**Opinion issued August 11, 2011.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-01001-CV**

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**JERRY WILKERSON, Appellant**

**V.**

**RSL FUNDING, L.L.C., Appellee**

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**On Appeal from the 125th District Court**
**Harris County, Texas**
**Trial Court Case No. 2009-76347**

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## DISSENTING OPINION

This case of first impression is important to the jurisprudence of Texas. It addresses the question of whether a non-Texas resident who uses interactive local websites allegedly to defame a Texas resident is subject to the same jurisdictional

standards as a non-Texas resident who uses local print media allegedly to defame a resident.

Appellee, RSL Funding, L.L.C. ("RSL"), a Houston, Texas company, sued appellant Jerry Wilkerson, a non-Texas resident, for defamation, libel, and business disparagement for posting allegedly defamatory comments on local Houston Yahoo! and local Houston Yelp websites. In this interlocutory appeal, Wilkerson appeals the trial court's order denying his special appearance. In dismissing this case for lack of jurisdiction over Wilkerson, the majority converts the requested review of whether the evidence is legally sufficient to enable Wilkerson to avoid the reach of Texas' long-arm statute into an objection of its own to the competency of RSL's evidence to establish the jurisdictional fact that Wilkerson used www.local.yahoo.com to publish his comments—a matter not presented to the trial court and not in dispute. In doing so, the majority not only erroneously raises the competency of the evidence to support the trial court's implied findings *sua sponte* on appeal, but also erroneously shifts the burden of proof from Wilkerson, to negate the jurisdiction of the Texas courts over him, to RSL, to prove it. Finding the jurisdictional evidence incompetent to support the fact that Wilkerson used www.local.yahoo.com, pursuant to its *sua sponte* review, the majority erroneously goes on expressly to decline to apply the legal test for the determination of jurisdiction over users of interactive websites—which it

acknowledges both local.yahoo.com and yelp.com are—on the ground that Wilkerson did not own and operate the websites on which he posted his comments. By this means, it reaches the erroneous legal conclusion that the case must be dismissed for insufficient evidence of the court's jurisdiction over Wilkerson and dismisses the case. The majority thus derails an important case of first impression in a developing area of law in which internet website owners, search engine operators, and users are all in need of the legal guidance expressly sought by the parties here as a matter of law, not fact.

I respectfully dissent. I would hold that this Court is called upon to review and apply the law governing personal jurisdiction over the users of interactive websites, not to review the evidence as to whether Wilkerson used local Yahoo! or as to whether the site is interactive. Applying the legal test for determining jurisdiction over the users of interactive websites, I would hold that by using the interactive local Yahoo! website for Houston and the interactive Yelp website for Houston to post allegedly defamatory comments about a local Houston, Texas business, appellant subjected himself to the long-arm jurisdiction of Texas.

## Background

Wilkerson is a California resident. RSL is a Texas company that specializes in factoring structured settlement payments. Wilkerson's daughter, Trisha Marlene Wilkerson ("Trisha"), also a California resident, won the California State Lottery.

Trisha and RSL entered into an agreement by which Trisha assigned a portion of her future lottery payments to RSL in exchange for a lump sum payment from RSL that she intended to use to purchase a home. Wilkerson apparently aided Trisha in conducting this business with RSL. As Trisha completed her business transaction with RSL, Wilkerson, who was unhappy with RSL's interaction with Trisha, posted comments regarding RSL on two different websites specific to Houston, Texas—local.yahoo.com for Houston and yelp.com for Houston.[1]

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[1] The majority claims:

> RSL produced no evidence to support its allegation that Wilkerson used "www.local.yahoo.com" to publish his comments in some fashion specifically associated with Houston. There is only evidence that RSL printed out a Yahoo! webpage that included a "local" reference in its web address (i.e. its uniform resource locator, or URL). The evidence that Wilkerson's comment was associated with Houston-related content on Yahoo! is not evidence that Wilkerson was responsible for that association, particularly if RSL or its Houston-based attorneys prepared the evidence of what appears on Yahoo! from their Houston-located computers.

