
NO. 3-97-198-CV

IN THE
THIRD COURT OF APPEALS
AUSTIN, TEXAS

MYRON MEADPUDDLE, Appellant

v.

OCTOGON CORPORATION, Appellee

Appealed from
The District Court of Travis County, Texas
331st Judicial District

BRIEF FOR APPELLANTS

This brief is so far
superior to the typical
"good" briefs turned in
that it is difficult to
adequately compensate you
with a fair grade

100 and my praise
for the best brief I have
ever gotten.

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ORAL ARGUMENT IS REQUESTED

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NAMES OF PARTIES

The following information upon this page is a complete list of the names and addresses of all parties to the trial court's final judgment and the names and addresses of all trial counsel:

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REQUEST FOR ORAL ARGUMENT

Appellant, Myron Meadpuddle, respectfully asks for the opportunity to present oral argument, as allowed by **TEX. R. APP. P.** 75 (f).

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Jari Litmanen, <u>The Ten Worst Out-of-State Exploiters of Weak Texas Labor Laws</u> , THE TEXAS OBSERVER, May 1991, at 56.	19
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MYRON MEADPUDDLE,

Appellant

v.

OCTOGON CORPORATION,

Appellee

BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

This brief is respectfully filed on behalf of Appellant, Myron Meadpuddle. Appellant requests opportunity to present oral argument and respectfully prays that the trial court's judgment be reversed and that a new trial be granted or judgment rendered to Plaintiff-Appellant based upon the great weight and preponderance of evidence in Plaintiff-Appellant's favor.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

This is an appeal from the trial court's summary judgment against Appellant's suit claiming wrongful termination by Appellee Corporation and its following denial of a motion for new trial. Appellant, Myron Meadpuddle (hereinafter "Mr. Meadpuddle") commenced this action as Plaintiff against his former employer, Delaware-based Octogon Corporation (hereinafter "Defendant/Appellee Corporation").

to recover lost wages, future earnings and damages for intentional infliction of emotional distress based upon Defendant Corporation's blatant violation of the "Sabine Pilots Act." See, Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). Mr. Meadpuddle was unceremoniously discharged from service with Defendant Corporation for his refusal to collude with Defendant Corporation in the commission of an act rendered illegal by federal laws and regulations.

The trial court granted Defendant Corporation a summary judgment based upon its filed general denial and special exceptions brief arguing that:

1. Mr. Meadpuddle was not an employee, but an independent contractor of Defendant Corporation and that Defendant Corporation was not subject to a wrongful termination suit.
2. Defendant Corporation's contacts with Texas were not sufficient to subject it to the jurisdiction of a Texas Court.

The trial court in the 331st District, Travis County agreed with both points above, granting summary judgment in favor of Defendant Corporation.

A motion for new trial promptly followed based upon the great weight and preponderance of evidence favoring (1) that Mr. Meadpuddle was indeed an employee and not an independent contractor

of Defendant Corporation who held a majority of control, right to control and power of *Respondeat Superior* over him and his work; (2) that the question of whether or not Mr. Meadpuddle was an employee or independent contractor of Defendant Corporation should be determined by a jury if there is no obvious indication of his status by evidence presented; and (3) that Defendant Corporation did have sufficient minimal contacts in Texas to avail itself of benefits from doing business in this forum, thus making it reasonably foreseeable that Defendant Corporation could indeed be brought under Texas jurisdiction for its activities within the State.

The trial court by order signed January 10, 1997, denied said motion. This appeal follows.

POINTS OF ERROR

POINT OF ERROR ONE. The trial court erred in its summary judgment ruling that Mr. Meadpuddle was not an employee, but an independent contractor of Appellee Corporation under "the meaning of the Texas Labor Code." This ruling rendered Mr. Meadpuddle unqualified to bring action against Appellee Corporation for wrongful termination under the auspices of the "Sabine Pilots Act." See, Sabine Pilots Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). This ruling goes against the great weight and preponderance of evidence as presented by Texas case law precedents relevant to Texas Labor Code sections defining "employment."

POINT OF ERROR TWO. The trial court erred in rendering summary judgment on the issue of whether Mr. Meadpuddle was an employee or independent contractor. A persuasive preponderance of Texas case law precedence dictates that in any instance where the question of employee or independent contractor status of a workman exists with no clear answer, that status must be left to a jury to decide.

POINT OF ERROR THREE. The trial court erred in its summary judgment by ruling that Appellee Corporation, a Delaware-based jewelry manufacturer, is not under jurisdiction of Texas Courts. In light of Texas Long-Arm Statutes and relevant case law within and without the State of Texas, this ruling goes against the great weight and preponderance of evidence indicating otherwise.

FACTUAL STATEMENT RELATING TO ALL POINTS

Mr. Meadpuddle was an employee of Appellee Corporation, a jewelry manufacturer based in Torino, Delaware, from 1981 until his sudden and pernicious discharge in September of 1996. Mr. Meadpuddle has been a jeweler and goldsmith by trade since 1976.

