19-6499

ORIGINAL

No. 18A1034

IN THE

Supreme Court of the United States

JOHN BERMAN,

Petitioner,

v.

DAVID MODELL

Respondent,

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In a case of long-arm specific jurisdiction where an intentional tort is alleged to have been directed into the forum state, does a court err by requiring a plaintiff to show what "benefit" the defendant derived from his intentional and allegedly tortuous actions expressly aimed at the plaintiff's activities in the forum state?

PARTIES TO THE PROCEEDING

Petitioner John Berman was the plaintiff-petitioner whose petition to the California Supreme Court was denied. Respondent David Modell was the defendant-respondent in the California Court of Appeal, below.

TABLE OF AUTHORITIES

Cases

Statutes

28 U.S.C. § 1391(b)(2)

C.C.P. § 395(a)

C.C.P. § 410.10

PETITION FOR A WRIT OF CERTIORARI

Petitioner/Plaintiff Berman petitions for a writ of certiorari to establish certainty where there is currently great and obvious confusion in some courts. The confusion exists, at a minimum, among various state and federal-district courts in California. This case asks whether, in a case of long-arm specific jurisdiction where an intentional tort is alleged to have been directed into the forum State, is there now a burden on a plaintiff to establish—or even speculate-on—some supposed "benefit" the defendant-tortfeasor derives from his intentional and allegedly tortious actions expressly aimed at the plaintiff's activities in the forum State?

According to the courts, below, there is: "Because the record shows that Modell did not purposefully avail himself of forum benefits, it is unnecessary to address the other prerequisites for the exercise of specific jurisdiction over a nonresident defendant..." (Opinion, a14.) Berman has contended that simple logic—to say nothing of case law—shows the requirement to be absurd. Nobody cares what an intentional-tortfeasor's "forum benefit" might be. What matters is harm in the forum State and its intentional direction there. Forum benefits are only applicable to general jurisdiction, contracts and other cases where a defendant definitely seeks some benefit from the State. While a tortfeasor may be seeking a forum benefit, a court's requiring a plaintiff to establish such a benefit negates core principles of specific jurisdiction and lets those

tortfeasors whose motivation is unclear or a mystery off the hook. A plaintiff should not have to play detective or psychologist to establish personal jurisdiction when he has been harmed by intentional actions. And controlling authority from this Court makes that clear.

But as it happened, Defendant Modell *did* in fact seek a benefit from California—that of a conservatorship over Berman's mother in Roseville, CA (at the time of his allegedly tortious activities)—and, as alleged, forced an unlawful economic coercion on Berman to "persuade" him to petition for the conservatorship. Modell, through counsel, finally addressed, in his appellate opposition paper, the alleged coercion. Modell wrote that Berman had "misinterpreted" his emails (Appendix a17), but he acknowledged that they were coercive in that he refused to reimburse Berman unless Berman complied with Modell's demands, which Berman had already done anyway. What *exactly* Modell was demanding in his emails and whether it was unlawful are questions for a trial on the merits, not a jurisdictional inquiry. Modell's own papers established that he desired a California conservatorship and sent emails into California setting forth a coercive trade for Berman's reimbursement. Berman asserted that this established specific jurisdiction regardless of whether some "benefit" requirement existed.

The contradictions created by such a "benefit" requirement in an intentional tort action are manifest and destructive of a State's interest in protecting legitimate activities within its borders

from harm inflicted from external actors. Berman set forth these contradictions and their consequences but to no avail. Berman pointed out that the confusion results in a negation of a cornerstone holding of this Court in Calder v. Jones, 465 US 783 (1984) on long-arm, specific jurisdiction in an intentional-tort action. As quoted infra, this Court specifically rejected (Calder at 789) the very requirement, above, that the Court of Appeal imposed.

The California Supreme Court summarily denied both Berman's petition for review and his contention that the appellate decision warranted publication (per Cal. Rules of Court) because it plainly reversed key holdings of both Calder and Pavlovich v. Superior Court 29 Cal.4th 262, 270 (2002)—the latter mandating that "courts must consider *Calder* [effects] in intentional tort cases." Neither the Superior Court of California nor the Court of Appeal even mentioned Calder or effects or anything else suggesting a consideration of effects. Berman pointed out that had the courts below applied the same requirement to Shirley Jones, as they applied to Berman, Ms. Jones would have had to travel to Florida, contrary to the express holdings in Calder. Such is the extent of the confusion and misapplication of Calder, below.

