Opinion issued November 18, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00013-CV

HENISE TIRE SERVICE, INC., Appellant

V.

VICTORIA JACOBS, ET AL., Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2008-67196

MEMORANDUM OPINION

After a bus accident near Sherman that claimed several lives and caused numerous injuries, the bus passengers, their families, and survivors of the deceased passengers (collectively, the passengers) sued, among other defendants, Henise Tire Service (Henise), a company that sells, repairs, and retreads tires through

several locations in the state of Pennsylvania. The passengers allege that a blowout of the right front tire, which Henise had retreaded, caused or contributed to the accident.

Henise filed a special appearance in the trial court, which the trial court denied. On appeal, Henise contends that the trial court erred in denying its special appearance because it lacks the minimum contacts with Texas required for a Texas court to exercise jurisdiction over it. We hold that the trial court erred in denying Henise's special appearance and reverse.

BACKGROUND

On August 8, 2008 a tour bus carrying fifty-five passengers from Houston, Texas to a religious event in Carthage, Missouri crashed on U.S. Highway 75 near Sherman, Texas. Seventeen passengers died as a result of the crash, and many of the surviving passengers suffered serious injuries.

Investigation revealed that a retread tire on the bus had a blowout, causing the accident. Tracing linked the tire's identification number to MCI Sales and Service in New Jersey (MCI New Jersey), a longstanding customer of Henise. In September 2007, MCI shipped the tire for retreading to Henise's plant in Cleona, Pennsylvania. Henise retreaded the tire and returned it to MCI in New Jersey.

MCI sells passenger buses and parts at locations throughout North America. It has its headquarters in Illinois. MCI New Jersey is a longstanding customer of

Henise. About the same time MCI New Jersey had Henise retread the tire, MCI New Jersey was reconditioning a bus. After completing the reconditioning, MCI sent the bus to its facility in Cincinnati, Ohio. In May 2008, MCI sold and delivered the bus to Angel Tours in Dallas, Texas. The record does not show precisely when or how the retread tire came to be installed on the bus, but the circumstances indicate that MCI New Jersey may have placed it on the bus in connection with the reconditioning process.

The passengers sued Henise in Texas district court, claiming that Henise was negligent for not having adequately inspected the tire's casing. Henise specially appeared and answered subject to the special appearance. In its special appearance, Henise, through its president, averred that Henise

- never had an employee residing in Texas;
- never maintained a bank account, telephone, or post office box in Texas; and
- never owned any real or personal property in Texas.

In response, the passengers contended that Henise "purposefully availed" itself of the Texas forum by:

- buying rubber and tires from Texas vendors from 2007 to 2009;
- sending copies of customer invoices to a Texas address in 2008 and 2009;
- engaging in "regular, consistent business" with and sending invoices to Dean Transportation, a Texas corporation;

- making payments to a Texas-based advertising company for advertising in the Pennsylvania Motor Truck Association Annual Buyers Guide Book;
- maintaining a website with nationwide access;
- sending a company representative to attend a seminar in San Antonio; and
- sending its president to attend a national tire dealers' meeting in San Antonio.

Before the passengers filed suit, Henise fulfilled two orders involving shipment of tires to Texas. The first occurred in March 2008 when MCI New Jersey ordered twenty tires and asked Henise to direct their shipment to MCI in Dallas. MCI New Jersey made a second order with the same terms in July 2008. Henise did not ship tires or sell tires directly to a Texas customer until March 2009. Henise maintains a website where online orders can be placed, but no Texas users have telephoned Henise to obtain access to the ordering feature, and no orders have been placed from Texas through the website.

The trial court denied Henise's special appearance on December 16, 2009. Henise timely appealed.

SPECIAL APPEARANCE

Henise contends that the trial court erred in holding that it is subject to personal jurisdiction in Texas. Specifically, Henise argues that it lacks the minimum contacts to support the exercise of jurisdiction over it.

A. Standard of Review

Whether a court has personal jurisdiction over a defendant is a question of law we review de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When the trial court issues findings of fact and conclusions of law, we review the findings of fact on legal and factual sufficiency grounds and review the conclusions of law. *Silbaugh v. Ramirez*, 126 S.W.3d 88, 94 (Tex. App—Houston [1st Dist.] 2002, no pet.) (citing *BMC Software*, 83 S.W.3d at 794). When, as here, the trial court does not issue findings of fact and conclusions of law, "all facts necessary to support the judgment and supported by the evidence are implied." *BMC Software*, 83 S.W.3d at 795.

