

GAMAL ABDEL-HAFIZ

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IN THE DISTRICT COURT

vs.

ABC, INC., ABC NEWS, INC., ABC  
NEWS HOLDING COMPANY, INC.,  
DISNEY ENTERPRISES, INC.,  
WFAA-TV, L.P., WFAA OF TEXAS,  
INC., BELO CORP., CHARLES GIBSON,  
BRIAN ROSS, ROBERT WRIGHT, AND  
JOHN VINCENT

TARRANT COUNTY, TEXAS

67<sup>th</sup> JUDICIAL DISTRICT

**ROBERT WRIGHT AND JOHN VINCENT’S SUPPLEMENT TO THEIR FIRST  
AMENDED SPECIAL APPEARANCES OBJECTING TO JURISDICTION**

COME NOW, Robert Wright (“Wright”) and John Vincent (“Vincent”), and file this Supplement to their First Amended Special Appearances Objecting to Jurisdiction and would show as follows:

**OVERVIEW**

This is a defamation suit filed in 2003. Plaintiff alleges that Wright and Vincent “directed” defamatory statements toward the State of Texas. As nonresidents, Wright and Vincent challenge personal jurisdiction in Texas and have not generally appeared. Since the April 15, 2004, filing of their First Amended Special Appearances, the discovery process has yielded evidence, including Plaintiff’s deposition testimony and his responses to interrogatories, relevant to the jurisdictional issues. Further, in 2005 the Texas Supreme Court expressly disapproved of the so-called “directed a tort” type jurisdiction that Plaintiff relies upon herein. As such, it is now clearer than ever that a Texas court may not assert jurisdiction over nonresidents unless *their* contacts with this State are constitutionally sufficient. Alleged tortious activity is *not* enough. The jurisdictional inquiry is limited to the nonresident’s contacts with Texas. And the unilateral activities of the plaintiff or any third parties remain irrelevant.

## EVIDENCE

In addition to the Affidavits attached to Wright and Vincent's respective First Amended Special Appearances on file herein since April 15, 2004, the following supplemental evidence is relied upon in support of the jurisdictional objections:

Exhibit 1: Plaintiff's June 22, 2005, Objections and Answers to Wright and Vincent's First Interrogatories.

Exhibit 2: Excerpts from Plaintiff's Deposition taken herein on November 21, 2005, including Exhibit 26 thereto as produced by Plaintiff.

## ARGUMENT AND AUTHORITY

The touchstone of jurisdictional due process is "purposeful availment." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W. 3d 777, 784 (Tex. 2005). Therefore, in each case it is essential that there be some act by which the defendant purposely avails himself of the privileges and protections of the laws of the forum state. *Id.* In this regard, it is only the defendant's contacts with the forum – not those of the plaintiff or any other third party – that count. *Id.* at 785. The defendant's acts must be purposeful rather fortuitous. *Id.* And the defendant must seek some "benefit, advantage, or profit" by availing himself of the forum. *Id.*

Thus, even though allegations that a tort was committed in Texas may satisfy the jurisdictional requirements of the long-arm statute, more is required to satisfy the Constitution. *Id.* at 788. Mere "foreseeability" of where a plaintiff may bear the brunt of his injury is not a "sufficient benchmark" for exercising personal jurisdiction. *Id.* at 789 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

And even though on one occasion the United States Supreme Court upheld specific jurisdiction based upon alleged defamation intentionally directed at a forum resident, *Calder v. Jones*, 465 U.S. 783 (1984), a companion case decided the same day, *Keeton v. Hustler*

*Magazine, Inc.*, 465 U.S. 770 (1984), shows that the deciding factor was the extent of the defendant's activities; not merely the residence of the alleged defamation victim. *Michiana*, 168 S.W. 3d at 789 (Tex. 2005). Whether or not a jury might have found the underlying articles in these Supreme Court cases to be defamatory, there was no question that the articles themselves constituted a substantial "presence" in the forum states by the defendants. *Id.*

Further opining on these and disapproving of other "directed a tort" type cases, the *Michiana* Court stated as follows:

Several problems arise if jurisdiction turns not on a defendant's contacts, but on where it "directed a tort." First, it shifts a court's focus from the "relationship among the *defendant*, the forum, and the litigation" to the relationship among the "*plaintiff*, the forum . . . and the litigation." The place where a plaintiff relies on fraud may determine the choice of law, but choice-of-law analysis considers all parties, local courts, legal policies, interested states, and the interstate and international systems. By contrast, minimum-contacts analysis focuses solely on the actions and reasonable expectations of the defendant.

Second, directed-a-tort jurisdiction confuses the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits. If purposeful availment depends on whether a tort was directed toward Texas, then a nonresident may defeat jurisdiction by proving there was no tort. Personal jurisdiction is a question of law for the court, even if it requires resolving questions of fact. But what if a judge and jury could disagree? May a trial judge effectively grant summary judgment in a local jurisdiction by deciding contested liability facts in favor of the defendant? And if a jury absolves a defendant of tort liability, is the judgment void because the court never had jurisdiction of the defendant in the first place?

