IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-00548-SCT

DOUGLAS MICHAEL LONG JR.

v.

DAVID J. VITKAUSKAS

DATE OF JUDGMENT:	04/04/2018
TRIAL JUDGE:	HON. CELESTE EMBREY WILSON
TRIAL COURT ATTORNEYS:	MICHAEL J. MALOUF A. E. (RUSTY) HARLOW JR.
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MICHAEL J. MALOUF ROBERT E. JONES
ATTORNEYS FOR APPELLEE:	A. E. (RUSTY) HARLOW JR. KATHI C. WILSON
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
DISPOSITION:	AFFIRMED - 12/05/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Douglas Michael Long Jr. filed a complaint against Pennsylvania resident David J. Vitkauskas for alienation of affections. Vitkauskas responded with a motion to dismiss for lack of personal jurisdiction. The trial court granted Vitkauskas's motion and dismissed Douglas's complaint. Douglas appeals, arguing that the trial court erred by finding that Vitkauskas was not subject to personal jurisdiction and, alternatively, by refusing to allow limited discovery pertaining to personal jurisdiction. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. In 1988, Douglas married Catherine A. Long. After the couple divorced, Douglas, a Mississippi resident, sued Pennsylvania resident Vitkauskas, alleging alienation of affections. Douglas claimed that Vitkauskas's wrongful and adulterous actions irreparably injured his marriage with Catherine. Douglas alleged that Vitkauskas's intentional, wrongful conduct proximately caused his divorce.

¶3. Vitkauskas filed a motion to dismiss, *inter alia*, for insufficient service of process under Mississippi Rule of Civil Procedure 4(c)(5). The trial court granted the motion, and the Court of Appeals affirmed. We reversed and remanded, holding that service had been sufficient. ***Long v. Vitkauskas***, 228 So. 3d 302, 303 (¶ 1) (Miss. 2017). Following remand, on December 8, 2017, Vitkauskas filed another motion to dismiss, but he omitted the insufficient service of process argument. Vitkauskas argued that Douglas's complaint should be dismissed under Mississippi Rule of Civil Procedure 12(b)(1)-(6). Vitkauskas argued that the trial court lacked personal jurisdiction over him because his contacts to Mississippi were not sufficient to expose him to the jurisdiction of the trial court. Vitkauskas also argued that the trial court lacked subject matter jurisdiction, that venue was improper, and that Douglas had failed to state a claim on which relief could be granted.

¶4. On December 22, 2017, Douglas noticed a deposition of Vitkauskas to be taken on January 17, 2018, in Hernando, Mississippi. On December 26, 2017, Vitkauskas filed a motion to quash the notice of deposition. Douglas filed a response, arguing that he should

be allowed to take Vitkauskas's deposition to prove that Vitkauskas's contacts with the state of Mississippi were sufficient to subject him to personal jurisdiction. Douglas requested that the trial court postpone the hearing on Vitkauskas's motion to dismiss until his deposition had been taken.

¶5. On January 10, 2018, the trial court entered an order finding that "[w]hile some limited discovery on the issue of personal jurisdiction may be warranted in this matter, the [trial c]ourt finds that [Douglas]'s *unilateral* notice of [Vitkauskas]'s deposition in Mississippi places an undue burden or expense on [Vitkauskas] at this time." The trial court quashed the deposition "*as noticed*[,]" however, it found that the "issue of [Douglas]'s entitlement to a deposition of [Vitkauskas] for limited purposes will be held in abeyance until the [motion to dismiss] hearing[.]"

¶6. On March 1, 2018, the trial court held a hearing on Vitkauskas's motion to dismiss. Douglas appeared with counsel and was prepared to testify about Vitkauskas's contacts with Mississippi. However, Douglas did not testify; instead, his counsel presented argument about what Douglas's testimony and certain evidence would show.

¶7. According to Douglas's counsel, Douglas and his wife, Catherine, lived in Olive Branch, Mississippi. While they lived in Olive Branch, Catherine worked for a company in Memphis, Tennessee, where Vitkauskas was her supervisor. Beginning in March 2010, while Catherine and Douglas lived together as a married couple, numerous phone calls and text messages were exchanged between Catherine and Vitkauskas. The phone calls and texts

continued until Catherine and Douglas separated. Douglas's counsel represented that Catherine had never received any phone calls from her two previous supervisors. Douglas's counsel stated that the phone calls occurred outside of working hours at night and on weekends. The phone logs were admitted into evidence without objection. The parties stipulated that the numbers identified in the exhibits were Vitkauskas's and Catherine's phone numbers.