Mr. Meadpuddle's substantial duties for Appellee Corporation were to (1) display and sell Appellee Corporation's, and only Appellee Corporation's, graduation rings and other related jewelry items in his shop located on Guadalupe Street across from the campus of the University of Texas in Austin; (2) attend special functions and conventions involving high school and university seniors, setting-up his standard display, and taking orders at the functions to which he travelled around the state under Appellee Corporation's orders and at its expense; (3) perform specialized repair and assemblage of jewelry sent to him by Appellee Corporation from its clients located all around the nation; (4) file monthly sales reports, tracking all customer contacts within and without his shop; (5) file monthly status sheets cumulative of the sales of the particular current year which the Appellee Corporation utilized to monitor Mr. Meadpuddle's activities and profits earned from his efforts in Austin and the state of Texas; and (6) meet standards of display, practice, and sales as set and enforced by Appellee Corporation.

Mr. Meadpuddle had no profit interest in his efforts for Appellee Corporation and he did no other work outside that done for

Appellee Corporation for the entire 15 year term of his employment. No matter how great or small his sales, assemblage, or repair work done for a particular month, Mr. Meadpuddle's monthly fee was a fixed salary of \$2100 from which no taxes were deducted by Appellee Corporation. Mr. Meadpuddle paid his income taxes independently on a quarterly basis. Appellee Corporation paid all bills for state sales tax through a remuneration procedure in which Mr. Meadpuddle paid the state with a personal check of his own. He would then send the tax receipts to Patrick Kluivert and Fabrizio Ravenelli, the Appellee Corporation's "Officers of Accounts and Exchequer," who would reimburse him six to eight weeks later. The sales tax permit was in the name of Appellee Corporation.

All money paid to Mr. Meadpuddle for jewelry was required to be in the form of a check or money order explicitly paid to the order of Appellee Corporation or by credit card, whose slips and computer records were payable only to accounts of Appellee Corporation.

In March of 1996, an excited high school senior named Robert Fowler walked into Mr. Meadpuddle's shop waving an advertisement clipped from his school's newspaper. Mr. Fowler requested to see the pictured ring. Mr. Meadpuddle obliged the student, pulling out a display case with several variations of the pictured ring model. Mr. Fowler examined the rings as Mr. Meadpuddle gave his standard sales pitch. Mr. Fowler chose one version called "the Spartan" and Mr. Meadpuddle measured his ring size, had the young customer fill-out an order form, and collected his forty percent deposit in check form to fill the order.

In his excitement, Mr. Fowler left his copy of the advertisement behind on Mr. Meadpuddle's display case. Mr. Meadpuddle examined the ad copy and noticed in prominent 18-point typeface below the pictured ring was the statement: "All of Octogon's Panathinaikos Graduation Rings are 14 Karat Solid Gold."

This perplexed Mr. Meadpuddle since none of the rings he sold under the auspices of Appellee Corporation for his entire fifteen year tenure had ever exceeded 10 karat gold. He was also aware that this particular line, the "Panathinaikos" line, did not exceed 8 karat gold.

Mr. Meadpuddle assumed this was a typographical error on the part of Appellee Corporation's advertising department and immediately left a voice mail message about the mistake with that department which had already closed for the day.

A week passed with no response. Mr. Meadpuddle called the advertising department again to confirm that his message had been received and that corrective measures had been taken. The supervisor of the department, Mr. Ryan Giggs, informed Mr. Meadpuddle that no mistake had been made and abruptly terminated the conversation by hanging-up on Mr. Meadpuddle in mid-sentence.

Now alarmed, Mr. Meadpuddle immediately phoned his overseer, Mr. Jergen Klinnsman, who was stationed within the same Delaware office complex. Mr. Meadpuddle had mentioned the mistaken advertisement to Mr. Klinnsman once before in one of their morning telephone briefings, but neither one felt too concerned, feeling it was but a typographical fluke. Mr. Klinnsman, a jeweler by trade himself for almost forty years, was also alarmed by Mr. Meadpuddle's

treatment at the hands of the advertising department. Mr. Klinnsman told Mr. Meadpuddle that he would immediately visit the advertising department personally to investigate the matter.

That was the last time Mr. Meadpuddle heard from Mr. Klinnsman as his overseer. Three days later, Mr. Klinnsman called Mr. Meadpuddle to inform him that he had been "sacked" and warned Mr. Meadpuddle that Appellee Corporation was making plans to "expunge" all jewelers and goldsmiths from its employ in favor of "less knowledgeable trainees." Mr. Klinnsman described it as "skill downsizing" and "a return to the days of indentured servitude."

In the course of their thirty minute conversation, Mr. Meadpuddle and Mr. Klinnsman discussed the strong possibility that Appellee Corporation was intentionally lying about the gold content in its rings to justify a thirty percent price hike implemented just before the current heavy spring sales season when the Appellee Corporation normally does upwards of seventy percent of its total annual sales. Mr. Klinnsman also advised Mr. Meadpuddle to seek legal counsel since he would most likely be fired soon. Klinnsman repeated several times throughout the exchange that misrepresentation of gold content in rings is against federal law.

