NO. 03-12-00576-CV

IN THE TEXAS COURT OF APPEALS FOR THE THIRD DISTRICT
AUSTIN, TEXAS

* * * * *

DR. ANDREW J. WAKEFIELD, MB, BS,

APPELLANT

V.

THE BRITISH MEDICAL JOURNAL PUBLISHING GROUP, LTD., BRIAN DEER and DR. FIONA GODLEE,

APPELLEES

* * * * *

On Appeal from the 250th Judicial District Court
Travis County, Texas
Trial Court Cause No.D-1-GN-12-000003

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APPELLANT'S REPLY BRIEF

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INTRODUCTION & SUMMARY

Distraction is the lynchpin of Appellees' arguments. This appeal concerns purely procedural matters related to the personal jurisdiction of Texas courts over the Appellees, The British Medical Journal Publishing Group, Ltd. ("BMJ"), Brian Deer and Dr. Fiona Goodlee, and the timing of the filing and litigation of certain affirmative claims brought by Appellees against Appellant, Dr. Andrew Wakefield, M.D. BS. Dr. Wakefield sued Appellees for defamation based on articles published in Texas and elsewhere alleging he committed scientific fraud in connection with a paper published in the *The Lancet*.

Nevertheless, Appellees included *six full pages* of allegations about Dr. Wakefield that have no bearing on the issues before this Court, with the obvious purpose of distracting from a multitude of procedural problems by trying to turn the Court against Dr. Wakefield. Though many of these supposed facts are false or misleadingly incomplete, since none of them have to do with the issues in this appeal, Appellant will focus on those facts and issues that are actually pertinent to the procedural issues before the Court.

The record overwhelmingly establishes Appellees waived jurisdiction by aggressively litigating their own counterclaims against Dr. Wakefield under Texas' Anti-SLAPP Statute. Despite Appellees' attempts to distract the Court into focusing solely on the filing of the counterclaim and re-characterize their extensive litigation of their counterclaims as merely "administrative," there is no such distinction in the law.

Rather, Appellees acted at every step of the way as though this case were properly pending before the trial court on the merits. Thus, Appellees made a general appearance, and the Court need not address their jurisdictional arguments.

Even if the Court does address jurisdiction, the record demonstrates Appellees purposefully availed themselves of the privilege of doing business in Texas, deliberately directing the defamatory publications to BMJ's Texas subscriber base through a network of contacts intended to allow the BMJ to distribute its publications in Texas for profit. Moreover, as explained below, many of Appellees' arguments rely on mischaracterizing the applicable standards of review. Given that Appellees have minimum contacts with Texas sufficient to satisfy Due Process, it was their very heavy burden in the trial court to prove that the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. They failed to do so.

In a final attempt at distraction, Appellees argue that the trial court did not properly have Dr. Wakefield's motion to strike the hearing setting on Appellees' Anti-SLAPP motion before it. However, if that were the case, the trial court would have refused to hear the motion. That is not what occurred. The court heard the motion, contrary to what Appellees claim in their brief to this Court.

As to the actual issue, the record does *not* show that the failure to timely have their Anti-SLAPP motion set for hearing was the result of anything other than Appellees' own decisions. *Appellees chose* not to even request a hearing within thirty

(30) days of filing their motion – as absolutely required by the Anti-SLAPP statute. Appellees waived their Anti-SLAPP motion by failing to meet a mandatory condition precedent.

ARGUMENT AND AUTHORITIES

I. APPELLEES WAIVED THEIR SPECIAL APPEARANCES BY ACTING AS THOUGH THEIR REQUESTS FOR AFFIRMATIVE RELIEF WERE PROPERLY BEFORE THE TRIAL COURT

Appellees attempt to soft-sell their extensive litigation of their Anti-SLAPP motion in two ways. First, they ask the Court to focus solely on the original filing of the motion as if Dr. Wakefield were solely or even primarily arguing that the filing of the motion was enough by itself to constitute waiver. However, the initial filing of their Anti-SLAPP motion was but one of *several* acts undertaken by Appellees – and the only one that was actually made subject to their special appearances.

Waiver of a special appearance occurs whenever a party does *any* of the following: "(1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court." *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004). In *all* of the other acts taken after the Anti-SLAPP motion was filed, Appelees failed to condition their actions on the outcome of their special appearances, and specifically invoked the trial court's jurisdiction to obtain orders that were completely unrelated to jurisdiction.

A. The Anti-SLAPP Motion Is a Claim for Affirmative Relief.

Appellees first try to avoid the application of this standard by claiming they were seeking no relief other than dismissal. (Brief at n.3) This is simply untrue.

