UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2907

JOHN ROGER COOPER,

Plaintiff-Appellant,

versus

MCDERMOTT INTERNATIONAL, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 1973)

July 6, 1995

Before KING and JONES, Circuit Judges, and LAKE, District Judge.[*]

By EDITH H. JONES, Circuit Judge:[**]

This case embodies the quintessence of forum shopping. An English citizen brought suit in Texas state court principally against a Panamanian corporation based upon a contract he signed in Dubai and injuries he sustained in Iran. After the case was removed to federal court, the district court granted the Panamanian corporation's motion to dismiss for lack of personal jurisdiction and granted summary judgment in favor of the codefendants. For the

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[*] District Judge for the Southern District of Texas, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

reasons outlined below, we affirm the dismissal, affirm in part and reverse in part the summary judgment, and order the remainder of the case remanded to state court.

BACKGROUND[1]

In March 1983, John Cooper, a British citizen, entered into a form employment agreement with McDermott International (International), which is incorporated in Panama and headquartered in Louisiana. The agreement provided that Cooper would perform sales and marketing activities on behalf of International as a senior sales representative in the Middle East.

While on a business trip to Iran in December 1985, Cooper was abducted at gunpoint by Islamic extremists. He was interrogated, beaten, tortured, and held captive in intolerable conditions on charges of espionage. After two years of captivity, Cooper was tried, convicted, and sentenced to "death plus ten years" by an Islamic Revolutionary Court. Over the next three years, Cooper endured mock executions and another trial. In April of 1991, Cooper was suddenly released from captivity and transported back to England. Forty-five days after his release, Cooper's employment agreement was terminated by International.

On June 1, 1993, Cooper commenced this action in Texas state court against International and McDermott Incorporated (McDermott), a subsidiary of International that is incorporated in

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[1] For purposes of this appeal, we take as true all allegations in plaintiff's petition and all uncontroverted admissible evidence offered by both parties in support of and in opposition to the motions considered by the district court.

Delaware, seeking damages for breach of contract and failure to provide him with a safe workplace. A First Amended Petition added as defendants Hudson Engineering Corporation and Hudson Products Corporation, both of which are incorporated and headquartered in Texas.[2]

Defendants removed the action to federal district court alleging that International and both Hudson companies were fraudulently joined solely to defeat McDermott's ability to remove this action to federal court. International moved pursuant to Federal Rule of Civil Procedure 12(b)(2) to dismiss Cooper's claims for lack of personal jurisdiction. Defendants also sought dismissal of McDermott and the Hudson companies for failure to state a claim. Fed. R. Civ. Proc. 12(b)(6).

On August 2, Cooper moved to remand the action back to state court. Two weeks later, Cooper moved to stay consideration of defendants' motions to dismiss pending disposition of his motion to remand. The district court, on August 30, ordered the parties to file and serve all responses to pending motions on or before September 13, 1993.

After considering the motions, responses, and evidence offered by all parties, the district court found that it lacked personal jurisdiction over International and accordingly granted its motion to dismiss without prejudice. The court also dismissed McDermott and the Hudson companies for Cooper's failure to state a

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[2] Hudson Products is a subsidiary of The Babcock & Wilcox Company, which is an indirect subsidiary of McDermott. Hudson Engineering is a direct subsidiary of McDermott.

claim upon which relief could be granted.[3] Because International and the Hudson companies had been fraudulently joined, the court had removal jurisdiction over McDermott and denied Cooper's motion to remand. Cooper now appeals all aspects of the district court's order.

DISCUSSION

1. Personal Jurisdiction over International.

We first address whether International was properly dismissed for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Behind McDermott's fraudulent joinder claim is the fact that both Cooper and International are foreign citizens; there would not be complete diversity if International remained as a defendant. Panalpina Welttransport GmBH v. Geosource, Inc., 764 F.2d 352, 354-55 (5th Cir. 1985) (existence of aliens on both sides of dispute destroys diversity jurisdiction).

Cooper chides the district court for failing to decide his motion to remand before considering International's motion to dismiss. The order of consideration of the motions is important in allocating the burden of proof and in determining the standard of proof required. In a Rule 12(b)(2) motion, the plaintiff has the burden of establishing a prima facie case of personal jurisdiction. Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 961 (5th Cir. 1994). In contrast, to establish that a party was fraudulently joined, a defendant has the

[3] The court sua sponte converted the motions to dismiss against McDermott and the Hudson Companies into motions for summary judgment and promptly granted the motions.

burden of demonstrating that "there is no possibility that the plaintiff would be able to establish a cause of action" against the party alleged to be fraudulently joined. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. Unit A Dec. 1981). By considering the motion to dismiss prior to the motion to remand, Cooper posits, the district court improperly saddled Cooper with the burden of proving a prima facie case of personal jurisdiction, rather than requiring International to prove no possibility of personal jurisdiction. This contention is wrong factually and legally.

