STATE OF MICHIGAN

COURT OF APPEALS

EBENEZER SARFO,

Plaintiff-Appellee,

v

ST. ELIZABETH HOSPITAL, a foreign corporation,

Defendant-Appellant,

and

McLAREN REGIONAL MEDICAL CENTER,

Defendant,

and

PAUL LAZAR,

Defendant.

UNPUBLISHED
July 19, 2002

No. 230992
Genesee Circuit Court
LC No. 00-67255-CL

Before: Kelly, P.J., and Murphy and Murray, JJ.

Murray, J. (dissenting).

The dispositive issue in this case is whether the courts of the State of Michigan may constitutionally exercise personal jurisdiction over a non-resident corporation based upon that corporation sending to Michigan, at the instruction of a Michigan resident, a contract of employment (to be performed out of state), a few correspondence, and the making of a few phone calls. The majority holds that such contacts with the state allow the exercise of jurisdiction by our courts. Because I believe the exercise of jurisdiction under the facts of this case does not comport with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, I respectfully dissent.

The trial court's jurisdictional ruling is reviewed *de novo* on appeal, as it presents a question of law. *Oberlies v Searchmont Resort*, 246 Mich App 424, 427; 633 NW2d 408 (2001). Moreover, plaintiff has the burden of establishing jurisdiction over the defendant. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995); *Vargas v Hong Jin Corp*, 247 Mich App 278, 282; 636 NW2d 291 (2001).

Assuming that the majority has correctly applied the broad provisions of Michigan's long-arm statute, MCL 600.715, to the facts of this case, it has nonetheless erred in determining that the exercise of such jurisdiction comports with due process.

In *Starbrite Distributing, Inc v Excelda Mfg Co,* 454 Mich 302, 308; 562 NW2d 640 (1997), our Supreme Court, quoting *Witbeck v Bill Cody's Ranch Inn,* 428 Mich 659, 666; 411 NW2d 439 (1987), reiterated the well-known constitutional principle that "[t]he Due Process Clause of the Fourteenth Amendment 'does not contemplate that a state may make binding a judgment in personam against an individual or a corporate defendant with which the state has no contacts, ties or relations.'" To determine whether sufficient contacts, ties or relations exist between the forum state and the non-resident defendant such that personal jurisdiction is properly exercised, we must decide "whether the defendant purposefully established 'minimum contacts' in the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Starbrite, supra* at 308-308, quoting *Witbeck, supra* at 666, quoting *International Shoe Co v Washington,* 326 US 310, 319; 66 S Ct 154; 90 L Ed 95; 161 ALR 1057 (1945).[1]

"Courts apply a three-part test to determine whether a defendant has 'minimum contacts' with Michigan to the extent that limited personal jurisdiction may be exercised in accordance with due process." *Oberlies, supra* at 433. That three-part test was set forth in *Jeffrey, supra* at 186, as follows:

> First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the Defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable.

These factors are to be determined on a case-by-case basis, *Oberlies, supra* at 433-434, with the primary focus being on the "reasonableness" and "fairness" of exercising jurisdiction. *Jeffrey, supra* at 186.

In the present case, the evidence reveals upon *de novo* review that defendant did not purposefully avail itself of the privilege of conducting activities in Michigan. This is so because, as this Court held in *Vargas, supra* at 285:

> The defendant must deliberately engage in significant activities within a state, or create "continuing obligations' between himself and residents of the forum" to the extent that "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp v Rudzewicz,* 471 US 462, 476; 105 S Ct 2174; 85 L Ed 2d 528 (1985). This requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of

[1] In *Kerry Steel, Inc v Paragon Industries, Inc,* 106 F3d 147, 149-150 (CA6, 1997), the United States Court of Appeals for the Sixth Circuit pointed out that at the time the Fourteenth Amendment was adopted, a state court could only exercise jurisdiction over a non-resident defendant if that defendant consented or was present in the state so as to be amenable to service of process. According to the *Kerry Steel* Court, *International Shoe* put to an end the consent and presence requirements of personal jurisdiction.

