# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-20-00142-CV

Charles W. **HANOR**,
Appellant

v.

Dicky G. **HANOR**,
Appellee

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-CI-24182
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 16, 2020

AFFIRMED

Appellant Charles W. Hanor appeals the trial court's judgment dismissing his claims against appellee Dicky G. Hanor for want of jurisdiction. We affirm the trial court's judgment.

### BACKGROUND

Charles and Dicky are brothers and co-tenants in several hundred acres of farmland left to them by their mother, Irene, who died in January of 2014. Charles also owns additional acreage that Irene bequeathed to him alone. All of the land at issue is located in Missouri, where Dicky has

lived his entire life. Although Charles was born and raised on the Missouri farmland, he has lived in Texas since 1975.

Charles contends—and Dicky does not dispute—that because a portion of the Missouri farmland is solely owned by Charles, Dicky needed Charles's permission to lease it to third parties for farming operations. While the brothers agree that Dicky visited Charles in Texas in February of 2014, they disagree about whether they discussed farm business at that time. Charles asserts that during that visit they agreed: (1) Dicky would rent out both the co-owned lands and Charles's solely owned lands to third parties for farming operations; (2) Dicky and Charles would share the repair, maintenance, and other expenses arising out of the rental agreements in proportions consistent with their percentage of ownership; and (3) Dicky and Charles would split the revenue from the rental agreements in accordance with their ownership percentages. From 2014 until 2017, Dicky managed the day-to-day operations of this venture in Missouri, and he sent invoices for Charles's share of the expenses and checks for Charles's share of the revenue to Charles's home in Texas. Charles, in turn, paid those expenses out of and deposited revenue into his Texas bank account.

During a 2017 visit to Missouri, Charles saw a document on Dicky's desk that he believed showed Dicky had been both overcharging and underpaying him. After efforts to resolve that dispute failed, Charles sued Dicky in Texas for breach of contract, fraud, and breach of fiduciary duty. He also sought a declaratory judgment. He alleged the Texas court had personal jurisdiction over Dicky because Dicky conducted business in Texas by contracting with a Texas resident and committing torts in Texas.

Dicky filed a special appearance arguing the Texas court lacked personal jurisdiction over him. He argued his contacts with Texas "were a fortuitous result of [Charles's] residency in Texas. . . . [Dicky] did not get to choose to be a cotenant with [Charles], nor did he control where

[Charles] lived." Charles filed a response supported by his own affidavit regarding the brothers' agreement and Dicky's alleged breaches, trust and probate documents detailing the ownership of the Missouri farmland, and documents related to the leases of the land. He also filed an amended petition adding partnership, agency, and conversion claims and alleging Texas had jurisdiction over Dicky because he entered into partnership and agency agreements with a Texas resident. Dicky did not amend his special appearance to specifically address these new allegations.

The trial court heard Dicky's special appearance on January 14, 2020. It also considered a motion Charles filed to compel Dicky to produce discovery regarding his contacts with Texas. At the end of the hearing, the trial court ordered Dicky to produce evidence, if any, regarding farm purchases he had made in Texas or business benefits he had obtained from attending a conference held in Texas by a Texas organization, the National Sorghum Producers. The court held Dicky's special appearance in abeyance until after the production of those materials.

On February 18, 2020, Charles filed a bench brief in opposition to Dicky's special appearance that included approximately 300 pages of new evidence. On February 24, 2020, Dicky filed an affidavit denying Charles's partnership allegation for the first time. Dicky also produced a letter from the National Sorghum Producers stating he had never received any cash awards for participating in the organization's yield contests. Charles objected to Dicky's affidavit as untimely, and Dicky moved to strike Charles's bench brief as outside the limited scope of the trial court's continuance of the special appearance hearing.

On February 28, 2020, the trial court resumed the hearing on Dicky's special appearance. The court declined to consider any of the evidence the parties filed after the January 14 hearing, sustained Dicky's special appearance, and signed a final judgment dismissing Charles's claims for want of jurisdiction. Charles requested findings of fact and conclusions of law but did not file a notice of past-due findings and conclusions. He timely appealed.

