

IN THE COURT OF APPEALS OF TENNESSEE

FILED
December 24, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

UPS,
Plaintiff-Appellant,

) C/A NO. 03A01-9609-CH-00288
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)
)
) APPEAL AS OF RIGHT FROM THE

v.

) KNOX COUNTY CHANCERY COURT
)
)
)

BUCK FEVER RACING, INC.,
Defendant-Appellee.

) HONORABLE FREDERICK D. McDONALD
) CHANCELLOR

For Appellant

For Appellee

DAVID A. LUFKIN
Lufkin & Henley
Knoxville, Tennessee

MARK L. ESPOSITO
MARK E. FRYE
Penn, Stuart & Eskridge
Bristol, Virginia

OPINION

AFFIRMED AND REMANDED

Susano, J.

UPS¹, an Ohio corporation, sued Buck Fever Racing, Inc.

(Buck Fever), a Virginia corporation, on an open account. The

¹UPS stands for United Parcel Service, Inc.

complaint seeks \$40,607.48, pre- and post-judgment interest, and attorney fees. It is supported by a sworn account. The trial court granted Buck Fever's motion to dismiss because the court found that it lacked the necessary *in personam* jurisdiction to render a monetary judgment against the defendant. UPS appealed, arguing that the facts developed below reflect that the defendant had sufficient minimum contacts with Tennessee to justify the exercise of jurisdiction over it.

Buck Fever's motion was filed pursuant to Rule 12.02(2), Tenn.R.Civ.P., "lack of jurisdiction over the person." Each of the parties filed "matters outside the pleadings" which were considered by the trial court; accordingly, the motion is properly disposed of pursuant to Rule 56, Tenn.R.Civ.P. See Rule 12.03, Tenn.R.Civ.P. Since the material facts are essentially undisputed², the question for us is whether these facts "show ... that the moving party [i.e., Buck Fever] is entitled to a judgment as a matter of law." Rule 56.03, Tenn.R.Civ.P. Since this is a question of law, the record below comes to us with no presumption of correctness of the trial court's findings.

Gonzales v. Alman Construction Co., 857 S.W.2d 42, 44 (Tenn. App. 1993). We must decide anew if the defendant is entitled to judgment in a summary fashion. *Id.* at 44-45.

On October 14, 1993, and again on July 8, 1994, UPS and

²We have limited our review to the verified facts presented by the nonmovant, UPS, and the evidence advanced by Buck Fever to which UPS either agrees or offers no rebuttal. We accept as true all evidence presented by UPS. See ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993) ("The evidence offered by the nonmoving party must be taken as true.") We have disregarded as immaterial any evidence submitted by Buck Fever that conflicts with the above.

Buck Fever, acting through their respective representatives, executed separate contracts, each of which pertains to UPS's agreement to transport, for a fee, packages that Buck Fever transferred to it. Both contracts were executed at Buck Fever's place of business in Marion, Virginia. Pursuant to these contracts, UPS picked up packages at the defendant's Virginia location. The company's shipments were processed through the UPS facility in Bristol, Virginia. The complaint seeks to recover shipping charges that are allegedly past due.

UPS was served with process through the Tennessee Secretary of State, pursuant to the provisions of T.C.A. § 20-2-214, the Tennessee long-arm statute.³ While acknowledging that the contracts in question were signed outside the state of Tennessee and that all packages were delivered to it in Virginia, UPS argues that Buck Fever had sufficient minimum contacts with Tennessee in other ways to justify jurisdiction here. The trial court disagreed, finding that the facts did not show that Buck Fever "purposely established minimum contacts with the state of Tennessee, such that it should have reasonably anticipated being haled into court in Tennessee."

The Tennessee Supreme Court has examined the outer limits imposed by constitutional due process on the *in personam*

³T.C.A. § 20-2-214(a) provides, in pertinent part, as follows:

Persons who are nonresidents of Tennessee... are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

* * *

(6) Any basis not inconsistent with the constitution of this state or of the United States.

jurisdiction of Tennessee courts under the long-arm statute:

In determining whether or not a state can assert long-arm jurisdiction, due process requires that a non-resident defendant be subjected to a judgment *in personam* only if he has minimum contacts with the forum 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, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). However, the absence of physical contacts will not defeat *in personam* jurisdiction where a commercial actor purposefully directs his activities toward citizens of the forum State and litigation results from injuries arising out of or relating to those activities. **Burger King Corp. v. Rudzewicz**, ___ U.S. ___, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985). In such a case, "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." **World-Wide Volkswagen Corp. v. Woodson**, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

T.C.A. § 20-2-214 was considered a "single act" statute, one in which jurisdiction was assumed only over causes of action arising out of the defendant's activities in the state, until the addition of subsection (6) in 1972. A three-pronged test had been developed to determine the outer limits of personal jurisdiction based on a single act: the defendant must purposefully avail himself of the privilege of acting in or causing a consequence in the forum State; the cause of action must arise from the defendant's activities there; and defendant's acts or consequences must have a substantial connection with the forum to make the exercise of jurisdiction reasonable. **Southern Machine Co. v. Mohasco Industries, Inc.**, 401 F.2d 374, 381 (6th Cir. 1968). Subsection (6) changed the long-arm statute from a "single act" statute to a "minimum contacts" statute which expanded the jurisdiction of Tennessee courts to the full limit allowed by due process. **Shelby Mutual Ins. Co. v. Moore**, 645 S.W.2d 242, 245 (Tenn. App. 1981). That decision, quoting extensively from **Gullet v. Qantas Airways Ltd.**, 417 F.Supp. 490 (M.D. Tenn. 1975), noted that the **Mohasco** test was now too

restrictive. The **Moore** court noted that three primary factors are to be considered in determining whether the requisite minimum contacts were present: the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts. Two lesser factors to be considered are the interest of the forum State and convenience. The **Moore** court concluded:

The phrase "fair play and substantial justice" must be viewed in terms of whether it is fair and substantially just to both parties to have the case tried in the state where the plaintiff has chosen to bring the action. In each case, the quality and nature of those activities in relation to the fair and orderly administration of the law must be weighed. As stated above in **Qantas**, this must involve some subjective value judgment by the courts.

645 S.W.2d at 246.

Masada Investment Corp. v. Allen, 697 S.W.2d 332, 334-35 (Tenn. 1985). With these principles in mind, we now examine in greater detail the facts before us.

The parties agree that this suit "seeks to recover amounts allegedly owed by Buck Fever ... for delivery services rendered in Virginia." That company has never operated a business or office in Tennessee. By the same token, it has never had any agents or employees acting on its behalf in this state. No individual from Buck Fever traveled to Tennessee as a part of the negotiations that led up to the execution of the two contracts.

UPS points out that both contracts signed by its

representatives reflect an address under the UPS representative's signature line of 500 Callahan Drive, Knoxville, Tennessee 37912. From 1987 through 1995, UPS's East Tennessee District was based out of Knoxville. The district office and accounting office are located in Knoxville. The Knoxville office covers the Bristol and Abingdon, Virginia areas. These Virginia areas were added to the East Tennessee District on July 1, 1992. The Knoxville accounting office handles C.O.D.'s, billing, accounts receivable, information services, credit, accounting, and payroll. Delivery information and customer service are also based out of the Knoxville office.

All phone calls to Buck Fever regarding its credit came from the UPS credit office in Knoxville. This office also received calls back from Buck Fever to a Knoxville phone number. Any billing inquiries received from Buck Fever would have been handled out of the Knoxville office. The Knoxville office would have faxed Buck Fever a copy of a pick-up record if one was requested. All packages picked up at the Buck Fever location in Marion, Virginia, were billed out of the Knoxville office, and all C.O.D.'s delivered to Buck Fever would be processed in the Knoxville office.

On October 16, 1992, a UPS employee spoke with an employee of Buck Fever after receiving a telephone message for a call back. The conversation showed that Buck Fever was aware that the Knoxville office was now handling its account. Buck Fever was also asked several times during 1992 to mail its payments to the Knoxville address as a matter of normal business.

Evidence was also presented which showed that at several times during 1994, the UPS credit department asked Buck Fever to mail its payments to the Knoxville address, and that Buck Fever did mail some payments during 1994 to the Knoxville office. Apparently, other payments were mailed to a UPS address in Louisville, Kentucky. The evidence also showed that the customer service department of UPS has business cards for each account executive that list their business address as 500 Callahan Road, Knoxville, Tennessee 37912.

The contracts between the parties do not contain provisions specifying that disputes will be resolved under Tennessee law, or that litigation between them has to be conducted in the courts of this state. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The contracts are silent on both subjects.

In the instant case, it is clear that the essence of the business relationship between the parties -- the transferring of packages from shipper to carrier and beyond -- took place outside the state of Tennessee. The parties agree that the shipping services furnished by UPS were rendered in Virginia. All contacts with Tennessee were merely ancillary to the real business transacted by the parties. It is true that UPS provides support services to its Virginia operations out of its Knoxville office; but it is not UPS's contacts with Tennessee that are central to the question before us, but rather the *defendant's* contacts with this state.

The fact that Buck Fever knew that it was dealing with the Knoxville office of UPS is also not critical. One does not anticipate the exercise of a foreign state's jurisdiction over it just because it has ancillary administrative contacts with an office of a company in that state, when the real business transactions between the parties are outside that state.

We do not believe that phone calls to and from Tennessee regarding Buck Fever's Virginia account, mailings of payments, or other communications to or from Tennessee are sufficient to justify an assertion of long-arm jurisdiction. All of this is ancillary to the business of shipping -- an activity that in this case occurred entirely outside the state of Tennessee.

When measured against the criteria outlined in **Masada Investment Corp.**, it is clear that Buck Fever's contacts with Tennessee are not sufficient in quantity or quality to constitute the minimum contacts required to constitutionally permit Tennessee to exercise *in personam* jurisdiction over Buck Fever. We agree with the trial court that Buck Fever's contacts with Tennessee are not such that it "should reasonably anticipate being haled into court" in Tennessee. **World-Wide Volkswagen Corp. v. Woodson**, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Suit in Tennessee against Buck Fever is not consistent with traditional notions of fair play and substantial justice.

The judgment of the trial court is affirmed. Costs on

appeal are taxed against the appellant and its surety. This case is remanded for collection of costs assessed below, pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Don T. McMurray, J.