

1993

Valerie Bryant v. Lon Morton, Michael Landau,  
Morton capital Management, The Morton  
Company Inc. and California Capital Services Inc. :  
Brief of Appellee

Utah Court of Appeals

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M. David Eckersley; Prince, Yeates & Geldzahler; Attorneys for Appellants.

Gregory D. Phillips; Scott R. Ryther; Kimball, Parr, Waddoups, Brown & Gee; Attorneys for Appellees.

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VALERIE BRYANT, )  
 )  
 Plaintiff and Appellant, ) Case No. 930052-CA  
 )  
 vs. ) Priority No. 16  
 )  
 LON MORTON, MICHAEL LANDAU, )  
 MORTON CAPITAL MANAGEMENT, )  
 THE MORTON COMPANY, INC., and )  
 CALIFORNIA CAPITAL SERVICES, )  
 INC., )  
 )  
 Defendants and Appellees. )

APPEAL FROM FINAL JUDGMENT  
OF THE THIRD DISTRICT COURT,  
JAMES S. SAWAYA, DISTRICT JUDGE

M. David Eckersley  
PRINCE, YEATES & GELDZAHLER  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111  
(801) 524-1000  
Attorneys for Appellants

Gregory D. Phillips, Esq. (A4645)  
Scott R. Ryther, Esq. (A5540)  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
185 South State Street  
Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147  
Telephone: (801) 532-7840  
Attorneys for Appellees

**FILED**  
Utah Court of Appeals

MAR 19 1993

Mary T. Noonan  
Clerk of the Court

## TABLE OF CONTENTS

JURISDICTION . . . . .	1
ISSUE ON APPEAL . . . . .	1
DETERMINATIVE STATUTES, RULES, CONSTITUTIONAL PROVISIONS . . . . .	2
STATEMENT OF THE CASE . . . . .	2
I.    NATURE OF CASE AND PROCEEDINGS . . . . .	2
II.   FACTS FOR PURPOSES OF THIS APPEAL . . . . .	3
SUMMARY OF ARGUMENT . . . . .	6
ARGUMENT . . . . .	8
I.    THE FACTS FOR PURPOSES OF THIS APPEAL MUST BE TAKEN FROM THE AFFIDAVITS SUBMITTED BY THE CALIFORNIA DEFENDANTS. . . . .	8
II.   THE CALIFORNIA DEFENDANTS CANNOT BE SUBJECTED TO PERSONAL JURISDICTION IN UTAH. . . . .	10
A.   Personal Jurisdiction May be Exercised Only Where Due Process Considerations are Satisfied. . . . .	10
B.   The California Defendants Cannot be Subjected to Jurisdiction Unless they Purposefully Directed Their Actions Toward Utah. . . . .	11
C.   The California Defendants Did Not Direct Their Actions Toward Utah When They Reported Plaintiff's Crimes to California Authorities. . . . .	13
D.   Personal Jurisdiction Cases that Have Involved the Use of Legal Process Support the District Court's Determination that the California Defendants Lack Minimum Contacts. . . . .	15
E.   Fairness Considerations Also Argue Against the Exercise of Jurisdiction in Utah. . . . .	19
CONCLUSION . . . . .	21

## TABLE OF AUTHORITIES

<u>American Life &amp; Casualty Ins. Co. v. First American Title Co. of Utah</u> , 772 F. Supp. 574, 577 (D. Utah 1991) . . . . .	11
<u>Anderson v. American Soc'y of Plastic Surgeons</u> , 807 P.2d 825, 827 (Utah 1990) . . . . .	8
<u>Arguello v. Industrial Woodworking Machine Co.</u> , 838 P.2d 1120, 1121 (Utah 1992) . . . . .	1, 3, 9
<u>Behagen v. Amateur Basketball Ass'n of U.S.A.</u> , 744 F.2d 731, 733 (10th Cir. 1984) . . . . .	8
<u>Brainerd v. Governors of the Univ. of Alberta</u> , 873 F.2d 1257 (9th Cir. 1989) . . . . .	14
<u>Burger King Corp. v. Rudzewicz</u> , 471 U.S. 462, 474 (1985) . . . . .	11, 12, 13, 15, 19, 20
<u>Burt v. Board of Regents of the Univ. of Nebraska</u> , 757 F.2d 242 (10th Cir. 1985) . . . . .	14
<u>Calder v. Jones</u> , 465 U.S. 787 (1984) . . . . .	11-14, 17-19
<u>Duke v. Young</u> , 496 So.2d 37 (Ala. 1986) . . . . .	14
<u>Hanson v. Denckla</u> , 357 U.S. 235, 253 (1958)). . . . .	11
<u>International Shoe Co. v. Washington</u> , 326 U.S. 310, 316 (1945) . . . . .	10
<u>Keeton v. Hustler Magazine, Inc.</u> , 465 U.S. 770 (1984) . . . . .	11, 12
<u>Lake v. Lake</u> , 817 F.2d 391 (9th Cir. 1987) . . . . .	14, 15, 16, 17, 18
<u>Milliken v. Meyer</u> , 311 U.S. 457, 463 (1940) . . . . .	10
<u>Parry v. Ernst Home Center Corp.</u> , 779 P.2d 659, 662 (Utah 1989) . . . . .	10
<u>Roskelley &amp; Co. v. Lerco, Inc.</u> , 610 P.2d 1307, 1310 (Utah 1980). . . . .	9

