

**SUPREME COURT OF ARKANSAS**

No. CV-12-306

SHARON ROLLER, VALERIE  
MURPHY, AND EMILY SMITH  
APPELLANTS

V.

TV GUIDE ONLINE HOLDINGS, LLC  
APPELLEE**Opinion Delivered** June 27, 2013APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. CV11-52-4]  
HONORABLE MARK LINDSAY,  
JUDGEREVERSED AND REMANDED.**KAREN R. BAKER, Associate Justice**

Appellants Sharon Roller, Valerie Murphy, and Emily Smith (collectively “appellants”) appeal from the judgment and order of the Washington County Circuit Court, granting appellee TV Guide Online Holdings’s (“TV Guide”) motion to dismiss. On appeal, appellants assert that the circuit court erred in granting TV Guide’s motion to dismiss because (1) appellants properly pleaded subject-matter jurisdiction and venue in their complaint, and (2) TV Guide did not meet its burden of proof to establish that venue was improper in Washington County, Arkansas (“Washington County”). We reverse and remand.

Appellants filed a class-action complaint against TV Guide, claiming that they represented a class of people who had accessed TV Guide’s website. They assert that, upon their access of the website, TV Guide downloaded a “Flash cookie” onto their computers without their knowledge, permission, or consent. The Flash cookie had the capacity to monitor, capture, and report information concerning appellants’ activity on the Internet.

Appellants' complaint alleged that each of the three appellants were citizens and residents of Washington County and that a substantial part of the events or omissions giving rise to their claims occurred in Washington County.

TV Guide filed a motion to dismiss, alleging that the appellants had not pleaded facts sufficient to show that venue was proper in Washington County. TV Guide contended that by use of TV Guide's website, appellants had consented to venue in Los Angeles, California ("Los Angeles"), and thus venue was not proper in Washington County. TV Guide asserted that the use of the website was governed by an agreement found on the "Terms and Conditions" page of the website, which is accessible via hyperlink at the bottom of each page of the website. Neither party disputes that this was a "browsewrap" agreement, in which the agreement is part of the website and the user assents to the contract by use of the website.<sup>1</sup> *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004). TV Guide attached a copy of the agreement as an exhibit to its motion. The agreement included the following language:

Your use of the TV Guide Website and/or the Services constitutes your agreement to be legally bound by these Terms of Use.

....

You agree that this Agreement, for all purposes, shall be governed and construed with the laws of the State of California applicable to contracts to be wholly performed therein, and any motion based on or alleging a breach of this Agreement must be brought in a state or federal court in Los Angeles, California. In addition, both parties agree to submit to the exclusive personal jurisdiction and venue of such courts.

Based on this agreement, TV Guide asserted that the only proper venue for appellants to bring

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<sup>1</sup>As opposed to a "browsewrap" agreement, a "clickwrap" agreement presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

their claims against TV Guide was a state or federal court in Los Angeles. TV Guide further argued that in order to establish that jurisdiction was proper in Washington County, appellants were required to plead facts sufficient to avoid jurisdiction in Los Angeles as required by the agreement.

On December 6, 2011, the circuit court held a hearing on the motion to dismiss. At the hearing, the circuit court treated the motion to dismiss as one under Arkansas Rule of Civil Procedure 12(b)(1) and (3) (2011). The circuit court ruled from the bench, finding that appellants had not pleaded sufficient facts to avoid jurisdiction and venue in Los Angeles. On January 3, 2012, the circuit court entered its order granting the motion to dismiss “for the reasons stated on the record during the hearing.” Appellants filed a motion to reconsider. The circuit court, after a hearing, denied appellants’ motion.<sup>2</sup> Appellants then filed this timely appeal. We have jurisdiction over this appeal pursuant to Arkansas Supreme Court Rules 1-2(b)(1) (2012) as this is a matter of first impression.

Although TV Guide filed its motion to dismiss asserting that appellants had not pleaded sufficient facts to establish that venue was proper in Washington County, the circuit court treated the motion to dismiss as one under Arkansas Rule of Civil Procedure 12(b)(1) and (3). Arkansas Rule of Civil Procedure 12(b) sets out affirmative defenses; 12(b)(1) allows defendants to assert that the circuit court does not have subject-matter jurisdiction over the claim; and 12(b)(3) allows defendants to assert that the claim was not brought in the appropriate venue.

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<sup>2</sup>Appellants do not appeal the denial of the motion for reconsideration.

We review a decision on a motion to dismiss under Arkansas Rule of Civil Procedure 12(b)(1) by accepting the facts alleged as true and liberally construing them in plaintiff's favor. *Dollarway Patrons for Better Schs. v. Dollarway Sch. Dist.*, 374 Ark. 92, 286 S.W.3d 123 (2008). As to issues of law presented, our review is de novo. *Id.*

Parties may by agreement consent to personal jurisdiction in a given court, but subject-matter jurisdiction cannot be conferred merely by agreement of the parties. *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005). While a forum-selection clause implies consent as to personal jurisdiction, it cannot confer subject-matter jurisdiction. *Id.* Subject-matter jurisdiction also may not be created by agreement of the parties. *Vibo Corp., Inc. v. State ex rel. McDaniel*, 2011 Ark. 124, 380 S.W.3d 411.