The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the Texas long-arm statute. *Id.* at 793. The burden of proof then shifts to the nonresident to negate all possible grounds for personal jurisdiction. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985).

B. Personal jurisdiction

A Texas court may assert personal jurisdiction over a nonresident defendant only if the requirements of both the Fourteenth Amendment's Due Process Clause and the Texas long-arm statute are satisfied. *See* U.S. CONST. amend. XIV, § 1; TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997); *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). The Texas long-arm statute allows a court to

exercise personal jurisdiction over a nonresident defendant who does business in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. The Texas Supreme Court has repeatedly interpreted this broad statutory language "to reach as far as the federal constitutional requirements of due process will allow." *CSR*, 925 S.W.2d at 594 (citations omitted). Therefore, the requirements of the Texas long-arm statute are satisfied if the exercise of personal jurisdiction comports with federal due process limitations. *Id.*

The United States Constitution permits a state to assert personal jurisdiction over a nonresident defendant only if the defendant has some minimum, purposeful contacts with the state and if the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76, 105 S. Ct. 2174, 2183–84 (1985); *Dawson-Austin v. Austin*, 968 S.W.2d 319, 326 (Tex. 1998). A nonresident who has purposefully availed himself of the privileges and benefits of conducting business in the state has sufficient contacts with the state to confer personal jurisdiction. *CSR*, 925 S.W.2d at 594.

The requirement of "purposeful availment" is the "touchstone of jurisdictional due process." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005); *see IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 596–97 (Tex. 2007). Purposeful availment analysis incorporates at least three important inquiries. *IRA Res., Inc.*, 221 S.W.3d at 596 (citing *Michiana,* 168 S.W.3d at 785,

and applying analysis). First, only the defendant's contacts with the forum count. *Id.* This ensures that a defendant is not haled into a jurisdiction solely by the unilateral activities of a third party. *Michiana*, 168 S.W.3d at 785 (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183). Second, the acts of the defendant on which the plaintiff relies to assert jurisdiction must be purposeful, which ensures that jurisdiction is not based solely on contacts that are "random, isolated, or fortuitous." *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984)); *see IRA Res., Inc.*, 221 S.W.3d at 596. Third, a defendant "must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction, thus impliedly consenting to its laws." *IRA Res., Inc.*, 221 S.W.3d at 596; *see Michiana*, 168 S.W.3d at 785 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980)).

The mere act of placing a good into the stream of commerce does not constitute purposeful availment. *CSR*, 925 S.W.2d at 595–96. Rather, Texas law requires some "additional conduct" which indicates that the defendant intended to serve the Texas market. *Michiana*, 168 S.W.3d at 786. Examples of additional conduct that may show that intent include advertising in Texas, establishing communication channels with Texas, designing the product for the market in Texas, and marketing the product through a Texas distributor acting as a sales agent. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575–76 (Tex.

2007); *see also Michiana*, 168 S.W.3d at 786; *Kawasaki*, 699 S.W.2d at 201. A defendant's purposeful contacts with a forum may give rise to either general or specific jurisdiction. *CSR*, 925 S.W.2d at 595; *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 227 (Tex. 1991).[1]

1. General jurisdiction

General jurisdiction arises when a defendant's "general business contacts" with the forum state are "continuous and systematic," allowing the forum to exercise personal jurisdiction over the defendant even if the claim does not arise from or relate to the defendant's activities within the state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 1873 (1984); *CSR*, 925 S.W.2d at 595. When general jurisdiction is asserted, the minimum contacts analysis is more demanding and requires a showing that the defendant conducted "substantial activities" in the forum state. *CSR*, 925 S.W.2d at 595. "Usually, 'the defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction.'" *PHC-Minden, L.P. v.*

[1] The passengers expressly declare that "they are not contending in this appeal that Texas courts have general jurisdiction over Henise." This is not a concession that no general jurisdiction exists over Henise, the briefing and evidence before the trial court addresses personal jurisdiction on both grounds, and the trial court's order does not specify whether it found general jurisdiction, specific jurisdiction, or both. We therefore review the trial court's order on both grounds.

