NO. 21-_____

In the Supreme Court of the United States

JUSTIN PANNELL,

Petitioner,

v.

ROGER ABSHIRE AND USK9 UNLIMITED, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When does a court in a resident's state have jurisdiction over a non-resident company who harms a resident in that resident's state? How does the requirement of "relatedness" intersect with the due process clause and the procedural vehicle of the special appearance?

2. What constitutes waiver of a special appearance under Texas Rule of Civil Procedure 120a? Did the misapplication of Rule 120a of the Texas Rules of Civil Procedure deprive Petitioner of due process of law?

PARTIES TO THE PROCEEDINGS

Petitioner

Justin Pannell, was Plaintiff in the trial court and Appellee in the Texas First District Court of Appeals in Houston and Appellant in the Supreme Court of Texas.

Respondents

Roger Abshire and USK9 Unlimited, Inc., were the defendants in the trial court and Appellant in the Texas First District Court of Appeals and Appellee in the Supreme Court of Texas.

LIST OF PROCEEDINGS

Harris County 80th District Civil Court

Cause Number 2017-52769-A

Justin Pannell v.
Roger Abshire and USK9 Unlimited, Inc.

Date of Final Order: August 27, 2019

Texas First District Court of Appeals, Houston
No. 01-19-00710-CV

Roger Abshire and USK9 Unlimited, Inc.
v. Justin Pannell

Date of Final Opinion: July 7, 2020

Supreme Court of Texas

Case No. 21-0098

Justin Pannell v.
Roger Abshire and USK9 Unlimited, Incorporated

Date of Final Order: June 18, 2021

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PETITION FOR A WRIT OF CERTIORARI

Justin Pannell, petitioner, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, First Judicial District, dated July 7, 2020 is included below at App.3a The judgment of the district court for the Texas 80th Judicial District, dated August 27, 2019 is included below at App.34a. These opinon and judgment were not designated for publication.

JURISDICTION

The order of the Supreme Court of Texas denying a petition for review was issued on June 18, 2021. (App.1a). This honorable court has jurisdiction over this case pursuant to 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Pannell sued Abshire, USK9, the City of Rosenberg, City of Rosenberg Police Department and several Rosenberg police officers for serval counts of defamation, libel and slander under Texas law. On October 17, 2017, Abshire and USK9, Respondents, filled their First Amended Special Appearance, Motion for Severance, Notice of Hearing and Subject to the Special Appearance, First Amended Original Answer.

In their motion to sever, filed presumably to gain strategic advantage in the underlying lawsuit, Respondents specifically requested that the court sever the proceeding between Pannell and Defendants from the Rosenberg Police Department defendants ("Co-defendants"). Prior to obtaining a ruling on their Special Appearance, though, Respondents' lawyer, Hoffman, along with Co-Defendants, requested a hearing on both Abshire and USK9's Motion to Sever and Co-Defendants' Motion to Transfer Venue, which was scheduled for November 2, 2018. On November 2, 2018

—almost a full year before the trial court ruled on Abshire and USK9's Special Appearance on August 23, 2019—the trial court granted Respondents' Motion to Sever.

All lawyers, including Hoffman, signed the court's order severing the Co-Defendants case from Abshire and USK9's and transferring it to Fort Bend County. Hoffman never objected either to the court issuing this order prior to ruling on Defendants' Special Appearance or requiring that Hoffman sign the order on behalf of Respondents.

At the hearing on Respondents' Special Appearance, nearly a year later on August 23, 2019, Pannell argued that Respondents' actions to seek and obtain severance and transfer of their co-defendants prior to obtaining a ruling on their pending Special Appearance amounted to waiver. The trial court rejected Pannell's argument on waiver but denied Respondents' Special Appearance; Pannell contested the trial court's waiver decision on appeal. Appellee contested the trial court's decision on the special appearance on appeal. Following that, Respondents filed an interlocutory appeal to the First Court of Appeals in Houston in which the Court reversed the trial court's ruling, granted the special appearance and remanded the case.

