

LAW WEST OF THE PECOS

Justice Ann McClure

Zinc National, S.A. v. Bouche Trucking v. Jorge Arrellano, No. 08-07-00314-CV (7/31/09)

Zinc Nacional brought an interlocutory appeal from the denial of a special appearance. At issue was whether a Mexican company that trucks its product into the United States at Laredo for transport to New Mexico may be sued in Texas for negligence in loading the trailer at its facility in Monterrey, Mexico which allegedly caused an accident that injured a Texas driver.

Zinc is a Mexican corporation with its principal place of business in Monterrey, Mexico. The company manufactures paper and paper-related products for worldwide distribution. It does not maintain an office in Texas, employ anyone in Texas, advertise in Texas, or market its products in Texas. Zinc has some 260 customers worldwide, thirty of which are located in the United States, and three or four of which are located in Texas. It also receives raw materials from suppliers in Texas. Zinc contracts with C.H. Robinson de Mexico, a Mexican entity, for the transportation of its products throughout Mexico and into the United States. Zinc focuses on selling its products to drywall manufacturing plants located in New Mexico, Nevada, and Florida. American Gypsum, located in Albuquerque, has been a customer of Zinc's grey-back paper products for the past seven years. Zinc ships American Gypsum approximately 300 metric tons of product per month. On average, it ships two to three loads a week.

On December 13, 1999, Zinc loaded eight rolls of grey-back paper onto a trailer in Monterrey, Mexico, pursuant to a purchase order from American Gypsum. Because of the size and weight of the rolls, Zinc loads them onto a trailer using a specialized forklift loader. The rolls are then secured using specialized supports and inflatable pillows purchased and provided by Zinc to ensure that the rolls do not shift during transport. Because the paper is delicate and fragile, the rolls are to remain on the same trailer from the time of loading in Monterrey until they are unloaded in New Mexico by the same specialized forklift owned by American Gypsum. The trailer was provided by C.H. Robinson and it trucked the load from Monterrey to Laredo. At that point, the customary procedure was to deliver the load to a customs agent to cross the shipment into the United States. In this case, the customs agent was Juan Alvarado Brokerage. The purchase order specified that the shipping terms were "F.O.B. Mid-Bridge Laredo." This ensures, in effect, that the transfer of title took place in Nuevo Laredo, Tamaulipas, Mexico. The shipment was then picked up in Laredo by Bouche Trucking, Inc.--a Texas corporation--which had been subcontracted by C.H. Robinson to transport the products to New Mexico.

Jorge Arrellano was a long haul truck driver for Bouche. On December 14, 1999, he was instructed to pick up a load containing numerous rolls of grey-back paper for transport to American Gypsum in Albuquerque. During transport, the rolls shifted causing the trailer rig to overturn in Texas on U.S. 55 North. Arellano sued Bouche, alleging it was negligent in: (1) failing to properly load the rolls of paper onto the trailer, (2) failing to properly secure the rolls of paper onto the trailer, and (3) failing to properly hire and/or train its personnel and/or its agents on the proper manner of loading. Bouche then filed a third party petition against Zinc Nacional seeking indemnity and contribution since Zinc employees actually loaded the paper rolls onto the trailer. Zinc filed a special appearance which the trial court denied. The court of appeals affirmed.

Texas courts may assert *in personam* jurisdiction over a non-resident if (1) the Texas long-arm statute authorizes the jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due process guarantees. The long-arm statute permits Texas courts to exercise jurisdiction

over non-resident defendants that do business in Texas, and the statute contains a non-exclusive list of activities that constitute “doing business”. A non-resident does business in Texas if it commits a tort in whole or in part in the state. A tort is committed where the resulting injury occurs. Section 17.042’s broad language extends personal jurisdiction “as far as the federal constitutional requirements of due process will permit.”

