

IN THE SUPREME COURT OF OHIO

Prouse, Dash & Crouch, LLP

: Case No. 06-0957

Appellant,

:

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

v.

:

Bruce Anthony Gorcyca, et al.

:

Appellee.

:

MERIT BRIEF OF APPELLANT PROUSE, DASH & CROUCH LLP

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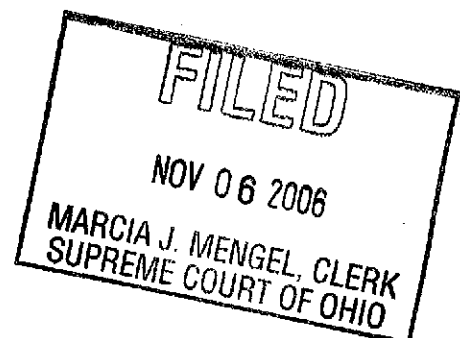


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STATEMENT OF THE FACTS

The primary question to be answered by this appeal is whether a state may exercise personal jurisdiction over a person who purposely does not avail himself to any jurisdiction, but who owns property in the state. In the present case, even though the debtor-Appellees were fleeing prosecution by the United States government, there are uncontested facts indicating that they had sufficient minimum contacts with the state of Ohio for the trial court to exercise jurisdiction over the Appellees' persons.

1. Until the moment they fled the country to avoid criminal prosecution, the Appellees resided in Ohio.

Appellees Bruce Anthony Gorcyca DiMarco (also known by no less than fifteen (15) aliases, including Bernie Schwartz, Albert Ash, Frank Negri, Robert Foley, Stuart Reynolds and virtually every combination of his 4 given names (Supplement 102-103, 191), but referred to herein as "DiMarco") and Ji Hae Linda Yum (also known by numerous aliases, but referred to herein as "Yum") resided in Ohio until they fled to Canada to avoid arrest. (Supplement 107). At all times material, Appellees DiMarco and/or Yum owned a home located at 5810 Gilbert Avenue, Parma, Ohio. (Supplement 26-28, 109-110, 176-179). Both Appellees resided in the Parma, Ohio home for several months before fleeing federal prosecution. (Supplement 100, 102, 107) Appellee DiMarco was an American citizen and had an Ohio driver's license issued in one of his names. (Supplement 100-102). DiMarco also had a bank account in Ohio where he kept money under his deceased mother's name. (Supplement 77-78, Appendix 18).

Furthermore, DiMarco was being sought by the FBI for allegations of stock manipulation. The computers and fax boards from which he committed the alleged crimes by mass faxing false stock tips to countless people were located within the Parma, Ohio home. (Supplement 79-80).

2. **Both DiMarco and Yum hired the Appellant to represent them on a number of legal issues. During the course of this legal representation, Appellant was required to travel to Parma, Ohio to interview witnesses and secure sworn statements, take photographs, secure the Appellees' possessions and home, and perform banking functions for DiMarco at his Ohio bank.**

During the summer of 2000, DiMarco was arrested in Canada at the request of the United States for extradition and immigration related offenses. Yum initially contacted Appellant for civil litigation arising from an alleged assault while DiMarco was in custody. (Supplement 10, 64-65, 94, Appendix 17-18). During the course of the subject representation, Mr. William Gilmour, a barrister and solicitor in Ontario and partner of Appellant, performed additional legal work with respect to DiMarco's extradition proceedings, intellectual property matters and certain commercial projects for Yum and her corporation, Pacific Blue Productions, upon the retainer, instruction, request and payment of fees by Yum. (Supplement 2, 4, 11, 15-19, 36-38, 41-43, 45-49, 52, 62-63, 65-69, 71-78, 92-94, 112, Supplement 116-175, Appendix 18, 19).

As a necessary part of Appellant's defense of DiMarco's immigration detention, Mr. Gilmour was required to travel to Ohio for the purpose of interviewing witnesses in Parma. More specifically, the issue that caused DiMarco to be initially detained by Canadian authorities was that he was alleged to have been in Canada for more than six (6) months without a visa. It was DiMarco's position that he had never been in Canada for six (6) continuous months. DiMarco claimed that he had traveled back to his home in Parma, Ohio during that period. (Supplement 13-14, 95).

Mr. Gilmour traveled to Parma, Ohio to interview DiMarco's neighbors on Gilbert Avenue to prove that DiMarco had returned home as he had alleged. (Supplement 13-14, 95, Appendix 18). Mr. Gilmour also took photographs of a flood that occurred at the house to verify that DiMarco had returned to the home to fix the flooding. (Supplement 13-14, 95). Mr.

Gilmour was also asked to take an inventory of DiMarco and Yum's personal effects in the home and take steps to assure that the home and the possessions were secured.

While in Parma, Mr. Gilmour also performed banking tasks for DiMarco at his local Ohio bank. (Supplement 77-78).

3. **From September of 2000 to 2003, DiMarco consistently represented to Bill Gilmour, Barrister and Solicitor for the Appellant, that the Appellees' account would be secured by the proceeds of the Dimarco home in Parma. Relying upon these representations, from September 2000 to 2003, Mr. Gilmour continued to represent the Appellees, including the performance of professional services within the State of Ohio, despite the fact that he was unpaid for over 90% of the value of the services rendered and billed.**

The Appellant Prouse, Dash & Crouch LLP, is a Canadian law firm which performed extraordinary amounts of legal work on behalf of Appellees DiMarco and his wife, Appellee Yum. (Supplement 79-82, 90-99, Appendix 17-19) During the attorney-client relationship between the Appellant and both Appellees, Appellant and/or Mr. Gilmour issued sample invoices and permanent invoices. (Supplement 21-25, 100, 116-175)

Under Canadian law, Appellant is responsible for paying sales tax on services provided and costs advanced, as well as income tax, **at the time of permanent invoicing**, not upon collection. (Supplement 5-9) Appellant issued three permanent invoices to Appellees dated approximately May 23, 2001, June 25, 2002 and January 29, 2004. (Supplement 116-175). At no time have Appellees disputed the invoices or the amount or quality of the legal work performed. (Supplement 82-90 Appendix 22-23).

The legal fees accumulated, and payments by DiMarco and Yum bounced or were not made at all. (Appendix 18). Eventually, Appellant requested that DiMarco and Yum furnish security for their mounting legal fees. (Supplement 62-63) DiMarco and Yum assured Appellee that their debt would be paid and pledged that payment would derive from the real property

located in Parma, Ohio. (Supplement 61-62, 98-99, Appendix 19). However, DiMarco never furnished Appellant with a written mortgage.

At the time of the final invoice, Appellees owed Appellant Two Hundred Fifty Thousand Eight Hundred Seventy Five and 71/100 Canadian dollars (\$250,875.71) in legal fees and disbursements, which Appellees have refused to pay. (Supplement 116-175, Appendix 20).

4. DiMarco and Yum availed themselves to Ohio's jurisdiction by fraudulently conveying the Ohio property to avoid creditors and government attachment.

While DiMarco had represented to Mr. Gilmour that the property belonged to him and continually referred to it as "my house in Parma" (Appendix 19), Appellant later learned that said property had been transferred from DiMarco to his wife, Yum on June 15, 1999 and recorded on July 27, 1999. (Supplement 26-32, 59-63, 176-179, Appendix 23-25). No consideration was given for this transfer. This fraudulent transfer occurred to avoid attachment of the real property by (1) the child support enforcement agency because DiMarco owed over \$100,000 in child support to his former wife (Supplement 26-32, 59-63, 176-179, Appendix 23-25) and (2) the FBI in relation to FBI the Securities and Exchange Commission investigation of DiMarco in late July 1999 and subsequent default judgment of August 11, 2000 (Supplement 26-32, 59-63, 176-179, 181, Appendix 23-25, Appendix 23-25.)

5. Appellant sued DiMarco and Yum. The trial court, after a bench trial, issued findings of fact and rendered judgment for the Appellants against both DiMarco and Yum.

Appellant filed suit against the Appellees in the Cuyahoga County Court of Common Pleas on April 11, 2003, alleging breach of contract, fraud, and fraudulent transfer of real property. Service was obtained upon both Yum and DiMarco. Judge Janet Burnside, of the Cuyahoga County Court of Common Pleas held a bench trial, for which DiMarco failed to appear.

On March 31, 2005, entered judgment against both Appellees for breach of contract and fraudulent transfer and awarded the Appellant the amount of \$206,342.07 USD (The Two Hundred Fifty Thousand Eight Hundred Seventy Five and 71/100 Canadian dollars (\$250,875.71) converted to American dollars). In its Judgment Entry for the Appellant, the Trial Court made the following specific findings of fact that pertain to jurisdictional issues of this case:

Plaintiff appeared through one of its partners with counsel; Defendant Bruce DiMarco did not appear in person but did appear through counsel, as he was unable to return to the jurisdiction of the Court as a result of his wanted status in the United States as a fugitive. The Court ruled that the fugitive status of this Defendant did not make him unavailable to appear as a matter of law. Defendant Linda Yum DiMarco, his spouse, did appear in person on the last day of trial.

During the summer of the year 2000, Defendant Bruce DiMarco was apprehended by Canadian authorities in the Province of Ontario, Canada upon the request of the United States of America for his extradition to face stock manipulation and wire fraud charges. At the time of his arrest Bruce DiMarco was carrying on business ostensibly as an internet web page designer. **He was an American citizen, had no employment visa in Canada and had not been continuously in Canada for more than six (6) months.**

In fall, 2000 Mr. Dash of Plaintiff's firm was contacted by the Defendant Linda DiMarco seeking representation of her husband. The initial consultation was with respect to an assault that Bruce DiMarco allegedly suffered while in custody.

Because of his police background and upon consultation with an attorney named Drukarsh, Plaintiff's former counsel, Mr. Gilmour of Plaintiff's firm represented Defendant Bruce DiMarco. In representing Defendant Bruce DiMarco, Gilmour issued a

statement of claim, **traveled to Cleveland, Ohio to interview witnesses and take photographs**, and traveled to Brooklyn, New York to meet with the Assistant United States Attorney in an effort to negotiate resolution of Defendant Bruce DiMarco's extradition issues. Gilmour completed all of these tasks for a price agreed for the enumerated tasks and then continued to undertake representation on new issues upon the request of Defendant Bruce DiMarco and his wife.

During the course of the representation, all payments to Plaintiff were made by Defendant Linda DiMarco, or by check drawn on her solely owned corporation Pacific Blue Productions, Inc., with the exception of three (3) payments: a check in the amount of \$5,000.00 which was delivered, purportedly by on Chuck Arnold, but later dishonored; the net amount of \$2,500.00 from an account jointly held by Defendant Bruce DiMarco with his deceased mother; and an initial retainer of a \$2,500.00 check more or less delivered by Defendant Linda DiMarco but issued by Linda DiMarco's mother.

During the course of representation, the Plaintiff firm performed the initial tasks, and Gilmour successfully defended Bruce DiMarco on a Breach of Recognizance charge arising from Bruce DiMarco's attendance at a sex show to market the sex cream of Pacific Blue Productions, Inc. Gilmour also testified at the immigration bail hearing of Defendant Bruce DiMarco; conducted his defense at the extradition hearing; brought motions to procure incarcerated witnesses' attendance at a Habeas Corpus application (although brought by Defendant Bruce DiMarco against the advice of Gilmour); researched, prepared, bound and submitted voluminous submissions to the Minister of Justice; perfected an appeal to the Court of Appeals for Ontario; and appeared on various occasions at the Ontario Court of Appeals to speak to the motion of Defendant Bruce

DiMarco when he resisted Plaintiff's withdrawal from representation due to the Defendant's failure to pay for services rendered.

