

Appeal No. SC90536

In The

SUPREME COURT OF MISSOURI
EN BANC

PEOPLES BANK
Plaintiff/Appellant

vs.

STEPHEN M. FRAZEE and JENNIFER FRAZEE,
Defendants, and

H.L. FRAZEE, Defendant/Respondent

Appeal from the Circuit Court of
Wright County, Missouri
Case No. 08WR-CV00018

APPELLANT'S SUBSTITUTE REPLY BRIEF

Michael J. King
Winters & King, Inc.
2448 East 81st, Suite 5900
Tulsa, OK 74137
(918) 494-6868
(918) 491-6297 FAX
MKing@WintersKing.com

Richard L. Rollings, Jr.
Missouri Bar No. 40650
379 West Lake Park
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 FAX
Rick@RRollings.com

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

	Page
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	2
ARGUMENT	4
I. Frazee Failed To Overcome Presumption of Personal Jurisdiction	4
A. Due Process Requirements for Personal Jurisdiction	5
B. Oklahoma Properly Asserted Personal Jurisdiction	12
II. The Trial Court Erred In Placing the Burden of Proof	21
CONCLUSION	26
CERTIFICATE OF SERVICE	28
RULE 84.06(c) AND (g) CERTIFICATE	29

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

	Page
<i>Bond Leather Co. v. Q.T. Shoe Mfg. Co.</i> , 764 F.2d 928 (1 st Cir. 1985)	16
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)	4-8, 19
<i>First Fidelity Bank, N.A. v. Standard Machine & Equipment Co.</i> , 398 Pa.Super. 607, 581 A.2d 629 (1990)	9
<i>Gletzer v. Harris</i> , 159 S.W.3d 462 (Mo.App.E.D. 2005)	22
<i>Hough v. Leonard</i> , 867 P.2d 438 (Okla. 1993)	25, 27
<i>Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)	21
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	9, 26
<i>Klassen v. Lazik</i> , 91 P.3d 90 (Okla.Ct.App. 2004)	21
<i>McGee v. International Life Ins. Co.</i> , 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)	9-11, 13
<i>Michiana Easy Livin' Country, Inc. v. Holten</i> , 168 S.W.3d 777 (Tex. 2005) . . .	13
<i>Phillips v. Fallen</i> , 6 S.W.3d 862 (Mo.banc 1999)	14

<i>Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass’n.</i> , 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982)	21
<i>Vance v. Molina</i> , 28 P.3d 570 (Okla. 2001)	26
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)	26

ARGUMENT

I. Frazee Failed To Overcome Presumption of Personal Jurisdiction

H.L. Frazee claims that Peoples Bank is attempting to “change the constitutional debate” by placing the focus on effects or consequences in the forum state rather than the actions of a defendant. (Respondent’s Substitute Brief, p. 10).

H.L. Frazee misunderstands Peoples Bank’s arguments and the Supreme Court’s holding in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Under the holding in *Burger King*, a single act or contract can support personal jurisdiction if it creates a substantial connection with the forum state. *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2184, 85 L.Ed.2d at 542, n. 18. Once that connection has been shown, the burden is then placed on the defendant to show that the exercise of jurisdiction would be unreasonable. *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2185, 85 L.Ed.2d at 544. When evaluating whether the exercise of jurisdiction would be unreasonable, a court should consider all of the circumstances surrounding the contract or contact, including the effects or consequences in the forum state of the defendant’s action. *Burger King Corp.*, 471 U.S. at 478-79, 105 S.Ct. at 2185, 85 L.Ed.2d at 544-45 (“[P]rior negotiations and contemplated future consequences” are to be evaluated in determining minimum contacts.).

In the present case, H.L. Frazee had the minimum contacts necessary for the Oklahoma court to properly exercise personal jurisdiction over him. The lender, Peoples Bank, is an Oklahoma corporation doing business in Oklahoma. (LF, p. 43). The borrowers, Stephen and Jennifer Frazee, were residents of Oklahoma. (LF, p. 43). H.L. Frazee spoke with Bill Burnett, Executive Vice-President of Peoples Bank, on more than one occasion regarding the guaranty. (LF, p. 39). H.L. Frazee also spoke, at least once, with Stephen and Jennifer regarding the Guaranty. (LF, p. 39). He returned the guaranty to Oklahoma after signing it. (LF, p. 39). H.L. Frazee knew that the loan was from an Oklahoma bank to Oklahoma residents and that his guaranty would have consequences in Oklahoma. (LF, p. 39-40). Without the execution of the guaranty by H.L. Frazee, the loan to Stephen and Jennifer Frazee would have been called in 2006. H.L. Frazee's contacts with Oklahoma, together with the consequences in Oklahoma resulting from his contacts, support the Oklahoma court's assertion of personal jurisdiction under the Supreme Court's holding in *Burger King*.

