

**Reversed and Remanded and Opinion Filed June 23, 2023**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-21-00739-CV**

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**NUSRET DALLAS LLC, Appellant  
V.  
STEVE REGAN, Appellee**

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**On Appeal from the 68th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-21-00902**

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**MEMORANDUM OPINION**

Before Justices Molberg, Pedersen, III, and Kennedy  
Opinion by Justice Pedersen, III

In this accelerated appeal, Nusret Dallas LLC (“Nusret”) seeks reversal of the trial court’s interlocutory order granting the special appearance of appellee Steve Regan.<sup>1</sup> We reverse the trial court’s order. Regan seeks damages against Nusret pursuant to Rule 45 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P.

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<sup>1</sup> Nusret brings this appeal pursuant to Texas Rule of Appellate Procedure 28.1(a) and section 51.014(a)(7) of the Texas Civil Practice and Remedies Code. *See* TEX. R. APP. P. 28.1(a); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7).

45.<sup>2</sup> We deny the motion for damages. We remand the case to the trial court for further proceedings.

### **BACKGROUND**

In May 2019, BengeTexas, Inc., agreed with Nusret to provide construction services as general contractor.<sup>3</sup> The agreement was for buildout and other work necessary for opening Nusret's new restaurant in Dallas, Texas. Regan was not party to the agreement. Nusret designated Regan, its employee, to facilitate and oversee the project on its behalf. Nusret alleged Regan was responsible for all aspects of the Dallas project, including overseeing payments to BengeTexas, reporting the project's progress to Nusret, and ensuring that Nusret's rights and interests were protected. Nusret alleged, "In this role, Regan, traveled to and spent extended time on the ground in Dallas, Texas opening the Nusret Steakhouse." Nusret alleged that during Regan's time in Dallas, he established ongoing, long term relationships with Texas citizens and companies, including vendors, contractors, landlords, attorneys, and Nusret employees.

On January 5, 2021, counsel for BengeTexas first advised Nusret in a letter that BengeTexas had paid \$182,880.50 to Regan. According to the letter, Regan told

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<sup>2</sup> See TEX. R. APP. P. 45 (providing for award of "just damages" to prevailing party for frivolous appeal).

<sup>3</sup> We refer to BengeTexas, Inc. d/b/a Benge General Contracting and Jim Benge collectively as "BengeTexas."

Nusret alleges Jim Benge is an individual resident of Rockwall, Rockwall County, Texas, and that BengeTexas is a Texas corporation operating in Dallas County, Texas.

BengeTexas that Nusret had agreed to pay him \$2,250.00 per week. Regan directed BengeTexas to wire payments for that amount—from funds it received from Nusret—to Regan’s Penult Projects, Inc., bank account. Regan directed BengeTexas to not report the payments as BengeTexas had routinely reported other payments. Regan directed BengeTexas to send all communications via his Penult Projects, Inc., email address unless he specifically directed BengeTexas to email him via his Nusret email address. The letter stated BengeTexas was apparently “duped” by Regan and that Nusret “. . . may not have been aware of the weekly management fees that Steve [Regan] was receiving from Benge . . . .” Nusret did not authorize the payments, which BengeTexas referred to as Regan’s possible “double dipping.”

On January 21, 2021, BengeTexas filed a lawsuit against Nusret in Dallas County. BengeTexas alleged breach of contract, quantum meruit, and violation of the Prompt Payment Act. It also sought foreclosure of a mechanic’s and materialman’s lien, and attorney’s fees.

Nusret filed a second amended verified counterclaim and second amended verified third-party petition against “counter-defendants” BengeTexas, Inc. d/b/a Benge General Contracting, Jim Benge, Steve Regan, and Penult Projects Inc. d/b/a/ Penult Consulting, Inc. Nusret alleged claims for violation of the Texas Construction Trust Fund Act, fraud, negligent misrepresentation, and conspiracy against all “counter-defendants.” It alleged breach of contract and sought declaratory relief solely against BengeTexas.

Regan filed a special appearance with a supporting brief and affidavit. Nusret filed an affidavit and response to the special appearance. Regan filed a supplemental brief and affidavit in support of the special appearance. Smith attached a document captioned “Mutual Agreement to Arbitrate Claims” to his supplemental brief. The trial court heard argument on the special appearance, requested additional briefing, and took the matter under advisement. The trial court signed an order sustaining Regan’s special appearance. Findings of fact and conclusions of law were not requested or filed. Nusret filed its accelerated appeal pursuant to Texas Rule of Appellate Procedure 28.1(a) and section 51.014(a)(7) of the Texas Civil Practice and Remedies Code. *See* TEX. R. APP. P. 28.1(a); CIV. PRAC. & REM. § 51.014(a)(7).