¶8. Douglas's counsel claimed that Vitkauskas sent gifts to Douglas and Catherine's Olive Branch home, including a subscription to Food Network Magazine, bamboo towels, and an expensive guitar. Douglas's counsel stated, "We've got the actual receipt here where [Vitkauskas] sent her a subscription" to Douglas and Catherine's home "address at 4028 Arbor Cove, Olive Branch, Mississippi." Douglas's counsel also mentioned Catherine's journal notes that she had hidden in her closet describing her and Vitkauskas's relationship. Douglas's counsel told the trial court,

> I'll be glad to share these notes. I don't want [to] read them into the record because they're somewhat explicit. Your Honor, but I would like you to look at them and let [Vitkauskas's counsel] look at them if you care to. I would rather not read them into the record, Your Honor.

After a pause in the proceedings, the trial court asked, "Do y'all want those to be marked as exhibits so there will be something in the record?" Vitkauskas's counsel objected, arguing that it had not been authenticated. Douglas's counsel responded that in addition to the phone calls, texts, and handwritten journal notes, Catherine left the marital home to move in with Vitkauskas in Pennsylvania.

¶9. Douglas's counsel showed the journal entries to the trial court. Vitkauskas's counsel had no objection to the entries' being published to the trial court. After a pause in the proceedings, Douglas's counsel stated, "Your Honor, I will state that these - - Judge Cobb ordered [Catherine] to read these into the record during the temporary hearing. I'm not comfortable with that unless you want them introduced." The trial court responded, "There's been an objection from counsel opposite[,] so I won't make it an exhibit at this time since it's not been properly authenticated." Douglas's counsel interjected, "Also, Your Honor, I would show that [Catherine]'s admitted to [Douglas] that Mr. Vitkauskas had visited in their home." Vitkauskas's counsel stated, "[Catherine] is not a party[, s]o any admission by her would not be admissible as it would be a party admission, least of all, the fact that she's not even here." Douglas's counsel responded that the entries would be an admission against interest and therefore admissible. The trial court sustained the objection.

¶10. Douglas's counsel argued that under ***Knight v. Woodfield***, 50 So. 3d 995 (Miss. 2011), Vitkauskas's actions constituted sufficient minimum contacts to subject to him personal jurisdiction.

¶11. The trial court took the matter under advisement and granted the motion to dismiss. In the dismissal order, the trial court acknowledged that a two step analysis as set out in ***Knight*** guides whether a Mississippi court may exercise personal jurisdiction over a nonresident defendant. ***Id.*** at 998 (¶ 12). The trial court found that no dispute existed that the requirements of Mississippi's long arm statute had been satisfied.

¶12. Next, the trial court considered the second step, *i.e.*, whether the exercise of personal jurisdiction over the nonresident defendant would be consistent with the Due Process Clauses of the state and federal constitutions. The trial court found that "[t]he record in this case includes no evidence that [Vitkauskas] ever purposefully made any contact—minimum or otherwise—with Mississippi." The trial court found that the only evidence presented had been an extensive log of telephone calls and text messages between Vitkauskas and Catherine. The trial court noted, however, that Catherine's phone number had been listed as a Memphis, Tennessee number. The trial court, relying on ***Nordness v. Faucheux***, 170 So. 3d 454, 461 (¶¶ 28-30) (Miss. 2015), found that "[t]here is some argument of [Douglas]'s counsel in this case that [Vitkauskas] knew of [Douglas]'s wife's Mississippi residency, but no corroborating evidence has been presented to this [trial c]ourt–no affidavits, no testimony[,] and no documentary evidence with the exception of the phone logs[.]" The trial court concluded that Douglas had failed to meet his burden of showing that Vitkauskas had the constitutionally required purposeful minimum contacts with Mississippi.

¶13. Douglas filed a notice of appeal. Douglas argues that the trial court erred (1) by finding that Vitkauskas is not subject to personal jurisdiction in Mississippi and, alternatively, (2) by refusing to allow limited discovery pertaining to personal jurisdiction.

