

IN THE SUPREME COURT OF TEXAS

No. 04-0016

MICHIANA EASY LIVIN' COUNTRY, INC. D/B/A MICHIANA, R.V.,
PETITIONER

v.

JAMES G. HOLTEN,
RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS

Argued January 6, 2005

JUSTICE MEDINA, joined by JUSTICE O'NEILL, dissenting.

Today the Court holds that an out-of-state defendant who intentionally defrauds a Texas resident, with full knowledge that reliance and damages will occur in Texas, cannot be made to answer for its conduct in a Texas court simply because the defrauded Texan initiated the phone call. Because the assumption of jurisdiction by Texas courts in this case does not offend the due process clause, I dissent.

I

This special appearance case arises out of James Holten's purchase of a motor home from Michiana Easy Livin' Country, Inc. Holten, a resident of Harris County, contacted Michiana regarding the purchase of a Class A Coachmen Catalina motor home, customized to meet certain specifications. According to Holten's affidavit, he informed Michiana that he resided in Texas and wanted the motor home delivered to his residence. Holten further avers that Michiana agreed to sell him the motor home, manufactured to his specifications, and to deliver its product to Texas, but that the motor home did not meet his specifications. Although Michiana's affidavit disputes whether delivery in Texas was planned from the start, its affidavits do not dispute Holton's averments concerning Michiana's misrepresentations.

Holten sued Ford Motor Company, Coachmen Industries, Coachmen Recreational Vehicle Company, and Michiana for violations of the Texas Deceptive Trade Practices Consumer Protection Act, fraud, breach of warranty, and breach of contract. Holten alleged that at the time he purchased the motor home, Michiana represented to him that the motor home would (1) be constructed of solid wood fastened with screws, (2) not contain nails or staples, (3) contain a bathtub and shower, (4) contain a double-pedal foot-flush toilet, and (5) be serviceable by any authorized Ford dealer. Holten avers that these representations turned out to be false.

Nevertheless, the Court concludes that the undisputed evidence of misrepresentations regarding the custom motor home are not actionable in Texas because the contacts with Texas are too attenuated to support jurisdiction here. Because I believe that torts perpetrated in Texas on Texas residents are actionable in this state, I dissent.

II

A nonresident defendant who commits a tort in Texas or transacts business with a Texas resident may be subject to the jurisdiction of a Texas court under the long-arm statute. TEX. CIV. PRAC. & REM. CODE § 17.042. The tort of misrepresentation occurs in Texas when reliance occurs in Texas. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982).¹ The record contains evidence that Michiana, knowing that Holten was a Texas resident and wished any motor home he purchased to be delivered to him in Texas, made misrepresentations to Holten upon which he relied in Texas. Therefore, on this record, it is undisputed that Michiana committed the tort of misrepresentation in Texas.

The Texas long-arm statute extends “as far as the federal constitutional requirements of due process will permit.” *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). The due process clause prevents an individual from being subjected to jurisdiction in a forum “with which he has established no meaningful ‘contacts, ties, or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). This “allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A defendant’s contacts with a forum state can support either general or specific jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9

¹ *See also Ring Power Sys. v. Int’l de Comercio y Consultoria*, 39 S.W.3d 350, 354 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189-90 (5th Cir. 1984) (stating that for jurisdictional purposes, a tort occurs in Texas if the resulting injury occurs in Texas).

(1984). The parties agree that Michiana's contacts with Texas are insufficient to give rise to general jurisdiction, in which a state exercises jurisdiction in a suit that does not arise out of the defendant's contacts with the forum. *See id.* at 414 n.9. But contacts that are insufficient to support general jurisdiction may still support specific jurisdiction. "Even a single purposeful contact may be sufficient to meet the requirements of minimum contacts when the cause of action arises from the contact." *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 234 (5th Cir. 1984), *citing McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

"Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there," the defendant must have "'purposefully directed' his activities at residents of the forum," and the suit must result from "injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (citations omitted). For our part, we have held that for a Texas court to exercise specific jurisdiction over a defendant, (1) the defendant's contact with Texas must be purposeful, and (2) the cause of action must arise from those contacts. *See Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). Furthermore, "assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice." *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966).

