

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
MICHIANA EASY LIVIN' COUNTRY, INC., d/b/a Michiana R.V., Petitioner,
v.
James G. HOLTEN, Respondent.
No. 04-0016.

January 6, 2005

Appearances:
Kelly Michael Kowis (argued), Watson, Kowis & Rossick, Houston, TX
for petitioner.
Brock C. Akers (argued), Phillips & Akers, P.C., Houston, TX for
respondent.

Before:

Wallace B. Jefferson, Chief Justice, Priscilla R. Owen, Harriet
O'Neill, David Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright,
Scott A. Brister, Justices.

CONTENTS

ORAL ARGUMENT OF KELLY MICHAEL KOWIS ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF BROCK AKERS ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF KELLY MICHAEL KOWIS ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated, please. The Court is ready to
hear argument in 04-0016, Michiana Easy Livin' Country, Inc. v. James
Holten.

SPEAKER: May it please the Court. Mr. Kelly Kowis will present
argument for the petitioner. The petitioner has reserved five minutes
for rebuttal.

ORAL ARGUMENT OF KELLY MICHAEL KOWIS ON BEHALF OF THE PETITIONER

MR. KOWIS: Good morning. I would like to start off by reading to
you a passage that was authored by the Court that presses upon a case
that's almost identical in the facts that we have here today. The Court
stated in the [inaudible] case, "The contracts -- the contracts of a
nonresident defendant with Texas are minimal and fortuitous, and a
nonresident cannot be said to have purposely have conducted activities
within the state. The nonresident's contacts with Texas were not
grounded on any expectation or necessity of invoking the benefit or
protections of Texas law nor were they designed to result in profit
from a business transaction undertaken in Texas. The contract was
solicited, negotiated, and consummated in another state and a
nonresident did nothing to indicate or to support an inference of any
purpose to exercise the privilege of doing business in Texas."

Simply put, this Court stated that the nonresident was a passive participant in a commercial transaction with a Texas resident; the nonresident neither sought, initiated, nor profited from his single and fortuitous contact with Texas. That was this Court's opinion in *U-Anchor Advertising v. Burt*; that is exactly the question we have before us today.

This is a case about a nonresident defendant who was contacted by a Texas resident. The contract was negotiated, performed, and completed in Indiana. The product was shipped from Indiana by a third party who was paid for by the respondent. The First Court of Appeals looked at this issue. The First Court of Appeals held that because of an implied finding of fact that there was no necessity to look at the content, quality, and nature of the contact, which is not what this Court has set down as precedent.

This Court in *BMC Software and Groverson* has set down that you do look at the nature and quality of the contacts and you look at it on a *de novo* status, you look at what the activities of the defendant were present in order to establish specific jurisdiction --

JUSTICE O'NEILL: When there's no record, how do we know that -- what additional evidence is presented at the trial?

MR. KOWIS: Well, there is the Court's record in this case and it is before the Court. And in the Court's record, it has the contract, which states quite plainly --

JUSTICE O'NEILL: No, but how do we know that -- there could have been -- I mean theoretically, they could have come in and put on witnesses that said, "Oh no, this could make this, this, this, and this in Texas," and we just -- we don't have a record so how do we know what evidence was put on at that -- in front of the trial court?

MR. KOWIS: Well, there was no evidence put on in front of the trial court that says there were sufficient contacts to establish general jurisdiction --

JUSTICE O'NEILL: But we don't -- how do we know that if we don't have the record? That's my question.

MR. KOWIS: Well, respondent has ample opportunity to represent that at the trial court level and they did not. The respondent --

JUSTICE O'NEILL: So, we don't have a record of what was in front of the trial court; that's my question. How do we know what evidence was presented to the trial court since we don't have a record of the evidence put in front of us.

MR. KOWIS: We don't have a transcript, so we don't know what the specific language was, but we do have the motions and the pleading. This particular court state -- excuse me, the Belmont Court of Appeals stated in *Reighley*, which is also quoting the [inaudible] Court of Appeals in *Alliance*, stated that when you are reviewing a special appearance, you look to everything that went before the trial court including pleas, motions, exhibits, as well as discovery which was filed in the case, which we do have. Mr. Holten testified in his deposition that he doesn't recall whether he specifically said, "I want these features on this motor home." What we do have to find out is [inaudible] from Coachmen who was the manufacturer. And he believes he got it from a dealer here in Texas, and that he'd called Coachmen, asked them to sell him a motor home, and they said, "If you want to buy a motor home from Coachmen without a Texas dealer involved, you have to go to our factory outlet in Indiana."