STANDARD OF REVIEW

¶14. When considering a motion to dismiss, we review the trial court's decision *de novo*. ***Scaggs v. GPCH-GP, Inc.***, 931 So. 2d 1274, 1275 (¶ 6) (Miss. 2006). Likewise, "[w]e

review jurisdictional issues *de novo*. When considering jurisdictional issues, the Court sits in the same position as the trial court, 'with all facts as set out in the pleadings or exhibits, and may reverse regardless of whether the error is manifest.'" ***Knight***, 50 So. 3d at 998 (¶ 11) (quoting ***Horne v. Mobile Area Water & Sewer Sys.***, 897 So. 2d 972, 975 (¶ 7) (Miss. 2004)). Finally, we review decisions concerning discovery matters for an abuse of discretion. ***Prime Rx, LLC v. McKendree, Inc.***, 917 So. 2d 791, 794 (¶ 7) (Miss. 2005).

DISCUSSION

I. Whether the trial court correctly found that Vitkauskas is not subject to personal jurisdiction in Mississippi.

¶15. Douglas argues that the trial court erred by finding that Vitkauskas did not have the requisite minimum contacts with Mississippi to justify its exercise of personal jurisdiction over Vitkauskas.

¶16. "[Douglas] bears the burden of establishing that Mississippi courts have personal jurisdiction over [Vitkauskas]." ***Nordness v. Faucheux***, 170 So. 3d 454, 457 (¶ 12) (Miss. 2015) (citing ***Kevlin Servs., Inc. v. Lexington State Bank***, 46 F.3d 13, 14 (5th Cir. 1995)). "Th[e] Court must conduct a two-step analysis when determining whether a Mississippi court may exercise personal jurisdiction over a nonresident defendant." ***Knight***, 50 So. 3d at 998 (¶ 12) (citing ***Horne***, 897 So. 2d at 976 (¶ 12)). "First, we must determine whether the nonresident defendant is amenable to suit in Mississippi by virtue of our long-arm statute." ***Knight***, 50 So. 3d at 998 (¶ 12) (citing Miss. Code Ann. § 13-3-57 (Rev. 2002)). Next, "we must determine whether the nonresident defendant is amendable to suit in [Mississippi]

consistent with the Due Process Clauses of the state and federal constitutions. ***Id.*** (citing ***Horne***, 897 So. 2d at 976 (¶ 12)). At an evidentiary hearing, as was held here, the plaintiff must demonstrate personal jurisdiction by a preponderance of the admissible evidence. ***Walk v. Haydel & Assocs., Inc.***, 517 F.3d 235, 241-242 (5th Cir. 2008); *see also* ***Germano v. Taishan Gypsum Co.*** (***In re Chinese Manufactured Drywall Prod. Liab. Litig.***), 742 F.3d 576, 584-585 (5th Cir. 2014).

¶17. Here, the parties do not dispute that the requirements of the long arm statute are satisfied. Therefore, we proceed to the second step.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Id. at 999 (¶ 15) (quoting ***Int'l Shoe Co. v. Washington***, 326 U.S. 310, 316 (1945)).

¶18. Douglas relies on ***Knight*** in support of his argument that the trial court erred. In ***Knight***, Eric Woodfield and his wife, Kristina Dokka, lived together in Long Beach, Mississippi, from July 2006 until their separation in April 2007. ***Id.*** at 997 (¶ 2). Dokka commuted to her job in Louisiana and worked with William Knight. ***Id.*** Woodfield noticed a substantial change in his marital relationship, which prompted him to discover numerous phone calls and text messages that had been exchanged between Dokka and Knight. ***Id.*** at 997 (¶ 3). Despite Woodfield's plea to Knight to stop pursuing Dokka, Knight continued communicating with Dokka. ***Id.*** at 997 (¶ 5). After Dokka and Woodfield divorced, Dokka moved to Louisiana and married Knight. ***Id.*** at 997 (¶ 7).

¶19. Woodfield sued Knight, a Louisiana resident, in Mississippi for alienation of affections, although the alleged sexual relationship had occurred in Louisiana. ***Knight***, 50 So. 3d at 996-97 (¶¶ 1, 6). Knight admitted that he was aware that Dokka and Woodfield were married and that Dokka had lived in Mississippi, but he claimed that they were never physically together in Mississippi while she was married. ***Id.*** at 997 (¶ 6).

