REVERSE and RENDER and Opinion Filed February 25, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00494-CV

INVASIX, INC., Appellant
V.
DEBBIE JAMES AND KATLYNN CLINICH, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-17175

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Bridges

This underlying lawsuit derives from failed settlement negotiations conducted partially in Texas regarding claims brought by nonresident appellees Debbie James and Katlynn Clinich against nonresident appellant Invasix, Inc. The trial court denied Invasix's special appearance without specifying the grounds. We reverse and render judgment dismissing appellees' claims against Invasix because Texas lacks jurisdiction over Invasix in this particular case. Because all issues are settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

Invasix designs, manufactures, and sells the Fractora device in North America. The medical device is used to perform a radio-frequency cosmetic surgery called the Fractora procedure. Appellees allegedly suffered permanent facial disfigurement and personal injuries after undergoing a Fractora procedure. Clinich's procedure occurred in Washington, D.C., and James's occurred in Missouri.

Appellees hired Dallas attorney Amy E. Davis to represent them in their lawsuit against Invasix. It is undisputed Davis began negotiations with Arthur Liederman, a New York attorney hired by Invasix.[1] Davis alleged that during the course of their negotiations, Liederman sent at least seventy-seven emails to her, called her approximately five times, and signed three tolling agreements. According to emails exchanged between the two attorneys, the parties reached a settlement on September 14, 2018; however, no final settlement papers were signed. Davis continued to follow up with Liederman over the following weeks to discuss execution of the written settlement agreements. On October 15, 2018, Liederman told Davis Invasix no longer considered appellees' claims settled.

Appellees filed suit in Dallas County against Invasix for breach of contract. Appellees' original petition asserted James is a citizen of Missouri, Clinich is a citizen of California, and Invasix is a corporation formed under the laws of

[1] Davis has represented many plaintiffs in suits against Invasix, and she first initiated settlement discussions with Invasix on behalf of two different plaintiffs not subject to this suit on or about May 13, 2014.

California. Appellees argued jurisdiction is proper in Texas because Invasix "has sufficient minimum contacts within in the State of Texas such that the Court enjoys general jurisdiction over matters against Invasix." To support general jurisdiction, appellees specifically alleged that Invasix maintains employers and/or independent contractors in Texas, sells medical devices in Texas, enters into contracts with healthcare providers in Texas, and "otherwise purposefully avail[s] itself to the resources" of this state. Appellees further alleged that Invasix, by and through its attorney, sent emails and made phone calls regarding offers of settlement to Davis in Dallas County, and Invasix agreed to make settlement payments to Davis in Texas. Appellees' original petition did not assert that Texas had specific jurisdiction over Invasix.

Invasix filed a special appearance stating it is a Delaware corporation with its principal place of business in California. It further asserted, "Invasix has no offices or principal place of business in Texas and does not maintain any mailing address or telephone listing in Texas." It denied having sufficient contacts with Texas to be subject to general or specific jurisdiction in the state.[2] Moreover, Invasix alleged that even if it met the minimum contacts requirement, appellees could not establish that suit in Texas comported with "fair play and substantial justice."

[2] In its brief in support of its special appearance, Invasix acknowledged that appellees alleged only general jurisdiction; however, it "denie[d] that this Court has general or special jurisdiction and addresse[d] each in turn."

Invasix attached to its special appearance the "Declaration of Yair Malca," the treasurer of Invasix. He testified Invasix is a wholly owned Israeli corporation, incorporated in Delaware, with its principal place of business in California. Invasix does not own any real estate, own or operate any facilities in Texas, or maintain bank accounts in the state. It has never leased any real or personal property in Texas or had an office, post office box, or telephone number in the state. Invasix has not consented to be sued in Texas. Malca further stated, "Of Invasix, Inc.'s ninety-eight (98) employees, only fourteen (14) of these individuals/employees reside in Texas. These individuals reside across the state and work out of their homes. Many of these employees have responsibilities that cover neighboring states and countries."