Business contacts are generally a matter of physical fact, while tort liability (especially in misrepresentation cases) turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the latter.

Third, in cases dealing with commerce, a plaintiff often has the option to sue in either contract or tort. Here, for example, Holten alleged tort, contract, and statutory claims, as Texas law

often allows a plaintiff to do. If directing a tort at Texas is enough, then personal jurisdiction arises when plaintiffs allege a tort, but not when they allege breach of contract. Thus, the *defendant's* purposeful availment depends on the form of claim selected by the *plaintiff*.

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In their dissenting opinion, our colleagues remind us seven times that Michiana did not deny Holten's fraud allegations. Of course, Michiana did deny his allegations in its answer, but rightly focused its jurisdictional affidavits on lack of *contacts* rather than lack of *culpability*. Jurisdiction cannot turn on whether a defendant denies wrongdoing -- as virtually all will. Nor can it turn on whether a plaintiff merely alleges wrongdoing -- again as virtually all will. If committing a tort establishes jurisdiction, our colleagues will have to decide who is correct -- and then the Texas jurisdictional rule will be: guilty nonresidents can be sued here, innocent ones cannot. The dissenting opinion shows little doubt on that score; but if we address jurisdictional questions in this spirit, nonresidents will avoid not just our courts but our state and all its residents as well.

For the reasons stated above, we disapprove of those opinions holding that (1) specific jurisdiction is necessarily established by allegations or evidence that a nonresident committed a tort in a telephone call from a Texas number, or that (2) specific jurisdiction turns on whether a defendant's contacts were tortious rather than the contacts themselves.

*Michiana*, 168 S.W. 3d at 790-792 (Tex. 2005)(citations omitted)(emphasis in original).

In the instant case, Plaintiff bases his jurisdictional argument largely on the notion that Wright and Vincent “directed” defamatory statements toward the State of Texas under the theory that they somehow “knew” he “resided” here. Not only does this jurisdictional theory rely upon unsubstantiated speculation as to what Wright or Vincent or “intended,” it would be improper at the jurisdictional stage for this Court to attempt to reach into Wright or Vincent’s minds in an effort to determine what they “thought.” The focus must remain on physical facts.

In one isolated instance, Plaintiff alleges that in 2003, “Vincent purposely traveled to Texas to defame, libel, and slander Plaintiff.” *See e.g. Plaintiff’s March 18, 2004, Response to John Vincent’s Special Appearance* at 3. Likewise, in one isolated instance, Plaintiff alleges that in 1999, “Wright as an FBI Agent had telephone contact with the Dallas office of the FBI.” *See e.g. Plaintiff’s March 18, 2004, Response to Robert Wright’s Special Appearance* at 2. Aside from these two “physical facts”, all other allegations in Plaintiff’s pleadings focus generally on what the parties thought or intended in or around 2002 with respect to Plaintiff’s residency theory. And other than legal conclusions, what Plaintiff repeatedly fails to explain is how any of these alleged “contacts” translate into constitutionally permissible jurisdiction. This hurdle he cannot overcome.

As set forth above, the jurisdictional focus must remain on Wright and Vincent’s physical “contacts” with Texas – not on whether their “contacts” were “tortious” or on what they might have “thought” or “intended.” *See also, Lewis v. Indian Springs Land Corp.*, 175 S.W.3d 906, 913-18 (Tex. App. – Dallas 2005, no pet.)(analyzing *Michiana* and recognizing that jurisdiction turns only on defendant’s physical contacts with forum; not on whether the contacts were tortious; and not on where defendant knew the brunt of any injury would be felt).

Quite simply, there is no valid authority holding that one phone call to Dallas, or a single trip to Texas, amounts to the purposeful availment of the privileges and protections of the laws of this State. Moreover, these sorts of general contacts with this State arising from Wright or Vincent’s respective employment with the FBI and/or Judicial Watch, Inc. are protected under the fiduciary shield doctrine. *See e.g. SITQ E.U., Inc. v. Reata Restaurants, Inc.*, 111 S.W. 3d 638, 651 (Tex. App. – Fort Worth 2003, pet. denied)

Even if it were shown that Plaintiff “resided” in Texas at any relevant time, *and* further shown that Wright and Vincent somehow “knew” he resided here – such that they “directed” the

alleged defamation toward this forum – the constitutional mandates of due process would still require dismissal of Plaintiff’s claims. This is so because, without *more*, merely directing a tort toward Texas is a constitutionally insufficient ground for asserting personal jurisdiction over nonresidents such as Wright and Vincent.

And not only has Plaintiff failed to specifically plead, much less come forward with evidence of anything “more,” he cannot even show that he *resided* in Texas. *See* Exhibit 1; 2. Indeed, Plaintiff was not physically present in Texas and had sold his Texas home after he was promoted to Riyadh, Saudi Arabia by the FBI in early 2001. Exhibit 2 at 264-66. Plaintiff cannot show, nor, despite having deposed them, is there any evidence that Wright or Vincent somehow “knew,” Plaintiff “resided” in Texas – he didn’t. Neither bodily presence nor intention alone will suffice to create residency. *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964). It is only when the two coincide at that the residence is fixed and determined. *Id.* Plaintiff can show neither.