The motion was titled a "Motion to Dismiss," but it expressly sought to invoke remedies beyond dismissal provided to defendants under a *Texas* statute – significant remedies that included a request for their attorneys' fees and even sanctions. Not only does the statute potentially provide these remedies --**Appellees expressly requested them**. (CR 1:126, 172-174)

It is only by virtue of claiming a right unique to a particular Texas statute that Appellees were able to pursue a claim for attorneys' fees and exemplary damages against Dr. Wakefield. This was a statutory counterclaim seeking affirmative relief. Appellees' suggestion that they only sought dismissal is misleading.

B. The Court Need Not Find the Filing of the Anti-SLAPP Motion Alone Was Waiver.

Appellees' next attack an argument Dr. Wakefield did not directly make in his brief. Appellees characterize the issue as whether or not they waived jurisdiction by filing their Anti-SLAPP motion. However, a review of the Appellant's brief demonstrates this is *not* one of the four acts asserted by Dr. Wakefield as the basis for waiver. Rather, as explained in both the introduction to this section of Appellant's brief[1], and the four subparts (A-D) of his waiver argument,[2] the issue before the Court is whether Appellees' continued acts in requesting and obtaining affirmative relief in

[1] Appellant's Brief at 9.
[2] Appellant's Brief at 19-24.

furtherance of their statutory claims constituted conduct inconsistent with their challenge to jurisdiction.

Whether a party has made a general appearance necessarily comes down to whether it behaved "in recognition that the action is properly pending" or requested "affirmative relief inconsistent with the jurisdictional challenge." *Exito*, 142 S.W.3d at 307. Appellees acted at every stage as though their claim for attorneys' fees and sanctions was properly pending before the court, and no less than *four times* requested affirmative relief unique to their own counterclaims inconsistent with their assertion that the trial court had no jurisdiction to even entertain those claims.

C. Requesting Court Orders to Further the Litigation of a Counterclaim is Not An "Administrative Act;" Texas Law Makes No Such Distinction.

Appellees argue their aggressive litigation of their statutory counterclaim involved nothing more than "administrative acts." Tellingly, there is no case law to be found in Appellees' brief for the proposition that one can seek orders on one's own claims that are "administrative" in nature without thereby entering a general appearance. Regardless, the acts in question go well beyond administrative happenstance.

Although ignored by Appellees, Texas law is clear that even the smallest requests inconsistent with a pending special appearance constitutes waiver – belying the notion that somehow calling one's actions in furtherance of a counterclaim "administrative" makes some legal difference. In *Seals v. Upper Trinity Reg'l Water Dist.*,

145 S.W.3d 291, 298-299 (Tex. App. – Fort Worth 2004, pet. dism'd), the defendant properly filed a special appearance, and its counsel showed up to a status conference at the judge's insistence. *Id.* The mere act of the Appellee stating during a status conference "that it had no objection to Appellant's unsworn testimony, reserved the right to place Appellant under oath, and asked the trial court to determine the scope of the pleadings in this case" was sufficient to waive the special appearance. *Id.* There is no "administrative" exception. If Appellees sought *any* relief on matters unrelated to personal jurisdiction, they waived their challenge. And they did *far* more than the defendant in *Seals.*[3]

There is little doubt Appellees repeatedly invoked the trial court's jurisdiction in ways inconsistent with their objection to jurisdiction, obtaining orders that were specifically intended to further the litigation of their own affirmative claims.

As with their attempt to coyly suggest they were only seeking "dismissal," Appellees' attempts to minimize each step of this aggressive litigation strategy are disingenuous at best, and occasionally misleading. Two acts in particular stand out.

First, Appellees sought and obtained a complex case assignment specifically for their own affirmative claims. They argue they sought a complex assignment "of the *entire case* to a single judge, not just the Anti-SLAPP Motion." (Brief at 22, emphasis

[3] Appellees also ignore *Beistel v. Allen*, No. 01-06-00246-CV, 2007 Tex. App. LEXIS 4307 (Tex. App. – Houston [1st Dist.] 2007, no pet.)(mem. op.). Counsel objected to a spreadsheet as evidence at a preliminary hearing before his client had made a formal appearance. *Id.* at *7-8. That simple objection to evidence was a general appearance that waived jurisdiction. *Id.*

in original) However, the motion for the complex case assignment did not condition the relief on the pending special appearances. (CR 1:302-304) More importantly, the reason *actually* offered for the assignment was specifically to have a judge assigned to hear Appellees' counterclaim.

Appellees' falsely suggest that the "impetus" for this motion was solely Dr. Wakefield seeking jurisdictional discovery. (Brief at 22) The motion speaks for itself – stating under "Reasons for Assignment to a Single Judge" the assignment was sought so one judge could hear "substantive issues on each motion," i.e. jurisdiction *and* the statutory claims. (CR 1:303) Conspicuously absent from the motion is any mention of Dr. Wakefield's request for jurisdictional discovery. (CR 1:302-304) At most, there is passing reference to "the interplay between these motions and the related discovery . . .," but the obvious "impetus" for this motion was Appellees' desire to have their own counterclaims heard by the same judge the day after jurisdiction.

