MINIMUM CONTACTS ANALYSIS AND BROADCAST SIGNALS IN TEXAS

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I. INTRODUCTION

TV Azteca v. Ruiz poses a question of first impression for the Supreme Court of Texas: How should Texas courts analyze minimum contacts arising out of broadcast publications in defamation cases?¹ In TV Azteca, the Court of Appeals of Texas, Corpus Christi-Edinburg, affirmed the trial court's determination that Texas courts had personal jurisdiction over a Mexican based broadcasting company and network (media parties) in a defamation case involving a Texas resident.² The media parties broadcast a program, which contained allegedly defamatory remarks from towers located in northern Mexico.³ The broadcast signals reach into southern Texas allowing individuals in Texas to view the Mexican-based programs.⁴

This Note argues that broadcast publications are analogous to internet publications and courts should apply the same minimum contacts analysis to both mediums in order to promote consistency and predictability. As such, the court of appeals erred in analyzing the standards established in Keeton v. Hustler Magazine, Inc., and the Supreme Court of Texas should apply the standards established in Calder v. Jones and hold that Texas

TV Azteca, S.A.B. de C.V. v. Ruiz, No. 13-12-00536-CV, 2014 WL 346031, at *5 (Tex. App.—Corpus Christi Jan. 30, 2014, pet. granted) (mem. op.).

^{2.} *Id.* at *24. 3. *Id.* at *12.

^{4.} *Id.* at *5.

courts do not have personal jurisdiction over the media parties. Part II of this Note discusses the history of personal jurisdiction in Texas defamation cases as well as recent litigation regarding changing technology and its effect on personal jurisdiction analysis. Part III discusses the court of appeals holding and rationale in *TV Azteca*. Part IV questions the application of the *Keeton* test to broadcast defamation cases and suggests that the *Calder* test would be more appropriate. Part V concludes by advocating that the Supreme Court of Texas should find that Texas courts do not have personal jurisdiction over a Mexican-based broadcast company in a defamation case involving a Texas resident.

II. ESTABLISHING PERSONAL JURISDICTION IN TEXAS

A. History of Personal Jurisdiction in Defamation Cases

Under the Texas long-arm statute, Texas courts may exercise personal jurisdiction over a nonresident defendant that is "doing business" in Texas. The Supreme Court of Texas has held that the "broad language extends Texas courts' personal jurisdiction 'as far as the federal constitutional requirements of due process will permit." As a result, Texas courts "rely on precedent from the United States Supreme Court... in determining whether a nonresident defendant has met its burden to negate all bases of jurisdiction."

Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, a court has personal jurisdiction when the defendant is physically present within the state or when the defendant has sufficient minimum contacts with the forum state. Minimum contacts may be established when a nonresident defendant purposefully avails himself to the benefits of the forum state. Once a court has determined that an individual has sufficient minimum contacts, the court may not exercise personal jurisdiction if such a finding would offend traditional notions of fair play and substantial justice.

Two cases from the United States Supreme Court provide alternative tests for establishing minimum contacts in defamation cases: the *Keeton* test

^{5.} TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041–.042 (West 2015); see also CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex. 1996) ("The long-arm statute allows a court to exercise personal jurisdiction over a nonresident defendant that does business in Texas.").

^{6.} BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002) (quoting U-Anchor Adver., Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977)).

^{7.} *Id*.

^{8.} See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

^{9.} Hanson v. Denckla, 357 U.S. 235, 253 (1958).

^{10.} Int'l Shoe Co., 326 U.S. at 316.

and the *Calder* test.¹¹ *Calder* and *Keeton*, which both involved defamation in printed publications, provide a useful framework for determining whether a nonresident defendant has sufficient minimum contacts to establish personal jurisdiction in the forum state.¹²

In *Keeton v. Hustler Magazine, Inc.*, the Court found that circulating 10,000 to 15,000 magazine subscriptions in New Hampshire was "sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." The Court reasoned that regular monthly sales of magazines in New Hampshire was not "random, isolated, or fortuitous" and thus the defendant's conduct was purposefully directed toward New Hampshire. Under the *Keeton* test, a defendant establishes minimum contacts when he is "carrying on a part of [his] general business" in the forum state or where a substantial part of his business is "regularly sold and distributed."