In addition to the foregoing, Gilmour, as a partner in the Plaintiff firm, assisted the Defendants with certain business enterprises including, but not limited to, projects undertaken by Defendant Linda DiMarco through her Pacific Blue Productions Inc. to promote and sell a series of sex enhancing products, bubble tea, and basalt composite materials.

At all material times Defendant Bruce DiMarco represented that Plaintiff could be paid from the proceeds of his mothers house which Bruce DiMarco referred to as "my house" in Parma, Ohio. At Defendant's request Gilmour visited the house in Parma on a number of occasions including to inventory and photograph a doll collection left to the Defendants by Bruce DiMarco's mother. Defendants considered selling the collection to pay legal fees.

When the account of the Defendants reached such a level as to concern Gilmour's partners, Gilmour requested a mortgage on the said Parma property to secure eventual payment of the account. The Defendants refused to provide such security or to make reasonable arrangements to pay the outstanding accounts for service.

There are presently outstanding unpaid invoices totaling \$250,785.71 in Canadian dollars owed to Plaintiff by the Defendants for services rendered and disbursements incurred, this after crediting Defendants for amounts previously paid.

The Plaintiff brings suit in Ohio where the Parma property is situated along with the doll collection and various other chattels which, to the information of the

Plaintiff, constitute the only significant assets upon which to execute and pay a judgment obtained against Defendants.

This Court has ruled that it has *in rem* jurisdiction over the Defendants in that the Defendants own property located in Cuyahoga County, Ohio.... (Appendix 17-20)

The contract was formed and substantially performed in Ontario *with significant services performed in Ohio*. (Emphasis added) (Appendix 22).

Thereafter, the Eighth District Court of Appeals overturned the trial court and voided the judgment against the Appellees on the sole ground that the trial court did not have personal jurisdiction over DiMarco or Yum.

While the uncontroverted facts at trial in this case point strongly to both DiMarco and Yum having established minimum contacts with the state of Ohio, the legal issues presented by this case will help define the procedural limits of due process for plaintiffs bringing civil suits against Ohio property owners that flee law enforcement. The fact pattern in this case is not uncommon. People flee from prosecution regularly. Often they are property owners. Because they cannot return to the state, they will hire people outside of the state to fix their problems. The witnesses and evidence to fix these problems will be located in Ohio. Often, the fleeing persons will not own property outside of Ohio and will not establish permanent residence while they are on the run. The holding of the Eighth District means that these fleeing persons cannot be sued anywhere, and that they can continue to victimize people without any civil recourse. Due process is not furthered by this result. By accepting this appeal, the Court has the opportunity to eliminate this erroneous and unjust result, to define the limits of due process under Article I, Section 1 of the Ohio Constitution, and eliminate confusion and inconsistent results in the Ohio lower courts.

ARGUMENT

Proposition of Law No. I:

Ohio Courts Have Personal Jurisdiction Over Persons Who Are Ohio Residents But, At the Time of the Institution of Litigation or Service of Process, Are Absent from the State. Ohio Courts Do Not Lose Jurisdiction Because Such Persons Leave the State or Temporarily Reside Elsewhere.

This case has exposed gaps in the statutes and case law conferring jurisdiction to Ohio courts, to wit:

1. The terms “Resident” and “Nonresident,” while used in the Ohio Long-arm Statute and jurisdictional case law, have not been defined in the context of Ohio jurisdictional inquiry; and
2. There is no test as to when an Ohio resident who leaves the state becomes a nonresident for the purposes of Long-arm Statute inquiry.

These loopholes have been exposed in the present case because the Appellees, who arguably resided in Ohio, fled their Ohio home, the state and country to avoid prosecution, and the Court of Appeals held that Ohio courts could not exercise personal jurisdiction over them.

The Long-arm statute does not apply to Ohio litigation involving Ohio residents. The Court of Appeals incorrectly focused its jurisdictional analysis upon the Ohio Long-Arm Statute and case law when the record indicated the Appellees were likely Ohio residents at all times material.

Ohio Revised Code §2307.382 provides in relevant part:

- (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:...
(Emphasis added).

Ohio Revised Code §2307.381 further provides:

As used in sections 2307.381 [2307.38.1] to 2307.385 [2307.38.5], inclusive, of the Revised Code, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this state. (Emphasis added).

There is presently no legal or factual standard for determining whether a person is a "nonresident" of Ohio as contemplated by the Long-arm Statute. It is important for this Court to establish what "nonresident" (as used in RC §2307.381) means so that Ohio Courts can predictably determine whether RC §2307.382 applies to any given scenario.

So, what is a "Resident" and does the present set of facts subject the Appellees to Ohio jurisdiction without invoking the Long-arm Statute? The Courts of Appeal in Ohio, in limited other contexts, have created conflicting definitions and have found that the word "resident" is ambiguous. Further, the conflicting definitions within the Ohio Revised Code are limited to particular fact situations. For example, statutory definitions of "Resident" are found in the driver's license and education statutes, but each of these definitions are expressly limited by statute to not be equated with the use of the term elsewhere in Ohio law. RC §4507.01; RC §3333.31; RC §3337.14.

Most Ohio case law that deals with the definition of "Resident" is found in the area of insurance. While the definition of "Resident" with respect to insurance contracts is usually particularized to the specific defining language found within each insurance contract, the analysis by the Eleventh District Court of Appeals in *Prudential Prop. & Cas. Ins. Co. v. Koby* (11th Dist., 1997), 124 Ohio App. 3d 174, 177 705 N.E.2d 748, 749, where "resident" was not defined in the policy, shows that the Courts of Appeal in Ohio are conflicted as to the meaning of the word.

In *Prudential Property & Cas. Ins. Co. v. LaMarr* (1993), 92 Ohio App. 3d 331, 334, 635 N.E.2d 63, the court stated:

"When construing undefined words in an insurance policy, a court must give the words used in the contract their plain and ordinary meaning. *State Farm Auto Ins. Co. v. Rose* (1991), 61 Ohio St. 3d 528, 531, 575 N.E.2d 459 ***. Black's Law Dictionary (5 Ed.Rev. 1979) defines 'resident' as 'a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less, duration.'"

The word 'resident' as used in the phrase 'resident of your household' refers to one who lives in the home of the named insured for a period of some duration or regularity, although not necessarily there permanently, but excludes a temporary or transient visitor." *Farmers Ins. of Columbus, Inc. v. Taylor* (1987), 39 Ohio App. 3d 68, 70, 528 N.E.2d 968.

"The word 'residing' is an ambiguous, elastic, or relative term, and includes a very temporary, as well as a permanent abode[.]" *Continental Ins. Co. v. McKain* (E.D.Pa. 1993), 820 F. Supp. 890, 894-895. Another court has opined:

"The words 'resident,' 'residence' and 'residing' have no precise, technical and fixed meaning applicable to all cases. *** 'Residence' has many shades of meaning, from mere temporary presence to the most permanent abode. *** It is difficult to give an exact or even satisfactory definition of the term 'resident,' as the term is flexible, elastic, slippery and somewhat ambiguous. *** Definitions of 'residence' include 'a place of abode for more than a temporary period of time' and 'a permanent and established home' and the definitions range between these two extremes ***. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection. ***." (Citations omitted.) *Great Am. Ins. Co. v. Allstate Ins. Co.* (N.C.App. 1986), 78 N.C. App. 653, 338 S.E.2d 145, 147.

Some courts say that being a "Resident" means something more permanent in nature. Some courts say that it can be very temporary. Regardless, this ambiguous word needs a clear definition from this Court in the Long-arm Statute context because it is a trigger invokes the state's right to exercise dominion over persons outside of the state.

The other question that requires answering is when an Ohio resident ceases to be an Ohio resident so as to invoke RC §2307.382. This question cuts to the heart of the issue in this case: Do Ohio residents become nonresidents under RC §2307.381 when they go on the lamb? Clearly the Ohio legislature did not intend to protect criminally charged residents by denying

victims the right to sue them in their home state when they disappear. After all, if law enforcement cannot track down the persons, why should their victims be required to?

In the present case, Appellees were Ohio residents at all times material. At the trial of this case, Appellee Yum testified that she and DiMarco resided at the Parma home for many months immediately prior to leaving for Canada:

Q: And are you the spouse of Bruce DiMarco?

A: Yes, I am.

Q: Bruce, Tony DiMarco?

A: Yes.

Q: Where do you reside?

A: 610 Kedleston Way, Mississauga, Ontario.

Q: Where did you reside before that?

A: In Ohio, at 5810 Gilbert.

Q: How long did you reside there?

A: I don't know the exact, but for many months.

(Supplement 107).

DiMarco had an Ohio driver's license (Supplement 100-102) and pursuant to RC §4507.01 et seq., could not have been issued such a license without being an Ohio "resident" or "temporary resident." DiMarco also had an Ohio bank account jointly held by himself and his deceased mother. (Supplement 77-78, Appendix 18).

With respect to the Appellees' anticipated position that they are Canadian residents, the Trial Court found that DiMarco was an American citizen, that neither Appellant had a work visa in Canada, and that they were present in Canada less than six (6) months at the time they

contracted with Appellant. (Supplement 13-14, 95, Appendix 18). In fact, when DiMarco and Yum first met with Mr. Gilmour, DiMarco was imprisoned because he overstayed his six (6) month welcome in the country. (Supplement 13-14, 95) Therefore, regardless of whether the Appellees' intended to remain in Canada, they cannot be said to be Canadian residents when they are not legally permitted to stay there.

Because the Appellees are Ohio residents, the Cuyahoga County Common Pleas Court had the right to exert personal jurisdiction over them. Service was obtained on the Appellees, and Ohio Civ.R. 4.3 permits service of process over Ohio residents that, at the time of the commencement of litigation or service of process, are absent from the state. Civ.R. 4.3 provides in relevant part:

(A) *When service permitted.* --Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state...

It logically follows that service of process upon a person could not be permitted if the Ohio Courts did not first have jurisdiction over the person.

Accordingly, Appellant believes that this Court should (1) define the term "nonresident" as it is used in RC §2307.381, (2) define when a resident becomes a nonresident under RC §2307.381, (3) find that DiMarco and Yum were Ohio residents, and (4) overturn the Court of Appeals and reinstate the Trial Court's judgment in this matter.

Proposition of Law No. II:

Ohio Courts May Exert Personal Jurisdiction Over Nonresident Defendants If The Nonresident Defendants Have Either Established Minimum Contacts With The Forum State, Or If They Satisfy The Elements Of The Long-Arm Statute.

Even if this Court finds that the Appellees are nonresidents of Ohio, the Trial Court had the right to exert personal jurisdiction over the Appellees.

As a preliminary matter, there is a conflict between two (2) of this Court's decisions and RC §2307.382(C) that that requires clarification in the present case. Regardless of how the conflicts are resolved, Ohio courts properly exerted personal jurisdiction over DiMarco and Yum.

