

1994

Arthur Biggs v. David R. Calvert : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

<p>ARTHUR BIGGS, Plaintiff-Appellant, vs. DAVID R. CALVERT, Defendant-Appellee.</p>	<p>Case No. 940562-CA Oral Argument Priority 15</p>
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REPLY BRIEF OF APPELLANT

Appeal from the Final Order of Dismissal
of the Fourth District Court of Utah County, Utah
the Honorable Guy R. Burningham, District Judge

U. S. COURT OF APPEALS
BRIEF

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COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

A. *Long-arm Statute* 1

 i. *Contacts* 1

 ii. *Documents* 3

B. *Due Process* 4

TABLE OF AUTHORITIES

1. Statutes

None.

2. Cases

Far West Capital v. Towne, 828 F. Supp. 909 (D. Utah 1993) . . . 3

Nicholas v. Buchanan, 806 F.2d 305 (1st Cir. 1986) 4

STV Int'l Marketing v. Cannondale Corp., 750 F. Supp. 1070 (D. Utah 1990) 1, 2

3. Other Authorities

None.

Plaintiff-Appellant Arthur Biggs submits this Reply Brief to the brief of Defendant-Appellee David Calvert.

A. *Long-arm Statute*

i. *Contacts*

Calvert claims that the exhibits attached to Biggs' complaint do not help Biggs' claim that the district court had personal jurisdiction. Specifically, Calvert quotes language from STV Int'l Marketing v. Cannondale Corp., 750 F. Supp. 1070, 1077 (D. Utah 1990):

The nexus requirement is not met whenever there is creation or breach of a contract with a Utah plaintiff. Nor would the circumstance of presence in Utah by way of correspondence and telephone calls, without more, necessarily be sufficient to satisfy nexus.

Calvert uses this language to suggest that the frequent correspondence and telephone calls between Biggs and Calvert, including the promissory note (Exhibit 1) and the assignments (Exhibits 2 and 3), do not establish Utah's jurisdiction over Calvert.

Calvert has omitted important language from this passage. Immediately after it the court dropped a footnote in which it stated,

In Rambo [v. American Southern Insurance Co.], 839 F.2d 1415 (10th Cir. 1988), the court said: "Certainly, telephone calls and letters may provide sufficient contacts for the exercise of personal jurisdiction. . . . However, the exercise of jurisdiction depends on the nature of those contacts." (citations omitted, emphasis added)

STV Int'l, 750 F. Supp. at 1077 n.17. This footnote demonstrates that when assessing jurisdiction there are no hard and fast rules (as Calvert suggests), but rather a "fact and circumstances" analysis controls. The STV Int'l court underscored this point when, immediately after stating the passage quoted by Calvert, it decides to rule that a nexus did indeed exist after examining the "totality of facts." Id.

There is no escaping the fact that Calvert was doing business in Utah, and was aware of that fact. He contracted with Utah residents, knowing that he would be sending payments to them in Utah. He executed assignments and subsequently sent them to Utah. He did the same with a promissory note.

The nature of such contacts is substantial and not transitory. This is not a case where one is negotiating a purchase of an item for use outside the forum state, or communicating terms of a contract to be performed outside the forum state. Under such circumstances the nature of the communications would be of the sort contemplated by the STV Int'l court. Rather, here the communications constitute part of a contract to be performed substantially in Utah. Furthermore, the communications do not operate as some kind of snare to trick Calvert into appearing in the Utah courts. Rather, he knew that payments would be sent to Utah and that he was dealing with Utah residents. Indeed, at least one of the documents (Exhibit 4) contained a blank signature line

for Biggs: Calvert knew that the document would be signed in Utah, and Calvert ostensibly sent it to Utah primarily for that purpose.

The case Calvert cites, Far West Capital v. Towne, 828 F. Supp. 909 (D. Utah 1993), does not change this conclusion. Calvert misrepresents the similarity of Far West with the case at bar. In Far West the plaintiffs specifically alleged only seven contacts with Utah, none of which were face to face, and virtually all of which were facsimile transmission (two of which were followed up by phone calls). Id. at 913. Furthermore, the contract in Far West was not to be performed in any way in Utah, and was negotiated primarily in Nevada (where Towne was a resident) and California. Any Utah contacts in Far West were certainly sparse and of a transitory nature. They do not match in quantity or quality the contacts in this case.

ii. Documents

Calvert contends that the documents that Biggs submitted in support of his jurisdictional claim were inadmissible. When confronted with the fact that no objection was made below to these documents, he simply responds, without supporting authority, "No motion to strike was necessary." Brief of Appellee at 14. This response speaks for itself. It is hornbook law that an evidentiary objection is waived if a proper objection is not made at the proper time. Biggs cited the Franklin Financial case to underscore that point. When Calvert contends that Franklin Financial is inapposite, he is merely displaying his unwillingness to recognize

that basic principle of evidentiary law. Calvert strains at a gnat (Franklin Financial dealt with affidavits), while swallowing a camel (Franklin Financial's point is that one must make evidentiary objections to preserve them on appeal).

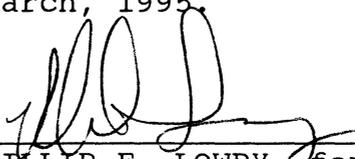
B. Due Process

Calvert correctly recognizes that it is important for a defendant to anticipate that he will be subject to the forum state's jurisdiction, but errs in asserting that he could not anticipate being brought to court in Utah. As has been pointed out, this debt was to be paid to Utahns in Utah, and important documents concerning the debt were sent by Calvert to the Biggs in Utah. This is purposeful availment.

It is simplistic of Calvert to invoke cases forbidding jurisdiction based merely on contracting with residents of the forum. This is not such a case. As noted above, Far West concerned a contract between a Nevada resident and a Utah resident, negotiated in Nevada and California, and to be performed outside of Utah. Another case cited by Calvert, Nicholas v. Buchanan, 806 F.2d 305 (1st Cir. 1986), concerns a contract between a Rhode Islander (plaintiff) and a Texan (defendant). The contract was solicited by the Rhode Islander, was to be performed in Texas, and virtually all correspondence concerning the contract originated in Rhode Island and was sent to Texas. There is, in short, no imaginable way to analogize this case to the one at bar.

Fairness is at the heart of the court's inquiry--that much is clear. The numerosity and substance of Calvert's communications with the Biggs, combined with his knowledge that payment would be made to the Biggs in Utah, demonstrate that Calvert should have anticipated suit in Utah. Furthermore, Calvert will suffer little inconvenience in having to defend the lawsuit here. The district court should be reversed.

DATED this 29th day of March, 1995.

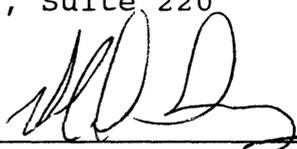


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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 29th _____ day of March, 1995.

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