Reverse and Dismiss; Opinion Filed August 22, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01436-CV

COOPER GAY MARTINEZ DEL RIO Y ASOCIADOS INTERMEDIARIOS DE REASEGURO S.A. DE C.V., Appellant

V.

ELAMEX, S.A. DE C.V., ELAMEX USA CORP., MOUNT FRANKLIN FOODS, LLC & CONFECCIONES DE JUÁREZ, S.A. DE C.V., Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-11987

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Stoddart

This is an interlocutory appeal from an order denying the special appearance filed by appellant Cooper Gay Martinez del Rio y Asociados Intermediarios de Reaseguro S.A. de C.V. ("Cooper Gay Mexico" or "CGM") in a lawsuit filed by appellees Elamex S.A. de C.V. ("Elamex"), Elamex USA Corp., Mount Franklin Foods, LLC, and Confecciones de Juárez, S.A. de C.V.[1] In two issues, Cooper Gay Mexico argues the trial court erred by denying its special appearance. We reverse the trial court's order and render judgment dismissing the cause against Cooper Gay Mexico for lack of personal jurisdiction.

[1] Elamex USA, Corp. and Confecciones de Juárez, S.A. de C.V. are wholly-owned subsidiaries of Elamex, S.A. de C.V. Mount Franklin Foods, LLC is a wholly-owned subsidiary of Elamex USA.

Cooper Gay Mexico is one of several defendants sued by appellees.[2] Two defendants, Cooper Gay Mexico and Seguros Afirme, S.A. de C.V. ("Afirme"), filed special appearances in the trial court, which were denied. Both parties appealed. In conjunction with our opinion today, we issue an opinion addressing the appeal filed by Afirme. *See Seguros Afirme, S.A. de C.V. v. Elamex, S.A. de C.V., Elamex USA Corp., Mount Franklin Foods, L.L.C., & Confecciones de Juárez, S.A. de C.V.*, No. 05-16-01465-CV (Tex. App.—Dallas Aug. 22, 2017, no pet. h.) (mem. op.). Although no other defendant challenged the trial court's personal jurisdiction, appellees allege those defendants participated in the transaction that creates the basis for appellees' claims. Our recitation of facts is based on the pleadings and documents filed with the trial court as part of the special appearance proceedings.

BACKGROUND

CGM is a Mexican limited liability stock corporation existing under the laws of Mexico with its home office and principle place of business in Mexico. CGM is a reinsurance broker that serves clients in Mexico, Central America, and Dominican Republic.

A. Elamex Seeks an Excess Insurance Policy

In late 2012, Elamex sought $50 million in commercial property and business interruption coverage for seven manufacturing and distribution facilities located in Mexico and the United States. Elamex is a limited liability stock corporation incorporated under the laws of Mexico with its principal place of business in El Paso, Texas. HUB International Texas, Inc. and HUB International, Ltd. (collectively, "HUB"), acting as Elamex's retail insurance brokers, placed the first $25 million of coverage with two carriers not involved in the litigation. Facts

[2] Other defendants in this lawsuit are: Seguros Afirme, S.A. de C.V., Swett & Crawford, Swett & Crawford of Texas, Inc., Cooper Gay Re, Ltd., HUB International Texas, Inc. and HUB International, Ltd. CGM, Swett & Crawford, Swett & Crawford Texas, and Cooper Gay Re are part of Cooper Gay Swett & Crawford Limited.

surrounding the $25 million excess layer, which eventually was placed with Afirme, give rise to this lawsuit.

On November 21, 2012, a HUB employee, Estela Lusky, emailed Ralph Higginbotham of Swett & Crawford Texas about obtaining excess coverage for Elamex. Swett & Crawford Texas is an insurance broker. The email stated that "AIG/Lexington are offering 25 million primary, their [Elamex's] largest location is at 55 million in Mexico, hence we are looking for an additional Property layer of 25mm excess 25mm." Her email noted that the initial company she contacted, located in Dallas, Texas, was not "able to front in Mexico." The email included an attachment titled "statement of values" that showed seven locations to be insured for Elamex, including two in El Paso, Texas, and three in Ciudad Juárez, Chihuahua, Mexico.