This Court, in *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232, 235, stated:

When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state's "long-arm" statute and the applicable Civil Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution. *U.S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048, 1051. (Emphasis added)

* * *

Under the second step of the personal jurisdiction analysis, a state court may assert personal jurisdiction over a nonresident defendant if the nonresident possesses certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *U.S. Sprint, supra*. The constitutional touchstone is whether the nonresident defendant purposefully established "minimum contacts" in the forum state; purposeful establishment exists where, inter alia, the defendant has created continuing obligations between himself and residents of the forum. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528; *Kentucky Oaks Mall v. Mitchell's Formal Wear* (1990), 53 Ohio St. 3d 73.

The "And, if so" indicates that both the elements of the Long-arm Statute and minimum contacts must be satisfied to establish personal jurisdiction over a nonresident defendant.

However, the language of RC §2307.382(C) appears to contradict the need for both elements to be satisfied:

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him. (Emphasis added).

The highlighted language of this statute section implies that there are instances that personal jurisdiction over a nonresident defendant may be exerted when the Long-arm Statute only applies or when it may not apply, thereby indicating that *either* the Long-arm Statute, *and/or* minimum contacts can establish personal jurisdiction. This implication is further supported by the Ohio Supreme Court's words in *United States Sprint Communications Co. P'ship v. K's Foods*, (1994) 68 Ohio St. 3d 181, 186:

The language in R.C. 2307.382(C) limiting causes of action against a defendant to those "arising from acts enumerated in this section" applies only when "jurisdiction over a person is based solely upon this section." Because of Mr. K's continuous and systematic contacts with the state of Ohio, we do not base our decision solely upon Ohio's "long-arm" statute but also upon a due-process, minimum-contacts analysis discussed infra. Thus we find that R.C. 2307.382(A)(1) authorizes an Ohio court to exercise personal jurisdiction over a foreign corporation in order to settle the unpaid long distance telephone service bills owed to another nonresident when a significant number of the charges arose in Ohio and goods were shipped into the state as a result. Moreover, we hold that R.C. 2307.382(C) is not a bar to permitting the court from adjudicating the related unpaid long distance telephone bills that did not arise in Ohio. (Emphasis added).

The language in *U.S. Sprint* and RC §2307.382(C) seem to indicate that the Long-arm Statute and Minimum Contacts standards may be disjunctive rather than conjunctive, whereas the *Christiansen* language states that they are conjunctive rather than disjunctive. While Appellant believes that the facts of this case satisfy both tests, this apparent conflict of the laws should be resolved by this Court to help avoid future confusion in the Courts. Appellant believes that this Court should accept the proposition of law that Ohio Courts may exert personal jurisdiction over nonresident defendants if the nonresident defendants have either established minimum contacts with the forum state, or if they satisfy the elements of the Long-Arm Statute.

Proposition of Law No. III:

A Nonresident Defendant May Establish Minimum Contacts With The Forum State With One Single Act If That Single Act Creates A Substantial Connection With The Forum State.

The Ohio Supreme Court in *Ky. Oaks Mall Co. v. Mitchell's Formal Wear* (1990),

53 Ohio St. 3d 73, 77 defined "Minimum Contacts:"

[A] nonresident defendant has purposefully established minimum contacts " * * * where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State * * * where the defendant 'deliberately' has engaged in significant activities within a State * * * or has created 'continuing obligations' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well." (Citations omitted). Furthermore, minimum contacts are satisfied when the defendant foreseeably causes injury in the forum state if " * * * the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." * * * (quoting *World-Wide Volkswagen Corp. v. Woodson* [1980], 444 U.S. 286, 297).

* * *

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these 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.' * * * Thus courts in 'appropriate cases[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.' * * * These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. * * * On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. (Citations omitted).

The Ohio Supreme Court in *United States Sprint Communications Co. P'ship v.*

Mr. K's Foods, (1994) 68 Ohio St. 3d 181, 188 further explained why the Minimum

Contacts standard has been used to establish personal jurisdiction over nonresident defendants separately and distinctly from the state's Long-arm Statute:

This concept of minimum contacts serves two functions. First, it protects the nonresident defendant "against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, 498. Second, it ensures that the states do not encroach on each other's sovereign interest. *Id.*

* * *

Following the minimum-contacts inquiry, in appropriate cases the court must also evaluate both the burden on the defendant of litigating in a distant forum and the interest of the forum state in settling the dispute. *Burger King Corp., supra*, 471 U.S. at 477, 105 S.Ct. at 2184, 85 L.Ed.2d at 543. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477, 105 S.Ct. at 2184, 85 L.Ed.2d at 543-544. However, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." (Citation omitted.) *Id.* at 474, 105 S.Ct. at 2183, 85 L.Ed.2d at 541. *United States Sprint Communications Co. P'ship v. K's Foods*, (1994) 68 Ohio St. 3d 181, 188.

The Ohio Supreme Court in *Fallang v. Hickey* (1988), 40 Ohio St. 3d 106, 107 further indicated that a nonresident defendant must satisfy a burden of proof in establishing that the forum state does not have the right to exert personal jurisdiction:

The United States Supreme Court has indicated that a high degree of unfairness is required to erect a constitutional barrier against jurisdiction. See *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 774; *Calder v. Jones* (1984), 465 U.S. 783.

There was another statement of law regarding the quantity of contact by the nonresident defendant to the forum state set forth by the Ohio Supreme Court in *Fallang v. Hickey* (1988), 40 Ohio St. 3d 106, 107 that the Ohio Courts of Appeal have not always chosen to follow:

If it creates a "substantial connection" to the forum state, a single purposeful contact is enough to satisfy the requirements of due process.

Citing *McGee v. International Life Ins. Co.* (1957), 355 U.S. 220, 223; *Hanson v. Denckla* (1958), 357 U.S. 235, 253; *International Shoe Co.*, *supra*, at 317; *Thompson v. Chrysler Motors Corp.* (C.A. 5, 1985), 755 F. 2d 1162, 1172; *Brown v. American Broadcasting Co.* (C.A. 4, 1983), 704 F. 2d 1296, 1302; *Brown v. Flowers Industries, Inc.* (C.A. 5, 1982), 688 F. 2d 328, certiorari denied (1983), 460 U.S. 1023; *Paolino v. Channel Home Centers* (C.A. 3, 1981), 668 F. 2d 721; *Vencedor Mfg. Co. v. Gougler Industries, Inc.* (C.A. 1, 1977), 557 F. 2d 886, 889-892; and *Southern Machine Co. v. Mohasco Industries, Inc.* (C.A. 6, 1968), 401 F. 2d 374, 380-381.

Unfortunately, the appellate courts of Ohio have failed to agree as to whether a single act may be enough. In 2000, the Ninth District, Summit County, of the Court of Appeals declined to adopt the “single act” rule of the federal courts in its decision in *Military Supply v. Reynosa Construction*, 2000 WL 109783 (Ohio App. 9 Dist., 2000). On the other hand, in 2005, the Tenth District, Franklin County, recognized that a “single act” is sufficient in *Benjamin v. KPMG Barbados*, 2005 WL 995589 (Ohio App. 10 Dist., 2005), 2005 Ohio 1959: “In contrast with general jurisdiction, specific jurisdiction may be premised upon a single act of the defendant.”

Notwithstanding the uncertainty in Ohio, the trend in the case law throughout many jurisdictions in the United States is towards recognition of the principle that a single act may be enough to meet the test of “transacting business” in a state, depending on the circumstances. In fact, in the State of New York, the courts have found that, under particular circumstances, a single transaction is enough to support a finding of “transacting business” - even where the defendant never physically entered the state: *Opticare Acquisition Corp. v. Castillo* (2005), 25 A.D.3d 238, 243. (This principle is

derived from the following cases: *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467; *George Reiner & Co. v. Schwarz*, 41 N.Y.2d 648, 651-652; *Parke-Benet Galleries v. Franklyn*, 26 N.Y.2d 13, 16-17; *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 456; *Eswing Mfg. Co. v. Singer*, 382 U.S. 905; *Deutsche Bank Sec. v. Montana Bd. Of Inves.*, 21 A.D.3d 90.) Similarly, in the District of Columbia, the courts have recognized that a “single act may be sufficient to constitute transacting business”: *Mouzavires v. Baxter* (1981), D.C.App. 434 A.2d 988, 992; *Bueno v. La Compania Peruana* (1977), D.C.App., 375 A.2d 6, 9. Courts in other states have recognized this rule as well: *Ahadi v. Ahadi* (2001), Tex.App.Corp.Chr., 61 S.W.3d 714, 719 (pet. denied); *Exito Electronics. v. Trejo* (2005), Tex.App.Corp.Chr., 166 S.W.3d 389.

Where the Courts have declined to follow the “single act” rule, as in *Kisak v. Wheeling Park Commission* (2005), Pa. Sup. Ct., 898 A.2d 1083, 1086, this usually stems from the reasoning that: “a single act is not enough” and “each case must depend on its own facts”: *Shambe v. Delaware and Hudson Railroad Company* (1927), 288 Pa. 240, 246. However, contextual reasoning, sensitive to the facts of each particular case, is at the heart of the approach adopted by the majority of the courts, in that: “a single act *may* be enough depending upon the circumstances” [Emphasis added]. The majority of courts have taken the contextual approach to the “single act” rule because it allows the courts maximum flexibility to evaluate the issue on a case by case basis (rather than through the rigid determinism of the “single act is never enough” approach). Given that the Ohio Courts of Appeal are arriving at conflicting decisions on this issue, Appellant believes that the majority view should be adopted by the Supreme Court of Ohio.

Regardless, the Trial Court had grounds to exert personal jurisdiction over DiMarco and Yum, and its judgment entry should be reinstated.

A. **The Trial Court could have properly exerted personal jurisdiction over DiMarco and Yum because they had established minimum contacts with Ohio.**

If the Court determines that DiMarco and Yum are nonresidents of Ohio in this case, it should still find that Ohio has personal jurisdiction over the Appellees.

In the present case, DiMarco is a criminal on the run. He is purposely not availing himself to any jurisdiction. His wife, Yum, is following her criminal husband. DiMarco and/or Yum own real and personal property in Ohio. They hired Appellant, a Canadian law firm, to handle matters in Ohio, other states and in Canada. Appellant performed significant amounts of service and did not get paid. Appellant thereafter sued the Appellees where they own property, as it was the strongest connection that the Appellees had to any forum anywhere.

The fact pattern in this case is not uncommon. People flee from prosecution regularly. Often they are property owners. Because they cannot return to the state, they will hire people outside of the state to fix their problems. The witnesses and evidence to fix these problems will be located in Ohio. Often, the fleeing persons will not own property outside of Ohio and will not establish permanent residence while they are on the run. The holding of the Eighth District means that these fleeing persons cannot be sued anywhere, and that they can continue to victimize people without any civil recourse. Due process is not furthered by this result.

DiMarco and Yum established minimum contacts in Ohio. They both have been the titled owner of the real property in Parma, Ohio. (Supplement 176-179). The criminal tools they used to commit their stock manipulation frauds on the American people were house in that property. (Supplement 79-80). DiMarco had an Ohio driver's license. (Supplement 100-102).