JUSTICE HECHT: Why isn't that enough to establish minimum contacts?

MR. KOWIS: Because the contact was originated from the respondent.

The respondent said, "I want to buy a motor home from you in Indiana," and originally the respondent said, "I will pick it up in Indiana." Ultimately, he changed his mind. He then was required to pay for the freight to ship it to Texas. Under the Business and Commerce Code, the FOB point, which is Indiana in this case, establishes when delivery takes place. The only contact that Michiana has with Texas is a phone call or phone calls, which were originated by the respondent. This particular Court has held in [inaudible] that if you allow a contact initiated by a Texas resident, it's not sufficient to establish specific jurisdiction. The contact was initiated by Mr. Holten. In his deposition, he testifies that he doesn't recall specifically asking for any single feature but just said, "I want a particular model," and when he gets the model here, it doesn't have what he wants, and he files suit.

Now, the sole contact that he's alleging specific jurisdiction arises out of is a phone call in which he claims there were misrepresentations. The First Court of Appeals note that because there was no findings of facts and conclusions of law that the First Court of Appeals had to assume that that was true. This Court has held in numerous occasions that that is not true. You don't just necessarily have to assume that the implied finding of facts and conclusions of law are conclusive, you can look at other things. If we look at other things, meaning the deposition transcripts, the motions that were filed, the clerk's record, we find that there is insufficient evidence to support the claim of specific jurisdiction. This particular Court in the U-Anchor Advertising v. Burt case, which is extremely similar, Burt was a Oklahoma resident who was contacted by a Texas resident for the specific purpose of the Texas resident selling him advertising materials, which were to be used in Oklahoma --

JUSTICE HECHT: Was that a contract case?

MR. KOWIS: No, your Honor. That case was grounded in court -- oh, I'm sorry, that case was a contract case. I apologize.

JUSTICE BRISTER: So that's -- we're here because they're alleging a tort was committed in Texas.

MR. KOWIS: If -- yes, your Honor, in Amarillo Court of Appeals in Laykin v. McFall, which was a tort case --

JUSTICE BRISTER: Which what?

MR. KOWIS: -- which was a tort case, which issued an opinion consistent with this Court's opinion in U-Anchor Advertising basically stated that a single telephone call is not sufficient to establish specific jurisdiction that--

JUSTICE BRISTER: Except we've got them aboard a Hospital System v. Fisher which says it is.

MR. KOWIS: Yes, your Honor; the difference between, I think, Memorial-Fisher versus the cases that we have here today --

JUSTICE BRISTER: Memorial-Fisher's right?

MR. KOWIS: No, your Honor, I'm gonna disagree with the Court of Appeals in Memorial-Fisher. The reason is, is because if we accept the principles that are laid down in Memorial-Fisher, what we do to the analysis of whether jurisdiction should or should not be asserted is to reduce it to a mechanical test. The United States Supreme Court in Hanson v. Denckla acknowledged that to do such a thing would be to lower the restrictions of state courts on a certain specific jurisdiction. This Court has actually quoted the United States Supreme Court's opinion in Hanson v. Denckla and stated that we should not reduce the analysis of specific jurisdiction to a mechanical test. If we accept the respondent's argument as true, that is exactly what we

are doing. We are saying that if a phone call was made and a tort arises out of that phone call, specific jurisdiction is automatically established. We do not pay attention to the analysis of the nature and the quality of the defendant's actions. When we pay attention to the nature and the quality of the defendant's actions in the analysis under the framework established for asserting specific jurisdiction, what we find is, is that Michiana, the petitioner in this case, never purposely availed themselves of the benefits and the protection of the laws of the state of Texas, which is a critical element in order to establish specific jurisdiction. Michiana merely picked up a telephone, answered a question, and filled an order, which was done in Indiana; delivery was completed in Indiana, payment was made in Indiana. The only contact we have here is a phone call.

