

Opinion issued October 10, 2017



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

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NO. 01-16-00943-CV

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**OMAR SALGADO, Appellant**  
V.  
**OMNISOURCE CORPORATION, Appellee**

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**On Appeal from the 295th District Court  
Harris County, Texas  
Trial Court Case No. 2015-25643**

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**MEMORANDUM OPINION**

In this interlocutory appeal,<sup>1</sup> appellant, Omar Salgado, challenges the trial court's order granting the special appearance of appellee, OmniSource Corporation

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<sup>1</sup> See TEX. CIV. PRAC. & REM. CODE ANN. §51.014(7) (Vernon Supp. 2016).

(“OmniSource”), in his suit against it for negligence. In his sole issue, Salgado contends that the trial court erred in granting OmniSource’s special appearance.

We affirm.

### **Background**

In his Fourth Amended Petition, Salgado alleges that on November 6, 2014, as a result of the negligence of OmniSource, along with CS Metals, Ciro Solache, McDermott International, Inc., and McDermott, Inc. (collectively, the “other defendants”), he sustained serious injuries when a “large piece of metal struck” him at a “demolition site” in Morgan City, Louisiana. According to Salgado, OmniSource engages in the business of selling processed scrap metal. It is incorporated and maintains its principal place of business in Indiana. The other defendants are Texas residents. Salgado “is and has at all times been an employee of CS Metals.” OmniSource hired CS Metals to perform work on the Louisiana jobsite, which was owned by McDermott International, Inc. and/or McDermott, Inc.

OmniSource filed a special appearance, asserting that Texas does not have general or specific jurisdiction over it and exercising jurisdiction over OmniSource in Texas would offend traditional notions of fair play and substantial justice. It attached to its special appearance an affidavit executed by Richard Poinatte, a “Vice President” and “Assistant Secretary” for OmniSource. He testified that OmniSource is organized and exists under the laws of Indiana, its principal place of business is in

Indiana, and it is not domiciled or registered to do business in Texas. OmniSource does not own real property, have any bank accounts, or have any employees or agents in Texas. And it “does not maintain an office, place of business, or telephone number” in Texas. Nor does it “direct any business activity to the State of Texas.” Further, Poinatte explained that “[t]ravel to Harris County, Texas in connection with this lawsuit would be a significant inconvenience and burden to OmniSource, its agents, and employees.” And the “jobsite at which [Salgado’s] injury allegedly occurred [is] located in Morgan City, Louisiana, not” in Texas.

Salgado filed an initial response and four supplemental responses to OmniSource’s special appearance. In his initial response, Salgado sought a continuance for discovery of jurisdictional facts.<sup>2</sup> In his second response, he moved to compel jurisdictional discovery from OmniSource. And in his third and fourth responses, Salgado argued that OmniSource is subject to specific jurisdiction in Texas because it entered into agreements with Texas companies related to this litigation. He further argued that OmniSource is subject to general jurisdiction in Texas because it sought and received the right to transact business in Texas, “has been filing Texas Franchise Tax Reports since 2006,” and previously was a party to

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<sup>2</sup> Salgado also challenged the sufficiency of Poinatte’s affidavit, asserted that OmniSource’s parent company’s contacts should be considered in the jurisdictional analysis, and asserted OmniSource’s website specifically solicits Texas customers. Salgado does not raise these arguments on appeal. *See* TEX. R. APP. P. 38.1(i).

other suits in Texas, both as a plaintiff and as a defendant. Salgado attached to his responses the pleadings from other suits filed nearly thirty years ago; Texas Comptroller's website documents stating that OmniSource's right to transact business in Texas is active; deposition excerpts from a CS Metals representative who testified that she was in Texas at all times during the negotiation and execution of its agreement with OmniSource; a list of Texas entities that are purportedly customers of OmniSource; and Texas Franchise Tax Public Information Reports showing that OmniSource, at one time, had a registered agent with an office in Texas.

In its reply to Salgado's second supplemental response, OmniSource argued that its agreement with CS Metals related to this case does not support specific jurisdiction because it was for work to be performed in Louisiana, not in Texas, and contracting with a Texas resident alone cannot support the exercise of jurisdiction over a nonresident defendant. In regard to general jurisdiction, OmniSource argued that its registration to do business with the Texas Comptroller, where it is not registered with the Texas Secretary of State, and the fact that it has Texas customers is not sufficient to show continuous and systematic contacts that satisfy due process.