DiMarco had an Ohio bank account. (Supplement 77-78, Appendix 18), DiMarco and Yum hired Appellant to specifically have Bill Gilmour travel to the Ohio property, take pictures, secure witness statements, and perform Ohio banking tasks. (Supplement 13-14, 77-78, 95, Appendix 18-19). Further, DiMarco and Yum promised that their debt to Appellant would be paid from the proceeds of the sale of the Parma, Ohio real and personal property. (Supplement 61-62, 98-99, Appendix 19). Based upon this promise, Appellant continued to perform as the Appellees' attorney (Supplement 61-62, 98-99, Appendix 19).

Appellant anticipates that the Appellees will argue that only some of the services provided by Appellant were provided in Ohio, and that most were provided elsewhere. This argument was rejected in *United States Sprint Communications Co. P'ship v. Mr. K's Foods*, (1994) 68 Ohio St. 3d 181. In that case, which is analogous to the present facts, Mr. K's Foods incurred telephone bills in multiple states for which it did not pay. Sprint sued for breach of contract on all of the invoices in Ohio. In holding that Mr. K's had minimum contacts with Ohio, the Ohio Supreme Court reasoned:

An interesting aspect of this case that compels Ohio jurisdiction is the nature of the causes of action. We are not dealing with defective goods being shipped into the state by nonresidents. Instead, the court is presented with several causes of action between two nonresidents regarding unpaid long distance telephone accounts -- six of these arose in Ohio, eleven did not. The subject of the breach of contract is the unpaid long distance charges themselves. It is significant that the seventeen causes of action arose from the mode of communication used by Mr. K's Foods to solicit business. Aside from points of origination and destination, the telephone service of all seventeen delinquent accounts is indistinguishable. If these claims are not permitted to be litigated in one forum, the parties would be forced to relitigate virtually the same facts and circumstances in several forums, possibly with different outcomes. It is the very nature of and the factual similarity among all seventeen causes of action that give rise to the court's interest in litigating them all in one forum. See *Chambers v. Merrell-Dow Pharmaceuticals, Inc.* (1988), 35 Ohio St.3d 123, 519 N.E.2d 370.

Similarly, in the present case, the Court is presented with several causes of action between two nonresidents regarding unpaid legal bills -- some of the charges arose in Ohio, some

did not. The subject of the breach of contract is the unpaid legal fee charges themselves. It is significant that the causes of action arose from DiMarco and Yum's solicitation of Appellant to go to Ohio to take witness statements, secure their Ohio property and perform Ohio banking tasks. Aside from points of origination of the legal services and destinations Mr. Gilmour traveled to at the direction of DiMarco and Yum, the legal services billed on all invoices is indistinguishable. If these claims are not permitted to be litigated in one forum, the parties would be forced to relitigate virtually the same facts and circumstances in several forums, possibly with different outcomes. It is the very nature of and the factual similarity among all causes of action that give rise to the court's interest in litigating them all in one forum.

Because Appellees established minimum contacts with Ohio, this Court should determine that the Trial Court had personal jurisdiction over DiMarco and Yum, without further inquiry, and should reinstate the Trial Court's judgment entry.

B. The Trial Court properly exerted personal jurisdiction over DiMarco and Yum pursuant to RC §2307.382(A)(1), (2), (7), and (8).

If the Court determines that DiMarco and Yum are nonresidents of Ohio and that minimum contacts must be considered conjunctively with the Ohio Long-arm Statute, it should still find that Ohio has personal jurisdiction over the Appellees.

Ohio Revised Code §2307.382, the Ohio long-arm statute, provides, in relevant part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state...
- (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
- (8) Having an interest in, using, or possessing real property in this state;...

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Additionally, Appellant obtained personal service on DiMarco and Yum pursuant to Ohio Civ.R. 4.3, which similarly provides:

(A) *When service permitted.* --Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. 'Person' includes an individual ... who ... has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's: ...

- (1) Transacting any business in this state;...
- (6) Having an interest in, using, or possessing real property in this state...
- (10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is guilty of complicity.

The record in this case shows that the Trial Court had personal jurisdiction over DiMarco and Yum because each of the cited provisions of the Long-arm Statute were satisfied and the causes of action arose from those cited sections.

1. **DiMarco and Yum "Transacted Business" in Ohio.**

The Ohio Supreme Court in *Kentucky Oaks Mall v. Mitchell's Formal Wear* (1990), 53 Ohio St. 3d 73, 75 stated:

It is clear that R.C. 2307.382(A)(1) and Civ. R. 4.3(A)(1) are very broadly worded and permit jurisdiction over nonresident defendants who are transacting any business in Ohio. "Transact," as defined by Black's Law Dictionary (5 Ed. 1979) 1341, " * * * means to prosecute negotiations; to carry on business; to have dealings * * *. The word embraces in its meaning the carrying on or prosecution of business negotiations but **it is a broader term than the word 'contract' and may involve business negotiations which have been either wholly or partly brought to a conclusion * * *.**" (Emphasis added.)

In *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232, 235, the Ohio Supreme Court further explained:

The complementary provisions of Ohio's "long-arm" statute, R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1), authorize a court to exercise personal jurisdiction over a nonresident defendant and provides for service of process to effectuate that jurisdiction when the cause of action arises from the nonresident defendant's "[t]ransacting any business in this state[.]" Because the [t]ransacting any business" phrase is so broad, the statute and rule have engendered cases which have been resolved on "highly particularized fact situations, thus rendering any generalization unwarranted." *U.S. Sprint, supra*, 68 Ohio St.3d at 185, 624 N.E.2d at 1052, quoting 22 Ohio Jurisprudence 3d (1980) 430, Courts and Judges, Section 280; see, also, *Wayne Cty. Bur. of Support v. Wolfe* (1991), 71 Ohio App.3d 765, 769, 595 N.E.2d 421, 424 ("test for minimum contacts is not susceptible to mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present").

The term "transact" as utilized in the phrase "[t]ransacting any business" encompasses "to carry on business" and "to have dealings," and is "broader * * * than the word "contract"." (Emphasis deleted.) *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477, 480.

In the factually analogous case of *United States Sprint Communications Co.*

P'ship v. Mr. K's Foods, (1994) 68 Ohio St. 3d 181, 185, the Ohio Supreme Court stated:

The subject of this suit is the breach of contract between U.S. Sprint and Mr. K's Foods due to unpaid telephone accounts for long distance charges made in Ohio and elsewhere.

From this record it is abundantly clear that Mr. K's Foods was "transacting any business in this state" within the plain meaning of R.C. 2307.382(A)(1).

Similarly, in this case, the subject of this suit is the breach of contract between Appellees and Appellant due to unpaid accounts for legal services provided in Ohio and elsewhere. RC §2307.382(A)(1) and (2) and Civ.R. 4.3(A) (1) and (2) were satisfied because while DiMarco was incarcerated in a Canadian prison for immigration offenses, he hired Appellant specifically to travel to the Parma home, to take witness statements in Ohio, to perform banking tasks in Ohio, to photograph the Parma home and to take an inventory and secure the Parma home's contents. (Supplement 13-14, 77-78, 95, Appendix 18). Accordingly, this Court should find it "abundantly clear" that DiMarco

and Yum were "transacting any business in this state" within the plain meaning of R.C. 2307.382(A)(1), and that the Trial Court's judgment entry should be reinstated.

2. **DiMarco and/or Yum caused tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.**

In the present case, DiMarco is fleeing prosecution with crimes involving stock manipulation and fraud. DiMarco and/or Yum mass faxed false "insider" stock tips regarding stock (or options) that he owned to millions of people for the purpose of causing the stock values to artificially rise. The computers and fax boards that DiMarco and Yum used to commit their stock manipulation frauds were housed in the Parma property at all times material. (Supplement 79-80). A significant portion of the legal services performed by Appellant directly arise from the defense of the extradition proceedings resulting from these charges crimes. (Supplement 116-175, Appendix 19, 21)

It should be noted that R.C. 2307.382(A)(7) refers to an injury caused to "any person" without any reference to what state the "any person" needs to be located in.

Accordingly, this Court should find that DiMarco and Yum "caused tortious injury to any person by a criminal act, any element of which takes place in this state" within the plain meaning of R.C. 2307.382(A)(7), and that the Trial Court's judgment entry should be reinstated.

3. **DiMarco and Yum have an interest in, use or possess real property in Ohio.**

In the present case, RC §2307.382(A)(8) and Civ.R. 4.3(A)6 are satisfied because DiMarco and/or Yum own a house in Parma, Ohio. (Supplement 26-28, 109-

110, 176-179). Furthermore, DiMarco and Yum promised payment of Appellant's legal bills from the proceeds of the Parma home. (Supplement 61-62, 98-99, Appendix 19).

In finding that the Cuyahoga Common Pleas Court did not have personal jurisdiction over the Appellees, the Eighth District Court of Appeals held: "[V]erbal assurances do not create an interest in real property sufficient enough to make that property part of an otherwise unrelated contract. Accordingly, there is no connection between [the Appellant's] claims and [Appellee's] interests in the Ohio property." However, this holding is problematic on several levels.

First, Ontario law, which must govern the substantive aspects of the court's evaluation of the validity of the contract formation at issue in this litigation, allows for the recognition of oral contracts for legal services. *Erie Railroad v Tompkins*, 304 U.S. 64, 58 S.Ct. 817; *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 438, 453 N.E.2d 683; *Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 286-287, 473 N.E.2d 807, 810. In paragraph 18 of the Trial Court decision, the court made the following finding of fact: "Ontario law permits a contract for the provision of legal services to be performed even in the absence of a written retainer agreement and such services can be contracted for by other than the direct recipient of the services." (See, also, Tr. Vol. I, p. 121-122.)

Second, there is authority for the proposition that oral agreements to pay debts from the proceeds of real property are enforceable, and moreover, that such oral agreements can establish personal jurisdiction over a non-resident defendant owning property within a forum state. In *Cameron v. Burke* (1990), Verm. Sup.Ct., 153Vt. 565, 572 A.2d 1361, 1365, the Vermont Supreme Court opined that where an oral agreement

to pay debt from the proceeds of real property can be performed within a year, such an agreement does not create an interest in land, and therefore does not attract the Statute of Frauds. The non-resident defendant in *Cameron, supra* had agreed to pay her debts to the plaintiff from the proceeds of her real property situate in the forum state, and the court concluded that the agreement could have been performed within a year, even though the defendant did not so perform. In terms of timing, the court determined that the proper method of calculating the year was not the date upon which the oral agreement to turn over the proceeds was performed, but the point at which the agreement was made. In other words, the Statute of Frauds cannot be attracted by the fact that a defendant reneges upon her obligations. At the time the oral agreement was made in the case, no interest in land was created because the contract was not for land but for proceeds owed in lieu of valid debt obligations. Accordingly, the Vermont Supreme Court recognized and enforced the oral agreement. Similarly, in *Bumgarner v. Tomblin* (1983), 63 N.C.App. 636, 640, the Court of Appeals of North Carolina held that oral agreements to make debt payments from proceeds of real property are enforceable and do not attract the Statute of Frauds:

Nor does the Statute of Frauds, G.S. 22-2, defeat plaintiffs' claim for contract damages regarding the Duncan's Creek Township land. Plaintiffs do not seek to enforce an oral contract by defendant to sell them land; instead they seek to enforce an alleged promise by defendant to take care of debt payments...