JUSTICE HECHT: [inaudible] see some benefit from that phone call.

MR. KOWIS: They did, your Honor, but if we -- if we accept that argument as true and we take it not to the logical extreme but even halfway to the logical extreme, we reduce the analysis of whether specific jurisdiction should be asserted to a mechanical test because if we accept that argument, any website, anywhere in the world, that is clicked on by a Texas resident and a transaction of a commercial nature results, there's specific jurisdiction. That does eliminate the boundaries that are placed by the Constitution on whether a party can be expected and hailed in a [inaudible] state court.

JUSTICE BRISTER: Was there any oral testimony at the trial court hearing?

MR. KOWIS: There was -- there was not any oral testimony at the trial court hearing.

JUSTICE BRISTER: So --

MR. KOWIS: But we do have Mr. Holten's deposition which is --

JUSTICE BRISTER: Was there -- is there anything that may have happened at the trial court hearing that we don't have in our record?

MR. KOWIS: The only factual issue that is in dispute, as far as I can tell, is whether there was a misrepresentation made in a phone call. There is no dispute that Michiana is an Indiana corporation; that they've never done any other business within the state of Texas. There is no dispute that originally Mr. Holten asked for the delivery to take place in Indiana and then subsequently changed his mind but he paid for the freight by a third party, independent of the petitioner, to deliver the motor home to Texas, that establishes that the motor home was delivered in Texas and the contract was, I mean, that motor home was delivered in Indiana and the contract was completed in Indiana.

JUSTICE O'NEILL: What in the record affirmatively shows there was no evidence or testimony presented to the trial court?

MR. KOWIS: Well, I think -- I'm not sure if you're asking me to prove a negative. If I understand your question, your Honor --

JUSTICE O'NEILL: [inaudible] is there a stipulation by the parties, if they all agreed to that, is there something in the record that affirmatively shows no evidence was put before the trial court hearing? He decided it based on the existing files [inaudible].

MR. KOWIS: I would assume that there was argument. I don't believe that there was any oral sworn testimony presented. I do believe that the deposition testimony of Mr. Holten was referenced, but as you pointed out, your Honor, we do not have a reporter's record or a transcript of the actual language, which was utilized --

JUSTICE BRISTER: Was one even made?

MR. KOWIS: I'm sorry, your Honor?

JUSTICE BRISTER: Was one even made?

MR. KOWIS: I believe that one was made, your Honor. I don't know what the response of the judge was because I was personally not present at that particular hearing. But if we go back to this Court's ruling, it is an implied finding of fact. This Court reviews it on a de novo standard, particularly, when you're applying law even if we assume that the applied finding of fact, that there was a misrepresentation, it was undisputed, we still look at the other extrinsic evidence that's been presented in this case, which is the motions that were filed, the documents and exhibits, which were attached to those motions. And when we do that, we've come to the very same conclusion; that is, everything that occurred with regards to this transaction occurred in Indiana except the telephone call. The telephone call was originated by Mr. Holten. The Texas courts have held albeit there is a difference among the appellate courts. But this Court has held in issued opinions consistent that a single telephone or a telephone call originated from a Texas resident is not sufficient to establish specific jurisdiction. You would have to look at the nature and quality of the contacts.

JUSTICE HECHT: There is more than -- there was a phone call which led to the transaction, so this is more than just a phone call, correct?

MR. KOWIS: You're right, your Honor, but my contention is, is the only contact with Texas was via a telephone. All the other components of this transaction, which you have to look at in whole, were completed in Indiana.

JUSTICE HECHT: So, does Michiana not sell any products to Texas residents?