Slip op. at 16–17. Wilkerson made no objection to the form of RSL's evidence of jurisdictional facts below, and he does not argue that the evidence of jurisdictional facts is defective on appeal. The majority makes this argument and issues its ruling *sua sponte* and, in doing so, it misapplies the law. The burden of proof in a special appearance is on the *non-resident* to prove the *absence* of jurisdiction; it is not on the resident plaintiff to prove the existence of facts sufficient to subject the non-resident to the jurisdiction of the Texas courts. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) ("In Texas, a nonresident must negate all bases of personal jurisdiction to prevail in a special appearance."); *Gonzalez v. AAG Las Vegas, L.L.C.*, 317 S.W.3d 278, 282 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("[A] nonresident defendant who files a special appearance assumes the burden of negating all bases of personal jurisdiction that the plaintiff has alleged."). Moreover, even if the burden had been on RSL to prove jurisdictional facts sufficient to establish jurisdiction over Wilkerson, as the majority implicitly

On the local Houston Yahoo website, Wilkerson stated, *inter alia*, that "dealing with all of the lies by Jim Kelly [one of RSL's Houston employees] and the non returned promised phone calls by Jim and Mr. Sanchez from accounting" had been "by far the worst experience I have had in my 64 years of life"; that "RSL has lied repeatedly to us and misled us and have caused numerous delays in this project that still has yet to be funded"; that "[b]ecause of all the problems with [RSL] and their violating the contract, we are in the process of a law suit against them and if there is anyone else out there who have had similar experiences with [RSL], please join us in a class action law suit"; and, "Try calling any of their offices, N.Y., L.A., Atlanta etc and you will find that there are no offices there, only phone numbers that are transferred to the Houston Office. Very clever and manipulating of them. Just goes to show how they really conduct business, smoke and mirrors."

In his second Houston local.yahoo.com comment, Wilkerson stated, "Received our check today and now we are able to find out why RSL was so

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holds, rather than on Wilkerson to negate the factual basis of RSL's allegations, parties having an objection to the form of the evidence are required not only to make their objection in the trial court but to secure a ruling on the objection by that court, or the objection is waived. *See, e.g.*, *Commint Tech. Servs., Inc. v. Quickel*, 314 S.W.3d 646, 650 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (discussing summary judgment evidence). Here, Wilkerson did not object to the form of RSL's evidence, nor did he attempt to negate the court's jurisdiction over him by proving that he did not use www.local.yahoo.com to publish his comments.

arrogant and mean and delaying everything. They did not have the money. The check is no good NSF, non sufficient funds. Guess their word is as good as their check." The local Houston Yahoo! page on which Wilkerson made his comments contained a map and photograph of RSL's Houston office.

On Yelp's Houston website, Wilkerson wrote, "Received the check today from RSL and guess what, it appears their word is as good as their check[.] NSF NON SUFFICIENT FUNDS. I can see why they treated us so badly and were so rude and inconsiderate and kept delaying, because they don't have the money. What a joke they are." This webpage, too, contained both a map and photograph of RSL's Houston office.

RSL filed this suit against both Trisha and Wilkerson on November 25, 2009, alleging defamation, libel, and business disparagement. Trisha and Wilkerson both filed special appearances supported by their affidavits. The evidence established that Trisha was not involved in any way with the allegedly defamatory and libelous statements posted by Wilkerson. Her special appearance was granted, and Wilkerson's was denied.

Wilkerson's affidavit declared that he is a resident of California, does not own any real or personal property in Texas, has never owned any business in Texas, has never specifically directed any opinion or statement of fact concerning RSL to anyone in Texas, and has only traveled through Texas on one occasion.