Kimberly-Clark Corp., 235 S.W.3d 163, 168 (Tex. 2007) (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5 (3d ed. 2007)). We consider contacts that occur "over a reasonable number of years, up to the date the suit is filed," in determining the whether the defendant conducted activities in the forum of a nature and quantity sufficient to give rise to general jurisdiction. *Id.* at 170.

The passengers contend that Henise has purposefully availed itself of the Texas forum in several ways. First, they point to Henise's shipment of tires to Texas in March of 2009 in performance of a contract with a New Jersey customer. This transaction is similar to one considered by the Texas Supreme Court in *CMMC v. Salinas*. 929 S.W.2d 435, 439 (Tex. 1996). In that case, the defendant, a foreign manufacturer of winepresses, direct shipped a winepress to Houston at the request of an independent wine equipment distributor. *Id.* at 436. Those circumstances, the Texas Supreme Court held, did not support a finding that the manufacturer purposefully availed itself of the Texas forum. *Id.* at 440. In contrast to the result in *CMMC*, delivering a product to Texas through an affiliated distributor constitutes purposeful availment. *See Spir Star AG v. Kimich*, 310 S.W.3d 868, 873–74 (Tex. 2010); *Control Solutions, Inc. v. Gharda Chems. Ltd.*, 245 S.W.3d 550, 559–60 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Henise's shipment of tires to MCI in Texas more closely resembles the circumstances addressed in *CMMC* than those in *Spir Star* or *Control Solutions*. Henise shipped the tires at the request of MCI, an entity unrelated to Henise and one with which Henise had transacted business only through its New Jersey office. Therefore, the deliveries of tires to Texas at MCI New Jersey's direction do not support a finding that Henise purposefully availed itself of the Texas forum.[2]

The passengers also point to Henise's payment to a Texas-based advertising company for advertising in the Pennsylvania Motor Truck Association's Annual Buyers Guide Book. The advertising itself, however, is directed to a specific Pennsylvania audience, and Henise sent payment to Texas only to comply with the Pennsylvania association's instructions. In *U-Anchor Advertising v. Burt*, the parties executed a contract in Oklahoma for advertising space in Oklahoma. 553 S.W.2d 760, 763 (Tex. 1977). The contract, which was executed in Oklahoma, required U-Anchor to remit payments to Texas. *Id.* The Texas Supreme Court held that U-Anchor's payments did not constitute purposeful availment of the Texas forum. *Id.* Likewise here, Henise did not seek to advertise in Texas or execute a contract in Texas. We conclude that Henise's payment to a Texas firm

[2] The passengers also point to Henise's July 2009 fulfillment of a tire order from MCI's Dallas branch. That transaction occurred after both the date of the injury and the date that the passengers filed suit; therefore, it does not fall within the time period relevant to the purposeful availment inquiry.

for advertising in Pennsylvania does not constitute purposeful availment of the Texas forum.

The passengers further contend that Henise purposefully availed itself of the Texas market by sending copies of invoices covering transactions with Wengert Dairy in Lebanon, Pennsylvania to its parent company in Texas. Henise has serviced Wengert's commercial fleet for approximately fifty years. Several years ago, Wengert, which had been a family-owned dairy since its inception, became acquired by Dean Foods, a large, publicly-traded holding company with a nationwide presence. Since then, Henise, at Wengert's request, has provided copies of the Wengert invoices to Dean Foods' subsidiary, Dean Transportation, located in Dallas, Texas. Wengert continues to pay the original invoices with checks drawn from a Pennsylvania bank.

Conducting out-of-state business with a Texas corporation is not sufficient to establish purposeful availment of the Texas jurisdiction. *Id.* Henise's provision of Wengert's billing information to Dean Transportation does not show that Henise purposefully availed itself of the Texas forum.

The passengers also point to Henise's purchase of tires and rubber from Texas vendors as contacts supporting the exercise of jurisdiction. Henise began to purchase tires from Texas vendors in July and August 2009, after both the date of

the accident and the date the passengers filed suit. As a result, they do not factor into the purposeful availment inquiry. *See PHC-Minden*, 235 S.W.3d at 168.