**PERSONAL JURISDICTION: APPLICABLE LAW,  
PROCEDURE, AND STANDARDS OF REVIEW**

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. *See 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 of 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).

A nonresident defendant's contacts with the forum state can give rise to general or specific jurisdiction. *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 8 (Tex. 2021); *Chen v. Razberi Techs., Inc.*, No. 05-19-001551-CV, 2022 WL 16757346, at \*2 (Tex. App.—Dallas Nov. 8, 2022, no pet.) (mem. op.). General jurisdiction is established when the defendant has continuous and systematic contacts with the forum, rendering it essentially at home in the forum state, regardless of whether the defendant's alleged liability arises from those contacts. *See TV Azteca v. Ruiz*, 490 S.W.3d 29, 37 (Tex. 2016); *Chen*, 2022 WL 16757346, at \*2. Moreover, a nonresident defendant's forum-state contacts may give rise to specific jurisdiction. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007). Specific jurisdiction is established if a defendant purposefully avails itself of

the privilege of conducting activities within Texas and its alleged liability arises out of or relates to its contacts with the forum state. *See id.* at 576.<sup>4</sup>

Procedurally, the supreme court explained the shifting burdens of proof in a special appearance. First, “the plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach of Texas’s long-arm statute.” *See Kelly*, 301 S.W.3d at 658. The defendant then “bears the burden to negate all bases of personal jurisdiction alleged by the plaintiff.” *Id.* “[T]he defendant’s . . . burden to negate jurisdiction is tied to the allegations in the plaintiff’s pleading.” *Id.* If the defendant, in its special appearance, presents evidence that disproves the plaintiff’s jurisdictional allegations, then the plaintiff should present evidence in support of the petition’s allegations. *Id.*

A defendant can negate jurisdiction on either a factual or legal basis. *Id.* at 659. Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff’s allegations. *See id.* A defendant who fails to negate jurisdiction on a factual basis may attempt to negate it on a legal basis. *See id.* A defendant negates jurisdiction on a legal basis by showing that even if 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;

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<sup>4</sup> We base our conclusion concerning in personam jurisdiction, below, on the law of specific jurisdiction. Consequently, we do not further address general jurisdiction. *See* TEX. R. APP. P. 47.1 (“The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.”).

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. *See id.*; *Colmen LLC v. Santander Consumer USA, Inc.*, No. 05-17-00101-CV, 2017 WL 5022700, at \*4 (Tex. App.—Dallas Nov. 3, 2017, no pet.) (mem. op.).

Rule 120a of the Texas Rules of Civil Procedure requires that a special appearance be determined on the pleadings, any stipulations by the parties, affidavits and attachments filed by the parties, results of discovery, and any oral testimony. *See* TEX. R. CIV. P. 120a(3); *Kelly*, 301 S.W.3d at 658 n.4 (while pleadings frame the jurisdictional dispute, they are not dispositive, and the court must consider additional evidence cited in Rule 120a(3), though this additional evidence merely supports or undermines allegations in the pleadings).

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). 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. *See BMC Software Belg., 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. *See Old Republic Nat'l Title Ins. Co.*, 549 S.W.3d at 558.

### **ANALYSIS**

Nusret brings two issues on appeal:

1. Did the trial court err by sustaining appellee's special appearance?
2. Is Steve Regan subject to personal jurisdiction in the State of Texas with respect to claims arising out of Regan's management and oversight of the construction and build-out of Nusret's restaurant in Dallas, Texas?

In Regan's brief, he asks us to award him damages because Nusret filed a frivolous appeal.

### **Regan's Special Appearance**

#### **Texas Long-Arm Statute**

We first determine whether Nusret carried its initial burden to plead sufficient allegations to bring Regan within the reach of the Texas long-arm statute. *See Kelly*, 301 S.W.3d at 658. "A plaintiff's petition satisfies the Texas long-arm statute when it alleges the defendant did business, which includes committing a tort in whole or in part in Texas." *Steward Health Care Sys., LLC v. Saidara*, 633 S.W.3d 120, 129 (Tex. App.—Dallas 2021, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2). In order to meet its burden, a plaintiff must show the act on which jurisdiction is predicated, not a prima facie demonstration of the existence of a cause of action. *See Saidara*, 633 S.W.3d at 126.

