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ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CV-17-249

DANIEL R. GOODWIN AND THE GOODWIN LAW FIRM, PLLC APPELLANTS V. MAGNESS OIL COMPANY; BENNY W. MAGNESS; JANIE A. MAGNESS; AND JEFFREY MAGNESS APPELLEES	Opinion Delivered: May 16, 2018 APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT [NO. 03CV-11-330] HONORABLE SHAWN A. WOMACK, JUDGE REVERSED AND DISMISSED

RITA W. GRUBER, Chief Judge

Virginia attorney Daniel Goodwin and the Goodwin Law Firm, PLLC (Goodwin), appeal from the judgment of the Baxter County Circuit Court entered after a bench trial finding him liable for conversion and assessing damages of $500,000 in favor of appellee Magness Oil Co. Goodwin argues that he lacks sufficient minimum contacts with the State of Arkansas to enable the circuit court to exercise jurisdiction over him. We agree. Accordingly, we reverse and dismiss.

Magness Oil is an Arkansas-based, family-owned corporation that owns a series of convenience stores in Arkansas and other states. On April 10, 2009, Magness Oil and

Piedmont Fields, LLC, a Georgia limited liability company, entered into a letter of intent for Magness Oil to sell twenty-three convenience stores in Arkansas to Piedmont.[1]

On April 23, 2009, Piedmont and USA Global Holdings Business Trust (USAG), a Nevada registered business trust represented by Goodwin, entered into an "Escrow Presentation Hypothecation Agreement" whereby USAG would use $500,000 provided by Piedmont to generate the funds to make a $45 million loan to Piedmont in order for it to purchase Magness Oil. The escrow/hypothecation agreement also provided that if the hypothecation process was unsuccessful, USAG would contact Piedmont and either attempt to hypothecate the deposit for a lesser amount or rescind the escrow/hypothecation agreement and return the money to Piedmont.

Also, on April 23, 2009, Goodwin emailed a letter to Piedmont in Georgia directing it to wire transfer the $500,000 to his trust account "in connection with [Piedmont's] acquisition of Magness Oil." The money was wired to Goodwin in Virginia as requested. Goodwin later wired $495,000 to a third-party account owned by a USAG subsidiary in Nevada and transferred $5,000 to his firm's operating account.

On May 13, 2009, Magness Oil and Piedmont entered into the purchase agreement called for in the letter of intent. The purchase price was to be $42.5 million, plus the actual costs of constructing another store in Mountain View, Arkansas. The purchase agreement required Piedmont to tender $500,000 earnest money and expressly stated that Piedmont had already delivered the money to USAG, who would hold the money as the escrow agent

[1]In addition to the Arkansas stores, the sale also included four stores each in Tennessee and Missouri, and one in Mississippi.

in accordance with the terms of the purchase agreement. The agreement also provided for a "Feasibility Period" of up to 120 days from the execution of the letter of intent for Piedmont to conduct its due diligence. After the expiration of the feasibility period, the earnest money became nonrefundable. Closing of the sale was to be on September 7, 2009. The agreement also provided that if Piedmont failed to meet its obligations, the earnest money was to be distributed to Magness Oil. The purchase agreement contained a forum-selection/choice-of-law provision that stated: "This Agreement shall be governed by and construed in accordance with the laws of the State of Arkansas. Any action shall be adjudicated in the Circuit Court of Baxter County, Arkansas."

The sale was not closed within the time specified by the purchase agreement because USAG could not secure the necessary funding. When USAG and Goodwin were not forthcoming with the earnest money after demands by Piedmont and Magness Oil, Magness Oil filed this suit in Baxter County Circuit Court against Goodwin, Piedmont, and USAG to recover the $500,000 earnest money. The complaint alleged conversion and breach of fiduciary duty against Goodwin and his law firm.

Goodwin filed a motion to dismiss, asserting that he lacked sufficient minimum contacts with the State of Arkansas as would enable the circuit court to exercise jurisdiction over him. Following a hearing on Goodwin's motion to dismiss, the circuit court ruled from the bench, denying Goodwin's motion. The court found that Goodwin had sufficient minimum contacts with the State of Arkansas. In making its ruling, the court relied on the role Goodwin played in facilitating the transactions to raise the money to fund the purchase agreement.

