

Page 1
JACI JOHNSON AND JEFFREY JOHNSON, Appellants,
v.
LEONARD POUNDS, Appellee.
No. 11-07-00073-CV.
Court of Appeals of Texas, Eleventh District, Eastland.
August 14, 2008.

On Appeal from the County Court at Law Midland County, Texas, Trial Court Cause No. CC 13,610.

Panel consists of: WRIGHT, C.J., McCALL, J., and STRANGE, J.

MEMORANDUM OPINION

McCALL, Justice.

Jaci Johnson and Jeffrey Johnson brought this suit in Midland against Leonard Pounds, a resident of New Mexico, alleging that funds due them from their mother's estate were misappropriated or converted by Pounds. Pounds had married their mother shortly before her death and was the executor of her will. The will was probated in New Mexico. Pounds filed a special appearance, contesting personal jurisdiction. The trial court granted the special appearance motion, finding that Pounds and the testatrix were residents of New Mexico, that Pounds had not had the minimum contacts necessary to confer personal jurisdiction in Texas, and that the operative facts concerning the estate and Pounds only involved New Mexico and its law. We affirm.

Background Facts

Pounds has been a resident of New Mexico since 1991. In 1992, Pounds and Sheila Denise Johnson, the mother of appellants, began their relationship in New Mexico. In 1993, Sheila was diagnosed as having breast cancer. She and Pounds contemplated marriage but postponed the marriage due to her health problems. They were finally married in New Mexico on July 13, 1996. Sheila died nine days later on July 22, 1996, while in a Midland hospital.

In her will, Sheila named Pounds as the personal representative, and Pounds filed an application for probate of the will in New Mexico in August 1996. Under the terms of the will, Sheila's residuary estate was to be divided in three equal shares: one-third to Leonard Pounds, one-third to Jeffrey Johnson, and one-third to Jaci Johnson. Jeffrey and Jaci were minors at the time, and the will provided that their shares would be placed in a trust with Pounds as the trustee.

Prior to their marriage, Sheila had opened a money market account at Sunwest Bank of Hobbs, New Mexico. Pounds was a cosigner on the account, and the account had a "payable-on-death" provision for the funds in the account to be payable directly to Pounds upon the death of Sheila. Pounds stated that the funds in the account were from a medical malpractice settlement received by Sheila and that, at the time of her death, there was \$72,000 in the account. The account is the primary focus of appellants' lawsuit. Although the account had the payable-on-death box checked, appellants maintain that the reason Sheila created trusts in her will was that the funds in the account would be divided into the three equal shares with their shares being placed in a testamentary trust. Appellants would then receive distributions from the trust when each reached twenty-one and twenty-five years of age.

After Sheila's death, Pounds subsequently lived for a period of time with a woman named Linda Gassaway. In 2001, Pounds then married another woman. In 2005, Pounds discovered that Gassaway had used an expired debit card that drew on his separate bank account at Sunwest Bank of Hobbs. The unauthorized purchases by Gassaway utilizing the debit card caused Pound's account to become overdrawn, and

Sunwest Bank automatically withdrew funds from the payable-on-death account to cover the overdrafts. Pounds estimated that Gassaway stole between \$26,000 and \$30,000. Pounds stated that he initiated a criminal prosecution of Gassaway, but the charges were dismissed.

Jeffrey and Jaci complain that Pounds did not tell them about the theft of the money by Gassaway and that Pounds misled them. Their evidence consisted of an affidavit by their father Eric Johnson, affidavits by Jeffrey and Jaci, and references to statements by Pounds in his deposition and in his affidavit. According to Eric's affidavit, he had telephone conversations from 1997 to 2006 with Pounds during which Pounds represented to him that Jeffrey and Jaci would receive distributions from the estate that would amount to about \$22,000 each. Eric stated that he heard about the theft by Gassaway for the first time in 2006. The affidavits by Jeffrey and Jaci are similar. They state that, while "communicating" with Pounds, they were told by Pounds that they would receive their share of the money that their mother "left as a result of the settlement proceeds from her malpractice claim" and that Pounds would send part of the money when they reached twenty-one and the balance when they reached twenty-five years of age. The three affidavits do not state that Pounds was in Texas when he made the representations, only that the affiants were "in the State of Texas." The evidence suggests that Pounds was in New Mexico during the telephone conversations involving his alleged representations. For example, Pounds testified at one point that Eric instigated a telephone call to him in New Mexico to discuss issues concerning Sheila's estate.

Jeffrey and Jaci stated that they did receive \$14,000 as a partial distribution from the estate in the spring of 2006, although Pounds testified that he made these payments from his own account. For our analysis of the question of jurisdiction, we will assume that Pounds represented that the distributions were made from the estate.

In three points of error, appellants argue that there were sufficient minimum contacts for personal jurisdiction over Pounds in Texas, that the trial court abused its discretion because Pounds did not carry his burden of proof at the special appearance hearing, and that the court's findings of fact were insufficient to support its order granting the special appearance motion of Pounds.