Nusret alleged in its second amended verified counterclaim and second amended verified third-party petition,

Regan and his entity, Penult Projects have both done and are doing business in this State, as provided by the Texas Long-Arm Statute, TEX.



CIV. PRAC. & REM. CODE ANN. § 17.042. This Court has both general and specific *in personam* jurisdiction over these third-party defendants. Exercise of jurisdiction over Regan and Penult Projects comports with due process.

Nusret also alleged detailed causes of action against Regan for fraud, negligent misrepresentation, conspiracy, and violation of the Texas Construction Trust Fund Act. Nusret alleged that all Regan's acts occurred in Dallas County. We conclude Nusret met its pleading requirement.

We next consider whether Regan carried his burden to negate all bases of jurisdictional allegations in Nusret's pleading by presenting evidence disproving the allegations. *See Kelly*, 301 S.W.3d at 658-59. Regan's special appearance and brief in support incorporated his own affidavit. It stated, in part:

FACTS ADDRESSING THAT NO TORT AGAINST PLAINTIFF  
WAS COMMITTED IN TEXAS

• • •

2. I have never been employed by Nusret Dallas, LLC.
3. I have never entered into any agreement with Nusret Dallas LLC. for services.
4. I have never received any funds from Nusret Dallas, LLC in Texas.
5. I have personal knowledge that Nusret Dallas, LLC is Delaware LLC with offices in Florida and as of this affidavit Nusret Dallas LLC has no operating business in Texas.
6. I have personal knowledge that the sole Manager of Nusret Dallas LLC, Naki Ufuk Soy Turk, is Turkish Citizen, residing in Florida.
7. I have never been an authorized bank signer on any account owned or operated by Plaintiff in any location.
8. I have never personally received any payment from Jim Benge, Benge Texas, Inc., or any Benge entity.
9. I have never knowingly committed a tortious act in Texas against the Plaintiff OR THE OTHER Defendants.<sup>5</sup>

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<sup>5</sup> The affidavit's remaining averments are relevant to the issue of general jurisdiction.

We conclude without detailed discussion that paragraphs two and three and paragraphs five through seven of Regan’s affidavit fail to negate Nusret’s jurisdictional allegations.

We conclude paragraphs four and eight—reciting that Regan (§ 4) never received funds from Nusret Dallas, LLC in Texas or (§ 8) personally received any payment from Benge or BengeTexas, Inc, or a Benge entity—do not squarely meet or negate Nusret’s allegations. As for paragraph four, Nusret does not allege that Regan received funds from it in Texas. Rather, Nusret alleges Regan directed BengeTexas to divert \$182,880.50, without Nusret’s authorization, to Regan “and/or” Penult Projects, Inc., and that Regan acted in Dallas County. As for paragraph eight, Nusret does not simply allege Regan personally received funds from BengeTexas. Nusret instead alleges, “Regan and Penult Projects benefited from the scheme . . . .” Moreover, Nusret alleges—and Regan failed to negate—that Penult Projects, Inc., is Regan’s entity.

Paragraph nine of the affidavit—that Regan never knowingly committed a tortious act in Texas against the Plaintiff or the other Defendants—fails to negate alleged jurisdiction. This Court has held that such a statement is conclusory and speculative and legally constitutes no evidence. *See Effel v. Rosberg*, No. 05-17-01332-CV, 2018 WL 4403444, at \*4 n.3 (Tex. App.—Dallas Sept. 17, 2018, no pet.) (mem. op.) (citing *Hale v. Richey*, No. 10-11-00187-CV, 2012 WL 89920, at \*9

(Tex. App.—Waco Jan. 11, 2012, no pet.) (mem. op.) (in special appearance proceeding, defendant’s affidavit averment that defendant never committed a tort in Texas was conclusory and should not be considered)); *Doane v. Cooke*, No 03-06-00414-CV, 2008 WL 4899169, at \*5 n.5 (Tex. App.—Austin Nov. 14, 2008, no pet.) (mem. op.) (“The affidavit provides no factual support for his statements . . . that he had not committed a tort. Instead, it merely states Doane’s legal conclusions . . . that he had not committed a tort. Those bare averments are conclusory and not competent affidavit evidence.”).