MR. KOWIS: Michiana does not actively pursue any Texas residents to sell products to. Mr. Holten contacted the manufacturer, Coachmen Industries -- Coachmen. Let me back up. Mr. Holten originally contacted a Texas dealer to buy this motor home. He decided he could get a better price at the factory, he contacted the factory. The factory said, "We do not sell directly to the consuming public. You must go through either a Texas dealer or our factory outlet," and they gave Mr. Holten the contact information for Michiana. Mr. Holten then contacted Michiana and said, "I want to order a specific motor home." Mr. Holten cannot recall making any representations as to any specific features that he wanted, which is what he complains of at this time; that there were not specific features that he wanted. The only contact we have is the placing of the order to an Indiana corporation. If we accept the respondent's argument as true then no commercial transaction can be completed with a Texas resident and a nonresident, which would not confer specific jurisdiction if the Texas resident then complains about the product. I mean, we could have cases where an automobile such as what has happened in World-Wide Volkswagen. It's a purchase from an out-of-state corporation, a Texas resident drives a car for ten years and it breaks down then that out-of-state corporation who sold the car could be hailed to defend the case in this state even though he had never done anything to actively pursue business within Texas. The respondent's argument is there was a telephone call, there was a misrepresentation that is sufficient to establish specific jurisdiction. They also argue that because there's no record, there's an implied finding of fact saying that the misrepresentation was true and that since that it was true, it establishes specific jurisdiction. This circular argument, your Honors, establishes within any commercial transaction, there is specific jurisdiction.

CHIEF JUSTICE JEFFERSON: Thank you. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Brock Akers will present argument for the respondent.

ORAL ARGUMENT OF BROCK AKERS ON BEHALF OF THE RESPONDENT

MR. AKERS: May it please the Court.

Michiana Easy Livin' accepted \$63,000 for this product, specifically ordered made-to-order, they required the money ahead of time, and they had it delivered to Jim Holten in Baytown, Texas at 9:30 at night, asked him to sign a receipt, which he did, and then he took the delivery guy to the airport.

JUSTICE MEDINA: Is there evidence of that in the record?

MR. AKER: The same sort of evidence that we're --

JUSTICE MEDINA: So, the deposition testimony --

MR. AKER: It's in the deposition testimony, yes.

JUSTICE HECHT: Was there any evidence at the hearing?

MR. AKER: Yeah, oh I'm sorry. And there was -- there were offers of proof. Mr. Holten was present, we talked in detail with the trial judge all about the facts and the circumstances, and we --

JUSTICE BRISTER: But did anybody get on the stand, raise to swear and --

MR. AKER: No.

JUSTICE BRISTER: Okay.

MR. AKER: What we had instead were offers of proof from Counsel as to what the testimony would be, which was accepted by all has been --

JUSTICE BRISTER: Was that the stuff that had previously been filed with the clerk? Do we have that in the clerk's record?

MR. AKER: No, the offers of proof were -- I mean, essentially oral recitations of some of these things that I'm stuck on now.

JUSTICE BRISTER: Well, I know but we usually try not to decide things based on just what the lawyers say even such well-known lawyers. We usually like to look at the contracts, we look at the depositions, see what the people under oath said, and that stuff was all on file on the clerk's record.

MR. AKER: Yes, sir.

JUSTICE BRISTER: Now, what could these folks have done -- other than refusing to deal with Texans to avoid this suit -- that they didn't do?

MR. AKER: They could have insisted, for instance, that the product be picked up --

JUSTICE BRISTER: Well, now, they did originally and then your guy said, "No, that's inconvenient for me. Would you deliver it to some -- to a third party who'll drive it down here," and they acceded. So, they should have told your client, "Nope, you've got to come up here and get it," and then that would have been different.

MR. AKER: Well, they charged him for a substantial amount of money to deliver it to Texas --

JUSTICE BRISTER: Well, because -- and so that tends to show they didn't purposely avail themselves of Texas but they made him pay for it to get it here, right?

MR. AKER: One of the portions of their contract, which they want to rely upon now as evidence or conclusive proof of reliance, is the notion that it was -- matters were gone over with a dealer representative, with either the manufacturer or the dealer's

representatives, so that he was fully satisfied. What they did by entrusting this delivery person with those responsibilities, at least for the paperwork and the delivery, it was essentially to appoint this agent to come to Texas and deliver this product to Baytown, Texas and that surely is substantive contact with Texas. They knew when they took that order that this was going to be coming down here. They required money ahead of time before they even made --

JUSTICE HECHT: The troubling thing here is -- take two other states, you're sitting in your office in Florida and somebody calls you from Alaska and says, "Please send me this," so you put it in a box and you send it to them. And meanwhile, he hangs up the phone, walks down the street to the courthouse, and says you lied to him. And all of a sudden -- all you were doing was responding to a customer and now you're litigating in Alaska, which you wish you didn't have to do. Isn't there something unfair about being able to hail somebody into a court simply on your assertion that no more than that occurred?

