

**Opinion issued November 6, 2008**



**In The  
Court of Appeals  
For The  
First District of Texas**

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**NO. 01-08-00228-CV**

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**THOMAS A. ROSS D/B/A RHI CLAIMS SPECIALIST, Appellant**

**V.**

**NICON CONSTRUCTION, INC., Appellee**

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**On Appeal from the 151st District Court  
Harris County, Texas  
Trial Court Cause No. 2007-09985**

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**MEMORANDUM OPINION**

Appellant, Thomas A. Ross d/b/a RHI Claims Specialist (“Ross”), brings this interlocutory appeal from an order granting a special appearance filed by appellee,

Nicon Construction, Inc. (“Nicon”). We affirm.

## **BACKGROUND**

Ross is a Texas resident and a public insurance adjuster licensed in Texas and Florida. Nicon is a construction company based in Florida. Ronnie Gearhart is an employee of Nicon who lives and works in Florida, but also has a residence in Kingwood, Texas. This lawsuit arises out of Nicon’s alleged failure to account and pay commissions owed to Ross pursuant to a written contract for adjusting work he performed in Florida.

As a result of several hurricanes that hit Florida in 2004, Nicon found the demand for construction work greater than it could handle and began looking for subcontractors to assist in estimating construction projects with insurance companies. With Nicon’s knowledge and consent, Gearhart contacted people he knew in the construction business in Texas to see if they were interested in working for Nicon in Florida. From Florida, Gearhart called Ross in Texas and informed him of employment opportunities with Nicon in Florida. Gearhart told Ross that any contract with Nicon must be negotiated and executed by Joseph Lopez, Nicon’s president in Florida.

In 2004, Gearhart met Ross and representatives of CST Environmental for lunch in Humble, Texas to discuss the construction market in Florida. At lunch, Ross

expressed interest in working for Nikon, but he and Gearhart did not discuss specifics of any contract. Gearhart, as an employee and not a director, officer or agent of Nikon, did not possess the authority to enter into contracts on Nikon's behalf. Ross negotiated a contract with Lopez by telephone and fax. Ultimately, Nikon faxed a written contract to Ross, which Ross signed and returned to Nikon by fax.

Ross became a licensed insurance adjustor in the state of Florida. Ross also rented a place to live and pursued other business opportunities beyond his employment with Nikon while in Florida. All services rendered by Ross and his employees under the contract with Nikon took place in Florida. Payments pursuant to Ross' contract were picked up by Ross at Nikon's Florida offices.

No officers or directors of Nikon ever met with Ross or other subcontractors in Texas. Nikon does not now nor has it ever carried out business, held employees, bank accounts, property, phone numbers or offices in Texas. Nikon has no registered agent for service of process in Texas.

This suit arises from Ross' claim for damages resulting from Nikon's alleged failure to account and pay for services rendered under the contract with Ross. Nikon timely filed a motion contesting in personam jurisdiction and requesting a special appearance. The court below granted Nikon's special appearance.

## STANDARD OF REVIEW

The plaintiff bears the initial burden of pleading allegations sufficient to bring a nonresident defendant within the personal jurisdiction of a Texas court. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002); *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 445–46 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Upon filing a special appearance, however, the nonresident defendant assumes the burden of negating all the bases of personal jurisdiction alleged by the plaintiff. *BMC Software*, 83 S.W.3d at 793. The existence of personal jurisdiction is a question of law, reviewed de novo, but that determination 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.). When, as here, the trial court issues findings of fact and conclusions of law, we may review the findings of fact on legal and factual sufficiency grounds and review the conclusions of law de novo as a legal question. *Silbaugh v. Ramirez*, 126 S.W.3d 88, 94 (Tex. App.—Houston [1st Dist.] 2002, no pet.). If there is more than a scintilla of evidence to support a factual finding, the legal sufficiency challenge fails. *Shell Compañia Argentina de Petroleo, S.A. v. Reef Exploration, Inc.*, 84 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A ruling will be reversed for factual insufficiency only if it is so against the great weight and preponderance of the

evidence as to be manifestly erroneous or unjust. *Id.* We treat unchallenged fact findings as true. *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App.—Dallas 1993, writ denied). We review the trial judge’s legal conclusions de novo. *BMC Software*, 83 S.W.3d at 794.

### IN PERSONAM JURISDICTION

Texas courts may assert in personam jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990). The Texas Long Arm Statute provides that, “[i]n addition to other acts,” a nonresident does business in Texas if it (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).

