

**Affirmed in Part, Dismissed in Part, and Opinion filed May 17, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-01551-CV**  
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**JAMES A. GRAF, Appellant**

**V.**

**MARIA GUADALUPE RODRIGUEZ, INDIVIDUALLY AND AS NEXT FRIEND OF  
EDGAR OSCAR RODRIGUEZ, LEONOR RODRIGUEZ, ORALIA GUADALUPE  
RODRIGUEZ, NADIA KARINA RODRIGUEZ, AND FRANCISCO JAVIER  
RODRIGUEZ, AND AS REPRESENTATIVE OF THE ESTATE OF FRANCISCO J.  
RODRIGUEZ, Appellees**

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**On Appeal from the 280<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 99-38014**

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**OPINION**

Appellant James A. Graf, (Graf) filed this accelerated interlocutory appeal from an order denying his special appearance in a wrongful death case. In one point of error, Graf contends the trial court lacked jurisdiction to join him, individually, as a party defendant because the statute of limitations had expired, and that denial of his special appearance violated his due process rights. We affirm in part, and dismiss the remainder of the appeal.

## F A C T U A L   B A C K G R O U N D

Appellees' wrongful death cause of action arising from the death of Francisco J. Rodriguez (Rodriguez) is governed by the two-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2001). The accident occurred, and Rodriguez died, on September 12, 1995. At the time of the accident, J. A. Graf Custom Homes was the general contractor building the home in which decedent was injured. Suit was filed on September 8, 1997, in federal court naming C & B Acoustical & Drywall Materials, Inc. et al., and J. A. Graf Custom Homes as defendants. Prior to this suit, however, James Graf dissolved the company named J. A. Graf Custom Homes and incorporated a new business entity, "J. Graf Homes, Inc." The lawsuit filed in federal court was subsequently dismissed.

On July 23, 1999, appellees instituted the underlying lawsuit in Harris County District Court again naming J. A. Graf Custom Homes as defendant. J. A. Graf Custom Homes answered the lawsuit, alleging it was not liable in the capacity in which it was sued and that there was a defect in parties. Accordingly, J. A. Graf Custom Homes moved for summary judgment. On December 7, 2000, the trial court signed an order granting summary judgment in favor of J. Graf Homes, Inc. on the basis it was not a proper party to the case,<sup>1</sup> denying J. A. Graf Custom Homes' motion for summary judgment, and substituting, pursuant to Civil Procedure Rule 28, the name of James A. Graf for the name of J. A. Graf Custom Homes. Graf responded by filing a special appearance alleging, among other things, that the trial court denied Graf appropriate due process by substituting him individually as the defendant inasmuch as he had never been served. The trial court disagreed, however, and denied Graf's special appearance on December 12, 2000.

### I.

#### Special Appearance

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<sup>1</sup> We have carefully reviewed the clerk's record before this Court and do not find any motion for summary judgment in the name of J. Graf Homes, Inc. The record only contains the summary judgment motion of J. A. Graf Custom Homes.

Graf brought this interlocutory appeal pursuant to section 51.014(7) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(7) (Vernon Supp. 2001) (permitting interlocutory appeal from grant or denial of special appearance pursuant to Rule 120a). Graf's sole point of error reads as follows:

The trial court improperly joined James A. Graf individually as a party defendant in the lawsuit, because the statute of limitations had long expired. As a consequence, the trial court lacked jurisdiction over Graf, and the denial of his special appearance denies Graf due process under the Texas and United States Constitutions.

We will first address Graf's challenge to the trial court's December 12, 2000 order denying his special appearance and retaining appellees' suit on the docket, because it directly affects our jurisdiction to hear this appeal. We must inquire into our own jurisdiction, even if it is necessary to do so *sua sponte*. *Normand v. Fox*, 940 S.W.2d 401, 402 (Tex. App.—Waco 1997, no pet.). Here, Graf has essentially used a special appearance to challenge the trial court's use of Rule 28 to substitute Graf, individually, as a defendant. Texas Rule of Civil Procedure 120a states in pertinent part:

a special appearance may be made by any party . . . for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State . . .

TEX. R. CIV. P. 120a. This procedure was designed only to allow a *nonresident* defendant to challenge the power of the state court to exercise jurisdiction over the defendant's person or property on the ground that such party or property is not amenable to process issued by the courts of this state. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985). A special appearance is a specific procedural mechanism to litigate one issue, and strict compliance is required. *N.F. Abramowitz v. Miller*, 649 S.W.2d 339, 342 (Tex. App.—Tyler 1983, no writ). Amenability to process issued by the courts of this state is the only issue to be determined at a special appearance hearing. *Texas Commerce Bank Nat'l Ass'n v. Interpol 1980 Ltd. P'ship*, 703 S.W.2d 765, 775. Graf's special appearance did not assert he was not

amenable to process issued by the courts of this state. Moreover, Graf conceded at oral argument that he is a Texas resident. Thus, a special appearance is not available to Graf. Accordingly, we overrule that portion of Graf's sole appellate issue challenging the trial court's December 12, 2000, denial of his special appearance.

## II.

### **Interlocutory Appeal**

We have held that Graf, as a Texas resident, could not validly assert a Rule 120a special appearance, thus vitiating the basis for his interlocutory appeal under section 51.014(7). Turning now to the other elements of Graf's sole point of error—improper joinder under Rule 28, limitations and denial of due process—we find that none of these issues may be raised through an interlocutory appeal.

It is well settled that the jurisdiction of an appellate court is, absent a statute authorizing an interlocutory appeal, vested only in cases where a final judgment has been rendered. *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985). Because the December 7, 2000 order appealed from did not dispose of all parties and all issues before the court, it is not a final and appealable judgment. *Schlif v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex. 1982). Indeed, as set forth above, that December 7 order substituted Graf as the defendant pursuant to Rule 28. None of the appellees' causes of action against Graf have been adjudicated, and appellant has not cited any express legislative grant of authority to allow this Court to hear the interlocutory appeal from the trial court's rulings in the December 7 order. Therefore, we have no jurisdiction to address the remainder of Graf's appellate issues because they arise from an interlocutory order.

Accordingly, we dismiss that portion of appellant's appeal of issues arising from the trial court's December 7, 2000, interlocutory order.

/s/ John S. Anderson  
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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