On December 17, 2012, Higginbotham contacted the office of Cooper Gay Re in Miami, Florida, about procuring the excess insurance for the properties listed in the statement of values. Cooper Gay Re is an international insurance broker. An employee of Cooper Gay Re, Richard Stark, forwarded Higginbotham's email to an employee for appellant Cooper Gay Mexico, who sent it on to Fernando Mendoza, the Commercial Director of CGM.

A transcript from Mendoza's deposition is part of the record from the special appearance proceedings. Mendoza explained that in response to Cooper Gay Re's request, CGM presented three Mexican insurance companies, Seguros Atlas, S.A., Afirme, and GMX,[3] who could act as insurance carriers for Elamex to Cooper Gay Re. The purpose of providing the names was to allow Cooper Gay Re to select one. CGM did not have authority to select an insurer.

Hazel Garcia of Cooper Gay Re emailed Higginbotham, Stark, and others on December 21, 2012, and attached a document titled "Reinsurance Slip," which showed "Seguros Atlas

[3] The full name of GMX is not provided.

and/or to be advised" by CGM as the "reinsured" ("Atlas Slip").[4] Elamex is named as the "original insured." Although the Atlas Slip describes the locations to be insured as "Mexico and USA as more fully defined in the attached breakdown" and "several in Mexico and USA according to the schedule attached," the document does not provide additional specificity. CGM's name appears at the bottom of each page of the eight-page document. Higginbotham forwarded Garcia's email, including the Atlas Slip, to a HUB representative.

Mendoza explained that the Atlas Slip was "illustrative" and was prepared for and sent to Cooper Gay Re. The slip was not binding or a formal document. Rather, it was akin to a quote, as reflected in the "and/or to be advised" language. Mendoza testified Cooper Gay Re's Miami office provided all relevant information for CGM. CGM did not communicate with HUB, the retail broker.

On January 13, 2013, Lusky of HUB emailed Higginbotham with instructions to bind the excess coverage with Seguros Atlas and attached a copy of the Atlas Slip. Higginbotham forwarded the email to Stark and Garcia, both of Cooper Gay Re, stating: "Please see request to bind the excess quote, which will be net to the agent with you Swett & Cooper Gay splitting the commission." However, the coverage was not bound with Seguros Atlas.

On January 30, 2013, Fernando Mendoza of CGM emailed Emmanuel Ramirez Lango at Afirme in reference to "this business we are doing with our Miami office" to provide excess protection for Elamex. Mendoza described Elamex as a "Mexican company with locations in Mexico and the United States." Mendoza attached three documents to his email: a "reinsurance quotation slip," a values detail report, and an inspection report. The "Reinsurance Quotation

[4] Although the Atlas Slip is titled "Reinsurance Slip" and lists Seguros Atlas as the "Reinsured," the document reflects a quote for excess coverage, not for reinsurance. *Compare Excess Insurance*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("An agreement to indemnify against any loss that exceeds the amount of coverage under another policy.") with *Reinsurance*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("Insurance of all or part of one insurer's risk by a second insurer . . ."). The Texas Supreme Court discussed the distinction in *Texas Department of Insurance v. American National Insurance Company*, 410 S.W.3d 843, 848 (Tex. 2012).

Slip" ("Afirme Quote") lists Afirme as the "reinsured" and Elamex as the original insured.[5] It states the relevant locations as "Mexico and United States as described in the attached Values Detail." Mexico is listed as the "governing law and jurisdiction." CGM's name appears at the bottom of each page of the Afirme Quote. The values detail report, titled "Mount Franklin/Elamex Property Exposure," lists seven properties: two in El Paso, one each in Florida and Wisconsin, and three in Juárez. The property risk improvement report relates to a property in Juárez.