Following a hearing, the trial court granted the special appearance of OmniSource and dismissed Salgado's claims against it.<sup>3</sup>

### **Standard of Review**

The existence of personal jurisdiction is a question of law, which must sometimes be preceded by the resolution of underlying factual disputes. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Paul Gillrie Inst., Inc. v. Universal Comput. Consulting, Ltd.*, 183 S.W.3d 755, 759 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.). When the underlying facts are undisputed or otherwise established, we review a trial court's denial of a special appearance de novo. *Paul Gillrie Inst.*, 183 S.W.3d at 759. Where, as here, a trial court does not issue findings of fact or conclusions of law with its special appearance ruling, all fact findings necessary to support the judgment and supported by the evidence are implied. *Marchand*, 83 S.W.3d at 795; *Paul Gillrie Inst.*, 183 S.W.3d at 759.

A trial court determines a “special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as

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<sup>3</sup> There is no record of a hearing on OmniSource's special appearance. Thus, we presume that any such hearing was “nonevidentiary” and “the trial court considered only the evidence filed with the clerk.” *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783 (Tex. 2005).

may be filed by the parties, the results of discovery processes, and any oral testimony.” TEX. R. CIV. P. 120a(3). The plaintiff bears the initial burden of pleading allegations sufficient to bring a nonresident defendant within the provisions of the Texas long-arm statute. *Am. Type Culture Collection v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002); *Paul Gillrie Inst.*, 183 S.W.3d at 759. The burden of proof then shifts to the nonresident to negate all the bases of jurisdiction alleged by the plaintiff. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985); *see also Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010) (“Because the plaintiff defines the scope and nature of the lawsuit, the defendant’s corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff’s pleading.”).

### **Personal Jurisdiction**

In his sole issue, Salgado argues that the trial court erred in concluding that Texas does not have personal jurisdiction over OmniSource because OmniSource does business in Texas, his claims “arise from or relate to Omni[S]ource’s contacts with Texas,” and OmniSource has “continuous and systematic contacts with Texas.”

A court may assert personal jurisdiction over a nonresident defendant only if the requirements of both the Fourteenth Amendment’s due process clause and the Texas long-arm statute are satisfied. *See* U.S. CONST. amend. XIV, § 1; TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 2015); *Guardian Royal Exch.*

*Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226–27 (Tex. 1991). The Texas long-arm statute allows a court to exercise personal jurisdiction over a nonresident defendant who does business in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. A nonresident “does business” in Texas if it “contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part” in Texas, it “commits a tort in whole or in part” in Texas, or it “recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside the state.” *Id.* The Texas Supreme Court has repeatedly interpreted this statutory language “to reach as far as the federal constitutional requirements of due process will allow.” *Guardian Royal*, 815 S.W.2d at 226. Therefore, the requirements of the Texas long-arm statute are satisfied if the exercise of personal jurisdiction comports with federal due process limitations. *Id.*

The United States Constitution permits a state to assert personal jurisdiction over a nonresident defendant only if it has some minimum, purposeful contacts with the state and if the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *Dawson–Austin v. Austin*, 968 S.W.2d 319, 326 (Tex. 1998). A nonresident who has purposefully availed himself of the privileges and benefits of conducting business in the state has sufficient contacts with the state to confer personal jurisdiction. *See Guardian Royal*, 815 S.W.2d at 226.

The “purposeful availment” requirement has been characterized by the Texas Supreme Court as the “touchstone of jurisdictional due process.” *Michiana*, 168 S.W.3d at 784. In *Michiana*, the court articulated three important aspects of the purposeful availment inquiry. *Id.* at 785. First, only the defendant’s contacts with the forum count. *Id.* This ensures that a defendant is not haled into a jurisdiction solely by the unilateral activities of a third party. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)). Second, the acts relied on must be purposeful; a defendant may not be haled into a jurisdiction solely based on contacts that are “random, isolated, or fortuitous.” *Id.* (citing *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 by ‘availing’ itself of the jurisdiction” because “[j]urisdiction is premised on notions of implied consent” and by “invoking the benefits and protections of a forum’s laws, a nonresident consents to suit there.” *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980)).

A defendant’s contacts with a forum can give rise to either general or specific jurisdiction. *Marchand*, 83 S.W.3d at 795. General jurisdiction is present when a nonresident “corporation’s ‘affiliations with the [s]tate are so continuous and systematic as to render [it] essentially at home in the forum [s]tate,’” even if the cause of action did not arise from or relate to activities conducted within the forum



state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011)); *see also Marchand*, 83 S.W.3d at 796. General jurisdiction requires a showing that a defendant conducted substantial activities within the forum, a “more demanding minimum contacts analysis” than for specific jurisdiction. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017) (general jurisdiction may be appropriate in “exceptional case[s]” where “a corporate defendant’s operations in another forum” essentially “render the corporation at home in that [s]tate”) (internal quotations omitted). Specific jurisdiction, however, is established if the defendant’s alleged liability arises from or relates to an activity conducted within the forum. *Marchand*, 83 S.W.3d at 796. When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship between the defendant, the forum, and the litigation. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575–76 (Tex. 2007).

