

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0450-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CATALYTIC COMBUSTION CORPORATION,

PLAINTIFF-APPELLANT,

V.

VAPOR EXTRACTION TECHNOLOGY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Catalytic Combustion Corporation appeals from an order granting Vapor Extraction Technology, Inc.'s motion to dismiss Catalytic's

complaint for lack of personal jurisdiction.¹ Catalytic argues that the circuit court erred by failing to determine that it had jurisdiction over Vapor pursuant to Wisconsin's long-arm statute, WIS. STAT. § 801.05. We conclude that Vapor is subject to Wisconsin's long-arm statute and has sufficient minimum contacts with this state such that the exercise of jurisdiction comports with due process.

BACKGROUND

¶2 Catalytic is a Wisconsin corporation in the business of designing, manufacturing and selling environmental remediation equipment. It is undisputed that, with the exception of a sales representative located in Colorado, all of Catalytic's employees live and work in Wisconsin. Vapor, an environmental consulting firm located in California, specializes in environmental site assessment and remediation of priority pollutants in soil and groundwater.

¶3 In April 1998, the parties negotiated a contract for the sale of equipment from Catalytic to Vapor in California. A second contract between the parties resulted in Catalytic's delivery of equipment to New Jersey. Equipment ordered under a third contract between the parties resulted in the present lawsuit, wherein Catalytic seeks a judgment for money allegedly owed it under the parties' contract. Vapor moved the circuit court to dismiss Catalytic's complaint for lack of personal jurisdiction. The court granted Vapor's motion and this appeal followed.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All statutory references are to the 1997-98 edition.

ANALYSIS

¶4 Whether a Wisconsin court has personal jurisdiction over a nonresident defendant is a question of law we review de novo. See *Precision Erecting, Inc. v. M & I Bank*, 224 Wis. 2d 288, 295, 592 N.W.2d 5 (Ct. App. 1998). This determination involves a two-step inquiry: (1) whether the defendant's contacts with Wisconsin subject him or her to jurisdiction under Wisconsin's long-arm statute, WIS. STAT. § 801.05; and (2) whether the exercise of jurisdiction conforms with the requirements of due process. See *Precision*, 224 Wis. 2d at 296.

¶5 Although a plaintiff has the burden of establishing jurisdiction under the long-arm statute, see *Schmitz v. Hunter Mach. Co.*, 89 Wis. 2d 388, 396, 279 N.W.2d 172 (1979), the statute is to be liberally construed in favor of exercising jurisdiction. See *Lincoln v. Seawright*, 104 Wis. 2d 4, 9, 310 N.W.2d 596 (1981). The long-arm statute provides, in relevant part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

....

(5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which:

- (a) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or
- (b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

- (c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or
- (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction; or
- (e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

WIS. STAT. § 801.05(5).

¶6 We conclude that, at a minimum, para. 5(c) and para. 5(d) are applicable to the present facts.² Vapor, claiming that it was unaware of where the products were to be shipped from, argues that it neither received goods within this state nor directed Catalytic to ship anything from Wisconsin. We are not persuaded.

¶7 On April 20, 1998, Vapor's president, Thomas Lahey, signed the first of three contracts with Catalytic. These agreements were on Catalytic letterhead and contained Catalytic's Bloomer, Wisconsin, address along the bottom of the page. Under the agreement's terms and conditions of sale, the equipment was to be delivered F.O.B. point of manufacture.³ Further, the invoices

² Wisconsin courts may obtain personal jurisdiction over a nonresident defendant through any one or more of the grounds stated in the long-arm statute, WIS. STAT. § 801.05. See *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 336, 555 N.W.2d 640 (Ct. App. 1996).

³ F.O.B. is an abbreviation for "free on board," a delivery term that requires a seller to ship goods and bear the expense and risk of loss to the F.O.B. point designated—here, the point of manufacture, i.e., Wisconsin. See BLACK'S LAW DICTIONARY 665 (6th ed. 1990). Under the Uniform Commercial Code, title to goods usually passes from the seller to the buyer at the F.O.B. location. See U.C.C. § 2-319(1).

billing Vapor for all three contracts designated F.O.B. “Bloomer.” The terms and conditions additionally contained a choice of law provision that stated “[t]he contract and the obligations thereby imposed on Seller and Buyer shall be governed by and construed according to the laws of the State of Wisconsin.”⁴ Likewise, subsequent correspondence from Catalytic to Vapor included Catalytic’s Wisconsin address. We therefore conclude that Vapor had sufficient notice that Wisconsin was the point of manufacture.

¶8 Vapor nevertheless asserts that all contract negotiations occurred with Catalytic’s Colorado sales representative either in California or Colorado. Although the record suggests otherwise, the geographic location of the contract negotiations is irrelevant under WIS. STAT. § 801.05(5)(c), which provides that jurisdiction may arise out of a defendant’s promise “*made anywhere* to the plaintiff or to some 3rd party for the plaintiff’s benefit ... to receive within this state ... goods, documents of title, or other things of value.” (Emphasis added.) Vapor agreed to the equipment’s sale with delivery F.O.B. point of manufacture. We therefore conclude that Vapor is subject to jurisdiction under para. (5)(c) of the long-arm statute.⁵

⁴ Vapor argues that the choice of law provision is irrelevant to the jurisdiction question because the parties did not specifically negotiate that provision. Although existence of the choice of law provision in the agreement’s terms and conditions may not be dispositive of the parties’ jurisdictional dispute, it should not “be ignored in considering whether a defendant has ‘purposefully invoked the benefits and protections of a State’s laws’ for jurisdictional purposes.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985).

