

Opinion issued November 10, 2010



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

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NO. 01-09-01094-CV

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**MORRIS INDUSTRIES, INC., Appellant**

**V.**

**TRIDENT STEEL CORPORATION, Appellee**

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**On Appeal from the 215th District Court  
Harris County, Texas  
Trial Court Case No. 2009-57578**

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**MEMORANDUM OPINION**

In this interlocutory appeal, appellant, Morris Industries, Inc. (“Morris”), appeals the trial court’s order denying its special appearance.<sup>1</sup> Appellee, Trident

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<sup>1</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 2008) (authorizing interlocutory appeal of order denying special appearance).

Steel Corporation (“Trident”) sued Morris, a New Jersey corporation, alleging claims for breach of contract and breach of warranty. Morris filed a special appearance that the trial court denied. Morris contends that the trial court erred, first, by failing to hold a hearing on its special appearance and, second, by denying its special appearance. We conclude that Morris met its special appearance burden to negate Trident’s jurisdictional allegations. We reverse and remand with instructions to the trial court to consider Trident’s motion for continuance of the hearing.

### **Background**

Morris is a New Jersey corporation headquartered in New Jersey. Morris makes and distributes pipes, casings, and other items used in the oil and gas industry. In February 2009, Trident—a Missouri corporation with offices in Houston, Texas—ordered oilfield couplings from Morris specifying delivery to the Port of Houston. Morris began delivering couplings to the Port of Houston. Trident became dissatisfied Morris’s couplings, stating that the couplings failed testing performed by Trident and Trident’s customers. Accordingly, Trident began rejecting Morris’s deliveries of the couplings, eventually filing suit against Morris in Harris County, alleging breach of contract and breach of warranty.

Morris specially appeared, asserting that it is not subject to personal jurisdiction in Texas. In support, Morris filed the affidavit of its vice-president,

Michael Stern. Trident did not file any affidavits controverting the facts asserted in Stern's affidavit. Before the special appearance hearing, Trident filed moved for a continuance, seeking more time to conduct discovery on the jurisdictional issue. The trial court, without expressly ruling on Trident's motion for continuance, denied Morris's special appearance.

### **Personal Jurisdiction**

In its second issue, Morris contends that the trial court erred in denying its special appearance because it is not subject to either specific or general jurisdiction in Texas.

#### **A. Standard of Review**

A legal conclusion concerning the existence of personal jurisdiction is a question of law subject to de novo review, but that conclusion must sometimes be preceded by the resolution of underlying factual disputes. *Am. Type Culture Collection Inc. v. Coleman*, 83 S.W.3d 801, 805–06 (Tex. 2002); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). “When . . . the trial court does not issue fact findings, we presume that the trial court resolved all factual disputes in favor of its ruling.” *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 445 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Am. Type Culture Collection*, 83 S.W.3d at 805–06). However, “we review de novo if the underlying facts are undisputed or otherwise established.” *Preussag Aktiengesellschaft v.*

*Coleman*, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.).

A plaintiff bears the initial burden to plead allegations sufficient to bring a non-resident defendant within the terms of the Texas long-arm statute. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010); *Am. Type Culture Collection*, 83 S.W.3d at 807. To establish jurisdiction over a nonresident defendant, the plaintiff must plead a “connection between the defendant[’s] alleged wrongdoing and the forum state.” *Kelly*, 301 S.W.3d at 655. If the plaintiff pleads sufficient jurisdictional allegations, the burden shifts to the nonresident defendant to negate all bases of jurisdiction alleged. *Id.* at 658; *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). If the plaintiff does not plead sufficient jurisdictional facts, the defendant meets its burden to negate jurisdiction by proving it is not a Texas resident. *Kelly*, 301 S.W.3d at 658–59. To prevail on a special appearance, a defendant may present evidence that it has no contacts with Texas, effectively disproving the plaintiff’s allegations; if the plaintiff does not present the trial court with evidence establishing personal jurisdiction, it risks dismissal of its lawsuit. *Id.* at 659.

