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ORDER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW (JUNE 18, 2021)

SUPREME COURT OF TEXAS

PANNELL

v.

ABSHIRE

RE: Case No. 21-0098

COA#: 01-19-00710-CV

TC#: 2017-52769-A

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice Lehrmann not participating)

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MEMORANDUM OPINION OF THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS (JULY 7, 2020)

IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

ROGER ABSHIRE AND USK9 UNLIMITED, INC.,

Appellants,

v.

JUSTIN PANNELL,

Appellee.

No. 01-19-00710-CV

On Appeal from the 80th District Court Harris County, Texas Trial Court Case No. 2017-52769-A

Before: KEYES, LLOYD, HIGHTOWER, Justices.

MEMORANDUM OPINION

In this interlocutory appeal, Roger Abshire ("Abshire") and USK9 Unlimited, Inc. ("USK9") appeal the trial court's order denying their special appearance in the lawsuit brought by Justin Pannell ("Pannell"). Abshire and USK9 contend that the trial court erred in denying their special appearance because there is insufficient evidence to support a conclusion that they are subject to either general or specific jurisdiction in

Texas, and they did not waive their special appearance. We reverse.

Background

A. Factual History

Abshire is a certified professional dog trainer and K-9 consultant and a resident of Louisiana. He is the owner and president of USK9, a Louisiana corporation with its principal place of business in Louisiana. USK9 trains and sells police service dogs to various government and law enforcement agencies as well as service dogs to private individuals.

Pannell was a K-9 handler with the Rosenburg Police Department who was assigned to the Fort Bend County Narcotics Task Force. In 2013, the Fort Bend County Sheriff's Office purchased a police dog, Rik, from Abshire. Later that year, Pannell attended the USK9 training academy with Rik in Louisiana. On September 27, 2013, USK9 certified that Pannell had completed the three-week handler course.

Pannell alleges that, while working with Rik on the task force, Rik exhibited ongoing behavioral issues such as spinning, heavy panting, crying, uncontrollable shaking, and anxiety. Pannell and Rik returned to the USK9 training facility in Louisiana multiple times in an effort to correct the behavioral issues. Pannell exchanged text messages and calls with his supervisors to request assistance with Rik's behavioral issues.

On July 21, 2016, Pannell sent a text message to his immediate supervisor, stating, "if I'm done with this [daily assignment] before you leave can we talk

at the office? I think I'm turning in my leash. I can't handle this dog anymore. I don't enjoy coming to work anymore [because] of the stress level it's causing me." Pannell alleges that his request was misconstrued as a resignation and that he was subsequently reassigned to the Rosenburg Police Department as a patrol officer.

On July 29, 2016, Pannell filed a written grievance with the City of Rosenburg. On August 11, 2016, Dallis Warren, who was then Chief of Police of the Rosenburg Police Department, prepared a written memorandum addressing the issues raised in Pannell's grievance. In the memo, Warren stated, among other things, that he spoke with Abshire about Pannell's problems with Rik on August 9, 2016, and that Abshire's "stated assessment was that Pannell was not a good fit as a K9 handler and was using inconsistent correction techniques [which] has led to the behaviors in K9 Rik." Pannell alleges that Chief Warren later republished this defamatory statement when he circulated the memorandum.

B. Procedural History

On August 8, 2017, Pannell sued Abshire, USK9, City of Rosenburg, Rosenburg Police Department, Fort Bend County, Fort Bend County Sherriff's Office, Dallis Warren, Jeremy Eder, Josh Dale, and Bryan Baker, alleging causes of action for defamation, libel, slander, common law defamation per se, common law libel per se, common law slander per se, defamation per quod, libel per quod, and slander per quod. Pannell alleged that all defendants "published a defamatory statement concerning [Pannell] . . .asserting as fact that [Pannell] was an unqualified K9 handler. . . " and that this led his reassignment which he described as a demotion.

On September 25, 2017, Abshire and USK9 jointly filed a special appearance asking the trial court to dismiss Pannell's claims against them because he failed to plead any facts that would subject them to the jurisdiction of a Texas court.

On October 20, 2017, Abshire and USK9 amended their special appearance to include an affidavit from Abshire and noticed the special appearance for hearing on November 17, 2017. In his affidavit, Abshire stated that (1) he is a resident of Louisiana and the President of USK9, whose principal place of business is Louisiana; (2) he trains law enforcement officers and their dogs at his training facility in Louisiana; (3) he does not do any marketing or recruiting of business in Texas; (4) any communication that Abshire had with Texas law enforcement occurred when Texas officers called USK9 in Louisiana; (5) Abshire and USK9 operate a website for advertising purposes only that describes the company and services and, provides contact information and an email form that can be completed on line and forwarded via the website; and (6) Abshire and USK9 do not enter into any contracts, transact any business, or interact via the website. In their pleading, Abshire and USK9 included a motion to sever requesting that the trial court sever the claims against them if the court first sustained their special appearance.

On November 16, 2017, Pannell filed an amended petition adding the following two paragraphs:

> 19. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated conduct business in Texas. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated receive payments from various government

and police agencies from around the State of Texas. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated have been sold defective canine/K9's in Matagorda County, Texas which did bite people. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated received and trained police officers from Texas including officers in Fort Bend county and the surrounding counties. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated did make phone calls and statements targeting a local audience in Texas regarding Plaintiff Justin Pannell as further delineated herein.

[. . .]

42. Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated have trained several of Defendant Rosenberg Police Department's K9 handlers as well as other Fort Bend K9 handlers. Statements made by Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated to the chain of command, such as Defendant Police Chief Warren, have bearing on the decision since Defendant Roger Abshire and Defendant USK9 Unlimited, Incorporated are viewed as an authority to rate K9 handlers. A statement made telephonically to a local police chief of a city in the State of Texas, in addition to the history and relationship of having sold K9's and trained officers from the local police department, demonstrates repeated and continual contact availing oneself to the State of Texas regarding K9 issues or actions related to the

K9 services committed by Defendants Abshire and US K9 Unlimited.

On November 16, 2017, Pannell filed a response to Abshire and USK9's special appearance. Pannell contended that Abshire and USK9 purposefully availed themselves of the privilege of conducting activities within Texas. Citing *TV Azteca, S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), Pannell argued that the trial court could exercise specific jurisdiction over Abshire and USK9 because Pannell's suit arose from, and was related to, Abshire and USK9's contacts with Texas, and that the incident giving rise to his suit was a result of Abshire and USK9's defamatory statements regarding Pannell to Chief Warren. Pannell further argued that the trial court could assert general jurisdiction over Abshire and USK9 because they have affiliations with Texas that are so continuous and systematic as to render Abshire and USK9 "at home" in Texas. Pannell contended that the trial court's assertion of jurisdiction over Abshire and USK9 would not offend traditional notions of fair play and substantial justice and would be consistent with the constitutional requirement of due process. Pannell requested that the trial court overrule Abshire and USK9's special appearance or, in the alternative, allow discovery, and that it deny Abshire and USK9's motion to sever. The trial court permitted Pannell to conduct limited discovery related to the issue of jurisdiction.