As such, even assuming that Plaintiff’s reliance on “directed a tort” jurisdiction is somehow proper, how could Wright or Vincent have directed a tort towards this State? The only credible answer is that they could *not* have. Plaintiff was not physically present in Texas nor did he have a home here during the relevant timeframe – he was living and working in Riyadh, Saudi Arabia. Exhibit 1; 2.

And Plaintiff himself readily admits that he “didn’t want to come back” to Texas after being promoted to Riyadh. Exhibit 2 at 261. Rather, his long-term goals were focused upon potentially worldwide promotions within the FBI. *Id.* at 262; 267. He did not want to “relocate” or “uproot” his family to return to Texas. *Id.* at 261. Indeed, his only admitted physical connection to Texas is that his “household goods” were being stored in Fort Worth at FBI expense. *Id.* at 262; 270.

Plaintiff's testimony further reflects that he claimed "Dallas, Texas" as his "actual residence" on his transfer papers only because "[t]hey just told me to write Dallas, Texas – Dallas, Texas and sign it." *Id.* at 254. In reality there was no relation to Plaintiff's actual residence or to where he lived; rather the only connection to Texas was the location of the FBI's Dallas Field Office at the time Plaintiff was promoted to Riyadh. *Id.* at 255. And although they are quite flattering to Texans, Plaintiff's sentiments that "no, no, no, no, no...nothing will replace Texas" do not create jurisdiction here. Exhibit 2 at 268.

In this regard, it was not until an FBI "administrative inquiry" arose related to insurance fraud that, despite his prior requested and approved "extension" in Riyadh through at least August 2003 (*Id.* at 257; 260), Plaintiff was sent back to the United States by the FBI on March 14, 2003. *Id.* at 266. This date is well after the occurrence of all but one of the alleged defamatory publications (i.e. March 30, 2002, Judicial Watch Washington, D.C. press conference; November 26, 2002 *Wall Street Journal* article; December 19, 2002, ABC broadcast; March 5, 2003, Judicial Watch Dallas, Texas press conference).

The only allegation that stems from a period when Plaintiff purports to have been physically present and actually living in Texas is the mid-2003 PBS *Frontline* interview. And again, there is no evidence that either Wright or Vincent knew of Plaintiff's whereabouts at that time. Nor is there any evidence that the PBS interview of Vincent involved any purposeful contact with Texas. There is not even evidence that Plaintiff "intended" to be back in Texas at that time – much less that Wright or Vincent "knew" where he was. These facts remain undisputed.

Also undisputed is the fact that Plaintiff's return to Texas from Riyadh – after he requested and was granted an "extension" – was the direct result of actions beyond the control of Wright and Vincent. Exhibit 2 at 257; 260-62. It was the FBI that sent Plaintiff back to Texas.

He never wanted to return. *Id.* at 261. This is an important point, not only because it negates Plaintiff's failed "directed a tort" theory of jurisdiction, but also because, as set forth above, the "purposeful availment" doctrine mandates that *only* Wright and Vincent's individual contacts with the forum be considered.

In other words, the unilateral activities of Plaintiff and/or other third parties such as the FBI, ABC, FOX, PBS, etc. are irrelevant to the jurisdictional inquiry as it relates to Wright or Vincent. Under these facts, if Plaintiff's "directed a tort" theory were to hold water, then jurisdiction in defamation cases could be unilaterally controlled upon the whim of any plaintiff who decided to move to any state. This is exactly what the Texas Supreme Court has forbidden.

Neither Wright nor Vincent had any control over the circumstances leading to Plaintiff's demotion and return to Texas by the FBI. And they certainly had no control over where any of the alleged defamatory publications would be "directed." Neither Wright nor Vincent has had any meaningful connections to Texas that arise to the constitutional level of "purposeful availment." Any connections that Plaintiff alleges were, at best, merely fortuitous. And at no time did Wright or Vincent seek any "benefit, advantage, or profit" by availing themselves of a Texas forum. Texas is without jurisdiction.

This Court should not hang the jurisdictional noose around Wright and Vincent simply because Plaintiff was roped back to Texas by the FBI. To Plaintiff, when he hit the trail to Riyadh, Saudi Arabia – happiness was [Fort Worth] Texas was in his rear-view-mirror. Not only is Plaintiff's "directed a tort" theory legally flawed – it factually fails.

WHEREFORE, PREMISE CONSIDERED, Robert Wright and John Vincent pray that the Court sustain their Special Appearances and order that all claims be dismissed for want of jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to the Texas Rules of Civil Procedure, I hereby certify that a true and correct copy hereof was served on all counsel of record on April 5, 2006

  
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Todd W. Hutton