In *Cameron, supra*, the Vermont Supreme Court also recognized personal jurisdiction over a non-resident defendant on the basis that the defendant had orally agreed to pay debts to the plaintiff from the proceeds of real property situate in the state. The finding of personal jurisdiction was based upon the occurrence of the oral promise within the forum state, the completion of substantial portions of the oral agreement within

present case, *Kvinta v. Kvinta*, 2003 WL 21291049 (Ohio App. 10 Dist., 2003), 2003 Ohio 2884; *Bank of Nova Scotia v. McGregor*, 1991 WL 307131 (Ohio App. 5 Dist., 1991); and *Leonesio v. Carter*, 1992 WL 105315 (Ohio App. 12 Dist., 1992). (It is incumbent at this point to observe that the Court of Appeals did not disturb Judge Burnside's finding of *in rem* jurisdiction over the subject property, and so it is not necessary to re-argue this point.)

The first case, *Kvinta, supra*, involved a claim against real property in satisfaction of spousal support. The Court of Appeals cited the case with approval, noting: "...[T]he Tenth District Court of Appeals held that the Trial Court did not have personal jurisdiction over a party, despite his owning real estate in Ohio, *in an action for legal separation...*" [Emphasis added]. In an action for a support award, it is not necessary for a court to find personal jurisdiction in order to award real property, as the action is one *in rem*. The *Kvinta* Court of Appeals held on the appeal of the same matter three years later: "...[P]ersonal jurisdiction over the non-resident defendant *is not required* where the court obtains jurisdiction over the defendant's real property located within the state *and applies the property to a support award*" [Emphasis added] *Kvinta v. Kvinta* (2003), 2003 WL 21291049 (Ohio App. 10 Dist., 2003), 2003 Ohio 2884. Where personal jurisdiction is inapplicable as a principle of law, it is specious to find that a court "[does] not have personal jurisdiction." In the present matter, the Appellant seeks to enforce a contract explicitly guaranteed by the proceeds of the subject real property. The Appellant's good faith performance of that contract, which involved numerous transactions of business in Ohio at the request of the guaranteeing party, was motivated by that explicit guarantee.

For similar reasons, *McGregor, supra* and *Leonesio, supra* are distinguishable from our facts. In *McGregor*, a non-resident defendant signed a promissory note in order to obtain a bank loan from a non-resident lender. When the defendant defaulted, the bank moved to obtain a judgment against the defendant's Ohio property. The Fifth District Court of Appeals held that the court could not establish personal jurisdiction over the non-resident defendant because the promissory note was not secured by the real property:

There is no nexus between the instant cause of action, a garden variety default action on an unsecured signature loan and [the Defendant Appellant's] interest in the subject real property. *Obviously, had the loan been secured by the subject real property, appellee could make a direct attack on the real estate in question* [Emphasis added]. *McGregor, supra* at 2.

On virtually identical facts, the Twelfth District Court of Appeals held against the Plaintiff Appellant lender due to the fact that the lender's promissory note was unsecured by real property: "If the promissory note had been secured by the real property, Leonesio could have made a direct attack on the real estate in question." *Leonesio, supra* at 2. In both *McGregor* and *Leonesio*, real property was not a term of contract, but was sought in after-the-fact action that was taken once an otherwise unrelated contract was breached. The courts of both cases acknowledged that had the promissory notes been secured by the respective real properties, the Plaintiffs could have made a "direct attack" on the subject properties. Again, in our case, the contract between the Appellant and the Appellees was secured by an explicit promise involving the proceeds of the subject real property.

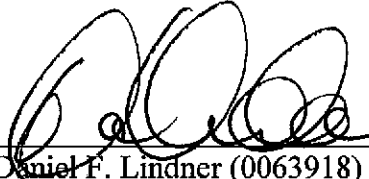
Appellant believes that this Court should follow the lead of the *Cameron* and *Tomblin* Courts and hold that where an oral agreement to pay debt from the proceeds of real property can be performed within a year, such an agreement does not create an interest in land, and therefore does not attract the Statute of Frauds and is enforceable.

Regardless, this Court should find that DiMarco and Yum have an interest in, use or possess real property in Ohio within the plain meaning of R.C. 2307.382(A)(8), and the Trial Court's judgment entry should be reinstated.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons discussed above, the Appellant requests that this Honorable Court find that the Cuyahoga County Court of Common Pleas properly exerted personal jurisdiction over Appellees DiMarco and Yum and hold that the Trial Court's judgment entry shall be reinstated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Daniel F. Lindner', is written over a horizontal line.

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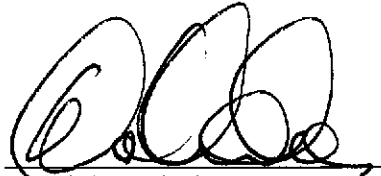
Attorney for the Appellant

CERTIFICATE OF SERVICE

A copy of this Merit Brief of the Appellant was sent by ordinary mail on this 6th day of November, 2006.

PAUL MANCINO, JR.
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Attorney for the Appellee

A handwritten signature in black ink, appearing to read 'D. Lindner', written over a horizontal line.

Daniel F. Lindner

COUNSEL FOR APPELLANT

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86324

PROUSE, DASH & CROUCH, LLP :

Plaintiff-Appellee :

vs. :

BRUCE A. GORCYCA DIMARCO, :
et al. :

Defendants-Appellants :

JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

March 30, 2006

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Case No. CV-498823

JUDGMENT:

REVERSED

DATE OF JOURNALIZATION:

APPEARANCES:

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For Defendants-Appellants:

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ANTHONY O. CALABRESE, JR., J.:

Defendants Bruce and Linda DiMarco (collectively appellants) appeal from the trial court's decision awarding \$206,342.97 to plaintiff Prouse, Dash & Crouch, LLP (Prouse), a Canadian law firm, for breach of contract, and the trial court's declaration that real property located in Parma, Ohio was fraudulently transferred from defendant Bruce DiMarco (Bruce) to his wife, defendant Linda DiMarco (Linda). After reviewing the facts of the case and pertinent law, we reverse.

I.

In the summer of 2000, Bruce was arrested in Ontario, Canada upon the request of the United States of America for his extradition to face stock manipulation and wire fraud charges. At the time of his arrest, Bruce was an American citizen who formerly resided with his wife Linda at 5810 Gilbert Avenue, Parma, Ohio (Parma property). On June 15, 1999, before his arrest, Bruce transferred the title of the property to Linda; the deed was recorded on July 27, 1999. It was around this same time, late July of 1999, that Bruce learned he was the subject of a Securities and Exchange Commission investigation, and he left the United States for Canada.

In the fall of 2000, Linda contacted Prouse to represent Bruce in a civil matter stemming from an alleged assault he suffered while in the Canadian authorities' custody. Canadian solicitor and

barrister William Gilmour (Gilmour) of Prouse agreed to the representation. Upon the request of Bruce and Linda, Prouse agreed to represent appellants in a number of other matters, including a breach of recognizance charge, an immigration bail hearing, the extradition hearing, a habeas corpus application, and intellectual property and commercial projects for Linda's corporation, Pacific Blue Productions (Pacific Blue).

There was no written contract between Prouse and appellants; however, the court found that there was an oral agreement that Prouse would charge appellants an hourly rate for Gilmour's services. All payments to Prouse were made by Linda or Pacific Blue, with the exception of three: one by Linda's mother; one by an account held jointly by Bruce and his deceased mother; and one by Chuck Arnold, which was subsequently dishonored. As appellants' outstanding balances with Prouse grew, Bruce told Gilmour not to worry, that Prouse would be paid from the proceeds of "his house" in Ohio. Although Bruce referred to the house as his, he eventually told Gilmour that he transferred the property to Linda to protect it from attachment in a claim his former wife had against him for \$100,000 in support arrears.

By 2003, appellants owed Prouse \$250,785.71 in Canadian dollars for services rendered. On April 11, 2003, Prouse filed suit in Ohio for breach of contract, fraud and fraudulent transfer of real property. On July 2, 2003, the court entered an order of

attachment concerning the Parma property, pursuant to R.C. 2715.01. Prouse's claims were tried to the court, and on March 31, 2005, judgment was entered against appellants, jointly and severally, for breach of contract in the amount of \$206,342.97 U.S. dollars. The court also found that the Parma property was fraudulently transferred from Bruce to Linda to defeat creditors and declared the transfer null and void. The court entered judgment in favor of appellants on the fraud claim, finding that although Prouse's evidence proved appellants committed a fraud, no independent damages were shown.

II.

In their first assignment of error, appellants argue that they "were denied due process of law when the court exercised personal jurisdiction in order to enter a judgment in personam where defendants were not residents of Ohio, and had conducted no activity in Ohio concerning plaintiff's claim for breach of contract."

We review a trial court's determination of whether personal jurisdiction exists under a de novo standard. *McIntyre v. Rice*, Cuyahoga App. No. 81339, 2003-Ohio-3940. "In deciding if an Ohio court has personal jurisdiction over a nonresident defendant, we must determine (1) whether Ohio's long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer personal jurisdiction and, if so, (2) whether granting jurisdiction

under the statute and rule would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution." *State ex rel. Toma v. Corrigan* (2001), 92 Ohio St.3d 589, 592. See, also, *U.S. Sprint Communications Co., L.P. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181.

As to the first prong of the personal jurisdiction test, R.C. 2307.382 provides in pertinent part, "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: *** (8) Having an interest in, using, or possessing real property in this state ***." Additionally, the relevant parts of Civ.R. 4.3, which are substantially similar to R.C. 2307.382, provide as follows: "(A) When service permitted - service of process may be made outside of this state, *** upon a person who *** is a nonresident of this state. 'Person' includes an individual *** who *** has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's: *** (6) Having an interest in, using, or possessing real property in this state ***."

The second part of the personal jurisdiction analysis deals with satisfying the demands of due process. "[D]ue process requires only that in order to subject a defendant to a judgment in *personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance

of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, citing *Milliken v. Meyer* (1940), 311 U.S. 457, 463. The Supreme Court further narrowed its definition of 'minimum contacts' in *Hanson v. Denckla* (1958), 357 U.S. 235, 253, when it held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws." What is critical to the due process analysis as it relates to exercising personal jurisdiction "is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 297.

Appellants argue that the only nexus they had to Ohio was the Parma property, and that according to R.C. 2307.382(C), only a cause of action arising from this property may be asserted against him. Prouse's claim for breach of contract, which essentially boils down to nonpayment, is unrelated to and does not arise from, appellant's real property in Ohio. Appellants further argue that the breach of contract issue should have been decided by a Canadian court and that if Prouse won a favorable judgment, it could attempt to attach the Parma property to satisfy the Canadian judgment.

Prouse, on the other hand, argues that the Parma property became a term of the contract for legal services between the parties, specifically as it related to payment of the outstanding balance due Prouse. Prouse argues that Bruce repeatedly assured it of his ability to pay from the proceeds of the Parma property, and because of this assurance, Prouse continued to represent appellants despite them failing to pay their invoices. Prouse further argues that the fraudulent transfer occurred in Ohio and, as such, Bruce sought the benefits and protections of Ohio laws, thus satisfying minimum contacts. The record establishes that Gilmour traveled to Ohio numerous times, upon appellants' request, to interview witnesses, take photographs of the Parma property and inventory various chattels located inside the house. At one point, Gilmour requested a mortgage on the Parma property to secure payment on appellants' account. However, appellants refused this request. The court also found that Prouse believed that the Parma property, as well as personal property located within, "constitute the only significant assets upon which to execute and pay a judgment obtained against" appellants.