Had Appellees intended this complex assignment to resolve issues related to jurisdictional discovery, as they now claim, they could have easily requested a complex case assignment limited to hearings related to jurisdiction, and expressly conditioned on their pending special appearances. They did not – instead requesting the assignment to ensure their affirmative relief was litigated before the same judge as jurisdiction.

The second and most obvious act of waiver was Appellees' request for a scheduling order requiring Dr. Wakefield to litigate Appellees' affirmative claims, while at the same time Appellees continued to maintain that the trial court did not have jurisdiction to even hear these claims. By this strategy, Appellees forced Dr. Wakefield to respond to Appellees' affirmative claims. They could have *both* hearings if they had desired, and pick the result they preferred for purpose of appeal.

Appellees make no attempt to even explain what purpose a scheduling order on their own affirmative relief served in their challenge to jurisdiction. (Brief at 27) Instead, Appellees falsely accuse Dr. Wakefield of misrepresenting the record. Dr. Wakefield stated the scheduling order was "related specifically to their Anti-SLAPP Motion to Dismiss." The fact that it also had a briefing schedule for the special appearances does not change that Appellees specifically requested - and obtained - a briefing schedule requiring Dr. Wakefield to litigate Appellees' affirmative claims, while Appellees were still challenging the court's jurisdiction to even hear those claims.[4]

II. DEFENDANTS HAVE SUFFICIENT MINIMUM CONTACTS WITH TEXAS TO SATISFY DUE PROCESS

[4] Appellees' attempt to blame Dr. Wakefield for this strategy is also misleading. They assert Dr. Wakefield refused requests to put off the Anti-SLAPP proceedings until after the special appearances were resolved. (Brief at n.10, citing CR 2:53-55) However, the record merely shows Dr. Wakefield's counsel refused to agree to ignore the Anti-SLAPP deadline (before the motion had even been filed). (CR 2:54-55) Litigating their jurisdiction challenge alongside their affirmative claims for relief was *Appellees'* strategic decision – not Dr. Wakefield's.

A. The Trial Court Disregarded the Overwhelming Evidence Supporting the Defendants' Minimum Contacts with this State.

Appellees understate what constitutes sufficient contacts with a forum to satisfy due process. "[A] nonresident defendant must take action that is purposefully directed toward the forum state." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007). This is satisfied specifically where the record demonstrates a defendant's "intent or purpose to serve the market in the forum State." *Id.* In determining the nature of a nonresident defendant's conduct, Texas courts may consider "advertising and establishing regular channels of communications to customers in the forum State." *Id.* (noting that purposeful availment exists where a defendant seeks "some benefit, advantage, or profit"). If purposeful contact with Texas is found, Court's then consider whether "the defendant's liability arises from or relates to" those contacts. *Id.* at 579.

Appellees purposefully availed themselves of the benefits and advantages of Texas, by actively selling the BMJ journals to Texas subscribers and profiting. This act alone is not "random, fortuitous or attenuated." *Id.* at 575. The very journals that the BMJ published and distributed to subscribers in Texas form the basis of Dr. Wakefield's claims against the Appellees and it was not by happenstance or the action of third parties that these journals reached Texas. Appellees have not met their heavy burden of defending their actions in this forum and it was error for the trial court to sustain Appellees' special appearance.

1. The BMJ's Subscription Circulation is sufficient under *Keeton* and its progeny

Appellees cite *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), to argue that the BMJ's subscription base comes "nowhere near [the] threshold" of 10,000 to 15,000 subscriptions at issue in *Keeton*. (Brief at 30) However, the jurisdictional analysis in *Keeton* did not concern a magical numerical threshold as Appellees suggest, but rather the principal that if a nonresident defendant conducts "a 'part of its general business' in [the forum]…that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted." *Keeton*, 465 U.S. at 780 (noting that the plaintiff didn't even reside in the forum). Further, in *Keeton* the Supreme Court didn't even consider the percentage of the defendant's subscribers relative to the forum – as Appellees suggest is necessary. Rather the Supreme Court held that it is the nature of the contacts with the forum and the claims that is primary to jurisdictional analysis: "[t]he contacts between respondent and the forum must be judged in the light of that claim… even though only a small portion of those copies were distributed in the forum." *Id.* at 775.

Nonetheless, Appellees attempt to mischaracterize the nature and number of their actual contacts, cherry-picking only those which diminish their presence in Texas. But most of Appellees' arguments erroneously hinge upon one fatal assumption: that "the number of [BMJ] online subscribers is irrelevant; only print subscribers should factor into the analysis." (Brief at 31) This argument assumes that only "print

subscribers" can be counted as "contacts" for purposes of minimum contact analysis. This is assertion finds no support in the law.