¶20. The trial court denied Knight's motion to dismiss based on lack of personal jurisdiction. ***Id.*** at 997 (¶ 8). On interlocutory appeal, the Court held that Knight's phone calls and text messages were sufficient minimum contacts with Mississippi. ***Id.*** at 1000 (¶ 19). The Court held that Knight "'purposefully directed' his actions at a" Mississippi resident and the alienation of affections lawsuit resulted from the alleged injures to Woodfield that arose out of or related to Knight's actions. ***Id.*** at 1000 (¶ 19) (quoting ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 472 (1995)). The Court concluded,

> In sum, the County Court of Harrison County has personal jurisdiction over Knight for the purposes of adjudicating Woodfield's claim of alienation of affections against Knight. If Woodfield suffered injuries due to Knight's actions of emailing, calling, and sending text messages to Woodfield's wife, such injuries were suffered by a Mississippi resident in his home state. These actions satisfy the Mississippi long-arm statute as well as the Due Process Clauses of our state and federal constitutions.

Id. at 1001 (¶ 22).

¶21. Unlike ***Knight***, the pleadings and evidence here fail to show that Vitkauskaus purposefully directed his actions at a Mississippi resident, which would satisfy the minimum contacts requirement for personal jurisdiction. The Court's decision in ***Nordness*** controls

today's case.

¶22. In ***Nordness***, Phillip and Paige Faucheux were married and lived in Southaven, Mississippi. ***Nordness***, 170 So. 3d at 456 (¶ 2). While on a work trip, Phillip began an affair with Francesca Munne Nordness in Louisiana. ***Id.*** at 456 (¶ 3). During the affair, Francesca never visited Phillip in Mississippi, and Phillip never told Francesca that he lived in Mississippi. ***Id.*** at 456 (¶ 4). Phillip actually misled Francesca into believing that he lived in Memphis, Tennessee. ***Id.*** Phillip's cell phone had a Memphis area code, and he sent packages to Francesca bearing a Memphis return address. ***Id.*** Paige discovered the affair, Phillip stopped seeing Nordness, and Paige believed that their marriage had been reconciled. ***Id.*** at 456 (¶¶ 4-6). However, "Francesca and Phillip continued to rendezvous at locations across the country, including Louisiana, Florida, North Carolina, Nevada, and Colorado—but never Mississippi." ***Id.*** at 456-57 (¶ 7).

¶23. After Paige discovered Phillip's continued infidelity, they divorced. ***Id.*** at 457 (¶ 10). Paige sued Francesca for alienation of affections and Francesca responded by filing a motion to dismiss for lack of personal jurisdiction. ***Id.*** The trial court denied the motion to dismiss, and Francesca filed an interlocutory appeal. ***Id.*** at 457 (¶ 11).

¶24. On appeal, the Court wrote that "because Francesca's actions allegedly broke up Paige's Mississippi marriage, we find the long-arm statute's language sufficiently broad enough to bring Francesca within its scope." ***Id.*** at 458 (¶ 12). The Court continued to the second step, but noted that it had not found any caselaw "that has held a person 'purposefully

established "minimum contacts" in [a] forum State' where that person did not know, or should not have been aware, he or she was making the contacts in the forum state." ***Id.*** at 459 (¶ 19) (alteration in original) (quoting ***Rudzewicz***, 471 U.S. at 474).