We focus on Regan’s affidavit and evidence that relates to the presence or absence of jurisdictional contacts. *See Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 791 (Tex 2005) (“Michiana . . . rightly focused is jurisdictional affidavits on lack of *contacts* rather than lack of *culpability*.”). Regan presented no evidence to dispute the allegation that he was physically present in Texas while coordinating all aspects of the construction project, including overseeing payments related to the project. He failed to negate Nusret’s allegations that he acted in Dallas County.<sup>6</sup>

We conclude Regan presented no evidence to factually negate Nusret’s alleged bases of in personam jurisdiction.

### Due Process

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<sup>6</sup> Regan also failed to negate additional jurisdictional facts addressed in the due-process analysis, below.

For a Texas forum to properly exercise specific jurisdiction in this case, (1) Regan must have made minimum contacts with Texas by purposefully availing himself of the privilege of conducting activities here, and (2) his liability must have arisen from or been related to those contacts. *See Moki Mac*, 221 S.W.3d at 576.

### 1. Purposeful Availment

Our 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. *See Moki Mac*, 221 S.W.3d at 575.

First, we consider Regan's contacts with Texas. *See Moki Mac*, 221 S.W.3d at 575 (“ . . . only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person.”). Regan was physically present in Dallas for an extended time and oversaw “all” aspects of the Dallas construction project, including payments. Regan directed BengeTexas to divert unauthorized monthly payments related to the project to his own Penault Projects, Inc. He failed to inform Nusret that he had directed BengeTexas to divert the unauthorized funds. He directed BengeTexas to irregularly report the unauthorized payments. He directed BengeTexas to bypass routine communications protocols to Nusret. He initially investigated, on Nusret's behalf, the irregularities on which Nusret's claims against him are based.

The BengeTexas letter of January 5, 2020, was attached to Nusret’s response to the special appearance. The letter stated, in part:

Steve [Regan] told Benge that his weekly contracted amount for management with Nusret was \$2,250.00 per week. He had Benge add that dollar amount to Benge’s weekly management amount. Steve told Benge that it should not be broken out on the SOV like all other subcontractor invoices. Once Benge was paid from Nusret, he then had Benge wire the money to his Penult, Inc bank account for his weekly management expenses. He also started to add reimbursements for himself on top of his weekly cost. He was paid total of \$182,880.50 by Benge throughout the duration of this project for his Project Management (Payment schedule attached). Benge tried to get invoices for each week, but he never sent one. Benge was also directed to have all communications via his Penult Inc email address unless he specifically told Benge to email him on his Nusret email.

Nusret also filed the affidavit of Naki Ufuk Soyuturk, manager of Nusret Dallas LLC.<sup>7</sup>

*See* TEX. R. CIV. P. 120a(3) (addressing use of affidavits in special appearances).

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<sup>7</sup> The affidavit stated, in part:

3. In his role, Regan reported directly to me, and was held responsible for all aspects of the Project—from pre-construction to project-close out—including but not limited to, overseeing payments to contractors, reporting to myself and other executives regarding the progress of the Project, and ensuring that Nusret’s rights and interests were protected.

4. As project manager, Regan, traveled to and spent extended time on the ground in Dallas, Texas. I am aware that during that time, Regan established ongoing, long term relationships with Texas citizens and companies, including . . . contractors . . . .

5. Importantly, Regan interacted with the general contractor for the Project, BengeTexas, Inc. d/b/a Benge General Contracting (“Benge”), and its principal Jim Benge. As background, on or about May 22, 2019, Nusret and BengeTexas, Inc. d/b/a Benge General Contracting entered into Agreement Between Owner and Contractor (the “Agreement”) under which, inter alia, BengeTexas agreed to provide construction and general contracting services for Nusret (the “Work”) for the to-be-opened Dallas, Texas restaurant. Nusret designated Regan as its representative under the Agreement, whereby Regan worked directly with BengeTexas, and its owner Jim Benge. . . .

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8. In the fall of 2020, Nusret discovered that BengeTexas has allegedly misappropriated funds from Nusret that belonged to subcontractors on the Project. Initially, Regan was wholly involved in

We conclude Nusret’s unnegated pleadings and evidence of jurisdictional contacts pertains to Regan’s conduct and not to unilateral conduct attributable to other parties. *See Moki Mac*, 221 S.W.3d at 575. Although BengeTexas allegedly diverted funds, it did so at Regan’s alleged direction, which Nusret alleged occurred in Dallas County and which Regan did not negate.

