IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM H. DURHAM, M.D. **PLAINTIFF**

VS. **CAUSE NO. 2:20-CV-112-KS-MTP**

ANKURA CONSULTING GROUP, LLC
and JOHN DOES 1-5 **DEFENDANTS**

REBUTTAL MEMORANDUM IN SUPPORT OF ANKURA CONSULTING GROUP, LLC'S RULE 12(b) MOTION TO DISMISS OR, ALTERNATIVELY, TO TRANSFER

Introduction

As shown in Ankura's Opening Memorandum (ECF 16), the Amended Complaint (Dkt. 12) filed by Plaintiff William H. Durham, M.D. ("Dr. Durham") should be dismissed because: (1) this Court does not have personal jurisdiction over Ankura, (2) this Court lacks subject matter jurisdiction, and (3) Dr. Durham failed to state a claim upon which relief can be granted. Alternatively, this case should be transferred to the United States District Court for the District of Columbia. Dr. Durham's Response failed to rebut any of these points.

I. The Court Does Not Have Personal Jurisdiction Over Ankura.

For this Court to exercise personal jurisdiction over Ankura, Dr. Durham must demonstrate that (i) Mississippi's long-arm statute is satisfied, and (ii) constitutional due process is satisfied by establishing that Mississippi has general or specific jurisdiction over Ankura. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011).

A. Mississippi's Long-Arm Statute Is Not Satisfied.

Dr. Durham alleges the long-arm statute is satisfied because Ankura is doing business in Mississippi and has committed a tort in whole or in part in Mississippi. He is incorrect.

1. Ankura Is Not Doing Business in Mississippi.

To satisfy the "doing business" prong, Dr. Durham must show, among other things, that Ankura purposefully did some act or consummated a transaction in Mississippi, and that his cause of action arises from or is connected with such act or transaction. *Wilson v. Highpointe Hospitality, Inc.*, 62 So.3d 999, (Miss. Ct. App. 2011) (citations omitted). Dr. Durham has not, and cannot, identify any alleged act by Ankura in Mississippi other than requests for information from Mississippi residents for an audit conducted in Washington, D.C. That alone fails as a matter of law to satisfy Mississippi's long-arm statute, and Dr. Durham fails to cite any authority to the contrary. Dr. Durham has likewise failed to rebut Ankura's showing that it is not doing business in Mississippi because Ankura has no offices or employees in Mississippi, no direct business presence in Mississippi, and it is not authorized to do business in Mississippi.[1]

2. Ankura Did Not Commit A Tort In Mississippi.

Dr. Durham's allegation that Ankura committed a tort in whole or in part in Mississippi[2] cannot withstand any scrutiny. As detailed in the Opening Memorandum, under the long-arm statute, a tort is committed in Mississippi only when the injury occurs in Mississippi – mere consequences stemming from the alleged tort injury do not confer personal jurisdiction. *Dunn v. Yager*, 58 So.3d 1171, 1184-85 (Miss. 2011) (citations omitted). Dr. Durham conveniently ignores "[t]he line between what constitutes actual injury and what are mere consequences of an injury …." *Id.* Instead, he alleges that his injury occurred when Ankura "wrongfully" prepared the audit and then reported the audit results to the Trusts.[3] By doing so, Dr. Durham effectively concedes

[1] ECF 15-1, Declaration of Gary L. Wingo, ¶ 5.
[2] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶¶ 1, 64, and 90.
[3] ECF 12, Amended Complaint, ¶ 11.e.

that the alleged tort and injury arose from actions that occurred outside of Mississippi and that, at most, the mere consequences of his alleged injury happened to occur in Mississippi.

Dr. Durham is unable to distinguish *Walker v. World Ins. Co.*,[4] where the Court found the alleged injury did not occur in Mississippi. "The actual *injury* or tort underlying Plaintiffs' emotional distress claim is the alleged wrongful preparation by Encompass of the determination regarding Plaintiffs' insurance claims(s)." *Id*. at 789. Here, the alleged actual injury underlying Dr. Durham's claims is Ankura's alleged wrongful preparation and then reporting the audit results to the Trusts, all of which occurred outside of Mississippi, primarily in Washington, D.C.[5] *Id*. ("All activities of Encompass related to the preparation of the determination occurred in Iowa.)" Dr. Durham's arguments about software sent to him and his own review of x-rays in Mississippi[6] are irrelevant, because none of those alleged activities are part of the actual alleged tortious conduct and injury.