¶25. The ***Nordness*** Court held that

> For purposes of a state court's exercise of personal jurisdiction over a nonresident, these cases make clear the Due Process Clause's requirement of evidence that the nonresident *purposefully*—not accidentally or unknowingly—engaged in minimum contacts *within the forum state*, sufficient to submit himself to the personal jurisdiction of that state's courts.
>
> The record in this case includes no evidence whatsoever that Francesca ever purposefully made any contact—minimum or otherwise—with Mississippi. She had an affair (never in Mississippi) with a man (a) who worked in Memphis for a Memphis-based corporation; (b) whose cell phone had a Tennessee area code; (c) who sent her packages using a Tennessee return address; (d) who drove a truck with a Louisiana license plate; and (e) who asked her to meet him in "MEM" so they could disclose the affair to his wife.
>
> As the Supreme Court has stated numerous times, due process requires that, for a state court to exercise personal jurisdiction over a nonresident, the person reasonably must expect that his or her actions could lead to him or her being "haled into court" in that state. Thus, Paige must demonstrate the Due Process Clause's requirement that Francesca "*purposefully established 'minimum contacts'* " in Mississippi, and that Francesca should have realized her actions could subject her to the jurisdiction of Mississippi courts. This, Paige has not done.
>
> It is uncontroverted that Francesca never knew of Phillip's home in Mississippi. There is no evidence in the record to suggest that Francesca knew or should have realized her calls and texts to Phillip's Tennessee telephone number would be received in Mississippi. And while Francesca certainly should have known her affair with a married man might break up a marriage somewhere, there is nothing in the record to suggest she knew or should have known the marriage would break up in Mississippi.

Id. at 461 (¶¶ 27-30) (citations omitted).

¶26. The ***Nordness*** Court distinguished ***Knight***, in which the nonresident defendant was fully aware that he was having an extramarital affair with a Mississippi resident whose marital home was in Mississippi. ***Nordness***, 170 So. 3d at 462 (¶ 32) (citing ***Knight***, 50 So. 3d at 997, 1000).

¶27. The ***Nordness*** Court continued, "In every case where Mississippi courts have exercised personal jurisdiction over nonresident paramours, our courts have made it clear that the paramours knew they were engaged in a relationship with a person from Mississippi. ***Id.*** at 461-62 (¶ 31).

> For purposes of a state court's exercise of personal jurisdiction over a nonresident, . . . the Due Process Clause's requirement of evidence that the nonresident *purposefully*—not accidentally or unknowingly—engaged in minimum contacts *within the forum state*, sufficient to submit himself to the personal jurisdiction of that state's courts.

Id. at 461 (¶ 27).

¶28. Vitkauskas argues that neither "[t]he record, nor the complaint filed in this case, include any evidence that [Vitkauskas] ever purposefully made any contact—minimum or otherwise—with Mississippi." We agree.

¶29. "The plaintiff bears the burden of establishing jurisdiction, but need only present *prima facie* evidence." ***Revell v. Lidov***, 317 F.3d 467, 469 (5th Cir. 2002) (citing ***Kelly v. Syria Shell Petroleum Dev. B.V.***, 213 F.3d 841, 854 (5th Cir. 2000)). Like the trial court, we consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." ***Id.*** at 469 (internal quotation marks omitted) (quoting

Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985)). We also accept Douglas's "uncontroverted allegations, and resolve in [his] favor all conflicts between the facts contained in the parties' affidavits and other documentation." ***Id.*** at 469 (alteration in original) (internal quotation marks omitted) (quoting ***Alpine View Co. v. Atlas Copco AB***, 205 F.3d 208, 215 (5th Cir. 2000)).

¶30. The allegations in Douglas's complaint and the phone logs fall short of demonstrating that Vitkauskas purposefully engaged in any contacts with Mississippi. The trial court correctly concluded that while Douglas's counsel presented some argument that Vitkauskas "knew of [Catherine]'s Mississippi residency[,]" the record contains no evidence that Vitkauskas knew of Catherine's Mississippi residency. As in ***Nordness***, "[t]he record in [today's] case includes no evidence whatsoever that [Vitkauskas] ever purposefully made any contact—minimum or otherwise—with Mississippi." ***Nordness***, 170 So. 3d at 461 (¶ 28). The trial court did not err in granting Vitkauskas's motion to dismiss for lack of personal jurisdiction based on the record before it.