## B. Analysis

A court may assert personal jurisdiction over a non-resident defendant if the requirements of the Due Process Clause of the United States Constitution<sup>2</sup> and the Texas long-arm statute<sup>3</sup> are both satisfied. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984); *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). “Because the Texas long-arm statute reaches ‘as far as the federal constitutional requirements of due process will allow,’ the statute is satisfied if the exercise of personal jurisdiction comports with federal due process.” *Preussag Aktiengesellschaft*, 16 S.W.3d at 113 (quoting *CSR, Ltd.*, 925 S.W.2d at 594). We thus examine whether a Texas court’s exercise of jurisdiction over Morris would comport with the requirements of federal due process. *See id.*

To comply with federal due process requirements, “the nonresident defendant must have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued there.” *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)). “If the nonresident defendant has purposefully availed itself of the privileges and benefits of conducting business in a state, it has sufficient contacts to confer personal jurisdiction.” *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at

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<sup>2</sup> U.S. CONST. amend. XIV, § 1.

<sup>3</sup> *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 2008).

2183). “Random, fortuitous, or attenuated contacts do not suffice.” *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183).

To assess whether a non-resident defendant has purposefully availed himself of the privileges and benefits of conducting business in Texas, we apply three principles. *See Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). First, only the defendant’s own actions may constitute purposeful availment; a defendant may not be haled into a jurisdiction based on the unilateral activities of a third party. *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183). Second, the defendant’s acts must be purposeful, and a showing of random, isolated, or fortuitous contacts is insufficient. *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183 and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984)). Third, a defendant must seek some benefit, advantage, or profit through his purposeful availment, because jurisdiction is based on notions of implied consent; that is, by seeking the benefits and protections of a forum’s laws, a non-resident consents to suit there. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980)). The purposeful availment test should focus on “the defendant’s efforts to avail himself of the forum” and not “the form of the action chosen by the plaintiff.” *Moki Mac*, 221 S.W.3d at 576. Due process also requires that the exercise of personal

jurisdiction over a nonresident defendant “comport with fair play and substantial justice.” *Preussag Aktiengesellschaft*, 16 S.W.3d at 113.

Minimum-contacts analysis is further divided into general jurisdiction and specific jurisdiction. *Preussag Aktiengesellschaft*, 16 S.W.3d at 114.

### **1. General Jurisdiction**

General jurisdiction does not require that the cause of action relate directly to the defendant’s contacts with the forum. *Preussag Aktiengesellschaft*, 16 S.W.3d at 114 (citing *CSR, Ltd.*, 925 S.W.2d at 595). To negate general jurisdiction, a defendant must show that its contacts in Texas were not “continuous and systematic.” *Id.* To support general jurisdiction, the defendant’s forum activities must have been “substantial,” which requires stronger evidence of contacts than for specific jurisdiction. *Id.* The Texas Supreme Court has described it as a “more demanding minimum contacts analysis.” *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007) (quoting *CSR, Ltd. v. Link*, 925 S.W.2d at 595). “Usually, ‘the defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction.’” *Id.* (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5 (3d ed. 2010)).

## 2. Specific Jurisdiction

A court may exercise specific personal jurisdiction over a non-resident defendant if (1) the non-resident purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there, and (2) the controversy arises out of or is related to the non-resident's contacts with the forum state. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004). The non-resident defendant's purposeful conduct, not the unilateral acts of the plaintiff, must have caused the contact. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414, 104 S. Ct. at 1872. Foreseeability of an injury in Texas is not solely determinative, *Michiana Easy Livin' Country*, 168 S.W.3d at 789, but foreseeability of causing injury is "an important consideration" in deciding whether a nonresident defendant has purposefully established minimum contacts. *BMC Software*, 83 S.W.3d at 795.

Even if a non-resident has purposefully availed himself of the benefits of conducting business in Texas, Texas courts do not have specific jurisdiction over the non-resident unless the cause of action "arises from or is related to an activity conducted within the forum." *Id.* at 796. We focus our analysis on the relationship among the non-resident, the forum, and the litigation to determine if the alleged liability arises from or is related to an activity conducted in Texas. *Counter Intelligence, Inc. v. Calypso Waterjet Sys., Inc.*, 216 S.W.3d 512, 517 (Tex. App.—



Dallas 2007, no pet. h.). That is, the non-resident's conduct must have been purposely directed towards or have occurred in the forum and must have a "substantial connection" with the litigation's operative facts. *Moki Mac*, 221 S.W.3d at 584–85; *Glattly*, 177 S.W.3d at 447.

