IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00193

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

ON APPEAL FROM THE
CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUIRED

Submitted by:
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CERTIFICATE OF INTERESTED PERSONS

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 judges of this Court may evaluate possible disqualification or recusal.

1. Brandon Wilson, a minor, Individually, and by and through his father and next friend, Barney Wilson - appellant/plaintiff.

2. Carroll Rhodes, Esq. - attorney for appellant/plaintiff.

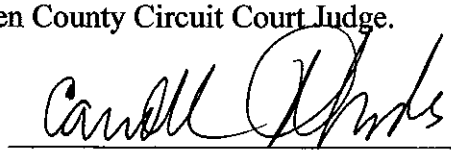
3. Highpointe Hospitality, Inc. - appellee/defendant.

4. Darryl LaPointe - appellee/defendant/

5. Sandra D. Buchannan, Esq. DANIEL, COKER, HORTON & BELL, P.A. - attorneys for appellees/defendants.

6. Honorable Frank Vollor - Retired Warren County Circuit Court Judge.

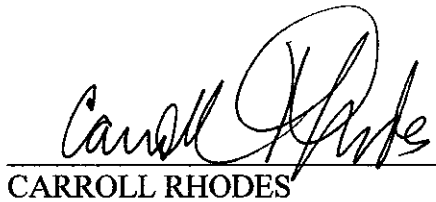
7. Honorable James Chaney, Jr. - Warren County Circuit Court Judge.



CARROLL RHODES

STATEMENT REGARDING ORAL ARGUMENT

Appellant/plaintiff, Brandon Wilson, a minor, Individually, and by and through his father and next friend, Barney Wilson, submits that oral argument is necessary in this case inasmuch as the facts, issues, and law involve a complex issue of jurisdiction.



CARROLL RHODES
COUNSEL OF RECORD FOR
PLAINTIFF-APPELLANT

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REPLY ARGUMENT

This Reply Brief is submitted to address several issues raised in the Brief of Appellees.

First, the defendants, Highpointe Hospitality, Inc. ("Highpointe) and Darryl LaPointe ("LaPointe"), argue that neither directly did business, committed a tort, entered into a contract, had any contacts, or advertised, sold, or delivered "any goods or products specifically in Mississippi." [Appellees' Brief, pp. 3-14]. This argument is based on LaPointe's affidavit. [R. 52-53, R. E. 32a-33a, Tab 8]. However, the plaintiffs submitted record evidence that Highpointe and Hilton Hotels Corporation ("Hilton") entered into a lease whereby they agreed to advertise and market the New Orleans hotel, and advertisements about the hotel appeared on the Internet in Warren County, Mississippi and in brochures in Hampton Inns and other hotels in the State of Mississippi. [R. 77-79, R. E. 38a-40a, Tab 9]. Church officials called the hotel in New Orleans to make reservations and hotel officials called church officials back in Warren County, Mississippi to arrange the church trip at a reduced rate.[1] [R. 79, R. E. 40a, Tab 9]. Church officials sent a check from Warren County to the defendants in New Orleans. Importantly, the defendants deposited the check in the interstate banking system and the check was routed to the church's bank account in Warren County and paid to the defendants in New Orleans. These transactions took place one month before Brandon went

[1]Although this evidence is contained in Barney Wilson's affidavit it is based on admissible hearsay under M. R. E. 803(24) and 804(b)(5). This statement has the equivalent guarantee of trustworthiness. For example the Hampton Inn invoice shows that a check (number 2634) was received by the Hampton Inn operated by the defendants on May 26, 2004. [R. 122, R. E. 49a, Tab 9]. Those same records reflect that the hotel room was not occupied until June 24, 2004, the date of the accident. [R. 122, R. E. 49a, Tab 9]. Furthermore, a plaintiffs submitted a receipt from the Cedars Grove Church on June 20, 2004 for the $104.00 that plaintiffs state they paid for the church trip. [R. 125, R. E. 52a, Tab 9]. These documents support plaintiff's statement that the church called and made reservations and the defendants called church officials back with a special rate which was sent on May 26, 2004, almost a month before the trip. Consequently, the Court should consider this testimony as admissible hearsay.

on the church trip to New Orleans and provide evidence that LaPointe and Hospitality did do business in Mississippi. The Mississippi Supreme Court has held that where a defendant enters into a contract either through the mail or over the telephone with a Mississippi resident, then the defendant is doing business as well as entering into a contract in Mississippi. *Murray v. Huggers Manufacturing, Inc.*, 398 So. 2d 1323 (Miss. 1981).