Following entry of a default judgment against USAG and summary judgment against Piedmont, a bench trial was held on Magness Oil's claims against Goodwin. The circuit court ruled from the bench, finding that Goodwin and USAG acted in concert for the purposes of committing conversion of the earnest money and that Goodwin was liable for the full amount. Once a final order was entered, this appeal and cross-appeal followed.[2]

Although Goodwin argues seven points on appeal, the dispositive point is whether the circuit court lacked personal jurisdiction over him. There, he argues that he lacked sufficient "minimum contacts" with Arkansas for the circuit court to exercise personal jurisdiction over him and his law firm. We agree.

We begin our analysis with our long-arm statute, which provides in pertinent part, "The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution." Ark. Code Ann. § 16-4-101(b) (Repl. 2010). Accordingly, "the exercise of personal jurisdiction is limited only by federal constitutional law." *Yanmar Co., Ltd. v. Slater*, 2012 Ark. 36, at 5, 386 S.W.3d 439, 443. In accordance with the statute, we look to Fourteenth Amendment due-process jurisprudence when deciding an issue of personal jurisdiction.[3]

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[2]Magness Oil's cross-appeal challenges the circuit court's denial of its breach-of-fiduciary-duty claim against Goodwin.

[3]We are mindful that our courts have utilized a five-factor test in making the determination of whether a defendant has sufficient minimum contacts with Arkansas for our courts to exercise personal jurisdiction. *Hotfoot Logistics, LLC v. Shipping Point Mktg., Inc.*, 2014 Ark. 460, 447 S.W.3d 592; *John Norrell Arms, Inc. v. Higgins*, 332 Ark. 24, 962 S.W.2d 801 (1998). While "these factors are helpful in the minimum-contacts analysis," *John Norrell Arms*,

Due process requires that a nonresident defendant may be subject to personal jurisdiction only if he or she has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)). Attention must be paid to the "quality and nature" of those contacts and also to whether that defendant through those contacts enjoyed the "benefits and protection" of the laws of the forum state. *Id.* at 319. There is not a bright-line litmus test for what constitutes "minimum contacts." *Reveley v. Roth*, 2016 Ark. App. 248, 491 S.W.3d 490.

The Supreme Court has identified two types of personal jurisdiction: general and specific. When a cause of action arises out of or is related to a defendant's contacts with the forum state, the exercise of personal jurisdiction is one of specific jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). However, if the exercise of jurisdiction arises in a case not stemming from the defendant's contacts with the forum state, the exercise of personal jurisdiction is one of general jurisdiction. *Id.*; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *International Shoe Co.*, *supra*. This is a case of specific jurisdiction.

While the dissent correctly notes that our courts have stated that Arkansas may exercise personal jurisdiction even in instances in which a defendant's contacts with the forum are slight, those contacts must nevertheless create a substantial connection between the defendant and the forum. As the Supreme Court has stated, "For a State to exercise

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332 Ark. at 29, 962 S.W.2d at 804, the United States Supreme Court provides the ultimate guidance in determining whether Arkansas's exercise of personal jurisdiction comports with due process.

jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). A nonresident defendant's contacts with a forum state must be sufficient to cause the defendant to "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). The proper focus of the "minimum contacts" inquiry is "the relationship among the defendant, the forum, and the litigation." *Walden*, 572 U.S. at 284. First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State. *Id.* (quoting *Burger King*, 471 U.S. at 475). Second, our "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. *Id.* The Supreme Court very recently emphasized that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction" in *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, ___ U.S. ___, ___, 137 S. Ct. 1773, 1781 (2017) (quoting *Walden*, 521 U.S. at 286). Notably, the proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way. *Walden*, 521 U.S. at 290.