Excess coverage was bound with Afirme for the period January 31, 2013 to December 1, 2013 (the "Policy"). The Policy lists "Elamex, S.A. de C.V." as the insured. The insured interest includes all real and personal property of the insured, including business income. The Policy states the relevant locations are "Mexico and USA as more fully defined in the attached breakdown." The attachment lists locations in El Paso, Florida, Wisconsin, and Juárez. The Policy states Mexico is the applicable "law and jurisdiction." CGM's name does not appear on the Policy. Invoices for the Policy premium were directed to Elamex at a Mexican address and with a Mexican federal taxpayer number. Afirme, as the fronting insurer, collected the entire premium. CGM was not involved in collecting the Policy premium.

CGM subsequently placed the reinsurance for the Afirme policy. Mendoza, whose responsibilities include leading CGM's brokerage department and placing reinsurance through the reinsurance market, explained that "reinsurance is basically placed for an insurance company, not for the specific insurer." CGM, as a reinsurer, acts on behalf of an insurance company or another insurance broker. In this instance, CGM placed reinsurance for Afirme, its "direct client." Afirme paid commissions to CGM for placing the reinsurance, and CGM shared the commissions with Cooper Gay Re. Mendoza testified: "the premium we received was for the

[5] Like the Atlas Slip, the Afirme Quote was a proposal for excess insurance, not reinsurance.

reinsurance of Afirme, irrespective of the original policy conditions. . . . Because we are only placing the reinsurance. . . we are not related to what happens between Afirme and the client." He explained the premium paid by Afirme to CGM is "basically to cover a potential loss of Afirme, a Mexican client, irrespective of what they are covering."

B. Fire at Juárez Facility

On October 24, 2013, during the coverage period, Elamex's facility in Juárez suffered damage from an explosion and fire. Afirme notified CGM, as the reinsurer, of the potential loss. However, after Afirme adjusted Elamex's claim and applied the terms of the Policy, Afirme determined it had no liability and denied coverage. This lawsuit followed.

C. The Lawsuit

Appellees sued CGM for negligent misrepresentation, professional negligence, procuring unauthorized insurance and failing to pay surplus lines taxes, and deceptive insurance practices under the Texas Insurance Code. Appellees allege that CGM (along with other defendants) misrepresented the terms of the Policy because, despite their order to bind a policy with no "co-insurance," or "average clause,"[6] the Policy contains an "average clause," pursuant to which Afirme denied coverage. Further, appellees allege CGM and other defendants placed coverage with Afirme, "an unlawful/illegal/unauthorized insurer," and failed to ensure that surplus lines taxes were paid on the Policy. Appellees also assert they requested and intended for the appellee Texas entities to be Named Insureds on the Policy, but this was not done. Appellees allege CGM, Afirme, and other defendants negotiated the Policy's terms with appellees' agents in

[6] In an email, Higginbotham stated: "Simple Average clause (coinsurance) is calculated by taking the (loss) times (amount declared dividend by actual amount at time of loss) = coinsurance amount due insured." Webster's Third New International Dictionary defines "average clause" as "a clause in an insurance policy that restricts the amount payable to the sum not to exceed the value of the property destroyed and that bears the same proportion to the loss as the face of the policy does to the value of the property insured." *See Average Clause*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1981). The same dictionary defines "coinsurance" as "1. joint assumption of risk with another or others (as the sharing of a risk jointly by two or more underwriters) 2. a system of insurance (as fine insurance) in which the insured is obligated to maintain coverage on a risk at a stipulated percentage of its total value or in the event of loss suffer a penalty in proportion to the deficiency." *See Coinsurance*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1981).

Dallas, Texas, and CGM and other defendants delivered an invoice for the Policy's premium to HUB in Dallas. Appellees allege CGM derived substantial benefit from the commissions for the coverage that it placed, which included coverage of properties in Texas.

D. Special Appearance

CGM filed a special appearance arguing the trial court lacked personal jurisdiction over it because CGM did not purposefully avail itself of the privileges and benefits of Texas law, CGM lacks sufficient minimum contacts with Texas, and the exercise of personal jurisdiction offends the traditional notions of fair play and substantial justice. CGM stated it lacks any contacts with Texas constituting doing business and there are no minimum contacts by CGM that have a substantial connection to the operative facts of the litigation, which CGM described as a lawsuit involving a Mexican insurance policy and damage at a Mexican facility. CGM also asserted that even if the evidence established minimum contacts, the exercise of jurisdiction over it would offend the traditional notions of fair play and substantial justice because of the substantial burden placed on it to defend itself in a foreign country.