Mr. Klinnsman has filed a suit similar to this one in a Delaware State District Court. Another suit against Appellee Corporation has been filed by the United Federation of Goldsmiths and Jewelers, Mr. Klinnsman's union affiliation. The former overseer's legal actions have also resulted in three class-action suits filed against Appellee Corporation by misinformed ring-buyers in three different states.

Months passed. Mr. Meadpuddle's constant pleas for corrections of the advertisement's text were still unheeded. At the end of July 1996, Meadpuddle had given-up on a response from Appellee Corporation's advertising department, and took matters into his own hands by mailing notices of the advertisement's mistake to all the high school newspapers in Central Texas he knew to be running the suspect advertisement.

One high school journalism instructor, Ms. Gabriella Batistuta, contacted Mr. Meadpuddle by phone. In the course of their conversation on August 2, 1996, she informed Mr. Meadpuddle that her school newspaper at Fiorentina High School in Dripping Springs, Texas had run the suspect ad some twelve times since November of 1995. By her estimations, determined from contacts with other high school journalism instructors in the Austin area, the advertisement had probably run almost 100 times in fifteen different newspapers and had been seen at least once by some 15,000 students in the Austin area alone. Mr. Meadpuddle believed he had gotten at least 300 inquiries and 75 sales due to the misleading advertisement.

Heeding Mr. Klinnsman's advice, Mr. Meadpuddle contacted several attorneys in Austin about his situation. It was confirmed by the attorneys at all contacted firms that it is indeed against federal law, with a heavy penalty imposed, to misrepresent the gold content in rings or any jewelry. Thereafter, Mr. Meadpuddle attempted, in his words, "to hang on to my job as long as possible," in hopes that the matter could be resolved without his loss of employment or costly litigation.

One month after mailing the aforementioned letters to various high school newspapers, Mr. Meadpuddle received an angry phone call from his new overseer at Appellee Corporation, a man named Mr. Dennis Bergkamp. Mr. Bergkamp was enraged that the letters sent to the newspapers had now prompted a class-action suit filed by Texas Attorney General Dan Morales on behalf of deceived ring-buyers in Texas. Mr. Bergkamp warned Mr. Meadpuddle to either "put up or shut up" about the advertisements. Before ending the exchange, Mr. Bergkamp warned Mr. Meadpuddle, "You'll hear from the front office about this."

One week later, Mr. Meadpuddle received a letter from the President of Appellee Corporation, Mr. Alan Sugar, containing the following statement: "We regret to inform you that, due to excessive tardiness arriving at your morning workplace, we must terminate our working relationship with you. This termination is effective September 15, 1996." The letter went on to order Mr. Meadpuddle to return "all tools and property of Octogon Corporation" upon his termination date.

Mr. Meadpuddle had never been late to open his shop at 9:00 a.m., Monday-Saturday, save holidays, in the fifteen years he had worked for Appellee Corporation and had always been present in his shop when Mr. Klinnsman or another company representative telephoned shortly thereafter for his daily briefing. Mr. Meadpuddle had also never been late for 8:00 a.m. monthly inspections of his premises performed by various representatives of Appellee Corporation.

This sudden termination also contradicted written Corporate Policy that any transgression of proper work procedure would first

be met with at least two written warnings before final termination. Mr. Meadpuddle's work record had been spotless until his termination and, without contention, had indeed even been spotless then. The only cause for immediate termination under the Octogon Employee Manual, which Mr. Meadpuddle was initially given in 1981 with updates mailed to him every two years, is theft, something for which Mr. Meadpuddle was not at the time, and had never been, guilty.

ARGUMENTS AND AUTHORITIES

POINT OF ERROR ONE (RESTATED)

The trial court erred in its summary judgment ruling that Mr. Meadpuddle was not an employee, but an independent contractor of Appellee Corporation under "the meaning of the Texas Labor Code." This ruling rendered Mr. Meadpuddle unqualified to bring action against Appellee Corporation for wrongful termination under the auspices of the "Sabine Pilots Act." See, Sabine Pilots Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). This ruling goes against the great weight and preponderance of evidence as presented by Texas case law precedents relevant to Texas Labor Code sections defining "employment."

Point of Error One is that the trial court's summary judgment that Mr. Meadpuddle was not an employee, but an independent contractor of Appellee Corporation is against the great weight and preponderance of evidence that he was indeed an employee under the Texas Labor Code definition and relevant explanatory case law.

... "Employment" means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.
TEX. LAB. CODE ANN. § 201.041 (Vernon 1996).

THE "RIGHT TO CONTROL" AND ITS EXERCISE

There have been a number of tests established by Texas case law for determining whether a laborer working under the auspices of another person or corporate entity is an employee or independent contractor under § 201.041 of the Texas Labor Code. Yet, for over

thirty years, one test has remained supreme, albeit inherently elusive and seemingly contradictory in nature.