A review of Ohio law shows that few cases have determined long-arm jurisdiction based solely on ownership of real property in the forum state. One Ohio legal authority states that Civ.R. 4.3(A)(6) "is indefinite in its long-arm reach in light of the fact that there have been very few cases in any state which interpret

its meaning. In short, subsection (6) is a 'sleeper.'" 4-150 Ohio Civil Practice (2005), Section 150.38.

Most recently, the Tenth District Court of Appeals of Ohio held that the trial court did not have personal jurisdiction over a party, despite his owning real estate in Ohio, in an action for legal separation where the spouse sought an equitable division of the couple's assets, including the Ohio property. *Kvinta v. Kvinta* (Feb. 20, 2000), Franklin App. No. 99AP-508. "Although appellee has sought a division of property, the action is not one arising from appellant's interest in, possession, or use of the real property in Mansfield, Ohio." *Id.* See, also, *Leonesio v. Carter* (May 11, 1992), Butler App. No. CA91-08-136 (holding that the "mere presence of property in a state does not establish a sufficient relationship between the owner of the property and the state to support the exercise of jurisdiction over an unrelated cause of action.")

The facts of *Bank of Nova Scotia v. McGregor* (Dec. 24, 1991), Fairfield App. No. 19-CA-91 are remarkably similar to the instant case. In *Bank of Nova Scotia*, McGregor left Ohio in 1987 and moved to Ontario, Canada after being indicted in federal court for fraud, illegal transportation of securities and wire fraud. While residing in Canada, McGregor executed a promissory note to the Bank of Nova Scotia. When McGregor failed to pay on the note, the bank obtained a default judgment against him in both the District Court

of Ontario and the Fairfield County Common Pleas Court in Ohio. A judgment lien in favor of the bank was filed on real property that McGregor and his wife owned in Ohio. The appellate court ruled that the trial court was without personal jurisdiction over McGregor when it rendered and filed the 1988 judgment lien. "There is no nexus between the instant cause of action, a garden variety default action on an unsecured signature loan, and McGregor's interest in the subject real property in Ohio. Obviously, had the loan been secured by the subject real property, appellee could make a direct attack on the real estate in question." Id.

In the instant case, Prouse argues that the Parma property became a term of the contract for legal services provided to appellants when they told Gilmour that the house would be used to pay the balance on the contract. However, verbal assurances do not create an interest in real property sufficient enough to make that property part of an otherwise unrelated contract. Accordingly, there is no connection between Prouse's claims and appellants' interest in the Ohio property. The trial court lacked personal jurisdiction over appellants to hear claims against them. See, also, *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 68 (holding that an attachment of real property "is a provisional remedy; an ancillary proceeding which must be appended to a principal action and whose very validity must necessarily depend upon the validity of the commencement of the principal action").

Because the court lacked personal jurisdiction to hear the instant case, appellants' first assignment of error is sustained.

Pursuant to App.R. 12(A)(1)(c), appellants' remaining assignments of error are made moot by our ruling on the first assignment of error.

We reverse the judgment of the trial court and remand with directions to vacate all orders and entries regarding appellants.

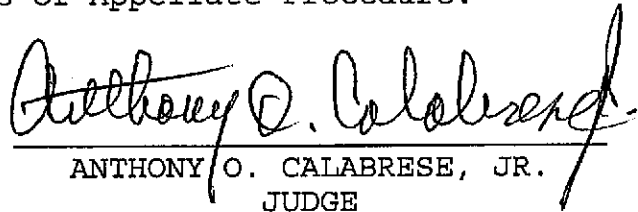
This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


ANTHONY O. CALABRESE, JR.
JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., CONCURS IN PART AND
DISSENTS IN PART. (SEE SEPARATE CONCURRING AND
DISSENTING OPINION.)

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR 30 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86324

PROUSE, DASH & CROUCH, LLP	:	C O N C U R R I N G
	:	
Plaintiff-Appellee	:	A N D
	:	
vs.	:	D I S S E N T I N G
	:	
BRUCE A. GORCYCA DiMARCO	:	O P I N I O N
	:	
Defendant-Appellant	:	

DATE: March 30, 2006

COLLEEN CONWAY COONEY, P.J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority opinion in its disposition of all but the eighth assignment of error involving Bruce's fraudulent transfer of the Parma property. I would affirm the trial court's judgment on that issue.

In the eighth assignment of error, appellants argue that the trial court erred in ruling that the transfer of the property from Bruce to Linda constituted a fraudulent transfer.

The court had jurisdiction to consider Prouse's claim of fraudulent transfer because the property transferred was located in Cuyahoga County, Ohio. An action alleging fraudulent conveyance is quasi in rem. *Falk v. Monning* (1942), 69 Ohio App. 550, 44 N.E.2d 375. Moreover, Ohio was the most appropriate forum for this action because it concerned Cuyahoga County property.

R.C. 1336.04(A) provides that "[a] transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

(b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

The ultimate burden of proof rests upon the party seeking to set aside the alleged fraudulent conveyance. *Stein v. Brown* (1985), 18 Ohio St.3d 305, 308, 480 N.E.2d 1121; *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.* (1993), 87 Ohio App.3d 644, 651, 622 N.E.2d 1113. In determining actual intent, R.C. 1336.04(B) lists several statutory factors, termed "badges of fraud," that a court considers in determining whether an inference of fraud exists. If the party alleging fraud is able to demonstrate a sufficient number of badges, the burden of proof then shifts to the defendant to prove that the transfer was not

fraudulent; however, if the defendant can put forth evidence that the transfer was for reasonable equivalent value, then there exists a defense to a prima facie case of actual intent to defraud pursuant to R.C. 1336.04(A)(1). *Baker, supra.*

Those "badges" include:

- "(1) Whether the transfer or obligation was to an insider;
- (2) Whether the debtor retained possession or control of the property transferred after the transfer;
- (3) Whether the transfer or obligation was disclosed or concealed;
- (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
- (5) Whether the transfer was of substantially all of the assets of the debtor;
- (6) Whether the debtor absconded;
- (7) Whether the debtor removed or concealed assets;
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor." R.C. 1336.04(B).

In the instant case, the trial court found that the conveyance of the Parma property from Bruce to his wife, Linda, constituted a fraudulent conveyance. Although the trial court, in support of its

conclusion, analyzed R.C. 1336.04(A)(2), a better analysis could be made under subsection (A)(1).

The evidence shows that at least eight of the eleven badges support the conclusion that the conveyance was fraudulent. The property was transferred to an insider, his wife, without consideration, on June 15, 1999 and recorded on July 27. However, Bruce still referred to this house as being "his," thus retaining possession or control over the property. There was testimony that the property was transferred because Bruce owed over \$100,000 in back child support to his ex-wife and he wanted to protect the house from being attached. Furthermore, Bruce learned that he was the subject of an SEC investigation in late July 1999. Finally, Bruce fled the United States to Canada to avoid prosecution for SEC violations.

Therefore, an inference of fraud exists. Appellants have failed to set forth any evidence demonstrating that the conveyance was not fraudulent except for the assertion that the transfer was done because Bruce was having various medical problems. Accordingly, there was sufficient evidence to suggest that the conveyance was done fraudulently.

Appellants argue that Prouse was not a creditor nor were appellants debtors when the transfer was made. A "claim" means a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,

disputed, undisputed, legal, equitable, secured, or unsecured. R.C. 1336.01(C). A "creditor" means a person who has a claim. R.C. 1336.01(D), and a "debtor" is a person who is liable on a claim. R.C. 1336.01(F). However, Prouse did not have to be a creditor when the transfer was done. Rather, anyone who now has a claim against a party and alleges the transfer was done fraudulently to elude other creditors or obligations, may now step in and declare that the transfer was done fraudulently. The plain language of R.C. 1336.04 clearly provides that the claim of the creditor can arise after the transfer of the property.

Here, there was sufficient evidence to suggest that Bruce was eluding child support and possible SEC penalties. Thus, the transfer was done to defraud other creditors. Prouse can now argue that the transfer was fraudulent. Therefore, I would find that the trial court did not err in finding that Bruce fraudulently conveyed the property to Linda. I would affirm the court's setting aside the transfer.

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CV-498823

PROUSE, DASH & CROUCH LLP)

Plaintiff)

vs.)

JUDGMENT ENTRY

BRUCE ANTHONY GORCYCA)
DIMARCO, *et al.*,)

Defendants)

JANET R. BURNSIDE, JUDGE

A bench trial was held in this matter on Plaintiff's complaint which set forth a cause of action for breach of contract, fraud and fraudulent transfer of real property. Plaintiff appeared through one of its partners with counsel; Defendant Bruce DiMarco did not appear in person but did appear through counsel, as he was unable to return to the jurisdiction of the Court as a result of his wanted status in the United States as a fugitive. The Court ruled that the fugitive status of this Defendant did not make him unavailable to appear as a matter of law. Defendant Linda Yum DiMarco, his spouse, did appear in person on the last day of trial.

During the summer of the year 2000, Defendant Bruce DiMarco was apprehended by Canadian authorities in the Province of Ontario, Canada upon the request of the United States of America for his extradition to face stock manipulation and wire fraud charges.

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At the time of his arrest Bruce DiMarco was carrying on business ostensibly as an internet web page designer. He was an American citizen, had no employment visa in Canada and had not been continuously in Canada for more than six (6) months.

In fall, 2000 Mr. Dash of Plaintiff's firm was contacted by the Defendant Linda DiMarco seeking representation of her husband. The initial consultation was with respect to an assault that Bruce DiMarco allegedly suffered while in custody.

Because of his police background and upon consultation with an attorney named Drukarsh, Plaintiff's former counsel, Mr. Gilmour of Plaintiff's firm represented Defendant Bruce DiMarco. In representing Defendant Bruce DiMarco, Gilmour issued a state of claim, traveled to Cleveland, Ohio to interview witnesses and take photographs, and traveled to Brooklyn, New York to meet with the Assistant United States Attorney in an effort to negotiate resolution of Defendant Bruce DiMarco's extradition issues. Gilmour completed all of these tasks for a price agreed for the enumerated tasks and then continued to undertake representation on new issues upon the request of Defendant Bruce DiMarco and his wife.

During the course of the representation, all payments to Plaintiff were made by Defendant Linda DiMarco, or by check drawn on her solely owned corporation Pacific Blue Productions, Inc., with the exception of three (3) payments: a check in the amount of \$5,000.00 which was delivered, purportedly by one Chuck Arnold, but later dishonored; the net amount of \$2,500.00 from an account jointly held by Defendant Bruce DiMarco with his deceased mother; and an initial retainer of a \$2,500.00 check more or less delivered by Defendant Linda DiMarco but issued by Linda DiMarco's mother.

During the course of representation, the Plaintiff firm performed the initial tasks, and Gilmour successfully defended Bruce DiMarco on a Breach of Recognizance charge arising from Bruce DiMarco's attendance at a sex show to market the sex cream of Pacific Blue Productions, Inc. Gilmour also testified at the immigration bail hearing of Defendant Bruce DiMarco; conducted his defense at the extradition hearing; brought motions to procure incarcerated witnesses' attendance at a Habeas Corpus application (although brought by Defendant Bruce DiMarco against the advice of Gilmour); researched, prepared, bound and submitted voluminous submissions to the Minister of Justice; perfected an appeal to the Court of Appeals for Ontario; and appeared on various occasions at the Ontario Court of Appeals to speak to the motion of Defendant Bruce DiMarco when he resisted Plaintiff's withdrawal from representation due to the Defendants' failure to pay for services rendered.