In *Calder v. Jones*, the Court found that minimum contacts might be found where a defendant purposefully avails himself to the forum state through either deliberate actions or deliberate effects arising from the defendant's conduct.¹⁶ In *Calder*, a California resident brought suit against the National Enquirer, a Florida corporation, for libel.¹⁷ The National Enquirer published an allegedly libelous story about the activities of a California resident.¹⁸ The publication attacked the "professionalism of an entertainer whose television career was centered in California."¹⁹

The Court reasoned that while the defendant in *Calder* resided in Florida, California was the "focal point" of the published story and the brunt of the injury was felt in the forum.²⁰ In *Calder*, the defendant used California sources, the story was centered on events that occurred in California, the plaintiff's career was located in California, and the harm was suffered in California.²¹ Based on these facts, the Court found the defendant had minimum contacts in the forum state based on the intended effects of his conduct.²² Under the *Calder* test, even if a defendant is not carrying on any part of his business in the forum state, minimum contacts may still be

^{11.} See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984); Calder v. Jones, 465 U.S. 783, 789 (1984).

^{12.} See Keeton, 465 U.S. at 781; Calder, 465 U.S. at 789.

^{13.} Keeton, 465 U.S. at 770, 773-74.

^{14.} *Id.* at 774.

^{15.} *Id.* at 780–81.

^{16.} Calder, 465 U.S. at 789–90.

^{17.} Id. at 785.

^{18.} Id. at 788.

^{19.} *Id*.

^{20.} Id. at 788–89.

^{21.} *Id*.

^{22.} Id. at 789.

established if the defendant has made the forum state the "focal point" of his conduct.²³

B. Analyzing Minimum Contacts Amid Changing Technology

While *Keeton* and *Calder* provide a useful framework for establishing minimum contacts in defamation cases arising from printed publications, many courts struggled in applying these traditional tests to other mediums, in particular, the Internet.²⁴ In the early 1990's, courts approached the question of minimum contacts in a variety of ways amidst the evolving technology.²⁵ Using the traditional tests, some courts found sufficient minimum contacts to establish personal jurisdiction if a website was accessible to everyone connected to the Internet in the forum state.²⁶ Courts that relied on accessibility reasoned that "the Internet is used to conduct wide-spread communication with everyone connected to the Internet."²⁷ Therefore, "the defendant purposefully directed her activities toward the forum state because she knew her website would reach everyone connected to the Internet, including residents in the forum state."²⁸

Other courts found that mere accessibility was not purposeful availment to the forum state and rejected such a broad assertion of personal jurisdiction. Under a theory of mere accessibility, personal jurisdiction may be exercised if one creates a website and permits anyone who finds it to access it. In rejecting mere accessibility, one court explained that [c] reating a site, like placing a product into the stream of commerce, may be felt nation-wide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."

Refusing to find minimum contacts based on mere accessibility alone, many courts began to apply an internet-specific minimum contacts analysis as established in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*³² In *Zippo*, Zippo

^{23.} *Id.* at 789, 791.

^{24.} TiTi Nguyen, A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition, 19 BERKELEY TECH. L.J. 519, 525 (2004).

^{25.} *Id.* (explaining that while some courts applied traditional personal jurisdiction tests to the Internet, other courts created an "Internet-tailored test").

^{26.} See Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996); see also Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333–334 (E.D. Mo. 1996).

^{27.} Nguyen, supra note 24, at 526.

^{28.} Id.

^{29.} GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000) (rejecting plaintiff's argument that "mere accessibility of the defendants' websites establishes the necessary 'minimum contacts' with [the] forum'); *see* Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

^{30.} Bensusan Rest. Corp., 937 F. Supp. at 301.