In *Walker*, the court held that "Plaintiffs may not rely on the location of the resulting *consequence* of the [alleged] tort to establish personal jurisdiction." *Id*. Because the *injury* occurred outside of Mississippi, Plaintiffs were "barred from relying on the tort prong of the Mississippi long-arm statute to establish personal jurisdiction over Encompass." *Id*. As in *Walker*, Dr. Durham's alleged injury – the alleged "wrongful" audit – occurred outside of Mississippi, and Dr. Durham's alleged damages he claims were sustained in Mississippi are merely consequences of that injury. Accordingly, Dr. Durham's claims must share a similar fate to those of the Plaintiffs in *Walker*, as he has demonstrably failed to satisfy the tort prong of Mississippi's long-arm statute.

[4] 289 F.Supp.2d 786 (S.D. Miss 2003).
[5] ECF 15-1, Declaration of Gary L. Wingo, ¶ 22.
[6] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶¶ 4, 5, 8, 9, and 26.

B. Constitutional Due Process Is Not Satisfied.

1. No General Jurisdiction.

Dr. Durham makes no attempt to show that this Court has general jurisdiction over Ankura.

2. No Specific Jurisdiction.

Dr. Durham's argument regarding specific jurisdiction is difficult to discern. He alleges in general terms that this Court has specific jurisdiction over Ankura because Ankura purposefully availed itself of doing business in Mississippi, that this Court has specific jurisdiction under the *Calder* "effects test," and analogously under the stream of commerce metaphor. Each of these arguments lacks merits.

a. No Purposeful Availment By Ankura.

Dr. Durham alleges that Ankura purposely availed itself of doing business in Mississippi by communicating with individuals in Mississippi to obtain information for its audit. He cites four such communications, none of which support specific jurisdiction.

First, Dr. Durham alleges that Ankura communicated with a Mississippi law firm to obtain x-rays in the law firm's possession.[7] Dr. Durham provides no evidence of this communication, but even if he did, it is a jurisdictionally irrelevant contact. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014) (specific jurisdiction cannot be established by demonstrating contacts between third parties and the forum State).

Second, Dr. Durham alleges that Ankura sent a letter (ECF 22-1) to Dr. Durham. ECF 22-1 makes plain on its face that it was sent to Dr. Durham by counsel for the Trusts and not by Ankura (see ECF 15-2). Dr. Durham's claim that Marla Eskin and Rachel Rowe were somehow

[7] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 3.

acting as agents for Ankura when they sent communications to individuals in Mississippi is equally devoid of any basis in fact.[8]

Ankura conducted the audit of Dr. Durham on behalf of the Trusts.[9] Eskin and Rowe are attorneys for the Trusts and were hired by the Trusts, not Ankura.[10] As between Ankura and counsel for the Trusts, there is simply no evidence, and it is contrary to law to suggest, that Trust counsel was also acting as an agent of Ankura. *See Summerall Elec. Co., Inc. v. Church of God at Southaven*, 25 So.3d 1090, 1094 (Miss. Ct. App. 2010) ("An agent is one who acts for or in the place of another by authority from him …. He is a substitute, a deputy appointed by the principal, with power to do the things which the principal may or can do.") Dr. Durham cites no law or facts to support the proposition that counsel for a party on whose behalf an audit is conducted (*i.e.*, the Trusts) somehow acts as an agent for the party conducting the audit (*i.e.*, Ankura).