CGM's special appearance includes an affidavit from Mendoza of CGM. Mendoza averred he was CGM's lead contact for interactions with Cooper Gay Re's Miami office and Afirme regarding the Policy and reinsurance for the Policy. He stated the Policy was negotiated, executed, and issued in Mexico. The only named insured under the Policy is Elamex, S.A. de C.V., a Mexican corporation. There was not any correspondence between CGM and any individual or entity in Texas relating to the placement of the Policy or any reinsurance for the Policy. CGM did not receive any insurance premiums that were mailed from Texas and did not mail any premium invoices to Texas. Policy premiums were paid by Swett & Crawford's Georgia office to Afirme in Mexico and deposited into Mexican bank accounts. In the event of a loss under the Policy, proceeds are to be issued to a Mexican address.

Mendoza's affidavit states CGM is not authorized to transact business in Texas and it does not have a registered agent, office, place of business, assets, or employees in Texas. CGM does not recruit Texas residents for employment with CGM and does not advertise in Texas.

Appellees filed a single response to the special appearances filed by CGM and Afirme. As to CGM, appellees stated "it is clear that [CGM] placed coverage with Afirme covering property and lost sales in El Paso and Ciudad Juárez. CGM took its commissions, again paid by or on behalf of Texas insureds from the United States, failed to follow the binding instructions of the Elamex Parties' Texas-based retail insurance agent, HUB, and misrepresented the terms of the policy procured." Appellees reiterated CGM "derived substantial benefit from the commissions" for placing coverage based on policy terms and conditions intended to benefit a Texas-based insured, "which Afirme did not supply." Appellees attached numerous exhibits to their response.

Following a hearing, the trial court denied Cooper Gay Mexico's special appearance. This appeal followed.

LAW & ANALYSIS

The parties agree that appellees seek to exercise only specific jurisdiction. The live pleading alleges the following bases for the exercise of specific personal jurisdiction over Cooper Gay Mexico: it conducted business within Texas by contracting with Elamex, Elamex USA, and Mount Franklin, which are residents of Texas, and the contract was to be performed in whole or in part in Texas because Mount Franklin would pay the premiums from Texas and payment of policy benefits and provision of services would be to appellees in Texas. Moreover, appellees alleged, CGM's tortious conduct was directed toward appellees in Texas.

In two issues on appeal, CGM argues it lacks minimum contacts with Texas because it does not conduct business in Texas, has no communications or business dealings with any Texas

resident, did not use any of its corporate affiliates to pursue business in Texas, and appellees' allegation that it committed torts against Texas is insufficient to establish personal jurisdiction in Texas. Further, CGM asserts that exercising personal jurisdiction over it in Texas would offend traditional notions of fair play and substantial justice. Because we conclude CGM lacks the requisite minimum contacts with Texas to justify the exercise of personal jurisdiction, we do not reach the issue of whether asserting personal jurisdiction would offend traditional notions of fair play and substantial justice.

A. Standard of Review

Whether a court can exercise personal jurisdiction over a nonresident defendant is a question of law. *Kelly v. Gen. Interior Constr., Inc*., 301 S.W.3d 653, 657 (Tex. 2010). We thus review de novo a trial court's determination of personal jurisdiction. *M & F Worldwide Corp. v. Pepsi–Cola Metro. Bottling Co., Inc*., 512 S.W.3d 878, 885 (Tex. 2017). If, as is the case here, the trial court does not issue findings of fact and conclusions of law, we must imply all relevant facts necessary to support the trial court's order that are supported by the evidence. *Id.*

B. Law on Personal Jurisdiction

Texas's long-arm statute extends its courts' personal jurisdiction as far as the federal constitutional due process requirements permit. *Id.* A state's exercise of jurisdiction comports with federal due process if the nonresident defendant has minimum contacts with the state and the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014)).