^{31.} *Ia*

^{32.} Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

Manufacturing, a Pennsylvania corporation brought suit against Zippo Dot Com, a California corporation, in Pennsylvania for trademark infringement as a result of Zippo Dot Com's use of the domain names "zippo.com," "zippo.net" and "zipponews.com." The court explained that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The court further stated that "[t]his sliding scale is consistent with well developed personal jurisdiction principles." The court further stated that "[t]his sliding scale is consistent with well developed personal jurisdiction principles."

The *Zippo* test focused on a website's presence in the forum state.³⁶ Thus, a nonresident defendant's presence depended on the level of commercial activity in the forum state.³⁷ While many courts embraced this "sliding scale"³⁸ approach to minimum contacts for the Internet, the *Zippo* test often yielded inconsistent results.³⁹ As a result, some courts added the requirement of "something more" than commercial activity in the forum state.⁴⁰ Other courts returned to the *Calder* test.⁴¹ While it took some time for courts to grapple with establishing minimum contacts through a new medium, in the end, whether through the modified *Zippo* test or the *Calder* test, courts have essentially returned to the traditional tests for personal jurisdiction in internet cases.⁴²

III. TV AZTECA V. RUIZ

In *TV Azteca*, the trial court found that Texas courts have personal jurisdiction over a Mexico-based broadcasting company and network for a defamation case involving a Texas resident. ⁴³ In *TV Azteca*, the media parties broadcast television programs on channels licensed by the Mexican

- 33. Id. at 1121.
- 34. Id. at 1124.
- 35. *Id*.
- 36. *Id*.
- 37. *Id*

- 40. Nguyen, supra note 24, at 529.
- 41. *Id.* at 531; *see* Clemens v. McNamee, 615 F.3d 374, 379 (5th Cir. 2010) (applying the *Calder* test in an internet based defamation case).
 - 42. Nguyen, *supra* note 24, at 531–32.
- 43. See TV Azteca, S.A.B. de C.V. v. Ruiz, No. 13-12-00536-CV, 2014 WL 346031, at *1 (Tex. App.—Corpus Christi Jan. 30, 2014, pet. granted) (mem. op.).

^{38.} *Id.* (explaining that exercising personal jurisdiction depends on an analysis of "the nature and quality of commercial activity that an entity conducts over the Internet"); Nguyen, *supra* note 24, at 529.

^{39.} Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1377 (2001); Nguyen, *supra* note 24, at 528–29 ("[T]he *Zippo* court did not provide further guidance for conducting this examination on interactive websites, such as how much interactivity or commercialism would suffice to assert personal jurisdiction or how interactivity and commercialism should relate to each other.").

government and directed to viewers in the northeast region of Mexico.⁴⁴ The plaintiff, Ruiz, lives in McAllen, Texas and viewed one of the programs at issue at her mother in law's home in McAllen.⁴⁵ The alleged defamatory statements about Ruiz were related to events that took place in Mexico, Europe, and Brazil.⁴⁶ While the media parties unsuccessfully attempted to interview Ruiz and family members in Texas,⁴⁷ the media parties did not rely on any Texas sources to produce the show and did not discuss any events that occurred in Texas.⁴⁸ The broadcast signals, which reach across the Texas-Mexico border, enabled individuals in southern Texas to view the programs.⁴⁹

In affirming the trial court's decision, the court of appeals relied primarily on the *Keeton* test to support the finding of personal jurisdiction over the nonresident defendant. 50 The court found the media parties had sufficient minimum contacts in Texas because the program at issue formed the basis of the suit, the program was viewed in Texas and the media parties knew they had potentially over one million viewers in southern Texas.⁵¹ The court reasoned that the media parties purposefully directed their activities to Texas because evidence suggested that the media parties were aware of the viewership in Texas and "intended for Texas viewers to watch its programs."52 The court further explained that the spillover of broadcast signals was not "random, isolated, or fortuitous" as required by *Keeton*.⁵³ The court analogized the media parties' broadcast signals reaching into to Texas to the defendant's circulation of magazines in *Keeton* to find that the conduct was purposefully directed at Texas.⁵⁴ As a result, the court of appeals found that the Calder test did not apply to the facts of this case and Texas had personal jurisdiction over the media parties.⁵⁵

^{44.} *Id.* at *5.