First, it ignores the fact that BMJ entered into contracts with major medical schools, hospitals and other institutional online subscribers in Texas and directly delivered to those online subscribers the defamatory material. Appellees' argument is inconsistent with BMJ's own admissions as to the significance of online publications, indicating they have become "the dominant institutional subscription model for scientific and academic journals." (CR 2:145-6)

The only case that Appellees reference to attempt to support their contention that online subscriptions should be precluded from jurisdictional analysis is *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002). *Revell* is inapposite and if anything, supports Appellant's arguments. *Revell* involved the jurisdictional challenge by a nonresident defendant, Lidov, who was sued by a Texas plaintiff for defamation. *Id* at. 469. Notably, Lidov had no affiliation with Columbia University, other than posting an alleged defamatory article on the university's website bulletin board accessible to the general public. *Id.* Although Columbia did have a Texas subscriber base, the Fifth Circuit declined to consider those contacts in its special jurisdictional analysis since the defamation action did not arise out of those contacts, but instead concerned a non-Columbia University's individual statements on a publically accessible website that happened to be controlled by Columbia. *Id.* at 472. Such is not the case here.

BMJ is an online and print commercial journal which markets, sells and distributes its articles in Texas. BMJ is in the business of distributing specialized publications to a specialized subscriber base. Its editor and its solicited author, Brian Deer, are responsible for authoring and distributing defamatory publications directly to residents of Texas, which form the basis of Dr. Wakefield's defamation claims. The BMJ subscriber base in Texas includes major hospitals and medical school libraries who Appellees knew made the materials available in turn to hundreds, if not thousands of users through a single subscription. (CR 1:596-97, 808-11, 822-23 & 2:148-51) Appellees' contacts are not random, isolated or fortuitous. They are deliberate and purposeful.

Appellees also argue that their contacts are insufficient under *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005). But, *Fielding* (like *Revell*) is readily distinguishable. *Fielding* involved a lawsuit filed in Texas concerning defamatory statements in a German tabloid targeted to a German audience. The court first weighed whether defendants' circulation of 60-70 subscriptions in Texas was sufficient to confer jurisdiction under *Keeton*. Ultimately, the Fifth Circuit determined that because the defendants were German tabloid newspapers, directing the overwhelming majority of their publications to German residents, in a publication written in the German language, concerning the activities of German residents, the Texas contacts were too insubstantial. *Id.* at 427. Unlike the defendants in *Fielding*, the BMJ publishes *specific* industry journals targeted to a *specific* medical/research

audience. In *Paul Gillrie Institute, Inc. v. Universal Computer Consulting, Ltd.*, 183 S.W.3d 755 (Tex. App. – Houston [1st Dist.] 2005, no pet.), the court found sufficient contacts over a limited trade journal with approximately 50 Texas subscribers, holding that it was "neither surprising nor determinative that [defendant] has a more limited circulation than that of a nationwide magazine marketed to the general populace." *Id.* at 762

Notably, the Appellees argue that this Court should disregard *Gillrie* because "it is unclear whether the court based its holding on *Keeton* or *Calder*." (Brief at 22). Appellees then improperly cite *Gillrie* for their supposition: "*C.f. id.* at ("We found [sic] the facts in this case to be comparable to those in *Calder*. . . .") (*Id.*) This is misleading, as the *Gillrie* court expressly stated: "We find the facts in this case to be comparable to those in *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), and *Keeton*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790)." *Paul Gillrie*, 183 S.W.3d at 761 (emphasis added).

2. Jurisdiction is also met under *Calder*

Not only can jurisdiction be established under "traditional" minimum contacts analysis, but in defamation cases, but it can also be established under *Calder's* effects test, where the nonresident defendant merely "aims" the story at the forum. Appellees also fail to distinguish or address *Gillrie,* which also found jurisdiction under the rule in *Calder*:

> Appellants argue that *Calder* is inapplicable because the alleged defamation "has absolutely no connection to the State of Texas," the journal does not specifically mention the State of Texas, there was no evidence to show that

> UCS's operations were centered in Texas, and there was no evidence that the journal was aimed at Texas or widely circulated in Texas. Here, however, PGI's allegedly defamatory statements were contained in its trade journal that it sent to approximately fifty customers located in Texas. Moreover, the allegedly defamatory statements concerned UCS, a corporation with its headquarters and principal place of business in Texas.

Paul Gillrie, S.W.3d at 760.

Relying entirely on federal authority, Appellees cite *Clemens*, *Fielding* and *Revell's* application of *Calder* to argue that the effects test is not met. But all of those cases are distinguishable from the facts at issue here.

Clemens involved defamation claims brought by famed baseball pitcher, Roger Clemens, who sued his personal trainer, McNamee, in Texas for disparaging statements made to a New York Sports Illustrated (SI.com) journalist regarding Clemens's doping. *See Clemens v. McNamee*, 608 F.Supp.2d. 811, 817 (S.D. Tex. 2009). After determining that McNamee had insufficient [physical] contacts with Texas the court then turned to *Calder's* effect test to determine whether McNamee aimed his statements at Clemens in Texas. *See id.* at 818-19. In its analysis, the court noted that because McNamee's statements concerned allegations of Clemens's doping in his New York apartment, "while Clemens was pitching for the Yankees…[t]he geographical focus of McNamee's statements was undoubtedly New York" *Id.* at 820.