The hearing on Abshire and USK9's special appearance, which had been previously reset several times, was reset to November 2, 2018. At the hearing, the trial court granted Pannell additional time to conduct discovery and continued the hearing. On November 9, 2018, the trial court entered an order

severing Pannell's claims against all other defendants, assigning a new cause number consisting only of Pannell's claims against Abshire and USK9, and transferring the remaining claims against all other defendants to Fort Bend County.

Abshire was deposed on December 7, 2018. On March 4, 2019, Pannell filed a second amended petition in which he deleted paragraphs 19 and 42 of his first amended petition and added the following sentence to paragraph 31 related to Abshire's alleged defamatory statements about Pannell to Chief Warren:

> When Roger Abshire and USK9 Unlimited made these comments to Chief Warren regarding Officer Pannell, Defendant Abshire and Defendant USK9 Unlimited either knew or should have known that the comments were directly linked to Plaintiff Pannell's career in Texas, and that if the statements injure Plaintiff Pannell in Texas, then Defendant Abshire and Defendant USK9 would be exposed to Texas Jurisdiction.

Pannell also added the following paragraph:

> 32. Defendant Roger Abshire personally conducts canine training courses in Texas for various entities and individuals. Defendant Abshire and Defendant USK9 have conducted these in person training courses in Texas for over a decade, and for several years before the underlying alleged defamatory statements. Defendant Roger Abshire and Defendant USK9 have conducted business with dozens of police officers, police agencies and private individuals in Texas over the

> past 15 years. Defendant Abshire and Defendant USK9 have produced invoices reflecting all the business conducted in Texas and with Texas entities and individuals. These invoices span approximately 15 years. The deposition of Roger Abshire reflects all the various contacts he has with the State of Texas, Texas citizens, Texas entities, and canine related business. Mr. Abshire made comments about Plaintiff Pannell within the scope of the business activities Defendants Abshire and USK9 partake in which avail them to Jurisdiction in Texas.

To his amended petition, Pannell attached USK9 invoices and a transcript of Abshire's deposition.

On March 8, 2019, Pannell filed a second response to Abshire and USK9's special appearance. He argued that the trial court could properly exercise specific jurisdiction over Abshire and USK9 because (1) they have conducted business in Texas for nearly fifteen years; (2) Abshire's defamatory statements are directly tied to the business activities which he and USK9 have conducted in Texas; (3) Pannell's suit arose from and was related to Abshire and USK9's contacts with Texas, and the incident giving rise to the suit was a result of their defamatory statements regarding Pannell's canine-handling skills; (4) Abshire and USK9 sold the K9 used by Pannell to the Rosenburg Police Department, a Texas police agency, and Abshire and USK9 trained Pannell how to be a K9 handler, and their defamatory statements regarding Pannell's skills were tied to their business being conducted in Texas. Pannell further asserted that although Abshire is not a resident of Texas and USK9 does not have its principal place

of business in Texas, their contacts are so continuous and systematic that the assertion of general jurisdiction over them was warranted.

On March 28, 2019, Abshire and USK9 filed a reply in support of their special appearance. With regard to their assertion that specific jurisdiction did not exist, Abshire and USK9 pointed to Abshire's testimony that (1) his business is incorporated in Louisiana and he has never been located elsewhere; (2) Abshire houses the K9s that he trains and sells at his facility in Louisiana; (3) the dogs are not shipped to his clients; (4) Abshire offers voluntary training to handlers that is conducted at his facility in Louisiana; (5) his marketing consists only of a website that does not claim to service any specific geographical region; (6) Abshire's standard business contracts all contain a forum clause stating that all grievances must be addressed in Louisiana. In support of their assertion that general jurisdiction did not exist, Abshire and USK9 pointed to Abshire's testimony that he recalled only one business trip to Texas within the past five years during which he spoke for a couple of days to various law enforcement agencies regarding dog training. When he was shown an invoice from 2012 reflecting two trips for training scheduled in Texas, Abshire did not recall conducting any training outside of his Louisiana facility. When he was shown an invoice reflecting that he delivered a K9 to Texas, Abshire testified that, if he did, it would have been an exception for USK9 to do so. Abshire and USK9 further asserted that USK9 does business outside of the United States as well as with numerous other states outside of Louisiana, and that they have not engaged in targeted marketing of Texas, do not regularly engage

in shipping products or performing services in Texas, and do not maintain any offices in Texas.

On March 29, 2019, the trial court held a hearing on Abshire and USK9's special appearance. The trial court invited the parties to submit evidence regarding who initiated the telephone call between Abshire and Chief Warren as well as any case law addressing whether a single phone call could establish specific jurisdiction. In response, Abshire and USK9 filed a sworn affidavit by Chief Warren attesting that "the communications between Mr. Abshire and myself referenced within the allegations of [Pannell's] petition would have been initiated by telephone, by myself, and at my own initiative."

On April 24, 2019, Pannell filed a sur-reply to which he attached several pages from USK9's website and a copy of the Texas Supreme Court's opinion in *TV Azteca v. Ruiz*. On June 25, 2019, Pannell filed a motion to compel discovery, a motion to strike objections, a motion to deem requests for admissions admitted, and a motion for sanctions. On August 22, 2019, Pannell filed a motion asking the trial court to rule that the special appearance had been waived as a result of the prior severance and transfer of the claims against the other defendants.

On August 23, 2019, the trial court continued the special appearance hearing. The court found that the special appearance had not been waived. Based upon its review of the *TV Azteca* opinion, the trial court denied Abshire and USK9's special appearance. The trial court signed an order denying the special appearance on August 27, 2019. This interlocutory appeal followed.

Special Appearance

Abshire and USK9 contend that the trial court erred in denying their special appearance because (1) they did not waive their special appearance; (2) the court lacks general jurisdiction over them because they are Louisiana residents; and (3) the court lacks specific jurisdiction over them because there is no evidence that either Abshire or USK9 purposefully availed themselves of Texas to commit any tortious act.

A. Waiver

Texas Rule of Civil Procedure 120a(2) provides: "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. 120a(2). 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." *Dawson–Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998); *Xenos Yuen v. Fisher*, 227 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

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. *Dawson–Austin*, 968 S.W.2d at 322; *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The test for whether a party has made a general appearance by obtaining a hearing on another

motion before obtaining a ruling on his special appearance is whether the other motion sought "affirmative relief inconsistent with [his] assertion that the district court lacked jurisdiction[.]" *Dawson–Austin*, 968 S.W.2d at 323.

