

**IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA**

HARRINGSON ZELAYA; and,
BRADY ZELAYA

Plaintiff,

v.

KING BIRD FIREWORKS, LLC,

Defendant.

Civil Action No.: 19CI00020

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT
UNDER O.C.G.A. § 9-11-60(d)(1)**

INTRODUCTION

The Court should deny King Bird's latest attempt to avoid default for two reasons: (1) the Court has jurisdiction and (2) King Bird waived any jurisdiction argument by seeking a ruling on the merits.

First, the United States Supreme Court recently held that "specific jurisdiction attaches . . . when a company [] serves a market for a product in the forum State and the product malfunctions there." *Ford Motor Co. v. Mont. Eight Judicial Dist. Court*, No. 19-368 & 19-369, 592 U.S. ___, 141 S.Ct. 1017, p. 9 (March 25, 2021). This Court has personal jurisdiction over King Bird because King Bird serves a market for fireworks in Georgia and King Bird's firework malfunctioned in Georgia.

Second, a nonresident defendant submits to the personal jurisdiction of a court when it seeks a ruling on the merits of the case *after* the resident defendant has been released from the case. *Crawford v. Randle*, 191 Ga. App. 112, 115 (1989). King Bird submitted to this Court's

jurisdiction when it filed a Motion for Summary Judgment seeking a ruling on the merits of the case on September 27, 2019.

Because the Court has jurisdiction over King Bird and King Bird submitted to the Court's jurisdiction, King Bird's motion should be denied.

FACTS

Plaintiff Harrington Zelaya bought a defective firework on July 4, 2018. Compl. ¶ 30. When Plaintiff's stepfather lit the firework, it did not move upward as it was supposed to. *Id.* at 40. Instead, it flew sideways and struck Mr. Zelaya in his eye. *Id.* at 41. Mr. Zelaya would later lose that eye. A picture of Mr. Zelaya follows.



That firework—the Zing Firework—was marketed, manufactured, sold, and distributed by King Bird. Compl. ¶ 16a. The King Bird logo appears in the top center on Zing packaging, as well as on the individual fireworks themselves:

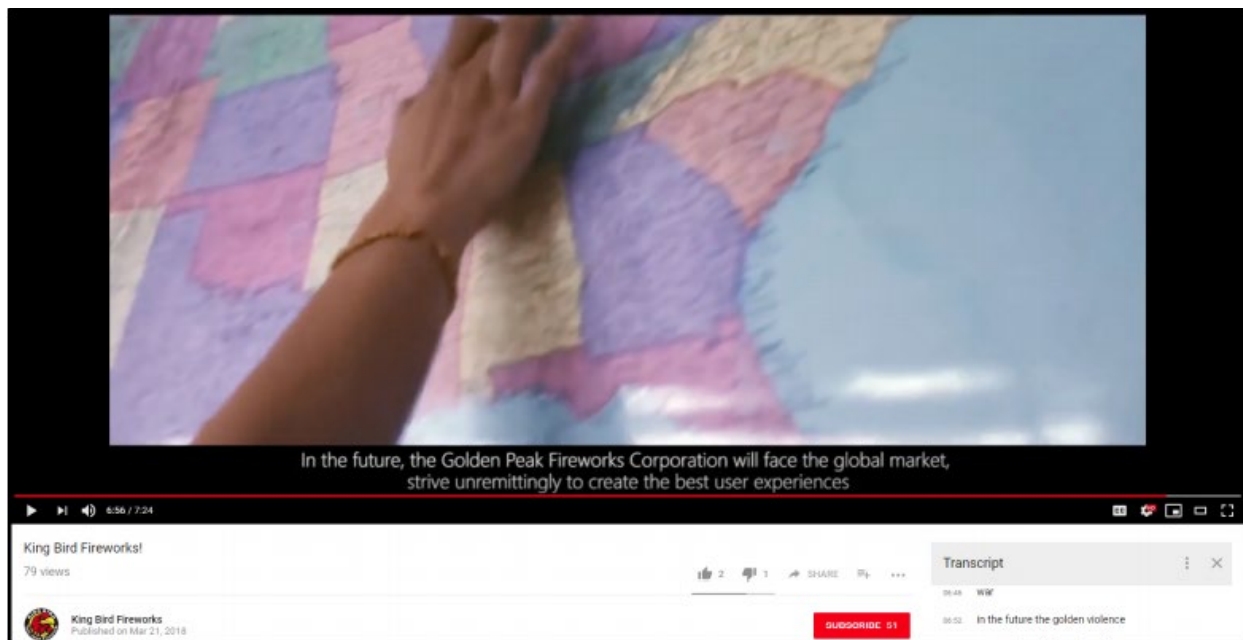


A picture of the King Bird logo follows.



“Elite Fireworks”—an online firework retailer—advertises the Zing Fireworks as part of the King Bird Firework Brand. *See* Zing – Small Wing from King Bird Webpage (Ex. 21).

