

Case Survey: Roller v. TV Guide Online Holdings, LLC.
2013 Ark. 285, 2013 WL 3322348

IN A MATTER OF FIRST IMPRESSION, THE ARKANSAS SUPREME COURT HOLDS THAT USERS OF A WEBSITE ARE NOT BOUND BY A BROWSEWRAP AGREEMENT CONTAINING A FORUM-SELECTION CLAUSE ABSENT EVIDENCE THAT THE TERMS OF THE AGREEMENT WERE COMMUNICATED TO THE USERS

In *Roller v. TV Guide Online Holdings, LLC*,¹ a class of plaintiffs sued TV Guide in Washington County Circuit Court for embedding a “Flash cookie” onto plaintiffs’ computers, without their consent or knowledge, in order to monitor and report their Internet activity.² TV guide filed a motion to dismiss based on improper venue.³ Specifically, TV Guide asserted that by using its website, the plaintiffs assented to a California Choice-of-Forum Clause, which was included in an agreement on the “Terms and Conditions” page of the site.⁴ The trial court granted TV Guide’s motion to dismiss, and the plaintiffs appealed.⁵ In a matter of first impression, the Arkansas Supreme Court reversed and remanded, finding that TV Guide failed to meet its burden of showing improper venue because it had not established that the terms of the agreement had been effectively communicated to the plaintiffs.⁶

Sharon Roller, Valerie Murphy, and Emily Smith filed a class-action complaint against TV Guide on behalf of people who had accessed TV Guide’s website, thereby causing the cookie to download onto their computers.⁷ The complaint, filed in Washington County, alleged that the three class representatives lived in Washington County and that a substantial part of the events giving rise to the claim occurred there.⁸

TV Guide filed a motion to dismiss based on its “browsewrap” agreement⁹—an agreement that is part of a website and to which the user assents by using the site.¹⁰ The agreement was located on the “Terms and Conditions” page and accessible by hyperlink at the bottom of each page of the website.¹¹ The agreement provided that any claim related to it must be brought in a state or federal court in Los Angeles and that the parties agreed to submit to the personal jurisdiction and venue of those courts.¹² Based on this provision, TV guide argued that Los Angeles constituted the only proper venue and that the plaintiffs failed to plead facts to avoid the jurisdiction of the California courts.¹³

The circuit court treated TV Guide’s motion as a motion to dismiss under both Arkansas Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(3) (improper

¹ *Roller v. TV Guide Online Holdings, LLC*, 2013 Ark. 285, 2013 WL 3322348.

² *Id.* at 1, 2013 WL 3322348 at 1.

³ *Id.* at 2, 2013 WL 3322348 at 1.

⁴ *Id.*, 2013 WL 3322348 at 1.

⁵ *Id.* at 3, 2013 WL 3322348 at 2.

⁶ *Id.* at 3, 7–8, 2013 WL 3322348 at 2, 4.

⁷ *Roller*, 2013 Ark. at 1, 2013 WL 3322348 at 1.

⁸ *Id.* at 2, 2013 WL 3322348 at 1.

⁹ *Id.*, 2013 WL 3322348 at 1.

¹⁰ *Id.*, 2013 WL 3322348 at 1 (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)).

¹¹ *Id.*, 2013 WL 3322348 at 1.

¹² *Id.* at 2–3, 2013 WL 3322348 at 1.

¹³ *Roller*, 2013 Ark. at 3, 2013 WL 3322348 at 1.

venue).¹⁴ The court granted the motion based on the plaintiffs' failure to plead facts sufficient to avoid venue and jurisdiction in Los Angeles.¹⁵ The plaintiffs filed a motion for reconsideration, which the court denied after a hearing.¹⁶ The plaintiffs appealed, and the Arkansas Supreme Court acquired jurisdiction over the case because it involved a matter of first impression.¹⁷

Treating the facts asserted in the complaint as true under Rule 12(b), the Arkansas Supreme Court concluded that plaintiffs pleaded sufficient facts to vest subject matter jurisdiction in the Washington County Circuit Court.¹⁸ Moreover, the court noted that, as a general rule, parties cannot waive or consent to subject matter jurisdiction by agreement.¹⁹ Thus, the forum-selection clause in the agreement, even assuming it bound the plaintiffs, did not negate the circuit court's subject matter jurisdiction.²⁰ To the extent that the circuit court dismissed the complaint for lack of subject matter jurisdiction, the Arkansas Supreme Court held that it committed reversible error.²¹

As to venue, the plaintiffs pleaded in their complaint that they were residents of Washington County, that TV Guide had the requisite minimum contacts with the state, and that TV Guide had availed itself of the privilege of doing business in Arkansas.²² Treating the facts as true, the court concluded that the plaintiffs pleaded sufficient facts to establish the propriety of venue in Washington County.²³ TV Guide, however, argued that the browsewrap agreement made venue proper only in Los Angeles and plaintiffs had not pleaded sufficient facts to show venue was improper there.²⁴ The Arkansas Supreme Court rejected this argument, concluding that "a defendant objecting to venue has the burden of demonstrating that venue is improper."²⁵ Thus, because TV Guide bore the burden of showing the impropriety of venue, the court reasoned that the circuit court incorrectly shifted the burden to the plaintiffs by requiring them to plead sufficiently to avoid the jurisdiction of the California courts.²⁶