Pannell contends, as he did below, that Abshire and USK9 waived their special appearance because they participated in the trial court proceedings when they sought a ruling on their co-defendants' motion to sever. He argues that although Abshire and USK9 did not obtain a ruling on their own motion to sever prior to the trial court denying their special appearance, they indirectly obtained the same affirmative relief by requesting a hearing on their co-defendants' motion to sever and transfer venue. In support of his argument, Pannell attached as an exhibit to his appellate brief an electronic docket entry that appears to list Abshire and USK9's counsel as the requesting party for hearings on November 2, 2018, for both a special appearance and a severance. Pannell contends that this action, coupled with the fact that Abshire and USK9 agreed to the form and substance of the trial court's order severing their co-defendants and transferring their case to Fort Bend County, was inconsistent with Abshire and Pannell's special appearance. Thus, he argues, the trial court erred in concluding that they had not waived their special appearance.

Our review of the record reveals that Abshire and USK9 only requested a hearing on their own first amended special appearance and motion to sever. The record also shows that the signature of counsel for Abshire and USK9 that appears (by permission) on the trial court's November 8, 2018 order severing the claims against Abshire and USK9 from the claims

against the other defendants and granting the other defendant's motion to transfer venue appears under the heading, "APPROVED AS TO FORM." There is nothing in the record indicating that Abshire or USK9, or their counsel, approved or agreed to the substance of the order.

More importantly, such actions do not constitute a general appearance because Abshire and USK9 did not seek any affirmative relief that was inconsistent with their assertion that the trial court lacked jurisdiction over Pannell's claims against them. *Dawson–Austin*, 968 S.W.2d at 323. Rather, the trial court severed Pannell's claims against Abshire and USK9 solely for the purpose of transferring the claims against the other defendants. And, Abshire and USK9 only requested a severance of their claims *after* the trial court sustained their special appearance: "If this Court sustains Defendants ABSHIRE and USK9's Special Appearance, then Defendants ABSHIRE and USK9 ask this court to sever the claims against Defendants ABSHIRE and USK9 into a new cause of action[.]" *See id.*; *see also Xenos Yuen*, 227 S.W.3d at 199 (concluding that defendant did not enter general appearance by filing motion to set aside default judgment, in part because although motion sought affirmative relief from trial court in form of sanctions, defendant expressly moved for sanctions "subject to" resolution of special appearance).

The trial court did not err in concluding that Abshire and USK9 did not waive their special appearance.

B. Standard of Review and Applicable Law

Whether a court can exercise personal jurisdiction over a nonresident defendant is a question of law, and thus we review de novo the trial court's determination of a special appearance. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). "However, the trial court frequently must resolve questions of fact before deciding the jurisdiction question." *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When, as here, "a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied." *Id*. at 795.

Texas courts may exercise personal jurisdiction over a nonresident if the long-arm statute authorizes it, consistent with federal and state constitutional due process guarantees. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 149 (Tex. 2013). Personal jurisdiction over a nonresident is consistent with due process when the nonresident has established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In most cases, the exercise of jurisdiction over a nonresident defendant will not conflict with notions of fair play and substantial justice if the nonresident has minimum contacts with the forum. *Moncrief Oil*, 414 S.W.3d at 154–55.

"A defendant establishes minimum contacts with a state when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus

invoking the benefits and protections of its laws.'" *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The Texas Supreme Court has identified three principles to guide our analysis of whether a nonresident has purposefully availed itself of the privilege of conducting activities in Texas. *See TV Azteca*, 490 S.W.3d at 37–38. First, only the defendant's contacts with the forum are relevant, as a nonresident should not be called to court in a jurisdiction solely as a result of the unilateral activity of another party. *Id.* at 38 (quoting *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005)). Second, the defendant's acts must be purposeful, as opposed to random, isolated, or fortuitous. *Id.* Third, the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction. *Id.*

A defendant's contacts can vest a court with either specific or general jurisdiction. *BMC Software*, 83 S.W.3d at 795. Specific jurisdiction requires that the claims at issue arise from or relate to the defendant's purposeful contacts with Texas. *Kelly*, 301 S.W.3d at 658. General jurisdiction, on the other hand, is predicated on the defendant's "continuous and systematic" contacts that render it "essentially at home in the forum State," irrespective of whether his alleged liability arises from those contacts. *TV Azteca*, 490 S.W.3d at 37 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). Because general jurisdiction permits a court to exercise personal jurisdiction over a nonresident for claims not directly linked to his contacts with the state, a general jurisdiction inquiry requires a more demanding minimum contacts analysis with a "substantially higher threshold." *PHC-Minden, L.P. v.*

Kimberly-Clark Corp., 235 S.W.3d 163, 168 (Tex. 2007). And although there is no precise formula for the number of contacts necessary to establish general jurisdiction, it is clear that the requisite level is substantial. *Id.* at 167.

When a defendant challenges the exercise of personal jurisdiction in a special appearance, the plaintiff and the defendant bear shifting burdens. *Kelly*, 301 S.W.3d at 658. The initial burden is on the plaintiff to plead sufficient allegations to establish jurisdiction over the defendant. *Id.* After the plaintiff meets its initial burden, the burden shifts to the defendant to negate all bases of jurisdiction alleged by the plaintiff. *Id.*

"The defendant can negate jurisdiction on either a factual or a legal basis." *Id.* at 659. To negate jurisdiction on a factual basis, the defendant can "present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations." *Id.* Alternatively, the defendant can negate jurisdiction on a legal basis by showing that "even if the plaintiff's alleged facts are true," (1) the evidence is legally insufficient to establish jurisdiction; (2) the defendant's contacts with Texas do not amount to purposeful availment; (3) for specific jurisdiction, the plaintiff's claims do not arise from the defendant's contacts; or (4) the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Id.*

C. General Jurisdiction

"For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at

home." *Bauman*, 571 U.S. at 137 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)). Even when a defendant's contacts may be continuous and systematic, they are insufficient to confer general jurisdiction if they fail to rise to the level of rendering a defendant essentially "at home" in the forum state. *See Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 565 (Tex. 2018).

Abshire contends that the trial court lacks general jurisdiction over him because he is a Louisiana resident and his contacts with Texas are not continuous and systematic but, rather, irregular and sporadic. USK9 similarly contends that it is incorporated and has its principal place of business in Louisiana, and its only contacts with Texas consist of fortuitous contacts initiated by potential customers who happen to reside in Texas.

In his response to the special appearance, Pannell argued that although Abshire and USK9 are not residents of Texas, they have "affiliations with Texas that are so continuous and systematic as to render them 'at home' in Texas." Specifically, Pannell asserts that Abshire and USK9 have sold dozens of canines to police agencies and private individuals in Texas and that they have conducted canine training courses in Texas in person for over ten years.