A. Due Process Requirements for Personal Jurisdiction

H.L. Frazee seeks to have this Court apply the Supreme Court's decision in *Burger King* too narrowly. The Supreme Court recognized that "continuing relationships and obligations" can suffice for personal jurisdiction.

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair [***541] warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, [citation omitted], and the litigation results from alleged injuries that "arise out of or relate to" those activities, [citation omitted]. . . . And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create *continuing relationships and obligations* with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities.

Burger King Corp., 471 U.S. at 472-73, 105 S.Ct. at 2182, 85 L.Ed.2d at 540-41 (footnote omitted) (emphasis added). The Court went on to state:

Jurisdiction is proper, however, [**2184] where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. [Citations omitted] [***543] Thus where the defendant "deliberately" has [*476] engaged in significant activities within a State, [citation omitted], or has created "continuing obligations" between himself and residents of the forum, [citation omitted], he manifestly has availed himself of the privilege of conducting business there, and

because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp., 471 U.S. at 475-76, 105 S.Ct. at 2183-84, 85 L.Ed.2d at 542-43 (emphasis in original) (footnote omitted). "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2184, 85 L.Ed.2d at 542, n. 18 (1985).

When a defendant has minimum contacts with a state as a result of his activities directed at that state, he has the burden of showing that the exercise of jurisdiction would be unreasonable.

On the other hand, where a defendant who purposefully has directed his activities at [**2185] forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King Corp., 471 U.S. at 477, 105 S.Ct. at 2185, 85 L.Ed.2d at 544.

A single contract, without more, does not establish personal jurisdiction automatically. However, the circumstances surrounding the execution of the contract and the future consequences of the contract can, and often will, support jurisdiction. The Supreme Court has explained that:

we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." [Citation omitted]. It is these factors -- prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing -- that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. *Burger King Corp.*, 471 U.S. at 479, 105 S.Ct. at 2185, 85 L.Ed.2d at 545. In evaluating the "prior negotiations and contemplated future consequences", courts should consider both the consequences to the defendant as well as the consequences to others in the forum state in determining whether the necessary minimum contacts exist for personal jurisdiction over the defendant.

Cases in which a contract is the basis of the cause of action constitute a particular subset of special jurisdiction cases. It is sufficient under the United States Constitution for purposes of due process that the suit be based on a contract having substantial connection with the forum state, [citations omitted], and jurisdiction is proper where the contacts proximately result

from actions by the defendant himself that create a substantial connection with the forum state.

First Fidelity Bank, N.A. v. Standard Machine & Equipment Co., 398 Pa.Super. 607, 613, 581 A.2d 629, 632 (1990). The Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), recognized that activities in a state generally supports personal jurisdiction, stating:

to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co., 326 U.S. at 319, 66 S.Ct. at 160, 90 L.Ed. at 104.

The U.S. Supreme Court upheld personal jurisdiction based on a single contract in the case of *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). In that case, the insured, a resident of California, purchased a life insurance policy from an Arizona corporation. *McGee*, 355 U.S. at 221, 78 S.Ct. at 200, 2 L.Ed.2d at 225. Thereafter, the defendant, a corporation

with its principal place of business in Texas, agreed to assume the Arizona corporation's insurance obligations. *McGee*, 355 U.S. at 221, 78 S.Ct. at 200, 2 L.Ed.2d at 225. The defendant then sent a reinsurance certificate to the insured in California, which was accepted, and the insured sent premium payments from California to the defendant's Texas offices until the date of his death. *McGee*, 355 U.S. at 221-22, 78 S.Ct. at 200, 2 L.Ed.2d at 225. The plaintiff, as beneficiary under the policy, obtained a judgment against the defendant in California after the defendant refused to pay the claim. *McGee*, 355 U.S. at 221-22, 78 S.Ct. at 200, 2 L.Ed.2d at 224-25. The plaintiff filed suit in Texas on the judgment but the Texas courts refused to enforce it holding that California did not have personal jurisdiction over the defendant. *McGee*, 355 U.S. at 221, 78 S.Ct. at 200, 2 L.Ed.2d at 225.