A defendant's contacts with the forum may give rise to general or specific jurisdiction. *Id*. In this case, we are concerned with specific jurisdiction. A Texas court may exercise specific jurisdiction over a defendant when (1) the defendant's contact with Texas are purposeful, and (2) the cause of action arises from those contacts. *Michiana Easy Livin'*

Country, Inc. v. Holten, 168 S.W.3d 777, 795 (Tex. 2005); *see also Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S.Ct. 1773, 1785-86 (2017).

An entity has minimum contacts with a forum state if it purposefully avails itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws. *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016). Three principles guide our purposeful-availment analysis: (1) only the defendant's forum contacts are relevant, not the unilateral activities of another party or third person; (2) the defendant's contacts must be purposeful rather than random, isolated, or fortuitous; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the forum such that it impliedly consents to suit there. *Id*. at 70–71.

We focus on the relationship among the nonresident defendant, the forum, and the litigation. *Id.* at 71. "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *M & F Worldwide*, 512 S.W.3d at 886. The Supreme Court recently described the specific jurisdiction analysis: "there must be an affiliation between the forum and the underlying controversy, principally an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation. For this reason, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Bristol-Myers Squibb*, 137 S.Ct. at 1780 (internal citation, brackets, and quotation marks omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. *Id.* at 1781.

C. Parties' Burdens

The plaintiff and defendant bear shifting burdens of proof when the defendant files a special appearance. *Kelly*, 301 S.W.3d at 658. The plaintiff bears the initial burden to plead allegations that would bring the nonresident defendant within the reach of the long-arm statute. *Id*. We look at the jurisdictional facts pleaded in the plaintiff's petition as well as those alleged in its response to the special appearance. TEX. R. CIV. P. 120a(3); *Flanagan v. Royal Body Care, Inc*., 232 S.W.3d 369, 374 (Tex. App.—Dallas 2007, pet. denied); *Jani-King Franchising, Inc. v. Falco Franchising, S.A.*, No. 05-15-00335-CV, 2016 WL 2609314, at *4 (Tex. App.—Dallas May 5, 2016, no pet.) (mem. op.). If the plaintiff meets its burden, the defendant must negate all alleged bases of personal jurisdiction, which it can do factually or legally. *Kelly*, 301 S.W.3d at 658-59. "Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations." *Id.* at 659. The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal if it cannot present the trial court with evidence establishing personal jurisdiction. *Id.* A defendant may also defeat personal jurisdiction by showing that even if the plaintiff's alleged facts are true, the evidence is legally insufficient, i.e., the defendant's contacts fall short of purposeful availment, or the plaintiff's claims do not arise from the alleged contacts, or traditional notions of fair play and substantial justice would be offended if jurisdiction over the defendant were exercised by the trial court. *Id*.

D. Jurisdictional Allegations

Appellees' live pleading alleges the following bases for the exercise of specific personal jurisdiction over Cooper Gay Mexico: it conducted business within Texas by contracting with Elamex, Elamex USA, and Mount Franklin, which are residents of Texas, and the contract was to be performed in whole or in part in Texas because Mount Franklin would pay the premiums from Texas and payment of policy benefits and provision of services would be to appellees in

Texas. Moreover, appellees alleged, CGM's tortious conduct was directed toward appellees in Texas.

In their response to the special appearances, appellees state CGM "placed coverage with Afirme" and the Policy insures property and lost sales in El Paso and Juárez. Further, they allege, CGM took commission, paid by or on behalf of Texas insureds, failed to follow the binding instructions of Texas-based HUB, and misrepresented the terms of the policy procured. Appellees believe CGM "derived substantial benefit from the commissions for the coverage it placed that included Texas properties." Appellees clearly state the "gravamen" of their claims are based on CGM's procurement of an unauthorized excess insurance policy and reinsurance for that policy on their behalf, and the commissions earned as a result.

CGM did not assert appellees failed to meet their burden to plead allegations that would bring it within the reach of the Texas long-arm statute. For purposes of this analysis, then, we assume appellees carried their pleading burden and consider whether the evidence negated jurisdiction.