The United States Supreme Court divides the due process requirement into two parts: (1) whether the non-resident defendant has purposefully established minimum contacts with the forum state, and if so, (2) whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. The focus falls on the defendant’s activities and expectations when deciding whether it is proper to bring the defendant before a Texas court. A defendant establishes minimum contacts when it purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Personal jurisdiction exists if the non-resident’s minimum contacts give rise to either specific jurisdiction or general jurisdiction. For a court to exercise specific jurisdiction over a non-resident defendant, two requirements must be met: (1) the defendant’s contacts with the forum must be purposeful, and (2) the cause of action must arise from or relate to those contacts. One exception to the “arising from” requirement is the stream of commerce doctrine. The minimum contacts analysis for specific jurisdiction focuses on the relationship between the defendant, the forum, and the litigation. In contrast, general jurisdiction exists when a defendant’s contacts in a forum are continuous and systematic so that the forum may exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted within the forum state. The court was asked to address only specific jurisdiction and it concluded that Zinc’s contacts with Texas were purposeful. Zinc deliberately structured its business to use Texas ports of entry and Texas roads and highways to transport its products to New Mexico on a regular basis. There was also an adequate relationship between Zinc, the forum, and the litigation. The case did not involve a third party purchaser in New Mexico who trucked Zinc’s product through Texas without its knowledge. Zinc purposefully transferred title to its load in the middle of the bridge at Laredo, but every shipment bound for the United States crossed at the Laredo point of entry and was trucked through the State of Texas utilizing Texas ports and highways. NAFTA, the North American Free Trade Agreement, allows the commercial transactions but does not control the method of transfer. Zinc controlled the loading of the shipment and the method of transfer. Zinc picked a Texas port of entry, the closest port of entry. Laredo, one of 24 Texas ports of entry, is only 150 miles from Monterrey. New Mexico has three ports of entry--Santa Teresa, Columbus, and Antelope Wells. Zinc could have chosen to truck its product across Mexican highways for entry at Santa Teresa. But it opted for the closest and quickest route across the best roadways. In so doing, it availed itself of Texas benefits.

The court then turned to the second prong of specific jurisdiction. Zinc argued that while a trucking accident might be foreseeable, it had purposefully structured its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction. In other words, it delivered its truck loads at mid-bridge Laredo to avoid being haled into Texas courts. But the court emphasized the general manager’s testimony that the trailers are delivered to the customs broker at Laredo, Texas. Zinc also argued that it must have intended that the specific product be targeted at Texas, and it had no such intent since no grey-back paper is sold in Texas. But an out-of-state company with no physical ties to Texas still has minimum contacts with Texas when it is clear the company purposefully directed its activities toward Texas.

Finally, Zinc claimed it had not specifically intended to serve the market in Texas just by shipping its product through Texas. In addressing this issue, the court distinguished product liability cases from negligence cases. Here, there was a negligence claim relating to the improper loading of certain rolls of paper onto a trailer. There was no claim that Zinc improperly or defectively manufactured the grey-back paper, put the paper into the stream of commerce, and then the product somehow caused

injury to the plaintiff. Instead, the allegation was that Zinc negligently loaded the product onto a trailer, and that same load--while on its way to a customer in New Mexico--caused an accident in Texas. Zinc did not merely foresee the possibility of its product passing through Texas, it purposefully loaded its product knowing with certainty that the trailer it loaded would pass through Texas. These contacts were sufficient to demonstrate that the alleged tort occurred at least, in part, in Texas.

Having concluded that Zinc purposefully established minimum contacts with Texas, the court next addressed whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice. Zinc admittedly sends a representative through Texas to New Mexico on a regular basis. El Paso is served by the El Paso International Airport, Ciudad Juarez, hosts an international airport as well. Texas also has a keen interest in maintaining the safety of its roads and citizens. The court stressed that not every truck loaded in Mexico and transported through Texas by a Mexican company faces the risk of *in personam* jurisdiction. Such an analysis is inherently fact specific. But Arellano is a Texas resident who works for a Texas company. The accident occurred in Texas on a Texas highway. Zinc regularly and purposefully ships its products through Texas to New Mexico. Despite the specifications on the purchase order that the shipping terms were "F.O.B. Mid-Bridge Laredo," Zinc's general manager pointedly testified that the load at issue was delivered to the customs broker in Laredo, Texas and not in Nuevo Laredo, Mexico. Thus, the exercise of jurisdiction over Zinc by a Texas court does not offend traditional notions of fair play and substantial justice.

***Arthur v. Grimmert*, No.08-07-00040-CV (7/29/09)**

This case involved a private airplane crash in Ozona, Texas, on October 19, 2001. The cause of the accident was undisputed. Stated bluntly, the Piper PA-30 Twin Comanche simply ran out of gas or, as phrased by the expert witnesses, the crash occurred as the result of "fuel starvation." Grimmert, a passenger on the plane, filed suit against the pilot, John Willison; the owner, Sheila Arthur; Arthur's husband, David Magiera; and Magiera's business entity, Dove Homes, L.L.C. Following a two-week trial, the jury returned a verdict in favor of the plaintiffs for \$14,266,238.75. Arthur and Magiera appealed. Concluding that the evidence was legally insufficient to support either theory of Grimmert's recovery, the court reversed and rendered.