Holten claims that Michiana is subject to specific jurisdiction. There is evidence, based on the affidavits, that Michiana had two significant contacts with Texas: (1) Michiana made misrepresentations about the motor home to Holten, knowing that he would rely on them in Texas and that any resulting damages would be suffered in Texas; and (2) Michiana shipped its

product to Holten in Texas. This action clearly arises out of those contacts. The question remains whether Michiana's contact with Texas was purposeful.

III

A

The unilateral actions of a plaintiff cannot form the basis for long arm jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 298. But when a tortfeasor commits a tort in the forum state by directing its actions toward the forum state with full knowledge that injury will occur in the forum state, jurisdiction is appropriate. *See Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 211 (5th Cir. 1999), *citing Calder v. Jones*, 465 U.S. 783, 789-90 (1984); *see also Mem. Hosp. Sys. v. Fisher Ins. Agency, Inc.*, 835 S.W.2d 645, 650-52 (Tex. App.—Houston [14th Dist.] 1992, no writ) (holding that a single phone call was sufficient). Here, although Holten initiated contact, Michiana made the decision to deal with him, made misrepresentations to him knowing that he was in Texas, and shipped the motor home to Texas. Michiana's conduct was therefore sufficiently purposeful to support jurisdiction.

The Court makes much of the fact that this transaction arises primarily out of a single phone call. However, it is not the quantity or duration of contacts that matters in the specific jurisdiction context but the nature of the contacts. *Miss. Interstate Exp. Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982); *see also Am. Type Culture Collection*, 83 S.W.3d at 810. When a defendant purposefully directs tortious conduct at a forum, whether in person, by

correspondence, or in a single phone call, that defendant should expect to be subject to the forum's jurisdiction.²

A defendant's mere knowledge that its product will end up in the forum does not, without more, give rise to jurisdiction. *See CMMC v. Salinas*, 929 S.W.2d 435, 439 (Tex. 1996). However, numerous courts have held that under the right circumstances, a single sale by an out-of-state defendant can give rise to jurisdiction in an action arising out of that sale.³ And in *McGee v. International Life Insurance Company*, the Supreme Court held that a single insurance contract mailed to the forum could support specific jurisdiction. 355 U.S. at 223. Furthermore, when a plaintiff in a patent-infringement action alleges that the defendant shipped the infringing material into the forum state "through an established distribution channel," and "[t]he cause of action is alleged to arise out of these activities[,] [n]o more is usually required to establish specific jurisdiction." *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994), *cert. dismissed*, 512 U.S. 1273, *citing Burger King*, 471 U.S. at 472-73; *see also No.*

² *See D.J. Invs. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 547 (5th Cir. 1985); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333-34 (5th Cir. 1982) (holding that a single defamatory phone call directed at a forum was sufficient), *cert. denied*, 460 U.S. 1023 (1983); *Union Carbide*, 731 F.2d at 1189-90 (holding that out of state acts that caused in-state injury were sufficient); *see also Ahadi v. Ahadi*, 61 S.W.3d 714 (Tex. App.—Corpus Christi 2001, *pet. denied*); *Ring Power Sys.*, 39 S.W.3d at 354; *Rowland & Rowland, P.C. v. Tex. Employers Indem. Co.*, 973 S.W.2d 432, 435-36 (Tex. App.—Austin 1998, *no pet.*); *Mem. Hosp. Sys.*, 835 S.W.2d at 650-52.

³ *See Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985) ("The sale and shipment of the master cylinder into Mississippi represented an affirmative act by Crimson to introduce its product into Mississippi for use in that state. By this shipment, Crimson purposefully availed itself of the privilege of conducting activities in Mississippi and its connection with the forum is such that it should reasonably anticipate being haled into court there . . ."); *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Edwards v. Radventures, Inc.*, 164 F. Supp. 2d 190 (D. Mass. 2001) (finding specific jurisdiction where Massachusetts plaintiff purchased a monoski via fax from a defendant with no other contacts with Massachusetts and was injured when the ski malfunctioned); *Houston Technical Ceramics, Inc. v. Iwao Jiki Kogyo, Co.*, 742 F. Supp. 387 (S.D. Tex. 1990).