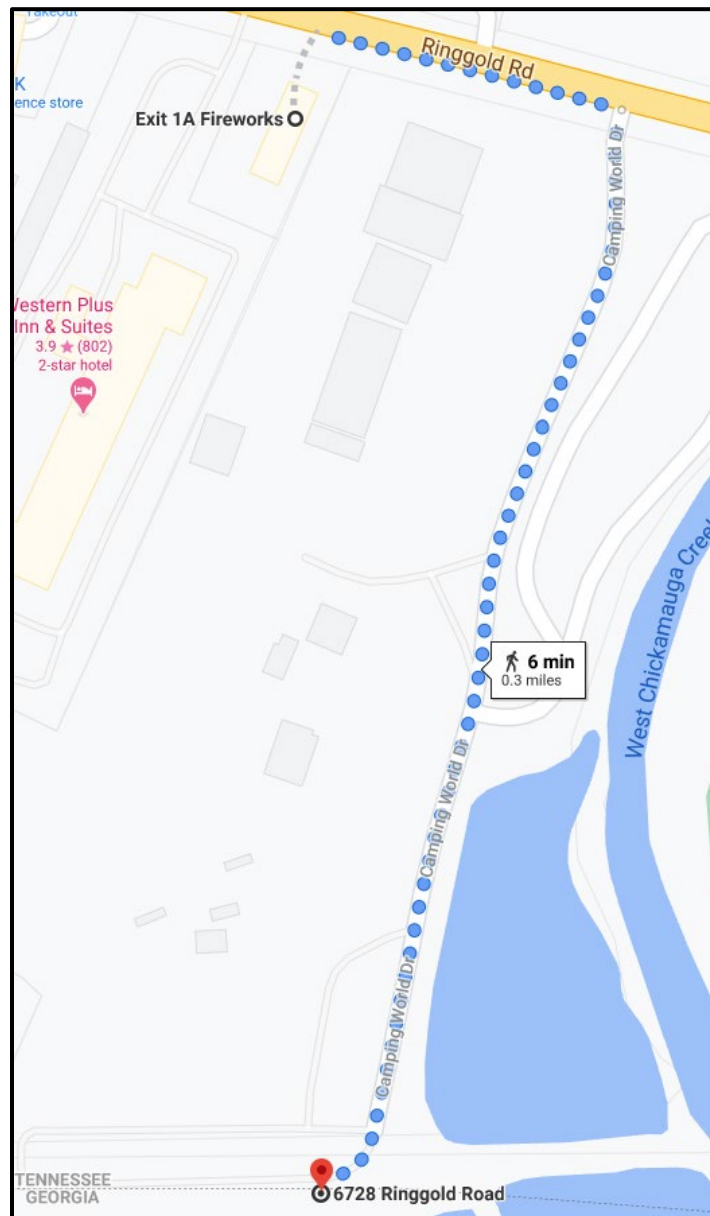
King Bird fireworks are sold in Georgia through King Bird’s distributor, Winco Fireworks International, LLC. *See* Winco 30(b)(6) Dep., 46:12-47:4 (Ex. 22). King Bird fireworks are also sold by Georgia’s Best Fireworks in Milledgeville and Valdosta, Georgia. *See* Georgia’s Best Fireworks – King Bird (Ex. 23); *see also* Winco 30(b)(6) Dep., 47:12-25. King Bird executive, Chen Shimei, says that King Bird “see[s] larger demand from states in the south.” *See* 12/13/2016 News Article (Ex. 24). In fact, King Bird specifically targets southern states, including Georgia, when marketing its fireworks.¹ A screenshot from King Bird’s “King Bird Fireworks!” marketing video follows:



In fact, the firework that caused Mr. Zelaya to lose his left eye was purchased from a store three-

¹ King Bird Fireworks, King Bird Fireworks!, YouTube (Mar. 21, 2018), at 3:20-4:02, <https://www.youtube.com/watch?v=PTj8RqKbpfc>.

tenths (0.3) of a mile—or a 6-minute walk—from Georgia. A screenshot from Google Maps follows.



LAW

I. Personal Jurisdiction

“[S]pecific jurisdiction attaches . . . when a company [] serves a market for a product in the forum State and the product malfunctions there.” *Ford Motor Co. v. Mont. Eight Judicial Dist. Court*, No. 19-368 and 19-369, 592 U.S. ___, p. 9 (March 25, 2021); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (when a manufacturer makes efforts to sell products in States A and B (and other States), a defect in a product first sold in State A causes injuries in State B, the manufacturer can be sued in State B). A plaintiff *does not* need to show that the subject product was purchased in the forum state but rather that the products liability suit “relates to” the defendant’s activities in the subject forum. *Ford Motor Co.*, 592 U.S. ___, p. 8-12 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)) (emphasis in original). “[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in several or all other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.” *Id.* at 10 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (emphasis added).