Applying these principles, we are unable to accept Magness Oil's argument that the circuit court had personal jurisdiction over Goodwin. Magness Oil relies on several emails Goodwin sent to it, claiming that the emails establish personal jurisdiction over Goodwin.

However, "the use of arteries of interstate mail and banking facilities, standing alone, is insufficient to satisfy due process in asserting long-arm jurisdiction over a nonresident." *John Norrell Arms*, 332 Ark. at 30, 962 S.W.2d at 804. We have applied the same reasoning to hold that the use of emails and social-media posts is likewise insufficient. *Morris v. Christopher*, 2013 Ark. App. 312. Many of the emails appear to have been initiated by Benny Magness, one of Magness Oil's principals, asking Goodwin for updates on the funding process. Also, some of the emails are between Will Harrelson, one of Piedmont's principals, and Goodwin, with Harrelson forwarding the emails to Magness Oil. However, because these emails were not initiated by Goodwin or directed to Arkansas, this is precisely the sort of activity that "cannot satisfy the requirement of contact with the forum State." *See Walden*, 521 U.S. at 291 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

True, Goodwin, in his April 23, 2009 email, directed Piedmont to wire the $500,000 to his trust account in Virginia, and the email referenced Piedmont's purchase of Magness Oil. But it should be noted that Piedmont's wiring the funds to Goodwin's account was consistent with the Escrow/Hypothecation Agreement between Piedmont and USAG, which contains a provision stating that it is to be interpreted under Nevada law. However, there is no evidence that Magness Oil was a party to that agreement or otherwise contacted in Arkansas.

The only Arkansas-based entity involved in this case was Magness Oil; all the other parties were from other states—Virginia, Nevada, or Georgia. Goodwin acted as counsel for the out-of-state escrow agent—USAG. We therefore cannot say that Goodwin "purposefully availed" himself of the "benefits and protection" of the laws of Arkansas.

While the dissent concedes that Goodwin's contacts with Arkansas are not substantial, it attempts to bolster its conclusion that Goodwin nevertheless has sufficient minimum contacts with Arkansas by attributing USAG's admittedly more substantial contacts to Goodwin. However, "a defendant's relationship with a . . . third party, standing alone, in an insufficient basis for jurisdiction." *Bristol-Myers Squibb Co.*, ___ U.S. at ___, 137 S. Ct. at 1781. Neither Goodwin nor his client initiated contact with Arkansas or entered into the contract to purchase an Arkansas business. Goodwin himself did not enter into any contracts nor did he conduct any business on his own behalf. Rather, he acted solely as an attorney representing a client, USAG. And although USAG was mentioned as escrow agent in the purchase agreement, USAG, Goodwin, and Goodwin's law firm were not signatories to that agreement, which was between Piedmont, a Georgia company, and Magness Oil. The fact that the purchase agreement contained a forum-selection clause providing for an Arkansas forum is irrelevant to Goodwin, who was not a party to that agreement. The role Goodwin may have played in the purchase agreement is pure speculation. The record provides no evidence that Goodwin played any role at all. In any case, the claims against Goodwin were not based on the purchase agreement. Instead, Goodwin was sued in tort for breach of fiduciary duty and conversion. Those alleged torts occurred not in Arkansas but in either Virginia or Nevada.[4]

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[4]In using the five-factor test to analyze this case, the dissent notes that the fourth and fifth factors favor the exercise of personal jurisdiction by the Arkansas courts. However, the Eighth Circuit Court of Appeals has held that those factors are secondary factors relating to "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073 (8th Cir. 2004) (quoting *Burger King Corp.*, 471 U.S. at 476). Indeed, the Supreme Court has said that the "primary concern" is

Because Goodwin and his law firm lacked sufficient "minimum contacts" with Arkansas, the circuit court clearly erred in finding that it could properly exercise jurisdiction over them.[5] We therefore reverse and dismiss as to Goodwin and Goodwin Law Firm, LLC. Having done so, it is not necessary to address the remaining points on appeal or Magness Oil's cross-appeal.

Reversed and dismissed.

ABRAMSON, HARRISON, WHITEAKER, and MURPHY, JJ., agree.