With regard to his first assertion, Pannell argues that "[d]ue to Appellants' high volume of sales to Texas, Texas serves as Appellants' principal place of business." Pannell points to USK9's website which lists twenty-six Texas law enforcement agencies that are among USK9's clients. However, the website also lists a total of more than 170 law enforcement agencies throughout the United States, in addition to eight

correctional facilities (only one of which is in Texas), ten international law enforcement agencies, and nine state agencies (only one of which is in Texas). Pannell also points to USK9 invoices showing that a total of thirty-five Texas-based clients purchased forty-three dogs and training services from USK9 between 2012 to 2018. USK9's website, however, also states that it "has thousands of satisfied customers at the local, state, and federal levels of government." There is no evidence to suggest that Texas makes up most of or even a substantial portion of USK9's business. Furthermore, the Texas Supreme Court has explained that courts must focus on the particular nature of the sales and not simply the volume. *See Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 808 (Tex. 2002) (disagreeing with court of appeals's characterization of defendant's volume of sales in Texas, which accounted for more than 3.5 percent of total annual sales and 5 percent of total U.S. sales, as "bedrock" fact supporting jurisdiction).

With regard to Pannell's assertion that Abshire and USK9 have conducted canine training courses in Texas in person for over ten years, the evidence shows that Abshire, on behalf of USK9, took four trips to Texas. Abshire testified that years ago he taught a patrol dog training in Temple, Texas, that lasted two days. In 2015, Abshire took a two-day business trip to Killeen, Texas, at the police department's invitation, to teach patrol dog functions to law enforcement officers. Abshire also testified that he provided on-site refresher training, at the request of the Dallas County Sheriff's Department, which consisted of one trip in 2012 and one trip in 2013. These four trips spread over a number of years do not constitute

continuous and systematic contacts with Texas sufficient to confer general jurisdiction. *See Old Republic Nat'l Title Ins.*, 549 S.W.3d at 565.

Further, as the Texas Supreme Court has explained:

> General jurisdiction is premised on the notion of consent. That is, by invoking the benefits and protections of a forum's laws, a nonresident defendant consents to being sued there. When a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws, the legal fiction of consent no longer applies.

Coleman, 83 S.W.3d at 808. Here, the evidence shows that Abshire and USK9 purposefully structure their transactions to avoid the benefits and protections of Texas laws. In his deposition, Abshire testified that USK9 does not ship its dogs to a client in Texas or elsewhere; rather, the client comes to the USK9's facility in Louisiana to take possession of the dog. Abshire testified that he might have shipped a dog to a private client but that, if he had done so, it would have been an exception to the normal rule of how he conducts business. USK9 offers training to handlers which is almost always conducted at USK9's Louisiana facility. Abshire also testified that USK9 includes a provision in its standard customer contract that requires all grievances to be resolved in Louisiana.

Because the evidence does not support a finding that Abshire's and USK9's contacts with Texas were so substantial that they were "essentially at home" in Texas, we conclude that the trial court could not exercise general jurisdiction over them.

D. Specific Jurisdiction

Abshire and USK9 contend that the trial court lacks specific jurisdiction over them because there is no evidence that Abshire or USK9 purposefully availed themselves of Texas to commit any tortious act.

For Texas to exercise specific jurisdiction over Abshire and USK9, Pannell must show that his cause of action arises from or relates to Abshire and USK9's purposeful contacts with the state. *See Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 71 (Tex. 2016); *TV Azteca*, 490 S.W.3d at 37 (quoting *Spir Star v. Kimich*, 310 S.W.3d 868, 972 (Tex. 2010)). "A claim arises from or relates to a defendant's forum contacts if there is a 'substantial connection between those contacts and the operative facts of the litigation.'" *TV Azteca*, 490 S.W.3d at 52 (quoting *Moki Mac*, 221 S.W.3d at 585); *see also Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."). Our specific jurisdiction inquiry "focuses 'on the relationship among the defendant, the forum, and the litigation.'" *Walden*, 571 U.S. at 284; *Moki Mac*, 221 S.W.3d at 575–76 (citations and internal quotation marks omitted). Thus, "the relationship must arise out of contacts that the 'defendant himself' creates with the forum State," *Walden*, 571 U.S. at 284, and the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," *id*. at 285 (citing *Int'l Shoe*, 326 U.S. at 319).

1. Purposeful Contacts

Pannell relies heavily on the Texas Supreme Court's opinion in *TV Azteca v. Ruixz* to support his assertion that Abshire and USK9 are subject to specific jurisdiction. There, a Mexican recording artist residing in South Texas filed a Texas defamation action against two Mexican television broadcasters and a TV Azteca news anchor and producer. *TV Azteca*, 490 S.W.3d at 35. The defendants filed special appearances, which the trial court denied. The court of appeals affirmed that denial. *Id.* at 35–36. The Texas Supreme Court affirmed the judgment of the court of appeals and held that the defendants purposefully availed themselves of the privilege of conducting activities in Texas. *Id.* at 52.

In reaching its conclusion, the Court focused on the source of the plaintiff's claims—the television broadcast—and the allegations and evidence that (1) the defendants "directed a tort" at the plaintiff in Texas; (2) the defendants broadcast allegedly defamatory statements in Texas; (3) the defendants knew the statements would be broadcast in Texas; and (4) the defendants intentionally targeted Texas through those broadcasts. *See id.* at 42–43. The Court concluded that the evidence of the first three contentions did not establish purposeful availment but that the evidence of the fourth contention did. *Id.* at 43.

In rejecting the plaintiff's first contention, the Court stated that "the mere fact that [the defendants] directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over [them]." *Id.* at 43 ("[C]ourts cannot base specific jurisdiction merely on the fact that the defendant

'knows that the brunt of the injury will be felt by a particular resident in the forum state.'") (quoting *Michiana*, 168 S.W.3d at 788). The court further explained that "[t]here is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." *Id.* Thus, the fact that Pannell lives and was allegedly injured in Texas is not irrelevant to the jurisdictional inquiry, but "it is relevant only to the extent that it shows that *the forum state* was 'the focus of the activities of defendant." *See id.* (emphasis in original).

The Court then considered the evidence that the defendants' broadcasts, though originating in Mexico, reached Texas residents through their television sets in their Texas homes. *See id.* at 44. The Court emphasized that the "touchstone of jurisdictional due process is 'purposeful availment,'" and that "a defendant purposefully avails itself of the benefits of activities in the state only "when its contacts are purposeful rather than random, fortuitous, or attenuated, and it seeks "some benefit, advantage, or profit by availing itself of the jurisdiction." *Id.* at 45 (quoting *Michiana*, 168 S.W.3d at 784 and *Montcrief Oil*, 414 S.W.3d at 151 (internal quotation omitted)). The Court concluded that "the mere fact that the signals through which [the defendants] broadcast their programs in Mexico travel[ed] into Texas was insufficient to support specific jurisdiction because that fact did not establish that [the defendants] purposefully directed their activities at Texas." *Id.* Similarly, Abshire's alleged defamatory statement to someone in Texas is insufficient by itself to support specific jurisdiction over Abshire and USK9.

