

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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NO. 2010-CA-00193

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BRANDON WILSON, A MINOR, INDIVIDUALLY,  
AND BY AND THROUGH HIS FATHER AND  
NEXT FRIEND, BARNEY WILSON

APPELLANT

VS.

HIGHPOINTE HOSPITALITY, INC.  
AND DARRYL LAPOINTE

APPELLEES

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ON APPEAL FROM THE CIRCUIT COURT  
OF WARREN COUNTY, MISSISSIPPI

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**BRIEF OF APPELLEES**

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SUBMITTED BY:

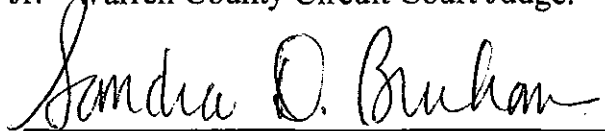
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**ORAL ARGUMENT REQUESTED**

### **CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Brandon Wilson, a minor, Individually, and by and through his father and next friend, Barney Wilson, Appellant.
2. Carroll Rhodes, Esq., Attorney for Appellant.
3. Highpointe Hospitality, Inc. and Darryl LaPointe, Appellees.
4. Sandra D. Buchanan, Esq. and Roy A. Smith, Attorney for Appellees.
5. Honorable Frank Vollor - Retired Warren County Circuit Court Judge, Circuit Court Judge.
6. Honorable James Chaney, Jr. - Warren County Circuit Court Judge.

A handwritten signature in cursive script, reading "Sandra D. Buchanan", is written over a horizontal line.

Attorney of Record for Appellees

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### **STATEMENT OF THE ISSUES**

Whether the trial court has personal jurisdiction over Highpointe Hospitality, Inc., a foreign corporation, and Darryl LaPointe, a nonresident individual, arising out of the operation of a hotel in Louisiana.

## **STATEMENT OF THE CASE**

### **A.     Nature of the case.**

This is a personal injury action based on alleged common law negligence and claims of deceptive advertising.

### **B.     Course of proceedings below.**

On October 2, 2007, Plaintiff, Brandon Wilson (“Wilson”), a minor, by and through his father and next friend, Barney Wilson, filed his Amended Complaint in the Circuit Court of Warren County, Mississippi against several defendants including Highpointe Hospitality, Inc. (“Highpointe Hospitality”) and Darryl LaPointe (“LaPointe”), individually, alleging negligence and deceptive advertising after he sustained certain injuries when he dived into the shallow end of a swimming pool while staying at a Hampton Inn hotel in New Orleans, Louisiana. [R.197-205]. Also named as defendants were Hilton Hotel Corporation (“Hilton”), Crescent City Lodging, Inc. (“Crescent City Lodging”) and Charles Harris.

On August 28, 2008, Highpointe Hospitality and LaPointe filed a motion to dismiss for lack of personal jurisdiction. [R.34-75]. The motion was granted and an order was entered accordingly on November 13, 2008. [R.134]. Highpointe Hospitality is a Florida corporation authorized to do business in Louisiana and LaPointe is a resident citizen of Florida. [R. 52-56].

In December 2009, the court entered a final judgment dismissing Hilton and the claims against all other defendants, those being Crescent City Lodging and Charles Harris.<sup>1</sup> [R.179-180].

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<sup>1</sup>Crescent City Lodging, LLC was never served with a Complaint; and while having in fact been served, Charles Harris has never made an appearance in this case and the record does not reflect whether Wilson ever sought any further relief from him.

On January 28, 2010, Wilson filed his Notice of Appeal challenging the trial court's November 13, 2008 ruling granting the motion to dismiss Highpointe Hospitality and LaPointe. [R.181].

**C. Statement of the facts.**

On August 30, 1999, Promus Hotels, Inc.<sup>2</sup> and Darryl LaPointe (a Florida resident) entered into a license agreement whereby LaPointe was given the right to use the "Hampton Inn" trademark and/or system to operate a hotel located at 12340 I-10 Service Road at Bullard Road, New Orleans, Louisiana 70128 ("Hotel"). [R.83]. This agreement was to be carried out solely within the State of Louisiana.

LaPointe, later as president of Highpointe Hospitality, a hotel management company, entered into a Management Agreement with Crescent City, owner of the Hotel, to manage the day-to-day operations of the Hotel. [R.106]. The Hotel was to be operated in Louisiana as Hampton Inn New Orleans-Six Flags Area.

