Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00367-CV

PATRICK G. PICOU AND DELORES PICOU, Appellants

V.

UNIVERSAL ENSCO, INC., UNIVERSAL ASSOCIATES, INC., AND JIMMY ADAMS, Appellees

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 98-34688

O P I N I O N

Appellants Patrick G. Picou and his wife appeal from (1) a special appearance granted in favor of a nonresident defendant working in Africa; and (2) a summary judgment granted in favor of the Texas corporations that hired the nonresident defendant. We affirm.

I. BACKGROUND

Patrick Picou suffered a back injury while working in Africa as a welding inspector for a company not a party to this lawsuit. At the time of Patrick Picou's injury, appellee

Jimmy Adams, a Louisiana resident, worked as a welding inspector in Africa for appellee Universal Ensco, Inc. ("UE"),[1] a Texas corporation. Picou and Adams both worked on a project to visually inspect the fabrication of a 650,000 barrel storage tank for Cabinda Gulf Oil Company ("CABGOC"),[2] supervisor of the Cabinda project. While helping Adams load a pipe onto a pickup truck, Picou attempted to lift one end of the pipe and injured his back and required two surgeries.

Patrick Picou and his wife Delores Picou[3] sued UE, UA,[4] and Adams for negligence and loss of consortium. The trial court (1) granted Adams's special appearance and (2) granted UA's and UE's motion for summary judgment against the Picous. The Picous challenge these decisions raising two points of error.

II. ISSUES PRESENTED FOR REVIEW

In their first point of error, the Picous contend the trial court erred in granting Adams's special appearance because Texas has general jurisdiction over him. In their second point of error, the Picous contend the trial court erred by granting UE's and UA's motion for summary judgment; specifically, they claim that the trial court erroneously concluded Adams owed no duty of ordinary care to Patrick Picou.

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1 UE provides detail design engineering, surveying, drafting, project management and inspection for the pipeline industry.

2 Chevron owns CABGOC.

3 Dolores Picou is also an appellant.

4 Appellee Universal Associates, Inc. ("UA") was predecessor to the UE corporation when its headquarters was in Tulsa, Oklahoma.

III. PERSONAL JURISDICTION

In their first point of error, the Picous contend the trial court erred in granting Adams's special appearance because they established that Texas has general jurisdiction based on the following:[5] (1) with activities connected to his employment in Texas over the last ten years, Adams purposefully established minimum contacts with Texas on a continuous and systematic basis; and (2) Adams provided no evidence of the burden and inconvenience of litigating in Texas and, thus, failed to establish that assertion of jurisdiction by a Texas court would violate the traditional notions of fair play and substantial justice.

A. Standard of Review

The existence of personal jurisdiction is a question of law. *Cartlidge v. Hernandez*, 9 S.W.3d 341, 346 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In an appeal from a special appearance, an appellate court reviews all the evidence in the record to determine if the nonresident defendant negated all possible grounds for personal jurisdiction. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). Here, neither party requested and the trial court did not make findings of fact or conclusions of law, and neither party assigned error to the trial court's failure to do so. Thus, we presume the trial court resolved all questions in support of the judgment, and we must affirm that judgment on any legal theory supported by the pleadings and the evidence. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 445 (Tex. 1997).

B. Minimum Contacts

Patrick Adams is not a resident of Texas. Texas courts may assert jurisdiction over a nonresident defendant only (1) if the Texas long-arm statute authorizes such exercise of

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[5] Because neither party contends that Texas has specific jurisdiction over Adams, we focus our discussion on general jurisdiction.

jurisdiction and (2) if such exercise is consistent with the due process guarantees embodied in both the United States and Texas Constitutions. *Cartlidge*, 9 S.W.3d at 346 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997); *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding)).

The federal due process clause protects, among other things, a person's liberty interest in not being subject to the binding judgments of a forum with which the nonresident has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). With respect to personal jurisdiction, federal due process mandates (1) the nonresident have purposefully established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over the nonresident comport with "traditional notions of fair play and substantial justice." *CSR Ltd.*, 925 S.W.2d at 594 (quoting *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