Moreover, even if this Court assumes that Eskin and Rowe were Ankura's agents (which they were not), that assumption would not establish specific jurisdiction. Merely requesting information from Dr. Durham does not create specific jurisdiction in Mississippi because "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 286. Dr. Durham has not and cannot cite any authority for the proposition that specific jurisdiction exists based solely on requests for information sent to Mississippi (or any other forum) where the information was used to conduct an audit or similar service outside of the forum. Indeed, case law instructs otherwise. For example, mailing documents from Louisiana to North Carolina in response to a North Carolina grand jury subpoena is "not sufficient meaningful contact with the State of Louisiana" to establish personal jurisdiction. *Valour LLC v. Depaoli*, 2017 WL 4276933

[8] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 5.
[9] ECF 12, Amended Complaint, ¶ 16.
[10] ECF 12-2, Letter from Marla Eskin as counsel for the Trusts. ECF 12-4 is a letter *from* Dr. Durham to Eskin, Rowe, and others.

at *4-5 (W.D. La. Sept. 7, 2017). Similarly, this Court found no specific jurisdiction where out-of-state defendants merely entered into a contract with a Mississippi resident and communicated with him regarding the terms and performance of the contract because the defendants' contacts with Mississippi came only from the fortuity of the plaintiff's residence here. *Estate of Ainsworth v. Boutwell*, 776 F.Supp.2d 227, 231-32 (S.D. Miss. 2011).

Third, Dr. Durham alleges that Ankura communicated the audit results to the Trusts knowing that the Trusts would provide that information to Dr. Durham.[11] Ankura's communications with the Trusts, which did not occur is Mississippi, are not a jurisdictional contact with Mississippi.

Fourth, Dr. Durham alleges that Ankura sent a letter (ECF 22-4) to Dr. Durham and his law firm customers.[12] Dr. Durham alleges ECF 22-4 informed the recipients that Dr. Durham "failed" the audit. Dr. Durham's citation to *Knight v. Woodfield*[13] shows why ECF 22-4 does not establish specific jurisdiction. In that case, Woodfield and his wife Dokka lived in Mississippi. *Id*. at 997. Knight, a Louisiana resident, had an affair with Dokka. *Id*. Woodfield subsequently sued Knight for alienation of affections. Woodfield alleged that Mississippi had personal jurisdiction over Knight because Knight made numerous phone calls to Dokka in Mississippi and sent her numerous emails and text messages in Mississippi. *Id*. at 1000. The Mississippi Supreme Court held that Knight's actions were sufficient to establish personal jurisdiction in Mississippi because "Knight's phone calls, emails, and text messages constitute the wrongful conduct that led to Woodfield's alleged injuries." *Id*. Because the alleged wrongful conduct here is the audit that occurred entirely outside of Mississippi, and not the communications to gather information used

[11] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 21.
[12] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 20.
[13] 50 So.3d 995 (Miss. 2011).

for the audit or the alleged post-audit communications regarding the audit findings to Dr. Durham or law firms in Mississippi, *Knight* supports the conclusion that this Court does not have specific jurisdiction over Ankura.

b. The *Calder* Effects Test Does Not Apply.

Dr. Durham erroneously claims that this Court has jurisdiction under the "effects test" announced in *Calder v. Jones*, 465 U.S. 783 (1984).[14] The *Calder* "effects test" applies to assessments of personal jurisdiction in defamation cases. *Herman v. Cataphora, Inc.*, 730 F.3d 460, 464 (5th Cir. 2013). Incredibly, Dr. Durham alleges he has asserted claims for defamation, libel, and slander.[15] That is demonstrably untrue. Dr. Durham's Amended Complaint asserts two Counts – *i.e.*, tortious interference with contract and negligence/gross negligence.[16] This is confirmed in his Response, where Dr. Durham identifies his causes of action as "tortious interference with contract, [and] negligence/gross negligence."[17] The words "defamation," "libel," and "slander" do not appear anywhere in Dr. Durham's Amended Complaint.

In his Response, but not his Amended Complaint, Dr. Durham alleges both that Ankura's audit intentionally "failed"[18] him and that Ankura defamed him by "falsely" informing him and the law firms who retained him that Dr. Durham failed the audit.[19] Dr. Durham appears to be using "failed" to mean that there was a determination he had engaged in a pattern or practice of providing unreliable medical evidence, in which case the statement that he "failed" the audit is a true statement, and cannot be defamatory. "The threshold in a defamation suit is whether the published statements are false. Truth is a complete defense." *Hayne v. The Innocence Project*, 2011 WL

[14] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 22.
[15] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 23.
[16] ECF 12, Amended Complaint, ¶¶ 39-93.
[17] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 1.
[18] "Failed" is Dr. Durham's term. By quoting Dr. Durham, Ankura does not agree that "failed" is the appropriate term to apply to the results of the audit that occurred here.
[19] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶¶ 18-20.

198128 at *4 (S.D. Miss. Jan 20, 2011) (citations omitted). Dr. Durham takes issue with how the audit was conducted, but he offers no evidence that the results of the audit were falsely reported. The *Calder* "effects test" has no application here.

c. Stream Of Commerce Metaphor Is Not Applicable.

Dr. Durham alleges this Court should apply the stream of commerce metaphor "by analogy" to find specific jurisdiction over Ankura.[20] He is incorrect. Courts use the stream of commerce metaphor to allow for jurisdiction where "the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." *Zoch v. Magna Seating (Germany) GmbH*, 810 Fed. Appx. 285, 289 (5th Cir. 2020). Dr. Durham suggests the audit is analogous to a product, but the audit was not product, it did not travel through a chain of distribution, and it did not reach a consumer in Mississippi.

"It is true that this circuit has extended the stream of commerce analysis outside of the products liability context. But these cases are closely related to products liability cases as they all concern products introduced into the stream of commerce by non-resident defendants who benefit from the products final sale in the forum." *Choice Healthcare, Inc. v. Kaiser Foundation Health Plan of Colo.*, 615 F.3d 364 n. 9 (5th Cir. 2010) (citations omitted). The cases in which the Fifth Circuit extended the stream of commerce metaphor all involved in some way a product that was placed in the stream of commerce. Because this case does not involve any such underlying product, the stream of commerce metaphor is not available by analogy to establish specific jurisdiction over Ankura.

[20] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 9.

II. Dr. Durham Lacks Standing.

In its Opening Memorandum, Ankura cited *Mandelbrot v. Armstrong World Indus. Asbestos Pers. Injury Settlement Tr.*, 618 F. App'x 57 (3rd Cir. 2015), to show that Dr. Durham does not have an injury in fact and therefore lacks standing. Dr. Durham does not address standing and the resulting lack of subject matter jurisdiction in his Response. He does attempt to distinguish *Mandelbrot*, but misses the essential point. Just like the alleged damage to the attorney in that case, Dr. Durham's alleged damages here are entirely based on the hypothetical loss of fees associated with the payment of claims by the Trusts. Dr. Durham fails to explain how this alleged loss of potential fees is an injury in fact, and this is sufficient reason, standing alone, to dismiss the Amended Complaint.

III. Dr. Durham Failed To State A Claim Upon Which Relief Can Be Granted.

A. No Plausible Claim For Relief For Negligence Or Gross Negligence.

Dr. Durham is not a "party" to the audit, which was performed by Ankura on behalf of the Trusts. As a third-party outside of the contractual relationship, to state a claim for negligence, Dr. Durham must establish, among other things, that he detrimentally relied on Ankura's audit. *Hosford v. McKissack*, 589 So.2d 108, 111-12 (Miss 1991). In its Opening Memorandum, Ankura established that Dr. Durham does not have a plausible claim for relief because he did not detrimentally rely on the audit. Dr. Durham now alleges he detrimentally relied on the audit because he had to report the audit findings to his customer law firms.[21] That is not detrimental reliance.[22]

[21] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 18.
[22] Dr. Durham's Response spends a lot of time discussing the foreseeability element of his negligence claim, but he must prove both foreseeability and detrimental reliance.

Dr. Durham correctly argues that a third party to a termite report, such as a homebuyer, may have a claim against the termite inspector if he detrimentally relies on the termite inspection in buying a home.[23] But this argument proves Ankura's point – *i.e.*, unlike in his example, Dr. Durham did not detrimentally rely on the audit to do anything affirmative in a transaction akin to buying a home in reliance on a termite inspection.

In its Opening Memorandum, Ankura showed that *Arnona v. Smith*[24] is analogous to this case. The Arnonas alleged that Smith negligently prepared a title opinion. The Mississippi Supreme Court held that the Arnonas could not plausibly claim they relied on Smith's title opinion because they openly disagreed with it. *Id*. at 66. In his Response, Dr. Durham creatively alleges that it is not mutually exclusive to reject the audit's findings while also relying on them.[25] But *Arnona* establishes Dr. Durham has no claim for negligence or gross negligence because he did not detrimentally rely on the audit, as he openly disagrees with it. Dr. Durham did not even attempt to distinguish *Arnona*.