The Supreme Court explained that “[i]t is not controverted that if the California court properly exercised jurisdiction over respondent the Texas courts erred in refusing to give its judgment full faith and credit.” *McGee*, 355 U.S. at 221, 78 S.Ct. at 200, 2 L.Ed.2d at 225. The Court then held:

Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was

based on a contract which had substantial connection with that State.

[Citations omitted]. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum -- thus in effect making the company judgment proof. Often the crucial witnesses -- as here on the company's defense of suicide -- will be found in the insured's locality. [*224] Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.

McGee, 355 U.S. at 223-24, 78 S.Ct. at 201, 2 L.Ed.2d at 226.

H.L. Frazee claims that courts in other jurisdictions “have routinely held that when, as here, the guarantor has no financial stake in a transaction and derives no financial benefit from it”, personal jurisdiction is improper. (Respondent’s Substitute Brief, p. 17). The financial benefit to the defendant is only one factor to

be considered and, as discussed in the Appellant's Substitute Brief, the majority of courts that have addressed the issue have indicated that personal jurisdiction can be predicated on effects or consequences in the forum state resulting from the defendant's purposeful actions directed at such state. (Appellant's Substitute Brief, p. 17-18).

B. Oklahoma Properly Asserted Personal Jurisdiction

In the present case, H.L. Frazee's Guaranty involved a continuing relationship and contact with Oklahoma. The underlying loan was between residents of Oklahoma. (LF, p. 39). Under the Guaranty, H.L. Frazee guaranteed that Stephen and Jennifer Frazee would promptly pay, not only the loan then being renewed, but any future obligations owed by them to Peoples Bank. (LF, p. 51). The loan that was renewed as a result of the Guaranty called for monthly payments over a five year period. (LF, p. 48). As a result, H.L. Frazee established a significant and continuing relationship with the State of Oklahoma as a result of his execution of the Guaranty.

The present case is distinguishable from a contract or transaction that is completed in a relatively short period of time and does not involve any expectation of a continuing relationship. The sale of a single item, even a \$64,000 recreational vehicle, without any continuing contacts with the buyer's state, does not render a

seller in another state subject to personal jurisdiction in the buyer's state. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005). In contrast, the issuance of a single life insurance policy that involves continuing contacts with the insured does subject the insurer to personal jurisdiction in the insured's home state. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Similarly, H.L. Frazee established a continuing relationship that was expected to last at least five years as a result of his Guaranty regarding a loan between Oklahoma residents. His obligations and involvement did not end when he executed the Guaranty. His actions in signing the Guaranty had consequences in Oklahoma, including the renewal of the loan to Stephen and Jennifer, and created a continuing obligation to ensure that Stephen and Jennifer met their obligations under the renewed loan. H.L. Frazee's actions directed at Oklahoma, his contacts with the state before and after executing the Guaranty, as well as the consequences and continuing obligations resulting from the Guaranty establish that he was subject to personal jurisdiction in Oklahoma for claims relating to the Guaranty.

H.L. Frazee relies on various "factors" to support the trial court's determination. (Respondent's Substitute Brief, p. 22-25). H.L. Frazee argues that these "factors" "compel the conclusion that Frazee lacked the minimum contacts

with Oklahoma constitutionally sufficient to support its exercise of long-arm jurisdiction”. (Respondent’s Substitute Brief, p. 22). The error in this logic, and the trial court’s Judgment, arises from the failure to properly place the burden of proof on H.L. Frazee to show that personal jurisdiction did not exist. Peoples Bank *was not* required to prove sufficient contacts to support personal jurisdiction. H.L. Frazee was required to prove that sufficient contacts *did not exist*.

"[A] foreign judgment, regular on its face, . . . is entitled to a strong presumption that the foreign court had jurisdiction both over the parties and the subject matter and that the court followed its laws and entered a valid judgment." *Johnson v. Johnson*, 770 S.W.2d 483, 485 (Mo. App. 1989).