In every case which turns upon the nature of the relationship between the employer and the person employed, the essential question to be determined is not whether the former actually exercised control over the details of the work, but whether he had a right to exercise control. Newspapers, Inc. v. Love, 380 S.W.2d 582, 585 (Tex. 1964).

Determining the right to control is a slippery endeavor. Yet the actual exercise of control does imply the right therein. See, Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. 1965); Hoescht Celanese Corp. v. Compton, 899 S.W.2d 215, 220 (Tex. App.- Houston [14th Dist.] 1994, no writ); INA of Texas v. Torres, 808 S.W.2d 291, 293 (Tex. App.- Houston [1st Dist.] 1991, no writ).

Appellee Corporation had the right to exercise control over every essential detail of Mr. Meadpuddle's work and brusquely asserted that right at every turn with fastidious vigilance and meticulous attention to every element of Mr. Meadpuddle's efforts. By all means, Appellee Corporation's intent with Mr. Meadpuddle was to maximize the cost-efficiency of its employee by ensuring that it received the maximum output for its monetary input by exercise of its absolute "right to control."

One method by which an employer asserts "right to control" over an employee is by persistent monitoring and communication concerning work details. See, Williams v. Olivio, 912 S.W.2d 319, 334 (Tex. App.- San Antonio 1995, no writ); Torres at 294. Appellee

Corporation asserted such "right to control" over Mr. Meadpuddle. The daily morning briefings with the overseer on the phone, the monthly inspections, and the monthly sales reports and status sheets were all its means of asserting that "right to control."

The very reason given for Mr. Meadpuddle's specious firing, "tardiness," and the fact that he was "fired" for any reason whatsoever, overtly exhibits a "right to control" and the existence of an employer-employee relationship. Independent contractors are not fired, they are simply not hired for any more jobs. See, Pitchfork Land and Cattle Co. v. King, 346 S.W.2d 598, 603 (Tex. 1961).

Another assertion of an employer's "right to control" is its imminent domain over all pecuniary matters in the relationship with its employee. See, Dougherty v. Gifford, 826 S.W.2d 672, 678 (Tex. App.- Texarkana 1992, no writ). Mr. Meadpuddle had no bank account through which to process transactions and no control over the flow of money between his shop and Appellee Corporation's headquarters. Mr. Meadpuddle could not make independent billings to be paid to his name. All payments were required to be made to the order of Appellee Corporation. Mr. Meadpuddle would send all checks, money orders, and credit card slips paid to order of Appellee Corporation by Federal Express to Appellee Corporation's headquarters once a week.

THE FIVE-POINT KING TEST OF EMPLOYMENT STATUS

There is also a prominent five-point test in Texas jurisprudence for distinguishing between an employer-employee relationship and that of employer-independent contractor.

...Recognized...tests to determine when one is acting in the capacity of independent contractor are: (1) the independent nature of his business; (2) his obligation to furnish necessary tools, supplies and material to perform the job; (3) his right to control the progress of the work except as to final results; (4) the time for which he is employed; (5) the method of payment, whether by time or by the job. King at 603.

In regards to factor one, the fact that one's business may be independent in nature does not preclude the possibility or fact of an employer-employee relationship. See, Dougherty at 679. On the surface, Mr. Meadpuddle's relationship with Appellee Corporation definitely appears to be that of an employer-independent contractor due to his great physical distance from his overseer and the fact that he works alone without constant supervision. But in Mr. Meadpuddle's case as in the case in Dougherty, "the independence element goes to the nature of the work, not the nature of the entities...Because of the professional nature of the work, very little supervision was necessary" Id.

Considering factor number two, Mr. Meadpuddle did not own the tools he used at his shop nor did he own any of the needed supplies

such as gold, silver, etc. They were furnished by and belonged to Appellee Corporation who asked for their return upon his termination.

Mr. Meadpuddle's relationship to factor three is not as easy to determine as the other four factors. He did control the quotidian aspects of his work. He could take lunches, breaks, and time for personal errands as he pleased. Still, the following morning, his overseer would telephone to make sure he had completed the previous day's work.

Under factor four, to be an independent contractor, one would have to be hired by the job and not by a period of time. See, Living, Inc. v. Redinger, 667 S.W.2d 846, 856 (Tex. App.- Houston [1st Dist.] 1984), rev'd on other grounds, 689 S.W.2d 415 (Tex. 1985). Since Mr. Meadpuddle had worked only for Appellee Corporation for fifteen years, it is obvious that he was a permanent employee. He was never "hired by the job" but was always ready, willing, and waiting for the beck and call of Appellee Corporation's orders.