OPINIONS BELOW

The Order from the California Supreme Court denying review and publication is included in the Appendix (App. a1). The Order from the California Court of Appeal denying publication based on establishment of new law is included in the Appendix

(App. a2). The Opinion from the California Court of Appeal is included in the Appendix (App. A3). A one page excerpt is included in the Appendix (App. a17) from Modell's brief, admitting: 1) that Modell's emails stated his California-conservatorship goal; and 2) it is a matter of interpretation—and thus for a jury—what was the purpose of his demands, e.g. for receipts that had already been provided; a demand in exchange for payment coercive by definition.

JURISDICTION

The California Supreme Court denied review on January 23, 2019. The record before this Court shows that Berman was granted a filing extension until June 22, 2019, a Saturday. This Petition will be mailed Priority Mail on June 24, 2019. The Supreme Court's jurisdiction arises under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall deprive any person of life, liberty, or property, without due process of law."

California Civ. Proc. Code § 410.10 provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

California Civ. Proc. Code § 395(a) provides in relevant part: "[T]he superior court in [] the county where the injury occurs ... is a proper court for the trial of the action."

STATEMENT

I. Jurisdiction Analysis for Intentional Torts

Berman has asserted consistently (this saga has reached this Court twice before at other stages in its "evolution," if that is the appropriate term) that there is a confused misapplication of the specific-jurisdiction standards between intentional-tort cases and other cases. In short, an alleged tortfeasor's "availment" of forum benefits is *irrelevant* to a jurisdictional analysis. It is irrelevant what "benefit" an alleged tortfeasor derives from the forum or any other source. To impose on a plaintiff the burden of showing—or speculating about—what "benefit" a tortfeasor obtains from inflicting harm leads to manifest contradictions that the courts below ignore (e.g. the Calder appellants' "hypothetical welder" argument getting them off the hook, quoted infra).

A forum "benefit" is relevant to doing business, making contracts, and forming other such contacts that a state encourages. A state does not—and should not have to—encourage the interjection of harm into it. But the "benefit" requirement, if it actually existed, most certainly would encourage the interjection of torts from external actors whose motivations cannot be determined and so would escape long-arm jurisdiction, according to the decisions, below.

Also, from a due process standpoint, Berman pointed out that case law does *not* apply a "convenience" or "fairness" test (the third prong in

specific-jurisdiction analysis) to an intentional tort. Once the first two prongs are established for an intentional tort (harm in the forum and intentionality/purposeful-direction), the analysis is over. A defendant's "convenience" is irrelevant if a prima facie case is established that he intentionally aimed harm at activities in the forum State. Calder and other opinions on intentional tort actions do not address the tortfeasor's "convenience." [1]

II. The Pavlovich Opinion

At least some of the obscuration of the distinction between intentional torts and other actions occurs in the seminal California case, Pavlovich v. Superior Court 29 Cal.4th 262 (2002). Berman pointed out, below, that page 335 of Pavlovich begins with the

[1] Complementarily, the opinion's final citation (Elkman) was an irrelevant breach-of-contract case with no intentional direction of harm at issue. The opinion then ended by misstating the "arose from" requirement by leaving out "solely," which Berman's papers below emphasized. Of course this "dispute arose out of" Maryland activities. But not *solely* out of those activities, which is the point. An external tortfeasor's power to direct and inflict harm *must* be external to the forum state; otherwise, there is no long-arm issue in the first place. Berman's dispute *also* arose from Modell's coercive and extortionate (Cal. Pen. 518, rev. and eff. Jan. 1, 2018) emails to Berman's California lawyer where his mother lived, emails that *Modell's counsel admitted* expressed his goal of a California conservatorship. (App. A17.) His counsel stated that Berman "misinterpreted" Modell's emails, and they acknowledged that his emails put coercive demands on Berman. Berman replied: fine, interpretation is for a jury at trial not a prima-facie evidentiary, jurisdictional hearing. Modell thus admitted the first two specific-jurisdiction prongs and that the ultimate (un)lawfulness question of coercion was for a jury, as Berman's Reply below made clear.