VAUGHT, J., dissents.

LARRY D. VAUGHT, Judge, dissenting. I respectfully disagree with the result reached by the majority in this case. I would affirm the circuit court's finding that it had personal jurisdiction over Goodwin and reach the merits of this appeal.

The majority correctly states that if Goodwin is subject to Arkansas's jurisdiction, it must be through specific personal jurisdiction. As part of our analysis, we must consider whether the nonresident's conduct and connection with Arkansas are such that he could "reasonably anticipate being haled into court" here, and whether he has purposely directed his activities toward Arkansas residents or availed himself of the privilege of conducting

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"the burden on the defendant." *Bristol-Myers Squibb Co.*, ___ U.S. at ___, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). Moreover, as we have already explained herein, Goodwin simply did not have contacts with Arkansas outside of his role as attorney for USAG. Thus, the first three factors—regarding the quality, nature, quantity, and relation of the cause of action to those contacts—do not convince us that sufficient minimum contacts exist in this case.

[5]We realize that at the time of its ruling on Goodwin's motion to dismiss, the circuit court did not have the benefit of the Supreme Court's most recent pronouncement on personal jurisdiction in *Bristol-Myers Squibb Co.*, *supra*. However, these principles of personal jurisdiction were well established at the time of that decision. *See Walden*, 571 U.S. at 291.

activities in Arkansas. *Pritchett v. Evans*, 2013 Ark. App. 679, at 5–6, 430 S.W.3d 223, 226 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

These principles have been embodied in a five-factor test set forth in *Hotfoot Logistics, LLC v. Shipping Point Marketing, Inc.*: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. 2014 Ark. 460, at 7, 447 S.W.3d 592, 596.[1] After applying these factors, I would hold that the facts alleged in Magness Oil's complaint provide a sufficient basis, as a matter of law, to subject Goodwin to specific personal jurisdiction in Arkansas.

Regarding the first factor, USAG and Goodwin initiated contact with the State of Arkansas by entering into and playing critical roles in contracts for the purported purpose of purchasing an Arkansas business—Magness Oil. USAG, Goodwin's client, was a party to the escrow-hypothecation agreement, the stated purpose of which was for the acquisition of Magness Oil and its multiple Arkansas properties. Magness Oil and its properties were expressly referenced and discussed in the escrow-hypothecation agreement, wherein

[1]The five-factor test has not only been applied by the Arkansas Supreme Court but also by the United States Court of Appeals for the Eighth Circuit. The first case to have used the five-factor test was *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 195–96 (8th Cir. 1965), which derived the test from the principles in five United States Supreme Court cases: *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643 (1950); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); and *Hanson v. Denckla*, 357 U.S. 235 (1958).

Piedmont agreed to pay USAG $500,000. This agreement was a prerequisite for the purchase agreement between Magness Oil and Piedmont. Further, USAG, Goodwin's client, was specifically mentioned in the purchase agreement between Magness Oil and Piedmont as the escrow agent and was assigned the responsibility of holding the $500,000 "in accordance with the terms and provisions of this agreement." The purchase agreement contained a choice-of-forum clause wherein the parties agreed to be governed by the laws of the State of Arkansas. Moreover, Goodwin, in an April 23, 2009 letter to Piedmont, directed it to wire the $500,000 to his trust account. This letter specifically references the acquisition of the Arkansas business and properties and expressly states that the funds are being wired to him for that purpose.

Goodwin continued his contacts with Arkansas by emailing Magness Oil regarding the funds that he had allegedly converted. Specifically, Goodwin emailed Benny Magness, a Magness Oil principal, on eight occasions from April 22, 2011, to August 5, 2011, offering reasons for the delay in the funding for the purchase agreement and requesting more time for the funding to come through. Goodwin's August 5 email to Benny Magness advised that the $500,000 was gone.