Standard of Review

The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the Texas long-arm statute. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 2008); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002). When the plaintiff meets this burden, the burden shifts to the nonresident defendant to negate all possible grounds for personal jurisdiction. *BMC Software*, 83 S.W.3d at 793; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). The existence of personal jurisdiction is a question of law that must sometimes be preceded by the resolution of underlying factual disputes. *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 113 (Tex. App.-Houston [1st Dist.] 2000, pet. dismissed w.o.j.). In considering an order granting or denying a special appearance, we may review a trial court's findings on disputed factual issues for both legal and factual sufficiency. *BMC Software*, 83 S.W.3d at 794. However, when the underlying facts are undisputed or otherwise established, we conduct a de novo review of the trial court's order as a question of law. *BMC Software*, 83 S.W.3d at 794; *El Puerto de Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V.*, 82 S.W.3d 622, 628 (Tex. App.-Corpus Christi 2002, pet. dismissed w.o.j.); *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App.-Austin 2001, pet. denied); *Preussag Aktiengesellschaft*, 16 S.W.3d at 113. In any event, in conducting its review, an appellate court considers all of the evidence in the record. *El Puerto de Liverpool, S.A. de C.V.*, 82 S.W.3d at 628. Pounds disputes that he made some of the representations during the telephone calls,

but we will adopt appellants' version of the facts. Even if we assume appellants' version, appellants have not demonstrated that the trial court erred in holding that Texas may not assert jurisdiction over Pounds.

Personal Jurisdiction

A Texas court may assert personal jurisdiction over a nonresident defendant only if the requirements of both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Texas long-arm statute are satisfied. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). The Texas long-arm statute reaches "as far as the federal constitutional requirements of due process will allow." *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

Personal jurisdiction over nonresident defendants is constitutional when two conditions are met: (1) the defendant has established minimum contacts with the forum state and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *BMC Software*, 83 S.W.3d at 795 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Appellants have met neither of these two conditions.

The minimum contacts analysis requires that a defendant "purposely avail" itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of our laws. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). The "touchstone" of due process analysis is "purposeful availment." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). There are three parts to a "purposeful availment" inquiry: (1) only the defendant's contacts with the forum are relevant; (2) the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated; and (3) the defendant must have sought some benefit, advantage, or profit by availing itself of jurisdiction. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007).

The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being haled into a Texas court. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Jurisdiction is premised on notions of implied consent that, by invoking the benefits and protections of a forum's laws, a nonresident consents to suit there. *Michiana Easy Livin' Country, Inc.*, 168 S.W.3d at 785. The quality and nature of the defendant's contacts with the forum state, rather than their number, are important in analyzing minimum contacts. *Guardian Royal*, 815 S.W.2d at 230 n.11.

A defendant's contacts with a forum state can give rise to either general or specific jurisdiction. *BMC Software*, 83 S.W.3d at 795-96; *Guardian Royal*, 815 S.W.2d at 227-28. General jurisdiction is present when a defendant's contacts are continuous and systematic permitting the forum to exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to the activities conducted within the forum. *CSR Ltd.*, 925 S.W.2d at 595. General jurisdiction requires a showing that the defendant conducted substantial activities within the forum, a more demanding minimum contacts analysis than for specific jurisdiction. *Id.* Appellants argue that the trial court below also had general jurisdiction over Pounds; however, they have not provided evidence to demonstrate minimum contacts for specific jurisdiction. Therefore, it follows that the more demanding analysis for general jurisdiction has not been met.

Specific jurisdiction is present when the cause of action arises from or is related to the defendant's contact with the forum state. *Id.*; *Guardian Royal*, 815 S.W.2d at 227. When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Guardian Royal*, 815 S.W.2d at 228. Specific jurisdiction is established if the defendant's alleged liability arises out of or is

related to an activity conducted within the forum state. *Moki Mac*, 221 S.W.3d at 575-76. As we will discuss, Pounds did not have sufficient contacts with Texas to satisfy the minimum contacts requirement. Appellants' allegations of Pounds's liability are not related to an activity conducted within Texas.

Minimum Contacts Analysis

As mentioned, the touchstone of the due process analysis is "purposeful availment." Minimum contacts are sufficient to establish personal jurisdiction only if Pounds purposefully availed himself of the privilege and benefits of conducting activities within Texas. Only his contacts are relevant; his contacts must have been purposeful, rather than random, fortuitous, or attenuated; and his contacts must demonstrate that he sought some benefit, advantage, or profit in availing himself of the jurisdiction of Texas. *Moki Mac*, 221 S.W.3d at 575; *Holten*, 168 S.W.3d at 784-85. To demonstrate the required minimum contacts, appellants argue that the telephone calls were sufficient to create an oral contract and to provide the basis for their alleged tort of fraud by Pounds. Appellants also argue that Pounds made trips to Texas to shop, trips to Texas for his employer, and other occasional trips to Texas and that these trips satisfied the minimum contacts requirements.