standard, generalized and accurate discussion of personal jurisdiction. However, the page-335 discussion then states: "A court may exercise specific jurisdiction over a nonresident defendant ***only if***: (1) "the defendant has purposefully availed himself or herself of forum benefits." (citing Vons Companies, Inc. v. Seabest Foods, Inc. 14 Cal.4th 434, 446 (1996). [Emphasis supplied.]) But the California Supreme Court mis-cited its own opinion, Vons. Vons did not state a necessary condition ("only if") for "availment" at p. 446 or anywhere else. That "purposeful availment" test was only *one* method of establishing specific jurisdiction. Vons, in the succeeding paragraph, quoted this Court in Burger King Corp. v. Rudzewicz 471 U.S. 462, 472 (1985): "a nonresident who has 'purposefully directed' his or her activities at forum residents (citation) ***OR*** who has "purposefully derived benefit" from forum activities..." (Vons 446 [emphasis supplied].)

The "OR" tells the tale, of course. A defendant can subject himself to specific long-arm jurisdiction *either* by: 1) "purposefully deriv[ing] benefit" from the forum State; OR 2) by "purposefully direct[ing] his or her activities" into the State, *such that any "benefit" is irrelevant.* When those directed activities are alleged to be intentionally tortious, it does not matter what "benefit," if any, might be at issue.

Only further down page 335 from its erroneous "only if" requirement, does Pavlovich consider a tort as the basis of specific jurisdiction: "In the defamation context, the United States Supreme Court has described an 'effects test' for determining purposeful availment." But even here, "availment" is

improperly substituted for what should be "direction" in referencing Calder. "Availment" simply cannot be used interchangeably with "direction" and preserve any hope for clarity, as Berman pointed out below, as follows.

Berman quoted Calder to the courts, below, as making that very point on erroneously using "direction" and "availment" interchangeably. Berman wrote that in Calder, the *only* occurrence of the word "benefit" is in the following passage: "Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer [citations omitted] should not be applied to the welder who has no control over and **derives no direct benefit** from his employer's sales in that distant State. Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their **intentional, and allegedly tortious**, actions were expressly aimed at California." (Calder 789.)

Calder explicitly rejected a "benefit" test and limited the test to "intentional, and allegedly tortious actions" causing harmful effects in the forum State. Those are prongs one and two—harm and intentionality. An intentional-tortfeasor's "benefit" and "convenience," are irrelevant.

Likewise, from Walden v. Fiore, 134 S. Ct. 1115 (2014): "A forum State's exercise of jurisdiction over an out-of-state **intentional tortfeasor** must be based on intentional conduct by the defendant that

creates the necessary contacts with the forum." (*Id.* 1123.) And, "The proper focus of the 'minimum contacts' inquiry in intentional-tort cases is "'the relationship among the defendant, the forum, and the litigation.'" " (*Id.* 1126.)

Nowhere in Walden does the term "benefit" occur. Focusing on some "benefit" is an improper focus. "Avail" occurs only on page 1125 in the "unavailing" argument sense. *A defendant's availment of a forum benefit is wholly irrelevant to a jurisdictional analysis for an intentional tort.* For a court to require some "benefit test" in an intentional tort analysis negates the holdings of Calder and Walden. But that is what the courts below required.

So, jurisdictionally *for an intentional tort*, the only issues are: 1) whether harm was properly alleged in the forum State; and 2) whether the harm was intentionally-directed at the plaintiff's activities there. The first ("harm") item establishes proper venue;[2] the second ("intentionality") establishes jurisdiction, given the existence of #1. This follows directly from the Calder effect of "harm suffered in California" (Id. 789) in combination with a defendant's "intentionality." If a plaintiff has not been harmed in the selected forum State, then there

[2] CCP §395(a) provides in relevant part: "[T]he superior court in...the county where the injury occurs...is a proper court for the trial of the action." Likewise for the federal venue statute §1391(b), harm is an "event." See e.g. Myers v. Bennett Law Offices, 238 F. 3d 1068, 1075-6 (9th Circ. 2001) ("On the venue issue ... at least one of the "harms" suffered by Plaintiffs is akin to the tort of invasion of privacy and was felt in Nevada. Accordingly, a substantial part of the events giving rise to the claim occurred in Nevada. Thus, venue was proper.")

has been no relevant tortious "effect" in that State; and the plaintiff must find a state where harm occurred. Venue cannot be proper in a state where the plaintiff has not been harmed. However, venue is immediately established where the plaintiff has been harmed.