Second, we consider whether Regan’s jurisdictional contacts were purposeful, rather than random, fortuitous, or attenuated. *See id.* The unnegated pleadings and evidence, addressed above, demonstrate Regan was physically in Dallas for an extended period of time to oversee all aspects of the construction project, including facilitation of project payments. Moreover, Nusret’s unnegated allegations and evidence of Regan’s jurisdictional contacts related to his alleged misconduct demonstrate his Texas contacts were purposeful. We do not repeat the unnegated allegations and evidence here. Regan provided no evidence that his presence in Dallas was random, fortuitous, or attenuated rather than purposeful.

We conclude Regan’s contacts with Texas were purposeful, rather than random, fortuitous, or attenuated. *See id.*

Third, we consider whether Regan sought “some benefit, advantage or profit by ‘availing [himself] of the jurisdiction.’” *See id.* (quoting *Michiana*, 168 S.W.3d at 785). As noted, Nusret’s unnegated pleading and evidence indicate Regan or his

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Nusret’s investigation of BengeTexas and Jim Benge, and Regan hired local counsel in Texas related to those alleged misappropriation. . . .

Penult Projects, Inc., benefitted from nineteen diverted, unauthorized payments for almost one year. The payments totaled \$182,880.50. Nusret alleged and provided evidence that Regan directed BengeTexas to divert the funds in Dallas County. We decide that Nusret’s unnegated allegations and evidence demonstrates Regan sought some benefit, advantage, or profit by availing himself of the jurisdiction. *See id.*

In sum, we conclude Regan purposefully availed himself of the privilege of conducting activities in Texas, thus invoking its laws, benefits, and protections. *See Kelly*, 301 S.W.3d at 657-58; *Petrie v. Widby*, 194 S.W.3d 168, 175 (Tex. App.—Dallas 2006, no pet.) (“Petrie purposefully availed himself of the laws of Texas through these purposeful contacts with the State. And Petrie should have realized that the consequences of having made the representations or omissions in Texas could reasonably lead to being haled into court in Texas.”); *Stein v. Deason*, 165 S.W.3d 406, 415 (Tex. App.—Dallas 2005, no pet.) (considering whether alleged misrepresentation, made by nonresident in Texas, was “purposeful” and stating, “We conclude that Stein should have understood that the consequences of his having made the representation in Texas could reasonably lead to being haled into court in Texas.”).

## 2. The relationship among the defendant, the forum, and the litigation.

Specific jurisdiction also requires the defendant’s alleged liability to arise out of or be related to an activity conducted within the forum. *See Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.]

2010, no pet.) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). The relevant test is whether a substantial connection exists between Regan’s contacts with Texas and the operative facts of the litigation. *See Moki Mac*, 221 S.W.3d at 576, 585. We focus on the “relationship among the defendant, the forum[,] and the litigation.” *Id.* at 575-76. Specific jurisdiction is established if the defendant’s alleged liability ‘rise[es] out of or [is] related to’ an activity conducted in the forum.” *Id.* at 576.

We analyze jurisdictional contacts on a claim-by-claim basis when determining specific jurisdiction unless all claims arise from the same forum contacts. *See Peter v. Stern*, No. 05-20-00021-CV, 2020 WL 4783192, at \*3 (Tex. App.—Dallas Aug. 18, 2020, no pet.) (mem. op.). Nusret alleged common-law fraud, negligent misrepresentation, conspiracy, and violation of the Texas Construction Trust Fund Act against Regan.<sup>8</sup> As noted, Nusret alleged and provided

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<sup>8</sup> The elements of fraud are (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party’s reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation. *See LendingHome Funding Corp. v. Tuesday Real Estate, LLC*, No. 05-20-00071-CV, 2021 WL 6124319, at \*10 (Tex. App.—Dallas Dec. 28, 2021, no pet.) (mem. op.).

“The elements of negligent misrepresentation are (1) the defendant made a representation in the course of its business or in a transaction in which it had an interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.” *Ganter v. Indep. Bank*, No. 05-15-00413-CV, 2016 WL 4376284, at \*12 (Tex. App.—Dallas Aug. 16, 2016, pet. denied) (mem. op.).

