COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2924

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WATERTRONICS, INC.,

PLAINTIFF-APPELLANT,

V.

FLANAGAN'S, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. Watertronics, Inc. appeals from a judgment entered after the trial court granted Flanagan's, Inc.'s motion to dismiss based on lack of personal jurisdiction. Watertronics claims that the trial court erred as a matter of law in concluding that it did not have personal jurisdiction over Flanagan's under Wisconsin's long-arm statute, WIS. STAT. § 801.05 (1999-2000).

Because personal jurisdiction over Flanagan's would not comport with due process principles, we affirm.

I. BACKGROUND

¶2 The factual background underlying this appeal is undisputed. Watertronics is a Wisconsin corporation with its principal place of business in Hartland, Wisconsin. It manufactures specially designed pumping stations for landscaping and irrigation projects. Bill Wise was the factory representative of Watertronics in the northeastern part of the United States. His office was located in Allentown, Pennsylvania. Aquarius Irrigation Supply, Inc. is a distributor for Watertronics's products and is located in Dove, New Jersey.

¶3 Flanagan's is a New Jersey corporation with its principal place of business in Somerville, New Jersey. It was a general contractor interested in obtaining the job of renovating the irrigation system at the Picatinny Golf Course in Arsenal, New Jersey. A representative of Aquarius, who was cognizant of this pending project, contacted Flanagan's prior to the bidding process for the purpose of selling a Watertronics pumping station to Flanagan's to be included in their proposed bid for the project. Aquarius had also communicated with other potential bidders for the project. Aquarius furnished prices to the potential bidders for the Watertronics pumping station. Flanagan's had used Watertronics's products in the past and had always purchased them from Aquarius. Subsequently, Robert Flanagan met with Aquarius and Wise in Flanagan's office in New Jersey to discuss the products to be used. Aquarius and Wise furnished plans and specifications to Flanagan.

¶4 On March 27, 1997, Flanagan faxed an order for the pumping station to Aquarius. Sometime after March 27th, Aquarius informed Flanagan that he

would have to order the product from Wise. On April 17, 1997, Flanagan faxed the same order to Wise at the Allentown, Pennsylvania office. On April 18, 1997, Wise faxed Flanagan at his New Jersey office thanking him for the order. As indicated in the confirmation fax, shipment of the product was to occur on or about June 1, 1997. On or about April 21, 1997, when 15% of the manufacturing had been completed, Watertronics sent an invoice from its Hartland headquarters to Flanagan requesting a partial payment of $5,615. When no payment was made, Watertronics asked for the submission of a credit application. Flanagan forwarded the credit application on June 5, 1997, and, on July 9, 1997, sent a check for an agreed-upon amount of $3,500.

¶5 After the pump was installed, problems arose with the operation of the pumping station. Flanagan made no further payments on the contract price and there remains an unpaid balance of $33,941. Watertronics filed this collection action against Flanagan's in Wisconsin. Flanagan's moved to dismiss, alleging lack of jurisdiction. The trial court granted the motion. Watertronics now appeals.

II. ANALYSIS

¶6 Watertronics raises two arguments to support its assertion that the trial court erred: (1) there is no convincing authority requiring a two-step inquiry to determine if the exercise of personal jurisdiction was proper; and (2) Flanagan's undisputed actions establish that it had sufficient minimum contacts with Wisconsin to confer jurisdiction upon the circuit court. We shall address each proposition in turn.

A. Test for Personal Jurisdiction.

¶7 Watertronics first contends that no supreme court decision mandates a two-step inquiry into whether personal jurisdiction is satisfied. Watertronics is incorrect. In ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶8, ___ Wis. 2d ___, 629 N.W.2d 662, our supreme court held: "Every personal jurisdiction issue requires a two-step inquiry." ***Id.*** The first step involves determining whether Flanagan's is subject to jurisdiction under Wisconsin's long-arm statute, WIS. STAT. § 801.05. ***Id.*** The second step requires the court to determine whether the exercise of jurisdiction comports with due process. ***Id.*** We will adopt a trial court's jurisdictional findings of fact unless they are clearly erroneous; yet, "we conduct an independent review of the court's ultimate determination on the sufficiency of the state contacts." ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 242, 430 N.W.2d 366 (Ct. App. 1988). We conclude that the first step is satisfied here.

