Affirmed and Opinion filed January 11, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00216-CV

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DONALD R. KENNEDY, INDIVIDUALLY AND AS NEXT FRIEND OF LINDSEY N. KENNEDY, A MINOR, AND DONALD R. KENNEDY, AS REPRESENTATIVE OF THE ESTATE OF LAVENA ANN KENNEDY, DECEASED, AND NATHAN R. KENNEDY AND LAVENA W. PACE, Appellants

V.

ADVANTAGE HEALTH PLAN, INC. AND HEALTHCARE ADVANTAGE, Appellees

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On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 99-55265

O P I N I O N

This is an appeal from the trial court's order granting appellees' special appearance. We affirm.

I. Factual and Procedural Background

Appellants, Donald R. Kennedy, individually and as next friend of Lindsey N. Kennedy and as the representative of the estate of Lavena Ann Kennedy, deceased, and Nathan R. Kennedy and Lavena W. Pace (hereinafter "appellants" or "the Kennedys"), are the surviving relatives of Lavena Kennedy ("the decedent"). They brought this action against appellees, a Louisiana health maintenance organization, Advantage Health Plan, Inc. ("the HMO"), and a Louisiana preferred provider organization, Healthcare Advantage ("the PPO").[1] The Kennedys' suit alleges appellees are liable under the Health Care Liability Act,[2] Texas's Wrongful Death Statute,[3] and for tortious interference with familial relations, all of which stem from the untimely death of the decedent.

The decedent, a lifetime resident of Louisiana, suffered from an autoimmune disorder. According to appellants' petition, she traveled to Houston, Texas, to seek treatment for her condition from a nationally renowned specialist, Dr. Campbell, even though Dr. Campbell was not a provider listed with the HMO's plan. Appellants allege that the HMO and PPO are liable because they substituted their medical judgment for the medical judgment of Dr. Campbell, who had prescribed a particular course of treatment for the decedent's condition; therefore, according to appellants, the HMO and PPO were "doing business" in Texas within the meaning of the Texas long-arm statute. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997) (defining "doing business" to include the commission of a tort, in whole or in part, in Texas). Appellants allege that the HMO and PPO are susceptible to personal jurisdiction in Texas because of the numerous phone calls, faxes, and correspondence they had with Dr. Campbell and others in Texas in connection with the decedent's treatment. Pursuant to Rule 120a of the Texas Rules of Civil Procedure, appellees filed a verified special appearance. A hearing was scheduled; after the hearing, the trial court sustained appellees' special appearance. The Kennedys now bring this appeal.

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[1] In their verified special appearance, appellees' Chief Executive Officer swore out an affidavit to the effect that the decedent was never a member of the PPO, and that the PPO ceased to exist as of January 1, 1998, after the cause of action in this case accrued but before appellants filed suit.

[2] TEX. CIV. PRAC. & REM. CODE ANN. § 88.001, *et seq.* (Vernon Supp. 2000).

[3] TEX. CIV. PRAC. & REM. CODE ANN. § 71.001, *et seq.* (Vernon 1997).

II. Standard of Review

The plaintiff has the initial burden of pleading sufficient allegations to bring the nonresident defendant within the provisions of the Texas long-arm statute. *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 633 (Tex. App.—Dallas 1993, writ denied). At the special appearance hearing, the burden shifts to the nonresident defendant to negate all bases of personal jurisdiction. *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 772 (Tex. 1995). If the plaintiff does not plead jurisdictional allegations, *i.e.*, that the defendant committed some act in Texas, the defendant can satisfy its burden by presenting evidence that it is a nonresident. *Hotel Partners*, 847 S.W.2d at 634.

Whether the court has personal jurisdiction over a nonresident defendant is a question of law, but the proper exercise of such jurisdiction is sometimes predicated upon a resolution of underlying factual disputes. *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ). The standard of review for determining the appropriateness of the resolution of disputed facts is factual sufficiency. *Id.* (citing *Hotel Partners*, 847 S.W.2d at 632). If, however, the special appearance is based upon undisputed and established facts, as here, the reviewing court shall conduct a *de novo* review of the trial court's order either granting or denying a special appearance. *Id.*[4] All evidence in the record is considered by the reviewing court. *Id.*

The record does not reflect that either party requested the trial court to make findings of fact and conclusions of law. All questions of fact, therefore, are presumed to be found in support of the judgment. *Billingsley Parts & Equip., Inc. v. Vose*, 881 S.W.2d 165, 168–69 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citing *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987)). Furthermore, this court must affirm the judgment of the trial court on any legal theory finding support in the

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[4] We reach this conclusion not because appellees failed to dispute the *prima facie* basis of jurisdiction in appellants' original petition, as argued in this appeal by appellants, but because the Kennedys failed to present any evidence in support of those allegations. In other words, the evidence is undisputed because, after appellees came forward with evidence negating personal jurisdiction, the Kennedys failed to contradict it with any evidence of their own. On review, it is the duty of this Court to consider all of the *evidence* that was before the trial court, including the pleadings, any stipulations, affidavits and exhibits, the results of discovery and any oral testimony. *De Prins v. Van Damme*, 953 S.W.2d 7, 18–19 (Tex. App.—Tyler 1997, writ denied).

evidence. *Temperature Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 673 (Tex. App.—Dallas 1993, writ dism'd by agr.).