## ANALYSIS

### *Standard of Review*

We review a trial court's ruling on a special appearance de novo. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016). "The plaintiff bears the initial burden of pleading allegations that suffice to permit a court's exercise of personal jurisdiction over the nonresident defendant." *Id.* If the plaintiff's allegations are sufficient, the burden shifts to the defendant to negate all bases of personal jurisdiction alleged by the plaintiff. *Id.* In considering whether the plaintiff met his initial burden, we may consider both his petition and his response to the special appearance. *See Camac v. Dontos*, 390 S.W.3d 398, 405 (Tex. App.—Dallas 2012, no pet.). Where, as here, the trial court does not issue findings of fact and conclusions of law, we imply all findings of fact that are necessary to support the trial court's ruling and that are supported by the evidence. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010).

### *Applicable Law*

"The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." *Walden v. Fiore*, 571 U.S. 277, 283 (2014). As a result, a personal jurisdiction analysis requires an examination of both state and federal law. *Searcy*, 496 S.W.3d at 66. The broad language of the Texas long-arm statute permits the trial court's jurisdiction to "reach as far as the federal constitutional requirements of due process will allow." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007) (internal quotation marks omitted); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. However, allegations that suffice under the Texas long-arm statute—for example, assertions that the defendant entered into a contract with a Texas resident or committed a tort in Texas—do not necessarily satisfy constitutional due process requirements. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005). To satisfy those requirements, the plaintiff must

also allege facts showing: (1) the defendant has established "minimum contacts" with Texas; and (2) Texas's assertion of jurisdiction would not "offend traditional notions of fair play and substantial justice." *Searcy*, 496 S.W.3d at 66 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

"A defendant establishes minimum contacts with a state when it purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (internal quotation marks omitted). The defendant's contacts with Texas must support the conclusion that it "could reasonably anticipate being subject to the jurisdiction of the Texas court system." *Haddad v ISI Automation Int'l, Inc.*, No. 04-09-00562-CV, 2010 WL 1708275, at *3 (Tex. App.—San Antonio Apr. 28, 2010, no pet.) (mem. op.). We consider only the defendant's contacts with Texas itself, not his contacts with persons who live in Texas. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 561 (Tex. 2018). "The purpose of the minimum-contacts analysis is to protect the defendant from being haled into court when its relationship with Texas is too attenuated to support jurisdiction." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002).

A defendant can attack a plaintiff's jurisdictional allegations on either a factual or a legal basis:

> Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations. The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction. Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant's contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.

*Kelly*, 301 S.W.3d at 659. Federal due process jurisprudence divides the minimum contacts analysis into "two strains of personal jurisdiction: specific and general." *Searcy*, 496 S.W.3d at 67. Here, the parties agree that only the specific jurisdiction analysis is relevant.

In a specific jurisdiction analysis, we focus our attention on the relationship between the defendant, the forum, and the litigation. *Walden*, 571 U.S. at 283–84; *Moki Mac*, 221 S.W.3d at 575–76. "Specific jurisdiction arises when (1) the defendant purposefully avails itself of conducting activities in the forum state, and (2) the cause of action arises from or is related to those contacts or activities." *Kelly*, 301 S.W.3d at 658 (internal quotation marks and alterations omitted). A state may not exercise jurisdiction over a nonresident defendant unless the defendant's suit-related conduct "create[s] a substantial connection with the forum State." *Walden*, 571 U.S. at 284; *Moki Mac*, 221 S.W.3d at 585. The relationship between the defendant and the forum "must arise out of contacts that the defendant *himself* creates with the forum State." *Walden*, 571 U.S. at 284 (emphasis in original, internal quotation marks omitted).