Three days prior to the special appearance hearing, appellees filed an objection and asked the trial court to strike Malca's affidavit as conclusory. Alternatively, they asked the court to disregard his testimony as not credible. They took particular issue with Invasix's representation that its principal place of business was in California because filings in California and the Texas Secretary of State indicated its principal place of business was in Ontario, Canada.[3]

In their response, appellees argued Invasix's special appearance should be denied because it conceded facts constituting minimum contacts "under both the

[3] Appellees acknowledge their original petition indicated Invasix's principal place of business is California, but they contend after further investigation, they learned this was incorrect but they were entitled to rely on Invasix's representations regarding principal place of business in California. Regardless, it remains undisputed Invasix's principal place of business is not Texas.

specific and general jurisdiction standards: namely, numerous voluntary and deliberate contacts with [Davis] in Texas, culminating in the settlement agreements that Plaintiffs seek to enforce, . . . and continuous, systematic exploitation of the Texas market for its product, resulting in more than $12 million in sales in Texas last year." Appellees argued Invasix's business model consisting of a decentralized, traveling sales team results in the corporation being as much "at home" in Texas as any other state in the United States where it sells medical devices. Moreover, appellees noted Invasix has twice been haled into Texas courts and voluntarily appeared.

Invasix filed an objection and moved to strike appellees' objection and response because they filed it in violation of civil procedure rule 120a and Dallas County Local Rule 2.09. Alternatively, Invasix asked for additional time to respond because appellees for the first time alleged that Invasix had no principal place of business (in contradiction to their original petition alleging California) and that the trial court had specific jurisdiction (in addition to general jurisdiction). The trial court did not rule on the objections prior to the hearing.

The court held the special appearance hearing on March 18, 2019. Invasix argued the trial court was bound by the general jurisdiction facts pleaded in appellees' original petition (the live pleading at the time of the hearing). Invasix, however, conceded, "[W]e certainly are prepared, to some extent to address [specific jurisdiction]." Both sides then argued whether general and specific jurisdiction

applied. The trial court concluded the hearing by "taking everything under advisement."

The following day, appellees filed their first amended petition. They alleged that Invasix's principal place of business was in Ontario, Canada and that Invasix had sufficient minimum contacts within Texas for the trial court to "enjoy specific and general jurisdiction."

After "having carefully considered the matter and the arguments of counsel," the trial court signed an order denying Invasix's special appearance without indicating the basis for the ruling or issuing findings of fact and conclusions of law. This appeal followed.

Special Appearance Standard of Review and Applicable Law

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law we review de novo. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018); *see also Golden Peanut Co., LLC v. Give & Go Prepared Foods Corp.*, No. 05-18-00626-CV, 2019 WL 2098473, at *2 (Tex. App.—Dallas May 14, 2019, no pet.) (mem. op.). If, as in this case, the trial court does not issue findings of fact and conclusions of law with its special appearance ruling, we imply all findings of fact necessary to support its ruling that are supported by the evidence. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). When jurisdictional facts are undisputed, whether those facts establish jurisdiction is a question of law. *Old Republic*, 549 S.W.3d at 558.

Texas courts may exercise personal jurisdiction over a nonresident defendant if (1) the Texas long-arm statute permits exercising jurisdiction and (2) asserting jurisdiction satisfies constitutional due process guarantees. *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016). The Texas long-arm statute reaches "as far as the federal constitutional requirements that due process will allow." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). Personal jurisdiction over a nonresident defendant satisfies constitutional due process guarantees when (1) the nonresident defendant has established minimum contacts with the forum state and (2) exercising jurisdiction comports with traditional notions of fair play and substantial justice. *See M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017) (citing *Walden v. Fiore*, 571 U.S. 277, 283 (2014)).

Minimum contacts are established when the nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking its laws' benefits and protections. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657–58 (Tex. 2010). The purposeful-availment inquiry includes three parts: (1) only the defendant's contacts are relevant; (2) the contact must be purposeful, not random, fortuitous, or attenuated; and (3) the defendant must seek some advantage, benefit, or profit by availing itself of the forum. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007).