MR. AKER: No, it's not unfair, and the reason -- if they're taking money, they have no problem taking the Texan's money and they have no problem dealing with the Texan. And if they don't have any problem dealing with the Texan and taking his money, and taking profit from him, knowing that that's who he is and knowing that they're going to deliver it and do all that sort of thing, then they ought to be subject -- when they commit fraud on that person -- to Texas state court.

JUSTICE BRISTER: Let me add to Justice Hecht's hypothetical. He walks in to their office in Florida, gives them the money there in Florida, says, "Ship it to me in Alaska, that's convenient for me," but -- and signs a form selection clause agreeing to be -- try everything in Florida. Now, isn't it a little unfair for him to say, "[inaudible] when I signed the form selection clause in Florida, I had my fingers crossed; come on up to Alaska; it's nice this time of year."

MR. AKER: Well, that's one of those other cases. There's a case on record much more like your fact situation, the name of which I don't remember, that does not confer jurisdiction under those circumstances and it's a tighter call but of course that's not what we have here.

JUSTICE BRISTER: How is it different? Just because it was -- just because he didn't walk into the office in Florida; he called from Alaska. He still signed a form selection clause in Indiana.

MR. AKER: Well, I mean, and that's another issue entirely. I mean, the word "waiver" hasn't yet passed my lips but it applies to every argument that we have discussed here today but as to the form selection clause under those circumstances, that form selection clause to the extent that it applies to the contract itself maybe enforceable when it is -- when you have fraud that is outside of the contract, when you have [inaudible] like violations that are outside of the contract then the form selection clause might not apply.

JUSTICE BRISTER: [inaudible] say it didn't have related to or a sale or anything like that [inaudible].

MR. AKER: In this case, the argument has been waived.

JUSTICE BRISTER: Yes. Wait a minute, why was it waived? I'm sorry.

MR. AKER: It was -- it was waived at the trial court; it was waived at the Court of Appeals, it is not part of any of the briefings to this Court.

JUSTICE BRISTER: So they --

JUSTICE HECHT: You mean the form selection.

MR. AKER: The form selection.

JUSTICE BRISTER: So they -- of course, I mean, the contracts in evidence with the form selection clause but they waived it because we

don't have the oral argument hearing transcript where they might have said something about it.

MR. AKER: That's --

JUSTICE BRISTER: That's it?

MR. AKER: Yes, I mean, that's part of it.

JUSTICE BRISTER: I understand.

JUSTICE O'NEILL: Setting aside the delivery person issue for the moment, what if this had been the same facts except that he picked up the phone and ordered a wine press from France?

MR. AKER: [inaudible] France. A wine press from France and do the French -- are they exposed to a Texas court. If -- an ocean I don't think makes a difference that I can think of. It's the same sort of circumstance if we're putting it into the same sort of actual scenario.

JUSTICE BRISTER: Well, do we have any evidence? I assume the -- do we have any evidence whether Michiana's RVs end up everywhere in the United States? I imagine wine presses don't end up in that many places in the US. Do we know whether -- I'm sure, Coachmen is all over but how about Michiana? Do we know one way or the other?

MR. AKER: We know only from the record that when you call Coachmen in order to deal directly with them, they report that this is our local dealer with whom you can deal and that is how Mr. Holten found them; was that because of the symbiotic relationship between Coachmen and Michiana, which has not been fully explored on the record below this [inaudible] all these years between us that they direct them automatically to Michiana with the representation they were there essentially in their factory outlet.

JUSTICE HECHT: Where in Texas did this tort occur?

MR. AKER: Baytown.

JUSTICE HECHT: And that was the consequence of a phone call?

MR. AKER: Yes, Mr. Holten lives in Baytown [inaudible].

JUSTICE HECHT: It was a consequence of the phone call and the receipt that he signed when it was delivered or just a consequence of the phone call?

MR. AKER: The tort?

JUSTICE HECHT: Yes.