### ***Application***

#### *Waiver*

In his second issue, Charles argues Dicky waived his special appearance by filing a motion to strike Charles's bench brief before the trial court ruled on the special appearance. Because this issue would, if meritorious, be dispositive, we will address it first. *Cf. Pilgrim Enters., Inc. v. Md. Cas. Co.*, 24 S.W.3d 488, 491 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

A nonresident defendant may challenge a Texas court's personal jurisdiction over him by filing a special appearance that complies with Texas Rule of Civil Procedure 120a. TEX. R. CIV. P. 120a. Rule 120a contains both "due-order-of-pleading" and "due-order-of-hearing" requirements. *Id.*; *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796, 800 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The due-order-of-pleading requirement specifies that a special

appearance must be "filed prior to [a] motion to transfer venue or any other plea, pleading or motion." TEX. R. CIV. P. 120a(1). The due-order-of-hearing requirement provides that a special appearance "shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard." *Id.* R. 120a(2). Any appearance by the defendant that does not comply with Rule 120a constitutes a general appearance. *Id.* R. 120a(1). However, "[c]ertain rulings by the trial court that are related to the special appearance do not violate the special appearance rule." *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Charles argues Dicky violated the due-order-of-hearing requirement because he sought affirmative relief by moving to strike Charles's bench brief before the trial court ruled on the special appearance. We disagree. Dicky's motion to strike did not ask the trial court to make any disposition on the merits of the case or to decide a question unrelated to the special appearance. *See SBG Dev. Servs., L.P. v. Nurock Grp., Inc.*, No. 02-11-00008-CV, 2011 WL 5247873, at *3 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.) (mem. op.) (special appearance waived where defendant moved to strike plaintiff's pleadings and requested dismissal of plaintiff's claims). Instead, the motion asked the trial court to determine whether it could properly consider evidence and authority Charles filed in support of his opposition to the special appearance.

Rule 120a itself recognizes that parties may contest each other's jurisdictional evidence in connection with the special appearance. TEX. R. CIV. P. 120a(3). Dicky's motion to strike, which does just that, is not inconsistent with his assertion that the court lacked personal jurisdiction over him. *See First Oil*, 264 S.W.3d at 781. As the Supreme Court has noted, "It is simply illogical to allow the parties to engage in relevant discovery . . . but prohibit the nonresident defendant from seeking the trial court's ruling on disputes that may affect the evidence presented at the special

appearance hearing." *Exito Elecs. Co., Ltd. v. Trejo*, 142 S.W.3d 302, 307 (Tex. 2004). We overrule Charles's second issue.

*Special Appearance*

In his first issue, Charles argues the trial court erred by sustaining Dicky's special appearance because Dicky purposefully established minimum contacts with Texas by: (1) entering into contractual, partnership, and agency agreements with a Texas resident that were to be partially performed in Texas; (2) directing misrepresentations and fraudulent statements at a Texas resident; (3) converting property belonging to a Texas resident; and (4) failing to structure his transactions to purposefully avoid Texas. We will assume, without deciding, that these contacts are sufficient to bring Dicky within the broad scope of Texas's long-arm statute. *See* TEX. CIV. PRAC. & REM. CODE § 17.042; *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, 308 S.W.3d 395, 397 (Tex. 2010). We must determine, however, whether any of these contacts allow Texas to exercise jurisdiction over Dicky consistent with due process. *See Moki Mac*, 221 S.W.3d at 574–75.

*The Brothers' Contractual Relationship*

For the exercise of personal jurisdiction to comport with due process, "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 285. Here, even if Dicky did business in Texas by contracting with Charles, both Dicky's special appearance and the evidence Charles presented in opposition to the special appearance show that Dicky and Charles are the only people who currently have ownership interests in the Missouri farmland.[1] Because this evidence supports a finding that Charles is the only person with whom Dicky *could* contract for permission to lease that land, it also supports a finding that Dicky "reached into" Texas simply because Charles lives here, not because he voluntarily sought out the benefits of doing business in

[1] While Dicky's and Charles's children are remainder beneficiaries in the land, there is no evidence that they have any current possessory rights.

