CIVIL PROCEDURE — PERSONAL JURISDICTION — FIFTH CIRCUIT REAFFIRMS THAT A DEFENDANT'S KNOWLEDGE OF LIKELY HARM TO A PLAINTIFF IN THE FORUM STATE IS INSUFFICIENT TO CREATE JURISDICTION UNDER *CALDER V. JONES*. — *Clemens v. McNamee*, 615 F.3d 374 (5th Cir. 2010).

In its landmark decision *Calder v. Jones*,[1] the Supreme Court established that the effects of an intentional act committed out of state, but aimed at the forum state and felt by the plaintiff there, create sufficient minimum contacts to establish personal jurisdiction.[2] The Court's requirement that the action be "expressly aimed"[3] at the forum has engendered confusion and division among lower courts.[4] Recently, in *Clemens v. McNamee*,[5] the Fifth Circuit refused to deviate from its prior holding that knowledge of likely injury to a plaintiff in the forum state is not alone sufficient to meet the express aim requirement in the defamation context. Instead, a plaintiff must show that the subject matter of the defendant's statements and that the sources the defendant relied upon are in the forum state. *Clemens* demonstrates the contrast between the Fifth Circuit's formulaic rule and the Supreme Court's flexible approach to personal jurisdiction, adopted to ensure fairness to both plaintiffs and defendants. It also reveals the primary problem with the Fifth Circuit's approach: it prevents the exercise of jurisdiction even when a defendant knows where the harm of his statements will be felt and thus could anticipate suit there.

Brian McNamee and Roger Clemens developed a professional relationship beginning in the 1990s in which McNamee trained Clemens for various periods until 2007.[6] During this time, Clemens played baseball for the Toronto Blue Jays, New York Yankees, and Houston Astros.[7] In the summer of 2007, federal authorities contacted McNamee and asked to meet with him in New York.[8] At the meeting, au-

---

[1] 465 U.S. 783 (1984).

[2] *See id.* at 788–90 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.).

[3] *Id.* at 789.

[4] *See, e.g.*, Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1123–24 (1996) (stating that some courts have found the "expressly aimed" requirement met where a defendant committed an intentional tort against a forum state's resident, whereas other courts require additional facts to support a finding of jurisdiction); *cf.* Andrew F. Halaby, *You* Won't *Be Back: Making Sense of "Express Aiming" After* Schwarzenegger v. Fred Martin Motor Co., 37 ARIZ. ST. L.J. 625, 630 (2005) ("The express aiming element was confusing from the start.").

[5] 615 F.3d 374 (5th Cir. 2010).

[6] Clemens v. McNamee, 608 F. Supp. 2d 811, 816 (S.D. Tex. 2009).

[7] *Id.*

[8] *Id.*

thorities told McNamee that they had sufficient evidence to convict him for delivering illegal performance-enhancing drugs to athletes, but promised to provide immunity for any statement he would give in relation to the government's investigation of the Bay Area Laboratory Cooperative (BALCO), a San Francisco–area lab suspected of involvement in the development and sale of such drugs.[9] McNamee told authorities that he had injected Clemens, in New York and Toronto, with performance-enhancing drugs in 1998, 2000, and 2001.[10] At the investigators' request, McNamee repeated these claims at another New York meeting to former Senator George Mitchell, who was leading an investigation for Major League Baseball into performance-enhancing drug use.[11] On December 13, 2007, the Mitchell Commission released its report, which contained McNamee's statements.[12] The statements were reported extensively in Texas, and also nationally.[13] On January 6, 2008, McNamee repeated his statements at his home in New York to SI.com, which published them.[14]

Clemens, a Texas resident since the age of fifteen who returned to Texas every off-season during his playing career,[15] sued McNamee in Texas state court.[16] McNamee removed the case to federal court and sought to dismiss the case, arguing, inter alia, that Texas courts lacked personal jurisdiction over him because the allegedly defamatory statements were made in New York.[17] The district court dismissed for lack of personal jurisdiction,[18] explaining that, because Texas's long-arm statute permits the exercise of personal jurisdiction to the extent permitted by the Fourteenth Amendment, the *Calder* test should be applied.[19] The court found that McNamee knew that the brunt of the statements' harm to Clemens would be felt in Texas.[20] However, it determined that it lacked jurisdiction because Texas was not the focal point of McNamee's statements.[21] The court stated that the sources used and the content of a defamatory statement must have a connection with a forum state to create jurisdiction.[22]