MR. AKER: No, they -- the tort comes from the misrepresentations that flowed from -- this is what you're going to get. You're going to get a coach with this feature -- this feature and when he gets them and he's able to look at it in the light, it doesn't have any of those features, and then some of them don't work. Purely misrepresentation --

JUSTICE HECHT: Did they try a remedy -- to remedy that situation?

MR. AKER: No, they refused to.

JUSTICE HECHT: If they would have tried to remedy that situation then, you know, it would have been a little easier to establish minimum contact?

MR. AKER: Well, yes, I mean, what happened to Mr. Holten is that he said, "Hey, what's the deal here so, I'll take it to your local dealer," and the local dealer said, "Oh, I can't work on this, you need to take it back to Indiana."

JUSTICE HECHT: There are dealers in Texas that sell those products?

MR. AKER: There are Coachmen products.

JUSTICE BRISTER: Of course.

JUSTICE HECHT: If they were to purchase the product from the dealer and the dealer were to deliver a product that your client didn't order, would that be sufficient establishment of contacts?

MR. AKER: I believe so.

JUSTICE BRISTER: Of course the reason we're here is because your client didn't want to deal with somebody local. He thought he could get a better deal and the reason it's cheaper in Michigan is because if you want to return it, they're in Michigan or Indiana, or wherever, right? So, isn't your client trying to have his cake and eat it, too? I want to save some money from -- by dealing directly with a factory outlet but I'm complaining that now I've got to return all this stuff up there but that was the deal, right?

MR. AKER: Well --

JUSTICE BRISTER: He could have bought it from Coachmen and then everything -- he could have driven it across town to get it fixed.

MR. AKER: Well no, Sir. Coachmen said, "We will not sell it to you directly. You have to go to our local factory outlet." He could have bought it from a more local dealer and paid a premium for that and he absolutely tried to save money by dealing directly with the factory and then after negotiating the price --

JUSTICE BRISTER: But isn't that unfairness; you say, "I want it cheaper so I'm going to go out of state," and then when you get something you don't like, you say, "Oh no, it was all down here." That's where I'm having trouble seeing like you. When you take that chance, you know, the chances are you're dealing with somebody farther away and not the difference between local dealers and out-of-state ones?

MR. AKER: Well, if there were no dealers in Texas --

JUSTICE BRISTER: Different situation. That is not our situation.

MR. AKER: It's not our situation. Is it wrong for him to have dealings with an out-of-state people? Of course not. Is it wrong for him to expect them to not tort him and commit a fraud upon him? Of course not. Is it fair in Aker's mind for these people who are getting a profit and are willing to sell it to him and know where it's going, and are charging him for the delivery for them to expect after they've committed a fraud on him and then think that's he's so far away that he's never gonna come back and buy them? No, I don't think that's fair because that's exactly what happened here. It's the flipside of what's fair. It's they say, "We're so far away, you can't get us."

CHIEF JUSTICE JEFFERSON: Mr. Akers, did I hear you to effectively concede earlier that there was no evidence presented to the trial court that would impact our resolution to this case?

MR. AKER: No, I don't concede that at all.

CHIEF JUSTICE JEFFERSON: But you were present, I mean, and there were offers of proof, but I thought you said earlier there was no testimony, that the record essentially is the depositions and affidavits that were before the trial court; that's the same record that we have here.

MR. AKER: Yeah. The record for the Court to consider -- I mean, you can't take -- I'm being honest with you really but you can't just take that. That's why we have these rules relating to findings of facts, conclusions of law, and reporter's records. You have to give presumptions to the trial court. The trial court is entitled to having these presumptions --

JUSTICE HECHT: Yeah, but we don't require the reporter's record if nothing happened other than lawyer talk.

MR. AKER: Oh, but it was more than lawyer talk.

JUSTICE HECHT: Well, that's what we're asking.

MR. AKER: Yeah. I mean, it was essentially an offer of proof. My witness -- much as you would in a bill of exception, my witness, if called, would say, "XYZ, 123" that --

JUSTICE O'NEILL: That's not evidence. Are you saying --

MR. AKER: I believe it is.

JUSTICE O'NEILL: Are you saying it was tried on stipulated evidence?