First, in discussing the lack of personal jurisdiction, the district court explained:

> The defendants argue that the Court should ignore the citizenship of International because the Court lacks *in personam* jurisdiction over it. An allegation of fraudulent joinder may be based on the lack of any possibility that a plaintiff can succeed on the merits in state court against the fraudulently joined defendants, and on **the lack of any possibility that the state court can acquire jurisdiction over the fraudulently joined defendants**.

(citation omitted) (emphasis added). Analyzing the contacts International had with Texas, the court found them insufficient and concluded that International had been fraudulently joined. Contrary to Cooper's assertion, there is no indication that the district court applied anything but the "no possibility" standard appropriate for claims of fraudulent joinder.

Moreover, the district court was not required to decide Cooper's motion to remand before considering the motion to dismiss.

Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993), cert. denied, 114 S.Ct. 690, 126 L.Ed.2d 658 (1994). According to Villar, judicial economy favors affording district courts the latitude first to evaluate the motion to dismiss "because if the district court remands the proceeding, then the state court will probably have to decide the same motion to dismiss for lack of personal jurisdiction that the district court avoided." Id.

Turning to the merits of the challenge to personal jurisdiction, Cooper has asserted no facts that, taken alone or together, subjected International to general personal jurisdiction in Texas courts. Whether personal jurisdiction may be exercised over a nonresident is a question of law subject to de novo review. Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415, 418 (5th Cir. 1993). The exercise of personal jurisdiction over a foreign defendant is appropriate only if permitted by the long-arm statute of the state where the district court is located, and if the exercise of jurisdiction would not be unconstitutional. Villar, 990 F.2d at 1495. Because the Texas long-arm statute permits the exercise of personal jurisdiction to the extent allowed by the constitution,[4] the sole jurisdictional issue is whether exercise of personal jurisdiction would violate the constitution.

The district court's authority to subject a nonresident defendant to personal jurisdiction is limited by the Due Process Clause of the Constitution to instances where the defendant has

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[4] The Texas Supreme Court has held that the Texas long-arm statute, codified at Tex. Civ. Prac. & Rem. Code. Ann. § 17.042, extends as far as the constitution permits. Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990).

"certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)). Where, as in this case, the alleged injury does not arise out of or relate to the defendant's contacts with the forum, "due process requires that there be continuous and systematic contacts between the State and the foreign corporation to support an exercise of 'general' personal jurisdiction by that forum." Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987). See also Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240 (1958) (plaintiff must establish that the defendant "purposefully avail[ed]" itself in the forum, "thus invoking the benefits and protections of its laws."); Jones v. Petty-Ray Geophysical, Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir.), cert. denied, 113 S.Ct. 193, 121 L.Ed.2d 136 (1992) (for general jurisdiction to exist, the defendant must conduct "substantial activities in the forum state").

To support his contention that International is subject to personal jurisdiction in Texas, Cooper submits a lengthy list of International's Texas "contacts" he contends is sufficient to support personal jurisdiction over International:

Undisputed

> International has been a party defendant in Texas state court in at least three different actions between 1991 and 1993;

Three of International's sixteen directors work and reside in Texas;

International made charitable contributions to non-profit institutions located in Texas;

International and some of its employees are members of certain professional associations based in Texas;

International's stock shares were publicly traded in Texas, and as much as 5% of its shares had been purchased or owned by Texas residents;

International recruited Texas residents and students for employment;

Disputed

International did business with the Texas offices of its subsidiaries;

International entered into a joint venture with a Texas-based company;

International was involved in the construction of a gas processing plant in Texas and received a contract to construct a platform off the coast of Texas;

International maintained an office/facility in Texas; and

International leased property in Texas.