E. Analysis

We begin by considering the purposeful availment prong of the analysis. It is undisputed that CGM exists under the laws of Mexico and maintains its principal place of business there. CGM offered undisputed evidence that it has no registered agent, office or place of business, assets, or employees in Texas. It does not recruit Texas residents for employment and does not advertise in Texas. Further, CGM's evidence shows it is not authorized to transact business in Texas. Rather, Mendoza's testimony shows CGM operates its business in Mexico, Central America, and Dominican Republic.

Although appellees allege CGM contracted with them and the contract was to be performed in whole or in part in Texas because Mount Franklin would pay the premiums from

Texas and payment of policy benefits and provision of services would be to appellees in Texas, these allegations are not supported by the record. Appellees' third amended petition concedes that "Afirme contracted, as an insurer, to provide Plaintiffs the Policy." Likewise, appellees state in their response to CGM's and Afirme's special appearances that Afirme insured Texas properties and financial interests of companies in Texas and received a premium from Texas businesses. Appellees did not contract with CGM for anything at any time. Rather, the record shows CGM proposed three potential insurers, including Afirme, that could front the coverage to Cooper Gay Re. CGM could not select the excess insurer because it lacked authority to do so and because its business is only providing reinsurance. Once Cooper Gay Re selected Afirme and coverage was placed with Afirme, then CGM contracted with Afirme and the reinsurers to provide reinsurance coverage.[7]

Appellees rely heavily on the Texas Supreme Court's opinion in *Cornerstone* to argue CGM "used its network of affiliates to purposefully avail itself of the privileges of doing business in Texas." In *Cornerstone*, the supreme court concluded Texas courts had specific jurisdiction over three nonresident private-equity fund limited partnerships and their general partner. 493 S.W.3d at 67. The funds invested in a newly created Texas subsidiary for the purpose of purchasing a chain of Texas hospitals from a Texas company. *Id.* The supreme court noted the well-settled law that "so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other" and their contacts must be assessed separately for jurisdictional purposes unless the corporate veil is pierced. *Id.* at 72 (quoting *PHC-Minden, LP v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 172

[7] Additionally, this Court consistently has stated that merely contracting with a Texas entity, as appellees allege CGM did, is insufficient to constitute purposeful availment for jurisdictional purposes. *See O'Daire v. Rowand Recovery, LLC*, No. 05-16-01097-CV, 2017 WL 930036, at *3 (Tex. App.—Dallas Mar. 9, 2017, no pet.) (mem. op.) (executing contract with Texas entity does not show purposeful availment); *Univ. of Ala. v. Suder Found.*, No. 05–16–00691–CV, 2017 WL 655948, at *6 (Tex. App.—Dallas Feb. 17, 2017, no pet.) (mem. op.) ("Contracting with a Texas residents [sic] does not of itself constitute purposeful availment."); *Mitchell v. Freese & Goss, PLLC*, No. 05–15–00868–CV, 2016 WL 3923924, at *4 (Tex. App.—Dallas July 15, 2016, pet. filed) (mem. op.) ("Merely contracting with a Texas entity is insufficient to constitute purposeful availment for jurisdictional purposes, especially when the contractual obligations are performed outside the forum state.").

(Tex. 2007)). Although there was no argument the funds and subsidiaries failed to maintain their legal separateness, the supreme court stated that all events "were all part of one overarching transaction" in which the funds created new subsidiaries to complete the transaction that they set in motion. *Id.* at 72-73. The funds, through the general partner, targeted Texas assets in which to invest and sought to profit from that investment. *Id.* at 73. In the lawsuit, the plaintiff entity sought to "trace the purchase of Texas assets to the entities that spearheaded and directed the transaction, and ultimately stood to profit from it." *Id.* Because the defendants arguing the trial court lacked personal jurisdiction "specifically sought both a Texas seller and Texas assets," the court concluded the contacts with Texas were purposeful and those parties impliedly consented to suit in Texas. *Id.* at 73-74.

Cornerstone is distinguishable. CGM did not spearhead or direct appellees' purchase of the Policy. CGM did not seek out appellees in Texas, insure appellees' Texas assets, or seek to profit from business in Texas. Further, unlike in *Cornerstone*, there is no evidence CGM was created for or created subsidiary entities for the purpose of conducting business in Texas, and appellees do not allege this occurred. Rather, Elamex, a Mexican entity, contacted HUB, which began a chain of communications eventually leading to CGM, to find an insurer for its properties. Afirme, a Mexican entity that provided that Policy, sought reinsurance through CGM and paid a commission to CGM. At no point did CGM seek out a Texas company or Texas assets in order to benefit, profit, or take advantage of Texas such that it impliedly consented to suit here.