¶31. In her dissent, Justice Beam reaches the opposite result by considering the argument of Long's counsel at the hearing as evidence. She cites a case from the United States Circuit Court of Appeals for the District of Columbia Circuit, ***Mwani v. Bin Laden***, 417 F.3d 1 (D.C. Cir. 2005), in support of doing so. However, we have held that argument of counsel does not suffice as evidence when facts are at issue. ***One 1970 Mercury Cougar v. Tunica Cty.***, 115 So. 3d 792, 796 (¶ 20) (Miss. 2013) ("No citation of authority is necessary for the

fundamental propositions that issues of fact are decided by the weighing of evidence, and that the arguments of counsel are not evidence."). Even if ***Mwani*** did control, the District of Columbia Circuit's opinion requires more than Long presents here. "[Plaintiffs] may rest their argument *on their pleadings*, bolstered by such affidavits and other written materials as they can otherwise obtain." ***Mwani***, 417 F.3d at 7 (emphasis added). Here, Long failed to allege any facts establishing personal jurisdiction against Vitkauskas and, when given the opportunity to do so at a hearing, offered into evidence no bolstering affidavits or other competent evidence.

¶32. In addition, the dissent would hold the trial court in error for sustaining Vitkauskas's evidentiary objections during the hearing. However, Long does not raise the trial court's rulings on Vitkauskas's objections as an issue on appeal. As such, absent plain error the issue is not before us. Miss. R. App. P. 28; ***Collins v. City of Newton***, 240 So. 3d 1211, 1221 (¶ 34) (Miss. 2018) ("Because the issue was not argued in the Collinses' appellate briefing, we consider it abandoned and waived." (citing ***Sumrall v. State***, 758 So. 2d 1091, 1094 (Miss. Ct. App. 2000))).

II. Whether the trial court erred by refusing to allow limited discovery pertaining to personal jurisdiction.

¶33. Alternatively, Douglas argues that the trial court erred by refusing to permit limited discovery with regard to personal jurisdiction of Vitkauskas. Vitkauskas argues that the trial court acted within its discretion to deny Douglas's request to conduct discovery. As mentioned above, the trial court granted Vitkauskas's motion to quash but found that "some

limited discovery on the issue of personal jurisdiction may be warranted in this matter" and held the "issue of [Douglas]'s entitlement to a deposition of [Vitkauskas] for limited purposes . . . in abeyance until the hearing[.]" The order granting the motion to quash left open the possibility that limited discovery might proceed. We cannot say that the trial court abused its great discretion in so ruling.

¶34. At the hearing, Douglas did not request additional discovery or request to depose Vitkauskas. Thus, Douglas abandoned his discovery argument by failing to obtain a ruling on his request to conduct discovery. *See* ***Ramsey v. Auburn Univ.***, 191 So. 3d 102, 112 (Miss. 2016).

CONCLUSION

¶35. For the reasons stated above, We affirm.

¶36. **AFFIRMED.**

KITCHENS AND KING, P.JJ., MAXWELL, ISHEE AND GRIFFIS, JJ., CONCUR. RANDOLPH, C.J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J. BEAM, J., DISSENTS WITH SEPARATE WRITTEN OPINION. CHAMBERLIN, J., NOT PARTICIPATING.

RANDOLPH, CHIEF JUSTICE, SPECIALLY CONCURRING:

¶37. The Cyber Age has reshaped how people interact and communicate with each other. Dramatic technological and societal changes of our increasingly interconnected cyber world have created an ever-expanding myriad of ways to purposefully contact others, even when geographically distant. *C.f.* ***South Dakota v. Wayfair, Inc.***, 138 S. Ct 2080, 2095, 201 L. Ed. 2d 403 (2018) (citing ***Direct Mktg. Assn. v. Brohl***, 135 S. Ct. 1124, 1135, 191 L. Ed. 2d 97

(2015) (Kennedy, J., concurring)). Communication of electronically stored and shared information and email have exploded. The purpose of communication may be for good or evil, laudable or criminal. Thus, our jurisprudence must be sufficiently supple to recognize and address the differences in this age, differences that have only accelerated since ***International Shoe v. Washington***, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), was decided in 1945.

¶38. Around twenty-five years ago fewer than one in fifty Americans had access to the internet. See ***Wayfair, Inc.***, 138 S. Ct. at 2095. This number has grown: a year ago, only one in ten Americans did not have access to the internet. *See* ***id.*** Similarly, over the last eight years, smartphone ownership has risen among Americans from 35 percent in 2011 to 96 percent in 2019. *See* Pew Research Ctr., *Demographics of Mobile Device Ownership and Adoption in the United States* (June 12, 2019), pewinternet.org/fact-sheet/mobile/. The use of Facetime, Facebook, Snapchat, email and text messaging present new challenges for analyzing "purposeful contacts" within a jurisdiction. Given these realities and the surety that we cannot even begin to predict what forms of communication and interaction are in store for the coming decades, the message to our trial courts is simple. When determining jurisdiction disputes, the rule of law is best served by conducting a record-intensive, case-by-case analysis of such controversies, as was the case in ***Knight v. Woodfield***, 50 So. 3d 995 (Miss. 2011), and ***Nordness v. Faucheux***, 170 So. 3d 454 (Miss. 2015). When considered through this lens, the lack of proof controls today's outcome. The trial court's decision to

dismiss without prejudice is properly affirmed, and the trial court's reasoning is sound.