The Court of Appeals, however, rejected Pannell's waiver argument, finding that (1) "there is nothing in the record indicating that Abshire or USK9, or their counsel, approved or agreed to the substance of the order"; (2) "Abshire and USK9 only requested a severance of their claims after the trial court sustained their special appearance" and lastly and most importantly, (3) the relief granted did not directly benefit Respondents but was awarded "solely for the

purpose of transferring the claims against the other defendants." *Abshire*, No. 01-19-00710 at 13. Furthermore, the Court of Appeals in a 31 page opinion explained that Texas did not have specific jurisdiction over Roger Abshire or USK9 Unlimited, Inc. due to the Court of Appeals adding causation to the test of "arising from or relating to" even though this honorable court has never ruled that causation is required for specific personal jurisdiction under the "arising from or relating to" test. Appellant, praying for his day in court, brought this case to the Supreme Court of Texas. The Supreme Court of Texas denied the petition for discretionary review after requesting briefing from the respondents.

REASONS FOR GRANTING THE PETITION

The judgments and conclusions reached by the Court of Appeals in Houston and the denying of the special appearance in this case has effectively expanded the law on special appearances and confines the ability of a Plaintiff to hail a big business to court to be sued. Construing the exercise of determining whether a forum state can hail a defendant to its courts to include requirements such as causation between the injury and the conduct of the Defendant forges a rule that allows Defendants to effectively force Plaintiffs to almost fully prove their case at the time of filing. This petition seeks to be granted by this Court so that this Court may provide a rule of law concerning the "relatedness" requirement of specific jurisdiction and whether Petitioner was deprived of due process of law as his arguments concerning waiver under Texas Rule of Civil Procedure 120a.

Under this law on special appearances, discovery will not be necessary and the special appearance functions like a 12(b)(6) motion in federal court. Nothing can be clearer because the 1st Court of Appeals has dismissed Petitioner's case, effectively causing the special appearance to function like a 12(b)(6) motion in federal court. Even worse, the Appellate court usurped the role of gatekeeper of the facts in this case; when, in fact, that role is solely reserved for the trial court.

Furthermore, Petitioner brings this before this honorable court because the law which has been applied and utilized to decimate Petitioner's claims

has no standing in light of the recent precedents of this court from *Ford Motor Co. v. Montana* and *Ford Motor Company v. Bandemer*, 592 U.S. ___ (2021). The Court of Appeals in Houston has misconstrued the rule of law that the suit "arise out of or relate to the Defendants' contacts with the forum" to mean that causation must be shown. *Burger King Corp. v. Rudzwicz*, 471 U.S. 462 (1985). As this court made clear in the above cases; "another State's courts may yet have jurisdiction, because of a non-causal 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence involving the defendant that takes place within the States' borders." *Ford Motor Co. v. Montana* at ___, ___. The misapplication by the First Court of Appeals of "arising from or related to" is what has landed this case in front of this honorable court.

I. GENERAL JURISDICTION

Texas courts have personal jurisdiction over a non-resident defendant when the Texas long-arm statute permits such jurisdiction and the exercise of jurisdiction is consistent with federal and state due-process guarantees. *See TV Azteca*, 490 S.W.3d at 36. The Texas long-arm statute specifically allows the exercise of personal jurisdiction over a non-resident who "commits a tort in whole or in part in this state." *See id*. (quoting Tex. Civ. Prac. & Rem. Code § 17.042 (2). This Court has previously cited authorities stating that the Texas long-arm statute reaches "as far as the federal constitutional requirements for due process will allow[.]" *Id.*

Two, conjunctive conditions must be satisfied for Texas Courts to exercise personal jurisdiction over a non-resident. *See id*. First, the non-resident defendant

must have established "minimum contacts" with Texas. *See id*. Second, "the exercise of [personal] jurisdiction [must] comport[] with traditional notions of fair play and substantial justice." *See id.*

The logic behind the minimum contacts requirement is that a non-resident defendant should not be haled into a Texas court unless the non-resident defendant could reasonably anticipated being haled into a Texas court. *See id*. at 37. Minimum contacts may create one of two subspecies of personal jurisdiction: general or specific personal jurisdiction. *Id*.