Highpointe Hospitality is incorporated under the laws of Florida and is authorized to transact business in the State of Louisiana. [R.52-56]. LaPointe is the president of Highpointe Hospitality. He is also a resident of Florida. Highpointe Hospitality maintains its principal place of business in Gulf Breeze, Florida. Neither the corporation, nor LaPointe, have any contacts with the State of Mississippi. [R.52-56].

The corporation is not licensed to do business in Mississippi and does not maintain a registered agent or officer for service of process in Mississippi. It does not transact business in Mississippi. It does not advertise in Mississippi and it has not entered into any

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<sup>2</sup>Promus Hotels, Inc. was later sold to Hilton Hotels Corporation.



contracts in Mississippi to be performed in whole or in part in Mississippi. [R.52-56]. Highpointe Hospitality does not maintain any offices, post office boxes, places of business, or telephone listing in Mississippi. Highpointe Hospitality has no real estate, bank accounts or other interest in property in Mississippi. [R.52-56]. The same applies as to LaPointe, individually.

On June 24, 2004, Brandon Wilson, a minor, was allegedly injured after diving into the shallow end of a swimming pool while staying at the Hotel in Louisiana. [R.197-205]. As a result, a suit was filed against Crescent City Lodging, Highpointe Hospitality, Darryl LaPointe (individually), Charles Harris (a trip chaperone<sup>3</sup>) and Hilton Hotel Corporation. According to the complaint, Wilson was a part of a church group traveling from Vicksburg, Warren County, Mississippi. Wilson alleged that defendants engaged in deceptive or misleading advertising by stating that the Hotel offered “comfortable surroundings”, causing the minor plaintiff to feel that it was safe to swim in the pool. [R.201, ¶19]. Wilson further alleged that defendants were negligent in failing to give adequate warnings, and failing to have a lifeguard on duty. [R.202-203].

Highpoint Hospitality and LaPointe did not advertise in Mississippi. They did not participate in advertising on the internet nor did they publish or disseminate brochures that appeared in Hampton Inns and other hotels in the State of Mississippi. They had no contacts with the State of Mississippi such that would subject them to personal jurisdiction.

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<sup>3</sup>Charles Harris is a resident of Warren County, Mississippi.

## **SUMMARY OF THE ARGUMENT**

Whenever personal jurisdiction is challenged, it becomes the burden of the plaintiff to establish that personal jurisdiction exists. Wilson bears the burden of establishing that one or more of the basis for personal jurisdiction as set forth in Mississippi Code Annotated § 13-3-57 (commonly referred to as Mississippi's Long Arm Statute) are present. The basis for personal jurisdictions are (1) a "contract" basis; (2) a "tort" basis; and (3) "and a doing business" basis. Furthermore, Wilson must prove that exercising personal jurisdiction over either Highpointe Hospitality or LaPointe would be consistent with federal due process and its attendant requirements of fair play and substantial justice.

Wilson has failed to plead sufficient jurisdictional facts to support this state's exercise of *in personam* jurisdiction and over Highpointe Hospitality or LaPointe. Neither Highpointe Hospitality nor LaPointe maintain sufficient minimum contacts with Mississippi to support personal jurisdiction in this forum. Furthermore, this state's exercise of personal jurisdiction over Highpointe Hospitality and LaPointe would violate due process and offend traditional notions of fair and substantial justice.

## ARGUMENT

### A. Standard of Review.

Jurisdiction is an issue of law and as such is subject to *de novo* review. *Rayner v. Raytheon Corp.*, 858 So. 2d 133 (Miss. 2003). Personal jurisdiction over a nonresident may be obtained pursuant to Mississippi's long-arm statute, however, the Due Process Clause of the Fourteenth Amendment limits the power of a state's long-arm statute to obtain personal jurisdiction over a non-resident. *McCain Builders, Inc. v. Rescue Rooter, LLC*, 797 So. 2d 952 (Miss. 2001).

### B. Highpointe Hospitality and LaPointe are not amenable to suit under Mississippi's Long-Arm Statute

"When a non-resident defendant presents a Motion to Dismiss for Lack of Personal Jurisdiction, the plaintiff bears the burden of establishing . . . jurisdiction over the non-resident." *Allred v. Moore & Peterson*, 117 F. 3d 278, 281 (5th Cir. 1997).; see *Lofton v. Turbine Engine Design, Inc.*, 100 F. Supp. 2d 404, 407 (N.D. Miss. 2000)(interpreting Mississippi law).