¶8 In granting the motion to dismiss, the trial court found that the April 17, 1997 purchase order for a pumping station sent by Flanagan to Wise directed Watertronics to ship goods from Wisconsin to Flanagan's. Based on this finding, the trial court concluded that WIS. STAT. § 801.05(5)(d), which confers personal jurisdiction on a defendant who directs goods to be shipped from Wisconsin, had been satisfied. Neither Watertonics nor Flanagan's has challenged this finding of fact or conclusion of law. Thus, the first step in the inquiry has been completed.[1] When jurisdiction is found under the long-arm statute,

[1] Although Flanagan's has not cross-appealed the trial court's determination that "when the defendant delivered the April 17, 1997 purchase order to Wise, it directed the plaintiff to ship goods from Wisconsin to the defendant," it nevertheless argues the point in its response brief. We need not address the issue based on waiver, but we pause briefly to conclude, based upon our review of the record, that the trial court's determination was not clearly erroneous.

compliance with due process is presumed. ***Kopke***, 2001 WI 99 at ¶22. However, we still need to address the constitutional due process issue, under which Flanagan's is entitled to rebut the presumption. ***Id.***

B. Due Process.

¶9 The second step of whether due process is satisfied requires the application of another two-factor test.[2] ***Id.*** at ¶23. The first factor is whether Flanagan's "purposefully established 'minimum contacts' in the forum State." ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 474 (1985). Watertronics carries the burden of proof on the first step. ***Kopke***, 2001 WI 99 at ¶22. If the first step is satisfied, the second step involves determining whether the forum-state contacts "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" ***Burger King***, 471 U.S. at 476 (citations omitted). The burden of proof as to the second step falls on Flanagan's. We need to reach only the first step because the record reflects that Flanagan's did not purposefully establish minimum contacts in Wisconsin sufficient to satisfy due process principles.

¶10 For the exercise of personal jurisdiction to comport with due process, a defendant must have purposefully availed itself of conducting activity within the forum state, thereby claiming the benefits and protections of its laws. Jurisdiction is appropriate when the contacts result from actions by the defendant,

[2] The Wisconsin Supreme Court "set aside" the five-factor due process test, which was formerly applied in this state. ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶23 n.9, ___ Wis. 2d ___, 629 N.W.2d 662. In its place, the supreme court adopted the two-factor due process test set forth in ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 474 (1985), reasoning that the two factors encompass the five factors and, therefore, the United States Supreme Court precedent should be applied. ***Kopke***, 2001 WI 99 at ¶23 n.9.

which create a substantial connection to the forum state. The unilateral activity of one seeking to claim a relationship with a defendant cannot satisfy the required minimum contacts. ***Id.*** at 475. Nor does the mere sending of money into a state, without more, "constitute a substantial minimum contact within the purview of due process requirements." ***Nagel v. Crain Cutter Co.***, 50 Wis. 2d 638, 645, 184 N.W.2d 876 (1971). In ***Regal Ware, Inc. v. TSCO Corp.***, 207 Wis. 2d 538, 558 N.W.2d 679 (Ct. App. 1996), we declared:

> [I]f a contract exists between the two parties, a court must consider the impact of the contract on the question of whether a party has "purposefully established minimum contacts within the forum." All prior negotiations and contemplated future consequences of the contract, as well as any relevant terms of the contract and the course of dealing between the parties, must be examined. Furthermore, only if the nature of the relationship between the nonresident to the company in the forum state is "fortuitous" or "attenuated" will a contractual relationship between the parties fail to satisfy this inquiry.

Id. at 544 (citations omitted). With these principles in mind, we turn to the constitutional analysis.