---

9 *See Clemens*, 615 F.3d at 377.
10 *Id.*
11 *See Clemens*, 608 F. Supp. 2d at 817.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 816.
16 *Id.* at 817.
17 *Id.*
18 *Id.* at 820.
19 *See id.* at 819.
20 *Id.* at 820.
21 *Id.*
22 *See id.*

The Fifth Circuit affirmed.[23] Writing for the panel, Judge Davis[24] adopted an approach similar to that of the district court. As the panel observed, Clemens only argued that Texas could exercise specific jurisdiction over McNamee, which is proper only when a defendant has established minimum contacts with the forum and the exercise of jurisdiction would not be fundamentally unfair.[25] The court noted that specific jurisdiction would be proper if McNamee purposefully directed his actions at Texas such that he could anticipate being sued there.[26]

The panel cited *Calder* as the "most instructive case."[27] Relying upon prior Fifth Circuit applications of *Calder* in *Revell v. Lidov*[28] and *Fielding v. Hubert Burda Media, Inc.*,[29] the majority wrote that the forum must be the "focal point" of a statement to provide jurisdiction.[30] In *Revell*, minimum contacts were not created because the defendant's comments on an internet message board claiming that the plaintiff had advance knowledge of the Pan Am 103 bombing contained neither references to Texas nor references to the Texas activities of the plaintiff.[31] In *Fielding*, the Swiss Ambassador to Germany and his American wife, a Texas resident, sued several German newspapers that published articles about the plaintiffs' social lives in Berlin. Minimum contacts with Texas were not established because the focus of the articles was on the activities of the plaintiffs in Germany and Switzerland.[32] The *Clemens* court concluded that, based on Fifth Circuit precedent, the subject matter of and the sources relied upon for an article must be in the forum state.[33] McNamee's statements did not meet either of the prongs of the focal point analysis.[34]

Judge Haynes dissented. She first argued that McNamee's frequent trips to Texas to train Clemens created sufficient minimum contacts for personal jurisdiction to be exercised.[35] Furthermore, the majority erred in using *Calder* as the exclusive test in a defamation case instead of as an additional means of exercising jurisdiction over a non-

---

[23] *Clemens*, 615 F.3d at 376.
[24] Judge Davis was joined by Judge Smith.
[25] *See Clemens*, 615 F.3d at 378.
[26] *See id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).
[27] *See id.* at 379.
[28] 317 F.3d 467 (5th Cir. 2002).
[29] 415 F.3d 419 (5th Cir. 2005).
[30] *Clemens*, 615 F.3d at 379–80.
[31] *Id.* at 379.
[32] *See id.* at 380.
[33] *Id.*
[34] *See id.*
[35] *See id.* at 381–83 (Haynes, J., dissenting).

resident defendant.[36] Even under *Calder*, however, McNamee had sufficient minimum contacts with Texas.[37] Judge Haynes distinguished *Revell* and *Fielding*, arguing that in *Revell* the defendant had no knowledge of the plaintiff's residence in Texas, and no other facts demonstrated that he had intentionally aimed his conduct at Texas.[38] Similarly, in *Fielding*, it was unclear whether the plaintiffs ever lived in Texas because during the time relevant to the lawsuit, they appeared to have lived in Germany, and the brunt of the injury was felt overseas.[39] In contrast, McNamee knew that Clemens's life was centered in Texas and, unlike the publication in *Fielding*, a German newspaper, SI.com was likely to be read in Texas.[40] Therefore, jurisdiction was proper because McNamee knew that Clemens lived and worked in Texas and that the brunt of the impact would be felt there.[41]