The more demanding subspecies, general personal jurisdiction, is created when the non-resident defendant's "affiliations with [Texas] are so 'continuous and systematic' and to render [the non-resident defendant] essentially at home" in Texas. *Id*. This requires "substantial activities within" Texas. *Id*. When general personal jurisdiction is satisfied, there is no requirement that "the cause of action . . . arise from activities performed" in Texas. *Id*.

The non-resident defendant bears the burden of negating every possible ground for personal jurisdiction in a special appearance. *See General Electric Co. v. Brown & Ross Int'l Distributors, Inc.*, 804 S.W.2d 527, 529 (Tex. App.–Houston [1st Dist.] 1990, writ denied). "When a corporation purposefully avails itself of the privilege of conducting activities with the forum state, it has clear notice that it is subject to suit there." *Id*. at 531. The First District has said that, "The courts agree that routine sales and other profit-making activities in another state will subject a corporation to general jurisdiction in that state." *Id*.

The question can be framed as follows: is 26 to 35 Texas clients enough to establish general personal jurisdiction? The answer is yes. This answer is compounded by the fact that many of these clients are entire law enforcement agencies within the State of Texas.

To call contracting with 26 to 35 Texas clients sporadic, random, or fortuitous simply defies logic. Not only does the conclusion defy logic, but it is contrary to other opinions handed down by the Court of Appeals for the First District, like the one in *General Electric Co. v. Brown & Ross Int'l Distributors, Inc.*, 804 S.W.2d 527 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

In *General Electric*, the First District noted that one of the non-resident defendants executed a licensing agreement with a company in Texas. *Id*. at 531. That same defendant added Houston as business location on its letterhead. *Id*. The First District also observed that the defendant "had about 20 Texas customers." *Id*. These facts and others led the First District to sustain the Plaintiff's argument that the trial court erred in sustaining the defendants' special appearance. *Id*. at 529, 534.

The Respondents have contractual relationships with more Texas clients than the non-resident defendant described in the *General Electric* case. If the First District is willing reverse an order sustaining a special appearance when 20 Texas clients were involved, why would the First District grant a special appearance involving 26 to 35 Texas clients?

II. SPECIFIC JURISDICTION

Even if the court disagrees about general jurisdiction, Petitioner maintains that specific jurisdiction exists here because the claims brought by Petitioner arise from or are related to the activities of the Respondents. Petitioner handled a dog trained by Respondents. Petitioner could not handle the dog because it was not trained properly by Respondents. Respondents defamed Petitioner for his dog-training capabilities when it was in fact because of Respondents' poorly trained dogs. Thus, the claims arise from or relate to activities of the Respondents. Just like in the Ford cases above, a company cultivates a market for a product in the forum State and the product malfunctions there. Here, Petitioner's K9 dog malfunctioned, he complained, and the Defendants wanted to quash the complaints. Therefore, the Respondents defamed Petitioner in an effort to prevent bad publicity over his product.

If the Court accepts that ongoing support and maintaining customer relationships are legitimate and even expectable business practices, then it must accept that such business practices satisfy the minimum contact requirement imposed by our decisional law and that the phone call at issue in this case was exactly that type of business practice.

The core of this specific personal jurisdictional analysis in this case is the idea that:

> . . . even if Abshire knew that he was delivering his comments to someone in Texas, that fact alone does [not] demonstrate an intent or purpose through that phone call to

> seek some benefit, advantage, or profit in Texas.

Abshire at 24. Indeed, if cases were decided by examining singular facts standing alone, that might be true. However, this Court and others have declined such myopic analyses in the past. *See TV Azteca*, 490 S.W.3d at 37 ("we must analyze the defendant's contacts [] on a claim-by-claim basis[.]"); *see also Allianz Risk Transfer (Bermuda), Ltd. v. S.J. Camp & Co.*, 117 S.W.3d 92, 97 (Tex. App.–Tyler 2003) (analyzing a constellation of facts together).