^{45.} *Id.* at *8.

^{46.} Id. at *6.

^{47.} *Id.* at *9.

^{48.} *Id.* at *12.

^{49.} *Id.* at *34.

^{50.} Id. at *20.

^{51.} *Id*.

^{52.} *Id.* at *21.

^{53.} *Id*.

^{54.} See id. at *20–21.

^{55.} Id. at *22.

IV. ANALYSIS OF TV AZTECA V. RUIZ

A. Does the Keeton Test Apply to Broadcast Defamation Cases?

In contrast to the circulation of printed publications to subscribers in *Keeton*, broadcast signals are sent out and available to anyone who chooses to access them. Broadcasting companies have little to no control over how far the signal will reach.⁵⁶ In this regard, broadcast publications are more analogous to internet publications.⁵⁷ Accordingly, the court of appeals' analysis of minimum contacts in *TV Azteca* under the standards set out in *Keeton* was improper. The court should apply the standards that have been applied in recent cases involving internet publications to analyze minimum contacts in defamation cases that arise from broadcast publications.

In *Keeton*, the Court found minimum contacts where the nonresident defendant was carrying on a part of his general business by selling tens of thousands of magazine subscriptions in the forum state.⁵⁸ The conduct of soliciting business and entering into contracts for magazine subscriptions was not "random, isolated, or fortuitous."⁵⁹ However, in *TV Azteca*, the media parties did not enter into contracts to allow individuals to view the broadcasted programs. Rather, individuals could choose to view the broadcasted programs because the signals happen to reach into southern Texas. Further, the broadcast towers are located in Northern Mexico, and intended to reach the northeastern region of Mexico.⁶⁰ The signal's reach into southern Texas may be viewed as fortuitous because broadcast signals do not follow or respect geographical boundaries. Though the media parties knew that viewers in southern Texas could view the programs, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."

In analyzing the media parties' contacts with Texas, the court of appeals appears to apply the mere accessibility test that has been rejected by a number of courts. ⁶² The court explained that over one million viewers in Texas could potentially view the programs broadcasted by the media parties. ⁶³ Not only does this accessibility argument distinguish *TV Azteca*

^{56.} *Id.* at *12

^{57.} See Nguyen, supra note 24, at 519.

^{58.} See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773-74, 789-90 (1984).

^{59.} *Id.* at 774.

^{60.} See TV Azteca, 2014 WL 346031, at *12.

^{61.} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980); *see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (explaining that a defendant's awareness that a product may reach the forum state through the stream of commerce does not establish purposeful availment).

^{62.} Nguyen, *supra* note 24, at 527.

^{63.} TV Azteca, 2014 WL 346031, at *20.

from *Keeton*, it also has the potential to allow Texas courts to assert jurisdiction over any internet company for making their website accessible to millions of Texas residents. The similarities between broadcast and internet publications suggest that minimum contacts in defamation cases arising from both media should be analyzed under the same standards to promote consistency and predictability. Accordingly, the Court should apply the *Calder* test to analyze the media parties' contacts with Texas.

B. The Court Should Apply the Calder Test to Determine if Minimum Contacts Were Established in Broadcast Defamation Cases

The *Keeton* test is appropriate when a nonresident defendant is carrying on part of his general business in the forum. In broadcast cases, where the information is merely accessible in the forum state, and the nonresident defendant is not carrying on a general part of his business in the forum, the *Calder* test is appropriate. In *TV Azteca*, the media parties were not purposefully availing themselves to the benefits of the forum state by carrying on part of their general business. The media parties were aware that the programs could be viewed in southern Texas but were not licensed by the Federal Communications Commission nor did they own or operate any towers in the state.⁶⁴ The media parties did not solicit business and customers did not enter into contracts to view the programs as occurred in *Keeton*. Based on these facts, in order to determine whether the media parties have sufficient minimum contacts in Texas, the Court should analyze whether the nonresident defendant made the forum state the "focal point" of the publication as required by the *Calder* test.⁶⁵