Under factor five, an independent contractor would be "paid by some quantitative standard," or in other words, paid by the actual completed performance of a specific job. King at 604. Conversely, an employee would be paid by time unit. See, Farrell v. Greater Houston Transp. Co., 908 S.W.2d 1, 4 (Tex. App.- Houston [1st Dist.] 1995, writ denied). Mr. Meadpuddle only received his monthly salary of \$2100 and was never paid by the job or by sales commission.

In light of the points examined above, it is obvious that Mr. Meadpuddle was indeed an employee, in a "Master-Servant" relationship with Appellee Corporation. He was in no way a free

working, self-employed independent contractor hired per job by Appellee Corporation.

The trial court's summary judgment on this point should be reversed.

POINT OF ERROR TWO (RESTATED).

The trial court erred in rendering summary judgment on the issue of whether Mr. Meadpuddle was an employee or independent contractor. A persuasive preponderance of Texas case law precedence dictates that in any instance where the question of employee or independent contractor status of a workman exists with no clear answer, that status must be left to a jury to decide.

Point of Error Two calls attention to the fact that the trial court had no precedence or jurisdiction for rendering summary judgment on the question of whether Mr. Meadpuddle was an employee or independent contractor working under the auspices of Appellee Corporation.

In examining and applying the doctrine of "right to control" from Newspapers, Inc. and the aforementioned five factors for determining employee or independent contractor status as established in King, if "the court finds that there is conflicting evidence as to the status of the workman, the issue should be submitted to the jury." Redinger at 856.

Clearly, Mr. Meadpuddle was subjugated to Appellee Corporation's "right to control" and with absolutely no questions or uncertainties met four of five requirements for employee status under the King test.

The question of whether Mr. Meadpuddle meets the remaining one facet of King should be put before a jury to resolve. Still, the

answer to that question may not be the final decisive factor of the issue of Mr. Meadpuddle's employment status. Even more importantly, a jury should be given an opportunity to consider if concrete employee status has been sufficiently established by Mr. Meadpuddle's doubtless meeting of four out of five requirements under King in addition to, or separately from, the clear fact that Appellee Corporation possessed and exercised "right to control" under the Newspapers, Inc. test.

The summary judgment granted on this issue, as discussed under Point of Error One, should have been, in consideration of the great weight and preponderance of Texas case law precedence, the opposite of that given. Beyond the shadow of a doubt, the summary judgment should be reversed. Yet, even if valid substantial questions and uncertainties were to somehow be proven to the Court, the issue of whether Mr. Meadpuddle was an employee or independent contractor of Appellee Corporation must be remanded to a jury's discretion under the dictates of Redinger.

POINT OF ERROR THREE (RESTATED).

The trial court erred in its summary judgment by ruling that Appellee Corporation, a Delaware-based jewelry manufacturer, is not under jurisdiction of Texas Courts. In light of Texas Long-Arm Statutes and relevant case law within and without the State of Texas, this ruling goes against the great weight and preponderance of evidence indicating otherwise.

Point of Error Three points to the fact that, in its summary judgment, the trial court erred in declaring that Appellee Corporation, a Delaware-based jewelry manufacturer, did not fall

under the jurisdiction of Texas Courts. The great weight and preponderance of evidence proves otherwise.

The trial court's summary judgment confirmed Appellee Corporation's statement from its special exceptions brief that the "sheer physical distance between Appellant and Octogon Corporation was sufficient to render the question of Texas *in personam* jurisdiction a moot point under the Due Process Clause of the Fourteenth amendment."

The point of whether or not Appellee Corporation was physically bound to Texas is arguable in regards to its overwhelming presence in sales and marketing efforts that made its products the "top-selling graduation jewelry in Texas." Jari Litmanen, The Ten Worst Out-of-State Exploiters of Weak Texas Labor Laws, THE TEXAS OBSERVER, May 1991, at 22.

Yet, physical presence in Texas is not necessary for imposition of *in personam* jurisdiction. This is especially the case when activities are "purposefully directed toward a forum's residents...The due process clause may not be wielded as a territorial shield to avoid interstate obligations that have been assumed voluntarily." Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174, 2183 (1985).

APPLICATION OF DUE PROCESS CLAUSE AND LONG-ARM STATUTES

Since it is one of only two points of law cited by Appellee Corporation in its special exceptions filing, it is necessary not only to fully examine the Due Process Clause of the United States

Constitution, but subsequent interpretative statutes and case law. Such thorough investigation will reveal the dubious and problematic nature of Appellee Corporation's special exceptions claims and supply irrefutable cause for reversal of trial court's ruling on this issue.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV § 1.

Appellee Corporation's primary reason for assertion of the Due Process Clause is that unfairness would arise if it were to be brought to task in a Texas Court. It alleges that *in personam* jurisdiction would offend "traditional notions of fair play and substantial justice" because a "great burden of inconvenience" would be placed upon Appellee Corporation as well as giving resident plaintiff an "unfair advantage."