A Mississippi court may exercise jurisdiction over a non-resident defendant only when two requirements have been met: (1) the defendant must be amenable to suit in Mississippi by virtue of the state's long-arm statute, MISS. CODE ANN. § 13-3-57 (1972); and (2) the defendant must be amenable to suit consistent with the dictates of due process. See *Yatham v. Young*, 912 So. 2d 467, 469 (Miss. 2005); *McDaniel, et al. v. Ritter*, 556 So. 2d 303,

307-09 (Miss. 1989). As such, the nonresident defendant may be subjected to personal jurisdiction in Mississippi pursuant to Mississippi's long arm statute; however, the Fourteenth Amendment of the Constitution serves as a limitation on the power of the state's long arm statute. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413-14, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984); *Yatham*, 912 So. 2d at 469.

Mississippi's long-arm statute provides in pertinent part:

Any non-resident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with the resident of the state to be performed in whole or in part by any party in the state, or who shall commit a tort in whole or in part in this state against a resident or non-resident of the state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

MISS. CODE ANN. § 13-3-57 (as amended). "Therefore, to establish personal jurisdiction over the defendant, the plaintiffs must establish jurisdiction under either the 'contract,' 'tort' or the 'doing business' prong of the long-arm statute." *Lifeline Ambulance Services, Inc. v. Laidlaw, Inc.*, 16 F. Supp. 2d 686, 688 (S.D. Miss. 1998). See also, *Williams v. Bud's Mobile Home Serv.*, 887 So. 2d 830, 833. (Miss. Ct. App. 2004).

1. Highpointe Hospitality did not enter into a contact, in whole or part, in Mississippi.

The Supreme Court has stated that the threshold inquiry in considering whether personal jurisdiction exists under the contract prong under the long-arm statute is whether

the complaint alleges the defendant made a contract to be performed in whole or in part in Mississippi. *R.C. Const. Co., Inc. v. National Office Systems, Inc.*, 662 So. 2d 1253, 1255 (Miss.1993). Here, Wilson does not set forth *any* allegations in his complaint that either Highpointe Hospitality or LaPointe entered into a contract to be performed in whole or in part in Mississippi and thus, the contract prong does not apply for purposes of the long arm statute. Wilson only states that “the church group arrived at the defendants’ New Orleans-Six Flags Hampton Inn on June 24, 2004.” [R.201].

2. Highpointe Hospitality and LaPointe did not commit a tort in Mississippi.

While Wilson does make a claim of deceptive advertising in his Complaint, for purposes of *in personam* jurisdiction under the Mississippi long-arm statute, a tort occurs when and where actual injury or accident takes place, and not at place of economic consequences of that injury. MISS. CODE ANN. § 13-3-57. *Estate of Portnoy v. Cessna Aircraft Co.*, 730 F.2d 286, 290 (5th.Cir.1984). Any injury or damages in regards to Wilson’s deceptive advertising claim would have occurred in Louisiana, the place where he was allegedly injured as a result of the advertisements. Wilson, in his Brief, concedes that the injury arising from his deceptive advertising claim occurred in Louisiana.

Specifically, Wilson states:

The deceptive advertising was made in Mississippi and misled Wilson into going to the hotel and swimming in the hotel swimming pool where he was injured. Highpointe Hospitality and LaPointe deceptively advertised in Mississippi inducing Wilson to go to New Orleans and be injured.”

[Appellant's Brief, p. 11]. Most importantly, Highpointe and LaPointe did not engage in advertising for the Hotel. Affidavits have been submitted by both Highpointe and LaPointe in this regard. [R.52-56]. To support his allegation that Highpointe and LaPointe advertised in Mississippi, Wilson refers to the license agreement between LaPointe and Promus Hotels Inc. The agreement discussed the Hampton Inn "System" and stated that "at present," (meaning 1999), the "System" included "access to a reservation service; distribution of advertising; publicity and other marketing programs and materials ..." [R.83]. Highpointe and LaPointe did not engage in advertising or marketing for the Hotel and nowhere in the record is there evidence that they did. Thus, any deceptive advertising would not have been done by Highpointe or LaPointe.