> "random," "fortuitous," or "attenuated" contacts . . ." *Albino, supra* at 561, 572 NW2d 21, quoting *Starbrite, supra* at 310, 562 NW 2d 640, quoting *Burger King, supra* at 475, 105 S Ct 2174 (citations omitted).

In determining whether a defendant has purposefully availed itself towards a forum state, it is vitally important to remember that the defendant's efforts must be "*purposefully directed towards* residents of another state." *Burger King, supra* at 476 (emphasis added). With respect to contractual obligations, the United States Supreme Court has held that only those parties who "reach out" to citizens of another state can be subject to that state's jurisdiction. *Id.* at 473. The Court earlier had emphasized how "essential" to the proper excuse of jurisdiction it was to find that the defendant took some act on which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v Denckla,* 357 US 235, 253 ; 78 S Ct 1228, 1239-1240; 2 L Ed 2d 1283 (1958). Because it is defendant's actions which control this inquiry, whether a defendant "purposefully availed" itself of the forum states benefits and laws cannot be premised upon "the unilateral activity of another party or a third person". *Burger King, supra* at 475, quoting *Helicopteros Nacionales de Colombia SA v Hall,* 466 US 408, 417; 104 S Ct 1868, 1873; 80 L Ed 2d 404 (1984). See also *Vargas, supra* at 286 ("The defendant's contacts with the forum state must be analyzed in terms of the defendant's own actions rather than the unilateral activity of another party or a third person").

Our courts have consistently held that when a non-resident defendant has only random contact with the state there can be no "purposeful availment," and thus, no personal jurisdiction consistent with due process. See, e.g., *Witbeck, supra* at 672-673 (finding no jurisdictional connection between non-resident defendant and state for due process purposes despite defendant placing advertisement in national AAA magazine that would reach Michigan residents); *Mozdy v Lopez,* 197 Mich App 356, 359-360; 494 NW2d 866 (1992) (holding that a single advertisement in a Detroit newspaper did not establish that non-resident purposefully availed itself of Michigan protections and laws). Other courts, however, have found sufficient contacts with the state and its residents based upon multiple business transactions or advertisements within Michigan. See *Oberlies, supra* at 434 (defendant's widespread advertising to Michigan residents was sufficient for purposeful availment test); *Aaronson v Lindsay & Hauer International Ltd,* 235 Mich App 259, 266; 597 NW2d 227 (1999) (defendant, over a 16-month period, shipped gemstones valued at over $125,000 to a Michigan resident, as well as sales literature); *Starbrite, supra* at 310-311 (finding purposeful availment based upon repeated sales calls and ultimate contract to sell teak oil to Michigan resident, with delivery occurring over several months).

Unlike *Aaaronson, Oberlies* and *Starbrite,* in the instant case, the undisputed evidence revealed that there was no action initiated by defendant towards any Michigan resident. Additionally, defendant has never conducted business in Michigan, has no holding or properties in Michigan, has no agents or employees in Michigan, and has never sent any agent or employee into Michigan for any reason, let alone a business reason. Moreover, defendant took no action directing itself specifically towards Michigan residents. Instead, it contacted a national phone bank in St. Louis which ran the listing for defendant. The only in-person interview took place in Illinois, as did the preparation of the contact. The evidence is also undisputed in that, under the contract, plaintiff was to work in Illinois for at least one year and potentially three years.

Recognizing these undisputed facts, the majority has in support of its ruling instead relied on the few isolated phone calls and mailings which occurred between plaintiff and defendant during at most a two-month period in the summer of 1999. Specifically, plaintiff's affidavit indicates that during this short time frame he had no more than four calls from defendant regarding his potential position. Plaintiff also states that he sent one correspondence to defendant in Illinois and defendant sent three correspondence to him – one a contract, one containing an application for an Illinois medical license, and the third, a lab coat, work schedule, keys, and parking pass. These relatively few contacts with plaintiff by phone and mail in Michigan, which all occurred after plaintiff responded to an out-of-state listing by defendant that was not specifically directed to any Michigan resident, are exactly the type of "random" or "attenuated" contacts that cannot form the basis for the exercise of personal jurisdiction consistent with the United States Constitution.