The *Clemens* decision illustrates a number of troublesome aspects of the Fifth Circuit's personal jurisdiction jurisprudence. The circuit affirmed its rule-like "focal point" analysis, demonstrating that knowledge that injury to a plaintiff is likely to occur in the forum state is not sufficient to meet the express aim requirement of the *Calder* analysis. This approach does not comport with the personal jurisdiction jurisprudence of the Supreme Court. The minimum contacts analysis is supposed to be a flexible case-by-case determination of whether jurisdiction is proper. Such an approach reflects the Supreme Court's underlying motivation — ensuring fairness to both plaintiffs and defendants. Furthermore, the *Clemens* decision demonstrates how the Fifth Circuit's approach narrows personal jurisdiction by preventing the exercise of jurisdiction in cases in which a defendant could reasonably anticipate suit in the forum state. A better analysis would ask whether a reasonable person would believe that the plaintiff would suffer a significant injury to his reputation in the forum state.

The Fifth Circuit, in following its precedents requiring an allegedly defamed plaintiff to show that the subject matter of the defendant's speech concerns the forum state activities of the plaintiff and is derived from sources within the state, applied an inflexible two-prong test.[42] But these requirements are not necessary conditions when answering the *Calder* inquiry. The situation in *Clemens* differs signifi-

---

[36] *See id.* at 384 ("[T]he *Calder* effects test is simply an additional, but not exclusive, vehicle for establishing personal jurisdiction . . . .").

[37] *Id.* at 385.

[38] *Id.* at 386.

[39] *See id.*

[40] *See id.*

[41] *Id.* at 387. Judge Haynes also concluded that the exercise of specific jurisdiction would not offend traditional notions of fair play and substantial justice. *See id.* at 387–88.

[42] *See id.* at 380 (majority opinion).

cantly from that in *Calder*, where the writer and editor of a published magazine article were sued.[43] In that case, it was conceivable that the location of the journalist's source may have indicated whether the forum-state audience was targeted. In contrast, in *Clemens*, the location of McNamee's statements[44] provided no similar insights into his intentions. Furthermore, the Fifth Circuit's approach does not permit courts to consider the mental state of the defendant.[45] Such a consideration is important because if a defendant knows his actions are especially likely to harm the plaintiff in a given forum, he should be on notice that he may face suit there.[46] Yet, as *Clemens* shows, such knowledge is irrelevant to the Fifth Circuit's test.[47]

More broadly, the rigidity of the Fifth Circuit's test is troubling because it does not comport with the Supreme Court's overall approach to personal jurisdiction. Rather than adopting a rule or formula, the Court has unequivocally stated that the appropriate analysis should be flexible. *International Shoe Co. v. Washington*,[48] which first articulated the minimum contacts analysis,[49] noted that jurisdiction "cannot be simply mechanical or quantitative."[50] Subsequent Court opinions have stressed the flexible nature of the minimum contacts analysis.[51] *Calder* itself highlights the flexible nature of the Court's approach by finding jurisdiction even where the defendants had not had any physical contact with California in relation to the published article.[52]

The Court's primary motivation for its flexible analysis has been whether the exercise of jurisdiction, or lack thereof, would be fair to

---

43 *See* Calder v. Jones, 465 U.S. 783, 784 (1984).

44 *See Clemens*, 615 F.3d at 377 (statements made in New York).

45 A number of other courts have found the defendant's knowledge that the plaintiff will likely suffer an injury in the forum state to provide grounds to exercise personal jurisdiction. *See, e.g.*, Zidon v. Pickrell, 344 F. Supp. 2d 624, 632 (D.N.D. 2004); Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 556 (N.J. 2000) ("[I]f defendants' statements are capable of a defamatory meaning and were published with knowledge or purpose of causing harm to plaintiff . . . within New Jersey, those intentional contacts . . . satisfy the minimum contacts requirement . . . .").

46 *See* C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 637 (2006) (noting that some courts focus on defendant's awareness of plaintiff's residence because such knowledge may provide notice of risk of suit there).

47 *Cf.* Clemens v. McNamee, 608 F. Supp. 2d 811, 820 (S.D. Tex. 2009) ("*McNamee knew* that Clemens would feel the brunt of the harm from his statements in Texas." (emphasis added)).

48 326 U.S. 310 (1945).

49 *See id.* at 316.

50 *Id.* at 319.