II. Personal Jurisdiction is Waived by Seeking a Ruling on the Merits.

Personal jurisdiction is waived when a nonresident defendant asks the court for a ruling on the merits of the case *after* the resident defendant has been released from the case. *Crawford v. Randle*, 191 Ga. App. 112, 115 (1989) (overruling cases that hold waiver of personal jurisdiction occurs when a case is defended on the merits *before* the release of the resident defendant). When a nonresident defendant seeks a ruling on the merits of the case, the nonresident defendant is submitting to the jurisdiction of the court. *Id.* This is because by

seeking a ruling on the merits, the nonresident defendant has tacitly agreed that the court has the authority to rule on the merits of the case. *Id.*; *Taylor v. Career Concepts, Inc.*, 184 Ga. App. 551, 552 (1987) (nonresident defendant waived personal jurisdiction when it argued against the merits of plaintiff’s motion for summary judgment after resident defendant was released from case); *Harrell v. Gomez*, 174 Ga. App. 8 (1985) (nonresident defendant waived personal jurisdiction when it moved for directed verdict after resident defendant released from case); *Vanguard Ins. Co. v. Beasley*, 167 Ga. App. 625, 625 (1983) (nonresident defendant waived jurisdiction when it proceed to trial on the issue of damages after resident defendant released and before raising jurisdiction).² “Want of jurisdiction is waived when *after dismissal of the resident co-defendant*, the non-resident defendant invokes rulings of the court on the *merits of the case.*” *Vanguard Ins. Co. v. Beasley*, 167 Ga. App. 625, 626 (1983) (emphasis added).

ARGUMENT

I. The Court has Personal Jurisdiction Over King Bird.

The Court has specific personal jurisdiction over King Bird because King Bird “serves a market” for fireworks in Georgia and “the product malfunction[ed]” in Georgia. *Ford Motor Co.*, 141 S.Ct. 1017 at p. 9. King Bird knew that its fireworks would be sold to consumers in Georgia because King Bird fireworks are sold at multiple locations in Georgia. *See Winco* 30(b)(6) Dep., 46:12-47:4 (Ex. 22); *see also* Georgia’s Best Fireworks – King Bird (Ex. 23); *see*

² A party seeks “a ruling on the merits” when it files a motion for summary judgment. *See Usher v. Johnson*, 157 Ga. App. 420, 422 (1981) (citing *Summer-Minter & Associates, Inc. v. Giordano*, 231 Ga. 601, 604 (1974) (“it is evident that an adjudication on summary judgment is an adjudication on the merits of the case.”)); *see also Taylor*, 184 Ga. App. at 552 (a party seeks a ruling on the merits when it opposes a motion for summary judgment).

also Winco 30(b)(6) Dep., 47:12-25. Additionally, King Bird specifically targets southern states when marketing its fireworks.³ Further, King Bird executive, Chen Shimei, says that King Bird “see[s] larger demand from states in the south.” See 12/13/2016 News Article (Ex. 24). Because King Bird serves a market for fireworks in Georgia, and the firework malfunctioned in Georgia, the Court has specific jurisdiction over King Bird. *Ford Motor Co.*, 592 U.S. ____, p. 9. For the same reasons, this Court’s exercise of personal jurisdiction over King Bird is reasonable. *Id.* at 10.

II. King Bird Waived Personal Jurisdiction When it Sought a Ruling on the Merits.

King Bird waived its personal jurisdiction argument as soon as it sought a ruling on the merits after Exit 1-A was dismissed. *Crawford*, 191 Ga. App. at 115 (waiver occurred when, after dismissal of resident defendant, “the non-resident defendant *sought* a ruling from the court on the merits of the case.”) (emphasis added). Exit 1-A, the resident defendant, was dismissed on April 23, 2019. See 04/23/2019 Order (Ex. 25). King Bird sought a ruling on the merits on September 27, 2019 when it filed its Motion for Summary Judgment. See Def.’s MSJ, pp. 5-6 (arguing the merits of the case). By filing that motion, King Bird waived any jurisdictional challenges that it may have had.

King Bird’s strategic withdrawal of the MSJ over a year and five months later on March 12, 2021 could not withdrawal that waiver because waiver occurs when a party *seeks* a ruling on the merits—not when the Court *rules*. *Crawford*, 191 Ga. App. at 115; *Taylor*, 184 Ga. App. at 552; *Harrell*, 174 Ga. App. at 10; *Vanguard Ins. Co.*, 167 Ga. App. at 625. That is because the determinative question for waiver is whether a party submits to the jurisdiction of the Court by

³ King Bird Fireworks, King Bird Fireworks!, YouTube (Mar. 21, 2018), at 3:20-4:02, <https://www.youtube.com/watch?v=PTj8RqKbpfc>.

seeking a ruling on the merits, not when or how the Court rules on a particular motion. Because King Bird sought a ruling on the merits of the case after the resident defendant was dismissed, it has submitted to this Court's jurisdiction, and this belated jurisdictional challenge has been waived.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant's Motion to Set Aside for Lack of Personal Jurisdiction because this Court has personal jurisdiction over King Bird and because King Bird submitted to this Court's jurisdiction when it sought a ruling on the merits of the case.

Respectfully submitted this 9th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify the foregoing **Plaintiffs' Response to Defendant's Motion to Set Aside Default Under O.C.G.A. § 9-11-60(d)(1)** was served upon all parties via email to the following:

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Respectfully submitted this 9th day of April, 2021.

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