As for the second factor, I concede that Goodwin did not have substantial contacts with the State of Arkansas. But under the law, his contacts do not have to be substantial. A state can exercise specific personal jurisdiction even if the nonresident defendant's contacts with the forum are slight. *John Norrell Arms, Inc. v. Higgins*, 332 Ark. 24, 31, 962 S.W.2d 801, 804 (1998). Specific personal jurisdiction can lie even if the nonresident has had only one contact with the forum state. *Hotfoot Logistics*, 2014 Ark. 460, at 7, 447 S.W.3d at 596.

Regarding the third factor, each of Goodwin's contacts is directly related to the controversy in this case—Goodwin's use of the escrow-hypothecation agreement and the purchase agreement executed between the parties to convert Magness Oil's $500,000. On the fourth factor, Arkansas has a strong interest in providing its businesses with a forum to redress disputes, especially those premised on fraud and those in which the nonresident initiated the alleged misconduct. *Pritchett*, 2013 Ark. App. 679, at 7 n.6, 430 S.W.3d at 227 n.6 (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984) (holding that Florida defendants were the "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis")). Finally, it is naturally more convenient for Magness Oil, an Arkansas business, to have redress in Arkansas. And though Goodwin is from Virginia, it is a small inconvenience for him to appear here in a dispute involving his decision to entangle himself in the legitimate sale of an Arkansas business in an effort to convert the earnest money from that sale.

I liken this case to *Hotfoot Logistics*. There, our supreme court ruled that a bill of lading raised a factual question regarding Arkansas's personal jurisdiction over one defendant alleged to have breached a contract. *Hotfoot Logistics*, 2014 Ark. 460, at 8, 447 S.W.3d at 597. Our supreme court further held that the Arkansas circuit court had personal jurisdiction over two other defendants, who had never entered Arkansas and had never directly contacted the plaintiff, based on circumstantial evidence that they conspired to commit fraud against Hotfoot Logistics. *Id.*, 447 S.W.3d at 597.

Like the defendants in *Hotfoot Logistics*, Goodwin did not enter Arkansas and did not directly contract with Magness Oil. Also like the defendants in *Hotfoot Logistics*, the

defendants in the instant case are from other states. Nevertheless, Goodwin did have contacts with the State of Arkansas. His client was expressly named as the escrow agent in Magness Oil's contract with Piedmont. Goodwin's client was a named party in the escrow-hypothecation agreement, wherein its stated purpose was the acquisition of Magness Oil. But Goodwin's role in the alleged conversion consisted of more than just his representation of USAG. He also acted as the escrow agent, who personally directed that the escrow funds be wired to his trust account. Furthermore, Goodwin himself contacted Magness, via email, multiple times to communicate information regarding the whereabouts of the funding for the purchase agreement and the earnest money. Finally, as in *Hotfoot Logistics*, there was circumstantial evidence that Goodwin and USAG conspired to convert Magness Oil's funds. This evidence demonstrates that Goodwin's contacts with the State of Arkansas were not limited to his relationship with his client, USAG; rather, the evidence establishes that he had direct contacts with Arkansas.

Based on the standards discussed above, I would hold that the facts presented demonstrate sufficient contacts to warrant personal jurisdiction over Goodwin. Goodwin should not have been surprised to be haled into court in Arkansas because he and his client, USAG, entered into one contract and were escrow agents for another contract—both for the stated purpose of the sale of an Arkansas business and multiple Arkansas real properties. When a defendant has deliberately engaged in significant activities within a state or has created continuing obligations between himself and residents of the forum, he has manifestly availed himself of the privilege of conducting business there. *Hotfoot Logistics*, 2014 Ark. 460,

at 10, 447 S.W.3d at 598 (citing *Burger King*, *supra*). Under these circumstances, I would hold that the assertion of personal jurisdiction is to be anticipated.

In sum, I would hold that the circuit court had personal jurisdiction over Goodwin and affirm the circuit court's denial of Goodwin's motion to dismiss. Therefore, I dissent.

Ethredge & Copeland, P.A., by: *Johnnie A. Copeland*, for appellants/cross-appellees.

Bailey & Oliver Law Firm, by: *Frank H. Bailey* and *Sach D. Oliver*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellees/cross-appellants.