the exact same facts happened, and he said I'm planning to
21 buy these 85 guns and 182 guns in order to supply those two
22 stores, there would be absolutely no question there would
23 be personal jurisdiction and due process.

24 JUDGE RIVERA: Let me ask the - - -

25 MR. LOWY: And the only difference here is



1 because - - -

2 JUDGE RIVERA: Let me ask the same question I
3 asked your adversary about whether or not the fact that
4 it's a dangerous instrumentality and we have an illicit
5 market should be factors for us to consider? And again, if
6 so, how should we do that?

7 MR. LOWY: I think it should be in this sense.

8 JUDGE RIVERA: Um-hum.

9 MR. LOWY: Not for this case - - - you don't need
10 it for this case, because in this case you have the
11 testimony of plan - - - the word "planned". And the
12 defendant has to prove that as a matter of law the
13 statement: I plan to open these stores and sell these guns
14 - - - guns in those stores - - - as a matter of law, that's
15 not purposeful availment. And I don't know how you get
16 there on the summary judgment standard.

17 But for - - - there are going to be more
18 difficult cases which you could face, Your Honors, where
19 you have gun traffickers who don't open their mouths and
20 don't say I'm going to resell. And - - - and what about
21 the gun trafficker who says I - - - who buys 100 AK-47s
22 every week from the same Ohio gun dealer, and the Ohio gun
23 dealer gets notices that those guns are being traced by New
24 York Law enforcement, but the - - - but he never asked the
25 question; the person never says they're going to New York.



1 Now, that - - -

2 JUDGE RIVERA: Did Brown get notices - - -

3 MR. LOWY: - - - that's a - - -

4 JUDGE RIVERA: - - - about where any - - - I'm
5 not just talking about the guns Bostic purchased - - - any
6 of those other sales - - - I know you've had - - - you had
7 charts in your briefs - - -

8 MR. LOWY: There - - - there were some - - - some
9 traces. But I - - - I can't say that any of them were
10 before this sale.

11 JUDGE RIVERA: Okay.

12 MR. LOWY: But the - - - the point is that if
13 Your Honors shut the door to New York authority in a case
14 where there's sworn testimony from the defendant that he
15 was told of the plan to resell these products,
16 extraordinary testimony - - - I'm not aware of any due
17 process case in New York or - - - or in the Supreme Court
18 where there's sworn testimony about the defendant's
19 purposeful availment of - - - of - - - of that particular
20 sale.

21 But if you shut the door in this case, then you
22 have completely shut the door to the case with a more
23 crafty gun trafficker who does not say where he's going to
24 resell the guns, yet the dealer should know he's supplying
25 the New York crime market.



1 JUDGE RIVERA: Well, the plaintiff still - - -

2 MR. LOWY: It's very diff - - -

3 JUDGE RIVERA: - - - still has - - - still has a
4 place where they can sue? The plaintiff can always go to
5 Ohio in this particular case.

6 MR. LOWY: That's - - - that's correct, Your
7 Honor.

8 JUDGE RIVERA: It's just a question of the
9 plaintiff being able to select New York - - -

10 MR. LOWY: But - - - but Your Honor - - - the - -
11 - but also, of course, the defendant's - - - the burden on
12 the defendant is the primary factor, according to Supreme
13 Court precedent, it's not the only factor. New York's
14 interest is also a relevant factor. The plaintiff's
15 interest is a relevant factor. And by the way, in this
16 case, there is absolutely no burden on the defendant,
17 because Mr. Brown is going to be in court in Buffalo in
18 this case on behalf of MKS, another - - - his other
19 company, which is another defendant, which has submitted to
20 jurisdiction.

21 So there is - - - as a factual matter, there is
22 zero burden on the defendant in this case.

23 JUDGE WISON: Chief, would you allow me one more
24 question?

25 CHIEF JUDGE DIFIORE: Yes, of course.



1 JUDGE WILSON: So I want to go back to the
2 statute for a second and give you a hypothetical. If Mr.
3 Bostic, instead of saying Buffalo, had said Miami, and the
4 guns nevertheless wound up in Buffalo, is the statute
5 satisfied, particularly (3)(ii)?