Am. Philips Corp. v. Am. Vending Sales, Inc., 35 F.3d 1576, 1578-79 (Fed. Cir. 1994). One court has gone so far as to hold that “[o]nce a defendant knowingly enters into a contract through a website, . . . that defendant has purposefully availed him or herself of the privileges of the forum state. . . . [and] may be subject to suit there.” *Stewart v. Hennesey*, 214 F. Supp. 2d 1198, 1203 (D. Utah 2002). I do not endorse that rule, but it further illustrates that finding jurisdiction on this record falls well within the pale.

In *World-Wide Volkswagen*, New York residents, who had purchased their automobile from a dealership in New York, were injured when their car caught fire in Oklahoma. The United States Supreme Court held that an Oklahoma court could not exercise personal jurisdiction over the dealership, which operated only in the northeast and had no way of knowing the automobile would end up in Oklahoma. *See World-Wide Volkswagen Corp.*, 444 U.S. 286. But the Court further stated that a “forum State does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” *Id.* at 297-98; *see also Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91, 93 (Tex. 1988) (overruled in part on other grounds by *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 594 (Tex. 1999)). Contrary to the Court’s assertion, the facts here materially differ from those in *World-Wide Volkswagen*. In that case, the defendant never agreed to send its product to Oklahoma—it was merely foreseeable that the car might end up in Oklahoma because car purchasers in New York sometimes drive to Oklahoma. Here, Michiana not only shipped its motor home to Texas

with the full knowledge that a Texas resident would use it, but also directed misrepresentations toward Texas.

The Court also maintains that Michiana's contacts with Texas are no more substantial than those of the defendant in *CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996). In that case, the plaintiff ordered a winepress from CMMC, a foreign corporation, through an out-of-state middleman. The plaintiff's only causes of action were for negligence and strict products liability; there was no evidence that CMMC committed any intentional torts in Texas by directing misrepresentations at a Texas buyer. Arguably, CMMC could have foreseen injury in Texas; but here, Michiana *knew* that injury would occur in Texas when it *deliberately* committed a tort there, as Holten avers. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988), is distinguishable on the same grounds. In that case, the Fifth Circuit held that no jurisdiction existed because there was no evidence that the defendant had "expressly aimed" its tortious conduct at Texas. *See id.* Injury only "occurred" in Texas because of the fortuity that the plaintiff's principal place of business was in Texas. *See id.* at 773. Here, there is evidence that any misrepresentation was knowingly aimed at Texas because Michiana, with the knowledge that Holten was a Texas resident who expected the motor home to be delivered to Texas, made representations to him regarding the custom motor home.

The Court further errs in its analysis of the special appearance process when it states that "[i]f committing a tort establishes jurisdiction . . . guilty nonresidents can be sued here[:] innocent ones cannot." ___ S.W.3d at ___. To establish jurisdiction, a plaintiff must plead facts sufficient to support jurisdiction; to overcome this, a defendant must negate all bases of

jurisdiction. *See BMC Software*, 83 S.W.3d at 793. Because jurisdiction under the long arm statute's tort provision turns on whether the defendant committed a tort in Texas, facts supporting jurisdiction often relate to the merits of the case. However, to establish jurisdiction, there need only be a prima facie showing of a purposeful contact with Texas, not proof of liability in tort. *See Arterbury v. Am. Bank & Trust Co.*, 553 S.W.2d 943, 947-48 (Tex. Civ. App.—Texarkana 1977, no writ). Sometimes, as here, the same act is alleged to be both the purposeful contact and the tort, and under these circumstances prima facie proof of a potentially tortious act may be required. *See French v. Glorioso*, 94 S.W.3d 739, 746 (Tex. App.—San Antonio 2002, no pet.). Such a showing gives the trial court jurisdiction to determine ultimate liability in tort. *See Arterbury*, 553 S.W.2d at 948. A subsequent finding that a tort was not committed does not mean that the trial court lacked jurisdiction.⁴

The Court's suggestion that plaintiffs will always allege a tort to get jurisdiction is also misplaced. If a plaintiff can secure jurisdiction by averring that the defendant committed a tort, why can the plaintiff not achieve the same result by averring that the defendant traveled to Texas (which, I assume, the Court would agree is sufficient)? Either case can easily turn into a swearing contest, but that is no justification for failure to give Texas residents the full protection of the long arm statute. We choose to decide jurisdiction based on allegations and averments. *See BMC Software*, 83 S.W.3d at 793. In any event, it is not the tortiousness of the defendant's