Phillips did not attack the Washington order as irregular on its face, so his burden was to overcome the presumption of validity and jurisdiction with "the clearest and most satisfactory evidence." *Trumbull v. Trumbull*, 393 S.W.2d 82, 89 (Mo. App. 1965).

Phillips v. Fallen, 6 S.W.3d 862, 868 (Mo.banc 1999). H.L. Frazee has not disputed that he had the burden to prove the Oklahoma court did not have jurisdiction.

H.L. Frazee relies on assumptions in arguing that he was not subject to personal jurisdiction in Oklahoma. Such reliance is improper when he had the

burden of proof to overcome a strong presumption that the Oklahoma court properly exercised jurisdiction in this case. H.L. Frazee argues that “There are ‘absolutely no supplemental contacts’ linking Frazee to Oklahoma.”

(Respondent’s Substitute Brief, p. 22). Such statement is not supported by any reference to the Record on Appeal. While the evidence showed that he did not own any property in Oklahoma or have any business interests in Oklahoma, H.L. Frazee has not established that no other supplemental contacts existed. His son and daughter-in-law resided in Oklahoma. H.L. Frazee has not presented any evidence regarding the number of times he visited them in Oklahoma or the number of times he called them to discuss either his execution of the Guaranty or the status of this loan. Given the strong presumption that Oklahoma had personal jurisdiction, this Court should not presume facts in favor of H.L. Frazee without any support in the record.

H.L. Frazee also claims “Nor is there anything in this record to show that there was any negotiation of the terms of the guaranty.” (Respondent’s Substitute Brief, p. 23). Again, H.L. Frazee failed to prove that no negotiations occurred. The Affidavit of Bill Burnett indicates that he spoke with H.L. Frazee and “discussed what would be required” and that “[s]ubsequently, H.L. Frazee called [Bill Burnett] and agreed to sign a guaranty”. (LF, p. 39). It is possible that these

discussions included other options by which H.L. Frazee could assist Stephen and Jennifer but that H.L. Frazee chose to execute the Guaranty. It is also possible negotiations regarding the terms of the Guaranty occurred, but resulted in an agreement to use a standard, printed form. Additionally, it is possible that H.L. Frazee negotiated with Stephen and Jennifer regarding whether or not he would execute the Guaranty. Again, the burden of proof was on H.L. Frazee to establish the facts upon which he wishes to rely and he has failed to do so.

H.L. Frazee next argues that “Nothing in either the guaranty or the record as a whole identifies ‘any contract rights created by the guaranty’ in Frazee that ‘could have been enforced in the [Oklahoma] courts and which could fairly be said to represent an intent by [Frazee] to reap the benefits of [Oklahoma] law.’” (Respondent’s Substitute Brief, p. 23) (quoting *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 934 (1st Cir. 1985)). First, H.L. Frazee enjoyed the benefits and protections available under Oklahoma law to a guarantor. He was entitled to the protections of any defenses available under Oklahoma law in response to Peoples Bank’s claim under the Guaranty. Second, it is possible that H.L. Frazee had an agreement with Stephen and Jennifer which induced him to execute the Guaranty or which addressed the rights of the parties in case Stephen

and Jennifer defaulted on the underlying loan. H.L. Frazee has not presented any evidence disproving the existence of such an agreement.

H.L. Frazee also argues that he received no pecuniary benefit from executing the Guaranty and that he had no financial interest in the underlying loan.

(Respondent's Substitute Brief, p. 24). Again, the burden was on H.L. Frazee to prove that Oklahoma could not properly assert personal jurisdiction over him. He did not present any evidence to support any of these claims. His affidavit does not indicate that he received no pecuniary benefit from signing the Guaranty or that he did not have any financial interest in the underlying loan. These assumptions ignore the strong presumption that the Oklahoma court had personal jurisdiction and that the burden was on H.L. Frazee to disprove the existence of personal jurisdiction.

H.L. Frazee goes on to claim “‘The only conceivable benefit accruing to [Frazee] was the personal satisfaction of helping [Stephen and Jennifer].’” (Respondent's Substitute Brief, p. 24) (citations omitted). Again, H.L. Frazee simply assumes facts supporting his argument that no personal jurisdiction existed. The burden was on him to prove the Oklahoma court lacked the necessary personal jurisdiction, yet he failed to produce evidence supporting the assumptions upon which he now relies.