A nonresident defendant's forum-state contacts may give rise to two types of personal jurisdiction. *Id*. Specific jurisdiction, also called case-linked jurisdiction, is established if the defendant's alleged liability arises out of or relates to the defendant's contacts with the forum state. *Id*. at 576. A claim arises from or relates to the forum contacts if there is a "substantial connection between [the] contacts and the operative facts of the litigation." *Id*. at 585. The specific jurisdiction analysis focuses on the relationship between the defendant, the forum, and the litigation. *Id*. at 575–76. Specific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis unless all claims arise from the same forum contacts. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150–51 (Tex. 2013).

A court has general jurisdiction, also called all-purpose jurisdiction, over a nonresident defendant whose "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *TV Azteca v. Ruiz*, 490 S.W.3d 29, 37 (Tex. 2016); *Golden Peanut*, 2019 WL 2098473, at *3. The "paradigm" forums in which a corporate defendant is "at home" are the corporation's place of incorporation and its principal place of business. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017). But "[t]he exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.'" *Id*. (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)). The test for general jurisdiction presents "a more demanding

minimum contacts analysis than for specific jurisdiction." *TV Azteca*, 490 S.W.3d at 37. When a court has general jurisdiction over a nonresident, it may exercise jurisdiction even if the cause of action did not arise from activities performed in the forum state. *Golden Peanut*, 2019 WL 2098473, at 3.

Discussion

In its second issue, Invasix argues the trial court erred by refusing to strike, or alternatively, by considering appellees' late-filed response to its special appearance and appellees' first amended petition. Thus, we first determine the parameters of the record for our review.

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. *Kelly*, 301 S.W.3d at 658. The defendant has no burden to negate a potential basis for personal jurisdiction when it is not pleaded by the plaintiff. *Id.*; *Stocksy United v. Morris*, No. 01-18-00924-CV, 2019 WL 6904546, at *6 (Tex. App.—Houston [1st Dist.] Dec. 19, 2019, no pet.). However, we have held the plaintiff's original pleading as well as its response to the defendant's special appearance can be considered in determining whether the plaintiff satisfied its burden. *Flanagan v. Royal Body Care, Inc.*, 232 S.W.3d 369, 374 (Tex. App.—Dallas 2007, pet. denied) (considering response to special appearance rather than limiting review to jurisdictional allegations in third party petition); *see also Alliance Royalties, LLC v. Booth*, 329 S.W.3d 117, 120–21 (Tex. App.—Dallas 2010, no

pet.). Thus, to the extent Invasix argues we are bound by the jurisdictional facts alleged in only appellees' original petition, we disagree. *See* TEX. R. CIV. P. 120a(3) (court determines special appearance on basis of pleadings on file at the time of the hearing); *see also Frank A. Smith Sales, Inc. v. Atl. Aero, Inc.*, 31 S.W.3d 742, 747 (Tex. App.—Corpus Christi 2000, no pet.) ("The meaning of the term 'pleading' must be limited at least so as to exclude matters not filed prior to the special appearance hearing.").

We are mindful that rule 120a(3) requires that affidavits "shall be served at least seven days before the hearing." TEX. R. CIV. P. 120a(3). Appellees did not timely serve their response and attached affidavit before the hearing, and Invasix filed objections and a motion to strike the response. However, nothing in the record indicates Invasix was surprised or prejudiced by the late filing. *See, e.g.*, *Foley v. Trinity Indus. Leasing Co.*, 314 S.W.3d 593, 602–03 (Tex. App.—Dallas 2010, no pet.) (considering fourth amended petition when defendant did not object or claim surprise or prejudice from plaintiff filing it seven days before hearing). In fact, Invasix's special appearance denied and addressed general and specific jurisdiction.

During the hearing, Invasix argued the trial court should only consider general jurisdiction and brought to the court's attention its motion to strike appellees' response. However, the trial court did not rule on the motion, and Invasix neither asked for a ruling, nor objected during the hearing when Davis argued facts

supporting specific jurisdiction. Instead, Invasix admitted it was "certainly" prepared "to some extent, to address it."