Foreseeability is an important consideration in deciding whether a nonresident has purposefully established minimum contacts with the forum state. *Burger King Corp.*, 471 U.S. at 474, 105 S. Ct. at 2183; *Guardian Royal*, 815 S.W.2d at 227. The concept of foreseeability is implicit in the requirement that there be a substantial connection between the nonresident defendant and Texas, arising from actions or

conduct of the nonresident defendant purposefully directed toward Texas. *Guardian Royal*, 815 S.W.2d at 227.

### ***Specific Jurisdiction***

In a portion of his sole issue, Salgado argues that Texas has specific jurisdiction over OmniSource because it “negligently hired CS Metals while CS Metals was located in Houston, Texas.” In response, OmniSource asserts that the particular contacts relied upon by Salgado do “not show that [it] ‘purposefully directed’ its activities at the forum, or that the alleged injuries ‘arise out of or relate to’ [its] activities nominally directed at the forum.”

Merely contracting with a Texas resident does not, standing alone, constitute purposeful availment. *Ashdon, Inc. v. Gary Brown & Assocs., Inc.*, 260 S.W.3d 101, 113 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Burger King Corp.*, 471 U.S. at 478, 105 S. Ct. at 2185). “Generally, a contract calling for performance outside of Texas does not subject a party to jurisdiction here.” *Id.* Further, specific jurisdiction does not “turn[] on whether a defendant’s contacts were tortious rather than the contacts themselves.” *Michiana*, 168 S.W.3d at 791. To do so would shift the focus from the “relationship among the *defendant*, the forum, and the litigation’ to the relationship among the ‘*plaintiff*, the forum . . . and the litigation.’” *Id.* (internal footnotes omitted) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984); *Rush v. Savchuk*, 444 U.S.

320, 332, 100 S. Ct. 571, 579 (1980) (emphasis added)). Directing-a-tort at Texas cannot form the basis of personal jurisdiction over a nonresident defendant because then the defendant's purposeful availment is dependent on the claim chosen by a plaintiff and not the defendant's actual contacts with the state. *Id.* And, "changes in technology have made reliance on phone calls obsolete as proof of purposeful availment." *Id.*

Saldago's assertions about specific jurisdiction all concern an agreement between OmniSource and CS Metals that was to be performed in Louisiana. Salgado places much significance on his assertion that this agreement was negotiated, and CS Metals was hired, while it was located in Houston, Texas. He insists that his allegation that OmniSource negligently hired CS Metals is sufficient to defeat OmniSource's special appearance. However, there is no allegation or evidence that OmniSource traveled to Texas for contract negotiations with CS Metals or performed any allegedly tortious acts in Texas as part of these negotiations. *Michiana*, 168 S.W.3d at 792 (specific jurisdiction turns on contacts themselves, not whether "a defendant's contacts were tortious"). Phone calls and emails with CS Metals, a Texas resident, as part of the negotiation process do not constitute sufficient proof of purposeful availment by OmniSource in this case. *Id.* at 791 ("[C]hanges in technology have made reliance on phone calls obsolete as proof of purposeful availment."). And, it is well-established that contracting with a Texas

resident, without more, is insufficient to establish jurisdiction over a nonresident defendant, particularly, as here, where the alleged agreement at issue calls for performance outside of Texas.<sup>4</sup> *Ashdon*, 260 S.W.3d at 113.

We conclude that OmniSource has negated all bases for an assertion of specific jurisdiction over it.

### ***General Jurisdiction***

In another portion of his sole issue, Salgado argues that Texas has general jurisdiction over OmniSource because OmniSource “applied for the right to do business in Texas,” has filed Texas franchise taxes “since at least 2006,” “has several Texas customers,” had, at one time, “a Texas registered agent and office,” and has “purposefully availed itself of the Texas court system.” In its response, OmniSource asserts that “corporate certificates of authority, not franchise reports, are indicative of general business operations in” Texas and “a former registered agent and thirty-year-old court case are plainly not sufficient to establish general jurisdiction.”

General jurisdiction (or “all purpose” jurisdiction) is not limited to the “paradigm” forums of a corporate defendant, but only in an “exceptional case” are a “corporate defendant’s operations in another forum . . . ‘so substantial and of such a

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<sup>4</sup> We note that Salgado has also asserted that CS Metals and Ciro Solache have designated OmniSource as a responsible third party in their pleadings and discovery. However, this fact does not have any bearing on our jurisdictional analysis. *See id.* at 790–91.

nature as to render the corporation at home in that [s]tate.” *BNSF*, 137 S. Ct. at 1558 (quoting *Daimler*, 134 S. Ct. at 760). And a “corporation that operates in many places can scarcely be deemed at home in all of them.” *Id.* at 1559. We are not concerned with the quantity of contacts, but instead the quality and nature of those contacts. *Coleman*, 83 S.W.3d at 809–10. “Payment of franchise taxes does not automatically establish personal jurisdiction, but only ‘potentially subjects a foreign corporation to jurisdiction in the state.’” *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 409 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *Asshauer v. Glimcher Realty Trust*, 228 S.W.3d 922, 933 (Tex. App.—Dallas 2007, no pet.)). Similarly, “[a]lthough we consider registering to do business in Texas and maintaining a registered agent in Texas in undertaking a minimum contacts analysis, these factors are not dispositive of whether Texas courts can constitutionally exercise general jurisdiction.” *Id.* at 418.