The elements of conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a



evidence that Regan directed BengeTexas to divert funds without authorization. He directed BengeTexas to record the payments and to make communications about the payments outside normal protocol, presumably so Nusret would not learn of the payments. Nusret alleged BengeTexas agreed with Regan to divert the funds. Nusret alleged the conduct occurred in Dallas County. Without repeating Nusret’s claims, the elements of the claims, the unnegated allegations, and the evidence in detail, we conclude that Nusret’s claims for fraud, negligent misrepresentation, conspiracy, and violation of the Texas Construction Trust Fund Act arise from the same set of jurisdictional contacts and operative facts. Accordingly, we need not analyze Regan’s jurisdictional contacts on a claim-by-claim basis. *See id.*

Based on the elements of Nusret’s alleged claims, Nusret’s unnegated jurisdictional allegations, and evidence of Regan’s jurisdictional contacts—addressed above—we conclude a substantial connection exists between Regan’s contacts with Texas and the operative facts of the litigation. *See Moki Mac*, 221 S.W.3d at 575-76, 585; *Horizon Shipbuilding, Inc.*, 324 S.W.3d at 849 (citing *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414 n.8)).

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proximate result. *See Barcus v. Scharbauer*, No. 05-19-01121-CV, 2021 WL 1422716, at \*25 (Tex. App.—Dallas Apr. 15, 2021, no pet.) (mem. op.).

The Texas Construction Trust Fund Act is violated if, in part, “A trustee who, intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds.” *Tex. A & M Concrete, LLC v. Brae Burn Constr. Co. LTD*, 651 S.W.3d 607, 622 (Tex. App.—Houston [1st Dist.] 2022, no pet.); *see* TEX. PROP. CODE ANN. § 162.001–162.033 (Texas Construction Trust Fund Act).

\* \* \*

We conclude Nusret has demonstrated Regan purposefully availed himself of the privilege of conducting activities within Texas, thus invoking its laws, benefits, and protections, *see Kelly*, 301 S.W.3d at 657-58, and that Regan’s alleged liability arises out of or relates to the defendant's contacts with Texas. *See TV Azteca*, 490 S.W.3d at 37.

### The Fiduciary Shield Doctrine Is Inapplicable

Regan argued in the trial court, but not in this Court, that the fiduciary shield doctrine nonetheless precludes personal jurisdiction over him because he allegedly acted in Texas as Nusret’s employee. Nusret argues to the contrary.

The fiduciary shield doctrine protects a nonresident corporate officer or employee from the exercise of jurisdiction when all his contacts with Texas were made on behalf of his employer. *See Nichols v. Tseng Hsiang Lin*, 282 S.W.3d 743, 750 (Tex. App.—Dallas 2009, no pet.); *Brown v. Gen. Brick Sales, Inc.*, 39 S.W.3d 291, 297-98 (Tex. App.—Fort Worth 2001, no pet.) (“The fiduciary shield doctrine provides that corporate officers are not subject to jurisdiction in a foreign forum where their actions are taken in a representative capacity.”). Corporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation. *See Tabacinic v. Frazier*, 372 S.W.3d 658, 668 (Tex. App.—Dallas 2012, no pet.). The fiduciary shield doctrine does not protect a corporate agent

who is alleged to have personally committed a tort and at least some of the agent's tortious conduct involved contacts with Texas. *See Stull v. LaPlant*, 411 S.W.3d 129, 137 (Tex. App.—Dallas 2013, no pet.); *Tabacinic*, 372 S.W.3d at 668; *Brown*, 39 S.W.3d at 298 (a plaintiff can defeat the protection of the fiduciary shield doctrine by showing the individual defendant was advancing his own interest).