Towards the end of the hearing, the trial court took "everything under advisement." Again, neither side asked for clarification or objected to the consideration of both general and specific jurisdiction. Under the facts of this case, it was not improper for the trial court to consider whether it had specific jurisdiction based on the pleadings and responses on file at the time of the hearing. *See, e.g., Stein v. Deason*, 165 S.W.3d 406, 413 (Tex. App.—Dallas 2005, no pet.) (trial court properly considered late-filed affidavits when opposing party did not, among other things, object to going forward with special appearance hearing). We overrule Invasix's second issue in part.

We reach a different conclusion regarding the first amended petition appellees filed after the special appearance hearing in which they alleged specific jurisdiction. Absent leave of court to file late pleadings, we cannot consider them in reviewing the trial court's order. *See Wellness Wireless, Inc. v. Vita*, No. 01-12-00500-CV, 2013 WL 978270, at *5 (Tex. App.—Houston [1st Dist.] Mar. 12, 2013, no pet.) (mem. op.). Nothing in the record indicates appellees asked for, or the trial court granted, leave to amend. Therefore, we shall not consider appellees' first amended petition in our review. We sustain, in part, Invasix's second issue.

Having determined the parameters of the record for review, we now consider whether appellees carried their initial burden to show general personal jurisdiction

over Invasix in Texas. *See Kelly*, 301 S.W.3d at 658. The United States Supreme Court has explained that "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts," but "[r]ather, the inquiry calls for an appraisal of a corporation's activities in their entirety" because "a corporation that operates in many places can scarcely be deemed at home in all of them." *BNSF Ry.*, 137 S. Ct. at 1559.

Invasix has not disputed its activities in Texas, but merely engaging in a substantial, continuous, and systematic course of business in the forum is no longer sufficient to confer general jurisdiction. *Daimler*, 571 U.S. at 138. A corporation's affiliations with the forum must be "so 'continuous and systematic' as to render [it] essentially at home in the forum State." *BNSF Ry.*, 137 S. Ct. at 1552. Although it has not had the occasion to affirmatively define the contours of the "essentially at home" standard, the Supreme Court has cited to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) as the singular example of an "exceptional case" where a foreign corporation was "essentially at home" in the forum state. *BNSF Ry.*, 137 S. Ct. at 1558. In that case, a Philippine mining corporation was sued in Ohio, where the corporation's president and general manager relocated and maintained the corporate office after the Japanese occupied the Philippines during World War II. *Id.* (citing 342 U.S. at 447–48) ("Because Ohio then became 'the center of the corporation's wartime activities,' suit was proper there.").

Relying on *Perkins* as an example, the Court declined to conclude BNSF was "at home" in Montana to permit general jurisdiction over claims despite the railroad having over 2,000 miles of railroad tracks and more than 2,000 employees in the state. *BNSF Ry*. 137 S. Ct. at 1558. Thus, the Court has set a "high bar" for establishing general jurisdiction over a foreign corporation.

Here, Invasix does not maintain any offices, a mailing address, or a telephone listing in Texas. It does not own or lease any real or personal property in Texas or maintain any bank accounts. While it has been registered with the Secretary of State since 2011 to sell products and has a registered agent for service of process in Texas, this is not enough to confer general jurisdiction. *See Golden Peanut Co*., 2019 WL 2098473, at *6 (citing *N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*., No. 05-16-00319-CV, 2017 WL 3275896, at *16 (Tex. App.—Dallas July 27, 2017, no pet.)) (general jurisdiction contacts not established by showing foreign entities paid taxes, registered to do business in Texas, and had registered agents for service of process in Texas); *see also Asshauer v. Glimcher Realty Trust*, 228 S.W.3d 922, 934 (Tex. App.—Dallas 2007, no pet.) ("[H]aving a registered agent and being registered to do business in Texas only potentially subjects a foreign corporation to jurisdiction in the state.").

Maintaining employees in Texas does not make a nonresident corporation "at home" in the state. *N. Frac Proppants*, 2017 WL 3275896 at *23; *see also BNSF Ry.*, 137 S. Ct. at 1559–60. Thus, although Invasix has fourteen employees residing

in Texas and working from their homes, this is not sufficient to confer general jurisdiction particularly when it has eighty-four employees working outside of Texas. Moreover, many of the fourteen employees in Texas have responsibilities in neighboring states and countries so their roles are not solely devoted to Texas.