⁵ Because we conclude that WIS. STAT. § 801.05(5)(c) and (d) are applicable to the present facts, we need not address Catalytic’s arguments for application of other subsections of the long-arm statute. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

¶9 Regarding WIS. STAT. § 801.05(5)(d), Vapor does not dispute that the equipment was shipped to California and New Jersey. Rather, it again claims ignorance of the point of manufacture to argue that it never ordered or directed Catalytic to ship anything from Wisconsin. Because Vapor concedes the equipment was shipped and because we determine that Vapor had sufficient notice that Wisconsin was the point of manufacture, we conclude that Vapor is additionally subject to jurisdiction under para. 5(d) of Wisconsin’s long-arm statute.

¶10 Having construed the long-arm statute in favor of finding jurisdiction, we must determine whether the exercise of jurisdiction conforms with the requirements of due process. *See Precision*, 224 Wis. 2d at 296. In *Precision*, this court recognized:

The due process clause permits a state to exercise jurisdiction over a nonresident defendant as long as the defendant has minimum contacts with the forum state such that “the exercise of jurisdiction does not violate traditional notions of fair play and substantial justice.” A defendant corporation establishes minimum contacts by purposely availing itself of the privilege of conducting business in the forum state. The defendant’s activities must be such that it could reasonably anticipate being subject to suit in the forum state. Finally, the cause of action may be unrelated to the foreign corporation’s activities in the state. The state may exercise general jurisdiction over a nonresident defendant based on contacts with the forum state unassociated with the claim, provided those contacts are sufficient to justify jurisdiction.

Id. at 296-97 (quoting *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 53, 505 N.W.2d 162 (Ct. App. 1993) (citations omitted)). Where minimum contacts with the forum state exist, other factors may be considered in determining whether the assertion of personal jurisdiction over the nonresident defendant comports with

notions of fair play and substantial justice. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). With an emphasis on reasonableness, the following factors may be considered:

(1) the burden on the defendant in having to defend in a distant forum; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Precision, 224 Wis. 2d at 297 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

¶11 Here, the circuit court did not address whether the long-arm statute was applicable in the first instance, but rather determined that Vapor did not have sufficient minimum contacts to subject it to Wisconsin jurisdiction. The court reasoned: "The only contacts are by phone or by letter. Nobody from the defendant's company has been in Wisconsin doing business with Catalytic Combustion or anybody else." The United States Supreme Court has recognized, however, that:

Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476. Although Vapor was not physically present within the state, it nevertheless thrice contracted with Catalytic for the manufacture and shipment of equipment from Wisconsin to California and New Jersey. Our review of the record reveals that there were various correspondence between Catalytic and Vapor regarding both the design and ultimately the shipment of the equipment forming the basis of the parties' three contracts.⁶ We therefore conclude that Vapor had sufficient minimum contacts with Wisconsin.

¶12 Vapor, however, contends that Wisconsin's assertion of jurisdiction would not comport with notions of fair play and substantial justice. We disagree. Of the five factors that we may consider in determining whether the assertion of personal jurisdiction over the nonresident defendant comports with notions of fair play and substantial justice, only that factor concerning the burden on the defendant in having to defend in a distant forum would, at first blush, weigh in favor of Vapor. See *World-Wide Volkswagen*, 444 U.S. at 292. However, given Vapor's contacts with this state, it should have reasonably expected the possibility of having to submit to Wisconsin jurisdiction—especially where, as here, the parties' underlying dispute involves allegations of nonpayment for alleged problems with the equipment's design and manufacture. Because all witnesses to

⁶ Vapor advertises its business via the internet. Citing foreign jurisdictions, it contends that because its web site is not interactive, its existence may not subject it to Wisconsin's jurisdiction. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997). *Bensusan* and *Cybersell* are distinguishable, however, from the present facts. Although both cases involved essentially passive web pages, neither involved situations where, as here, there existed a contractual relationship between the parties. Although the mere existence of Vapor's web site is not dispositive of the jurisdiction issue, we conclude that the web site in conjunction with the various correspondence surrounding the three contracts evidences the sufficiency of Vapor's contacts with Wisconsin for jurisdictional purposes. See *Cybersell*, 130 F.3d at 420 (holding that passive web page was insufficient minimum contact in absence of any commercial activity or other contacts with forum state).

the design and manufacture of the equipment are located within Wisconsin, Catalytic has a substantial interest in maintaining its action within this state. Further, although the contract's choice of law provision is not dispositive of the parties' jurisdictional dispute, its existence inherently suggests that Vapor would be amenable to defending a claim in Wisconsin and pursuant to its laws. The remaining factors are neutral to the parties, as they may be effectively argued either for or against the exercise of jurisdiction. We therefore conclude that the exercise of jurisdiction over Vapor does not offend due process, but, rather, comports with notions of fair play and substantial justice.

By the Court.—Order reversed and cause remanded.

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