The case at hand is distinguishable from *Clemens*. *McNamee was simply someone who was interviewed, he was not the author of an article that was distributed to Texas. Id.* at 824. He made his statements to a third-party outside of Texas. Second, unlike *Clemens*, Dr.

Wakefield resided in Texas at the time the defamatory articles were published. Third, Deer contacted Dr. Wakefield in Texas during his investigation of the defamatory articles. The Appellees' attempt to attribute Deer's contacts with Dr. Wakefield in Texas to work Deer performed for a previous article for *The Sunday Times*. (Brief at 36). However, Deer admits that he relied also on the research he did for *The Sunday Times* for the defamatory articles at issue: "Q: Much of the research that you conducted for the [BMJ] article was research that you did while you were with the Sunday Times, correct? [Deer] A. Overwhelmingly the content of this was in before I was even asked to write it." (CR 2:1701)

Appellees' reliance on *Fielding* is also distinguishable for at least two reasons. First, in applying the effects test, the court found that the plaintiffs apparently didn't even reside in Texas at the time of defendants' publications. The *Clemens* court noted this very fact in discussing the facts of *Fielding*: "The Court of Appeals declined to extend *Calder*, noting that the plaintiffs had not proved that they ever resided in Texas during any time relevant to the suit. *Fielding*, 415 F.3d at 427." *Clemens*, 608 F.Supp.2d. at 820. Second, *Fielding* noted that the "[defendant's k]nowledge that sufficient harm would be suffered in Texas is conspicuously lacking." *Fielding*, 415 F.3d at 427. Such is not the case here.

Originally, when Appellees filed their special appearances, they argued that "there is no evidence that any of the Defendants—Deer, Godlee, or anyone at the BMJ involved in the review—even knew that Dr. Wakefield was residing in Texas at

the time." (CR 2:1316) In response to this assertion (and as argued in Appellant's Brief (at pp. 39-42), Dr. Wakefield cited multiple articles written by Appellees providing ample evidence that confirmed Appellees' knowledge that Dr. Wakefield lived in Texas. Now, Appellees have changed their position and argue instead that "none of the articles cited by Dr. Wakefield proves [sic] conclusively that any of the Appellees had actual knowledge in January 2011 that Wakefield was living in Texas." (Brief at 37) (emphasis added). Appellees change in position highlights the fact that there was indeed sufficient evidence that was disregarded concerning Appellees knowledge.[5]

[5] Appellees argue the Court should resolve any disputed fact issues in favor of affirming the trial court's dismissal. There are no actual, disputed facts, the resolution of which would be determinative of this case. However, to the extent the Court needs to address disputed facts in this matter, all disputed facts should be resolved in favor of the plaintiff at such an early stage. *See AllChem Performance Prods. v. Aqualine Warehouse, LLC*, 878 F. Supp. 2d 779, 785 (S.D. Tex. 2012) ("conflicts between facts in the parties' affidavits must be resolved in plaintiff's favor for purposes of the prima facie case of personal jurisdiction.") (*citing Revell*, 317 F.3d at 469); *see also Grynberg v. Ivanhoe Energy, Inc.*, 490 Fed. Appx. 86, 90 (10th Cir. 2012)("resolve any factual disputes in the plaintiff's favor."); *Sawtelle v. Farrell*, 70 F.3d 1381, 1385 (1st Cir. 1995). Though the Texas Supreme Court has held that disputed facts are resolved in favor of the trial court's ruling, it has always done so in the context of reviewing the denial of a special appearance, i.e. in favor of the plaintiff. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871 (Tex. 2010). In those cases, the standard of review has been applied in a manner consistent with the standard applied in all federal courts. To apply it in this case would not only place Texas law in conflict with federal standards for personal jurisdiction, but would create an unworkable rule. If a factual dispute on the merits of the case is intertwined with a jurisdictional factual dispute (as for example, if a product defendant denies being in the "stream of commerce" for a defective product despite competent evidence that it was), a meritorious factual dispute would be taken away from the jury at the jurisdictional stage. This is especially problematic in a case like this, where the trial court was simply reviewing competing affidavits, did not hear live testimony, and did not make any credibility determinations from anything other than the static record before this Court.

Additionally, as stated by the BMJ's corporate representative, the BMJ also knew that publishing the defamatory articles would cause substantial damage to Dr. Wakefield:

> "Q: [Plaintiff's Counsel] this was an article that you knew could do substantial damage to Dr Wakefield, correct?
>
> A: [BMJ] Yes."

(CR 2:1716)

The trial court also erred in determining that Appellees had not satisfied *Calder's* effects test.