"Isolated or sporadic" contacts may lead to the exercise of specific personal jurisdiction. *TV Azteca*, 490 S.W.3d at 37. To satisfy specific personal jurisdiction, the cause of action must arise from or relate to the minimum contacts. *Id.* The minimum contacts must be "purposeful activities in" Texas. *See id.* This analysis requires looking to the non-resident defendant's contacts, not the unilateral activity of another party or third person. *Id.* Random, fortuitous, or attenuated contacts are not enough to satisfy specific personal jurisdiction. The non-resident defendant must have sought some benefit, advantage, or profit by availing itself to Texas in order for Texas courts to exercise specific personal jurisdiction. *See id.*

Regardless of who initiated the phone call at issue in this case, it is clear that the phone call was to benefit, to gain an advantage, or to gain a profit for USK9: Abshire and USK9 had every incentive to quell the complaints of a dissatisfied client, a client that might represent repeat business in the future. That some "after care" might be needed for a product is completely expectable. The facts are that an upset Texas customer called USK9 and USK9 pointed the

finger at the Petitioner instead of acknowledging that USK9 sold an inferior product.

As Petitioner has already shown this Court, this case directly contradicts the precedent from the Ford cases recently decided by this honorable court, but it also contradicts precedent from Texas itself. In *Ford Motor Company v. Maria Cruz Lopez*, 13-19-00480-CV (Tex. App. Corpus Christi 2021), the Court held that Ford could be hailed to Texas because a car that it placed in the stream of commerce malfunctioned and harmed the Plaintiff. This products liability case and the resulting opinion from the Court of Appeals in Corpus Christi involved similar issues to the Ford cases before this honorable Court and Petitioner's case itself. In this case, the Court discussed arising from or related to. The court explained that "arising from or related to" element of specific jurisdiction requires a nexus between the nonresident defendant, the litigation, and the forum state. *Bristol-Myers Squibb CO. v. Superior Ct. of Cal.*, ___ U.S. ___, ___, 137 S.Ct. 1773, 1780 (2017). The Texas Supreme Court has held that the "relatedness" requirement is satisfied by a substantial connection between the nonresident defendant's contacts and the operative facts of the litigation. *Id.* The Court in Corpus Christi looked to the relation between Ford's contacts with Texas and the Plaintiff's claims.

Here, this Court should look at the nexus between the Petitioner's claims, USK9 Unlimited Inc.'s dealings in Texas, and the subject K9 which resulted in this litigation. Appellant was never required to show that the contacts caused the injury. The Court of Appeals remarked in its opinion that "Here, Pannell's claim concerns an alleged statement made

by Abshire during a single phone call between Abshire and Warren. The phone call was initiated by Chief Warren, not Abshire. The general business contacts that Abshire and USK9 have in Texas would not be the focus of the trial, nor would they consume most if not all of the litigation's attention. Abshire and USK9's general business contacts are not related to the operative facts of Pannell's defamation claim. In sum, there is no evidence to support a finding that Pannell's claim arises from or relates to any of Abshire's or USK9's alleged purposeful activities in Texas". *Abshire v. Pannell*, No. 01-19-00710-CV, 2020 Tex. App. LEXIS 5010, 2020 WL 3820912, at 4(Tex. App.–Houston [1st Dist.] July 7, 2020, pet. denied). This paragraph highlights the Court's misplacement of the requirement of relatedness and how the Court usurped the trial court's role as gatekeeper of the facts. Appellant sued Abshire and USK9 Unlimited for its defamation of Appellant in saying that he was unfit to handle K9 dogs, an occupation which he had spent his whole life pursuing. The dog at issue which Appellant was working with was produced by USK9 Unlimited and placed into the stream of commerce. It is that product itself which was the basis for this litigation. There is no way a reasonable person could not imagine the claims, the Defendants, and the injuries at play in this litigation not to be related. However, the appellate court's opinion highlights how it usurped the trial court's role of putting the facts together for the appellate court. The trial court never remarked that the business dealings had to cause the injury in question, but the First Court of Appeals read that requirement into their opinion on the case. The question of jurisdiction does not require causation; it only requires a lower standard of

relatedness which the Court improperly read to mean "caused". The last few pages of the 1st Court of Appeals' opinion shows a misinterpretation and complete misreading of the facts which is why the appellate court arrived at the wrong conclusion and this Court should grant review. This Court must preserve access to justice and allow Appellant's claims to move forward past this special appearance which the Defendants have used as a tool to subvert the trial process.