<u>Simon v. United States</u> , 644 F.2d 490 (5th Cir. 1981) . . . . .	14, 15, 16, 17, 18
<u>Synergetics v. Marathon Ranching Co.</u> , 701 P.2d 1106, 1110 (Utah 1985) . . . . .	10
<u>Taylor v. Phelan</u> , 912 F.2d 429, 431 (10th Cir. 1990) . . .	8
<u>Wallace v. Herron</u> , 778 F.2d 391, 394 (7th Cir. 1985) . . . . .	12, 18, 19
<u>World Wide Volkswagen Corp. v. Woodson</u> , 444 U.S. 286, 297 (1980) . . . . .	11, 13, 20

#### STATUTES

Utah Code Ann. § 78-2a-3(k) (Supp. 1992). . . . .	1
Utah Code Ann. § 78-27-24 (Supp. 1992). . . . .	2
Utah Code Ann. § 78-27-24(3) (Supp. 1992) . . . . .	10

### **JURISDICTION**

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(k) (Supp. 1992).

### **ISSUE ON APPEAL**

The issue presented by this appeal is: Can these California Defendants, who have no contacts with Utah, be subjected to personal jurisdiction in Utah merely because the Plaintiff has relocated from California to Utah, and now alleges that the California Defendants committed a tort against the Plaintiff when they reported to California authorities certain criminal acts that the Plaintiff perpetrated in California before she relocated to Utah?

This issue involves the review of a pretrial jurisdictional decision made on documentary evidence only. Accordingly, the District Court's decision is reviewed for correctness. Arguello v. Industrial Woodworking Machine Co., 838 P.2d 1120, 1121 (Utah 1992).

### DETERMINATIVE STATUTES, RULES, CONSTITUTIONAL PROVISIONS

This appeal is governed by the Due Process clause of the Fourteenth Amendment to the United States Constitution, and by Utah's long-arm statute which reads:

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) the transaction of any business within this state;
- (2) contracting to supply services or goods in this state;
- (3) the causing of any injury within this state whether tortious or by breach of warranty;

. . . .

Utah Code Ann. § 78-27-24 (Supp. 1992).

### STATEMENT OF THE CASE

#### I. NATURE OF CASE AND PROCEEDINGS

Valerie Bryant ("Plaintiff") sued Lon Morton, Michael Landau, Morton Capital Management, The Morton Company, Inc., and California Capital Services, Inc. (collectively the "California Defendants") in the Third District Court for Salt Lake County. Plaintiff alleged claims for malicious prosecution and defamation.

The California Defendants moved the District Court to dismiss based on the Court's lack of personal jurisdiction. The District Court, Honorable Judge James Sawaya, determined that the California Defendants' Fourteenth Amendment rights to due process would be violated by the assertion of personal

jurisdiction over them in Utah. Based on that conclusion, the District Court dismissed, and Plaintiff appeals.

II. FACTS FOR PURPOSES OF THIS APPEAL

The facts for purposes of this appeal are to be taken from the affidavits of Lon Morton and Michael Landau (attached hereto as Exhibits "A" and "B" respectively). "[T]he facts recited in the complaint are considered only to the extent that they do not contradict the affidavit[s]." Arguello v. Industrial Woodworking Machine Co., 838 P.2d 1120, 1121 (Utah 1992). The facts have thus been established as set forth below.

Defendants Lon Morton and Michael Landau are citizens and residents of California. Neither of them has ever been a resident of Utah. They have never owned property in Utah and have never done business in Utah. [Affidavit of Lon Morton ("Exhibit A") ¶ 2, at 1; Affidavit of Michael Landau ("Exhibit B") ¶ 2, at 2].

Lon Morton is the majority shareholder of the three corporate defendants in this action: Morton Capital Management, The Morton Company, Inc., and California Capital Services, Inc. (collectively the "Morton Companies"). [Exhibit A ¶ 1, at 1]. The Morton Companies are all California corporations with their collective principal place of business in California. None of the Morton Companies have ever done business in Utah. They have no property or clients



in Utah, maintain no offices in Utah, have never contracted to provide goods or services in Utah, and do not purchase goods or services from any persons or entities in Utah. [Exhibit A ¶ 3, at 2].

In short, none of the California Defendants have any contacts with Utah.

In April 1989, Plaintiff, then a resident of California, was hired by Lon Morton to be the Controller for the Morton Companies. [Exhibit A ¶ 4, at 2]. Plaintiff continued her employment with the Companies until the end of February 1990, at which time she resigned and moved to Utah. [Exhibit A ¶ 7, at 2].

Before Plaintiff left California at the end of February 1990, Lon Morton requested that Plaintiff continue to provide consulting services to the Morton Companies in order to aid the Morton Companies in making the transition to a new Controller. [Exhibit A ¶ 8, at 3]. While still in California, Plaintiff agreed to provide the requested assistance. [Id.] Plaintiff then moved to Utah, but continued to consult with Companies until approximately May 1990. [Exhibit A ¶ 10, at 3].

All the Morton Companies' computer equipment and software, on which Plaintiff relied to do her work, were located at the Morton Companies' offices. [Exhibit A ¶ 11, at 3]. The Morton Companies and Plaintiff understood from the outset that Plaintiff's continued assistance to the Companies

after February 1990 would necessarily be performed in California. The California Defendants never requested that Plaintiff provide services in Utah. Consequently, Plaintiff commuted to California frequently during the period from March through May of 1990 and assisted the Morton Companies there. [Exhibit A ¶ 11, at 3].