3. Appellees' "Additional Contacts" are relevant

Appellees complain the "additional contacts" (*e.g.* BMJ's sales, marketing, advertisements, *etc.*) are irrelevant because they are too attenuated to the claims at issue. (Brief at 39-40 (citing *Moki Mac*, 221 S.W.3d at 579)).[6] But, certainly Appellees' intentional efforts to sell, promote and market the very journals that give rise to Dr. Wakefield's claims are relevant to jurisdictional analysis – this is a machinery they deliberately set up to carry their journal into Texas. At the very least, these additional contacts show Appellees have enough interest in serving the Texas market that it

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[6] In. *Moki Mac*, the Texas Supreme Court found that the nonresident defendant's sales and marketing contacts in Texas too attenuated to consider in connection with claims for a wrongful death which occurred in Arizona: "Similarly, the injuries for which the Druggs seek recovery are based on Andy's death on the hiking trail in Arizona, and the relationship between the operative facts of the litigation and Moki Mac's promotional activities in Texas are simply too attenuated to satisfy specific jurisdiction's due-process concerns." *Id.*, 221 S.W.3d at 588.

would not be an unreasonable burden for them to defend themselves in this State, as discussed *infra*.

B. Appellees Failed to Meet Their High Burden that Defending Their Lawsuit in Texas Would Not be Reasonable.

Appellees try to argue that Dr. Wakefield waived his challenge to the trial court's implied findings on the factors applicable to fair play and substantial justice as though there were factual disputes that had been resolved by the trial court. However, there were no factual disputes as to these factors. The parties' disagreement is how the *law* applies to the facts, which is always reviewed *de novo*. *In re R.J.H.*, 79 S.W.3d 1, 6 (Tex. 2002) (holding that "review of the application of the law to the facts is *de novo* because the trial court is in no better position to decide legal issues than the appellate court"); *Furst v. Smith*, 176 S.W.3d 864, 869 (Tex. App. – Houston [1st Dist.] 2005, no pet.) (stating "[w]hen a trial court's ruling results from applying the law to the facts, we traditionally review the ruling as a matter of law, *i.e.*, *de novo*.")(*citing BMC Software*, 83 S.W.3d at 794).

Texas law squarely places the heavy burden of negating personal jurisdiction on the basis of "fair play and substantial justice" on a defendant seeking to avoid jurisdiction. *See Spir Star*, 310 S.W.3d at 879 (if there are minimum contacts, the defendant must present "a compelling case that the presence of some consideration would render jurisdiction unreasonable."). This issue was directly addressed in Dr. Wakefield's brief, where there is extensive argument for why the facts presented as the

basis for Appellee's challenge do not create a "compelling case" for this rare and narrow exception. The Court should review the facts on the record and conduct its own *de novo* review of whether these facts were sufficient to meet Appellees' heavy burden.

1. Dr. Wakefield's Previous Unrelated Disputes Have No Relevance to Appellees' Burden

Appellees reference to Dr. Wakefield's previous unrelated matters has absolutely no bearing on the procedural issues at hand, much less their burden to prove unreasonableness.

Appellees' reliance on a *Crown Sterling, Inc. v. Clark*, 815 F. Supp. 199 (N.D. Tex. 1993), is meritless. In *Crown Sterling* the court granted defendants' motion to dismiss *primarily* because of insufficient contacts: "Simply stated, these defendants have not purposefully availed themselves of this forum." *Id.* at 203-04. Conversely, if sufficient contacts are established (as is the case here), it is "unlikely" that a nonresident defendant will meet his burden "because the minimum contacts analysis already contains several fairness protections." *A.C.S. Wright, v. Sage Engineering, Inc.,* 137 S.W. 3d 238, 253 (Tex. App. Houston [1st Dist.] 2004, pet. denied) "[O]nly in rare cases will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *See Pessina v. Rosson,* 77 S.W.3d 293, 289-99 (Tex. App – Austin 2001, cert. denied).

2. Appellees Failed to Establish a Sufficient Record to Meet Their High Burden.

As noted *supra*, Appellant provides a substantial evidentiary record of Appellees' multiple business dealings in the United States and Texas. Appellee claims that "none of these contacts have anything to do with this litigation." (Brief at 46) Contrary to these assertions, this evidence demonstrates that Appellees do not consider it a significant burden to travel to the United States and Texas when conducting their regular business affairs. They should not now be heard to argue that it is too burdensome to defend their defamatory actions in Texas.

Appellees complain that documents and witnesses are located in the United Kingdom and thus securing such discovery would be too burdensome on Appellees. But this argument is without merit. In response to Appellant's discovery requests concerning Appellees' Anti-SLAPP Motion to Dismiss, Appellees' admitted that "the challenged [defamatory articles] contained detailed citations, which disclose materials Mr. Deer relied upon or reviewed…between the 1600+ documents already produced to Dr. Wakefield…and the publication available GMC transcript…we believe that you already have access to the 'universe' of relevant documents." (CR 1:1370).