Appellants point to the affidavit of their father where he stated that Pounds referred to a "sharing agreement" that Jeffrey and Jaci would share in their mother's estate and that Pounds would make distributions to them. First, the evidence fails to demonstrate that Pounds entered into a contract with appellants. Second, even assuming a contract, contract negotiations with a Texas resident and contract payments sent to Texas are insufficient to establish jurisdiction when the entire substance of the contract is performed outside the state. *Bastian Material Handling, L.L.C. v. Stelluti Kerr, L.L.C.*, 229 S.W.3d 407 (Tex. App.-Eastland 2007, no pet.); *Blair Commc'ns, Inc. v. SES Survey Equip. Servs., Inc.*, 80 S.W.3d 723, 727 (Tex. App.-Houston [1st Dist.] 2002, no pet.). A contract with a nonresident defendant does not alone

constitute a sufficient "contact" for due process purposes. *Rudzewicz*, 471 U.S. 462, 478; *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 598 (Tex. 2007). Any "performance" by Pounds would only involve the sending of money from New Mexico.

Appellants also claim that Pounds made fraudulent representations to them during the telephone calls (e.g., that he would make distributions to them even though he knew the money was gone). Allegations or evidence of torts committed during telephone calls by a nonresident defendant with persons in Texas are not adequate to establish specific jurisdiction. *Holten*, 168 S.W.3d at 791-92. The focus for jurisdiction must be on the contacts of Pounds with Texas. The focus is not on the claim of Jeffrey and Jaci that they relied upon representations of Pounds. See *Holten*, 168 S.W.3d at 790-92; *Morris v. Kohls-York*, 164 S.W.3d 686, 696 (Tex. App.-Austin 2005, pet. dism'd). The telephone calls were not sufficient contacts.

Appellants also list a number of contacts by Pounds with Texas that they claim meet the minimum contacts requirements: he is employed by a company whose home office is in Tyler; he occasionally works on oil and gas wells in Texas for his employer; he lived in Perryton prior to moving to New Mexico; he has taken vacations and traveled on Texas highways; and he has shopped in Texas and paid Texas sales taxes. Those contacts were random, fortuitous, or attenuated; they do not satisfy the requirements of minimum contacts for jurisdiction in Texas. See *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 167 (Tex. 2007); *Virtual Healthcare Servs., Ltd. v. Laborde*, 193 S.W.3d 636 (Tex. App.-Eastland 2006, no pet.). Appellants have not provided evidence that their causes of action arose from or were related to activities conducted by Pounds within Texas; appellants were required to do so to establish specific jurisdiction. See *Moki Mac*, 221 S.W.3d at 575-76. Appellants have not shown sufficient contacts with Texas by Pounds to satisfy specific jurisdiction, and they have not shown the more demanding minimum contacts analysis for

general jurisdiction. General jurisdiction is "dispute-blind" because it permits a Texas court to "exercise jurisdiction over a nonresident defendant based on any claim, including claims unrelated to the defendant's contacts with the state." *PHC-Minden*, 235 S.W.3d at 168; *CSR Ltd.*, 925 S.W.2d at 595.

The trial court made a number of findings that were not challenged: Pounds and Sheila were residents of New Mexico; Sheila died in Texas, but her will was probated in New Mexico; New Mexico law and rulings will guide matters relating to Sheila's estate; New Mexico law will determine the claims of appellants; Sheila entered the payable-on-death account prior to her marriage and her death, and the account contained "the bulk of what the [appellants] are complaining about in this action."¹ The court further found that Pounds did not invoke Texas law or purposely seek to administer this estate in Texas, and the allegations of appellants, even if established, were not such meaningful contacts as to impose the jurisdiction of Texas over Pounds. We agree with the findings of the trial court.

In addition to the minimum contacts requirement not being met, the exercise of jurisdiction by a Texas court over Pounds in this case would offend traditional notions of fair play and substantial justice. In making this determination, we examined Pounds's contacts with Texas in light of the following factors: (1)

the burden on Pounds to litigate in Texas; (2) Texas's interest in adjudicating the dispute; (3) appellants' interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. *Guardian Royal*, 815 S.W.2d at 232. The records of Pounds, the estate, and Sunwest Bank of Hobbs are in New Mexico; everything in connection with the payable-on-death account occurred in New Mexico; appellants can obtain convenient and effective relief in New Mexico if they are entitled; the most efficient resolution of the controversy will be in New Mexico; and the policies of New Mexico control the questions in this case, not those of Texas. Appellants' three points of error are overruled.

This Court's Ruling

The judgment of the trial court is affirmed.

Notes:

1. Appellants only challenged the tenth finding of the trial court: "New Mexico law and rulings will guide and direct the interpretation and any resulting questions as [to] the P.O.D. account." However, appellants have not provided argument or authorities to support their challenge.