Wilkerson also averred that he found the websites to which he posted his comments by performing a Google search and did not "direct, or target, Houston, or Texas in general when I posted my review concerning RSL." He further stated that he does "not know how to target a specific location when posting reviews on the internet" and "did not attach a map or a photograph of RSL's location or building when [he] posted [his] review of RSL on the internet," nor does he know how to include such attachments.

RSL responded to Wilkerson's special appearance by arguing that Wilkerson purposefully directed his actions at Texas. RSL supported its response with the affidavit of Stewart A. Feldman, the Chief Executive Officer of RSL, who averred that Houston is RSL's principal place of business. Feldman stated,

> The Yelp Web site is an interactive site that offers interactive forums where users can post comments and communications regarding various businesses. The Yelp Web site has influence and a large audience in RSL's financial services industry, so that defamatory posts made on the Yelp Web site are particularly likely to cause injury to the reputation of RSL.

Feldman also averred that both local.yahoo.com and yelp.com "use geographic location as the key to their respective search options" and are "intended to help a searcher find information in specific geographic areas." Feldman stated that "[m]ore likely than not it will be residents of the Houston area in particular, or Texas residents in general, that will search RSL Funding located in Houston, Texas." RSL also provided evidence that the check it gave to Trisha was in fact a

good check and that Trisha was able to use the funds from the check to purchase her home.

**Personal Jurisdiction**

In his sole issue, Wilkerson argues that the trial court erred in denying his special appearance.

Here, the question is whether Wilkerson's acts of posting allegedly defamatory and libelous statements on interactive websites that provide communications about local Houston businesses are, by themselves, sufficient to support the exercise of personal jurisdiction over him.

In the context of establishing a Texas court's jurisdiction over a company doing business in Texas, courts have characterized internet usage as falling within three categories on a sliding scale. *See, e.g.*, *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 177–78 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 677 (Tex. App.—Fort Worth 2001, no pet.). At one end of the sliding scale are websites that are "clearly used for transacting business over the Internet," such as entering into contracts and the knowing and repeated transmission of files of information. *Dawson*, 274 S.W.3d at 177. These websites may be sufficient to establish minimum contacts with a state. *Id.* On the other end of the scale are "passive" or "informational" websites that are used only for purposes such as advertising and "are not sufficient to establish minimum

contacts even though they are accessible to residents of a particular state." *Id.* at 177–78. Between the extremes of the scale are "interactive" websites that allow for the "exchange of information between a potential customer and a host computer." *Id.* Courts determine jurisdiction in situations involving an interactive website by examining the degree of interaction between the parties. *Id.*; *see also Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App.—Dallas 2006, no pet.) (characterizing eBay as interactive website and concluding that court had "to look beyond the internet activity to the degree of interaction between the parties.").

The two websites used by Wilkerson were clearly interactive—they allowed for the "exchange of information between a potential customer and a host computer." *See Dawson*, 274 S.W.3d at 178; *Karstetter*, 184 S.W.3d at 405. Therefore, the degree of interaction between the parties must be examined to determine jurisdiction. *See Dawson*, 274 S.W.3d at 178.[2]

[2] Notably, in refusing to apply the sliding scale for interactive websites in this case, the majority fails to identify any prior Texas cases addressing interactive websites that have similarly refused to use the sliding scale for such cases; rather, it cites several Texas and one Fifth Circuit Court of Appeals case that do use it. In support of its refusal to apply this standard, the majority references, in its footnote 6, only unpublished cases of no precedential value (and one published case) from other jurisdictions. These cases present neither binding nor persuasive authority and are also inapplicable in that they reference different factual scenarios. Likewise, the mostly unpublished cases from other jurisdictions cited in the majority's footnote 16 as failing to find that online defamatory statements were directed at the forum state are neither binding nor persuasive authority, present different fact patterns, and are inapplicable.