Appellees' arguments ignore the fact that Dr. Wakefield and relevant documents and witnesses, reside in *Texas*. (CR 1:838-39) Thus, Appellees' contention that Texas is not a convenient forum for Appellees would *improperly* shift the onus to Dr. Wakefield. *See Arthur v. Stern*, 2008 WL 2620116 at *15 (S.D. Tex., June 26, 2008)

(stating that "[w]hile [defendant] will suffer more of a financial burden…such a burden would certainly be no greater on [defendant] than would be the burden on [plaintiff]"). In addition, there are rules in place to enforce foreign discovery, if necessary.

3. The United Kingdom Does Not Have a Superior Interest in this Lawsuit and Appellees' Arguments Suggesting Otherwise are Irrelevant, Prejudicial and Misleading.

Clearly, the Appellees are contorting the "Reasonableness" factors in an attempt to parade in a host of irrelevant and very misleading arguments concerning Dr. Wakefield's previous unrelated issues. For clarification, in 2004 the General Medical Counsel proceeding in the United Kingdom, which took place years before the defamatory articles at issue, did not involve the same issues that are the subject of the defamation claims, but instead involved whether Dr. Wakefield and others complied with ethical guidelines in conducting their work. (CR 3:66) In fact, the only court of law that examined those proceeding criticized the GMC proceeding and decision, overturned some of the principal findings, and reinstated the doctor who appealed. (CR 3:67) The GMC decision did not deal with the substantive issues in this case and has nothing to do with the procedural issues before this Court. As Appellees admitted in the publications that are the subject of the lawsuit, the focus of this litigation is clearly different than the focus and findings of the GMC proceeding, as Defendant Deer so stated the first of the defamatory articles published by Appellees:

(CR 3:85).

Further, Appellee Dr. Godlee admits the same as published in another of the defamatory articles:

> The *Lancet* paper has of course been retracted, but for far narrower misconduct than is now apparent. The retraction statement cites the GMC's findings that the patients were not consecutively referred and the study did not have ethical approval, leaving the door open for those who want to continue to believe that the science, flawed though it always was, still stands. We hope that declaring the paper a fraud will close that door for good.

(CR 3:94) Any suggestion that this case would require re-litigation of the GMC proceeding is simply bogus.

Appellees contentions regarding the law and how it applies are wrong. The Reasonableness factors do not contemplate that a prior foreign proceeding somehow bars a resident (Dr. Wakefield) from legal action such as this. That factor concerns conflicts between sovereign interests: "The federal government's foreign policy interests are not hindered when individual states ensure that large international companies operate in an equitable business environment in which wrongs are redressed by those responsible." *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707,

726 (Tex. App.--Austin 2000, pet. dism'd w.o.j.) Thus, Appellees are mistaken in their application of the law.

Similarly flawed, is Appellees' application of *Guardian Royal Exch. Assur., Ltd. V. English China Clays, P.L.C.,* 815 S.W. 2d 223, 231 (Tex. 1991). The Texas Supreme Court specifically stated that requiring defendant "an *English* insurer, to submit its dispute with its *English* insured to a foreign nation's judicial system is burdensome." *Id.* at 232 (emphasis added). Accordingly, the Court found that "the interests of Texas in adjudicating the dispute and the English China entities in obtaining convenient and effective relief are minimal." *Id.* There is nothing in the current state of facts that gives the U.K. a heightened interest in resolving the current dispute between private litigants – Dr. Wakefield, *a Texas resident*, was injured *in Texas,* by articles published *in Texas* by Appellees' deliberate act of delivering such publications directly *to Texas* residents.

Equally misplaced is Appellees' reliance upon *Moni Pulo Ltd., v. Trutec Oil & Gas, Inc.,* 130 S.W.3d 170, 180 (Tex. App. – Houston [14th Dist.] 2003). That matter involved a dispute brought in Texas between Nigerian entities, regarding Nigerian mineral interests, where the court held that "generally, Texas has no interest in adjudicating a case between nonresidents concerning occurrences that took place outside of Texas." *Id.* at 180.

III. APPELLEES FAILED TO MEET A MANDATORY CONDITION PRECEDENT

The issue of whether the trial court erred in denying the motion to strike the hearing on Appellees' Anti-SLAPP motion is ripe for this Court's consideration. Appellees argue the trial court *might* have determined the motion was improperly filed. (Brief at 54) However, whatever the trial court *might* have decided, the record shows what it *did* decide. The trial court expressly stated on the record that despite issues raised about the hearing, it *was* going to hear the motion on its merits and was *not* denying the motion on that basis. (SR 3:11) ("I'm going to hear it. I mean, I'm already hearing it, and so I'm not going to not hear it . . . I would say to Mr. Ellwanger, next time around . . . I do think these need to get set on the central docket, not on the continuance docket.").