In applying the *Calder* test, the court considers three things to determine if the nonresident defendant purposefully availed himself to the forum state by making the state the "focal point" of his publication: (1) whether the publication focuses on events that occurred in the forum; (2) whether the defamatory statements were adequately directed at the forum; and (3) whether the plaintiff suffered the brunt of the injury in the forum. ⁶⁶ In *TV Azteca*, the publication focused on events that occurred primarily in Mexico, Brazil, and Europe rather than in Texas. ⁶⁷ While the defamatory statements were about a Texas resident, the evidence does not support the assertion that the program was specifically directed at Texas. ⁶⁸ In contrast, the evidence indicates the media parties did not use any Texas sources, the program did not focus on events that occurred in Texas, and the intended

^{64.} See id. at *12.

^{65.} Calder v. Jones, 465 U.S. 783, 788–89 (1984).

^{66.} See Clemens v. McNamee, 615 F.3d 374, 379–80 (5th Cir. 2010).

^{67.} TV Azteca, 2014 WL 346031, at *6.

^{68.} See id.

audience was residents of Mexico.⁶⁹ As such, the publication was merely accessible in Texas. Ruiz testified that she lost business opportunities in Texas and suffered emotional distress as a result of the publication.⁷⁰ While the harm suffered by Ruiz in Texas is one consideration for the Court, an analysis of all three factors is required to determine if Texas was the focal point of the publication.⁷¹

In *TV Azteca*, the media parties are Mexican companies that published a story in Mexico that was broadcast from towers located in Mexico.⁷² The media parties intended the publication to be viewed by individuals in northern Mexico where they are licensed under Mexican laws to broadcast their programs.⁷³ The facts illustrate that while the brunt of the harm was felt in Texas, the publication did not focus on events that occurred in Texas and the statements were not adequately directed to Texas. As a result, the media parties did not make Texas the "focal point" of the publication. Therefore, the media parties do not have sufficient minimum contacts in the forum state to justify an assertion of personal jurisdiction in Texas.

V. CONCLUSION

TV Azteca provides the Supreme Court of Texas with the opportunity to establish the standards under which minimum contacts should be analyzed for broadcast publications. Due to the nature of broadcast signals, broadcast publications are accessible to millions of people across geographical boundaries. In this regard, broadcast signals are analogous to the Internet in that both media allow individuals the choice to access content produced by the publisher. As such, the Court should analyze the media parties' contacts with Texas under the same standards that have been applied in defamation cases involving internet publications. Rather than carrying on a general part of business in Texas, as required under Keeton, the broadcast publications were merely accessible in Texas. Many courts have rejected the mere accessibility test in internet cases and instead embraced the standards established in Calder v. Jones. 74 As a result, the Supreme Court of Texas should apply the Calder test to determine whether the media parties purposefully availed themselves to the forum state by making Texas the focal point of the publication.

In applying the standards established in *Calder v. Jones*, the Supreme Court of Texas will likely find that the media parties did not purposefully

^{69.} *Id*.

^{70.} Id. at *10-11.

^{71.} See Calder v. Jones, 465 U.S. 783, 788–89 (1984).

^{72.} See TV Azteca, 2014 WL 346031, at *7, *11–12.

^{73.} *Id.* at *6–7, *12.

^{74.} See Nguyen, supra note 24, at 527, 530.

avail themselves to benefits of the forum state. Evidence suggests that while the harm was suffered in Texas, the broadcast publication did not focus on events that occurred in Texas and the defamatory statements were not related to events that occurred in Texas. Accordingly, the Supreme Court of Texas should find that the media parties do not have sufficient minimum contacts to justify an assertion of personal jurisdiction in Texas courts.

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