Here, the contact in question is an individual's direct use of the internet to commit, allegedly, the torts of libel, defamation, and business disparagement. Thus, as we determine the "degree of interaction" between the parties in this case, we also look to other libel and defamation cases that involved the distribution of tortious statements to broad audiences to determine whether Wilkerson's contact with Texas via the internet is sufficient to satisfy the minimum-contacts requirement. *See Revell v. Lidov*, 317 F.3d 467, 471–72 (5th Cir. 2002) (holding that sliding scale used to evaluate internet contacts is still applicable in defamation case, in spite of defamation cause of action's "unique features," concluding that sliding scale is compatible "with the 'effects' test of *Calder v. Jones*[, 465 U.S. 783, 104 S. Ct. 1482 (1984),] for intentional torts," and stating, "we must evaluate the extent of [the interactivity between parties on internet "bulletin board"] as well as [appellant's] arguments with respect to *Calder*"); *see generally Touradji v. Beach Capital P'ship, L.P.*, 316 S.W.3d 15, 24–25 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("We focus our analysis on the relationship among the non-resident, the forum, and the litigation to determine if the alleged liability arises from or is related to an activity conducted in Texas.").

The tort of libel is generally held to occur wherever the offending material is circulated. *Tabor, Chhabra & Gibbs, P.A. v. Med. Legal Evaluations, Inc.*, 237 S.W.3d 762, 774 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (quoting *Keeton*

*v. Hustler Magazine, Inc.*, 465 U.S. 770, 777, 104 S. Ct. 1473, 1479 (1984)). In *Calder*, an entertainer who lived and worked in California brought suit in California alleging that she had been libeled by Florida residents in an article printed in the *National Enquirer*. 465 U.S. at 784–85, 104 S. Ct. at 1484–85. The Supreme Court held that the California court had personal jurisdiction over the Florida defendants because

> [t]he allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

*Id.* at 788–89, 104 S. Ct. at 1486. However, "[t]he Texas Supreme Court has warned that, in applying *Calder*, we should be mindful of shifting our focus from 'the relationship among the *defendant*, the forum and the litigation' to the relationship among the '*plaintiff*, the forum . . . and the litigation.'" *Tabor, Chhabra & Gibbs*, 237 S.W.3d at 775 (quoting *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 790 (Tex. 2005)).

This Court has applied the law set out by the Supreme Court in *Calder* and *Keeton* to find that a Texas court could properly exercise personal jurisdiction over a non-resident defendant in a defamation case for the distribution of allegedly defamatory printed material in Texas and elsewhere. *Paul Gillrie Inst., Inc. v.*

*Universal Computer Consulting, Ltd.*, 183 S.W.3d 755, 761 (Tex. App.—Houston [1st Dist.] 2005, no pet.). In that case, the Paul Gillrie Institute allegedly defamed a corporation with its headquarters and principal place of business in Texas and mailed the trade publication containing the article to subscribers across the country, including approximately fifty subscribers in Texas, some of whom were customers of the corporation. *Id.* at 760–61.

I would hold that this case is similar to *Calder* and this Court's prior case in *Gillrie* in that the non-resident defendant's conduct was purposefully directed at Texas. Specifically, Wilkerson's posting of allegedly defamatory statements regarding a Houston business on local websites that review Houston, Texas businesses was purposely directed at visitors to those targeted local websites, including consumers seeking information regarding the provision of financial services by Houston businesses. Wilkerson's posts referred to a Texas company, specifically named two of its Texas employees and its accounting department, made factual statements about its provision of financial services that RSL contends were false and defamatory, and solicited participants in a class action lawsuit against the company. Wilkerson made his comments on websites that included a map and photograph of RSL's Houston offices and that would be of particular interest to Texas residents investigating local firms that provide financial services, like RSL. Wilkerson complained of RSL's acts undertaken in Texas, and—as the

allegedly defamatory posts indicate—Wilkerson was aware that RSL is a resident of and has its principal place of business in Texas, where any harm was suffered. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (holding that foreseeability of causing injury in Texas, though not determinative, is important consideration in establishing minimum contacts).