H.L. Frazee next argues that “nothing in the record shows that the Bank advanced any additional money to Stephen and Jennifer Frazee, much less to Frazee himself.” (Respondent’s Substitute Brief, p. 25). More importantly, nothing in the record shows that Peoples Bank *did not* advance any additional money to either Stephen and Jennifer or H.L. Frazee as part of the renewal of this loan. H.L. Frazee is improperly attempting to rely on the absence of evidence in the record to meet his burden of proof.

Lastly with respect to this point, H.L. Frazee claims that since the Guaranty was “an independent obligation”, his obligation under the Guaranty “does not arise out of, and is not connected with, other activities in which he engaged in Oklahoma”. (Respondent’s Substitute Brief, p. 26). Such argument ignores the clear relationship between the Guaranty and the renewal of the loan to Stephen and Jennifer. The Guaranty clearly states:

To induce the Lender to extend credit to the Debtor [Stephen and Jennifer] and for other good and valuable consideration, the receipt of which is acknowledged, and for the purpose of enabling the Debtor to obtain or renew loans, credit or other financial accommodation from the Lender [Peoples Bank] named above, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Lender that Debtor

will fully and promptly pay or otherwise discharge all indebtedness and other obligations (“indebtedness”) upon which Debtor now is or may later, from time to time, become obligated to Lender as principal, guarantor, endorser, or in any other capacity,

(LF, p. 41). It is also clear from the Affidavit of Bill Burnett that Peoples Bank would not have renewed the loan to Stephen and Jennifer without H.L. Frazee’s Guaranty. (LF, p. 39). As a result, it is proper to consider the circumstances surrounding the renewal of the loan to Stephen and Jennifer by Peoples Bank, the payments and other obligations owed by Stephen and Jennifer under the promissory note, and the consequences resulting from the Guaranty, namely the renewal of the note, in determining whether Oklahoma properly exercised personal jurisdiction over H.L. Frazee.

This case does not involve “‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts” with Oklahoma. *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 542. H.L. Frazee made an informed and considered decision to execute the Guaranty after discussing it first with Bill Burnett and then with Stephen and Jennifer. (LF, p. 39). Only after those discussions did he agree to sign the Guaranty. (LF, p. 39). Further, this is not a situation where a buyer was purchasing a product over the phone and the location of the seller was of no

importance to his decision. H.L. Frazee knew that the loan was from an Oklahoma bank to his son and daughter-in-law that lived in Oklahoma. He knew the location of the transaction and that his Guaranty would entail continuing obligations to Peoples Bank in Oklahoma. The location of the transaction was important because it was where Stephen and Jennifer lived and where the loan was situated. H.L. Frazee made a conscious and deliberate decision to become involved in a loan transaction in Oklahoma. His actions were neither random, fortuitous, or attenuated.

H.L. Frazee guarantied a loan from an Oklahoma bank. In addition, the loan was made to Oklahoma residents, which increases the significance of his connection with the state. H.L. Frazee knew when he signed the guaranty to Peoples Bank and mailed it back to Oklahoma that he could and would be haled into an Oklahoma court if his son failed to pay Peoples Bank on the loan. It does not offend the requirements of due process to exercise personal jurisdiction over H.L. Frazee because he knew he was guarantying an Oklahoma Bank's loan for the benefit of his son and daughter-in-law, Oklahoma residents, and he could reasonably expect that the Bank would seek to enforce that guaranty in an Oklahoma court, if necessary. "The assertion of in personam jurisdiction comports with 'fair play and substantial justice' if it is reasonable to require the defendant to

defend suit in the forum.” *Klassen v. Lazik*, 91 P.3d 90, 93 (Okla.Ct.App. 2004).

Under the facts of this case, it was reasonable to require H.L. Frazee to defend a claim on the guaranty in Oklahoma and the trial court erred in granting the Motion to Quash.