A nonresident establishes minimum contacts in Texas by purposefully availing himself of the privileges and benefits inherent in conducting business within the state. *CSR*, 925 S.W.2d at 594. In other words, the nonresident must purposefully invoke the benefits and protections afforded by the forum state's laws. *Reyes v. Marine Drilling Cos., Inc.*, 944 S.W.2d 401, 404 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing *Burger King*, 471 U.S. at 474–75; *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991)). Requiring purposeful availment ensures the nonresident's connections derive from its own purposeful conduct, and not the unilateral actions of the plaintiff or third parties. *Guardian*, 815 S.W.2d at 227–28 (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)). Personal jurisdiction, therefore, does not emerge from the nonresident's random, fortuitous, or attenuated contacts with the forum, or from another's acts. *Id.* at 226 (citing *Burger King*, 471 U.S. at 465; *Helicopteros*, 466 U.S. at 417; *World-*

Wide, 444 U.S. at 298). Rather, the nonresident must take some action or engage in some conduct creating its own "substantial connection" with the forum state. *Id.* (citing *Burger King*, 471 U.S. at 474–75).

Although not a separate component, foreseeability is an important consideration in determining whether a nonresident's ties to a forum create a "substantial connection." *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 477–78 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The nonresident must reasonably anticipate being haled into a Texas court to answer for its injurious actions. *Cartlidge*, 9 S.W.3d at 348.

If we conclude that minimum contacts with the forum state exist, we then evaluate those contacts in light of five factors to determine if the assertion of jurisdiction comports with traditional notions of fair play and substantial justice. *Antonio v. Marino*, 910 S.W.2d 624, 627 (Tex. App.—Houston [14th Dist.] 1995, no writ) (citing *Guardian*, 815 S.W.2d at 228). Those five factors are (1) the nonresident's burden; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining an efficient resolution of disputes; and (5) the states' common interest in furthering fundamental, substantive social policies. *Id.*

C. General Jurisdiction

A defendant's minimum contacts with the forum state can produce either general or specific jurisdiction. *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996) (orig. proceeding). General jurisdiction arises when a nonresident defendant's contacts are "continuous and systematic." *Id.* Therefore, general jurisdiction allows the forum state to exercise personal jurisdiction over the nonresident defendant even if the cause of action did not arise from or relate to the nonresident's contacts with the state. *Id.* The general jurisdiction analysis is

more demanding than the specific jurisdiction analysis as it requires a showing of substantial activity in the forum state. *Id.*

With this standard in mind, we now examine whether Adams purposefully established "minimum contacts" with Texas. We note that in evaluating Adams's contacts with Texas, we may only consider those occurring before Patrick Picou was injured. *See Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 126 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.) (indicating that contacts occurring after the date of injury are not relevant).

The Picous argue that the following proof establishes Adams's continuous and systematic contacts with Texas. Since 1989, Adams has been exclusively employed by Texas companies. He worked in Texas or coastal waters off Texas for an aggregate of about one year and nine months.[6] When Patrick Picou's injury occurred, Adams worked as a welding inspector for UE. From its Houston headquarters, UE hired Adams and administered his payroll, health insurance, benefits, and other personnel matters. UE paid Adams with checks generated in Houston and drawn on a Houston bank account. Adams's immediate supervisor and the head of UE's inspection department had an office in Houston.

During his most recent stint with UE, beginning sometime in 1995, Adams did not perform any work in Texas. Instead, he worked in Africa on a rotating basis —with eight weeks on and four weeks off work, during which he returned home to Louisiana. While working for UE on the Cabinda project, Adams (1) never worked in Texas and never passed through Texas on his way to or back from Africa; (2) never faxed anything from Africa to Houston; and (3) never called Houston from Africa, only making phone calls to Houston from within the U.S. Adams testified he had no written contract with UE at any time and had nothing to do with any written contract between UE and CABGOC. The work Adams did

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[6] From 1989 to sometime in 1993, Patrick Adams worked as a welding inspector for UE. From 1993 to 1995, Adams worked as a welding inspector for CBS Services, Inc., also based in Texas. Adams estimated he was last in Texas in 1995 while working for CBS.

in Africa for UE, during which Patrick Picou was injured, had nothing to do with previous work Adams did in Texas for CABGOC.

We find Adams's contacts with Texas are sporadic, and thus they do not constitute the systematic and continuous contacts with Texas necessary for general jurisdiction in conformity with the Due Process Clause.[7] *See Leblanc v. Patton-Tully Transp. LLC*, 138 F. Supp.2d 817, 819–20 (S.D. Tex. 2001) (finding insufficient contacts for general jurisdiction based merely upon defendant's having contracted with Texas company); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995) (finding no general jurisdiction, reasoning that being sued in Texas was not reasonably foreseeable, when (1) nonresident defendant periodically mailed letters and publications to Texas plaintiff in addition to members outside Texas; and (2) an official of defendant's company attended a Texas meeting); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 763 (Tex. 1977) (holding that Texas courts could not consitutionally assert general jurisdiction over a defendant who had mailed payments to the plaintiff in Texas under a contract to be partially performed in Texas).