To the extent appellees seek to base jurisdiction on commissions paid to CGM, there also is no evidence that CGM received commissions from any appellee. The evidence shows Afirme, as the fronting insurer, collected the entire premium for the Policy, and CGM was not involved in that process. CGM did not receive any portion of the commission paid on the Policy. Rather,

the evidence shows Afirme used CGM for purposes of reinsurance, Afirme was CGM's client, and Afirme paid a commission to CGM for the reinsurance. Although appellees may have paid Afirme for the excess policy, the excess policy is separate from the reinsurance provided for Afirme by CGM. The reinsurance protected Afirme in the event it must pay on the excess policy, and was not a policy benefiting appellees. There is no evidence in the record that appellees paid any money, directly or indirectly, to CGM.[8]

Appellees assert CGM knew the request for excess coverage originated in HUB's office in Dallas and some of the properties to be insured were in El Paso. They argue this knowledge shows purposeful availment. "However, if the acts themselves fail to establish minimum contacts and purposeful availment, the defendant's knowledge of the relationship to Texas will not make the defendant amendable to jurisdiction." *See KC Smash*, 384 S.W.3d at 394 (discussing *Michiana*, 168 S.W.3d at 784-94); *see also Priller*, 2016 WL 7163918, at *3. Additionally, CGM did not insure any Texas properties. It insured Afirme, a Mexican entity.

Finally, appellees allege CGM's tortious conduct was directed toward appellees in Texas by misrepresenting the terms of the Policy. We have rejected the argument that "directing a tort" at the forum state is a basis for specific personal jurisdiction. *Crossroads Fin., LLC v. A.D.I.M. Glob. Co. Ltd.*, No. 05-16-00486-CV, 2016 WL 7220970, at *6 (Tex. App.—Dallas Dec. 13, 2016, no pet.) (mem. op.) (citing cases). The Texas Supreme Court concluded a defendant is not subject to specific jurisdiction in Texas because it directed a tort into Texas by allegedly making misrepresentations during a telephone call with a Texas resident. *See Michiana*, 168 S.W.3d at

[8] Even if we assumed that Afirme paid a portion of the Policy premium to CGM, that payment also would not show CGM directed its activity to Texas and would not be a contact by CGM with Texas. *See Priller v. Cox*, No. 05-15-01257-CV, 2016 WL 7163918, at *3 (Tex. App.—Dallas Nov. 15, 2016, no pet.) (mem. op.) (citing *KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd, L.L.P.*, 384 S.W.3d 389, 393-94 (Tex. App.—Dallas 2012, no pet.)); *see also Michiana*, 168 S.W.3d at 787; *Mitchell*, 2016 WL 3923924, at *4; *Furtek & Assocs., L.L.C. v. Maxus Healthcare Partners*, LLC, No. 02–15–00309–CV, 2016 WL 1600850, at *6 (Tex. App.—Fort Worth April 21, 2016, no pet.) (citing *Myers v. Emery*, 697 S.W.2d 26, 32 (Tex. App.–Dallas 1985, no writ)).

788. Rather, a "forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Walden*, 134 S.Ct. at 1123. A defendant must choose to create contacts with Texas for Texas courts to have specific jurisdiction over claims stemming from those contacts. *Searcy v. Parex Res.*, 496 S.W.3d 58, 87 (Tex. 2016).

The supreme court explained "[t]here 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 v. Ruiz*, 490 S.W.3d 29, 43 (Tex. 2016). "[M]ere injury to a forum resident is not a sufficient connection to the forum." *Walden*, 134 S. Ct. at 1125; *see also TV Azteca*, 490 S.W.3d at 43. Instead, "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Walden*, 134 S. Ct. at 1125; *see also TV Azteca*, 490 S.W.3d at 43. "The 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*, 134 S. Ct. at 1125; *see also TV Azteca*, 490 S.W.3d at 43. "Mere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy*, 496 S.W.3d at 68-69 (citing *Walden*, 134 S. Ct. at 1123). "[T]he analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *TV Azteca*, 490 S.W.3d at 42 (quoting *Walden*, 134 S. Ct. at 1122).