The Court next addressed the fact that the defendants knew that their television broadcasts traveled into Texas. *See id.* at 44–46. The Court stated that "[w]hile a defendant's knowledge that its actions will create forum contact may support a finding that the defendants purposefully directed those actions at the forum, that knowledge alone is not enough." *Id.* at 46. "Instead, evidence of 'additional conduct' must establish that the broadcaster had 'an intent or purpose to serve the market in the forum State.'" *Id.* at 46–47 (quoting *Moki Mac*, 221 S.W.3d at 577). Applying this reasoning, even if Abshire knew that he was delivering his comments to someone in Texas, that fact alone does demonstrate an intent or purpose through that phone call to seek some benefit, advantage, or profit in Texas.

Finally, the Court examined evidence of the defendants' additional conduct showing that they intended to serve the Texas market with their broadcasts. *See id.* at 47. The Court stated that "a plaintiff can establish that a defamation defendant targeted Texas by relying on other 'additional conduct' through which the defendant 'continuously and deliberately exploited' the Texas market." *Id.* The Court noted that the plaintiff had submitted evidence that the defendants "made substantial and successful efforts to benefit from the fact that the signals traveled into Texas as well as additional efforts to promote their broadcasts and expand their Texas audience." *See id.* at 49. The plaintiff's three categories of evidence demonstrated that the defendants (1) physically entered into Texas to produce and promote their broadcasts; (2) derived substantial revenue and other benefits by selling advertising time to Texas businesses; and (3) made

substantial and successful efforts to distribute their programs and increase their popularity in Texas, including the programs in which they allegedly defamed the plaintiff. *See id.* at 49–50. The Court concluded that this evidence showed that the defendants intentionally targeted Texas through those broadcasts and, in doing so, purposefully availed themselves of the benefits of conducting activities in Texas. *See id.* at 52.

Pannell argues that Abshire and USK9 similarly "targeted" Texas because "Abshire's defamatory statement targeted Texas and, itself, reveals Abshire's and USK9's purpose to profit from Texas." This is, so, he argues, because "[t]he statement's only conceivable purpose—in light of the fact that Abshire annually certified Pannell and never said a single negative word about Pannell's handling skills in over six years—was to shift the blame to Pannell for his dog's poor performance in an attempt to preserve Appellant's Texas business relationships." Pannell, however, points to no evidence to support his assertion. A plaintiff's speculation cannot support a finding of jurisdiction. *See 2007 E. Meadows, L.P. v. RCM Phoenix Partners, L.L.C.*, 310 S.W.3d 199, 207 (Tex. App.—Dallas 2010, pet. denied) (noting speculation does not support haling nonresident defendant to court in Texas); *see also Buswell v. The GWSPI Co. LLC,* No. 04–15–00398–CV, 2015 WL 5837851, at *5 (Tex. App.—San Antonio Oct. 7, 2015, no pet.) (mem. op.) (stating that trustee's speculation that claims examiner profited from activities in Texas by remaining employed based on outcome of her investigation was "not evidence"). Further, it does not appear that Pannell made this suggestion to the trial court in any of his petitions, his responses to

the special appearance, or during the August 23, 2019 hearing. *See Michiana*, 168 S.W.3d at 782 (stating that if no evidence is presented during special appearance hearing, "the appeal should be decided on the clerk's record alone").

Pannell also asserts that the *TV Azteca* Court found jurisdiction was proper under the (1) "directed-a-tort" test; (2) subject-and-sources test; and (3) stream of commerce theory. He argues that here, like in *TV Azteca*, jurisdiction exists under all of these tests.

Contrary to Pannell's assertion, the *TV Azteca* court rejected the "directed-a-tort" test as a basis for jurisdiction in that case, concluding that "the mere fact that [the defendants] directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over [the defendants]." 490 S.W.3d at 43. Here, there is no evidence that Abshire directed a tort at Texas. Rather, Abshire's alleged defamatory statement was directed to Chief Warren who happened to be in Texas at the time he called Abshire. This is not evidence that the state of Texas was the focus of Abshire's alleged tortious activity. *See id.* (noting crucial difference exists between directing tort at individual who happens to be in forum state and directing tort at that state).

The *TV Azteca* Court also considered and rejected the "subject-and-sources" test as a basis for jurisdiction over the defendants. *See id.* at 48. Under that test, a plaintiff must show that the subject matter of the alleged defamatory broadcast and the sources relied upon are in the forum state. *See id.* at 47. Noting that the "subject-and-sources" test is consistent with the United States Supreme Court's approach in *Calder*

v. Jones, 465 U.S. 783 (1984) the Court agreed with the defendants "that these broadcasts did not concern the Texas activities of a Texas resident or describe activities having a connection with Texas, as the subject-and-sources test requires." *Id.* at 48. Notably, the Texas Supreme Court in *Michiana* rejected the idea that *Calder*—which involved a publication that sold over 600,000 copies in the forum state—would come out the same way if "the defamation had occurred in a single unsolicited phone call a nonresident answered from a single private individual in the forum state." *Michiana*, 168 S.W.3d at 789. Here, the fact that Pannell (the subject of the alleged defamatory statement) resides in Texas is insufficient to subject Abshire and USK9 to jurisdiction. *TV Azteca*, 490 S.W.3d at 43 ("[C]ourts cannot base specific jurisdiction merely on the fact that the defendant 'knows the brunt of the injury will be felt by a particular resident in the forum state.'").

Lastly, Pannell contends that jurisdiction is proper under the stream-of-commerce theory applied in product liability cases. Under that theory of personal jurisdiction, "a nonresident who places products into the 'stream of commerce' with the expectation that they will be sold in the forum state" may be subject to personal jurisdiction in the forum state. *Id.* at 46 (internal quotations omitted). However, mere knowledge that the product will be sold in the forum state is not enough; rather, "additional conduct" must demonstrate "an intent or purpose to serve the market in the forum [s]tate." *Id.* The *TV Azteca* Court stated that, "[i]n the same way, we conclude that a broadcaster's mere knowledge that its programs will be received in another jurisdiction is insufficient to estab-

lish that the broadcaster purposefully availed itself of the benefits of conducting activities in that jurisdiction. Instead, evidence of 'additional conduct' must establish that the broadcaster had 'an intent or purpose to serve the market in the forum State.'" *Id.* The Court concluded that the defendants' efforts to advertise and promote the allegedly defamatory broadcast constituted the "additional conduct" necessary to support a finding of specific jurisdiction. *See id.* at 55.

Pannell argues that, like in *TV Azteca*, there is evidence of additional conduct in this case because Abshire generates income from Texas and "maintained communication with his Texas clients and traveled to Texas when necessary to cultivate more Texas-related business." However, the *TV Azteca* Court specifically found that the evidence of additional conduct established that the defendants "purposefully availed themselves of Texas *in connection with* their actionable conduct (the allegedly defamatory broadcasts)." *Id.* at 55 (emphasis added). The evidence upon which Pannell relies does not establish that Abshire or USK9 purposefully availed themselves of Texas in connection with Abshire's alleged defamatory statement about Pannell to Chief Warren.