After Plaintiff's relationship with the Morton Companies ended, the California Defendants discovered that, during her time with the Morton Companies, Plaintiff had used a company-owned credit card extensively to purchase items for her personal use. [Exhibit A ¶ 12, at 3]. Such company-owned credit cards were to be used only for company business expenses. [Id. ¶ 5, at 2]. As the California Defendants scrutinized Plaintiff's use of the cards more closely, they found that Plaintiff had used her position within the Morton Companies to prevent others from discovering her embezzlement. [Id. ¶ 12, at 3]. Plaintiff wrote and signed checks from the Morton Companies' accounts to pay the credit card balance each month without any review or oversight. [Id.]

When the management of the Morton Companies learned of Plaintiff's misuse of the credit cards, Lon Morton complained to law enforcement officials in Los Angeles County, California. [Id. ¶ 13, at 4]. Plaintiff was later charged in Los Angeles County with criminal theft. [Complaint ("Exhibit C") ¶ 9, at 3]. Because Plaintiff had moved to Utah, Los

Angeles County law enforcement officials necessarily had Plaintiff arrested in Utah.

In her Complaint, Plaintiff alleges that the California Defendants' reports to Los Angeles County law enforcement officials were false, and that the California Defendants have initiated a malicious prosecution against her. Putting aside for the moment this claim's utter lack of merit, it is clear that Plaintiff chose the wrong forum in which seek relief. The District Court was correct in deciding that the California Defendants cannot constitutionally be subjected to personal jurisdiction in Utah.

#### **SUMMARY OF ARGUMENT**

Plaintiff seeks redress in Utah against California Defendants who have no contacts with Utah. In order to establish jurisdiction within due process constraints, Plaintiff would have to demonstrate that the California Defendants purposefully directed their acts toward the State of Utah. The California Defendants have not so directed their actions.

The California Defendants never published any statement to any person in Utah, nor did they seek the assistance of any Utah officials. Instead, the California Defendants complained to law enforcement authorities in California about criminal actions perpetrated by the Plaintiff in California while she was still a resident of California.

Plaintiff has argued that because she became a resident of Utah shortly before the California Defendants complained of her conduct, it was foreseeable that she would suffer an injury in Utah. Under the Supreme Court's due process analysis, however, this brand of foreseeability is not sufficient to create the necessary minimum contacts. Contacts must be viewed from the defendant's perspective and must be analyzed to determine not whether some effect was foreseeable, but whether the defendant intentionally and purposefully directed his actions toward the forum. Only then should the defendant "reasonably anticipate being haled into court in the forum state." If the defendant did not purposefully direct his acts toward the state, and his contacts are merely "fortuitous" or the result of the "unilateral conduct" of another, then minimum contacts do not exist to establish jurisdiction.

In this case, the California Defendants' only arguable contact with Utah arises from their report to California authorities that Plaintiff embezzled from the Morton Companies while in California. The fact that Plaintiff chose to move to Utah shortly after committing a crime, thus requiring California authorities to find her in Utah, does not subject the California Defendants to jurisdiction here. Plaintiff's presence in Utah was not the choice of the California Defendants, nor was it the focus of their actions. Plaintiff could have taken herself to any state and would eventually

have been arrested there. But which state she was in would have made no difference to the California Defendants. The California Defendants' contacts in Utah were thus "fortuitous" and the result of "unilateral" activity by the Plaintiff. Accordingly, the District Court correctly concluded that it lacked personal jurisdiction over the California Defendants.

#### ARGUMENT

Plaintiff wants to sue the California Defendants in Utah despite their utter lack of contacts with Utah and despite Utah's lack of interest in the controversy. As the following pages demonstrate, the District Court correctly concluded that a Utah court cannot assert personal jurisdiction over the California Defendants consistent with due process.

I. THE FACTS FOR PURPOSES OF THIS APPEAL MUST BE TAKEN FROM THE AFFIDAVITS SUBMITTED BY THE CALIFORNIA DEFENDANTS.

In any action, the plaintiff bears the burden of establishing facts on which jurisdiction can be based. See Taylor v. Phelan, 912 F.2d 429, 431 (10th Cir. 1990) (quoting Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984); Anderson v. American Soc'y of Plastic Surgeons, 807 P.2d 825, 827 (Utah 1990) (adopting Tenth Circuit's guidelines for making pretrial determinations of personal jurisdiction and citing with approval Behagen). When

a defendant brings a motion to dismiss and supports the motion with an affidavit setting forth the defendant's version of the jurisdictional facts, the plaintiff cannot merely rest on the allegations of the complaint. If the plaintiff does not controvert the defendant's affidavit, "the facts asserted in the affidavit are taken as true and the facts recited in the complaint are considered only to the extent that they do not contradict the affidavit." Arguello v. Industrial Woodworking Machine Co., 838 P.2d 1120, 1121 (Utah 1992).

We think that a mechanism for determining jurisdiction prior to a trial on the merits, analogous to the mechanism available for summary judgment, Rule 56(e), comports with fairness and due process, and hence that allegations in a complaint should not be able to withstand the force of specific allegations of fact in affidavit form which latter allegations are not challenged.

Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1310 (Utah 1980).

In this case, the California Defendants submitted the affidavits of Defendants Lon Morton and Michael Landau, which set forth facts demonstrating a complete lack of contacts between the California Defendants and the State of Utah. [See Exhibits A and B]. Because Plaintiff did not challenge those facts, they are to be taken as true for purposes of this appeal.