Even taking the allegations of Wilson's Complaint as true, first (as mentioned above) the tort did not occur in Mississippi. Second, at best, advertisement for the Hotel was a part of the national advertisement by Hilton. However, the fact that advertisements were placed in national publications is not in itself sufficient to subject a defendant to personal jurisdiction. *Growden v. Ed Bowlin & Associates*, 733 F. 2d 1149, 1151-52 (5th.Cir.1981).

Wilson alleges that advertising was "published, disseminated, circulated, and placed before the public within the State of Mississippi, in newspapers, pamphlets, leaflets, brochures, letters, internet advertisements and other publications." [R.197-205]. However, he only provides alleged proof of advertising by attaching to the amended complaint copies of publications, printing screens found on the Hampton Inn website and a page of information from an unknown source but not specific to the hotel in New Orleans where the

church group chose to stay. [R.48-51]. Wilson provides no proof that this information was disseminated specifically to them in Mississippi by Highpointe or LaPointe or that Highpointe or LaPointe were in some way responsible for the content associated with the publications or website.

Interestingly at the hearing on this matter, Wilson conceded that the tort prong of the long arm statute did not apply in this case.

3. Highpointe Hospitality and LaPointe were not doing business in Mississippi.

Wilson states that the business that Highpointe and LaPointe were doing in Mississippi was advertising. Highpointe and LaPointe did not do business in Mississippi and certainly were not engaged in the business of advertising in Mississippi. The Mississippi Supreme Court has held:

The test to determine whether a non resident corporation is doing business in Mississippi, as contemplated by our long-arm statute, is (1) the nonresident corporation must purposefully do some act or consummate a transaction in Mississippi; (2) the cause of action must either arise from or be connected with the action of transaction; and (3) the assumption of jurisdiction by Mississippi must not offend traditional notions of fair play and substantial justice. The third prong of this test must be considered in light of the amount and type of activity in Mississippi, convenience of the parties, whether the parties receive benefits and protections of Mississippi's law, and the equities of the situation.

Wilson states that Highpointe Hospitality purposefully advertised in Mississippi. This has simply not been shown in this case. Highpointe and LaPointe have done nothing to purposely avail themselves to the jurisdiction of the State of Mississippi. They did not do

business in Mississippi and they did not advertise in Mississippi. They have no connection whatsoever to the state of Mississippi. Further, they received no benefits or protections from Mississippi. Wilson continues to reference advertisements made over the Internet and in newspapers, pamphlets, leaflets, brochures, letters, and other publications in Mississippi. Yet he does not accurately identify who was responsible for those advertisements or distribution to confer jurisdiction on Highpointe and LaPointe.

More importantly, any argument that Wilson attempts that make that Highpointe and LaPointe purposefully availed themselves to the State of Mississippi by way of the telephone contact between the church official and Highpointe should wholly fail. It was the church official who initiated the call to the Hotel, soliciting information, not Highpointe or LaPointe.

It should be noted that Wilson contends that the advertisements were relied on in making a decision to go to Hampton Inn. However, the record is absent any evidence that the church official relied on these alleged advertisement.

C. The Exercise of Jurisdiction in this case would be inconsistent with due process.

Even if, assuming arguendo, that Highpointe Hospitality, Inc. or Darryl LaPointe did fall under one of the prongs of the Long Arm Statute, the trial court would not have in personam jurisdiction because neither Highpointe Hospitality, Inc. nor Darryl LaPointe has sufficient minimum contacts with Mississippi to satisfy the due process notions of "fair play and substantial justice." *International Shoe Co.* 326 U.S. at 316, 66 S. Ct. at 158; *Paternostro v. Dow Furnace Co.*, 848 F. Supp. 706 (S.D. Miss. 1994); *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 549-50 (Miss. Ct. App. 2000);



*Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy*, 680 So. 2d 831, 834-35 (Miss. 1996). The plaintiff must show, and the trial court must be satisfied, that the defendant "did some act to purposefully avail itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "The defendants contact with the foreign state must such that he should reasonably anticipate being hauled into court there." *Cappaert*, 680 So. 2d at 834-35 (citing *Worldwide Volkswagen Corp. v. Woodson*, 444 US 286, 295, 100 S. Ct. 559, 62 L.Ed. 2d 490). "The general principle regarding the exercise of jurisdiction over a nonresident is that he may not be subject to a litigation in a foreign jurisdiction unless he has certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *McDaniel, et al. v. Ritter*, 556 So. 2d 303, 307-09 (Miss. 1989) (quoting *Int'l Shoe*, 326 U.S. at 316) (citations omitted).