Closer examination of this list, however, reveals "contacts" that are largely insignificant, irrelevant, and unsupported by admissible evidence.[5]

Cooper contends, without supporting citations, that International's voluntary submission as a defendant to personal jurisdiction in other Texas cases somehow "judicially estops" or operates as a prospective waiver forever preventing International

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[5] The number of contacts with the forum state is not determinative. Quasha v. Shale Dev. Corp., 667 F.2d 483, 487 (5th Cir. 1982). "Whether due process is satisfied must depend rather upon the quality and nature" of the contacts. Perkins v. Benguet Cons. Mining Co., 342 U.S. 437, 447, 72 S.Ct. 413, 419 (1952) (citation omitted).

from again contesting personal jurisdiction in Texas. This court suggested quite the opposite in Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1363 n.4 (5th Cir. 1990). Therefore, the prior litigation does not advance Cooper's personal jurisdiction contention.

The remainder of undisputed "contacts" are insufficient as a matter of law to make out a prima facie case of personal jurisdiction. That fewer than one-fifth of the Board of Directors reside in the forum does not materially advance the argument that International purposefully availed itself of the protections of Texas law. Nor does the fact that International and some of its employees belong to professional organizations that happen to be based in Texas further an allegation of continuous and systematic contacts by International.

Even if the residency of the owners of a company's publicly traded stock could conceivably be relevant in personal jurisdiction analysis,[6] the ownership of a small minority of that stock by Texas residents cannot materially further Cooper's argument. Were this true, every publicly traded company in the United States could be haled into court in any domestic jurisdiction, virtually emasculating International Shoe and its progeny. We are also unpersuaded that International's charitable contributions to Texas-based organizations are of the nature or

[6] In detailing the lack of contacts with Texas in Helicopteros, the Supreme Court mentioned that none of the company's shareholders lived there. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 409, 411, 104 S.Ct. 1868, 1871, 80 L.Ed.2d 404 (1984). Unlike the case *sub judice*, shares of Helicopteros were not publicly traded. The importance of shareholder residency is thus unclear, but presumably much diminished, when the shares are publicly traded.

quality that would tend toward a finding of personal jurisdiction. Finally, because International's recruitment of Texas residents was purposeful, it does qualify as a bona fide contact with the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 409, 411, 104 S.Ct. 1868, 1871, 80 L.Ed.2d 404 (1984). The undisputed facts alone do not approach the due process requirements of International Shoe.

The disputed allegations of minimum contacts are more of the nature and quality typically associated with purposeful availment of the forum state's jurisdiction. Where jurisdictional facts are in dispute, "uncontroverted allegations in the plaintiff's complaint must be taken as true and conflicts between the facts contained in the parties' affidavits must be resolved" in favor of the party seeking to invoke the court's jurisdiction. D. J. Investments Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 546 (5th Cir. 1985). Therefore, Cooper contends, all of his disputed allegations of minimum contacts must be taken to be true.

However, the general rule of resolving conflicts in favor of the plaintiff applies to affidavits (or other admissible evidence), not merely allegations. See Fernandez-Montes v. Allied Pilots Assoc., 987 F.2d 278, 284 (5th Cir. 1993) (unsupported conclusory allegations are insufficient to withstand a motion to dismiss). None of Cooper's disputed allegations are supported by admissible evidence. In contrast, International's contentions denying the accuracy of the contacts are properly contained in

affidavits submitted by an International senior corporate officer, Peter Atkinson.[7]

All five disputed contacts are based upon information Cooper gained from publications. Cooper does not deny that accounts of events and facts in newspapers, magazines, and books are inadmissible hearsay. See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 391-92 (5th Cir. 1961). He does argue, however, that hearsay evidence should be admissible in opposition to a motion to dismiss, especially when there has been no discovery prior to the motion. We are not persuaded.

First, when faced with a motion to dismiss, a plaintiff must make a prima facie showing of jurisdiction through its own affidavits and supporting material. Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir. 1985). When directly contradicted by defendant's affidavit, hearsay evidence will not defeat a motion for dismissal under Rule 12(b)(2). See Kern v. Jeppesen Sanderson, Inc., 867 F.Supp. 525, 531 (S.D.Tex 1994); Welcher v. Michigan Mut. Ins. Co., 691 F.Supp. 1017, 1018-19 (S.D.Miss. 1988). Hearsay is not properly included in an affidavit. See, e.g., Garside v. Osco Drug, Inc., 895 F.2d 46, 49 (1st Cir. 1990) (affidavits must be based upon personal knowledge). The district court was correct in disregarding the "contacts" based

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[7] Cooper complains on appeal that Atkinson may not be a proper affiant because he may not have sufficient knowledge to support his affidavit testimony. The proper time and place to challenge an affidavit is in the district court prior to an unfavorable judgment. We do not consider this contention.

solely on hearsay evidence contradicted by International's affidavit.