Appellants alleged in their complaint that a substantial part of the events or omissions giving rise to their claims occurred in Washington County. Treating the facts alleged in the complaint as true, appellants have pleaded sufficient facts to show that the Washington County Circuit Court has subject-matter jurisdiction over these claims. Assuming arguendo that appellants were bound by the obligations outlined in the agreement, this would not affect the Washington County Circuit Court's subject-matter jurisdiction over the claims because subject-matter jurisdiction may not be created or waived by agreement of the parties. Therefore, to the extent that the circuit court granted TV Guide's motion to dismiss based on lack of subject-matter jurisdiction under Arkansas Rule of Civil Procedure 12(b)(1), this was error.

Next, we turn to the circuit court's finding that venue was improper in Washington

County under Arkansas Rule of Civil Procedure 12(b)(3). In reviewing a circuit court's decision on a motion to dismiss for improper venue under Arkansas Rule of Civil Procedure 12(b)(3), this court treats the facts alleged in the complaint as true and views them in the light most favorable to the plaintiff. *Provence v. Nat'l Carriers, Inc.*, 2010 Ark. 27, 360 S.W.3d 725. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.*

Appellants asserted in their complaint that each was a citizen and resident of Washington County. Appellants further asserted that TV Guide has more than minimum contact with the State of Arkansas and has availed itself of the privilege of conducting business in the State of Arkansas. Treating these facts as true and viewing them in the light most favorable to the plaintiff, appellants have pleaded sufficient facts to show that venue is proper in Washington County.

TV Guide contends that appellants did not plead facts sufficient to show that the court has jurisdiction of the claim and that venue is proper under Arkansas Rule of Civil Procedure 8(a)(1) (2012). TV Guide asserts that the proper venue for this claim is in Los Angeles pursuant to the agreement on TV Guide's website, and that it was appellants' burden to plead facts sufficient to avoid venue there.

When venue is questioned, a defendant objecting to venue has the burden of demonstrating that venue is improper. *Helm v. Mid-Am. Indust., Inc.*, 301 Ark. 521, 785 S.W.2d 209 (1990). If an objection to venue is not substantiated by the pleadings, the

objecting party has the duty to produce evidence showing that venue is not proper. 2 David Newbern, John J. Watkins & D.P. Marshall, Jr., *Arkansas Civil Practice & Procedure* § 14:4 (5th ed. 2010) (footnote omitted). Because TV Guide objects to venue in Washington County, TV Guide has the burden to show that is venue not proper in Washington County. By requiring appellants to plead sufficiently to avoid jurisdiction in Los Angeles, the circuit court impermissibly shifted this burden to appellants.

Additionally, TV Guide did not meet its burden of demonstrating that venue was improper in Washington County. TV Guide contests venue in Washington County on the basis of the agreement set out on its website. In order to contest venue due to an agreement, the party questioning venue must establish that an agreement exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent. *Alltel Corp., Inc. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005). We keep in mind two legal principles when deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Williamson v. Sanofi Winthrop Pharm., Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001). Both parties must manifest assent to the particular terms of the contract. *DIRECTV, Inc. v. Murray*, 2012 Ark. 366, \_\_\_ S.W.3d \_\_\_. A party, by knowingly accepting the benefits of a proposed contract, is bound by its terms. *Id.*

TV Guide argues that appellants manifested assent through use of the TV Guide

website. However, for a party to assent to a contract, the terms of the contract must be effectively communicated. *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991).

We addressed a similar issue in *Sumner*. In *Sumner*, Paul Sumner and Charles Miller (collectively, “plaintiffs”) filed a class-action suit against Alltel, asserting that Alltel had violated the Arkansas Deceptive Trade Practices Act. Alltel filed a motion to dismiss or stay pending resolution of the arbitration issue in another case, or, in the alternative, to compel arbitration. Alltel asserted that plaintiffs were subject to a service contract that included an arbitration clause.<sup>3</sup> As evidence, Alltel submitted the affidavit of John Chapman, Director of Retail Sales for Alltel, who stated that the agreement would have been given to plaintiffs prior to the initiation of service, and that no customer would receive service without such an agreement. The circuit court denied Alltel’s motion to dismiss. On appeal, we affirmed the ruling of the circuit court, holding that an affidavit of Alltel’s policy and procedure was insufficient to show that Sumner and Miller had notice of the agreement.

In this case, TV Guide has not demonstrated that the terms of the agreement were communicated to appellants. TV Guide’s assertions that appellants had notice of the agreement stem from appellants’ mention of the agreement in their complaint. However, this is insufficient as the dispositive issue in determining if an enforceable agreement existed is whether appellants had constructive or actual knowledge of the terms of the agreement and therefore agreed by their use of TV Guide’s website to be bound by those terms. *See Specht*

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<sup>3</sup>This court treats arbitration clauses as forum-selection clauses. *See DIRECTV v. Murray*, 2012 Ark. 336, at 12, \_\_\_ S.W.3d \_\_\_, \_\_\_ (“Arbitration is a forum selection made by contracting parties.”).

*v. Netscape Commc'ns Corp.*, 306 F.3d 17 (holding that a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms). Here, TV Guide failed to meet its burden to show an enforceable agreement existed between it and appellants; thus, it has likewise failed to establish that venue was improper in Washington County.

In sum, because subject-matter jurisdiction cannot be created or waived by agreement between the parties, and because TV Guide has not met its burden to show that an enforceable agreement existed between it and appellants relating to the proper venue in which to bring claims, the circuit court erred in granting TV Guide's motion to dismiss.

Reversed and remanded.

Special Justice EDWARD ALLEN GORDON joins in this opinion.

GOODSON, J., not participating.

*Taylor Law Partners, LLP*, by: *William B. Putnam*, for appellants.

*Friday, Eldredge & Clark, LLP*, by: *Clifford W. Plunkett* and *Seth Haines*, for appellee.