II. The Trial Court Erred In Placing the Burden of Proof

H.L. Frazee argues that the trial court’s improper placement of the burden of proof is “much ado about nothing.” (Respondent’s Substitute Brief, p. 26). H.L. Frazee claims that “the trial court simply dealt with the facts as the documents showed them to be, and since the facts were not disputed, it was immaterial who bore the burden of proof.” (Respondent’s Substitute Brief, p. 27). Such argument ignores the strong presumption that the Oklahoma court had personal jurisdiction.

The Supreme Court has recognized that different standards apply in determining whether personal jurisdiction was properly asserted depending on whether the decision is reviewed on direct appeal or attacked collaterally in an action in another state. *See Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass’n.*, 455 U.S. 691, 713-15, 102 S.Ct. 1357, 1370-71, 71 L.Ed.2d 558, 576-77 (1982). The Court has also held that a determination that personal jurisdiction is proper may be based on “a variety of legal rules and presumptions, as well as straightforward factfinding.” *Insurance*

Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492, 504 (1982).

In this case, the Default Judgment was entered in favor of Peoples Bank and against H.L. Frazee and the other defendants in Oklahoma. (LF, p. 7-10). Peoples Bank then filed the Default Judgment with the Circuit Court of Wright County, Missouri, for registration as a foreign judgment. (LF, p. 1, 5). As a result, a presumption exists that the Oklahoma court had both personal jurisdiction and subject matter jurisdiction and the burden was on H.L. Frazee to overcome such presumption and prove that jurisdiction was not present in Oklahoma.

A foreign judgment, which is regular on its face, is entitled to a strong presumption that the rendering court had jurisdiction over the parties and the subject matter of the suit. [Citations omitted]. A party asserting the invalidity of a foreign judgment has the burden of overcoming the presumption of validity.

Gletzer v. Harris, 159 S.W.3d 462, 465 (Mo.App.E.D. 2005).

H.L. Frazee suggests that this Court should defer to the trial court's factual determinations. (Respondent's Substitute Brief, p. 12). While this would generally be the correct course, such deference is clearly improper when the trial

court placed the burden of proof on the wrong party and failed to apply the strong presumption in favor of the existence of personal jurisdiction.

As discussed above, H.L. Frazee attempts to support the trial court's Judgment based on various assumptions which are not supported by the record. The burden of proof was on H.L. Frazee to overcome the strong presumption that he was subject to personal jurisdiction in Oklahoma. He cannot rely on unsupported assumptions to meet his burden of proof.

In the present case, the Affidavit of H.L. Frazee does not address the circumstances surrounding the execution of the guaranty. (Supp. LF, p. 1-2). The facts should be considered in light of the strong presumption that personal jurisdiction did exist. Under these circumstances, it is reasonable to assume that the execution of the guaranty was actually done at the request of H.L. Frazee. A reasonable interpretation of the facts supplied by the affidavits is that:

- H.L. Frazee called Bill Burnett, expressed a desire to help Stephen and Jennifer Frazee, and asked how he could prevent the loan from being called.
- Bill Burnett informed H.L. Frazee that he could execute a personal guaranty of the loan.
- "H.L. Frazee then said that he would talk to Stephen and his wife." (LF, p. 39).

- H.L. Frazee subsequently called Bill Burnett, stated that he would sign the guaranty, and requested that it be mailed to him at his Missouri address.
- Bill Burnett prepared the guaranty and mailed it to H.L. Frazee.
- H.L. Frazee signed the guaranty and returned it to Bill Burnett.

These facts constitute a reasonable interpretation of the evidence in this case consistent with the strong presumption that Oklahoma had personal jurisdiction.

H.L. Frazee did not present any evidence indicating that he did not initiate contact with Peoples Bank at his son's request or ask for the opportunity to execute the guaranty. In fact, his affidavit purposely avoids the issue by stating "The only contact I *currently* have with Oklahoma is the presence of my grandchild in the state." (Supp. LF, p. 1) (emphasis added). Such statement fails to address the contacts he had at the time he executed the guaranty or provide any information regarding the nature or extent of his contacts involved in the execution of the guaranty.