The court began by examining the individual actors and the relationships that existed between them. Sheila Arthur was a former executive secretary who was married to David Magiera. At the time of the events in question, Arthur was involved in an Internet-based ministry. Magiera was an artist, sculptor, and website designer. Through their church, the couple had become friends with John Willison, a pilot. The three of them also became friends with Jose Hernandez, a young man from El Salvador. Hernandez found work in Texas as a framer and ultimately started a subcontracting framing business operated as JOH Construction. This company employed up to eighty workers engaged in construction contracts throughout the United States. He and Magiera also formed their own construction company, Dove Homes.

Throughout the late summer and early fall of 2001, Hernandez worked on a construction contract at a golf resort in Lajitas, Texas. On several occasions, he leased a private airplane to fly to Fort Worth for the weekend to visit his family. On at least one of these occasions, Willison piloted the plane. Hernandez and Willison then began discussing the purchase of an airplane to facilitate the business travel. Although Hernandez had sufficient income to afford payments and expenses related to owning a plane, neither he nor Willison had the credit necessary to obtain financing. Willison then talked to Magiera about buying an airplane. Because Arthur had the necessary credit, she would be the owner in name only. Hernandez would be the owner-in-fact. Arthur would arrange the loan and Hernandez would make the payments, including maintenance expenses. To protect Arthur's credit, Hernandez would make the payments to her and she in turn would pay the lender. After the note was repaid, Arthur would transfer

title to Hernandez. All parties agreed there was never an intent to operate the aircraft for profit or for charter.

Within a few weeks, the four friends decided to move forward with their plan. Willison began looking at planes and reporting to the others. Willison found the plane on the Internet and the purchase was completed on October 18, 2001. The very next day, Willison flew to Lajitas to pick up Hernandez and two of his friends. The plane crashed on the return trip.

Grimmett pursued six theories of recovery against Willison, Arthur and Magiera. Question One submitted negligence. The jury found that Willison was negligent, but that neither Arthur nor Magiera was negligent. It did not answer Question Two, which would have apportioned fault among the defendants. Questions Three and Four inquired whether Willison was Arthur's employee or agent. The jury answered both of these in the negative. By its answer to Question Five, the jury found that Willison, Arthur, and Magiera were engaged in a joint enterprise. And in response to Question Six, the jury determined that Willison, Arthur, and Magiera were engaged in a joint venture.

The court first addressed the issue of joint enterprise. The essential elements of a joint enterprise are (1) an express or implied agreement among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest in that purpose, and (4) an equal voice in the direction of the enterprise, which gives an equal right of control. The focus of the opinion is the third element – a community of pecuniary interest. The court specified that the ordinary meaning of “pecuniary” is “of or pertaining to money” and this monetary interest must be common among the members of the group. Monetary benefits flowing from the enterprise will not suffice--there must still be evidence that the monetary benefits were shared among the members without special or distinguishing characteristics. While the parties clearly agreed to share the airplane, there is no evidence that they agreed to share with each other any financial benefits resulting from the operation of the airplane. Indirect, potential financial interests do not satisfy the test.

Turning to joint venture, the court recounted the elements. A joint venture exists if the persons concerned have (1) a community of interest in the venture; (2) an agreement to share profits; (3) an express agreement to share losses; and (4) a mutual right of control or management of the venture. Inasmuch as the airplane was not intended to generate a profit, nor was it to be used for chartered flights, there was no evidence of an agreement to share monetary profits from the aircraft itself. More importantly, there was absolutely no evidence of an express agreement to share losses. No joint venture exists as a matter of law where an agreement includes a provision for sharing profits, but no express provision for sharing losses.

Kendikian v. State, No. 08-08-00182-CR (08/31/09)

Kendikian was indicted for the murder of and injury to a child younger than fifteen years of age. Kendikian and her husband, Joshua Wensel, were both suspects, but neither was under arrest. The couple went voluntarily to the El Paso Police Department and each gave a separate statement which was videotaped. They were not told by the officers that these individual statements were recorded. Wensel then asked to speak to his wife. The police acquiesced and brought Kendikian to see him. The pair were not informed that their conversation would be recorded, and no camera, microphone, or recording device was visible in the room. The door was closed while the two talked, but there was no express representation that their conversation would be private. The detectives knocked on the door before re-entering. Kendikian left the room a number of times to try to call her mother. After their conversation, Kendikian and Wensel were allowed to leave the station. The trial court entered a written order suppressing the recorded conversation between Kendikian and Wensel. The State appealed, arguing that there was no expectation of privacy in a police interview room, and that even if Kendikian held that

subjective belief, society is not prepared to recognize it as reasonable.