In addition to the foregoing, Gilmour, as a partner in the Plaintiff firm, assisted the Defendants with certain business enterprises including, but not limited to, projects undertaken by Defendant Linda DiMarco through her Pacific Blue Productions Inc. to promote and sell a series of sex enhancing products, bubble tea, and basalt composite materials.

At all material times Defendant Bruce DiMarco represented that Plaintiff could be paid from the proceeds of his mothers house which Bruce DiMarco referred to as "my house" in Parma, Ohio. At Defendant's request Gilmour visited the house in Parma on a number of occasions including to inventory and photograph a doll collection left to the Defendants by Bruce DiMarco's mother. Defendants considered selling the collection to pay legal fees.

When the account of the Defendants reached such a level as to concern Gilmour's partners, Gilmour requested a mortgage on the said Parma property to secure eventual payment

of the account. The Defendants refused to provide such security or to make reasonable arrangements to pay the outstanding accounts for services.

There are presently outstanding unpaid invoices totaling \$250,785.71 in Canadian dollars owed to Plaintiff by the Defendants for services rendered and disbursements incurred, this after crediting Defendants for amounts previously paid.

The Plaintiff brings suit in Ohio where the Parma property is situated along with the doll collection and various other chattels which, to the information of the Plaintiff, constitute the only significant assets upon which to execute and pay a judgment obtained against Defendants.

This Court has ruled that it has *in rem* jurisdiction over the Defendants in that the Defendants own property located in Cuyahoga County, Ohio.

The law of the State of Ohio governs the procedure of the trial and proceedings in this matter as the *lex fori*, the law of the forum; however, the proper law of the parties' contract is the *lex loci*, the law of the situs of the formation and the performance of the contract. Therefore, Ontario law applies to the substantive aspects of the case before the Court. Counsel for Defendants concedes that the law of the Province of Ontario applies to the substantive aspects of the case before the Court and has in fact submitted that entire matter should have been so tried in Ontario. *Erie Railroad vs. Tompkins* dictates that Ohio law govern procedure in this matter and that Ontario law govern substantive issues. *Id.* at 304 U.S. 64, 58 S.Ct. 817.

In choice-of-law situations, the procedural laws of the forum state, including applicable statutes of limitations, are generally applied. See *Barile vs. Univ. of Virginia* (1986), 30 Ohio App.3d 190, 194, 30 OBR 333, 336, 507 N.E.2d 448, 451; *Howard vs. Allen* (1972), 30 Ohio St.2d 130, 59 O.O.2d 148, 283 N.E.2d 167. An Ohio forum court must however, give effect to

the substantive law of the state with the most significant contacts to the case. As the Ohio Supreme Court held in the cases of *Schulke Radio Productions Ltd. vs. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 438, 453 N.E.2d 683; *Gries Sports Enterprise, Inc. vs. Modell*, 15 Ohio St.3d 284, 286-287 (1984), to determine which state has the most significant relationship, Ohio has adopted the test set forth in the Restatement (Second) of Conflict of Laws 188 (1971). Section 188 provides the factors to be considered in making the choice of law. The Court has applied those factors in making its choice of law rulings.

The Defendant Bruce DiMarco was incarcerated in a correctional facility when Defendant Linda DiMarco approached the Plaintiff law firm to represent the Defendants. In order to do so Defendant Linda DiMarco made contact with Plaintiff firm at its offices in Ontario. The first representation sought was the commencement of a civil suit about an assault suffered by Defendant Bruce DiMarco while in custody; plaintiffs for the suit would be both Bruce and Linda DiMarco.

The Plaintiff firm also performed services in the States of Ohio and New York and the Province of Ontario. Substantially all of the services performed for the Defendants by the Plaintiff firm were performed in Ontario. Services were also provided to the Defendants concerning pursuit of business opportunities for Linda's wholly owned corporation Pacific Blue Productions, Inc., an Ontario corporation. Later Plaintiff represented Bruce DiMarco on a bail violation and his extradition matter when the United States sought his return.

A contract for professional legal services was formed between the Plaintiff and both of the Defendants because Defendant Linda DiMarco contacted the Plaintiff firm to seek representation for herself and her husband in the above-described civil suit and virtually all of the

payment for services received by Plaintiff from the Defendants in respect of all services--whether related to the criminal defense of Defendant Bruce DiMarco, the business of the Defendant Linda DiMarco's wholly owned corporation, the investigation services requested, and the various civil matters addressed--were paid for through her wholly owned corporation over her signature. Also, Defendant Linda DiMarco initiated and participated in three-way telephone conversations wherein the Defendants jointly instructed attorneys of Plaintiff law firm on desired services; services were rendered by Plaintiff to the economic benefit of the Defendants' family unit; and the Plaintiff's attorneys were always operating under the understanding that they were retained by and providing services to both of the Defendants jointly.

Ontario law permits a contract for the provision of legal services to be performed even in the absence of a written retainer agreement and such services can be contracted for by other than the direct recipient of the services. Further, the person contracting for such services even when contracted for another person, may be liable on the contract to pay the fees arising therefore. *Roach, Schwartz & Associates vs. Pinnock* (2004) O.J. No. 1230; *Solicitors (re)* 1978 O.J. No. 2347. Likewise in Ohio a contract for representation by a lawyer may be inferred and may arise from the conduct of the parties. *Cuyahoga County Bar Assn. vs. Hardiman*, 798 N.E.2d 369 (Ohio 2003).

The contract formed was that Plaintiff would provide services to the Defendants, jointly and severally, at the customary hourly rates of the lawyers providing services plus disbursements and that Plaintiff would be paid for such services by the Defendants. The contract was formed and substantially performed in Ontario with significant services performed in Ohio. ~~In the absence of any evidence that the services, the hours, the disbursements, or the rates claimed are~~

not as testified by the witnesses for Plaintiff, there is no basis upon which to find that any other measure of damages should be awarded.

There was no credible evidence offered by the Defendants which in any way challenged Plaintiff's asserted financial arrangement, the quality or performance of services or the entitlement to the fees claimed.

The Defendant Bruce DiMarco transferred the title to the real property in Parma, Ohio to the Defendant Linda DiMarco by document dated June 15, 1999. The Defendant Bruce DiMarco learned that he was the subject of a Securities and Exchange Commission investigation in late July 1999. The Defendant Bruce DiMarco recorded the transfer of the said real property to the Defendant Linda DiMarco on July 27, 1999. The Defendant Bruce DiMarco told his Solicitor William R. Gilmour that he had transferred the said real property to the Defendant Linda DiMarco because he feared his former wife Magaly Perez's claim against him in the amount of \$100,000 for support and he wanted to protect the said real property from attachment by her.

The Ohio Fraudulent Conveyance Statute, R.C. 1336.01 *et seq.*, provides, in relevant part:

"R.C. 1336.04(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways

....

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

- (a) The debtor was engaged or as about to engage
In a business or a transaction for which the
Remaining assets of the debtor were
Unreasonably small in relation to the business
or transaction;

- (b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

R.C. 1336.01 provides the definitions that are relevant to this matter:

- (B) "Asset" means property of a debtor, but does not include any of the following:
 - (1) Property to the extent it is encumbered by a valid lien;
 - (2) Property to the extent it generally is exempt under nonbankruptcy law, including, but not limited to Section 2929.66 of the Revised Code;
 - (3) An interest in property held in the form of a tenancy by the entireties created under Section 5302.17 of the Revised Code prior to April 4, 1985, to the extent it is not subject to process by a creditor holding a claim against only one tenant.
- (C) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (D) "Creditor" means a person who has a claim.
- (E) "Debt" means a liability on a claim.
- (F) "Debtor" means a person who is liable on a claim.
- (G) "Insider" includes all of the following:
 - (1) If the debtor is an individual, any of the following:
 - (a) A relative of the debtor or of a general partner of the debtor;
- (L) "Transfer" means every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

Further, R.C. 1336.09 provides that any claim brought under R.C. 1336.04(A)(2) has a four (4)

year statute of limitation so this action is timely.

The conveyance of the real property located at 5810 Gilbert Avenue in Parma, Ohio to the Defendant Linda DiMarco was, based on the evidence, an improper transfer to defeat creditors and is set aside by order of this Court. It was done at a time that these Defendants were incurring debt to Plaintiff and knew that they were likely to incur a great deal of debt with Plaintiff. Despite Defendants' attempt to now claim that Linda DiMarco was never a client of Plaintiff, and Plaintiff cannot present a claim against her real estate, this transfer is not valid as against Plaintiff. Further, even if the transfer were valid, under Ontario law Linda DiMarco is jointly and severally liable for the debt, as she was also the client in this case. Plaintiff's Gilmour received the instructions from both of Defendants in respect of the services rendered which were all provided to the benefit of, and at the retainer of, both Defendants.

~~The only evidence before this Court is that Plaintiff provided all of the services set out in the invoices at issue in this case, incurred the disbursements charged for the benefit of Defendants jointly and severally, and that the accounts for services had and received have not been paid.~~

A corroborating witness, attorney Paul Dhaliwal, testified for Plaintiff that: he was present during discussions with Bruce DiMarco within which William Gilmour confirmed his hourly rate to Bruce DiMarco and told Bruce DiMarco that he would be billed by the hour, and while Bruce DiMarco requested a flat rate for service, William Gilmour refused to conduct business on that flat rate billing basis; both Bruce DiMarco and Linda DiMarco retained Plaintiff for the services provided; Plaintiff had meetings with both Linda DiMarco and Bruce DiMarco

and Gilmour received instructions from both Bruce DiMarco and Linda DiMarco; and he saw Linda DiMarco meet with Gilmour multiple times and saw her at Plaintiff's offices five or six times.

Harry J. Doan, Barrister and Solicitor, was offered as an expert for Plaintiff to provide opinion evidence with respect to the application of Ontario law to the facts of this case, to the quality of the work done by Plaintiff law firm and the reasonableness of the outstanding accounts based upon his review of Plaintiff's file. Harry J. Doan testified as follows: that he has been a lawyer since 1967; that he reviewed Plaintiffs file in respect of the matter before the Court and spoke to William Gilmour about the work done; that William Gilmour has a good reputation in the legal community as being meticulous and well prepared, and that he has known William Gilmour for 30 years professionally but that they do not socialize; that Gilmour produced a horrendous amount of material on the file; and that the work that Gilmour did on this case was meticulous, well prepared and of very high caliber.

Doan further opined that under Ontario law, both Linda DiMarco and Bruce DiMarco are liable for the account in respect of the representation that he reviewed because both Linda DiMarco and Bruce DiMarco were a client in the case before the Court; a written retainer agreement is not necessary in Ontario; under Ontario law the obligations of the Defendants to Plaintiff were "joint and several"; that the fact that Linda participated in instructing Plaintiff's and Gilmour's work makes her a client under Ontario law; that upon his review of Plaintiff's file he did not find any work done where Linda DiMarco was not the client; and that Mr. Gilmour's rate for services at \$325.00 per hour (Canadian dollars) is reasonable for his seniority, experience and quality of work.