B. Dr. Durham Fails To State A Claim For Tortious Interference With Contract.

1. No Plausible Allegation Of An Enforceable Contract.

The Amended Complaint does not enable the Court to ascertain the terms of Dr. Durham's alleged verbal contracts primarily because it is silent on whether these contracts were one-off contracts each time he read an x-ray or covered a specific period of time. Dr. Durham's Response adds to the confusion. Dr. Durham now claims that he read x-rays and prepared reports for a flat rate of $110 regardless of his interpretation.[26]

[23] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 19.
[24] 749 So. 2d 63 (Miss. 1999).
[25] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 18.
[26] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶ 12.

Dr. Durham is being coy about the duration of his verbal contracts. If they were one-off contracts each time he was asked to read an x-ray, then the law firms remain contractually obligated to pay him for the reads he did make,[27] and Dr. Durham has no claim for tortious interference because no contracts came into existence after it was reported that the Trusts would not accept Dr. Durham's B-Reads. The existence of an enforceable contract is a prerequisite to a claim for tortious interference with contract. *Par Industries, Inc. v. Target Container Co.*, 708 So.2d 44, 48 (Miss. 1998). On the other hand, if Dr. Durham is claiming that he had existing contracts for a term of years until 2032, as implied in his Amended Complaint,[28] then his claims are barred by Mississippi's statute of frauds.[29] Under Mississippi's statute of frauds, § 15-3-1(d), verbal contracts "not to be performed" within fifteen months are unenforceable.[30] Existing contracts with a term until 2032 are not enforceable under the statute of frauds because they cannot be performed within fifteen months.

2. Ankura's Actions Regarding The Audit Were Privileged.

In its Opening Memorandum, Ankura cited *Gulf Coast Hospice LLC v. LHC Group Inc.*[31]and *King's Daughters & Sons Circle No. Two v. Delta Reg'l Med. Ctr.*[32] to show that actions taken under a contractual right to perform are privileged and thus are not wrongful and actionable under the law. Although Dr. Durham attempted to distinguish those cases in his Response,[33] he

[27] Dr. Durham alleges he could not collect $215,630 in recent accounts receivable because the Trusts would not accept his x-ray reports. ECF 22-2, Dr. Durham's Affidavit, ¶ 11. But Dr. Durham claims that he was to be paid a flat fee of $110 for each x-ray he read regardless of the outcome of his reads and with no contingencies. If Dr. Durham was not paid for his reads, then the law firms breached their contracts with him. That does not create a cause of action against Ankura for tortious interference with contracts.
[28] ECF 12, Amended Complaint, ¶¶ 44 and 92-94.
[29] Dr. Durham raised the statute of frauds in his Response (ECF 23, ¶ 17), so Ankura is permitted to respond.
[30] Verbal employment contracts of indefinite duration do not fall within the statute of frauds because either party may terminate the contract at any time. *Culpepper Enterprises Inc. v. Parker*, 270 So.3d 116, 126 (Miss. Ct. App. 2018). But if Dr. Durham's verbal contracts were not one-off contracts and were in existence until 2032, then they are not for an indefinite duration and are subject to the statute of frauds.
[31] 273 So.3d 721, 746 (Miss. 2019).
[32] 856 So.2d 600, 606 (Miss. Ct. App. 2003).
[33] ECF 23, Memorandum in Support of Plaintiff's Response to Ankura's Motion to Dismiss, ¶¶ 14-16.

never rebutted the fundamental point of law that because Ankura had a contractual right to perform the audit, its actions were privileged. Therefore, Dr. Durham does not have a plausible claim for relief for tortious interference.

Relief Requested

Ankura's 12(b) Motion to Dismiss (ECF 15) should be granted. In the alternative, the case should be transferred to the United States District Court for the District of Columbia.

Dated: September 3, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 3, 2020, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ James W. Shelson
JAMES W. SHELSON