Ross’s breach of contract claims are based on Nikon’s recruitment of him in Texas for employment in Florida. Thus, the “doing-business” requirement for

jurisdiction under the long-arm statute is met. Nevertheless, the exercise of jurisdiction under the statute must be consistent with federal and state constitutional guarantees of due process. *Moki Mac*, 221 S.W.3d at 575; *Schlobohm*, 784 S.W.2d at 356.

The long-arm statute's broad doing-business language allows the statute to "reach as far as the federal constitutional requirements of due process will allow." *Moki Mac*, 221 S.W.3d at 575 (quoting *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P. L. C.*, 815 S.W.2d 223, 226 (Tex. 1991)). Therefore, the requirements of the long-arm statute are met if an assertion of jurisdiction accords with federal due-process limitations. *Moki Mac*, 221 S.W.3d at 575.

Federal due process demands that (1) the nonresident defendant have purposefully established sufficient minimum contacts with the forum state and (2) exercising jurisdiction over the nonresident will not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154 (1945); *Moki Mac*, 221 S.W.3d at 575. Minimum contacts are sufficient when the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus, invoking the benefits and protections of its laws." *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co.*, 326 U.S. at 319, 66 S. Ct. at 154); *Michiana Easy Livin' Country, Inc. v. Holten*, 168

S.W.3d 777, 784 (Tex. 2005).

The “purposeful availment” inquiry of the minimum contacts analysis requires that we consider three issues. *See Michiana*, 168 S.W.3d at 784–75. First, only the defendant’s contacts with the forum are relevant, not the unilateral activity of any third party. *Id.* at 785. Second, the contacts relied upon must be purposeful, rather than fortuitous. *Id.* Third, a defendant must seek some benefit, advantage or profit by ‘availing’ itself of the jurisdiction. *Id.* In contrast, a defendant may purposefully avoid availing itself of the jurisdiction by structuring its transactions in such a way as to neither profit from the forum’s laws nor be subject to its jurisdiction. *Id.*

Purposeful availment “ensures that a defendant will not be haled into a jurisdiction solely as a result of . . . the ‘unilateral activity of another party or a third person.’” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)). Random, fortuitous, or attenuated contacts are insufficient. *BMC Software*, 83 S.W.3d at 795; *Silbaugh*, 126 S.W.3d at 95. The quality and nature of the contact is determinative—not their number. *Silbaugh*, 126 S.W.3d at 95.

### **Specific Personal Jurisdiction**

A minimum-contacts analysis is divided into general and specific jurisdiction.

*Id.* General personal jurisdiction requires that the contacts in Texas be continuous and systematic, but does not require that the cause of action arise from or relate to activities conducted in Texas. *BMC Software*, 83 S.W.3d at 796. For a court to exercise specific jurisdiction over a nonresident defendant, the defendant's contacts with Texas must be purposeful, and the cause of action must arise from or relate to those contacts. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). Ross does not contend that Nikon's contacts with Texas were sufficient to establish general personal jurisdiction; thus we consider only whether the state can exercise specific personal jurisdiction over Nikon.

### **Purposeful Availment**

In an effort to establish that Nikon had sufficient minimum contacts with Texas, i.e., purposely availed itself of the privilege of conducting activities within the State of Texas, Ross relies on Gearhart's contacts with Texas. Specifically, Ross points to the following:

1. Gearhart, a Nikon employee, contacted Ross in Texas by telephone to see if Ross was interested in coming to work in Florida for Nikon;
2. Gearhart had lunch with Ross in Texas, at which time they discussed the construction market in Florida. No contract terms were discussed.
3. Ross, in Texas, negotiated with Lopez of Nikon, in Florida, regarding



the terms of his employment contract.

4. Nikon faxed a contract to Ross in Texas, which Ross signed and faxed back to Nikon in Florida.

In evaluating these contacts to determine whether there was “purposeful availment, we consider (1) the defendant’s contacts only; (2) whether the contacts were purposeful, rather than fortuitous, and (3) whether the defendant sought some benefit, advantage or profit by ‘availing’ itself of the jurisdiction, or whether it purposefully avoided availing itself of the jurisdiction by structuring its transactions in such a way as to neither profit from the forum’s laws nor be subject to its jurisdiction. *Michiana*, 168 S.W.3d at 784-785.

Nikon’s contacts in this case include allowing Gearhart, its employee, to contact prior business colleagues in Texas to determine whether they might be interested in working for Nikon in Florida, and in Lopez’s negotiating with and faxing a contract from Florida to Ross in Texas.