2. "Arising from or Related to"

A plaintiff must also show that his claims arise from or relate to the defendant's purposeful activities in the state. *Id.* at 53. "For specific-jurisdiction purposes, purposeful availment has no jurisdictional relevance unless the defendant's liability arises from or relates to the forum contacts." *Id.* at 52 (quoting *Moki Mac*, 221 S.W.3d at 579). A claim arises from or relates to a defendant's forum contacts if there is a

"substantial connection between those contacts and the operative facts of the litigation." *Id.* (quoting *Moki* Mac, 221 S.W.3d at 585). In making this determination, we consider "what the claim is principally concerned with, whether the contacts will be the focus of the trial and consume most if not all of the litigation's attention, and whether the contacts are related to the operative facts of the claim." *Id.* at 53.

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.

Because the evidence does not support a finding that Abshire and USK9 purposefully availed themselves of Texas in connection with the alleged defamatory statement and Pannell's claim does not arise out of or relate to that statement, we conclude that the trial court could not exercise specific jurisdiction over them.

Having concluded that Abshire and USK9 have negated all bases for the assertion of personal jurisdiction over them, we sustain Abshire and USK9's issue.[1]

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[1] In light of our holding, we need not address the question of whether the exercise of personal jurisdiction would offend the

Conclusion

We reverse the trial court's August 27, 2019 order denying Abshire and USK9's special appearance, and we dismiss Pannell's claims against them.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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traditional notions of fair play and substantial justice. *See 11500 Space Ctr., L.L.C. v. Private Capital Grp, Inc.*, 577 S.W.3d 322, 336 n.9 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

JUDGMENT OF THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS (JULY 7, 2020)

IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

ROGER ABSHIRE AND USK9 UNLIMITED, INC.,

Appellants,

v.

JUSTIN PANNELL,

Appellee.

No. 01-19-00710-CV

Appeal from the 80th District Court Harris County, (Tr. Ct. No. 2017-52769-A)

Before: KEYES, LLOYD, HIGHTOWER, Justices.

This case is an appeal from the interlocutory order signed by the trial court on August 29, 2019. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the trial court's judgment in the following respect: the trial court lacked jurisdiction over Roger Abshire and USK9 Unlimited, Inc. and, accordingly, erred in denying their special appearance. Accordingly, the Court **reverses** the trial court's judgment and **renders** judgment

dismissing the claims of Justin Pannell against Roger Abshire and USK9 Unlimited, Inc.

The Court **orders** that the appellee, Justin Pannell pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered July 7, 2020.

Panel consists of Justices Keyes, Lloyd, and Hightower. Opinion delivered by Justice Lloyd.

ORDER DENYING ROGER ABSHIRE AND USK9 UNLIMITED'S SPECIAL APPEARANCE (AUGUST 27, 2019)

IN THE DISTRICT COURT 80TH JUDICIAL DISTRICT OF HARRIS COUNTY, TEXAS

JUSTIN PANNELL,

Plaintiff,

v.

CITY OF ROSENBERG, ROSENBERG POLICE DEPARTMENT, DALLAS WARREN, JEREMY EDER, FORT BEND COUNTY, FORT BEND COUNTY SHERIFF'S OFFICE, JOSH DALE, BRYAN BAKER, ROGER ABSHIRE AND USK9 UNLIMITED, INCORPORATED,

Defendants.

No. 2017-52769

Before: WEIMAN, Judge.

On August 23, 2019, the Court after having considered the arguments of counsel and evidence hereby ruled that the special appearance should be DENIED.

/s/ Lawrence Weisman
Judge

Date: 8/27/2019

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BENCH RULING TRANSCRIPT
RELEVANT EXCERPT
(AUGUST 23, 2019)

IN THE DISTRICT COURT 80TH JUDICIAL DISTRICT OF HARRIS COUNTY, TEXAS

JUSTIN PANNELL,

Plaintiff,

v.

CITY OF ROSENBERG, ROSENBERG POLICE DEPARTMENT, DALLAS WARREN, JEREMY EDER, FORT BEND COUNTY, FORT BEND COUNTY SHERIFF'S OFFICE, JOSH DALE, BRYAN BAKER, ROGER ABSHIRE AND USK9 UNLIMITED,

Defendants.

No. 2017-52769

Appellate Case No. 01-19-00710-CV

Before: Larry WEIMAN, Judge.

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[August 23, 2019, Transcript p. 1]

THE COURT: Okay. Let's go on the record please, Cause Number 2017-52769, Justin Pannell versus City of Rosenberg. We have several motions pending. Continuing the Special Appearance hearing. And there's also some discovery issues.

Counsel, please state your appearances for the record.

MR. HOUTHUIJZEN: Alexander Houthuijzen for the plaintiff, Justin Pannell. Last name is spelled H-O—okay, I won't spell it.

MR. HOFFMAN: Benedict Hoffman on behalf of defendants, Roger Abshire and USK9 Unlimited.

THE COURT: Okay. And let's keep it under the time because we have other hearings coming in. So, we'll need to move along. You may proceed.

MR. HOFFMAN: Thank you, Your Honor. Addressing the Special Appearance which we—was held March 29, 2019. I'll be very quick, Judge.

My recollection of that hearing is that Your Honor agreed that general jurisdiction had been negated based on the evidence that was presented and discussed. However, Your Honor had questions regarding specific jurisdiction specifically about who initiated the—the communication that was complained of. Just a reminder, that was allegedly via telephone conversation as my client lives in Louisiana.

And Your Honor asked the parties to provide one or two things. The first was to submit any evidence that would substantiate or contradict Mr. Abshire's contention that he received any communication and then did not initiate it.

And the second was Your Honor asked the question of whether or not there was any case law on point specifically regarding whether specific jurisdiction could be conferred with a single phone call.

THE COURT: Okay. Well, we can proceed. I don't know if there's any reply at this point. But we'll —I mean, we'll proceed. Any comment at this point?

MR. HOFFMAN: Actually, I'll be—I just had one follow-up to that, Your Honor, if I may, unless counsel wants to interject.

That was March 29th, Your Honor. On April 15th, as was suggested by the Court, the defendant—defendants did file the affidavit of Chief Dallis, or excuse me, former Chief Dallis Warren. And in Chief Warren's affidavit, he confirmed or substantiated Mr. Abshire's contention that any communications that were complained of in

plaintiff's petition would have originated from him. And I'll just leave it at that.

THE COURT: Okay. You may proceed.