Texas. *See id.* at 284–85. This case is therefore distinguishable from *Haddad*, upon which Charles relies. *See Haddad*, 2010 WL 1708275, at *4–6 (affirming denial of special appearance where defendant chose to contract with Texas corporation). While Charles argues the agreement created "continuing, substantial contractual obligations" between Dicky and Charles, he has not shown those obligations created the kind of "wide-reaching contacts" that would support a conclusion that Dicky had purposefully availed himself of Texas. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 (1985); *Searcy*, 496 S.W.3d at 74.

Moreover, while Charles contends the brothers' contract was partially performable in Texas, the performance that occurred in Texas was Charles's end of the bargain—his grant of permission to lease the land, payment of expenses, and acceptance of revenue—not Dicky's. *See Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013) (only defendant's contacts with forum are relevant to due process analysis). We have previously held that "partial performance of a contract in Texas is not the *sine qua non* of personal jurisdiction," especially where, as here, there is no evidence the nonresident defendant either required or bargained for that performance to be completed in Texas. *See Magnolia Gas Co. v. Knight Equip. & Mfg. Co.*, 994 S.W.2d 684, 692 (Tex. App.—San Antonio 1998, no pet.), *abrogated on other grounds by BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 n.1 (Tex. 2002). Additionally, there is no evidence the contract was "specifically designed to benefit from the skills of" Charles or any other Texas resident. *See Citrin Holdings, LLC v. Minnis*, 305 S.W.3d 269, 281 (Tex. App.—Houston [14th Dist.] 2009, no pet.). To the contrary, Charles expressly argued in both this court and the trial court that he "relied on [Dicky's] superior farming knowledge and industry contracts when forming these agreements."

This evidence supports a finding that the brothers' contractual relationship arises out of their co-ownership of the Missouri farmland, not out of any actions Dicky took to purposefully

seek out Texas or benefit from its laws. *See TV Azteca v. Ruiz*, 490 S.W.3d 29, 38 (Tex. 2016). It also supports a finding that Dicky's contractual relationship with Charles is not a purposeful contact with Texas, but is instead the kind of random, fortuitous, or attenuated contact that cannot support jurisdiction over a nonresident. *See Kelly*, 301 S.W.3d at 660; *Moki Mac*, 221 S.W.3d at 575. As a result, the trial court did not err by concluding that even if Charles's allegations are true, the evidence of the brothers' contractual relationship falls short of showing Dicky purposefully availed himself of Texas. *See Kelly*, 301 S.W.3d at 659.

*Dicky's Alleged Torts*

"There is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." *TV Azteca*, 490 S.W.3d at 43. In determining whether a nonresident tortfeasor's acts support the forum state's exercise of jurisdiction over him, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 571 U.S. at 290.

Here, Charles alleges that Dicky directed fraudulent statements and misrepresentations to him in Texas and converted funds that belonged to him. He contends these acts caused him to pay more expenses than he owed and receive less revenue than he was entitled to. However, even if these allegations are true, there is no evidence that Texas itself was the focus of Dicky's conduct. *See TV Azteca*, 490 S.W.3d at 43; *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780–81 (1984) (New Hampshire's personal jurisdiction over defendant that "continuously and deliberately exploited the New Hampshire market" was consistent with due process). Instead, both Dicky's special appearance and Charles's opposing evidence show that the only connection between Dicky's alleged torts and Texas is that Charles, the alleged target of those torts, "happens to live in" Texas. *TV Azteca*, 490 S.W.3d at 42–43. The trial court did not err by concluding the

harm Charles allegedly suffered is "not the sort of effect that is tethered to [Texas] in any meaningful way" and therefore does not connect Dicky to Texas "in a way that makes those effects a proper basis for jurisdiction." *Walden*, 571 U.S. at 290.