Cooper cites an article from Financial World as his authority for the allegation that International leases property in Texas. In contrast, paragraph four of Atkinson's affidavit attests that International does not own or lease property in Texas, and paragraph three of his supplemental declaration specifically declares that the property in question was leased by McDermott and not by International. A copy of the lease confirming this was attached to the declaration. Cooper's sole support for his contention that International maintains an office in Texas is a Dunn & Bradstreet corporate directory. Paragraph four of Atkinson's affidavit declares that International does not have an office or other physical presence in Texas, and paragraph three of his supplemental declaration states that Dun & Bradstreet has acknowledged this was erroneous. A copy of the Dun & Bradstreet letter acknowledging the error was attached to the declaration. Cooper's hearsay allegations were correctly disregarded.

The Wall Street Journal and the New York Times serve as the lone bases for Cooper's assertions that International was involved in the construction of a gas processing plant in Texas and entered into a joint venture with a Texas-based company. Cooper relies on Moody's for his assertion that International does business with its own subsidiaries. International generally disputes via the Atkinson declaration that it conducted any business in Texas, but does address whether it did business with

its subsidiaries. Without deciding whether Atkinson's affidavit is sufficient to trump Cooper's hearsay, we find that even if true, these alleged transactions are insufficient as a matter of law to constitute the type of continuous and systematic contacts necessary to support general personal jurisdiction.[8] See Bearry, 818 F.2d at 372-73 (business transactions with a wholly-owned but corporately distinct Texas subsidiary insufficient to establish minimum contacts).

When considered as a whole, the limited contacts International had with Texas are less substantial than those enumerated in Helicopteros, which the Supreme Court held to be insufficient to satisfy due process. Helicopteros, 466 U.S. at 12-13, 104 S.Ct at 1874. In Helicopteros, the defendant negotiated a contract in Texas, had purchased eighty percent of its fleet of helicopters and other related equipment from Texas sellers at regular intervals over a seven year period at a price of more than four million dollars, and had sent pilots and other personnel to Texas for training and technical consultation. Id. at 411, 104 S.Ct. at 1870. International's recruitment of employees and minimal dealings with Texas-based companies including its subsidiaries is even less continuous and systematic than those in Helicopteros. Accordingly, we affirm the district court's dismissal of International as a party defendant.

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[8] Cooper's disputed allegation that International merged with a Texas-based company after this litigation began is unsupported and not properly before us. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 (5th Cir. Unit A Aug. 1981) (personal jurisdiction is determined at time service is made).

Cooper's protestations that he was denied the opportunity to conduct discovery prior to the district court's ruling on the motion to dismiss are equally unpersuasive. While it is true that this court "will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery," Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982), we have also held "[t]he decision not to permit depositions on a motion to dismiss for lack of personal jurisdiction is specifically one for the trial court's discretion, and . . . 'will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse.'" Id. We need not determine whether an abuse of discretion occurred, because plaintiff never requested any discovery. From the day the case was removed to federal court on jurisdictional grounds on July 2, 1993, until November 1, 1993, when the district court issued its summary judgment order, Cooper did not propound any interrogatories, request production of any documents or request any admissions, and did not notice any depositions. Cooper took no steps to procure the discovery he now claims he was denied.

Instead, Cooper twice threatened the district court that he would need to conduct substantial jurisdictional discovery unless his motion to remand was granted on the evidence submitted. Cooper's claim that he was "rebuffed" by the district court in his efforts to procure such discovery is fanciful in that no leave of court is required to seek such discovery. Further, Cooper never sought a stay of the court's ruling on the motion to dismiss in

order to conduct jurisdictional discovery. Cooper now weakly claims that he did not do so because he thought that the district court wanted to rule on the motion without further delay, and that defendant probably would have objected to such discovery anyway. Whether such a motion would have been denied as Cooper predicts, we will never know because no such motion was made.[9] In short, if any error was committed below, it was by Cooper.

2. Dismissal of Hudson Companies.

We now examine the propriety of the dismissal and subsequent grant of summary judgment in favor of the Hudson companies and McDermott. McDermott removed this case to federal district court alleging that the Hudson companies were fraudulently joined to defeat removal jurisdiction.[10]

We have long held that, in ruling upon a fraudulent joinder claim, a district court may "pierce the pleadings" and consider summary judgment type evidence such as affidavits and deposition testimony to determine whether the plaintiff's claim is cognizable under the substantive law of the forum state. See Ford v. Elsbury, 32 F.3d 931, 935 (5th Cir. 1994). As previously stated, the defendant bears the burden of demonstrating that there is "no possibility" that the plaintiff would be able to prove a

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[9] Additionally, International represented to the court in its responsive motion that it stood ready and willing to provide jurisdictional discovery if needed.