Furthermore, the Arkansas Supreme Court concluded that TV Guide failed to satisfy its burden of demonstrating that venue in Washington County was improper.²⁷ In order to rely on the agreement to contest venue, TV Guide had to establish the existence of a legal contract—namely, mutuality and notice and assent to the terms.²⁸ Moreover, the court stated that "[b]oth parties must manifest assent to the particular terms of the contract,"²⁹ and "for a party to assent to a contract, the terms of the contract must be effectively communicated."³⁰ TV Guide asserted that plaintiffs assented to the terms of the browsewrap agreement, including the forum-selection

¹⁴ *Id.*, 2013 WL 3322348 at 2.

¹⁵ *Id.*, 2013 WL 3322348 at 2.

¹⁶ *Id.*, 2013 WL 3322348 at 2.

¹⁷ *Id.*, 2013 WL 3322348 at 2.

¹⁸ *Id.* at 4, 2013 WL 3322348 at 2.

¹⁹ *Roller*, 2013 Ark. at 4, 2013 WL 3322348 at 2 (citing *Vibo Corp., Inc. v. State ex rel. McDaniel*, 2011 Ark. 124, 380 S.W.3d 411).

²⁰ *Id.*, 2013 WL 3322348 at 2.

²¹ *Id.*, 2013 WL 3322348 at 2.

²² *Id.* at 5, 2013 WL 3322348 at 3.

²³ *Id.*, 2013 WL 3322348 at 3.

²⁴ *Id.*, 2013 WL 3322348 at 3.

²⁵ *Roller*, 2013 Ark. at 5, 2013 WL 3322348 at 3 (citing *Helm v. Mid-Am. Indust., Inc.*, 301 Ark. 521, 785 S.W.2d 209 (1990)).

²⁶ *Id.* at 6, 2013 WL 3322348 at 3.

²⁷ *Id.*, 2013 WL 3322348 at 3.

²⁸ *Id.*, 2013 WL 3322348 at 3 (citing *Alltel Corp., Inc. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005)).

²⁹ *Id.*, 2013 WL 3322348 at 3 (citing *DIRECTV, Inc. v. Murray*, 2012 Ark. 366, 423 S.W.3d 555).

³⁰ *Id.* at 7, 2013 WL 3322348 at 4 (citing *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991)).

clause, by using the website.³¹ Additionally, TV Guide argued that the plaintiffs had notice of the terms because they had mentioned the terms of the agreement in their complaint.³²

The court disagreed. It concluded that plaintiffs had not assented because the terms of the agreement had not been effectively communicated to them; as such, they had no notice of the terms.³³ In reaching this conclusion, the court analogized to *Alltel Corp., Inc. v. Sumner*.³⁴ In *Sumner*, the plaintiffs filed a class action against Alltel, alleging violations of the Arkansas Deceptive Trade Practices Act.³⁵ In response, Alltel filed a motion to dismiss or stay the case pending another action, or alternatively compel arbitration.³⁶ To establish that the plaintiffs had notice of the arbitration clause, Alltel submitted an affidavit from its Director of Retail Sales, who stated that customers received a service agreement containing an arbitration clause prior to the initiation of their phone service as a matter of company policy and service would not be provided absent an agreement.³⁷ On review, the court of appeals held that the affidavit was insufficient to show that the plaintiffs had actual notice of the agreement.³⁸

Likewise, the court concluded that TV Guide had not demonstrated that it communicated the terms of the agreement to the plaintiffs.³⁹ The court dismissed TV guide's argument that the plaintiffs' reference to the browsewrap agreement in their complaint demonstrated notice: "this is insufficient as the dispositive issue in determining if an enforceable agreement existed is whether appellants had constructive or actual knowledge of the terms of the agreement and therefore agreed by their use of TV Guide's website to be bound by those terms."⁴⁰ Thus, because TV Guide failed to establish that the plaintiffs had notice of and assented to the terms of the agreement, it did not demonstrate the existence of a binding agreement and did not meet its burden of showing the impropriety of venue in Washington County.⁴¹ The court reversed the grant of the motion to dismiss and remanded the case for further proceedings.⁴²

³¹ *Roller*, 2013 Ark. at 6–7, 2013 WL 3322348 at 4.

³² *Id.* at 7, 2013 WL 3322348 at 4.

³³ *Id.*, 2013 WL 3322348 at 4.

³⁴ 360 Ark. 573, 203 S.W.3d 77 (2005).

³⁵ *Roller*, 2013 Ark. at 7, 2013 WL 3322348 at 4.

³⁶ *Id.*, 2013 WL 3322348 at 4.

³⁷ *Id.*, 2013 WL 3322348 at 4.

³⁸ *Id.*, 2013 WL 3322348 at 4.

³⁹ *Id.*, 2013 WL 3322348 at 4.

⁴⁰ *Id.* at 7–8, 2013 WL 3322348 at 4 (citing *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002)).

⁴¹ *Id.* at 8, 2013 WL 3322348 at 4.

⁴² *Id.*, 2013 WL 3322348 at 4.