¶39. The defendant filed a motion to dismiss, asserting that his contacts with Mississippi were insufficient for the trial court to exercise jurisdiction. The trial court examined the record before it and found that it included "no evidence that the Defendant ever purposefully made any contact – minimum or otherwise – with Mississippi." The court observed that the only evidence presented was "a long log of telephone calls and text messages . . . no corroborating evidence [was] presented to [the] Court – no affidavits, no testimony and no documentary evidence." The absence of corroborating evidence led the trial court to conclude that the plaintiff "utterly failed in [his] burden of showing [the Defendant] had the constitutionally required purposeful minimum contacts in Mississippi."

¶40. The court looked for purposeful minimum contacts with Mississippi such that it was foreseeable the defendant would be haled into court here. ***World-Wide Volkswagen Corp. v. Woodson***, 444 U.S. 286, 296–97, 100 S. Ct. 559, 566–67 62 L. Ed. 2d 490 (1980). The trial court relied on the evidence presented to render a decision. At the hearing before the trial court, the plaintiff argued that he possessed a treasure trove of proof. But, instead of opening this cache and strewing his proof before the trial judge, he merely praised its contents. The trial judge rightfully awaited an unveiling of the evidence, but it never came. This alleged hoard of proof of infidelity went unopened before the trial court and is now similarly not available for our inspection. Courts may only consider what is properly presented to them.

¶41. Just as the trial court found the partial copy of incoming and outgoing phone numbers insufficient, so do we. The phone log fails to correlate dates and times or provide other information. No reasonable inference of contact with the state of Mississippi can be made from this document. *See* ***Canadian Nat. Ry. Co. v. Waltman***, 94 So. 3d 1111, 1115 (Miss. 2012) (quoting ***R.C. Constr. Co. v. Nat'l Office Sys.***, 622 So. 2d 1253, 1255 (Miss. 1993)). No witnesses testified at the hearing: in view of the record before us, I agree with the majority that the plaintiff has failed to provide evidence that minimum contacts exist with Mississippi. The trial court properly dismissed this case without prejudice.

KITCHENS, P.J., JOINS THIS OPINION.

BEAM, JUSTICE, DISSENTING:

¶42. Respectfully, I dissent from the majority's decision to affirm the trial court's dismissal of the case for lack of personal jurisdiction under Rule 12(b)(2) of the Mississippi Rules of Civil Procedure.

¶43. When no pretrial evidentiary hearing is held by the trial court with regard to a nonresident defendant's motion to dismiss for lack of personal jurisdiction, plaintiffs need only demonstrate a prima facie showing of personal jurisdiction. ***Hogrobrooks v. Progressive Direct***, 858 So. 2d 913, 920 (Miss. Ct. App. 2003) (adopting the approach utilized by Mississippi federal courts under Federal Rule Civil Procedure 12(b)(2)). To demonstrate a prima facie showing, plaintiffs are not limited to evidence that meets the standards of admissibility by the trial court. ***Mwani v. Bin Laden***, 417 F.3d 1, 7 (D.C. Cir.

2005). Rather, plaintiffs "may rest their arguments on their pleadings, bolstered by such affidavits and other written materials as they can otherwise obtain." ***Id.*** (footnote omitted).

¶44. In ***United Electric Radio and Machine Workers of America v. 163 Pleasant Street Corp.***, the United States Court of Appeals for the First Circuit explained,

> The prima facie showing must be based upon evidence of specific facts set forth in the record. This means that plaintiff must go beyond the pleadings and make affirmative proof. However, in determining whether the prima facie demonstration has been made, the district court is not acting as fact finder; rather, it accepts properly supported proffers of evidence by a plaintiff as true and makes its ruling as a matter of law. Therefore, appellate review of such a ruling is nondeferential and plenary.