We conclude the fiduciary shield doctrine does not apply here. As noted, the doctrine precludes personal jurisdiction of employees “when all his contacts with Texas were made *on behalf of his employer*.” *Nichols*, 282 S.W.3d at 750 (emphasis added). We conclude Regan’s conduct was not on behalf of Nusret but was adverse to it. Nusret alleged, “In the event Regan purportedly ‘authorized’ payments to himself (or Penult Projects), such conduct was *not* authorized by Nusret and was beyond the course and scope of his authority with his employer.” (Emphasis in original.) In his affidavit, Soy Turk averred Regan’s duties in overseeing the project included ensuring Nusret’s rights and interests were protected. He averred that Regan’s diversion of funds was not authorized by Nusret. Nusret alleges it was damaged due to Regan’s fraud, negligent misrepresentation, conspiracy, and violation of the Texas Construction Fund Trust Act. In short, Nusret alleges Regan personally committed a tort against it in Texas and was advancing his own interest rather than acting on its behalf, as application of the fiduciary shield doctrine requires. *See id.*; *Brown*, 39 S.W.3d at 298 (“Because this specific jurisdiction case

includes allegations sounding in tort for which the [corporate personnel] may be held individually liable, the fiduciary shield doctrine does not apply.”).

The Arbitration Agreement Does Not Preclude  
In Personam Jurisdiction

Regan argues an arbitration agreement requires arbitration of Nusret’s claims in Florida and precludes in personam jurisdiction over him in this lawsuit. The document states the parties are Nusret Miami, LLC and Regan. It provides arbitration shall take place in Miami-Dade County, Florida. Regan refers to the provision as an arbitration clause and as a forum-selection clause. We note that in *Peter*, 2020 WL 4783192, at \*5, this Court held an agreement to arbitrate claims in Florida pursuant to Panamanian law did not prevent a Texas trial court from exercising personal jurisdiction. *See id.*

A forum-selection clause cannot be ignored when analyzing personal jurisdiction. *Michiana*, 168 S.W.3d at 792-93. However,

A forum-selection clause designating Indiana does not necessarily indicate Michiana had no minimum contacts anywhere else. Generally, a forum-selection clause operates as consent to jurisdiction in one forum, not proof that the Constitution would allow no other.

*Id.* at 793; *see Silber v. Shallow Prod. Sols., Inc.*, 656 S.W.3d 500, 515 n.4 (Tex. App.—El Paso 2022, no pet.) (same); *Nawracaj v. Genesys Software Sys., Inc.*, 524 S.W.3d 746, 756-57 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (same).

Although we may not ignore the clause, *see Michiana*, 168 S.W.3d at 792-93, it does not preclude in personam jurisdiction here. *See id.*; *Peter*, 2020 WL 4783192,

at \*5. Unlike *Michiana*, which involved a single contact with Texas, *see Michiana*, 168 S.W.3d at 794, Nusret alleged and provided evidence, which Regan failed to negate, of a number of purposeful jurisdictional contacts that gave rise to and were related to Nusret’s claims. *See Silber*, 656 S.W.3d at 515 n.4, 519 (citing *Michiana*, affirming denial of special appearance despite forum-selection clause specifying California and choice-of-law clause, and stating: “The forum-selection clause operates as Silber’s consent to jurisdiction in California, but it does not prevent jurisdiction from being proper in another forum, such as Texas.”); *Nawracaj*, 524 S.W.3d at 756-57 (citing *Michiana*, affirming denial of special appearance despite contract provision providing for arbitration in Chicago, Illinois, and stating: “Regardless of the clause’s enforceability in this case (an issue not before us), it does not prevent the exercise of personal jurisdiction in Texas.”).

We conclude the clause does not preclude in personam jurisdiction over Regan. *See Michiana*, 168 S.W.3d at 792-93; *Peter*, 2020 WL 4783192, at \*5; *Silber*, 656 S.W.3d at 515 n.4, 519; *Nawracaj*, 524 S.W.3d at 756-57.

#### Fundamental Fairness and Fair Play

We now consider whether the exercise of personal jurisdiction satisfies traditional notions of fair play and substantial justice. *See Moncrief Oil Int’l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 154-56 (Tex. 2013). We consider the burden on the nonresident defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial

system's interest in obtaining the most efficient resolution of controversies, and the shared interest of several states in furthering substantive social policies. *Id.* at 155; *Peter*, 2020 WL 4783192 at \*6. When a nonresident has purposefully established minimum contacts with the forum state, it will be only a rare case when the exercise of jurisdiction over that defendant does not comport with traditional notions of fair play and substantial justice. *See Moncrief Oil Int'l, Inc.*, 414 S.W.3d at 154-55; *Peter*, 2020 WL 4783192 at \*6. This is not such “a rare case.”