The Fourth Amendment serves to safeguard an individual's privacy from unreasonable governmental intrusions. A defendant may challenge the admission of evidence obtained by governmental intrusion only if she displays a legitimate expectation of privacy in the place invaded. In determining whether Kendikian had a reasonable expectation of privacy, the court analyzed whether she exhibited a subjective expectation of privacy and, if so, whether that subjective expectation is one that society is willing to recognize as reasonable. The latter inquiry is a question of law.

While a loss of privacy is an inherent incident of confinement, Kendikian and her husband were not confined; they were free to leave when they pleased. The court concluded that the actions of the detectives created an atmosphere such that a reasonable person could believe she had an expectation of privacy. Under these circumstances, Kendikian had a reasonable expectation of privacy that society is indeed prepared to recognize. The judgment of the trial court was affirmed.

Woodall v. State, No. 08-07-00015-CR (09/09/09)

Woodall was found guilty of engaging in organized criminal activity in connection with her ownership of the Naked Harem. She was sentenced to sixteen years' confinement. The other individuals named in the indictment as part of the combination were co-owner, Jeannie Coutta, and four managers of the club. Upon receiving transactional immunity, several managers, dancers, and former patrons testified that prostitution routinely occurred at the club and that Woodall was not only aware of it, she promoted it. The determinative issue in the appeal was the admission of grand jury testimony given by a then-fifteen-year-old girl who admitted to participating in acts of prostitution at the club.

The witness was called by the defense. She testified that she had been in an automobile accident at the age of 18 and suffered memory loss as a result. She could not remember speaking to the grand jury, nor could she recall the specifics of working at Naked Harem. The next day, the prosecutor attempted to re-call the witness but she did not appear. The prosecutor then proposed to read her previous grand jury testimony to the jury as a past recollection recorded. The defense objected on two grounds. First, counsel argued that the State failed to establish a predicate for admission under 803(5), and second, counsel argued that he would not be able to cross-examine the witness about her grand-jury testimony, thus violating Woodall's right of confrontation. The trial court overruled the objection and the State read into the record fifty-seven pages of grand jury testimony. The witness told the grand jury that she was fifteen and had been a dancer at the club for about a month. She used her school photo I.D. when seeking a position as a dancer. She went into private rooms with customers three or four times during each of her eight hour shifts and had sexual contact on numerous occasions.

The court reviewed the Confrontation Clause and the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). In all state and federal criminal prosecutions, the accused has a right to confront the witnesses against her. To implicate the Confrontation Clause, an out-of-court statement must be (1) made by an absent witness, and (2) testimonial in nature. Once the Confrontation Clause is implicated, the admission of testimonial hearsay violates the constitution unless (1) the declarant is shown to be unavailable to testify, and (2) the defendant had a prior opportunity to cross-examine her. The threshold question is whether the statements at issue are testimonial or non-testimonial in nature. Testimony before a grand jury and statements derived from police interrogations are indisputably testimonial. The State argued that the Confrontation Clause was not implicated because the witness was not absent from trial. While she did appear at trial and was questioned by defense counsel, she testified to a complete lack of memory. Under the rules of evidence, a witness who testifies to memory loss is unavailable as a witness. Her undisputed testimony about the car accident and resulting loss of memory established that she was unavailable. Once her unavailability was established, she remained unavailable so long as her memory was not recovered. Having concluded that admission of the evidence was error, the court turned to a harm analysis.

Confrontation Clause error is constitutional error subject to harm analysis under TEX.R.APP. 44.2(a). The court must reverse unless it finds beyond a reasonable doubt that the error did not contribute to conviction or punishment. The court concluded beyond a reasonable doubt that the grand jury testimony did not contribute to Woodall's conviction. This witness was just one of many former dancers who testified to the same end. Given the testimony of Woodall herself, the evidence of guilt was overwhelming. But the same could not be said for the punishment phase. The details of alleged acts of child prostitution contained in the fifty-seven page grand jury testimony were explosive testimony that likely had significant impact on the minds of the jurors during the punishment phase. No other child witness testified at trial, and the State sought a harsher punishment because the Appellant never apologized for allowing child prostitution to occur at her club. Woodall was eligible for probation, but was sentenced to sixteen years of confinement. The case was reversed for a new punishment hearing.