United Elec. Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 987 F.2d 39, 44 (1st Cir. 1993) (citing ***Boit v. Gar-Tec Products, Inc.***, 967 F.2d 671, 675 (1st Cir. 1992)).

¶45. Here, as the majority points out, the plaintiff did not assert adequate facts in his complaint for purposes of establishing personal jurisdiction over the defendant. Nevertheless, the trial court held a hearing on the defendant's motion to dismiss for lack of personal jurisdiction. And at that hearing, the trial court allowed some evidence to be received into the record. That evidence consisted of phone logs displaying extensive phone calls and text messages between the defendant and the plaintiff's former wife.

¶46. The evidence showed that the plaintiff's former wife's number was a Memphis, Tennessee number, and the defendant's counsel had no objection to its admission as evidence. Defendant's counsel, however, objected (either on grounds of hearsay or lack of authentication) to certain other potential evidence being allowed into the record for

consideration by the trial court. This evidence, according to the proffer by the plaintiff's counsel, would demonstrate that the defendant "purposefully directed" his alleged activities at a Mississippi resident. ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1995).

¶47. Such evidence, according to the plaintiff's counsel, included gifts sent by the defendant to the plaintiff's marital home in Olive Branch, Mississippi, along with a corroborating receipt; the plaintiff's former wife's journal describing her and the defendant's relationship; and a purported admission by the plaintiff's former wife that the defendant had been in the marital home.

¶48. Ultimately, the trial court sustained all of the defendant's evidentiary objections, allowing only the unopposed phone logs into the record for its due-process analysis for personal jurisdiction. This was error on the part of the trial court under the prima facie standard to be applied to a motion to dismiss for lack of personal jurisdiction. ***Mwani***, 417 F.3d at 7 ("plaintiffs are not limited to evidence that meets the standards of admissibility by the district court").

¶49. As a result, the trial court concluded that this case falls in line with ***Nordness v. Faucheux***, 170 So. 3d 454 (Miss. 2015). There, this Court found that the record contained no evidence that the defendant "created sufficient purposeful minimum contacts with Mississippi by having an affair with a man she did not know lived in Mississippi." ***Id.*** at 464. Given that the spouse in ***Nordness*** had a Memphis telephone number, evidence

showing phone calls and text messages by the defendant to that number did not establish minimum contacts with Mississippi. ***Id.***

¶50. Here, though, had the trial court allowed the plaintiff, over the defendant's evidentiary objection, to submit for the record other evidence proffered by the plaintiff, this case would be similar to ***Knight v. Woodfield***, 50 So. 3d 995 (Miss. 2011). There, this Court found that phone calls and text messages sent by the defendant to his paramour in Mississippi constituted "sufficient 'minimum contacts' with Mississippi for the purposes of our personal-jurisdictional analysis." ***Id.*** at 1000 (citing ***Int'l Shoe Co. v. Washington***, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

¶51. I agree with the majority that "argument of counsel does not suffice as evidence when facts are at issue." Maj. Op. ¶ 31 (citing ***One 1970 Mercury Cougar v. Tunica Cty.***, 115 So. 3d 792, 796 (Miss. 2013)). But counsel's argument was not presented as evidence; rather, it was presented as a proffer of what the evidence would show on the ultimate question of personal jurisdiction.

¶52. Further, by stipulating and allowing the trial court to consider partial evidence for its due-process analysis for personal jurisdiction, the defendant waived whatever insufficiencies existed solely with the complaint for purposes of pleading personal jurisdiction.

¶53. Having accepted and considered some evidence in the case, the trial court effectively converted the motion-to-dismiss hearing into a quasi-evidentiary hearing. And out of fairness to the plaintiff, notice should have been given that this was occurring.

¶54. Also, respectfully, I would not find that the plaintiff abandoned his request for additional discovery. The trial court held in abeyance the plaintiff's motion seeking limited discovery until a hearing could be conducted. From that hearing, the trial court granted the defendant's motion to dismiss for lack of personal jurisdiction, which in effect dismissed the plaintiff's limited discovery request.

¶55. For these reasons, I would reverse and remand for further proceedings.