II. THE CALIFORNIA DEFENDANTS CANNOT BE SUBJECTED TO PERSONAL JURISDICTION IN UTAH.

A. Personal Jurisdiction May be Exercised Only Where Due Process Considerations are Satisfied.

Under Utah's "long-arm" statute, nonresidents submit themselves to jurisdiction by "the causing of any injury within this state." Utah Code Ann. § 78-27-24(3) (Supp. 1992). Based on that language, Plaintiff theorizes that her allegation of malicious prosecution in California automatically subjects the California Defendants to jurisdiction by reason of an "injury" caused in Utah. However, the scope of Utah's long-arm statute does not frame the critical inquiry. As the Utah Supreme Court has stated, the Utah long-arm statute should be construed to extend the jurisdiction of Utah courts "to the fullest extent allowed by the due process clause of the Fourteenth Amendment to the United States Constitution." Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1110 (Utah 1985). Thus, the critical inquiry is whether the exercise of personal jurisdiction over the California Defendants violates due process.

Under due process analysis, personal jurisdiction is valid only where the defendant has established "certain minimum contacts with the [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); see also Parry v. Ernst

Home Center Corp., 779 P.2d 659, 662 (Utah 1989). Accordingly, the defendant's "conduct and connection with the forum state [must be] such that [they] should reasonably anticipate being haled into court there." World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). "To establish minimum contacts, a defendant must 'purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.'" American Life & Casualty Ins. Co. v. First American Title Co. of Utah, 772 F. Supp. 574, 577 (D. Utah 1991) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (citations omitted).

B. The California Defendants Cannot be Subjected to Jurisdiction Unless they Purposefully Directed Their Actions Toward Utah.

Plaintiff urges that jurisdiction is valid in this case because: (1) the California Defendants' alleged actions affected a Utah resident, and (2) the California Defendants knew that Plaintiff lived in Utah and could foresee an effect in Utah. In support of her "effects" analysis, Plaintiff relies on Calder v. Jones, 465 U.S. 787 (1984) and Keeton v.



Hustler Magazine, Inc., 465 U.S. 770 (1984), in which defamatory materials published in the forum by out-of-state defendants were held to establish sufficient minimum contacts. By relying on Calder and Keeton, however, Plaintiff fails to recognize the true import of the Supreme Court's minimum contacts analysis.

The Supreme Court's discussion of "effects" in Calder cannot be read to mean that any effect caused in the forum state creates minimum contacts. A proper reading of the Supreme Court's jurisdiction decisions reveals a functional analysis that focuses not on the mere existence of some contacts, but rather on the nature and quality of those contacts. Thus, "[t]he Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests." Burger King Co., 471 U.S. at 478. A defendant who merely causes an effect in the forum state does not necessarily establish minimum contacts.

The Seventh Circuit has aptly synthesized Calder and its "effects" language into the whole of the Supreme Court's jurisdiction analysis as follows:

We do not believe that the Supreme Court, in Calder, was saying that any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff. As the Supreme Court explained in [Burger King Corp.] (decided after Calder), "the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum state."

Wallace v. Herron, 778 F.2d 391, 394 (7th Cir. 1985).

The foreseeability of an effect on the forum also fails to establish minimum contacts. The Supreme Court articulated this reasoning as follows:

Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S., at 295, 100 S.Ct., at 566. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Id. at 297, 100 S.Ct., at 567.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

Thus, it is the purposeful direction of one's activities toward the forum state, not simply the resulting effects or their foreseeability, that creates the requisite contacts. Only through such purposeful direction can the defendant "reasonably anticipate being haled into court" in the forum state.

C. The California Defendants Did Not Direct Their Actions Toward Utah When They Reported Plaintiff's Crimes to California Authorities.

Plaintiff makes much of the fact that the California Defendants knew of Plaintiff's residence in Utah when they reported her crimes in California. Indeed, Plaintiff attempts to analogize this case to Calder, by pointing out that Calder, like the present case, involved allegations of wrongful statements made out of state that caused injury in the state. Plaintiff's comparison is misplaced. Unlike the present case,

the defendants in Calder actually published the allegedly defamatory statements in the forum state. See Calder, 465 U.S. at 785. The Calder defendants clearly directed their activities toward the forum state.<sup>1</sup>

In contrast, the California Defendants in this case never directed their actions toward Utah. When they discovered the Plaintiff's embezzlement, the California Defendants reported the fact of the embezzlement to California authorities. The California Defendants made their report with the (correct) expectation that the matter would be handled by California authorities in the California court system. Although it was foreseeable that Plaintiff might be affected in Utah, Utah was not the focal point of the California Defendants' actions. The California Defendants did not enlist the assistance of Utah authorities or publish any statements regarding Plaintiff to anyone in Utah. In short, the California Defendants did not concern themselves with Utah.

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<sup>1</sup> Plaintiff relies on a number of other cases that are distinguishable for the same reason. See Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257 (9th Cir. 1989) (defamation case in which defendant directed defamatory remarks toward persons in forum state); Burt v. Board of Regents of the Univ. of Nebraska, 757 F.2d 242 (10th Cir. 1985) (same); Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987) (attorney misled California court in procuring order intended to be taken and used by client to enlist Idaho authorities in wrongful action); Simon v. United States, 644 F.2d 490 (5th Cir. 1980) (attorney prepared and directed invalid subpoena to officials in forum state resulting in plaintiff's arrest); Duke v. Young, 496 So.2d 37 (Ala. 1986) (defendants allegedly directed fraudulent statement toward plaintiff in forum state).