III. Modell Did, In Fact, Seek a Benefit

Berman includes a section to repeat and emphasize that Defendant Modell *did* in fact seek a benefit from California—that of a conservatorship over Berman's mother in California.

Modell—as was shown in his own emails *and acknowledged by his own papers filed below*—**was in fact seeking a California benefit**; namely, that Berman "transfer" a Montgomery County Maryland adult guardianship (re: Berman's mother) to a California conservatorship. Modell's desired transfer would have rid him of a matter that he viewed as an albatross around his neck and from which he had attempted to resign, as the ample record below demonstrated.

IV. Ninth Circuit Recognizes the Problem

Berman pointed out, below, that the court in Schwarzenegger v. Fred Martin Motor Co., 374 F. 3d 807 (9th Cir. 2004) essentially hit the nail on the head of this "availment" confusion, but stopped short of calling it "confusion:" "We often use the phrase 'purposeful availment,' in shorthand fashion, to include both purposeful availment and purposeful direction (citations), but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in

contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." (*Id.* 803.)

Shorthand is fine when it is decipherable into the actual meaning of the longhand. But the "shorthand" term "availment" (to avail, of course, means "to utilize," "to take advantage of," etc.) has no applicability to a tortfeasor's intentional direction of harm into the forum State. As Berman wrote to the courts, below: Calder effects is stuck under prong one (of the specific-jurisdiction test) with availment—availment a near opposite of Calder's harmful effects in an intentional tort case. Creating harmful effects in a forum is quite the opposite from availing oneself of benefits from the forum. The first directs harm into. The second takes benefit out-of. The latter is applicable to general jurisdiction and specific jurisdiction involving a contract. The former is applicable to torts. That they are under the same "prong" heading has been a problem borne out in this saga.

The Court in Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F. 3d 1199, 1206 (9th Circ. 2006) was slightly more direct about the confusing/misleading "availment" term. Referencing Schwarzenegger's "shorthand" designation, the Yahoo Court then wrote: "Despite its label, this prong includes both purposeful availment and purposeful direction." The is as close as an opinion comes, in Berman's searching, to calling the "availment" label what it is when applied to an intentional tort—an extremely poor and misleading word choice. Berman and

probably others[3] have been wrongfully denied court jurisdiction because the shorthand "availment" is mechanically applied to every specific jurisdiction question, when it cannot logically be applied to an intentional tort.

In the Court of Appeal opinion, below, "despite" became unseemly *spite* against Berman[4] despite the fact that the opinion completely ignored or missed, among other things, the crucial *and correct* point that Berman set forth *clearly*—on the confusion, poor word-choice, and irrelevancy of "availment of benefits" in an intentional-tort action.

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[3] See e.g. Jensen v. Jensen, 31 Cal. App. 5th 682 (2019), though the opinion misquoted Vons and added the "only if" requirement (Id. 686), its final reasoning appeared to employ "directed:" "her contacts with California were directed toward protecting the best interests of her 'client,'" Id. 688.

[4] It's ok that the opinion called "many of Berman's arguments irrelevant or incomprehensible" when the opinion itself devoted several pages to irrelevant aspects of the procedural history and allegations in the original complaint that were omitted from the FAC and thus extinguished and rendered wholly irrelevant to the operative pleading. What a plaintiff throws into a complaint (and is amended-out) in order to beat what might be a time bar can include any claim against any entity at all. It's called "abundance of caution" when a licensed attorney does it. Also, that Berman had to reply to harebrained arguments from Modell (e.g. that extortion is fine so long as the hostage is later returned unconditionally, so what's the harm? ...and Modell's contentions on residence that are squarely contradicted by Keeton v. Hustler 465 US 770, 780 (1984); "plaintiff's residence ... is not a separate requirement"), consumed a considerable number of Berman's Reply pages. And, as is the crux of this Petition, the opinion completely misapplied an irrelevancy—"availment of forum benefits" — to intentional torts.