Neither the targeting of Texas physicians to participate in a "Luminary Program" by which Invasix recruits doctors to conduct trainings nor Dr. Stephen Mulholland, the co-founder of the company, visiting Texas two to three times a year for conferences adds sufficient basis to support general jurisdiction. *See, e.g., Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 809 (Tex. 2002) (nonresident's attendance at five Texas conferences did not support jurisdiction); *Golden Peanut*, 2019 WL 2098473, at *6 (executives' travel to Texas for trade shows and conferences insufficient to confer general jurisdiction); *see also SprayFoamPolymers.com, LLC v. Luciano*, 584 S.W.3d 44, 51 (Tex. App.—Austin 2018, no pet.) (hiring independent sales representatives and training installers in Texas did not give rise to general jurisdiction); *Chevron Bangladesh Block Twelve Ltd. v. Baldwin*, No. 01-17-00303-CV, 2017 WL 6043686, at *4 (Tex. App.—Houston [1st Dist.] Dec. 7, 2017, no pet.) (mem. op.) (recruiting and hiring of Texas residents not a contact in support of an "exceptional case").

The fact that the second highest salesman out of twenty-eight lives in Texas and oversees associate territory managers responsible for sales in Texas does not

impact Invasix's jurisdictional contacts with Texas. *See Baldwin*, 2017 WL 6043686, at *4.

Appellees further emphasize Invasix's revenue in 2017 and 2018 from the sale of its medical devices to show it is "at home" in Texas. However, the revenue from Texas was approximately one-sixth of its national sales for both years.[4] As such, Invasix's sales in Texas are not so sizable as to render it "at home" here. *See, e.g.*, *Michel v. Rocket Eng'g Corp*., 45 S.W.3d 658, 680 (Tex. App.—Fort Worth 2001, no pet.) (sales constituting less than ten percent of corporation's total sales, did not, standing alone, constitute evidence to support general jurisdiction); *see also Internet Advertising Grp., Inc. v. Accudata, Inc*., 301 S.W.3d 383 (Tex. App.—Dallas 2009, no pet.) (evidence of thirteen customers from which company derived less than one percent of its revenues was not sufficient to establish general jurisdiction);[5] *Locke v. Ethicon Inc*., 58 F.Supp.3d 757, 763 (S.D. Tex. 2014) ("plaintiffs' substantial revenue argument cannot withstand holding in *Daimler*" to make it "at home" in Texas).

Finally, regardless of whether Invasix voluntarily appeared in previous suits has no relevance to whether Invasix's Texas contacts are so strong at to be comparable to having Texas as its state of incorporation or principal place of

[4] Sales in Texas totaled $7,779,087 in 2017 while the national sales totaled $46,665,190. Sales in Texas totaled $12,106,824 in 2018 with national sales totaling $79,834,675.

[5] We recognize these cases pre-date *Daimler* and *BNSF Railway* and therefore the analysis involved whether activities were "continuous and systematic" in determining general jurisdiction rather than whether a corporation is "at home" in the state; however, they remain instructive.

business thereby making it "at home" here. *See N. Frac Proppants, II, LLC*, 2017 WL 3275896 at *23.

Having considered the jurisdictional facts alleged by appellees in their original petition and special appearance response, Invasix's activities "in its entirety," do not rise to the level of an "exceptional case" as in *Perkins*. *See* 342 U.S. at 447–48 (president conducted personal and business affairs including maintaining office files, corresponding with employees, distributing salary checks, maintaining active bank accounts, dispatching funds to cover purchases, holding directors' meetings, and supervising policy dealings from office making it "at home" in the state). Invasix's operations, as a nonresident corporate defendant, "are not so substantial and of such a nature to render the corporation at home in th[is] state." *BNSF Ry.*, 137 S. Ct. at 1558–59 (emphasizing a corporation that operates in many places can scarcely be deemed at home in all of them). To the extent the trial court found general jurisdiction over Invasix, it erred.