I would hold that Wilkerson's "interaction" with Texas by posting his allegedly defamatory and libelous statements online on local.yahoo.com's Houston website and yelp.com's Houston website is sufficient to support the trial court's exercise of personal jurisdiction over him. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007) (holding that sufficient minimum contacts exist when non-resident defendant "purposefully directed action toward Texas"); *Tempest Broad. Corp. v. Imlay*, 150 S.W.3d 861, 875 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that single, substantial act can support exercise of personal jurisdiction).

Wilkerson argues that he did not purposefully avail himself of the benefits of "doing business" in Texas. He states in his affidavit that he did not intentionally direct his actions to Texas, because he only performed a Google search and posted a review of RSL on the websites the search returned, and he did not attach the maps or photographs to his posts and did not know how to do so. However, this evidence does not overwhelm the other evidence in the record already discussed.

Wilkerson also argues that *Revell* and *Pearl v. Abshire* support his claim that the trial court cannot properly exercise personal jurisdiction over him. I would hold that this case is distinguishable from both cases. In *Revell*, the Fifth Circuit held that the Texas court could not exercise personal jurisdiction based on an allegedly defamatory article posted to an internet bulletin board because

> the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell [the resident plaintiff], and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California.

*Revell*, 317 F.3d at 473 (citing *Calder*, 465 U.S. at 788, 104 S. Ct. at 1482). As already discussed, Wilkerson's posts were made on websites that distribute reviews of local Houston businesses, specifically referred to RSL's Houston office and to specific employees in the Houston office, made factual statements that complained of RSL's Texas activities as a provider of financial services, and were directed to a medium that would be more likely to reach Texas readers than readers in other states, specifically including actual and potential customers of RSL and of other financial services providers in the Houston area. Furthermore, Texas was the focal point of Wilkerson's posts and of any harm suffered.

In *Pearl v. Abshire*, the Fort Worth Court of Appeals held, in a memorandum opinion, that the Texas court did not have personal jurisdiction over

Pearl, the non-resident defendant, based on his posting of messages on the Yahoo! Finance AXA internet message board. No. 02-08-286-CV, 2009 WL 1996288, at *1, *4 (Tex. App.—Fort Worth July 9, 2009, no pet.) (mem. op.). The Fort Worth court concluded that

> Pearl's internet connections with Texas were in fortuitous response to the postings of a Texas resident, Abshire. By his own admission, Abshire [the resident plaintiff] purposefully posted messages in an attempt to prompt Message Board readers like Pearl [the non-resident defendant] to respond, and he acknowledged that his posts had, from time to time, provoked vitriolic responses. There is no evidence that Pearl ever posted any message about Abshire, except in response to, and shortly following, an initiating post by Abshire. Although some statements reference Texas, there is no evidence that Pearl directed his statements at Texas other than the fact that Abshire happened to be located in Texas at the time Pearl's messages were posted.

*Id.* at *4. Here, however, Wilkerson deliberately sought a forum in which he could post his statements regarding RSL by performing a Google search, and he posted them in a way that focused on a Texas business, the actions of a Texas resident that were undertaken in Texas, and the consumers of Texas financial services. Thus, *Pearl* does not apply in the instant case.[3]

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[3] Wilkerson did not argue that exercise of personal jurisdiction would not be fair and just; therefore, it is not necessary to address this issue. *See Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 450 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that defendant bears burden of presenting "compelling case" that exercising jurisdiction over it would not be fair and just); *see also Guardian Royal Exch. Assurance Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991) (holding that when non-resident defendant has purposefully established minimum contacts, Texas court's exercise of personal jurisdiction will not comport with fair play and substantial justice "only in rare cases").

I would overrule Wilkerson's sole issue.

## Conclusion

I would conclude that the trial court correctly determined that it could exercise personal jurisdiction over Wilkerson, and I would affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Keyes, dissenting.