MR. AKER: The trial court was given the facts. These weren't stipulated facts per se but we -- he essentially asked us, "What's the deal here," he asked us questions about this --

JUSTICE BRISTER: Right, but that happens in all summary judgment hearings. And the fact of the matter is nothing can happen at a summary judgment hearing other than what you attach to your affidavits. But the summary judgment hearing, you say, "Well, what mine says is this, what mine says is that," but we limit our refute to what you filed with the clerk is what you all talk about, stuff that was filed with the clerk or something else?

MR. AKER: No, it was not. I think -- I believe that it falls more on the form and this isn't a summary judgment hearing. You don't take a testimony at a summary judgment hearing. You do take testimony at a special appearance hearing --

JUSTICE BRISTER: Right. And we used to deal only by testimony but we changed that rule because it didn't make sense for people out-of-state to have to come in and orally testify that they shouldn't be haled into the state. And so, we now encourage people to do it all by affidavits, and we don't want to set up a presumption rule that requires them to go back and do it the old way; that everybody has to come in live and say why they shouldn't have to come in live at Texas. And so that's why I'm asking: Are you wanting us to presume that there was something that happened at the hearing that's not going to be found and can't be found in the clerk's record?

MR. AKER: Yes.

JUSTICE BRISTER: Which is? What kind of --

MR. AKER: Which is the offers of proof by which Justice Owen disagrees with me as whether or not that constitutes evidence for the trial court's consideration? The trial court heard what the witness sitting, you know, right over there, what he would say if we took the time to swear him in.

JUSTICE O'NEILL: Was it based on --

MR. AKER: Those were the offers of proof or the sorts of things upon which a trial court under these circumstances ought to be permitted to rely.

JUSTICE O'NEILL: Was that -- was that testimony? Had it been committed to deposition testimony before or was this gonna be -- was what you have so-called offer of proof different from what was in the depositions?

JUSTICE HECHT: I can tell you, your Honor, if I'm in California and I click on the Internet, I see a product that I like here, a big trailer that costs \$63,000 or a \$5 product, and I ask that product to be delivered to Texas, and when it gets to Texas, to my home, it's not what I ordered. Do I have -- have I established minimum contacts with Texas?

MR. AKER: Well, there's a body of law, as I understand, that relates to these Internet cases that I'm ashamed to not be familiar with. In --

JUSTICE HECHT: [inaudible] minimum contacts constantly.

MR. AKER: I think that this -- the character of this contact was substantially different. It was a negotiating process, it was an ordering. This is what you can get if you want it, it was going over a whole list of things, it was arranging for financing, it was ultimately

arranging for delivery, it was a whole series of transactions which -- all of which told this seller that this sale and the profit from that sale was going to come from the money of some Texan, and that it was going to be used in Texas, and that this product that we were specially making for him was ultimately going to be -- going there.

JUSTICE O'NEILL: What is the record evidence about the delivery person and what transpired in Texas?

MR. AKER: Well, the only record evidence that would come out of this -- [inaudible] at the time --

JUSTICE O'NEILL: Well, what -- whose agent was -- you said earlier that they're -- you're now saying in the brief that he was their agent. What's the evidence on the agency part of the delivery person?

MR. AKER: Well, therein would be one of those things that I think that the Court should presume as to the trial court's evidence. This person came, delivered the unit directly from the manufacturer. He was the person that required Mr. Holten to sign and then ultimately disclaim also on this issue. And as such, if you are going to look at the very contract, which was signed that talks about dealer or dealer's representative, that person who presented it and presented those papers to him, either he was that person -- he had to have been that person or he have been presumably, they just can't have it both ways.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you.

REBUTTAL ARGUMENT OF KELLY MICHAEL KOWIS ON BEHALF OF THE PETITIONER

MR. KOWIS: I'd like to pick back up with the hypothetical Justice Hecht put forward, and that was if a person who's in Alaska calls a Florida company and they have it shipped, does it establish specific jurisdiction. I'd like to take it one step further. It's a Texas resident that calls a Florida company and the Texas resident says, "Ship it to Alaska." Does that confer specific jurisdiction in Texas because the contract's with a Texas resident, the phone call originated from Texas but the seller on the other end of the phone had no idea, unless he maybe had caller ID or could, you know, divine it from some -

JUSTICE BRISTER: Let's worry about that one when that one happens. What about the record here? I mean, it is true, normally, if it's an evidentiary hearing, we presume things happen even if we're making them up that supported the verdict. Was this an evidentiary hearing? How do we -- what happened to these offers of proof. Do we have depositions; if so, how'd they get to us?