Second, the defendants argue that having a passive website that is accessible by Mississippi residents does not satisfy the "doing business" prong of the state's long arm statute, Miss. Code Ann. § 13-3-57 (Rev. 2002). While having a passive website alone might be insufficient to satisfy the doing business prong of the long arm statute, *Lofton v. Turbine Design, Inc.*, 100 F. Supp. 2d 404 (N. D. Miss. 2000), having an e-mail or an interactive website that is accessible by Mississippi residents is sufficient to satisfy the doing business prong of the statute and establish personal jurisdiction over a foreign company with the interactive website that has been accessed by a Mississippi resident and injured. See, *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773 (S. D. Miss. 2001).

Third, the defendants argue that the plaintiffs' complaint does not allege sufficient facts to establish personal jurisdiction. They are wrong. Plaintiffs alleged that:

> The defendants, Hilton Hotels Corporation, Crescent City Lodging, LLC, Highpointe Hospitality, Inc., and Darryl LaPointe, jointly and severally, for a period of time prior to and leading up to June 24, 2004, with the intent to sell hotel services, directly or indirectly, to the public, with the intent to increase the demand for hotel services at the New Orleans-Six Flags Hampton Inn, made, published, disseminated, circulated, and placed before the public within the State of Mississippi, in newspapers, pamphlets, leaflets, brochures, letters, internet advertisements and other publications, advertisements that the New Orleans-Six Flags Hampton Inn had a swimming pool that was safe for minors to use, which such advertisements contained assertions, representations, and statements of fact which were deceptive and misleading, and which the defendants knew, or might on reasonable investigation have ascertained

to be deceptive and/or misleading.

[R. 200, R. E. 11a, ¶ 16, Tab 4]. Plaintiffs alleged facts sufficient to establish personal jurisdiction over the defendants. A motion to dismiss under *M.R.C.P. 12(b)(2)* "should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Brewer v. Burdette*, 768 So. 2d 920, 922 (Miss. 2000) (en banc). The Court should reverse the trial court's grant of dismissal under this standard of review.

Fourth, plaintiffs argued below that the tort prong of the long arm statute is inapplicable in this case essentially because a tort is not complete until an injury occurs, and the injury occurred in this case in the State of Louisiana. However, this Court reviews the dismissal of a party for lack of personal jurisdiction de novo. *Yatham v. Young*, 912 So. 2d 467 (Miss. 2005) (En Banc). On that de novo review, this Court should determine that a tort committed, in part, in Mississippi by a foreign corporation subjects that corporation or individual to the jurisdiction of Mississippi Courts. See, *Yatham v. Young*, supra.

Fifth, the plaintiffs contend that they, not the church officials, relied on the deceptive advertising which led to Brandon's injury. If the plaintiffs had known the advertising was false, they would not have allowed Brandon to go on the church trip. Therefore, Brandon would not have been injured. Church officials, on the other hand, might still have gone on the trip even if they knew the advertising was misleading. Brandon would not have gone if the plaintiffs had known. It is their reliance and not the church's reliance on the misleading advertising that is at the crux of their false advertising case.

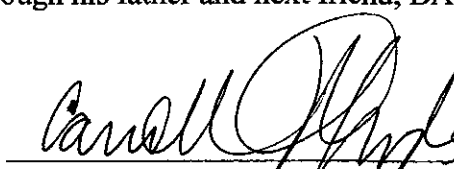
Finally, the exerciser of jurisdiction would not be inconsistent with the minimum contacts requirements of the Due Process Clause in this case. See, *Internet Doorway, Inc. v. Parks*, supra.

CONCLUSION

On the basis of the foregoing facts and authorities and the facts and authorities contained in plaintiffs' initial Brief, this Court should reverse the trial court's order granting Highpointe Hospitality's and LaPointe's motion to dismiss, and remand the case for a trial.

This the 25th day of August, 2010.

Respectfully submitted,
BRANDON WILSON, a Minor, Individually, and by
and through his father and next friend, BARNEY WILSON

BY: 
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CERTIFICATE OF SERVICE

I, Carroll Rhodes, attorney for Plaintiffs, do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Reply Brief of Appellant*** to:

Sandra D. Buchanan, Esq.
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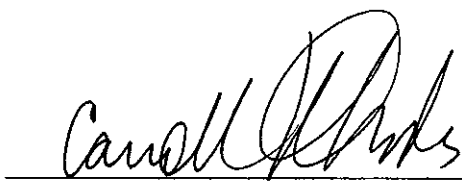
Counsel for the defendants/appellees

Honorable M. James Chaney, Jr.
Post Office Box 351
Vicksburg, MS 39181

Circuit Court Judge

This, the 25th day of August, 2010.



CARROLL RHODES