For a time, Henise bought strip rubber for use in agricultural tire retreading from a Texas vendor because it was not available from its main supplier. That business relationship ended in 2007 when Henise changed its process for agricultural tire retreading. The passengers rely on *Pulmosan Safety Equipment Corp. v. Lamb* in contending that Henise's purchases from Texas vendors authorize the exercise of specific jurisdiction. 273 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). In *Pulmosan*, however, the defendant had an employee in Texas, established channels of regular communication with Texas residents for the purpose of selling its products in Texas, and mailed catalogs to Texas residents. *Id.* at 834. Here, in contrast, Henise purchased a single product with specialized application and involving a small facet of its overall business for a limited time. This activity is not a general business contact that is "continuous and systematic" enough to show purposeful availment. *See PHC-Minden*, 235 S.W.3d at 171 (concluding that specialty coverage contract for teleradiology assistance was for limited services that did not equate to "continuous and systematic" contacts).

The passengers further contend that Henise purposefully availed itself of the Texas forum by maintaining an interactive website accessible to Texas residents. Interactive websites that are clearly used for transacting over the internet or for

exchanging information between an individual and a host computer may be sufficient to authorize the exercise of general jurisdiction over a nonresident defendant. *All-Star Enterprise, Inc. v. Buchanan*, 298 S.W.3d 404, 426–27 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Henise's website provides information about its products and allows customers to order products online. A person who wishes to use the website's interactive component must apply to Henise for a username and password. No Texas resident has contacted Henise for that purpose. The website's interactive feature thus was not available to any Texas resident.

The passengers claim that, because Henise's internet advertising reaches a national audience, including Texas residents, Henise availed itself of the right to do business in Texas and subjected itself to the jurisdiction of Texas courts. That Texas residents may view the website's passive advertising does not constitute purposeful availment of the Texas forum. *See Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 177–78 (Tex. App.—Houston [1st. Dist] 2008, no pet.); *Amqiup Corp. v. Cloud*, 73 S.W.3d 380, 388 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Henise's website does not support the exercise of jurisdiction over Henise in Texas.

Before this lawsuit began, Henise made purchases from one Texas vendor. That arrangement has since been discontinued. The remaining relevant transactions involve delivery of products and documents to Texas as directed by its

local customers in Pennsylvania and New Jersey. Those limited and sporadic contacts do not amount to purposeful availment. *See PHC-Minden*, 235 S.W.3d at 171. We hold that Texas courts do not have general jurisdiction over Henise.

2. Specific jurisdiction

Specific jurisdiction exists when the plaintiffs' claims arise from or relate to the defendant's purposeful contacts with Texas. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). We focus on the relationship between the defendant, Texas, and the litigation. *See Guardian Royal*, 815 S.W.2d at 228. Specific jurisdiction requires a "substantial connection" between the defendant's purposeful contacts with Texas and the operative facts of the litigation. *Moki Mac*, 221 S.W.3d at 585.

The accident that gave rise to the underlying litigation involved a tire sent to Henise by MCI New Jersey that Henise repaired for and returned to MCI New Jersey. The record does not show the entity responsible for the tire's arrival in Texas. *See Spir Star AG*, 310 S.W.3d at 873. The passengers maintain that Henise subjected itself to personal jurisdiction by returning the tire to a sales and service facility and thus placing the tire in the stream of commerce. Because a tire is inherently transportable, it is foreseeable that it might be used in Texas. But "foreseeability alone will not support personal jurisdiction." *CSR*, 925 S.W.2d at 595. In returning the tire to MCI New Jersey, Henise did not purposefully direct

any action toward Texas. *See id.* (holding that, although CSR could have known that sale of raw asbestos to Johns-Manville might lead to asbestos-containing product in Texas, that awareness did not convert conduct into act purposefully directed toward forum state).

The record does not show that the passengers' claims are based on any of Henise's contacts with Texas. *See Siskind v. Villa Found. for Educ. Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). Because Henise lacks any contact with Texas that is substantially connected to the facts giving rise to the passengers' claims, we hold that Texas courts do not have specific jurisdiction over Henise.

CONCLUSION

We hold that the record does not support a finding of either general or specific jurisdiction over Henise. We therefore reverse the trial court's order denying Henise's special appearance and render judgment granting the special appearance.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Sharp.