Plaintiff's presence in Utah was not the choice of the California Defendants nor was it their focus. Plaintiff could have located herself in Hawaii or Alabama and it would have made no difference to the California Defendants. Plaintiff would eventually have been arrested somewhere. And the mere reporting of criminal activity by the Plaintiff in California, which report foreseeably and eventually resulted in her arrest elsewhere, cannot be considered to establish minimum contacts in any state where Plaintiff unilaterally chooses to reside. A defendant's behavior toward the forum state must be more substantial than that, such as in Calder and Keeton, where the defendants directed their libelous statements into the forum state and published them there. The California Defendants' contacts with Utah are, in words of the Supreme Court, "fortuitous" and arise from the "unilateral activity" of the Plaintiff, who happened to move to Utah after committing crimes in California. Burger King Corp., 471 U.S. at 474.

D. Personal Jurisdiction Cases that Have Involved the Use of Legal Process Support the District Court's Determination that the California Defendants Lack Minimum Contacts.

Plaintiff attempts to analogize this case to other cases in which the defendants abused judicial process in the forum state thereby establishing minimum contacts. See Lake v. Lake, 817 F.2d 391 (9th Cir. 1987); Simon v. United States, 644 F.2d 490 (5th Cir. 1981). Examining, as this Court must,

the nature and quality of the contacts involved in Lake and Simon shows that both cases are distinguishable from this one.

In Lake, an attorney misled a California court in obtaining an ex parte order regarding the custody of a child who was located in Idaho. The attorney failed to disclose to the California court that the child had lived in Idaho for at least sixteen months, thereby making Idaho the correct state for jurisdiction over the child's custody determination. See Lake, 817 F.2d at 1419. The attorney nevertheless obtained the ex parte order from the California court and gave the order to his client with the intent that the client would use the order to secure the assistance of Idaho authorities to gain custody of the child. The Ninth Circuit held that the attorney was subject to jurisdiction in Idaho based on his actions. Id. at 1423. Critical to the Ninth Circuit's decision was the fact that the attorney "intended a foreign act, obtaining the California ex parte order, to have an effect in the forum state of Idaho." Id.

In Simon, an attorney practicing in Georgia was held to have established minimum contacts in Louisiana. The Georgia attorney drafted a subpoena to be served on the plaintiff in Louisiana. The attorney had made several careless errors in drafting the subpoena, including an incorrect name and address. See Simon, 644 F.2d at 492. The plaintiff was never served as a result. When the plaintiff did not appear to testify in Georgia as the erroneous subpoena

demanded, the defendant attorney told the Georgia court that the plaintiff had been served and was avoiding compliance with the subpoena. Id. Consequently, the Georgia court issued a warrant that resulted in the arrest of the plaintiff. The plaintiff sued the Georgia attorney in Louisiana, and the Fifth Circuit held that jurisdiction was valid. Once again, the key to the Fifth Circuit's decision was that the Georgia attorney drafted an erroneous subpoena and directed that the subpoena be issued by Louisiana officials on a Louisiana plaintiff. Thus, the actions of the Georgia attorney were directed at the forum state.

Lake and Simon are distinguishable from the present case because they both involved the use of legal process specifically directed at the forum states at issue. In both cases, the defendants necessarily reached out to the forum states and caused false written materials to be used there. Accordingly, Lake and Simon are similar to Calder in the sense that the defendants made the forum states the intended focus of their actions. In contrast, the California Defendants in this case never published any statements to Utah residents or officials, and never enlisted the assistance of Utah authorities. The arrest of Plaintiff in Utah occurred, at best, indirectly and only at the discretion of Los Angeles County law enforcement officials. Consequently, the California Defendants' contacts with Utah are fundamentally

different in their nature and quality than the contacts involved in Lake and Simon.

The United States Court of Appeals for the Seventh Circuit followed this same reasoning in concluding that jurisdiction did not exist in a case indistinguishable from this one. See Wallace v. Herron, 778 F.2d 391, 394 (7th Cir. 1985). In Wallace, the plaintiff, an Indiana resident, filed a suit for malicious prosecution in Indiana against several California residents. The basis for the plaintiff's claim was that the defendants had maliciously initiated a lawsuit in California against the plaintiff. See Wallace, 778 F.2d at 392-93.

When the defendants objected to jurisdiction in Indiana, the plaintiff argued that the prosecution of the earlier case by defendants against plaintiff, although filed in California, had caused him injury in Indiana. The plaintiff pointed out that the defendants had established minimum contacts with Indiana because, during the alleged malicious prosecution in California, they "served interrogatories, requested the production of documents, and caused plaintiff to respond to five complaints in Indiana where the plaintiff resides." Id. at 394. In so arguing, the plaintiff relied on Calder, in which the Supreme Court held that two Florida residents were subject to jurisdiction in California when they authored a libelous article in The National Enquirer and circulated it in California.

The Seventh Circuit rejected the plaintiff's argument and his reliance on Calder as follows:

The defendants' contacts with Indiana in this case are significantly more attenuated than the Calder defendants' contacts with California. In Calder, the suit grew out of an article about the California activities of a California resident whose career was centered in California. The defendants relied primarily on California sources in writing the article. 104 S.Ct. at 1486-87. California was the focal point both of the story and any harm suffered. The harm was uniquely related to California because the emotional distress and injury to professional reputation suffered by the plaintiff were primarily a result of the publication of the story to California residents. Id. Calder on its facts is sharply distinguishable from this malicious prosecution case, where the defendants' only arguable contacts with Indiana were the legal papers which were served on [the plaintiff] in Indiana.

Wallace, 778 F.2d at 395.

Looking carefully at the intent and direction of the California Defendants' actions, the California Defendants' contacts with Utah are similar to the contacts held to be insufficient in Wallace. They are not the result of purposeful and intentional direction toward Utah and are not sufficient to establish jurisdiction over the California Defendants.