Indeed, one need only review some of the closely analogous decisions from the federal courts to see that the contacts defendant has with plaintiff in Michigan do not satisfy the due process requirements. For example, in *LAK, Inc v Deer Creek Enterprises*, 885 F2d 1293 (CA6, 1989), defendant, an Indiana general partnership, transacted no business in Michigan, had no employees or agents in Michigan, and had no property or other holdings in Michigan. However, its Florida representative was contacted by plaintiff, a Michigan limited partnership, regarding the purchase of Florida property owned by defendant.[2] Thereafter, negotiations took place over the phone between plaintiff in Michigan and Defendant in Illinois, Florida and elsewhere. Plaintiff's Michigan lawyer conducted "a number" of contract language negotiations over the phone with counsel in Indiana, including sending back and forth between Michigan and Indiana three draft contracts. The contract was ultimately signed in Indiana, but the $275,078.50 earnest money was drawn on a check from a Michigan bank. Eventually problems arose, which resulted in more phone calls between Michigan and Indiana, and ultimately a lawsuit was filed in Detroit.

The district court entered judgment on a jury verdict for plaintiff, but the Sixth Circuit reversed, holding that the court could not exercise personal jurisdiction over defendant consistent with due process. In particular, the court held that the contacts between defendant and Michigan, consisting of phone calls and mailings during contract negotiations, were not sufficient to establish that defendant purposefully availed itself of Michigan:

> The telephone calls and letters on which the plaintiff's claim of jurisdiction primarily depends strike us as precisely the sort of "random," "fortuitous" and "attenuated" contacts that the *Burger King* Court rejected as a basis for haling non-resident defendants into foreign jurisdictions.
>
> A numerical count of the calls and letters has no talismanic significance: "The quality of the contacts as demonstrating purposeful availment is the issue, not their number or their status as pre- or post-agreement communications." *Stuart v Spademan*, 772 F2d 1185, 1194 (5th Cir, 1985). And the majority of the lawyers' telephone calls between Detroit and Indianapolis, for whatever that datum may be

[2] Defendant did not advertise the sale of property in Michigan.

worth, were originated not by the defendant's lawyer, Mr. Backer, but by Mr. Mehr, the lawyer for Beznos Realty.

* * *

Mr. Backer did, to be sure, originate some calls to Mr. Mehr, and he did send three draft contracts to Mr. Mehr in Detroit. (Deer Creek's refusal to adjust the purchase price was also confirmed by letter to Mr. Mehr, but that has little or no significance in this context.) On the facts of this case, however, we do not find these communications sufficient to establish "purposeful availment." *Cf. Scullin Steel Co v National Railway Utilization Corp,* 676 F2d 309, 314 (8th Cir, 1982) (The use of interstate facilities such as the telephone and the mail is a "secondary or ancillary" factor and "cannot alone provide the 'minimum contacts' required by due process"). See also *Hydrokinetics, Inc v Alaska Mechanical, Inc,* 700 F2d 1026, 1029 (5th Cir, 1983), *cert denied,* 466 US 962, 104 S Ct 2180, 80 L Ed 2d 561 (1984) ("As for the exchange of communications [by telex, telephone and letter] between Texas and Alaska in the development of the contract, that in itself is also insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws"). On the record before us, to borrow from this court's language in *Weller v Cromwell Oil Co,* 504 F2d 927, 931 (6th Cir, 1974), there is no reason to suppose that either Mr. Hasten, the general partner, or Mr. Backer, the lawyer, intended to lay himself open to liability "in every state of the union whenever [he made] telephone calls or wrote letters to a customer who [might subsequently claim] that they constitute[d] misrepresentations." [*Id.*, at 1301.]

The Sixth Circuit adhered to its holding in *LAK* in the more recent decision of *Kerry Steel, Inc v Paragon Industries, Inc,* 106 F3d 147, 149-150 (CA6, 1997). In that case, a Michigan corporation sued an Oklahoma corporation in the Eastern District of Michigan. The suit was over a contract which was negotiated between Michigan and Oklahoma by means of telephone and facsimile. The purchase order was sent to Michigan. The federal district court granted defendant's motion to dismiss on the basis of no personal jurisdiction. The Sixth Circuit affirmed.