6 MR. LOWY: I - - - I think that is a much - - -
7 it's a much weaker case on that prong. There's no question
8 about it. I mean and what you - - - the facts that you've
9 given me, there may not - - - there may not be a basis to
10 know that the guns were going to New York. There may be
11 external facts that - - -

12 JUDGE WILSON: Assume that there was no basis to
13 know they were going to New York.

14 MR. LOWY: - - - and but - - - but then they - -
15 - yes. But then - - - but you may get jurisdiction under
16 the prong, but - - - but I think that's - - -

17 JUDGE WILSON: Okay.

18 MR. LOWY: - - - that's correct, and that
19 distinguishes, of course, this case, and highlights the
20 strength of this record.

21 JUDGE GARCIA: But let's say - - - if I might,
22 Chief?

23 Let's say under Judge Wilson's hypothetical
24 that's the case - - - and I'm sorry if this was your
25 hypothetical - - - but these guns are going to Miami, and



1 they wound up being sold in New York, do you get
2 jurisdiction under 302(a)(i) - - - (3)(i)?

3 MR. LOWY: I - - - I'm sorry. I - - -

4 JUDGE GARCIA: So same hypothetical - - - and I
5 hope this is a little bit different - - - buyer says I'm
6 going to sell these guns in Florida. In fact, they sell
7 the guns in Buffalo.

8 Is that your hypothetical?

9 JUDGE WILSON: That's it.

10 JUDGE GARCIA: Okay. So it would - - - that
11 would be a pure sale in New York without any foreknowledge,
12 so that is - - - you think is a closer case.

13 MR. LOWY: Well, in that case, you would derive -
14 - - the question is have you derived substantial revenue
15 from goods used? And if the - - - if the amount of the
16 sale is substantial revenue, then you comport with (3)(i).

17 JUDGE GARCIA: And doesn't that suggest there
18 needs to be some type of volition or knowledge element in
19 that portion of the statute? Because in that hypothetical,
20 how could that comport with due process? I believe I'm
21 selling these guns to you. I believe you're taking them to
22 Miami. You've told me that. You wound - - - wind up
23 diverting them to sell in New York.

24 I have no idea you're going to do that. And then
25 how could we possibly exercise jurisdiction under 302(a)(i)



1 (sic)?

2 MR. LOWY: That would be a due process argument
3 for a much tougher case. But again, you - - -

4 JUDGE FEINMAN: No, but you have to - - -

5 MR. LOWY: - - - that - - -

6 JUDGE FEINMAN: - - - you have to comply - - -

7 MR. LOWY: - - - here you have the - - -

8 JUDGE FEINMAN: - - - you have to read the
9 statute to comply with the due process.

10 MR. LOWY: Well, for this case we need to read
11 the statute as applied in this case. And as applied here,
12 we have the testimony of: planned to open a store. And I
13 - - - and I would say that that is all Your Honors should
14 look at.

15 The other testimony, page 448, page 450, the
16 court cannot, on summary judgment - - - the Appellate
17 Division should not have picked and chosen what incons - -
18 - which of the inconsistent statements of Brown the court
19 chose to rely on. That is simply not permitted on summary
20 judgment.

21 And - - - and nor can one read the word "planned"
22 to open a store in the context of someone who is understood
23 to be buying inventory for that store to resell, can - - -
24 you - - - making all inferences in our favor, I - - - I
25 don't see how that can be read other than purposeful



1 availment of the New York market, a voluntary choice by Mr.
2 Brown, which he didn't have to make.

3 He could have said I'm not going to sell these
4 guns, because I don't anything to do with New York. That's
5 what he should have done. That's what the other dealer
6 did. He didn't.

7 He said, I'm happy to take your cash, if - - -
8 and - - - and bear the risk of supplying the New York
9 market, which is what he did.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. LOWY: Thank you, Your Honors.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Daniel Williams and Eddie Williams v. Beemiller, Inc., et al., No. 25 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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