E. Fairness Considerations Also Argue Against the Exercise of Jurisdiction in Utah.

Other fairness considerations also militate against jurisdiction in this case. As the Supreme Court stated in Burger King Corp., even if the defendant has established minimum contacts with the forum state, those "contacts may be considered in light of other factors to determine whether the



assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corp., 471 U.S. at 476.

Thus, courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum state's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies."

Id. at 476-77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

The "fairness" factors outlined in Burger King Corp. argue against the exercise of jurisdiction over the California Defendants. The burden on the California Defendants of litigating in Utah is great compared to the burden of requiring Plaintiff to litigate her claim in California. All the witnesses in this action, except Plaintiff, reside in California.

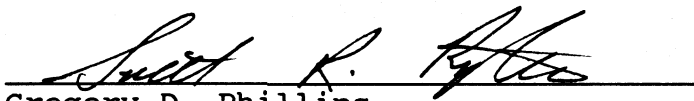
Moreover, the State of Utah has little interest in adjudicating this dispute. Of course, Plaintiff argues that Utah has a strong interest in providing redress for tortious injuries caused in Utah. However, the circumstances of this case belie that argument. This case arises from acts done in California by the California Defendants. Likewise, the circumstances leading up to the California Defendants' actions arose out of criminal activity that occurred in California. Utah's connection to this dispute is, at best, attenuated. Thus, Plaintiff's claim should be heard in California.

**CONCLUSION**

The California Defendants have not established sufficient minimum contacts with the State of Utah to allow the exercise of personal jurisdiction. Accordingly, the District Court's dismissal of Plaintiff's claim for lack of personal jurisdiction must be affirmed.

DATED this 19<sup>th</sup> day of March, 1993.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

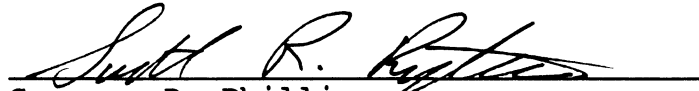
  
\_\_\_\_\_  
Gregory D. Phillips  
Scott R. Ryther  
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellees were mailed, postage prepaid, this 19<sup>th</sup> day of March, 1993, to the following:

M. David Eckersley, Esq.  
PRINCE, YEATES & GELDZAHLER  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111

KIMBALL, PARR, WADDOUPS, BROWN & GEE

A handwritten signature in cursive script, appearing to read "Gregory D. Phillips", is written over a horizontal line.

Gregory D. Phillips  
Scott R. Ryther  
Attorneys for Appellees

# **EXHIBIT "A"**

Gregory D. Phillips, Esq. (4645)  
Scott R. Ryther, Esq. (5540)  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
185 South State Street  
Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147  
Telephone: (801) 532-7840

Attorneys for Defendants

---

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

VALERIE BRYANT,	)	
	)	AFFIDAVIT OF
Plaintiff,	)	LON MORTON
	)	
vs.	)	
	)	
LON MORTON, MICHAEL LANDAU,	)	
MORTON CAPITAL MANAGEMENT,	)	
THE MORTON COMPANY, INC., and	)	Civil No. 920902306CV
CALIFORNIA CAPITAL SERVICES,	)	
INC.,	)	Judge James S. Sawaya
	)	
Defendants.	)	

---

Lon Morton, being first duly sworn on oath, states the following:

1. I am the President and majority shareholder of Morton Capital Management, The Morton Company, Inc., and California Capital Services (collectively referred to as the "Companies"). I make this Affidavit based on personal knowledge concerning the business dealings of myself and the Companies.

2. I have never been a resident of Utah. I own no property in Utah, and I have never done business in Utah.

3. The Companies have never done business in Utah. The Companies have no clients in Utah, maintain no offices in Utah, have never contracted to provide goods or services in Utah, and do not purchase goods or services from any suppliers in Utah. In short, the Companies have never had any reason to be in Utah or to deal with persons or companies in Utah.

4. In April, 1989, plaintiff Valerie Bryant ("Plaintiff"), then a resident and citizen of California, began employment with the Companies in the position of Controller.

5. The Companies provided certain of their corporate officers with company-owned credit cards to pay for business expenses of the Companies. Plaintiff was never an officer of any of the Companies and was never provided with a company-owned credit card. However, Plaintiff was authorized to use company-owned credit cards if needed to make incidental purchases on behalf of the Companies. It was understood by all officers and employees, that the company-owned credit cards were to be used only for company business expenses.

6. In January 1990, Plaintiff notified me of her intent to move to Utah and resign her position as Controller.

7. Because the Companies would need Plaintiff's assistance in making the transition to a new Controller, I requested that Plaintiff remain in her position for a while longer. Plaintiff agreed to continue her employment as Controller until February 1990.

8. Before Plaintiff left California in February 1990, I requested that Plaintiff provide further assistance to the Companies and me as we made the transition to the new Controller, Ms. Tina Vagnoni. While still in California, Plaintiff agreed to work for the Companies as an independent consultant during the upcoming transition period.

9. Plaintiff relocated her residence to Utah immediately after her resignation in February 1990.

10. Plaintiff assisted the Companies on a contract basis and as an independent consultant from February 1990 through approximately May 1990.

11. All the Companies' computer hardware and software, which Plaintiff used in her work for the Companies, were located in the Companies' California offices. Accordingly, Plaintiff commuted to California from Utah to assist the Companies during the transition period. To my knowledge, all of Plaintiff's consulting work for the Companies was performed at the offices of Morton Capital Management in California.