¶11 Although Flanagan had used Watertronics's products in the past, it had always dealt with its New Jersey distributor, Aquarius. With respect to the Picatinny Golf Course project, Watertronics's distributor, Aquarius, solicited Flanagan prior to the bidding for the pumping station portion of the job and supplied pricing information. Flanagan requested plans and specifications from Wise, who was located in Pennsylvania, and from Aquarius. On August 16, 1996, Flanagan sought better pricing, so it called Watertronics at its Hartland, Wisconsin office, and spoke with Jeffrey Nelson, its national sales manager. The phone call lasted for 4.4 minutes. That was the only contact between Flanagan and

Watertronics's Wisconsin headquarters initiated by Flanagan prior to the execution of the final purchase order for the pumping station.

¶12 As set forth earlier in this opinion, Flanagan sent its first purchase order by fax to Aquarius in New Jersey on March 27, 1997, and then faxed a second and final order to Wise in Pennsylvania on April 17, 1997. The second purchase order was a replica of the first order. The purchase order contained the following caveat: "ALL INVOICES FOR THE ABOVE WORK WILL BE PAID ONCE WE RECEIVE PAYMENT FROM THE DEPARTMENT OF THE ARMY. THEREFORE, NO INTEREST WILL ACCRUE ON BALANCES NOT PAID IN FULL FOR THIS PROJECT."

¶13 On April 18, 1997, Wise faxed an acceptance of the order without qualification. No down payment or credit application was a prerequisite for acceptance. Delivery was to be June 1, 1997. On April 21, 1997, Watertronics sent Flanagan an invoice requesting a partial payment of $5,616.15. When Flanagan did not pay the partial payment invoice, Watertronics, through Wise, requested the execution of a credit application. Later in June, Wise advised Flanagan that the pumping station would not be shipped unless a down payment was made. On July 9, 1997, Flanagan's sent Watertronics a down payment check for $3,500. Consequently, the pumping station was shipped to the golf course on July 23, 1997. Up to that point, all contacts by Flanagan's were made with Aquarius or Wise, or were initiated by Watertronics, with the exception of the phone call on August 16, 1996, concerning better pricing.

¶14 But for that 4.4 minute phone call on August 16, 1996, placed by Flanagan's for the purpose of obtaining a better price, the record is barren of any contacts with Watertronics initiated by Flanagan's. The trial court correctly found

that the balance of the telephone and fax contact constituting 21.6 minutes was initiated by Watertronics, and was unilateral in nature for the purpose of obtaining a credit application or a down payment. There is no evidence in the record or allegations in the pleadings that Flanagan's performed any work in Wisconsin, had contracts for the performance of the same, or sent any employees or representatives to Wisconsin to conduct any business. Flanagan's was solicited by representatives of Watertronics's New Jersey and Pennsylvania offices, and purposefully negotiated with them. The business it performed occurred in either New Jersey or Pennsylvania.

¶15 After troubles developed with the installation of the pump, contact between Flanagan's and Watertronics concerned only collection on the unpaid balance and credits for improper installation or defective performance of the pumping station. This contested cause of action for the collection of an unpaid invoice did not arise in Wisconsin, but rather in New Jersey at the site of the installation of the pumping station.

¶16 Based on the foregoing, we conclude there is no reasonable basis in the record to support a conclusion that Flanagan's purposefully established minimum contacts in Wisconsin, so that Flanagan's should reasonably anticipate being haled into court here. ***World-Wide Volkswagen Corp. v. Woodson***, 444 U.S. 286, 297 (1980).

¶17 Therefore, we affirm the trial court's dismissal of this action.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶18 SCHUDSON, J. (*dissenting*). Flanagan's purchased a pumping station manufactured by Watertronics, a Wisconsin corporation located in Hartland. Although Flanagan's first attempted to make the purchase through Aquarius, Watertronics' New Jersey distributor, it did not do so. In order to get a better price, Flanagan's dealt directly with Watertronics. According to the undisputed affidavit of Jeff W. Nelson, Watertronics' sales manager:

> In 1996, … Flanagan's …, in order to get a lower price for a pumping station, entered into direct negotiations with Watertronics. That happened after Flanagan's president, Bob Flanagan, told me while I was in my office in Hartland, Wisconsin, that if he didn't get a better price than he had been given by our dealer he would get another brand of pumping station approved for the government job he was working on.
>
> ….
>
> On or about January 16, 1997 a revised quotation was sent directly to Flanagan's….
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> On or about April 17, 1997, Flanagan's sent to Watertronics its written Purchase Order No. 114 for the pumping station ….
>
> ….
>
> After receipt in Wisconsin of Flanagan's purchase order, Watertronics commenced the manufacture in Wisconsin of the pumping station ordered by Flanagan's. On or about April 21, 1997, when 15% of the manufacture had been completed, Watertronics sent to Flanagan's an invoice for a partial payment….
>
> When Flanagan's did not promptly pay the partial payment invoice, it was asked to execute a Business Credit Application And Agreement providing for Watertronics' recovery of interest at the rate of 1.5% per month and reasonable attorney's fees on past due accounts. The

> President of Flanagan's executed such agreement on or about June 5, 1997….
>
> On or about July 9, 1997 Flanagan's sent to Watertronics in Wisconsin its check for $3500 to be applied against the Watertronics April 21, 1997 invoice.
>
> On or about July 23, 1997, upon the specific instructions of Flanagan's, Watertronics shipped from Wisconsin to Flanagan's job site in New Jersey the pump station which had been manufactured by Watertronics in Wisconsin upon Flanagan's Purchase Order No. 114.

¶19 The circuit court first determined: "When defendant delivered the April 17, 1997[] purchase order to [Watertronics' representative Bill] Wise, it directed plaintiff to ship goods from Wisconsin to defendant. Therefore, the first prong of the two-part test is satisfied." I agree.

¶20 Next, however, the circuit court concluded that the exercise of jurisdiction did not comport with due process. The court explained, "It is undisputed that defendant ha[d] no contacts with Wisconsin other than the events giving rise to this action." So what? Obviously, "the events giving rise to this action," some of which occurred in Wisconsin, are the basis for Watertronics' action. Quite remarkably, however, the circuit court reasoned:

> The only contacts with Wisconsin appear to be one 4.4 minute phone call from defendant, and the down payment and credit application sent by defendant. These contacts are not numerous, nor are they significant. The concerns voiced by defendant in the phone call were apparently addressed by Wise in Pennsylvania. *The mailing of the down payment and credit application were mere formalities after the parties reached an agreement.*

(Emphasis added.) But the parties "reached [their] agreement" during that phone call. And surely, placing an order and making a down payment are anything but "mere formalities."

¶21 Long-arm jurisdiction is appropriate when an out-of-state party has purposefully established minimum contacts within the forum state. ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 474 (1985). Depending on the circumstances, when a defendant has "'do[ne] some act or consummate[d] some transaction within the forum,'" even a "'single event will suffice.'" ***Zerbel v. H.L. Federman & Co.***, 48 Wis. 2d 54, 62, 179 N.W.2d 872 (1970) (quoted source omitted). By placing the order and making the down payment, Flanagan's purposefully established sufficient contacts with Watertronics in Wisconsin.

¶22 "Compliance with the [long-arm] statute presumes that due process is met, subject to the objecting defendant's opportunity to rebut." ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶22, __ Wis. 2d __, 629 N.W.2d 662. "'[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" ***Id.*** at ¶23 (quoting ***Burger King***, 471 U.S. at 477). Flanagan's has not done so.

¶23 Wisconsin's long-arm statute is to be "liberally construed in favor of exercising jurisdiction." ***Regal Ware, Inc. v. TSCO Corp.***, 207 Wis. 2d 538, 542, 558 N.W.2d 679 (Ct. App. 1996). The circuit court's "reasoning" makes no sense, and Flanagan's has not presented anything, much less "a compelling case," that would rebut the presumption in favor of jurisdiction or would "render jurisdiction unreasonable." *See* ***Kopke***, 2001 WI 99 at ¶23. Accordingly, I respectfully dissent.