The contacts by the nonresident defendant with the forum state need to be more than fortuitous. See *Woodson*, 444 U.S. at 295. The nonresident defendant must have purposefully directed its activities toward the forum state. See generally, *Helicopteros*, 466 U.S. at 417. Minimum contacts exist with a state when a defendant "purposefully avails itself to the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Lofton*, 100 F. Supp. 2d at 409 (quoting *Hanson*, 357 U.S. at 253). A defendant's conduct relating to the forum state must have been sufficient to create "a reasonable expectation that he could be brought into the state's courts." *American Cable Corp.*, 754 So. 2d at 550. In deciding whether the exercise of jurisdiction over a

defendant offends "traditional notions of fair play and substantial justice," a court should consider "the amount and type of activity in the state, the relative convenience of the parties, the benefits and protections of Mississippi's law afforded parties and the equities of the situation." *Kekko v. K&B Louisiana Corp.*, 716 So. 2d 682, 683 (Miss. Ct. App. 1998).

Minimum contacts may give rise to either general or specific in personam jurisdiction. *Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 673-74 (Miss. 1994). In order to exercise specific jurisdiction over a nonresident defendant, the cause of action must arise out of the defendant's contacts or activities with the forum state. *Id.* at 673-74. Furthermore, the nonresident defendant must have purposefully directed those activities at the forum state. *Id.* at 674 (emphasis added).

If the cause of action does not arise out of a defendant's activities in the forum state, a court may exercise general jurisdiction over the defendant if its contacts with the forum are "systematic and continuous." *American Cable Corp.*, 754 So. 2d at 550; *Sorrells*, 636 So. 2d at 673 (holding that "remote" and "isolated" contacts are not enough to exercise general jurisdiction). See also, *Willow Creek Exploration Ltd. v. Tadlock Pipe & Electric, Inc.*, 186 F. Supp. 2d 675, 681 (holding that maintaining a passive website; advertising in eight trade publications that circulated in Mississippi; faxing ninety different communications to eleven different Mississippi companies; and making \$188,000 in sales over five years to Mississippi customers combined were not enough to meet the "continuous and systematic" requirement).

Wilson fails to make any specific allegations supporting jurisdiction. The Mississippi Long Arm Statute does not apply to the non-resident defendants Highpointe Hospitality, Inc. and Darryl LaPointe and neither defendant has sufficient minimum contacts with the State of Mississippi.

Wilson attempts to assert general jurisdiction on the basis or presence of an internet website, however, he concedes that the record does not disclose whether the defendants' website was interactive or not. [R.12, footnote 6]. Such information would be necessary and essential when determining the issue of jurisdiction. At any rate, Highpointe nor LaPointe maintained or operated a internet site.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the ruling of the lower court and assess cost to Wilson. Highpointe Hospitality, Inc. or Darryl LaPointe would further assert that this appeal was untimely as the trial court's ruling on the motion to dismiss for lack of personal jurisdiction was entered on November 13, 2008, almost two years ago.

Respectfully submitted,

HIGHPOINTE HOSPITALITY, INC.  
AND DARRYL LAPOINTE

BY: *Sandra D. Buchanan*  
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**CERTIFICATE OF SERVICE**

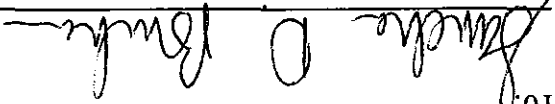
I, Sandra D. Buchanan, Esq., of counsel for Defendants-Appellees Highpointe Hospitality, Inc. and Darryl LaPointe, do hereby certified that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees Highpointe Hospitality, Inc. and Darryl LaPointe to:

Honorable M. James Chaney, Jr.,  
Warren County Circuit Court Judge  
Post Office Box 351  
Vicksburg, Mississippi 39181

Law Offices of Carroll Rhodes  
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4217-117261jsk

SANDRA D. BUCHANAN

A handwritten signature in dark ink, appearing to read "Sandra D. Buchanan", written over a horizontal line.

THIS, the 18<sup>th</sup> day of August, 2010.