51 *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478–79 (1985) ("The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests . . . . Instead, we have emphasized the need for a 'highly realistic' approach . . . ." (quoting *Int'l Shoe*, 326 U.S. at 319; Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316 (1943) (citations omitted))).

52 *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

the defendant and plaintiff.[53] As Professors Douglas Floyd and Shima Baradaran-Robison have argued, "[T]he Supreme Court's underlying concern has been whether the defendant reasonably should anticipate the impact of his activities . . . in a particular geographic jurisdiction."[54] Such a standard ensures that a defendant is not unfairly forced to litigate in a forum he could not have reasonably anticipated, and also allows defendants to structure their activities in an economically efficient manner.[55] Supreme Court precedent amply supports such an assertion, as the Court has held that jurisdiction is not proper without some degree of likelihood that the defendant's actions will have an impact in the forum state.[56] The Court has also expressed a desire to allow plaintiffs to sue in a convenient forum.[57]

Because the Fifth Circuit's test is so rigid, it risks creating the very sort of unfair results that the Court hoped to avoid in adopting a more flexible, standard-like approach.[58] As personal jurisdiction cases show, the various fact patterns and scenarios are virtually infinite. In this area, therefore, it is difficult for courts to create precise rules.[59] A rule that eliminates flexibility, which the Fifth Circuit test does, runs the risk of being both over- and underinclusive, and of generating unfair and arbitrary results.[60] Admittedly, standards are not perfect, and one of the major weaknesses of standards is that they are costly for courts and potential litigants because they are more difficult to apply than rules.[61] However, given the Supreme Court's emphasis on fairness for

---

[53] *See, e.g.*, *Burger King*, 471 U.S. at 474 ("[I]t may well be unfair to allow [defendants] to escape having to account in other States for consequences that arise proximately from [their] activities."); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting) (noting that the "principal focus" of personal jurisdiction cases since *International Shoe* has been "on fairness and reasonableness to the defendant"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'").

[54] Floyd & Baradaran-Robison, *supra* note 46, at 636.

[55] *See id.* at 634–35.

[56] *See World-Wide Volkswagen*, 444 U.S. at 297; Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[57] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (noting that California residents would be severely disadvantaged and might not be able to bring claims against insurance companies if forced to sue in a distant forum).

[58] For a classic discussion of rules versus standards, see generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[59] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 603 (1988) ("It is obvious that 'rulemakers' cannot see into the future in any very precise way when they are laying down crystal rules, and so we know that those who are in an ex ante position cannot possibly see things ex post.").

[60] *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992 (1995).

[61] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) (arguing for clear rules to answer jurisdictional questions).

both defendants and plaintiffs, courts and parties should be willing to accept some degree of uncertainty if it will buy them fairer outcomes.

Clemens demonstrates an even more troubling aspect of the Fifth Circuit's approach — it precludes the exercise of jurisdiction when doing so would be proper under the Supreme Court's jurisprudence. The very point of *Calder* was to allow plaintiffs injured by out-of-state actions to sue in their home state so long as the defendant could anticipate suit there.[62] In her dissent, Judge Haynes hypothesized that under the majority's approach, McNamee could not be sued in Texas if he made statements in New York alleging that Clemens took steroids in New York, even had Clemens always lived in Texas and played baseball in Texas throughout his entire career, and even had McNamee known that his statements would destroy Clemens's reputation in Texas.[63] Yet, such a hypothetical is not necessary because in *Clemens* the district court found that McNamee knew the brunt of any damage would be felt in Texas.[64] Despite this finding, the panel nevertheless held that suit in Texas was improper.[65] *Clemens* unequivocally shows that the Fifth Circuit's approach can prevent the exercise of jurisdiction even when likelihood of injury in the forum state allows one to anticipate being subject to suit there, which can result in unfair outcomes for plaintiffs who may not be able to sue if the forum that can exercise jurisdiction is too inconvenient.[66]

A better approach[67] would ask whether McNamee's knowledge about Clemens's residence in Texas and business ties to the state would cause a reasonable person to suspect that a significant portion of the damage to Clemens's reputation[68] would be felt in Texas.[69]

---

[62] *See* Calder v. Jones, 465 U.S. 783, 789–90 (1984) (emphasizing that the defendants could anticipate suit in California because they knew that their article could impact the plaintiff in California and that the brunt of any injury would be felt in California).