⁴ *BMC Software*, 83 S.W.3d 793. *See also Boissiere v. Nova Capital, LLC*, 106 S.W.3d 897, 904 (Tex. App.—Dallas 2003, no pet.). This stands in contrast to subject-matter jurisdiction. *See Tex. A & M Univ. v. Bishop*, ___ S.W.3d ___ (Tex. 2005) (determining that no subject-matter jurisdiction existed only after a trial on the merits).

conduct that creates jurisdiction; it is its purposefulness. Whether a tort was committed is a question for the trial on the merits.

Here, there were uncontroverted averments of a purposeful act directed toward Texas, which Michiana did not bother to refute. Thus, it can hardly be said that Michiana negated this basis of jurisdiction. *See BMC Software*, 83 S.W.3d at 793. The trial court therefore had jurisdiction to determine whether the alleged acts were in fact tortious.

B

The Court makes much of the forum-selection clause in the contract of sale. Michiana's brief refers to the forum selection clause only as evidence of its own desire that litigation take place in Indiana. Sufficient contacts do not become insufficient simply because the defendant does not want to travel.

Furthermore, this interlocutory appeal under section 51.014(a)(7) of the Civil Practice and Remedies Code concerns the special appearance only. Texas law provides no interlocutory appeal from a denial of a motion for summary judgment based on a forum-selection clause. *See* TEX. CIV. PRAC. & REM. CODE § 51.014. Even if the issue could be considered here, Michiana has not briefed the validity and enforceability of the clause, and it is thus not properly a part of this interlocutory appeal.

IV

Finally, "the exercise of jurisdiction [must] comport[] with traditional notions of fair play and substantial justice." *BMC Software*, 83 S.W.3d at 795; *Asahi Metal Indus. Co. v. Super. Ct.*,

480 U.S. 102, 113 (1987). Factors courts consider are the burden on the defendant, the forum state's interest in adjudicating the controversy, the plaintiff's interest in obtaining efficient resolution of the case, and the shared interest of states in furthering their respective interests. *See Burger King*, 471 U.S. at 477. The burden on Michiana is not great. This case arises out of Michiana's decision to avail itself of a business opportunity in Texas and to commit the tort of misrepresentation in Texas (intentionally, according to the only evidence in the record). Surely Texas has the right to expect that companies doing business with Texas residents can reasonably anticipate having to answer in Texas courts for torts they commit in Texas.

The Court urges that relying on where a tort was directed impermissibly shifts our focus from the defendant's relation to the forum to the plaintiff's relation to the forum. It does not, however, because knowingly directing a tort at a forum, as Michiana allegedly did, is itself a contact with the forum. The Court attempts to cloud the issue with hypotheticals about cell phones. ___ S.W.3d at ___. Certainly, if a defendant did not know, or were mistaken about, where it was directing its conduct, that "direction" could not serve as a valid basis for jurisdiction—but that is not this case. Let there be no mistake: under the Court's opinion, a defendant who intentionally defrauds a Texas resident, with full knowledge that reliance and damages will occur in Texas, cannot be made to answer for its conduct in a Texas court so long as the plaintiff initiated the phone call.⁵

⁵ For example, the Court argues that a single defamatory phone call to an individual in the forum state is not enough to support jurisdiction in an action for libel. ___ S.W.3d at ___. However, the Fifth Circuit has held precisely the opposite—that a single defamatory phone call to a United States Attorney in Mississippi was sufficient to create jurisdiction in Mississippi. *See Brown*, 688 F.2d at 333-34.

Nothing prevented Michiana from producing evidence to negate jurisdiction, if it existed. The trial court might have even ruled in Michiana's favor. *See French*, 94 S.W.3d at 747. But Michiana did not attempt to refute Holten's averment that it committed a tort in Texas. The trial court therefore did not err in denying Michiana's special appearance, and the court of appeals correctly affirmed the judgment of the trial court.

* * * *

This action arises out of Michiana's contacts with Texas. Because those contacts are sufficient to support specific jurisdiction in this case without violating due process, I would affirm the judgment of the court of appeals.

David M. Medina
Justice

OPINION DELIVERED: May 27, 2005