While there is evidence in the record that OmniSource has Texas customers, was registered with the Texas Comptroller, and filed franchise taxes in Texas, there is nothing that demonstrates that these contacts were substantial enough to justify subjecting OmniSource to general jurisdiction in Texas, especially where Salgado’s claims do not arise from or relate to such contacts. In support of his assertions, Salgado directs our attention to two places in the record. The first, from the Texas Comptroller’s website, is a printout entitled “Franchise Tax Account Status.” The

second is a 2009 letter from the Texas Comptroller of Public Accounts informing OmniSource that it is required to fill out a “2007 Initial Franchise Tax Report & Signed Public Information Report” and a “2009 Annual Franchise Tax Report & Signed Public Information Report.” However, nothing in these documents, or anywhere else in the record, shows the extent of OmniSource’s franchise tax liability in Texas, if any.

Additionally, we recognize that there is evidence in the record that OmniSource has “customers” and presumably does some business in Texas. But there is no evidence that these contacts with Texas are substantial. Without any evidence as to how much income, if any, OmniSource derives from its Texas “customers” or whether it routinely conducts business with them, there is no basis for overturning the trial court’s implied finding that these contacts were insufficient to support general jurisdiction.<sup>5</sup> See *Guardian Royal*, 815 S.W.2d at 230 n.11 (explaining importance of quality and nature of contacts, not their number). For the

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<sup>5</sup> We note that the record reflects that discovery was requested, and possibly exchanged, on this issue. Salgado attached a list of Texas companies as an exhibit to his Second Supplemental Response to Special Appearance in support of his assertion that “Omni[S]ource has several Texas customers.” However, there is nothing on the face of the document, or in Salgado’s response, that ties these entities to OmniSource—much less that demonstrates the nature and extent of OmniSource’s alleged relationship to these entities. Accordingly, we defer to the implied finding of the trial court that this was insufficient to confer general jurisdiction over OmniSource. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Paul Gillrie Inst., Inc. v. Universal Comput. Consulting, Ltd.*, 183 S.W.3d 755, 759 (Tex. 2005).

same reason, maintaining a registered agent in Texas, without evidence of substantial business relations or other contacts, is not enough to subject a nonresident defendant to general jurisdiction in Texas. *Waterman*, 355 S.W.3d at 418.

Salgado asserts that a nearly thirty-year-old collection suit filed by OmniSource in Texas subjects it to jurisdiction in this case. However, a thirty-year-old suit is far too attenuated of a contact to constitute the continuing and systematic requirement of general jurisdiction. Even so, “[v]oluntarily filing suit in a particular jurisdiction is purposeful availment of the jurisdiction’s facilities and can subject the party to personal jurisdiction in another lawsuit ‘only when the lawsuits arise from the same transaction.’”<sup>6</sup> *Waterman*, 355 S.W.3d at 422 (quoting *Zamarron v. Shinko Wire Co.*, 125 S.W.3d 132, 143 (Tex. App.— Houston [14th Dist.] 2003, pet. denied)). The underlying suit in this case is not related to any of the other suits relied on by Salgado.

We conclude that OmniSource has negated all bases for an assertion of general jurisdiction because its contacts with Texas are not substantial enough to render it “essentially at home” here. *BNSF*, 137 S. Ct. at 1558, 1559 (defendant not subject

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<sup>6</sup> We note that there is also evidence in the record of thirty-year-old suits in Texas in which OmniSource was a defendant. These also do not satisfy the requirements of general jurisdiction. See *Waterman*, 355 S.W.3d at 422–23 (“The failure of a defendant to challenge personal jurisdiction in a case in which a Texas Court apparently would be able to exercise specific jurisdiction ‘does not demonstrate that a nonresident has the continuous and systematic contacts with Texas necessary for the exercise of general jurisdiction.’”).

to general jurisdiction even where it had “over 2,000 miles of railroad track and more than 2,000 employees in” forum state).

Because OmniSource does not have sufficient minimum contacts with Texas to subject it to personal jurisdiction, we hold that the trial court did not err in granting its special appearance.

We overrule Salgado’s sole issue.

### **Conclusion**

We affirm the order of the trial court.

Terry Jennings  
Justice

Panel consists of Justices Jennings, Bland, and Brown.