III. Texas Long-Arm Statute

A Texas court may exercise jurisdiction over a nonresident if two conditions are satisfied. First, the Texas long-arm statute must authorize the exercise of jurisdiction. Second, the exercise of jurisdiction must be consistent with federal and state constitutional guarantees of due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990).

The Texas long-arm statute authorizes the exercise of jurisdiction over a nonresident defendant who does business in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). While the statute enumerates several specific acts that constitute "doing business" in Texas, it also includes any "other acts that may constitute doing business." *Schlobohm*, 784 S.W.2d at 357.[5] The "doing business" requirement permits the statute to reach as far as the federal constitutional requirement of due process will allow. *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). Therefore, we need only consider whether the assertion of personal jurisdiction over appellees is consistent with the requirement of due process. *Id.*; *Reyes v. Marine Drilling Cos.*, 944 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1997, no writ).

IV. Due Process

Whether due process is met is answered by a resolution of two inquiries: (1) has the nonresident defendant purposefully established "minimum contacts" with the forum state?; and (2) if so, does the exercise of jurisdiction comport with "fair play and substantial justice"? *Guardian Royal Exch.*, 815

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[5] The Texas long-arm statute states:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state, (2) commits a tort in whole or in part in this state, or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

S.W.2d at 226 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76, (1985)).

Under the minimum contacts analysis, we must determine whether the nonresident defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of Texas law. *Reyes*, 944 S.W.2d at 404 (citing *Burger King*, 471 U.S. at 474–75). A nonresident defendant who has purposefully availed itself of the privileges and benefits of conducting business in the forum state will have sufficient contacts with the forum to confer personal jurisdiction on the court. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). The requirement of purposeful availment, in turn, insures that the nonresident defendant's contact results from *its* purposeful contact and not the unilateral activity of the plaintiff or a third party. *Guardian Royal Exch.*, 815 S.W.2d at 227.

In determining whether a nonresident defendant has purposefully established minimum contacts with the forum state, "foreseeability" is a significant consideration. *Memorial Hosp. Sys. v. Fisher Ins.*, 835 S.W.2d 645, 650 (Tex. App.—Houston [14th Dist.] 1992, no writ). Although not an independent component of the minimum contacts analysis, foreseeability is implicit in determining whether there is a "substantial connection" between the defendant and the forum state. If a nonresident, by its actions or conduct, has purposefully availed itself of a state's benefits and the protections of its laws, then it has established a substantial connection with the state and subjected itself to the state's jurisdiction. *Conner*, 944 S.W.2d at 410 (citing *Guardian Royal Exch.*, 815 S.W.2d at 226–27).

The nonresident defendant's contacts can give rise to two types of jurisdiction. The first—specific jurisdiction—is established when the plaintiff's cause of action arises out of, or relates to, the defendant's contacts with the forum state. *Id.* The defendant's activities must have been purposefully directed toward the forum state. *Guardian Royal Exch.*, 815 S.W.2d at 228. Under specific jurisdiction, the minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Id.*

The second type of jurisdiction—general jurisdiction—is established by the defendant's continuous and systematic contacts with the forum. Such contacts permit the forum to exercise personal jurisdiction over the defendant even though the cause of action did not arise from or relate to the defendant's activities conducted within the forum state. *Schlobohm*, 784 S.W.2d at 357. Under general jurisdiction, the

minimum contacts analysis is more demanding, requiring a showing of substantial activities within the forum state. *CSR Ltd.*, 925 S.W.2d at 595.

V. Application of Law to Facts

The only basis of personal jurisdiction alleged by the Kennedys is that appellees committed a tort in Texas. Accordingly, this is the only basis of jurisdiction which appellees need to negate. *Runnells v. Firestone*, 746 S.W.2d 845, 852 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (discussing long-arm statute's requirement of purposeful act to establish tort-based jurisdiction) (citing *Arterbury v. American Bank & Trust Co.*, 553 S.W.2d 943 (Tex. Civ. App.—Texarkana 1977, no writ)). At the special appearance, appellees relied solely on their verified special appearance. As we have noted above, we employ a *de novo* review of this evidence in determining whether the trial court reached the correct result.