III. WAIVER

Texas Rule of Civil Procedure 120(a)(2) provides that "any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard." Tex. R. Civ. P. 120(a)(2). In addition, "if a party moving for special appearance obtains a hearing on a matter seeking affirmative relief inconsistent with the special appearance before obtaining a ruling on the special appearance," that party has "entered a general appearance and waived any challenge to personal jurisdiction." *Trenz v. Peter Paul Petroleum Co.*, 388 S.W. 3d 796, 803 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The Rule provides limited exception for "the issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance." Tex. R. Civ. P. 120 (a)(2). Absent an express exception, "[e]very appearance, prior to judgment, not in compliance with this rule is a general appearance." *Id.* Because the lower court failed to find waiver when Respondents not only requested a hearing but obtained a ruling on a non-discovery matter prior to obtaining a ruling on

their Special Appearance, they waived their rights under 120A. Any contrary holding would unnecessarily expand the scope of Rule 120a's exceptions as well as case law regarding when a party has voluntarily appeared for jurisdictional purposes as well.

Although special appearances involve the application of well-established legal principals, they could hardly be considered black and white. Whether a defendant "could reasonably anticipate being haled in to court" in Texas leaves a great deal open to interpretation. The question of whether a defendant sought "some benefit, advantage[,] or profit by availing itself" to Texas is an equally nebulous inquiry. *See generally TV Azteca v. Ruiz*, 490 S.W.3d 29, 37-38 (Tex. 2016) (outlining personal jurisdiction under modern precedents). Nevertheless, these ambiguous rules are what we are left to work with and they frequently decide whether or not Texas courts are available to aggrieved litigants.

A. The Lower Court's Decision Unnecessarily Expands the Scope of 120a's Exceptions Beyond That Which Was Contemplated by 120a's Express Language.

The lower court's holding improperly expands the scope of impermissible actions under 120(a)(2) beyond that ever contemplated by this Court's decision in *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998). *Dawson-Austin*'s interpretation of waiver under Rule 120A is unforgiving—waiver will occur when a party asserting a special appearances requests relief on ANY matter unrelated to the court's jurisdiction: "A party enters a general appearance whenever it involves the judgment of the court on any question

other than the court's jurisdiction; if a defendant's act recognized that an action is properly pending or seeks affirmative action from the court, that is a general appearance." *Id.* at 322. That is, without limitation or inquiry as to who benefits from the action taken, a general appearance occurs when a party requests affirmative relief inconsistent with an assertion that the trial court lacks personal jurisdiction. *See id.*

Consistent with this mandate, lower courts have routinely found that a defendant enters a general appearance if he "obtains a hearing on a motion that seeks affirmative relief unrelated to his special appearance before he obtains a hearing and ruling on his special appearance." *E.g.*, *Glob. Paragon Dallas, LLC v. SBM Realty, LLC*, 448 S.W.3d 607, 612 (Tex. App.—Houston [14th Dist.] 2014, no pet.). That is, any action taken before a ruling on a pending special appearance and not *after* or "subject to" would amount to waiver. *See Xenos Yuen v. Fisher,* 227 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("A party waives his special appearance if he seeks "affirmative relief or invoke[s] the trial court's jurisdiction on any question other than the court's jurisdiction prior to the trial court ruling on the special appearance."). Moreover, "[a] defendant waives his special appearance by not timely pressing for a hearing." *Milacron Inc. v. Performance Rail Tie, L.P.*, 262 S.W.3d 872, 876 (Tex. App.—Texarkana 2008, no pet.).