We now consider whether specific jurisdiction exists. Broadly stated, specific jurisdiction exists when the plaintiff's claims "arise out of" or "relate to" the defendant's contact with the forum. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 67 (Tex. 2016) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945)). The Supreme Court has emphasized that the defendant's relationship, not the plaintiff's relationship, with the forum state is the proper focus of the specific jurisdiction analysis. *Id*. In short, specific jurisdiction "does not turn on where a plaintiff

happens to be, and does not exist where the defendant's contacts with the forum state are not substantially connected to the alleged operative facts of the case." *Id*. at 70. Rather, there are three features of the "purposeful availment" inquiry as applied to specific jurisdiction: (1) the relevant contacts are those of the defendant; (2) the contacts that establish purposeful availment must not be random, fortuitous, isolated, or attenuated; and (3) the defendant must seek some benefit, advantage, or profit by "availing" itself of the jurisdiction. *Id*. at 67.

To support specific jurisdiction, appellees rely on Liederman's negotiations with Davis, which occurred while she worked in Texas. Although appellees admit Davis initiated the settlement negotiations, they argue Invasix "chose to respond to the demand." They cite to the seventy-seven emails Liederman sent, the five phone calls he made, and the three tolling agreements Invasix signed and delivered to Davis over a span of three years in working towards settling appellees' claims. They argued in their special appearance response "the number and regularity of these contacts more than suffice under the specific jurisdiction minimum contacts requirement." Their argument, however, ignores that the minimum contacts analysis focuses on "the quality and nature of the defendant's contacts, rather than their number." *Id*. at 69. Accordingly, the number of emails or phone calls Liederman sent to a Texas attorney is not dispositive of the specific jurisdiction inquiry.[6]

[6] To the extent appellees attempt to bolster their argument by referencing contacts between the attorneys regarding settlement of other disputes, such contacts are irrelevant to a specific jurisdiction inquiry as they

In arguing that Invasix's actions were deliberate, not random, fortuitous or attenuated, appellees push the notion that Invasix had no obligation to engage in settlement negotiations but chose to and did so for the purpose of seeking "some benefit and advantage" thereby further establishing it purposefully availed itself to Texas jurisdiction. First, to allow a Texas court to exercise specific jurisdiction over a nonresident defendant based on settlement negotiations between a nonresident attorney and a Texas attorney would potentially chill rather than encourage parties to negotiate in good faith towards a compromise and settlement of their claims. Liederman could have "quite literally" interacted with Davis, who could have been anywhere in the world, in the same manner. *Searcy*, 496 S.W.3d at 75 (noting Texas employees could have been located anywhere and foreign company would "presumably have interacted with them in the same way). "The mere coincidence of [Davis's] presence here—completely out of [Invasix's] control" means specific jurisdiction is lacking. *Id*.

Second, standing alone, entering into a contract with a Texas resident does not necessarily establish minimum contacts sufficient to support personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *Citrin Holdings, LLC v. Minnis*, 305 S.W.3d 269, 281 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Importantly, the contract at issue in the underlying lawsuit is not between *any*

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are outside the facts related to these particular appellees' claims. *See Moncrief Oil Int'l Inc.*, 414 S.W.3d at 150–51 (specific jurisdiction requires analysis of jurisdictional contacts on a claim-by-claim basis).

Texas residents. Moreover, telephonic and written communication of information regarding a contract in the forum state does not establish jurisdiction even if such communications are extensive. *See, e.g., Thousand Trails, Inc. v. Foxwood Hill Prop. Owners Ass'n*, No.Civ.A. 3:98-2843-D, 1999 WL 172322, at *4 (N.D.Tex. 1999). And while a contract's place of performance is an important consideration, *see Citrin Holdings*, 305 S.W.3d at 281, the fact that settlement payments were to be sent to Davis in Texas does not establish minimum contacts sufficient to confer personal jurisdiction. *See Tran v. Tran*, No. 01-16-00248-CV, 2017 WL 817183, at *5 (Tex. App.—Houston [1st Dist.] Mar. 2, 2017, no pet.) (mem. op.); *see also KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd*., 384 S.W.3d 389, 393 (Tex. App.—Dallas 2012, no pet.) (concluding nonresident's contacts with Texas plaintiff through telephone and email communications and sending of payments to plaintiff in Texas did not constitute contact demonstrating purposeful availment). It is apparent that Invasix's contacts with Davis were based on her representation of the nonresident plaintiffs in the personal injury lawsuit and had nothing to do with the State of Texas. We cannot conclude such contacts were purposeful, rather than random and fortuitous.