Appellees' special appearance attached the affidavit of Shannon Gaffney Speir, the Chief Executive Officer of the HMO. Speir's sworn affidavit acknowledged that the decedent was a member of the HMO but denied she was a member of the PPO. Further, Speir's affidavit established that the only connection this case has with Texas rests solely upon the decision of the decedent to travel to Houston to receive medical attention from Dr. Campbell, a doctor unrelated to the HMO's plan. Specifically, Speir asserted that neither of the appellees chose, recommended, hired or contracted with Dr. Campbell. While appellees concede that they denied the decedent's request for coverage for a specific brand of drug recommended by Dr. Campbell, Speir's affidavit demonstrates that, even if the Kennedys' allegations are actionable, all conduct related thereto occurred in Louisiana—not in Texas. All of the decisions made in connection with Dr. Campbell occurred solely in Louisiana.

Speir's affidavit sufficiently established that neither the HMO nor the PPO is a resident of Texas. It also established that neither is required to, nor does, maintain a registered agent in Texas. Her affidavit also supported a finding that the HMO is licensed only in Louisiana and that the PPO ceased to exist prior to appellants bringing this action. Finally, it established that neither the HMO nor the PPO ever engaged in business in Texas or maintained a place of business in Texas. No evidence contradicts the facts set forth in this affidavit.

Based on the foregoing, the trial court correctly found that there was not a "substantial connection" between appellees and Texas. *Schlobohm*, 784 S.W.2d at 357. Accordingly, we find that appellees are not subject to the court's general jurisdiction. *CSR Ltd.*, 925 S.W.2d at 595 (Tex. 1996) (finding general jurisdiction exists where defendant's contacts with forum state are continuous and systematic). As for whether the court failed to properly invoke specific jurisdiction over appellees, it is undisputed that the PPO had no relationship whatsoever with the decedent. As such, we find that the trial court did not err in finding the PPO was not amenable to specific jurisdiction in Texas. Regarding the HMO, Ms. Speir's affidavit established that any arguably actionable conduct by the HMO occurred entirely in Louisiana. Thus, as explained below, there is no relationship among the defendant, the forum, and the litigation—the benchmark of specific jurisdiction. *Guardian Royal Exch.*, 815 S.W.2d at 228.

Appellants respond, however, that appellees "purposefully availed themselves to Texas jurisdiction by sending faxes, telephone calls and correspondence into Texas . . . ." They point to this Court's earlier holding in *Memorial Hospital Systems v. Fisher Insurance Agency* as support for their conclusion that the trial court had jurisdiction over defendants. 835 S.W.2d 645. The issue presented in that case, however, was whether a single phone call could support personal jurisdiction in a case of negligent misrepresentation. This Court found that jurisdiction over the non-resident defendant insurance company was proper because the hospital, in treating an insured of the defendant, had relied on the misrepresentation of the defendant that the insured was covered under workers' compensation insurance. We held that "even if the misrepresentation occurs outside the state of Texas, a tort is committed in Texas, if reliance thereon occurred in Texas." *Id.* at 648. Moreover, in *Memorial Hospital*, the plaintiff presented evidence that the single phone call made by appellees was received in Texas and caused economic injury in Texas. *Id.* at 650–51. Finally, we found it was foreseeable that sending false information into Texas would cause reliance and injury in Texas. *Id.*

In the present appeal, there is no allegation or proof that appellants relied on any misrepresentation by appellees. Furthermore, unlike misrepresentation, where the actionable conduct is presumed to occur

wherever the reliance occurred, the conduct in this case occurred in Louisiana.[6] Were we to hold otherwise, a local insurance company would be subject to jurisdiction in every state to which its insured traveled, based solely on the insured's unilateral decision to do so. To so hold would contravene well-established rules relating to personal jurisdiction. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 417 (1984); *Guardian Royal Exch.*, 815 S.W.2d at 227.

Accordingly, we find that appellees' contacts with Texas are insufficient to establish the requisite minimum contacts for the exercise of personal jurisdiction. Thus, we affirm the trial court's order sustaining appellees' special appearance.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed January 11, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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[6] For instance, appellants are not alleging that the conduct attributable to the HMO and the PPO—the placing of phone calls and other forms of communication into Texas—is the basis of the allegation that they practiced medicine under the Health Care Liability Act. If they were, that would be analogous to *Memorial Hospital Systems.* Rather, if they practiced medicine within the meaning of section 88.001, *et seq.*, of the Texas Civil Practice and Remedies Code, they did so in Louisiana. The same is true under section 71.001, the Wrongful Death statute. TEX. CIV. PRAC. & REM. CODE 71.001, *et seq.* (imposing liability if the injury causing the death "was caused by the person's or his agent's or servant's wrongful *act* . . . .") (emphasis added). The wrongful act, if any, was appellees' decision, which was made in Louisiana, not the communication of that decision to Dr. Campbell in Texas.