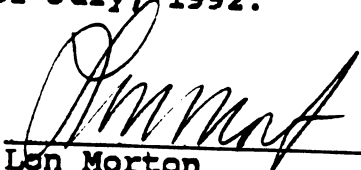
12. Soon after Plaintiff had completed her consulting work for the Companies, personnel at Morton Capital Management discovered that Plaintiff had used a company-owned credit card extensively to purchase items for her personal use. As Plaintiff's use of the card was scrutinized more closely, employees discovered that Plaintiff had used her position as Controller to prevent others from discovering her personal use of the card. Plaintiff wrote checks from the Companies' cash accounts to pay the credit

card balance each month without anyone else reviewing the charges made. Because nobody else reviewed the credit card charges on a regular basis, Plaintiff's misappropriation of company funds was not discovered until after she left.

13. When company management learned of Plaintiff's misuse of the company credit card, I complained to law enforcement officers in Los Angeles County, California.

14. It is my understanding that Plaintiff was charged with criminal theft in Los Angeles County, California, and that those charges were later dismissed.

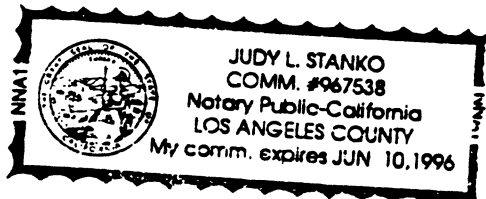
DATED this 23 day of July, 1992.

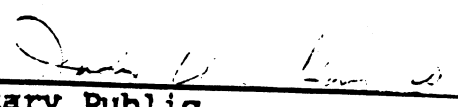
  
\_\_\_\_\_  
Len Morton

SUBSCRIBED AND SWORN TO before me this 23 day of July, 1992.

My Commission Expires:

June 10, 1996



  
\_\_\_\_\_  
Notary Public  
Residing at: Los Angeles, CA



# **EXHIBIT "B"**

### Attorneys for Defendants

VALERIE BRYANT,  
Plaintiff,

LON MORTON, MICHAEL LANDAU,  
MORTON CAPITAL MANAGEMENT,  
THE MORTON COMPANY, INC., and  
CALIFORNIA CAPITAL SERVICES,  
INC.,

**AFFIDAVIT OF  
MICHAEL LANDAU**


**Judge James S. Sawaya**

1. From May 1986 until January 1991, I was employed in the position of Vice President and Chief Financial Officer of Morton Capital Management. While in that position, I also carried out responsibilities for two other companies owned by Mr. Morton, The Morton Company, Inc. and California Capital Services (all sometimes collectively referred to as the "Companies"). I make this Affidavit based on personal knowledge.

2. I have never been a resident of Utah, I own no property in Utah, and I have never done business in Utah.

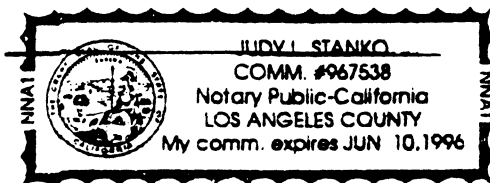
3. During my employment with the Companies, I never had occasion to travel to Utah for business on behalf of the Companies. To my knowledge, the Companies have never done business in Utah, nor have they done business with persons or companies in Utah.

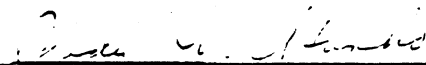
DATED this 23 day of July, 1992.

  
Michael Landau

SUBSCRIBED AND SWORN TO before me this 23 day of July, 1992.

My Commission Expires:



  
Notary Public  
Residing at: Los Angeles, California

# **EXHIBIT "C"**

PRINCE, YEATES & GELDZAH  
M. David Eckersley (0956)  
Attorneys for Plaintiff  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111  
(801) 524-1000

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

VALERIE BRYANT,

Plaintiff,

**VS.**

LON MORTON, MICHAEL LANDAU,  
MORTON CAPITAL MANAGEMENT,  
THE MORTON COMPANY, INC.,  
and CALIFORNIA CAPITAL  
SERVICES, INC.,

Defendants.

## COMPLAINT

Civil No. 920902306CV  
Judge James S. Sawaya

Plaintiff Valerie Bryant alleges as follows for her cause of action against defendants:

1. Plaintiff is a resident of Salt Lake County,  
State of Utah.

2. Defendants Lon Morton and Michael Landau are individuals residing in Calabassa, California.

3. Defendants Morton Capital Management, The Morton Company, Inc. and California Capital Services, Inc. are

California corporations which are related entities having common ownership and in which Lon Morton is a principal.

4. In April of 1989, plaintiff was hired by Lon Morton to provide services for each of the corporate defendants named above. She was given the title of Controller of Morton Capital Management, Inc., and its related entities. Mr. Morton agreed, in the presence of defendant Landau, that plaintiff would be compensated at the rate of \$6,000.00 per month, with \$4,000.00 per month to be paid in cash and plaintiff being authorized to charge \$2,000.00 per month on various credit cards issued to the corporate defendants.

5. Between April of 1989 and January of 1990, plaintiff performed services for the corporate defendants. In January of 1990, she resigned from her position and informed Mr. Morton of her impending move to Utah.

6. Mr. Morton persuaded plaintiff to continue her employment until the end of February, 1990. Following her relocation to Utah, Ms. Bryant continued to provide contract services to defendants at the request of defendant Morton until May of 1990.