MR. HOUTHUIJZEN: Thank you, Judge. So, obviously, I entered an appearance in this case in April. So, I'm not aware of what happened in those prior hearings or what was said in this court. So, I've tried to put together my responses to what I understand to be going on.

My understanding is that they are trying to claim that this Court doesn't have jurisdiction over Mr. Abshire and USK9 Unlimited because this company is based in Louisiana. So, the first thing I would like to bring to the Court's attention is that this Court has actually already ruled on a motion to sever and a motion to transfer venue. By doing that, I didn't see any objections made by the defendants to those motions, the orders that were signed by this Court.

And if you look at Rule 120a(2) of the Texas Rules of Civil Procedure, it says, "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."

And then quoting *Tranz v. Peter Paul Petroleum Co*, the case stated that, "If a party moves for a special appearance obtains hearing on a matter seeking affirmative relief inconsistent with the special appearance before obtaining the ruling on the special appearance, it has entered a general appearance and waived any challenge personal jurisdiction."

Our first argument to the Court is that the defendants have waived any objection to personal jurisdiction of this Court because they didn't object to the motion to transfer venue. They didn't object to the motion to sever. And they didn't bring up the fact that they were challenging this Court. They allowed this Court to exercise jurisdiction over Mr. Abshire and USK9 by severing the cases and by moving the other defendants to Fort Bend County. So, that's the first part.

Now, if the Court doesn't think that that's—that they have waived their Special Appearance, there has been plentiful evidence that shows that Mr. Abshire for years has been coming to the state of Texas. He sells dogs to different police departments throughout the state. In fact, I went on his website, and I attached it to a motion that I submitted to this Court, where he brags about furnishing dogs to about 22 or 23 different police departments in the state. He has purposefully availed himself of the benefits of this forum state. And so, this Special Appearance shouldn't even be occurring.

In another case in Bay City, they–Mr. Abshire did the same thing. And then they agreed and waived the Special Appearance later on in the case.

This is just a stalling tactic that they are using. And I don't understand it. But Mr. Abshire is subject to the jurisdiction of this case. And all of the motions and filings that I've put before the Court establishes that.

The only other thing I have is a case that I submitted in a sur-reply to their response to this–

my sur-reply, which was *TV Azteca v. Ruiz*, which is a case from 2016 from the Supreme Court of Texas. In that case, there was a Mexican TV company that was submitting broadcast to the state of Texas. And they were reaching quite a few different people. And the Court actually granted a Special Appearance. The Court of Appeals affirmed it. And then the Supreme Court said, "No, sir. What needs to happen is they need to understand that they've purposefully availed themselves of this jurisdiction by putting their products into our stream of commerce."

And then the only other thing is there's a note in that case. I mean, it's actually headnote 27. And it says that in determining whether a nonresident defendant purposefully availed itself of conducting activities within the forum state so as to support the exercise of specific personal jurisdiction in compliance with due process, the fact that the plaintiff lives and was injured in the forum state is not irrelevant to the jurisdictional inquiry, but it is relevant only to the extent that it shows that the forum state was the focus of the activities of the defendant.

And so, the jurisdictional question is not just about the specific injury that we are complaining of in our lawsuit. It is about the rest of the defendant's activities by selling dogs to all of these different police departments. And so, we would ask this Court to finally deny their Special Appearance and allow us to proceed forward in this lawsuit.

THE COURT: Response.

MR. HOFFMAN: If I may respond, Your Honor. I'm going to address very quickly the–counsel's argument in regards to waiver, as it pertains to waiver. And the argument is this, Judge, one, that that motion and that argument was filed one day prior to this hearing. It's not properly noticed to be addressed today. But I understand that if we're to address the Special Appearance, I'm prepared to address it, Your Honor.

Let me say, first of all, that there's a disagreement regarding the—the timeline and the facts.

In November of 2017, Your Honor entertained the initial argument regarding defendant's Special Appearance. At that time, and in subsequent hearings, defendants did have the position that the Court must rule on the Special Appearance prior to addressing any of the other motions regarding transfer venue. Those motions were not filed by these defendants, Your Honor. They were filed by the other entities that were involved in the suit.

In November of 2018, we had a hearing which I believe was the third hearing on the Special Appearance where the codefendants expressed their frustration with the amount of time that was taken to conduct the limited discovery. And by agreement, Your Honor was to address the Special Appearance and allow the codefendants to go pursue their claims that were tied up here with Fort Bend, as I believe Your Honor had ruled on it in—at least at the initial hearing. We were just waiting.

So, the argument is the defendants have-these defendants have never raised any issue regarding anything aside from the Special Appearance. And as such, there's been no conduct by the defendants or these defendants that would constitute waiver.

THE COURT: And your clients were not involved in the action that was transferred to Fort Bend County?

MR. HOFFMAN: Correct, Your Honor. And make sure I don't forget to address—let me, if I could very briefly address. Your Honor, as I mentioned before, did invite the parties to supplement the discovery and provide the Court with case law. That was on point as to the issue regarding specific jurisdiction.

I'll just be very brief, Your Honor, that the case that was provided, the facts are that there's a television program allegedly making defamatory statements regarding Texas residents. Your Honor's direction was to provide specific case law. That would be on point as to the issue regarding conferring jurisdiction with the phone call, I would argue that this case isn't on point.

And although I did, there's some excellent analysis regarding stream of commerce that I think is applicable to our case. That, just as a reminder just placing products in the stream of conference—of commerce, in particular, the state is not enough to confer jurisdiction.

THE COURT: Okay. Anything further?

MR. HOUTHUIJZEN: I stand by everything I said, Judge.

THE COURT: Well, the Court does not find that the motion—that the Special Appearance has been waived. The transfer of venue did not involve this defendant. This defendant wasn't transferred or, you know, over to Fort Bend. And I don't know that they would have had standing to—or to interject themselves in the motion that did not involve them at all. I don't think passively having other parties have their issue that didn't involve them adjudicated, I don't think waived their Special Appearance. So, I'll overrule the objection as to waiver.

Now, on this Special Appearance itself, with regard to case law, did you want to—no one has actually shown the Court any case law since the last time you've been here on point. Do either one of you have any?

MR. HOUTHUIJZEN: I attached to my sur-reply, the *TV Azteca* case.

THE COURT: Do you have a copy of it, please?

MR. HOUTHUIJZEN: I don't have a copy.

MR. HOFFMAN: I do, Your Honor. I'd be happy to—although, I apologize. It has my notes on it. I apologize.

MR. HOUTHUIJZEN: Doesn't bother me.

THE COURT: I can probably pull it up on the screen. Let me find it here. What date did you file it?

MR. HOUTHUIJZEN: That would be 4-24. I'm sorry, April 24th.

THE COURT: Okay.

MR. HOUTHUIJZEN: And I can email the Court a copy of that.

THE COURT: No. If you filed it, it will be on here. Let's see. Says it was filed with a sur-reply?

MR. HOUTHUIJZEN: Yes, sir.