### **3. Application to Relevant Facts**

Here, Trident's petition contains no allegation that Morris had continuous or systematic contacts with Texas. Nor does Trident's petition contain allegations that Morris had any longstanding or substantial business activities in Texas, such as marketing or maintaining an office here. *See PHC-Minden*, 235 S.W.3d at 168. In his affidavit, Stern, Morris's vice-president, stated that Morris is a New Jersey corporation with its office in New Jersey and that Morris "does not have an office in Texas, does not advertise or solicit business in Texas, [and] does not have any employees in Texas." We conclude that this sworn statement is sufficient to negate general jurisdiction as a basis for the trial court's exercise of personal jurisdiction. *See Kelly*, 301 S.W.3d at 659; *see also PHC-Minden*, 235 S.W.3d at 168 (requiring for general jurisdiction that defendant have "substantial" forum activities such as "longstanding business in the forum state").

In its petition, Trident alleges that the court may exercise specific jurisdiction over Morris because the parties' contract required performance in Harris County, Texas. Specifically, Trident alleges that it ordered the oilfield

couplings from Morris for delivery at the Port of Houston. In Stern's affidavit, Morris responded to these jurisdictional allegations by stating that Morris, at its office in New Jersey, received purchase orders from Trident's office in St. Louis, Missouri. Morris also stated that the couplings were sent to the Port of Houston "[a]t the request of Trident." Because Trident's actions cannot be considered purposeful availment by Morris, Morris sufficiently negated this basis for jurisdiction. *See Michiana Easy Livin' Country*, 168 S.W.3d at 785 (holding non-resident defendant that was contacted by Texas resident and asked to deliver recreational vehicle to Texas did not purposefully avail itself of Texas law; unilateral act of Texas resident insufficient to support jurisdiction). Trident offered no countervailing evidence. We therefore conclude that Morris negated Trident's assertion that the trial court had personal jurisdiction over it.

#### **4. Disposition**

In its prayer, Morris requests that this Court render an order of dismissal because it is not subject to personal jurisdiction. In response, Trident asks that we remand for further proceedings to allow the trial court to consider Trident's request for a continuance. Ordinarily, when an appellate court determines that the trial court erroneously denied a nonresident's special appearance, the court renders judgment dismissing the claims against the nonresident defendant for want of jurisdiction. *See, e.g., BMC Software*, 83 S.W.3d at 801 (holding no evidence

supported trial court's determination that nonresident defendant subject to personal jurisdiction and rendering judgment of dismissal); *Johnson v. Kindred*, 285 S.W.3d 895, 904 (Tex. App.—Dallas 2009, no pet.) (stating proper disposition when nonresident defendant negated alleged minimum contacts is rendering judgment of dismissal).

Here, because the trial court denied the Morris's special appearance, it did not need to consider Trident's request for additional time to conduct jurisdictional discovery. However, because we conclude that Stern's affidavit negated Trident's jurisdictional allegations, the burden shifts to Trident to bring forth evidence establishing personal jurisdiction over Morris. *See Kelly*, 301 S.W.3d at 659 (once defendant negates jurisdictional allegations, plaintiff risks dismissal if it fails to establish jurisdiction over defendant). "Jurisdictional discovery 'can be a vital part of resolving a special appearance.'" *Lamar v. Poncon*, 305 S.W.3d 130, 139 (Tex. App.—Houston [1 Dist.] 2009, pet. denied) (quoting *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 307 (Tex. 2004)). Additionally, a trial court faced with a request for a continuance to allow additional time for jurisdictional discovery has discretion whether to continue the special appearance hearing. *Id.* (citing *Barron v. Vanier*, 190 S.W.3d 841, 847 (Tex. App.—Fort Worth 2006, no pet.); *see also BMC Software*, 83 S.W.3d at 800. We conclude that, in this case, it is appropriate to remand the case for the trial court to consider Trident's request for additional time

to conduct jurisdictional discovery. *See Lamar*, 305 S.W.3d at 139 (affirming trial court’s determination that no specific jurisdiction existed but remanding for further discovery concerning general jurisdiction); *see also Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (holding, in healthcare liability claim, that where trial court erroneously determined expert report was adequate, court of appeals has discretion to remand case to trial court to consider granting 30-day extension for plaintiff to cure deficiencies); *Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 822 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (“Remand is also appropriate when a case, for any reason, has not been fully developed.”) (citing *United States Fire Ins. Co. v. Carter*, 473 S.W.2d 2, 3 (Tex. 1971)). Importantly, we note that Morris complains that the trial court failed to hold an evidentiary hearing. Thus, both parties contend that should they lose the legal ruling, there is more work to be done in the trial court.

## **Conclusion**

We reverse the trial court's order denying Morris's special appearance and remand the case to allow the trial court to consider Trident's motion for continuance requesting jurisdictional discovery.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Bland and Massengale.