For example, in *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796, 803 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the *Trenz* Court first found that it was "undisputed that *Trenz* requested and obtained

hearings on his motion to dismiss, original motion for summary judgment, and amended motion for summary judgment before the trial court heard and determined his special appearance." *Id.* Based on the dates of the respective rulings alone, the Court then found that the defendant's bad timing was fatal: "By obtaining and participating in hearings on requests for affirmative relief from the trial court before obtaining a ruling on his special appearance, Trenz violated rule 120a and waived his challenge to personal jurisdiction. *Id.* at 803.[1]

Applying these rules to Pannell's waiver point instead of the law applied by the lower court, the inevitable and proper legal conclusion is that Respondents' Special Appearance was waived because

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1 *See also Restrepo v. Alliance Riggers & Constr., Ltd.*, 538 S.W.3d 724 (Tex. App.—El Paso 2017, no pet.) (finding waiver when a defendant obtained a ruling on a motion to dismiss prior to securing a ruling on her special appearance); *Kehoe v. Pollack*, 526 S.W. 3d 781 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("By failing to get a ruling on the special appearance before the trial court discharged Penn Mutual and restrained the Trustee from instituting any action against Penn Mutual for the recovery of the ownership or surrender value of the Policy, the Trustee waived the special appearance and the challenge to the trial court's exercising personal jurisdiction over the Trustee."); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759 (Tex. App.—Corpus Christi-Edinburg 1999, pet denied) (finding waiver when defendant filed motion to transfer venue prior to contesting jurisdiction); *SBG Dev. Services, L.P. v. Nurock Group, Inc.*, 02-11-00008-CV, 2011 WL 5247873, at *3 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.) ("Additionally, by choosing to have his motion to strike heard prior to his special appearance, Hoskins violated rule 120a's due-order-of-hearing requirement. Strict compliance with rule 120a is required; every appearance not in compliance with rule 120a is a general appearance. Tex. R. Civ. P. 120a(1).") (citation omitted).

they obtained affirmative relief—severing co-defendants—prior to the trial court's ruling on their special appearance. The fact that the defendant's affirmative action does not directly benefit him should not change this analysis. Indeed, the test for deciding when a party has made a general appearance has never examined the alleged affirmative act's purpose or to whom the act benefits. Instead, as stated above, the focus is simply "whether the other motion sought affirmative relief inconsistent with [his] assertion that the district court lacked jurisdiction" and not who benefited from such action or *Id.* (quotations omitted).

The exceptions to this mandate, to date, are narrow and limited to the following: (1) serving non-jurisdictional discovery requests; (2) filing a motion to compel nonjurisdictional discovery but did not schedule a hearing or obtain a ruling on such motion; (3) litigating a jurisdictional discovery dispute; (4) litigating other disputes that are factually related to the special appearance; or (5) litigating opposition to merits-based discovery sought by another party. *E.g., Nationwide Distribution Services, Inc. v. Jones*, 496 S.W.3d 221, 225 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

In *Nationwide Distribution*, the court, strictly complying with 120a, found waiver where NDS, among other things not listed in Rule 120a, sought to compel discovery on the merits of the underlying action. *Id.* at 228. In addition, NDS filed a motion for continuance of the expert-designation deadlines. *Id.* at 225. The court noted that, at the hearing on these discovery motions, "counsel for NDS Counsel did not mention the pending special appearance or any jurisdictional challenge" and that "NDS, the specially

appearing party, was the party that set the motions to compel, the motion for continuance, and its special appearance for hearings." *Id.* at 226. The court further noted that "it was NDS that elected to have its motion to compel heard before its special appearance." *Id.*

In finding waiver, the court reasoned that NDS's inconsistent, non-120a sanctioned actions, taken before it obtained a ruling on its special appearance, warranted waiver:

> But NDS elected to set the motion to compel discovery as well as the motion for continuance of expert designation deadlines for hearings prior to setting a hearing for its previously filed special appearance. And it has not explained why it required a ruling on its motion to compel merits-based discovery before it obtained a ruling on the special appearance or how the election to obtain a ruling on merits-based discovery before obtaining a jurisdictional ruling is consistent with its special appearance.

Id. at 227.