The Due Process Clause in the Information Age

Bear in mind that Appellee Corporation seems to be interpreting the Due Process Clause from the perspective of American Citizens living in 1868, the year the Fourteenth amendment was ratified. When the amendment was conceived, business and commerce was, for the greatest part, localized. Movement of goods and persons over state lines did occur, but only very rarely. The Amendment's

authors in no way could fathom the nature of economic rapidity and personal mobility that followed in its wake. It was written in the century before computers, express mail, telephones, faxes, airlines, automobiles, and related technology began their assault upon, and virtual erasure of, state boundaries, especially in the realm of commercial trade and business relations. Its purpose at the time of its inception was to protect citizens from being summoned back to States several days or weeks travel away from their homes at a burdensome cost and undue imposition of hardship. The Due Process Clause of the Fourteenth Amendment would need to be seriously revamped in order to be the final word upon *in personam* jurisdiction in today's world. See, World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559, 564-66 (1980).

Long-Arm Statutes as Guideposts to the Due Process Clause

Out of necessity, many interpretive statutes and case law precedents concerning the issue of Due Process have arisen since the dawn of the modern information and technological age to protect the interests of states and their citizens in these times of personal and commercial fluidity. See, Burger King at 2182.

One such body of law is the Long-Arm Statutes adopted by Texas and most of the other forty-nine states. These protectionistic interpretive laws give State Courts the opportunity to overstep their boundaries when the interests of justice within their states demands it. For the greatest part, the purpose of Long-Arm Statutes

is to protect states from unjust over-application of the Fourteenth amendment.

Long-Arm Statutes prevent citizens and business entities from committing fraud, tort, breach or other such usurpations of law in states other than that in which they reside, only to later claim, under the authority of Constitutional Due Process, a lack of jurisdiction in the state in which the legal transgression was committed. One perspective is that Long-Arm Statutes create quasi-citizenship for persons and business entities involved in commercial and other activity within a respective state and thus impose *in personam* jurisdiction upon them. See, *Id.* at 2182-83.

The Texas Long-Arm Statute defines acts constituting doing business in the State of Texas in the following manner:

...A nonresident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1996).

Appellee Corporation meets all three of the above requirements for being defined as doing business in Texas, thus establishing quasi-citizenship and Texas *in personam* jurisdiction under the Texas Long-Arm Statute.

Detailed Application of the Texas Long-Arm Statute to the Instant

In consideration of requirement one, Appellee Corporation had contracted implicitly with Mr. Meadpuddle, a Texas resident, for fifteen years in an employee-employer relationship in which work orders (contracts under Uniform Commercial Code), payments for goods, repaired goods, and new goods were exchanged by United States Postal Service and like couriers. In that fifteen years, Appellee Corporation also contracted by phone, mail, and other couriers with thousands of customers and hundreds of business, sales, education, and temporary agents. All of these customers and agents were within Texas and residents thereof. All contracts were performed in Texas.

In consideration of requirement two, Appellee Corporation committed fraud within this state against Texas residents when, in numerous prominently displayed newspaper advertisements (in high school newspapers aimed at impressionable young persons, no less), it wantonly misrepresented gold content in its graduation rings. In addition, it flagrantly violated federal regulations within Texas borders.

In consideration of requirement three, Appellee Corporation recruited Mr. Meadpuddle into its employ in 1981 and has since hired scores of temporary demonstrators, display models and construction workers to aid in its sales efforts at various conventions and educational institutions throughout Texas.

Appellee Corporation has, over the last fifteen years, made consistent regular contacts and contracted with Temporary Employment Agencies in Austin, Dallas, Houston, El Paso, Amarillo, Longview,

San Antonio, McAllen, Corpus Christi, Midland and Lubbock; and with Modeling and Talent Agencies in Austin, Dallas, Houston, Corpus Christi, and El Paso.

APPLICATION OF CASE LAW RELEVANT TO DUE PROCESS CLAUSE AND LONG-ARM STATUTES

Atop other declarations, Appellee Corporation, in its special exceptions statement, claims three prominent legal theories sufficiently support its exemption from Texas *in personam* jurisdiction: (1) "no reasonable foreseeability" for being called into Texas Court; (2) its contacts with Texas were minimal; and (3) jurisdiction over Appellee Corporation does not travel with its merchandise.

Appellee Corporation supports the assertions of the previous paragraph with the United States Supreme Court's decision in World-Wide Volkswagen Corp. v. Woodson.

Appellee Corporation's reliance upon this case as "on point" and controlling in this instant is misguided, if not blatantly misrepresentational. In its special exceptions brief, Appellee Corporation grossly misinterpreted the facts and theories presented by the ruling, facetiously omitting and decontextualizing key factors that make the case clearly distinguishable from the instant. See, World-Wide Volkswagen at 561-63.

* Distinguishable Facts and Applicable Theories in World-Wide Volkswagen*

In World-Wide Volkswagen, the Petitioner Company, an automobile distributor based in New York state, was called into an Oklahoma court for a products-liability suit involving a car it sold to a couple in New York. That car just happened to get involved in a severe accident in Oklahoma as the couple was driving between New York and Arizona. See, Id. at 562.