[63] *See Clemens,* 615 F.3d at 383–84 (Haynes, J., dissenting).

[64] *See* Clemens v. McNamee, 608 F. Supp. 2d 611, 620 (S.D. Tex. 2009).

[65] *See Clemens*, 615 F.3d at 380.

[66] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (expressing concern that plaintiffs may not be able to afford litigation in a foreign forum, making the defendant judgment proof); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1007 (1991) (arguing that risk-neutral plaintiffs will sue only if expected benefits exceed expected costs).

[67] This is not to say that prior precedent did not bind the panel. The suggested approach is meant merely to provide a theoretically better approach than the one the panel used, regardless of whether it was bound to do so.

[68] Defamation cases often involve injuries to reputation. *See* Floyd & Baradaran-Robison, *supra* note 46, at 637 n.188. As Professor Robert Post has argued, there are at least three types of reputation: reputation as property, as honor, and as dignity. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693 (1986). To completely enact the analytical approach proposed here, it may be necessary for a court to further define with which type of reputation it is concerned. Such a discussion is beyond the scope of this piece.

Such a standard is more flexible and allows courts to take into account various factors that may indicate whether it would be reasonably foreseeable that the plaintiff would suffer a reputational injury in the forum state, such as the defendant's knowledge of the plaintiff's residence or professional ties there.[70] This standard also allows more opportunity for an aggrieved party to sue in a convenient forum.[71] Some may argue that where an injury is likely to be felt across many states, such as with a national figure like Clemens, the defendant should have to take some specific action directed at the forum for jurisdiction to be found, because otherwise jurisdiction may be possible anywhere. However, the proposed standard's requirement that a reasonable person suspect that a significant proportion of the injury will be felt in the forum in question sufficiently limits the range of possible forums to those where a defendant should be on notice that he may be sued.[72]

When confronted with a defendant who knew with certainty that the plaintiff would likely suffer injury in Texas due to his commission of an intentional tort, the Fifth Circuit reaffirmed a rigid, formulaic test despite the flexible nature of personal jurisdiction analysis. *Clemens* shows how the formulaic test can prevent the exercise of jurisdiction even when any reasonable person could conclude an act would cause a substantial injury in the forum state. The test ignores the fundamental concern underlying jurisdiction analysis: fairness to the defendant and to the plaintiff in deciding whether to force a nonresident defendant to litigate in a foreign forum. The courts should adopt an inquiry that asks whether a defendant could reasonably suspect that a significant injury to the plaintiff's reputation would be felt in the forum state.

---

[69] Such an approach with regard to the geographic location of the injury has already been proposed. *See* Floyd & Baradaran-Robison, *supra* note 46, at 633–66. Andrew Halaby has proposed a different standard, *supra* note 4, at 652–55, suggesting that jurisdiction should be found in the state in which the plaintiff resides if an act is done with intent to injure the plaintiff. Such a standard incorrectly assumes that reputational injury is always felt in the state of residence. For example, some avenues of disseminating information may be too limited to cause a significant injury in the plaintiff's home state. *See, e.g.*, Jackson v. Cal. Newspapers P'ship, 406 F. Supp. 2d 893, 898 (N.D. Ill. 2005) (finding lack of personal jurisdiction in Illinois over California defendants who published allegedly defamatory comments about Bo Jackson because Illinois residents do not read local California websites).

[70] The *Calder* Court took these considerations into account. *See* Calder v. Jones, 465 U.S. 783, 790 (1984).

[71] The analysis does not grant jurisdiction, however, merely because the plaintiff resides in the forum state. This aspect of the standard is criticized in Counts & Martin, *supra* note 4, at 1123.

[72] For instance, in *Jackson v. California Newspapers Partnership*, 406 F. Supp. 2d at 893, a national figure, Bo Jackson, sued a California newspaper in Illinois for defamation. The court refused to exercise jurisdiction because defendants could not foresee that Illinois residents would visit a local California website. *See id.* at 898.