That Gearhart was originally from Texas and had former business contacts here is a fortuitous event; thus Nikon’s contact with Ross through Gearhart is not a “purposeful” contact. In addition, Gearhart did not have the authority to negotiate contract terms with Ross, and, in fact, no contract terms were discussed at their lunch meeting in Houston. Thus, it cannot be said that Gearhart entered a into contract with

Ross in Texas, which Nikon then ratified, thus subjecting it to personal jurisdiction. *See Maurice Pierce & Assoc., Inc. v. Computerage, Inc.*, 608 F. Supp. 173, 177 (N.D. Tex. 1985) (nothing that “ratification of contract may support an assertion of personal jurisdiction”).

Gearhart’s trip to Texas to meet with his former associates, including Ross, though approved by Nikon, is an attenuated contact with the forum because it is based merely on the fact that Gearhart had a house in Texas and knew some people in the construction industry here.

As such, this case is distinguishable from *Astorga v. Connleaf, Inc.*, 962 F. Supp. 93 (W.D. Tex. 1996). In *Astorga*, the defendant, contracted with Carlos Moran, a Texas-based labor contractor, to recruit migrant workers to harvest tobacco in Massachusetts. *Id.* at 94. The defendant corporation worked closely with Moran by providing him with literature to recruit employees and contracts that were ultimately signed by the plaintiffs. *Id.* After Moran recruited the plaintiff migrant farm workers, the defendant corporation sent Moran a contracting fee, as well as enough money to pay each plaintiff’s travel expenses. *Id.* at 95. The court held that these were sufficient minimum contacts to assert jurisdiction over the nonresident defendant corporation. *See id.* at 95–96.

In contrast, in this case, Nikon did not specifically target Texas employees by hiring a labor recruiter in the state. In *Astorga*, the nonresident defendant corporation provided the Texas recruiter it had hired with recruiting materials and actual contracts, which Moran then presented to the plaintiffs. In this case, Nikon merely allowed its employee to contact former business associates to see if they were interested in working for Nikon. No contracts or recruiting materials were given to Gearhart, and, in fact, Gearhart specifically told Ross that any and all negotiations would have to take place with Lopez in Florida. Unlike the ongoing recruiting efforts that Moran provided, which specifically targeted Texas migrant farm workers, Nikon did not conduct any ongoing recruiting efforts directed at Texas; it merely permitted Gearhart to contact some former business associates who happened to live in Texas.

Therefore, we conclude that Nikon's contacts with Texas, through Gearhart, were "random, fortuitous, and attenuated," and not a purposeful availing of the right to conduct activities in the forum state.

We also note that rather than purposefully seeking some benefit, advantage or profit by 'availing' itself of Texas jurisdiction, Nikon purposefully avoided availing itself of the jurisdiction by structuring its transactions in such a way as to neither profit from the forum's laws nor be subject to its jurisdiction. More specifically, we note that the contract between Ross and Nikon contained a forum selection clause

designating that Florida law would apply.<sup>1</sup> “[I]nsertion of a clause designating a foreign forum suggests that no local availment was intended.” *Michiana*, 168 S.W.3d at 792. As such, a choice-of-law provision should not be ignored in considering whether a defendant has purposefully availed the benefits and protections of a State’s laws. *Id.*

### CONCLUSION

Because Nikon did not “purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,” *Moki Mac*, 221 S.W.3d at 575 (quoting *Int’l Shoe Co.*, 326 U.S. at 319, 66 S. Ct. at 154), Nikon lacks sufficient minimum contacts to support an assertion of specific jurisdiction in Texas. Because Nikon did not have sufficient minimum contacts to support an assertion of specific jurisdiction in Texas, we need not address whether Nikon’s liability arises from or relates to the forum contacts. *See Moki Mac*, 221 S.W.3d at 579.

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<sup>2</sup> We note that, on appeal, Ross contends that the choice-of-law clause is indefinite or incomplete and cannot be enforced. Such argument was never raised in the trial court and, therefore, is waived. TEX. R. APP. 33.1(a). Nevertheless, we do not consider whether the choice-of-law provision can be enforced; we merely consider its existence as a factor weighing against finding purposeful availment by Nikon.

We affirm the trial court's interlocutory order granting Nikon's special appearance.

Sherry Radack  
Chief Justice

Panel consists of Chief Justice Radack, Justice Nuchia and Justice Higley.