Further, the purposeful availment doctrine "recognizes that a defendant can make choices to avoid benefitting from activities in Texas." *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). "Insertion of a clause designating a foreign forum suggests that no local availment was intended."

Searcy, 496 S.W.3d at 75 (referencing inclusion of forum selection and choice of law clauses in contract) (quoting *Michiana*, 168 S.W.3d at 792); *see also Hoagland v. Butcher*, 396 S.W.3d 182, 194 n.13 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (recognizing a choice-of-law provision, while not dispositive, is one factor to consider in determining personal jurisdiction over nonresident defendant). Here, the contract at issue included a California choice of law provision, which indicates Invasix's contacts were not for purposes of reaping profit or obtaining a benefit or advantage in Texas.

To the extent the trial court found specific jurisdiction over Invasix, it erred. In reaching this conclusion we reject appellees' reliance on *Hoagland* and *Citrin*. *See Hoagland*, 396 S.W.3d 182; *Citrin*, 305 S.W.3d 269. In *Citrin*, the nonresident defendant contracted with a Texas resident after multiple Texas contacts over many months "in contemplation of an ongoing business relationship to be performed at least in part in Texas." *Citrin*, 305 S.W.3d at 283. The court further considered that the ongoing relationship was not unilaterally initiated by the Texas resident. *Id*. Similarly, in *Hoagland*, the nonresident defendants intended to obtain business and keep an ongoing business relationship in Texas and sought profit based on presentations in Texas. *Hoagland*, 396 S.W.3d at 194. Unlike the nonresident defendants in those cases, Invasix did not seek an ongoing business relationship with a Texas resident and unlike *Citrin*, any relationship was unilaterally initiated by Davis.

Finally, we recognize case law holding that a single contract may establish sufficient minimum contacts when considered against a backdrop of prior negotiations and contemplated future consequences. However, appellees' reliance on *Citrin* is again misplaced. The *Citrin* plaintiff's breach of contract claim was based in part on alleged misrepresentations that allegedly occurred in part, in Texas, and during phone calls to Texas. *Citrin*, 305 S.W.3d at 284. Appellees in the present case have not alleged that Invasix made misrepresentations during any of its contacts with Davis.

In light of our conclusion that Invasix lacked sufficient minimum contacts with Texas to support a finding of specific jurisdiction, we need not consider whether the exercise of jurisdiction comports with the traditional notion of fair play and substantial justice. *See Foley v. Trinity Indus. Leasing Co*., 314 S.W.3d 593, 602 (Tex. App.—Dallas 2010, no pet.) ("[o]nly if minimum contacts are established does the court consider the second prong of the constitutional due process analysis"); *see also* TEX. R. APP. P. 47.1. We sustain Invasix's first issue.

Conclusion

We reverse the trial court's order and render judgment dismissing appellees' claims against Invasix for lack of jurisdiction.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

INVASIX, INC., Appellant No. 05-19-00494-CV V. DEBBIE JAMES AND KATLYNN CLINICH, Appellees	On Appeal from the 101st Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-18-17175. Opinion delivered by Justice Bridges. Justices Molberg and Partida-Kipness participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** dismissing appellees DEBBIE JAMES'S and KATLYNN CLINICH'S claims against appellant INVASIX, INC. for lack of jurisdiction.

It is **ORDERED** that appellant INVASIX, INC. recover its costs of this appeal from appellees DEBBIE JAMES and KATLYNN CLINICH.

Judgment entered this 25th day of February, 2020.