[10] Diversity suits "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Because the Hudson Companies are citizens of Texas, their inclusion in the suit would prevent removal.

cause of action against the party alleged to be fraudulently joined. B., Inc., 663 F.2d at 549.

In evaluating Cooper's First Amended Petition, the district court construed the pleadings as only alleging derivative liability against the Hudson companies and McDermott. This construction was spawned by the structure of plaintiff's petition, which offered two theories of derivative liability -- alter ego and single business enterprise. The placement of these theories early in the petition apparently suggested to the defendants and the district court that those were the only theories of liability Cooper was relying on. We read the petition differently.

The factual contentions contained in Cooper's petition sufficiently allege direct, and not just derivative, liability against the Hudson Companies and McDermott. Cooper repeatedly and explicitly pleads that he performed various tasks and was assigned specific duties on behalf of the Hudson companies, and to a lesser degree McDermott. In fact, Cooper alleges that he was en route to a meeting on behalf of Hudson Products when he was abducted. Cooper further alleges that "the defendants" had knowledge prior to his abduction that he was in danger, yet failed to notify or protect Cooper, even though they had a duty to do so. We are persuaded that Cooper has alleged direct tort causes of action for negligence, gross negligence, and intentional infliction of emotional distress against the Hudson companies and McDermott sufficient to raise a "possibility" that he could prove them in state court.

The same is not true for the contract cause of action. Cooper alleges breach of contract against all four defendants only in reference to the "Employment Agreement." The term "Employment Agreement" is earlier limited by the petition to the contract signed on or about March 27, 1983. Cooper alleges that the contract was between him and the "defendants." However, examination of the contract, included in the record on appeal, confirms the defendants' assertion that the only parties to the contract were Cooper and International. Therefore, because the petition nowhere alleges the existence of an implied contract, Cooper must rely upon his derivative liability theories of alter ego and single business enterprise to reach the Hudson Companies and McDermott in his contract cause of action.

Texas law permits a court to pierce the corporate veil when a corporation is the alter ego of its owners or shareholders, the corporation is used for illegal purposes, or the corporation is used as a sham to perpetrate a fraud. Fidelity & Deposit Co. v. Commercial Casualty Consultants, 976 F.2d 272, 274-75 (5th Cir. 1992). This theory is only invoked "when there is such unity . . . between corporation and corporation, that the separateness between the two has ceased, and holding only the corporation or just one of the corporations liable would result in injustice." Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd., 740 S.W.2d 838, 843 (Tex. Ct. App. 1987, no writ).

The single business enterprise theory of derivative liability is invoked in Texas when the corporations "integrate

their resources to achieve a common business purpose . . . ." Paramount Petroleum Corp. v. Taylor Rental Center, 712 S.W.2d 534, 536 (Tex. Ct. App. 1986, writ ref'd n.r.e).

Cooper has proffered no evidence that the defendants disregarded corporate formalities, were undercapitalized, or that International engaged in any fraud in its contractual dealings with Cooper. See Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 374-75 (Tex. 1984). On the other hand, defendants submitted uncontradicted summary judgment evidence establishing minimal shared directors, maintenance of separate financial records, separate tax returns, separate budgets, separate annual meetings, separate stock, and substantial separate capital. To the limited extent that employees are shared, their time and expenses are invoiced to the other corporation. Therefore, the district court correctly held that there is no possibility that Cooper could prove that the corporations are indistinguishable instrumentalities and conduits of each other or have integrated their resources to achieve a common business purpose such that they should be treated as alter egos or a single business entity.

"Summary judgment will always be appropriate in favor of a defendant against whom there is no possibility of recovery." Carriere v. Sears, Roebuck and Co., 893 F.2d 98, 102 (5th Cir. 1990). Accordingly, summary judgment was properly granted in favor of the Hudson companies and McDermott on Cooper's breach of contract claim.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the dismissal of International without prejudice, **AFFIRM** summary judgment in favor of the Hudson companies and International on the breach of contract cause of action, and **REVERSE** summary judgment on the tort causes of action with instructions to **REMAND** the remainder of the case to state court.