Unlike the Appellee Corporation in the instant, the Petitioner Company

carried on no activity whatsoever in Oklahoma...closed no sales and performed no services there and did not avail themselves of...privileges and benefits of Oklahoma law. They solicited no business there either through salespersons or through advertising...nor did they regularly sell cars...in Oklahoma.
Id. at 565.

One theoretical passage in World-Wide Volkswagen is even supportive of the fact that Appellee Corporation does fall under Texas jurisdiction.

"When a corporation "purposefully avails itself of the privilege of conducting activities within forum state, it has clear notice that it is subject to suit there..." Id. at 567.

Appellee Corporation availed itself of privileges of doing business in Texas. The State was its second largest market behind New York and for four consecutive years, 1984-1987, it was the state with the Corporation's highest dollar sales, with no small credit due Mr. Meadpuddle.

Appellee Corporation also enjoyed a higher profit margin in Texas than in other states because of Texas' low tax demands and cheaper transportation costs due to lower gasoline prices than in any other of Appellee's market states. Also, Texas is the only state in which Appellee Corporation operates in which goldsmiths and jewelers are not unionized. This state is very employer-friendly as a result of its "Right to Work" laws.

In the facts section of its general denial, an executive of Appellee Corporation stated, "The fact that Texas is a 'Right to Work' state, and the generally cheaper nature of doing business in the state, is the main reason Octogon saw it as a prime market to move into in 1981."

In his deposition, Mr. Meadpuddle estimated, from personal contacts with other jewelers and goldsmiths under employ of Appellee Corporation, that he made anywhere from 20-30% less than those persons doing equivalent work for Appellee Corporation in its other market states where unions and other costly factors existed.

Mr. Meadpuddle also stated in his deposition that he paid half the rent and all utilities at his shop in Austin and, to the extent of his knowledge, he was the only company employee to do so. He also stated that, to the extent of his knowledge, he was the only skilled employee without a full benefits and medical package from the Appellee Corporation and that because of that and the other numerous factors that made Texas cheaper in which to operate than other States, Appellee Corporation's profit margin was usually approximately 20-25% higher in Texas than in other states in which it did business.

The previous passage from World-Wide Volkswagen goes on to further bolster the assertion that Appellee Corporation be brought under Texas jurisdiction.

Forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.
Id.

Atop the legal and cost-saving benefits Appellee Corporation reaped from conducting business within the State of Texas, there was an even more impressive benefit gained in this state in terms of net income results by Appellee Corporation's mere act of placing its products into the State's "stream of commerce" for purchase by Texas consumers.

It was estimated by Mr. Meadpuddle in his deposition that he sold over four thousand gold graduation rings while under the employ of Appellee Corporation. Records surrendered by Appellee Corporation confirmed the exact number as 4,128 gold rings, 1,236 silver, and 532 of other metals. The dollar amount taken in by Mr. Meadpuddle for Appellee Corporation, as confirmed by records surrendered by Appellee Corporation, was exactly \$3,122,560. This dollar amount preceding does not consider other income generated by Mr. Meadpuddle within Texas for Appellee Corporation for repairs done on rings and jewelry, and sales of other type jewelry aside from rings. It is safe to say that Appellee Corporation generated, at the very least,

between three and four million dollars (almost \$210,000 per year) in income from doing business in Texas.

This monetary factor alone should be enough to place Appellee Corporation under Texas Jurisdiction. In consideration of the sheer volume of transactions done in Texas over the period of Mr. Meadpuddle's tenure and the considerable amount of money generated, it would not be unreasonable for Appellee Corporation to realize it had made "minimum contacts" and could have foreseen the possibility of being subject to suit in Texas as it is now.

Schlobohm v. Schapiro: The Truly Controlling Case in the Instant

The case that is controlling and closest to point in this instant, rather than World-Wide Volkswagen, is the Supreme Court of Texas ruling in Schlobohm v. Schapiro. In that case, the Supreme Court ruled that a Pennsylvania resident had intentionally availed himself of the privileges of doing business in Texas and had made sufficient "continuing and systematic" contacts with Texas to "permit the imposition of Texas jurisdiction." Schlobohm v. Schapiro, 784 S.W.2d 355, 356 (Tex. 1990).

The Court in Schlobohm neatly laid-out its supporting theories for imposing *in personam* jurisdiction over a Pennsylvania resident in the form of three different tests: "The Long-Arm Test," which has already been discussed here; a "Federal Test;" and a "Texas Test."

Under the "Federal Test," two factors are considered to determine a state's jurisdiction over a nonresident person or business entity.

"(1) The plaintiff must initially show that the defendant has established minimum contacts with the forum state." Id. at 357.

The Court then goes on to further elucidate the definition of "minimum contacts," resonating with the United States Supreme Court's definition asserted in World-Wide Volkswagen.