Thus, this Court need not guess the reason the trial court denied the motion. The trial court expressly did not deny it for the reason suggested by Appellees. Indeed, if the court sustained the objections to the hearing, the motion would not have been denied - the hearing simply would not have gone forward.

Next, Appellees argue that they were unable to set the hearing within thirty days of filing the motions and therefore met the exception applicable when "the docket conditions of the court require a later hearing." (Brief at 55, quoting TEX. CIV. PRAC. & REM. CODE §27.004) In support of this argument, Appellees state the record "shows that the earliest available hearing date . . . was more than 30 days after" the motion was filed. (Brief at 56, citing CR 2:53-55) <u>This assertion is not supported by the record.</u>

The affidavit of Appellees' trial counsel at pages 53-55 of volume 2 of the Clerk's Record does *not* say that the earliest available hearing date from the court was more than 30 days after the motion was filed. What the record *actually* says is that April 26 was chosen for the hearing because it was "the next available hearing date on which Mr. Parrish had stated he was available." (CR 2:55) However, no attempt appears to have been made to get *any* hearing setting earlier than April 9 from the court – a date that was *already* more than thirty days after the motion was filed. Indeed, the discussion that led up to available dates in April appears to have *started* with dates "for the week of April 9." (CR 2:54, ¶22) And it occurred before Appellees had even filed the motion. (Id.) Contrary to Appellees' assertions, the record simply does not show any attempt to obtain a timely hearing.

Finally, Appellees' argument that Texas courts should simply ignore the deadline because the statute contains no express remedy for failing to comply with it renders significant portions of the statute's procedures meaningless.

Appellees' argument that the use of the word "must" in a deadline does not impose a condition precedent to bringing the claim is flawed in several ways. First, the main case cited by Appellees did not involve a statute indicating that a party "must" do something. In *State v. $435,000*, 842 S.W.2d 642 (Tex. 1992), the civil forfeiture statute said the "time for hearing on forfeiture shall be set within thirty (30) days . . ." *Id.* at n. 1 (quoting repealed TEX. HEALTH & SAF. CODE §481.157(a), emphasis added).

"Shall" and "must" do not mean the same thing in Texas statutes. Under the Code Construction Act, "shall" only denotes the creation of a duty. "Must," by contrast, creates a "condition precedent." TEX. GOV'T CODE §311.016. A condition precedent is *mandatory* even in the absence of an immediate non-compliance penalty if it appears to have been intended as mandatory by the legislature. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). Whether the legislature intended a mandatory condition precedent is determined from "the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction." *Id.*

This statute does far more than specify that something "must" be done. There was a deliberate structuring of the statute to allow the extension of deadlines for the *filing* of motions under the statute upon "good cause," but to allow *no exceptions* other than "docket conditions" for any delay in the *hearing* of such a motion. This deliberate distinction in the statute would be meaningless if it were not a mandatory condition precedent to obtaining relief under the statute.

The Anti-SLAPP statute serves two purposes: to protect rights of persons to free speech and association and "at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE §27.002. All discovery is suspended upon filing of a motion, until the court has ruled on the motion. *Id.* at §27.003. Immediately after providing for the discovery stay, the statute provides the hearing "must" be set within thirty days. *Id.* §27.004. If

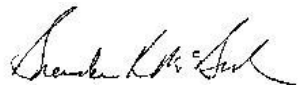
Appellees were correct, a party could file its motion and stay discovery of the claims, never set a hearing, and prevent the claimant from ever going forward with a "meritorious lawsuit for demonstrable injury."

This is why the statute allows for good cause for late *filing* of the motion, but does not allow any good cause to extend the *hearing* of a motion. The legislature intended this timeliness requirement to act as a mandatory condition precedent to safeguard the right of claimant to present meritorious claims. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) (when the Legislature uses a term in one section of a statute and excludes it in another, the term should not be implied where it was excluded). It is a mandatory condition precedent, and Appellees ignored it.

CONCLUSION

The trial court erred in granting the special appearances. Appellees entered general appearances by aggressively litigating their own claims before jurisdiction was resolved. Dr. Wakefield also easily met his burden of establishing that Defendants purposefully availed themselves of the business of directly and intentionally distributing the defamatory articles in Texas. The court also erred in not finding Defendants had waived their Anti-SLAPP Motion by not seeking a hearing within the statute's mandatory deadline.

Respectfully submitted,



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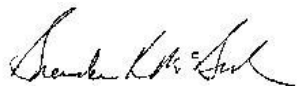
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded on March 25, 2013 to all counsel of record via facsimile and/or via electronic service through EFSP/PRODOC.



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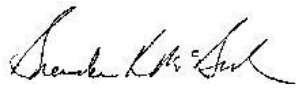
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length of briefs prepared by electronic means. The brief was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 7,488.



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