If we were to assume that emails CGM sent to Cooper Gay Re in Miami could be considered tortious and CGM knew would reach appellees, we would conclude the emails do not constitute contacts in Texas demonstrating purposeful availment. The information in the emails was solicited by, and replies were sent to, Cooper Gay Re in Miami. The emails do not connect CGM with Texas in any meaningful way. "Directing a tort" at the forum state—as appellees

allege CGM did in its communications with Cooper Gay Re—is not a basis for specific personal jurisdiction. CGM's alleged conduct of sending and receiving emails from Cooper Gay Re and Afirme does not connect CGM with Texas in any way. Even though appellees allege they were harmed in Texas, their alleged harm in the forum state is insufficient to confer specific jurisdiction.

Having reviewed the record, we conclude CGM did not have any contacts with Texas. It had contacts with Afirme in Mexico and Cooper Gay Re in Miami. The record also shows that CGM did not "seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction" in Texas. *Michiana*, 168 S.W.3d at 785; *see also KC Smash*, 384 S.W.3d at 394. At most, CGM furnished the names of three companies it believed capable of providing the excess coverage sought by Elamex, a Mexican company, to Cooper Gay Re in Miami and it placed reinsurance for the policy issued by Afirme, a Mexican company. Not only was there no relationship between CGM and appellees, but the relationship that appellees allege existed was not instigated by CGM—it was instigated by Cooper Gay Re's Miami office. The evidence shows CGM has no connection—and therefore no "substantial connection"—with Texas. *See Walden*, 134 S.Ct. at 1121-23 (To satisfy the minimum contacts test, "the defendant's suit-related conduct must create a substantial connection with the forum State," and not merely with persons who reside there.). In short, there is no "adequate link" between any act by CGM and Texas. *See Bristol-Myers Squibb*, 137 S.Ct. at 1776.

We conclude CGM satisfied its burden to show it did not purposefully avail itself of the privilege of conducting activities in Texas and there is no substantial connection between CGM's contacts and the operative facts of the litigation. CGM did not invoke the benefits and protections of Texas laws. Therefore, because CGM did not purposefully avail itself of the privilege of conducting activities within the state, we conclude it lacks minimum contacts with

the State of Texas and the trial court erred by concluding it could exercise personal jurisdiction over CGM.

Based on these conclusions, we need not consider the other portions of the special appearance analysis. *See* TEX. R. APP. P. 47.1. We conclude the trial court erred by denying CGM's special appearance. We sustain CGM's first issue. In light of our resolution of CGM's first issue, we need not address its second issue. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the trial court's order denying CGM's special appearance, and we render judgment dismissing the cause against it for want of jurisdiction.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

COOPER GAY MARTINEZ DEL RIO Y ASOCIADOS INTERMEDIARIOS DE REASEGURO S.A. DE C.V., Appellant

No. 05-16-01436-CV V.

ELAMEX, S.A. DE C.V.; ELAMEX USA, CORP., MOUNT FRANKLIN FOODS, L.L.C., AND CONFECCIONES DE JUAREZ, S.A. DE C.V., Appellees

On Appeal from the 95th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-11987.
Opinion delivered by Justice Stoddart.
Justices Lang and Myers participating.

In accordance with this Court's opinion of this date, the trial court's order denying the special appearance of appellant Cooper Gay Martinez Del Rio Y Asociados Intermediarios de Reaseguro S.A. de CV is **REVERSED** and the cause against appellant is **DISMISSED** for want of jurisdiction.

It is **ORDERED** that appellant recover its costs of this appeal from appellees Elamex, S.A. de C.V., Elamex USA, Corp., Mount Franklin Foods, L.L.C., and Confecciones de Juarez, S.A. de C.V.

Judgment entered this 22nd day of August, 2017.