In affirming, the court of appeals held that the entry of a contract with a Michigan resident is alone insufficient to show that the defendant "purposefully availed itself of the 'benefits and protections' of Michigan law:"

The mere fact that Paragon entered into a contract with a Michigan corporation does not mean that Paragon purposefully availed itself of the "benefits and protections" of Michigan law. As the Court explained in *Burger King,* 471 US at 478, 105 S Ct at 2185, "an individual's contract with an out-of-state party alone" cannot "automatically establish minimum contacts." See also *CompuServe,* 89

> F3d at 1265 ("merely entering into a contract . . . would not, without more, establish sufficient minimum contacts"). [*Id.*, at 151.[3]]

The court then concluded that the telephone calls and facsimiles which comprised the contract negotiations were too random and attenuated to establish the purposeful availment test:

> It is immaterial that Paragon placed telephone calls and sent faxes to Kerry Steel in Michigan. To borrow language employed by this court in *LAK*, 885 F2d at 1301, "[t]he telephone calls and letters on which the plaintiff's claim of jurisdiction primarily depends strike us as precisely the sort of 'random,' 'fortuitous' and 'attenuated' contacts that the *Burger King* Court rejected as a basis for haling non-resident defendants into foreign jurisdictions." *Id.* at 1300. See also *Scullin Steel Co v National Ry. Utilization Corp.*, 676 F2d 309, 314 (8th Cir, 1982) ("The use of interstate facilities (telephone, the mail), the making of payments in the forum state, and the provision for delivery within the forum state are secondary or ancillary factors and cannot alone provide the 'minimum contacts' required by due process"). *Id.*

Not surprisingly, other courts have reached the same conclusion as the *Kerry* and *LAK* courts. See *IMC Industries, Inc v Kiekert AG*, 155 F3d 254, 259 n 3 (CA3, 1998); *Brady v Burtt*, 979 F Supp 524, 529-530 (ED Mich, 1997) ("contract negotiations entailing telephone calls and mailings to the forum state, if random, fortuitous, and attenuated, are an insufficient basis for exercising personal jurisdiction over a defendant"); *Piper v Kassel*, 817 F Supp 802, 805-806 (ED MO, 1993); and *Whittaker v Medical Mutual of Ohio*, 96 F Supp 2d 1197, 1200-1201 (D Kan, 2000).

As in the foregoing cases, there was insufficient evidence in this case that defendant took action directed towards Michigan such that it could be said to have "purposefully availed" itself of the protections and benefits of Michigan law. Neither entering into a contract with a Michigan resident, nor a few isolated mailings and phone calls into Michigan, can support a finding of personal jurisdiction over this defendant which is consistent with due process.

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[3] See also *Calphalon Corp. v Rowlette*, 228 F2d 718, 722 (CA6, 2000).

Accordingly, I would reverse the circuit court's order.[4]

/s/ Christopher M. Murray

[4] Although unnecessary to a proper disposition of this appeal, I further note that the circuit court incorrectly found that this state has an interest in having the case litigated in Michigan. Indeed, Michigan law does not even afford its own courts with subject matter jurisdiction to review contract and tort claims brought by medical professionals who are subject to the bylaws of a private hospital. *Long v Chelsea Community Hospital*, 219 Mich App 578, 586; 557 NW2d 157 (1996); *Samuel v Herrick Memorial Hospital*, 201 F2d 839, 834-835 (CA6, 2000). Furthermore, the circuit court improperly relied on plaintiff's case against the co-defendants as a basis for finding jurisdiction against this defendant, for personal jurisdiction cannot be established under the due process clause based on the acts of third parties or persons. *Vargas, supra* at 286. Hence, even if one could find that defendant somehow did purposely avail itself of the protections of Michigan law, plaintiff still has not established the other two tests under *Jeffrey, supra.*