7. Following plaintiff's termination of her relationship with defendants, Mr. Morton and Mr. Landau began making false accusations that plaintiff had misappropriated

funds from the corporate defendants in an effort to damage her reputation and credibility with regulators of the defendants' business operations.

8. Defendants Morton and Landau, acting with malice towards plaintiff, initiated a prosecution against plaintiff, who they knew to be living in Utah, by means of false statements and perjured testimony.

9. Criminal charges of felony theft were brought in Los Angeles County, State of California, against plaintiff as a direct result of the actions of defendants Morton and Landau acting on behalf of the corporate defendants. A warrant of arrest was issued in California and plaintiff was ultimately arrested in Salt Lake County, State of Utah in January of 1991 and held to answer the false charges filed in California.

10. As a direct and proximate result of the malicious prosecution initiated by the defendants, plaintiff incurred in excess of \$25,000.00 in expenses associated in legal fees and travel costs, suffered emotional distress and general damages and was injured in her reputation.

11. Following further investigation by the office of the prosecuting attorney, wherein the falsity of the defendants' allegations was revealed, charges against plaintiff were dismissed by the Court on motion of the prosecution in September of 1991.

WHEREFORE, plaintiff requests that judgment be entered against each defendant for an amount established by the evidence to fully compensate her for her special and general damages, plus an additional amount in punitive damages to adequately punish defendants for their intentional and malicious misconduct.

DATED this 23 day of April, 1992.

PRINCE, YEATES & GELDZAHLER

By M. David Eckersley  
M. David Eckersley  
Attorneys for Plaintiff

Plaintiff's Address:

1291 E. Earl Way  
Sandy, Utah 84070

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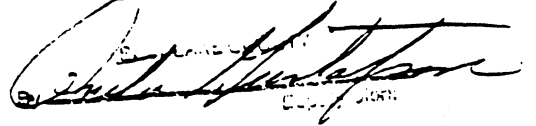
# **A D D E N D U M**

Gregory D. Phillips, Esq. (4645)  
Scott R. Ryther, Esq. (5540)  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
185 South State Street  
Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147  
Telephone: (801) 532-7840

Attorneys for Defendants

FILED  
THIRD JUDICIAL DISTRICT

SEP 23 1992



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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

VALERIE BRYANT,	)	
	)	
Plaintiff,	)	ORDER GRANTING MOTION
	)	TO DISMISS FOR LACK OF
vs.	)	PERSONAL JURISDICTION
	)	
LON MORTON, MICHAEL LANDAU,	)	
MORTON CAPITAL MANAGEMENT,	)	
THE MORTON COMPANY, INC., and	)	Civil No. 920902306CV
CALIFORNIA CAPITAL SERVICES,	)	
INC.,	)	Judge James S. Sawaya
	)	
Defendants.	)	

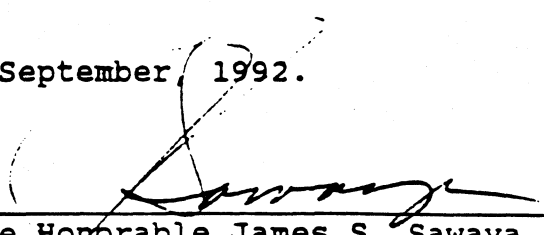
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The defendants' Motion to Dismiss for Lack of Personal Jurisdiction was submitted to the Court pursuant to a Notice to Submit for Decision dated August 11, 1992.

The Court, having reviewed the written memoranda and supporting affidavits filed by the parties, concludes that plaintiff Valerie Bryant has failed to carry her burden of demonstrating that any of the defendants in this case can be subjected to the jurisdiction of this Court consistent with their rights to due process under the Fourteenth Amendment. Accordingly, the Court hereby orders as follows:

IT IS HEREBY ORDERED that the defendants' "Motion to Dismiss for Lack of Personal Jurisdiction" against plaintiff Valerie Bryant is GRANTED, and the complaint of Plaintiff Valerie Bryant filed herein is hereby DISMISSED.

DATED this 23 day of September, 1992.



---

The Honorable James S. Sawaya  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 4-504(2) of the Utah Code of Judicial Administration, a true and correct copy of the foregoing proposed Order Granting Motion to Dismiss for Lack of Personal Jurisdiction was hand delivered this 2<sup>nd</sup> day of September, 1992, to the following:

M. David Eckersley  
PRINCE, YEATES & GELDZAHLER  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

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BY [Signature] CLERK

PRINCE, YEATES & GELDZAHLER  
M. David Eckersley (0956)  
Attorneys for Plaintiff  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111  
(801) 524-1000

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

VALERIE BRYANT,

Plaintiff,

vs.

LON MORTON, MICHAEL LANDAU,  
MORTON CAPITAL MANAGEMENT,  
THE MORTON COMPANY, INC., and  
CALIFORNIA CAPITAL SERVICES,  
INC.,

Defendants.

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NOTICE OF APPEAL

Civil No. 920902306CV  
Judge James S. Sawaya

Plaintiff Valerie Bryant hereby gives notice, pursuant to the provisions of Rules 3 and 4 of the Utah Rules of Appellate Procedure, that she is taking an appeal of the Order of the Third Judicial District Court dismissing her Complaint, which Order was entered on September 23, 1992, to the Utah Supreme Court.

DATED this 21 day of Oct, 1992.

PRINCE, YEATES & GELDZAHLER

MAILING CERTIFICATE

I hereby certify that, on the 21 day of October, 1992, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing NOTICE OF APPEAL to the following:

Gregory D. Phillips, Esq.  
Scott R. Ryther, Esq.  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
185 South State Street  
Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147



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