We overrule appellant's first point of error.

IV. SUMMARY JUDGMENT

In their second point of error, the Picous contend the trial court erred in granting UE's and UA's motion for summary judgment. Specifically, the Picous contend that the trial court erred in concluding that no duty existed, arguing that UE's and UA's employee, Adams, assumed a duty to act with ordinary care by voluntarily entering upon an affirmative course of action affecting Patrick Picou's interest.

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[7] Given our finding that Adams does not have minimum contacts with Texas, we need not address the "fair play and substantial"justice prong of the special appearance analysis.

A. Standard of Review

A summary judgment functions to eliminate patently unmeritorious claims or untenable defenses. *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). The standards for reviewing a summary judgment are well-established:

(1) The movant has the burden to show absence of genuine issues of material fact and to show entitlement to judgment as a matter of law;

(2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and

(3) Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

Huckabee v. Time Warner Entm't Co. L.P., 19 S.W.3d 413, 424 (Tex. 2000).

A defendant may obtain summary judgment by negating at least one element of the plaintiff's cause of action or by pleading and conclusively proving each element of an affirmative defense.[8] *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). Because UE and UA did not base their motion for summary judgment on an affirmative defense, to prevail they had to negate at least one element of the Picous' negligence claim. *See id.*

B. Assumption of Duty

The common law action based on negligence consists of three elements: (1) a legal duty owed by one party to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). The threshold inquiry in a negligence case is duty. *Id.* To establish tort liability, a plaintiff must initially prove the existence and breach of a duty owed by the defendant. *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). As a general

[8] EA and EU moved for a traditional summary judgment under Rule 166a(c), and did not file a no-evidence motion under 166a(i).

rule, one person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)). However one who, in the absence of a pre-existing duty to act, nonetheless voluntarily enters upon an affirmative course of action affecting the interests of another is regarded as assuming a duty to act, and must do so with reasonable care. *Id.*; *Yeager v. Drillers, Inc.*, 930 S.W.2d 112, 118 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Adams's responsibilities included (1) assisting in gathering materials needed by CABGOC engineers on the platforms; and (2) getting the materials to docks for shipment to the offshore platforms. In response to a CABGOC engineer's request for doubler plates for an offshore oil platform, Adams located a piece of carbon steel pipe from which he could cut the doubler plates. The pipe was roughly fourteen to sixteen inches in diameter and weighed two-hundred thirty pounds. Patrick Picou testified that Adams asked him to help move the pipe after having unsuccessfully attempted for three days to get help from others. Adams testified he had a forklift (located about 100 yards away from the pipe) put in the area where the pipe was located, and asked Picou to help him hook the pipe to the forklift for transport. Picou agreed and rode with Adams to the pipe's location. Adams backed the truck up to the pipe so they could "pick up one end of the pipe, put it on the tailgate and then push it in there." The Picous contend "Adams took this approach even though he knew . . . it would need to be lifted by machine."[9] Adams asked Picou if they could try to move the pipe by rolling. The pipe was filled with dirt, and they needed to roll it so they could attach a sling and hook it to the forklift. This they could not do. Adams testified that he then saw Picou bend down to one end of the pipe and attempt to lift it. Picou testified that in attempting to pick up one end of the pipe, he felt a very hard, sharp pain in his back and dropped the pipe. He suffered a back injury, requiring two surgeries.

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[9] The Picous point to Adams's testimony that he knew before Picou was hurt he needed machinery to lift the pipe.

Here, even if Adams had the *ability* to control Picou's conduct,[10] he did not have a *duty* to control it. *See Otis*, 668 S.W.2d at 309 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)). Moreover, the exception to this rule —for those who voluntarily enter upon an affirmative course of action affecting the interests of another— does not apply. The evidence shows that Adams merely asked Picou to help move the pipe. Picou, alone, decided to lift one side of the pipe without assistance. We find no evidence indicating that anyone directed or in any way encouraged him to lift the pipe in that manner. Because UE and UA established that Adams assumed no duty to Picou, we find that trial court did not err in granting UE and UA's motion for summary judgment. We overrule the Picous' second point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Chief Justice Brister and Justices Edelman and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[10] The evidence shows that Adams did not even have the ability to control Picou because they were on equal-footing and that neither had authority over the other.