*Partnership and Agency Allegations*

Charles contends Dicky did not meet his burden to negate all of Charles's jurisdictional allegations because he did not amend his special appearance to address Charles's partnership and agency claims. However, as explained above, both Dicky's special appearance and Charles's opposing evidence support a finding that Dicky's only meaningful connection to Texas is Charles himself. *See Kelly*, 301 S.W.3d at 660–61. Because due process does not allow a forum to exercise jurisdiction over a defendant if the plaintiff is the defendant's only link to the forum, the record before the trial court supported a conclusion that Charles's partnership and agency allegations, even if true, fall short of showing Dicky purposefully availed himself of Texas. *See Walden*, 571 U.S. at 285; *Kelly*, 301 S.W.3d at 660–61.

*Dicky's Other Contacts with Texas*

Charles notes that the evidence shows Dicky attended a farming convention in Texas and is a member of a farming organization based in Texas. There is also some evidence that one of Dicky's children lives in Texas. However, Charles does not identify any evidence demonstrating a "sufficiently direct" connection between those contacts and Charles's allegations of fraud, contract, fiduciary duty, partnership, agency, and conversion. *See Moki Mac*, 221 S.W.3d at 585. Because there is no substantial connection between these contacts and the operative facts of this litigation, we cannot consider them in our analysis. *See Haddad*, 2010 WL 1708275, at *5.

*Failure to Avoid Texas*

Charles also argues that if Dicky wished to avoid subjecting himself to Texas's jurisdiction, he could have "established a trust account for [Charles] to receive his annual share of the profits

minus expenses" and "arranged with vendors that [Dicky] was the [sole] point of contact." Charles cites no authority holding that a special appearance movant must show he took affirmative steps to avoid Texas altogether. Moreover, as Charles emphasized in both the trial court and in his brief, the evidence shows Dicky needed Charles's approval to lease the Missouri farmland. Charles does not explain how the establishment of a trust account or Dicky's unilateral involvement with vendors would have allowed Dicky to avoid reaching into Texas to obtain that approval. We decline to reverse the trial court's judgment on this basis.

*Failure to File Findings of Fact and Conclusions of Law*

Finally, Charles argues we must presume he was harmed by the trial court's failure to file findings of fact and conclusions of law. However, Dicky notes that although Charles timely filed a request for findings of fact and conclusions of law, he did not file a notice of past due findings and conclusions as required by Texas Rule of Civil Procedure 297. TEX. R. CIV. P. 297. Because Charles did not file a notice of past due findings of fact and conclusions of law, he waived his complaint about the trial court's failure to file findings and conclusions.[2] *See In re A.I.G.*, 135 S.W.3d 687, 694 (Tex. App.—San Antonio 2003, no pet.).

We overrule Charles's first issue.

*Exclusion of Evidence*

In his third issue, Charles argues the trial court abused its discretion by refusing to consider evidence he submitted after the trial court continued the special appearance hearing. Assuming without deciding that this was error, the record does not show Charles was harmed by it. *See* TEX.

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[2] Charles argues his request for findings of fact and conclusions of law is governed by Texas Rule of Appellate Procedure 28.1(c), not Texas Rule of Civil Procedure 297, because this is an interlocutory appeal. However, the order granting Dicky's special appearance dismisses all of Charles's claims for want of jurisdiction and states it "is intended to dispose of all claims and all causes of action in this lawsuit and is a final, appealable judgment." Because the trial court's order finally disposes of all parties and claims, it is a final judgment, not an interlocutory order. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Texas Rule of Appellate Procedure 28.1(c), which addresses "appeals of interlocutory orders," therefore does not apply here. *See* TEX. R. APP. P. 28.1(c).

R. App. P. 44.1. Our review of the excluded evidence reveals nothing demonstrating that Dicky's conduct created a substantial connection with Texas, as opposed to merely with Charles. *See Walden*, 571 U.S. at 285. Because Charles has not shown that the trial court's evidentiary ruling probably caused an improper judgment, we overrule his third issue. Tex. R. App. P. 44.1; *Gunn v. McCoy*, 554 S.W.3d 645, 671 (Tex. 2018).

**CONCLUSION**

We affirm the trial court's judgment.

Beth Watkins, Justice