The court then concluded that NDS consequently waived its special appearance: "It waived its special appearance by obtaining affirmative relief from the trial court that was entirely unrelated to the jurisdictional challenge. This was inconsistent with its claim that the court lacked personal jurisdiction, and it was a violation of Rule 120a's due-order-of-hearing requirement." *Id.* (citations omitted)

Here, in filing a motion to sever their co-defendants, Respondents took action not specifically

sanctioned by Rule 120(a). Moreover, Respondents' action to sever their co-defendants is not related to or intertwined with the jurisdictional issue; nor does it fall within any of the express exceptions for discovery. Also, as in *Nationwide Distribution*, Respondents filed the motion, set the motion for hearing, failed to mention their Special Appearance at the hearing on their Motion to Sever and ultimately, sought and obtained relief "entirely unrelated to the jurisdictional challenge." Thus, the lower court's decision not only violates established precedent but also results in a blatant "violation of Rule 120a's due-order-of-hearing requirement."

Lastly, the lower court's decision injects a new standard into the test for waiver under 120a, a standard that is uninvited by the plain language of this Rule. Specifically, the lower court hinged its decision on whom the affirmative relief benefited, what the movant's motivation was in filing the motion or even on the impact or effect of the affirmative action: "Rather, the trial court severed Pannell's claims against Abshire and USK9 solely for the purpose of transferring the claims against the other defendants." *Abshire*, No. 01-19-00710-CV at 13. Not a single Texas court has yet to find waiver occurs simply when the movant acts solely for his or her own benefit. *See e.g. Trenz,* 388 S.W.3d at 802 ("Generally, if a defendant obtains a hearing on a motion that seeks affirmative relief unrelated to his special appearance before he obtains a hearing and ruling on his special appearance, he has entered a general appearance and thus waived any challenge to personal jurisdiction.").

This "benefit" or "result" test, moreover, would result inconsistent rulings, create confusion and give

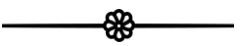
multiple party non-resident defendants strategic advantage over their single defendant counterparts. Namely, the lower court's decision opens the door to parties taking affirmative action for strategic reasons as long as the "purpose" of the action involves another defendant or a matter unrelated, at least on the surface, to the merits of the pending claim. But removing an unwanted co-defendant could have as much of an impact on the underlying merits of the case as removing an unwanted claim by summary judgment. There is no good reason to treat the acts of filing a motion to sever or a motion for summary judgment any differently, particularly when the net result—strategic advantage—is the same. Moreover, if Abshire and USK9 were the only defendants in this action, their act of filing a motion that impacted the underlying action—by reshaping the claims for trial in any manner, for example, by severance, transfer, or dismissal—would also unquestionably amount to waiver. The result should not be different simply because Respondents were not the only defendants joined in the action.

B. The Lower Court's Decision Also Unnecessarily Expands Current Case Law Regarding When a Party Voluntarily or Generally Appears.

To determine whether a party has made a voluntary appearance, the nature and quality of the party's activities must be examined. *Serna*, 908 S.W.2d at 492. A general appearance occurs "when a party invokes the judgment of the court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by a previous ruling of the court." *Id.* The emphasis "is on affirmative

action which impliedly recognizes the court's jurisdiction over the parties, since the mere presence of a party or his attorney in the courtroom at the time of a hearing or a trial, where neither participates in the prosecution or defense of the action, is not an appearance." *Id.* A party who examines witnesses or offers testimony has made a general appearance. *Wichita County v. Robinson*, 155 Tex. 1, 276 S.W.2d 509, 512 (1954). On the other hand, a party who is a silent figurehead in the courtroom, observing the proceedings without participating, has not. *Smith*, 672 S.W.2d at 617.

Now, under the lower court's decision and contrary to the above well-established precedent, one does not generally appear even though he does the following: (1) file an unrelated motion and sets it for hearing; (2) obtain affirmative relief on that motion before obtaining a ruling on a pending special appearance and (3) approve the court's favorable, non-jurisdictional order as to form and substance, once again, before obtaining a ruling on a pending special appearance. Once again, this result is contrary to otherwise established Texas law on voluntary appearances. And furthermore, it has effectively deprived Petitioner of due process of law via its misapplication. Petitioner prays that this Court will grant review.



CONCLUSION

The ruling of the trial court should never have been disturbed. The State of Texas had jurisdiction over the Defendants, Roger Abshire and USK9 Unlimited Inc., and the Court of Appeals' interjection resulted in an injustice. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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