THE COURT: I see an Exhibit 1 that's nine pages. That's not a case. Okay. Is it *Azteca v. Ruiz*?

MR. HOUTHUIJZEN: Yes, sir.

THE COURT: Okay. Let me pull that up here. Says it's a Supreme Court case from 2016. Okay. And how is the holding in that case, how is it applicable here?

MR. HOUTHUIJZEN: In this case, the Court held that the defendants had purposefully availed themselves of the privilege conducting activities in Texas. So, even though the company that he's running is based in Louisiana, he was purposefully taking dogs and selling them to police departments throughout the state of Texas. He was conducting business with the state of Texas. And so, to say that he should be allowed to confer the benefits of conducting that business in the state of Texas, but he's not allowed to have the detriments is just not fair.

And so, that's what this case is talking about, that the exercise of specific personal jurisdiction comported with traditional notions of fair play and substantial justice.

THE COURT: Okay. So, what's the reply with regard to the cite of this *TV Azteca* case?

MR. HOFFMAN: Your Honor, as I mentioned a moment ago, it—the facts are not aligned with our case. And specifically, your request was to clarify specific jurisdiction. I believe counsel's arguments would be more into with general jurisdiction. I have nothing more to add.

THE COURT: But I don't think this case was raised at the previous hearing, right?

MR. HOFFMAN: It was not, Your Honor.

THE COURT: So, again, the Court has to naturally consider all binding case law. And this is a Texas Supreme Court case. So, I've got to see how do you believe the facts in this case before the 80th District Court is significantly different from the *TV Azteca* case versus *Ruiz*.

MR. HOFFMAN: Well, specifically, Your Honor, in this particular case, again, this is defamation that it was allegedly spread via broadcast from a TV station.

The facts in our case allege a defamatory statement that was spread via a single telephone call. So, that first and foremost—aside from that, Your Honor, I stand on the previous arguments that we have made in regards to general jurisdiction specifically regarding the extensive argument Your Honor has already heard in regards to my client's deposition that was conducted. And the fact that, again, he's incorporated in Louisiana, has never been incorporated elsewhere, conducts his business including the training of the animals, the training of the—his—of the clients, being the law enforcement and government personnel that train with the dogs. And he does not, as a regular

course of duty, ship the dogs to the clients. They come to him. The train is conducted on site. I could go on, Your Honor. But I get all of the arguments and the facts that were raised at the previous hearing.

THE COURT: And on the alleged defamatory phone call, that was made by—the call was initiated by the plaintiff; is that correct?

MR. HOFFMAN: By chief—former Chief Dallis Warren. And that's via sworn affidavit that's been filed with the Court.

THE COURT: Okay. So, let me—on the reply here, are you going on general contacts rather than specific contacts? I'm trying to understand the grounds that you're challenging the Special Appearance. In other words, you're talking about them sending dogs into Texas. Their market is intended to be in Texas.

Now, with regard to the alleged defamatory call, you've heard that the defendant has allegedly-the call was actually initiated not by them but by the plaintiff.

MR. HOUTHUIJZEN: Not by the plaintiff.

MR. HOFFMAN: Codefendant.

THE COURT: Codefendant rather.

MR. HOUTHUIJZEN: That's why the lawsuit was filed because the defendants were defaming the plaintiff. And so, Mr. Abshire was involved in the telephone call. And no one has said that he wasn't. And so, at the very minimum, that estab-

lishes that he was conducting some sort of business with them.

And then he was personally selling dogs to that police department. And so, the test for personal jurisdiction over a nonresident defendant is if the defendant has established minimum contacts with the state. And at the very minimum, even if he picks up the phone call and talks to the chief of the police department in Rosenberg, that's minimum contacts. But we have even further evidence of his contacts by invoices of him selling the dogs, him admitting in—in the request for admissions, that he was selling the dogs to the state of Texas. And so-

THE COURT: So, you believe that even on general jurisdiction, direct grounds are sufficient minimum contacts that would make it fair to hail the defendant into Texas court?

MR. HOUTHUIJZEN: Yes, sir. And I think that the test that is talked about in the *TV Azteca* case applies. The defendant has established minimum contacts with the state in the exercise of jurisdiction, comports with traditional notions of fair play and substantial justice. So, he's saying that he can come here. He can sell dogs. He can make money, and then he can go back to Louisiana, and it doesn't matter who he hurts.

THE COURT: Okay. Give me a moment. I want to look through the cited case, the *TV Azteca* case.

Now, as I'm going through this case, the plaintiff in the *TV Azteca* case actually resided in Texas; is that correct?

MR. HOUTHUIJZEN: Yes.

THE COURT: Okay. That's not the case here. Here the plaintiff resides in Louisiana.

MR. HOUTHUIJZEN: Plaintiff resides in Texas.

THE COURT: Pardon me?

MR. HOUTHUIJZEN: In our case, the plaintiff resides in Texas. The defendant resides in Louisiana.

THE COURT: Okay. Okay. The Court, when we previously met on these and had previous hearings, this case was not apparently previously presented to the Court or argued. However, reviewing the Texas Supreme Court Opinion in *TV Azteca v. Ruiz*, the Court denies the Special Appearance. Do I have an order denying?

MR. HOUTHUIJZEN: I don't know if I filed one. I can file one.

THE COURT: Let me see if I have one.

MR. HOFFMAN: May I be heard, Your Honor?

THE COURT: Well, the Court's already ruled on it, so.

MR. HOFFMAN: Oh, I'm just inquiring about whether or not the order will contain the basis for Your Honor's ruling.

THE COURT: I don't think it's necessary, but I want to see the proposed order on it.

You didn't bring an order?

MR. HOUTHUIJZEN: I don't know if I filed one. There might be one.

THE COURT: See if you can find an order. Or if you find out what date you filed it, I can pull it up on here. Mr. Casares will print the order—

MR. HOUTHUIJZEN: Okay.

THE COURT:—or I can sign it electronically. Okay. It's just a simple order denying the Special Appearance.

No. This is the motion to severe, looks like. This isn't the right order.

MR. HOUTHUIJZEN: And, Judge, I would like to pass all the rest of my motions and hearings that were set for today.

THE COURT: Did you have any other hearings set or any other motions?

MR. HOFFMAN: Just the motion to quash.

THE COURT: Okay.

MR. HOUTHUIJZEN: And that was for a deposition on the Special Appearance. So, I don't think–

THE COURT: So, that's moot?

MR. HOUTHUIJZEN: Yes, sir, it is. It is. I can file—I can file one.

THE COURT: Okay. Submit it to opposing counsel as to the form. It will be just a simple order denying the Special Appearance.

MR. HOUTHUIJZEN: Yes, sir.

THE COURT: We're off the record.

MR. HOUTHUIJZEN: Thank you, Judge.

MR. HOFFMAN: Thank you, Your Honor.

(Proceedings concluded.)