The defendant must do something purposeful to avail himself of the privilege of conducting activities in the forum, thus invoking the benefit and protection of its laws. . . . Those activities . . . must justify a conclusion that the defendant should reasonably anticipate being called into court . . . and that his activities were continuing and systematic. Id.

The issue of "purposeful availment of benefits and privileges of a forum state" in the instant has been previously given rigorous examination in the argument under this Point of Error. In adding a reiteration relating to this point and the question of "minimum contacts" as set forth by the Court in Schlobohm, it would not be improper for Mr. Meadpuddle to assert that the Appellee Corporation's veritable daily contacts with this State for the purpose of business for over fifteen years, whether or not it made more than a single dollar in sales, is more than ample evidence to establish its meeting of this criterion.

"(2) Plaintiff must show that the assertion of jurisdiction comports with fair play and substantial justice." Id.

The Schlobohm Court then goes on to state, acknowledging the near dissipation of state lines and the innumerable interpretations

of the Due Process Clause, that proving a nonresident meets this criterion has become quite easy over time.

"Because the minimum contact doctrine encompasses so many considerations of fairness, it has become less likely that the exercise of jurisdiction will fail a fair play analysis." Id. at 357-58.

Here, in our instant, the notion of fair play is indeed a criterion easily fulfilled. Appellee Corporation is a multi-million dollar business. In 1985, it was named one of America's twenty fastest growing corporations by a number of reputable national business periodicals. See, Jane Eyre, Big Jewels, Big Money, MONEY MAGAZINE, Jan. 1985, at 56; Marcelo Lippi, The Growth Companies, FORTUNE, Apr. 1985, at 19. Its counsel is one of the most prominent law firms in the northeastern region of the United States. Its President, Mr. Alan Sugar, is well-known in New England socialite circles and is known worldwide in sporting circles. He owns substantial portions of a National Basketball Association team and a National Football League team as well as minority interests in a Major League Soccer team and a prominent English Premiership (soccer) club based in London. See, Hugo Sanchez, Golden Champions, SPORTS ILLUSTRATED, Feb. 5, 1988, at 21.

Considering that the President of Appellee Corporation is a renowned world-class jet-setter worth millions, it can hardly be argued that requiring the Corporation to appear in Texas Court, especially in light of the profit it has reaped from the State in the last fifteen years, would cause hardship, inconvenience, or be construed as unfair under the doctrine of Due Process.

The "Texas Test" only slightly varies from the "Federal Test," imparting a three-pronged examination rather than two.

"(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state." Schlobohm at 358.

This first prong implies that only one "purposeful" business transaction need take place in order for *in personam* jurisdiction of a nonresident business to be imposed in Texas. This point is also relevant to another case of import to the instant, Zac Smith & Co. v. Otis Elevator Co. In that case, when a Florida construction firm breached a contract with a New Jersey elevator manufacturer, it was ruled by the Supreme Court of Texas that the single transaction, which was to take place here in Austin, was enough to establish "...sufficient contacts with Texas to reasonably require this Florida corporation to be subject to our long-arm statute." Zac Smith & Co. v. Otis Elevator Co., 734 S.W.2d 662, 663 (Tex. 1987).

As has been established in the instant, Appellee Corporation's number of transactions here in Texas ran into the thousands, generating a hefty some of money for the Corporation's coffers. Even if it were to sell only one misrepresented ring in Texas, it would still be subject to the State's jurisdiction under the dictates of Zac Smith & Co.

"(2) The cause of action must arise from, or be connected with, such act or transaction..." Schlobohm at 358.

The cause of action in the instant, Mr. Meadpuddle's wrongful termination suit, is connected with the transactions that Appellee Corporation made in Texas. Mr. Meadpuddle, as agent in employ of

Appellee Corporation, was implicitly directed to perform an illegal act. In following such orders and continuing fraudulent transactions, Mr. Meadpuddle would have been implicated in the criminal act. Because the issue in the instant, Mr. Meadpuddle's "wrongful termination," arises over the nature of the transactions made by Appellee Corporation, there is no doubt that the second criterion of the "Texas Test" is achieved.

The third prong of the "Texas Test" involves notions of "fair play and substantial justice." See, Id. This question has already been given thorough examination under application of the "Federal Test."

In light of the substantial precedence recounted under this Point of Error affirming solid justification for imposing Texas *in personam* jurisdiction upon Appellee Corporation, the trial court's summary judgment on this issue is obviously in error and should be reversed.

PRAYER FOR RELIEF

WHEREFORE, Appellant respectfully requests that the Court of Appeals reverse the trial court's summary judgment and grant Appellant a new trial.

IN THE ALTERNATIVE, Appellant respectfully requests that the Court of Appeals reverse the trial court's summary judgment and render judgment in favor of Mr. Meadpuddle, allowing for his collection of damages for wrongful termination from Appellee Corporation.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief for the Appellant was served upon the following counsel of record by certified mail, return receipt requested, FAX, or by hand delivery, this _____ day of April, 1997.

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