Subjecting Regan to suit in Texas may impose some burden on him, but the same can be said of all nonresidents. Distance alone cannot ordinarily defeat jurisdiction. *See Moncrief Oil Int'l, Inc.*, 414 S.W.3d at 155. Regan has traveled to Texas in the past and oversaw the construction project while being physically present in Dallas. Moreover, the record indicates Regan’s Penult Projects, Inc. filed a special appearance in the same trial court in which this case pended. The trial court denied Penult Projects, Inc.’s special appearance. Regan’s involvement with his Penult Projects, Inc.’s continued litigation in the court below mitigates his inconvenience and burden of defending allegations against him in the same court on similar issues.

Texas is interested in adjudicating this dispute, which arose from conduct related to a construction project on Texas property. Nusret alleges Regan violated the Texas Construction Trust Fund Act, a remedial statute enacted for the protection of laborers and materialmen. *See Texas A & M Concrete, LLC*, 61 S.W.3d at 621-22 (citing *Dealers Elec. Supply Co., Inc. v. Scoggins Constr. Co., Inc.*, 292 S.W.3d 650,

658 (Tex. 2009)); *cf. Dowelanco v. Benitez*, 4 S.W.3d 866, 874 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.) (concluding Texas had interest in litigating dispute in Texas because, in part, foreign corporation conducted business in Texas and had an office in Texas, and stating, “We cannot say that Texas residents are not affected by this litigation.”). Moreover, Texas has an interest in exercising judicial jurisdiction over those who are alleged to have committed torts within its territory. *See Mi Gwang Contact Lens Co., Ltd. v. Chapa*, No. 13-13-00306-CV, 2015 WL 3637846, at \*10 (Tex. App.—Corpus Christi–Edinburg June 11, 2015, no pet.) (mem. op).

Litigating Nusret’s claims against Regan in the court below advances Nusret’s interest in obtaining convenient and effective relief. As noted, Nusret’s lawsuit against Penult Projects, Inc., and its claims against BengeTexas pend in the court below.

The interstate judicial system’s interest in obtaining the most efficient resolution of controversies is advanced by deciding Nusret’s claims against Regan in the court below. This case involves claims, counterclaims, and third-party practice. Deciding all issues in one forum and in this lawsuit—rather than in California, Texas, and Florida—supports efficient interstate resolution of an otherwise jurisdictionally fractured litigation of Nusret’s case.

We conclude Regan failed to present a “rare” and “compelling case” that jurisdiction here is unreasonable and does not comport with traditional notions of fair play and substantial justice.

We sustain Nusret’s appellate issues.<sup>9</sup>

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<sup>9</sup> Because we conclude Regan is subject to specific jurisdiction in the trial court, we need not address general jurisdiction. *See Tabasso v. BearCom Grp., Inc.*, 47 S.W.3d 822, 830 n.1 (Tex. App.—Dallas 2013, no pet.) (“The court need not address general jurisdiction if it finds that a defendant is subject to specific jurisdiction.”); *and see* TEX. R. APP. P. 47.1.



### **Regan’s Motion For Appellate Damages**

Regan seeks sanctions against Nusret pursuant to Rule 45 of the Texas Rules of Appellate Procedure “due to the frivolity of this Appeal.” Rule 45 authorizes us to award each prevailing party “just damages” if we determine an appeal is frivolous. *See* TEX. R. APP. P. 45. An appeal is frivolous if, at the time asserted, the advocate had no reasonable grounds to believe judgment would be reversed or when an appeal is pursued in bad faith. *See D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 205 (Tex. App.—Dallas 2011, no pet.). This appeal is not frivolous. Nusret—not Regan—prevailed here and obtained reversal of the trial court’s special appearance order. We deny Regan’s request for damages.

### **CONCLUSION**

We reverse the trial court's special appearance order. We deny Regan’s request for appellate damages. We remand the case to the trial court for further proceedings.

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/Bill Pedersen, III/  
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BILL PEDERSEN, III  
JUSTICE



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

NUSRET DALLAS LLC, Appellant

No. 05-21-00739-CV      V.

STEVE REGAN, Appellee

On Appeal from the 68th Judicial  
District Court, Dallas County, Texas  
Trial Court Cause No. DC-21-00902.  
Opinion delivered by Justice  
Pedersen, III. Justices Molberg and  
Kennedy participating.

In accordance with this Court's opinion of this date, the order of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant NUSRET DALLAS LLC recover its costs of this appeal from appellee STEVE REGAN.

Judgment entered this 23<sup>rd</sup> day of June, 2023.