It is possible that H.L. Frazee had several telephone conversations with Stephen and Jennifer Frazee prior to deciding to execute the guaranty. It is also possible that he had an agreement with Stephen and Jennifer regarding compensation for his execution of the Guaranty or regarding reimbursement if he was required to pay the debt owed to Peoples Bank. H.L. Frazee may have

discussed the status of the note with Stephen or Jennifer routinely after he executed the Guaranty. We also do not know how often H.L. Frazee visited Stephen and Jennifer in Oklahoma or otherwise traveled to that state. H.L. Frazee simply has not provided any evidence concerning his actions involved in executing the Guaranty or in monitoring the status of the loan after it was renewed. H.L. Frazee wants this Court to assume all of the facts in his favor and to ignore the strong presumption which he was required to overcome. Under the law, H.L. Frazee failed to meet his burden to show that the Oklahoma court did not properly assert personal jurisdiction over him and the trial court erred in granting the Motion to Quash.

H.L. Frazee could have avoided the possibility of being sued in Oklahoma by simply choosing not to sign the Guaranty. As the Supreme Court of Oklahoma has explained, “Regardless of who initiated the contact, the non-residents could have refused to enter into a contract and thereby alleviated the risk of defending a suit commenced in Oklahoma.” *Hough v. Leonard*, 867 P.2d 438, 444 (Okla. 1993) (footnote omitted). H.L. Frazee clearly had the option of refusing to sign the Guaranty. Instead, he chose to take actions that induced Peoples Bank to renew the loan to Stephen and Jennifer Frazee. The loan was from an Oklahoma bank to Oklahoma residents and H.L. Frazee mailed the Guaranty to Peoples Bank in

Oklahoma. H.L. Frazee could reasonably expect any dispute regarding the loan to be resolved in Oklahoma. His actions clearly had significant consequences in Oklahoma and his contacts with Oklahoma were sufficient so that ““maintenance of the suit “does not offend traditional notions of fair play and substantial justice.””” *Vance v. Molina*, 28 P.3d 570, 573 (Okla. 2001) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 100 S.Ct. 559, 563-64, 62 L.Ed.2d 490 (1980), citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

The trial court erroneously declared the law and erroneously applied the law in placing the burden of proof regarding personal jurisdiction on Peoples Bank. A strong presumption existed that the Oklahoma court had personal jurisdiction and H.L. Frazee had the burden of overcoming that presumption. When the facts are considered in the proper context, it is clear that the trial court should have denied the Motion to Quash. This Court should reverse the Judgment and remand with instructions to deny H.L. Frazee’s Motion to Quash.

CONCLUSION

A strong presumption exists that the District Court In and For Tulsa County, Oklahoma, had personal jurisdiction over H.L. Frazee. He failed to meet his burden to present clear evidence showing that he was not subject to personal

jurisdiction in Oklahoma. Further, the trial court erroneously declared and erroneously applied the law in placing the burden of proof on Peoples Bank and finding that H.L. Frazee did not have sufficient minimum contacts with Oklahoma to support personal jurisdiction there. The undisputed evidence shows that the exercise of personal jurisdiction by the Oklahoma court was reasonable and did not “offend the traditional notions of substantial justice and fair play.” *Hough*, 867 P.2d at 443. This Court should reverse the trial court’s Judgment and remand with directions to deny H.L. Frazee’s Motion to Quash.

Respectfully Submitted,

Richard L. Rollings, Jr.
Missouri Bar No. 40650
379 West Lake Park
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 Fax
Rick@RRollings.com

Michael J. King
Winters & King, Inc.
2448 East 81st, Suite 5900
Tulsa, OK 74137
(918) 494-6868
(918) 491-6297 FAX
MKing@WintersKing.com

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of Appellant's Substitute Reply Brief together with a copy of the CD-ROM required by Supreme Court Rule 84.06(g) on the following counsel of record by depositing in the United States Mail, postage prepaid, on this 1st day of March, 2010.

Richard L. Schnake
Neale & Newman, L.L.P.
PO Box 10327
Springfield, MO 65808

Attorney for Respondent

Richard L. Rollings, Jr.

RULE 84.06(c) AND (g) CERTIFICATE

I hereby certify that this Appellant's Substitute Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 5,819 words. I hereby further certify that the CD-ROM disks containing the brief and filed with the Court and served on the Attorney for Respondent were scanned for viruses by an anti-virus program and are virus-free according to such program.

Richard L. Rollings, Jr.
Missouri Bar No. 40650
379 West Lake Park
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 Fax
Rick@RRollings.com