MR. KOWIS: We have the deposition of Mr. Holten and that's the only deposition testimony I'm aware of, Justice Brister. But I think you hit the key element and that is what did happen that Michiana, the petitioner, submitted affidavits basically setting out the specific proof necessary to negate the basis for specific jurisdiction. Michiana is a dealership. They don't produce a product. They are a reseller of Coachmen product, Coachmen material, which is the same as Holiday World, which is a Texas dealership that sells --

JUSTICE O'NEILL: Were there live witnesses sitting in the courtroom at the hearing?

MR. KOWIS: I'm sorry, your Honor, I didn't catch --

JUSTICE O'NEILL: Were there live witnesses sitting in the courtroom at the hearing?

MR. KOWIS: Just Mr. Holten as far as I can tell --

JUSTICE BRISTER: Nobody flew down from --

MR. KOWIS: Nobody flew down from Michiana and it was submitted by affidavit for the very reason that Judge Brister pointed out. It seemed a bit heavily unfair to require somebody to come to Texas to explain why they shouldn't be in Texas --

JUSTICE O'NEILL: But we again -- how do we know what happened at the hearing without a record? I mean, how can -- how as a Court can we say with confidence, there was no stipulation, there was no anything else without evidence.

MR. KOWIS: We can look at the court's record in the motions --

JUSTICE O'NEILL: No, we don't -- in other words, what if Mr. Holten was sitting there and Mr. Aker said, "I'm gonna call him," and the trial court said, "Wait a minute, I don't want to take up your time, Counsel. You all agree what this guy was gonna say in the interview," yes, that's -- how do we know that didn't happen? How do we know what happened at the hearing?

MR. KOWIS: Without being flippant, your Honor, because we're here. If Michiana's counsel had stipulated to the factual assertions of Mr. Holten, there wouldn't be an issue before this Court. The factual assertion that is being disputed is whether or not there was a sufficient contact with Texas to establish specific jurisdiction over Michiana. Mr. Holten alleges it was a misrepresentation --

JUSTICE O'NEILL: What are the facts about the delivery person?

MR. KOWIS: The delivery person was paid for if he -- let me back up. Mr. Holten was charged to have the motor home delivered to Texas. That fee was given over to Michiana. Michiana then, in turn, arranged for an independent third party to deliver the motor home from Coachmen's factory to Baytown, Texas, at Mr. Holten's address, and that's what we know. Now, the deposition testimony of Mr. Holten is, is that it arrived at 9:30 at night. There was an inspection sheet basically, which you would normally find on an item that has lots of components that says, you, as the customer, look it over. If you notice any defects, you need to note it on this inspection sheet. Mr. Holten basically put a disclaimer at the top that says, "You know, I'll sign this but it's subject to my subsequent inspection," and that's not what we're taking issue with in this case. You know, what we're taking issue with facts was whether or not there was a misrepresentation because that's the single point --

JUSTICE O'NEILL: What -- I'll try again. What if -- is there any presumptions in favor of the trial court's conclusion that that delivery person was Michiana's agent?

MR. KOWIS: No, your Honor. There is nothing to suggest that the only evidence we have on that particular issue is the fact that the contract between Michiana and Mr. Holten states that he, Mr. Holten, would have to pay for freight. That's an undisputed fact. If we look to the law of Texas and basically look to the UCC in general, when that situation occurs, the FOB point is the origin point, for lack of a better word, and that at the origin point is when delivery takes place. And when the risk of lawsuit is considered done -- and one question I would like to put forth before this Court is the basis for specific jurisdiction is very tenuous as asserted by Mr. Holten. I don't know if [inaudible] has become so successfully in this state that we have to stimulate litigation by allowing plaintiffs to make a phone call, and then in some form or fashion contrived a cause of action which actually confers specific jurisdiction.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is

submitted and that it is -- oral arguments for this cause ends for the morning, and the Court will now adjourn.

SPEAKER: All rise. Oyez, oyez, oyez, the Honorable Supreme Court of Texas now stands adjourned.

2005 WL 6161823 (Tex.)