REASONS FOR GRANTING THIS PETITION

Berman is under no illusions as to the realities of the disposition of this Petition. But "[t]he right of access to the courts is indeed but one aspect of the right of petition" (California Motor Transport Co. v. Trucking Unlimited, 404 US 508, 510 (1972)); so Berman is simply making a record here. [5]

Berman cannot point to any significant statistics concerning other plaintiffs who have been denied a court's jurisdiction based on an "availment of benefits" requirement for an intentional-tort action. With a rather quick search, there appear to be some

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[5] Also, Berman has Skype conferenced with a member of the California Senate Judiciary Committee on this case and other issues with the court system, including results of a 2005 survey reported by a California Supreme Court Advisory Committee (www.courts.ca.gov/documents/report-1005.pdf). The percentages (shown on p. 27) of California appellate justices who *admit* that "embarrassment" to lawyers and trial judges plays a role in how they decide which cases to publish is an eye opener. Obviously there are those who would not make such an admission. That Cal. Rules of Court were changed, as a result of this survey, to supposedly prohibit "embarrassment" and other similar factors from determining what is the law, should give no comfort to those who see big problems with the system. Berman is not concerned about what is undoubtedly eye-rolling at his Senate project. As noted in his extension filing with this Court, Berman survived three hours in what Santa Fe rescue teams described as the most brutal, icy winds in 50 years hitting Berman directly in the face—Berman with a broken neck, back, shattered ankles and legs. Berman fights every day to relearn how to walk and use his hands they way he used to, and to stay off opioids. Compared with icy wind in the face, eye rolling doesn't bother Berman.

other such plaintiffs in California (a Google Scholar search on "purposefully availed" "only if" (tort OR tortious) and citing to Pavlovich or Vons). Berman cannot process all of the search returns from a wider search at this time; however, there is a May 10, 2019 Fifth Circuit opinion that indicates it is precedential (it has no publication volume information yet, but is available online): Jose Carmona v. Leo Ship Management, Inc., 18-20248 (5th Cir. May 10, 2019). Berman asserts that the Fifth Circuit got it right:

> whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state *or* purposefully availed itself of the privileges of conducting activities there; ... Accordingly, LSM is subject to jurisdiction only if it has purposely directed its activities to the forum state *or* purposely availed itself of its protections. (Id. [emphases supplied].)

Though Berman is also aware of the related Eastern District of California ruling in his own 2013 case,[6] these few data points will not likely qualify as

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[6] In Berman's first two petitions to this Court in this saga (14-195 and 16-7469), he pointed out that the district court in Sacramento (where Berman filed in 2013) ruled that the California venue was both improper *and* inconvenient (under both 28 U.S.C. §1406 *and* §1404) which is impossible because it produces an direct conflict in choice of law, among other reasons. The transferee federal court in Maryland (mis)applied California law to *three of the five* claims due to "events in California." This choice of law showed that Berman was correct all along—that California was a proper venue (otherwise there would be no need to apply California law)—and that California law should have been applied to all claims. Further, that Modell

a Circuit or State "split" for purposes of this Court.

However, Berman notes that neither the Calder nor Walden opinions made any mention of resolving a split; nor (as noted) did they mention any "availment of forum benefits" requirement in those intentional-tort cases. A grant of certiorari here would permit this Court to address California's aberrant imposition of this requirement, directly contrary to Calder and Walden—cases that are unequivocal holdings of this Court on the balance between due process rights and a state's interest in protecting activities within its borders from tortious interjections.

The manifest and irreconcilable contradictions following from California's novel requirement that a plaintiff establish that an external actor derive some "benefit" from his tortious actions make California far out of balance with what is supposed to be a uniform application of the law under the Fourteenth Amendment. Berman submits that a grant of this Petition and resolution of this question would rectify California's out-of-balance condition (assuming California appellate justices who have factored-in "embarrassment" with their decisions actually apply precedent from this Court) and also clarify what may be similar confusion elsewhere.

"To avail" and "to direct" are different concepts and by a wide margin. Berman submits that the

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had stated on the record that he *himself* would be a petitioner in a California court for a conservatorship, if Berman refused to petition, was a manifest statement that California was plenty convenient for Modell when it suited his purposes.

distinction is as clear-cut as it gets and that this Court could easily set the issue straight in a short opinion.

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