Defense witnesses were presented as well. In the main they were not credible. The evidence of all of the defense witnesses related second-hand and inferential information about the alleged fixed fee retainer but was not specific and was simply not credible. All of the testimony on behalf of the defense was conducted in part, rehearsed and simply not credible general terms of expression; and in particular Defendant Linda DiMarco's repetition of the stock phrase "not once" is not credible in the face of contrary evidence by two practicing solicitors.

Plaintiff is granted judgment on the Counts of Plaintiff's Complaint, as follows:

Judgment is rendered in favor of Plaintiff and against Defendants, jointly and severally, on Plaintiff's cause of action for breach of contract, in the amount of \$206,342.97¹ U.S. Dollars to be realized in Ohio to the extent that there are assets in Ohio belonging to the Defendants, or either of them, capable of being executed against; and on Plaintiff's cause of action for fraudulent transfer the declaration and judgment that the 5810 Gilbert Avenue real property in Parma, Ohio 44129 was fraudulently transferred from Defendant Bruce DiMarco to the Defendant Linda DiMarco to defeat creditors and that such transfer is hereby reversed and declared null and void against the creditors of Bruce DiMarco. That real property is legally described as follows:

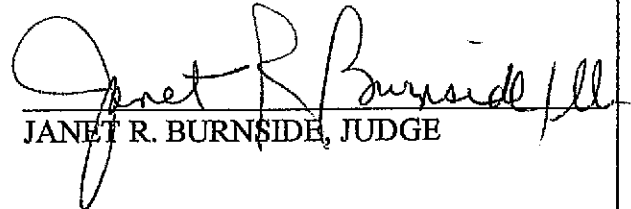
No. 800 in the City of Sublot Parma in the H.A. Stahl properties Company's Ridgewood Gardens annex subdivision of Part of original Parma Township Lot No. 5, Blake Tract as shown by Recorded plat in volume 70 of maps page 34 of Cuyahoga County records.
Permanent Parcel No. 443-09-006

¹ The exchange of rate of .822786 was utilized to convert the judgment from Canadian currency to U.S. currency. The .822786 exchange rate was obtained by taking the average of three randomly selected published exchange rates as of March 30, 2005: New York Times (.82), Washington Post (.823859), and Bloomberg, L.P. (.8245).

A certified copy of this judgment may be presented and/or recorded in the files of the County Recorders office to carry this judgment into effect.

Judgment is entered in favor of Defendants upon Plaintiff's fraud cause of action. Plaintiff's evidence proved a fraud upon it by Defendants but failed to prove independent damages proximately caused by such fraud.

IT IS SO ORDERED.


JANET R. BURNSIDE, JUDGE

March 30, 2005

Copies to:

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Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit
County.

MILITARY SUPPLY, INC., Appellant,

v.

REYNOSA CONSTRUCTION, INC. et al.,

Appellees.

No. 19326.

Jan. 26, 2000.

Appeal from judgment entered in the Court Of
Common Pleas County Of Summit, Ohio, Case No.
CV 98 04 1452.

R. Scott Haley and Amy McKee Hulthen, Attorneys
at Law, Akron, OH., for Appellant.

Robert F. Linton and Valoria C. Hoover, Attorneys
at Law, Akron, OH., for Appellees.

DECISION AND JOURNAL ENTRY

CARR.

*1 Appellant-plaintiff Military Supply Inc. ("Military Supply") appeals from the dismissal of its complaint against appellees-defendants Reynosa Construction, Inc. ("Reynosa") and Mid-Continent Casualty in the Summit County Court of Common Pleas.^{FN1} This Court affirms.

FN1. According to the pleadings, Mid-Continent Casualty is also known by the names Mid-Continent Group and Mid-Continent Insurance. Because the trial court primarily used the designation Mid-Continent Casualty, this Court will adhere to that name.

Military Supply is an Ohio corporation that supplies government contractors with building materials that are used in jobs for military bases and other government installations. Reynosa is a Texas-based

government contractor, and Mid-Continent Casualty is an insurance company that had issued a performance and payment bond on work Reynosa contracted to complete at Dyess Air Force Base in Texas. Military Supply was to supply doors to Reynosa, which would in turn install the doors in two renovated dormitories on the Texas base. The doors were manufactured in Texas pursuant to an arrangement between Military Supply and a third company that is not a party to this proceeding.

During the project, dispute arose over the specifications of the doors, which resulted in an additional \$13,483.54 cost above the contract price. Both companies blamed the other for the extra costs incurred and Reynosa balked at paying the additional money; Reynosa paid only the original contract price. Thereafter, on April 13, 1998, Military Supply filed a complaint for breach of contract against Reynosa and Mid-Continent Casualty. The complaint alleged that Reynosa had failed to pay for goods and materials and that Mid-Continent Casualty had failed to honor its performance and payment bond. In response, Reynosa and Mid-Continent Casualty filed a Civ.R. 12(B)(2) motion to dismiss for lack of personal jurisdiction on May 15, 1998. The trial court granted the motion on September 17, 1998, finding that:

Reynosa never travelled [*sic*] to Ohio, was not registered to do business in Ohio and the barracks were renovated in Texas. The only intentional contact [Reynosa] had with the State of Ohio were the negotiations over the doors and windows to be supplied, telephone calls about the doors and windows, and mailing the check to [Military Supply]. Accordingly, this Court finds that it has no personal jurisdiction over [Reynosa] in this matter. [Military Supply] has failed to make even a prima facie showing of jurisdiction to withstand a motion to dismiss.

Military Supply timely appealed, asserting a single assignment of error:

THE TRIAL COURT ERRED AS A MATTER OF
LAW IN DISMISSING APPELLANT MILITARY

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APP 0029

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SUPPLY'S COMPLAINT AGAINST APPELLEE REYNOSA WHERE MILITARY SUPPLY HAD ESTABLISHED A PRIMA FACIE CASE OF PERSONAL JURISDICTION OVER THE APPELLEE.

In its sole assignment of error, Military Supply argues that Reynosa was subject to Ohio's long-arm statute and that, as a result, the trial court erred in granting the motion to dismiss for lack of personal jurisdiction.^{FN2} This Court disagrees.

FN2. Although Reynosa has devoted a portion of its brief to arguing that the trial court also lacked subject matter jurisdiction over the claim against Mid-Continent Casualty, Military Supply has not presented an argument regarding its claim against Mid-Continent Casualty. Consequently, this Court need not reach this aspect of the case and expresses no opinion as to the matter.

The Supreme Court of Ohio has set forth a two-part test for determining when a state court has personal jurisdiction over a foreign corporation:

*2 First, the court must determine whether the state's "long-arm" statute and applicable civil rule confer personal jurisdiction, and, if so, whether granting jurisdiction under the statute and the rule would deprive the defendant of the right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution.

U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc. (1994), 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048, citing *Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 532 N.E.2d 117; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 559 N.E.2d 477. This Court has previously explained that determining whether R.C. 2307.382, the Ohio long-arm statute, is applicable depends upon whether the nonresident party has sufficient "minimum contacts" with Ohio. *Krutowsky v. Simonson* (1996), 109 Ohio App.3d 367, 369, 672 N.E.2d 219, citing *Universal Coach, Inc. v. New*

York City Transit Auth., Inc. (1993), 90 Ohio App.3d 284, 287, 629 N.E.2d 28. To establish minimum contacts, a plaintiff must demonstrate "that the nonresident defendant 'purposely avail[ed] himself of the privilege of conducting activities within the forum State.'" (Alteration in original.) *Id.*, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

R.C. 2307.382(A)(1) provides that a foreign corporation such as Reynosa "submits to the personal jurisdiction of an Ohio court if its activities lead to '[t]ransacting any business' in Ohio." (Alteration in original.) *U.S. Sprint Communications Co. Ltd. Partnership, supra*, at 185, 624 N.E.2d 1048. Therefore, the threshold question in the instant case is whether Reynosa had sufficient minimum contacts with Ohio so that it could be said to have been transacting business in the forum state.

This Court has explained that, when deciding whether the long-arm statute applies, a court should consider three factors:

First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Krutowsky, supra, at 370, 672 N.E.2d 219, quoting *Cincinnati Art Galleries v. Fatzie* (1990), 70 Ohio App.3d 696, 699, 591 N.E.2d 1336. See, also, *Clark v. Connor* (1998), 82 Ohio St.3d 309, 314, 695 N.E.2d 751, quoting *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 237, 638 N.E.2d 541 ("The constitutional touchstone is whether the nonresident defendant purposefully established "minimum contacts" in the forum state; purposeful establishment exists where, *inter alia*, the defendant has created continuing obligations between himself and residents of the forum."). Applying the facts herein to the criteria set forth in *Krutowsky*, this Court concludes that Reynosa lacked sufficient minimum contacts so that R.C. 2307.382 and Civ.R.

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4.3(A) would confer personal jurisdiction in the courts of this state.

*3 The interaction between Military Supply and Reynosa began on March 28, 1996, when Military Supply sent Reynosa a general specification quotation for the doors and other items; two days prior to this, Military Supply had learned from a government contracting officer that Reynosa was one of the contractors on the list for the Dyess Air Force Base dormitory project. The quotation stated: "Prices shown are valid for sixty days." In response, Reynosa requested additional information and quotations, which Military Supply provided in a communication dated March 29, 1996. On April 25, 1996, Reynosa then sent Military Supply a purchase order for doors contained in the initial price quotation, well within the sixty-days contemplated by the March 28, 1996 quotation.

Drawing upon these facts, Military Supply argues to this Court that *Hammill Mfg. Co. v. Quality Rubber Prod., Inc.* (1992), 82 Ohio App.3d 369, 612 N.E.2d 472, is dispositive. This Court disagrees. In *Hammill*, the Sixth District stated that "we hold that a corporate nonresident, for the purposes of personal jurisdiction, is 'transacting any business,' within the plain and common meaning of the phrase, where the nonresident corporation initiates, negotiates a contract, and through the course of dealing becomes obligated to make payments to an Ohio corporation." (Emphasis added.) *Id.* at 374, 612 N.E.2d 472. Unlike *Hammill*, the instant case is one in which the nonresident corporation did not initiate the proceedings. Rather, the record clearly indicates that Military Supply contacted Reynosa first by its March 28, 1996 communication. Further, the product involved in *Hammill* was returned to Ohio for modification by an Ohio company; the products in the instant case remained in Texas, where a Texas company performed the modifications. To overlook such critical facts would be to extend *Hammill* in such a manner that would create a general rule that broadly favors personal jurisdiction, and the Supreme Court of Ohio has cautioned against rendering any such generalizations in favor of proceeding on a case-by-case determination. See *U.S. Sprint Communications Co. Ltd.*, *supra*, at 185, 624

N.E.2d 1048. Cognizant of that policy, this Court finds *Hammill* unpersuasive in light of the specific facts involved herein. ^{FN3}

FN3. This is not to imply, however, that the determination is always dependent upon who initiates contact. This Court notes that, "[f]or purposes of personal jurisdiction, * * * the mere solicitation of business by a foreign corporation does not constitute transacting business in Ohio." *U.S. Sprint Communications Co. Ltd. Partnership*, *supra*, at 185, 624 N.E.2d 1048, citing *Wainscott v. St. Louis-San Francisco Ry. Co.* (1976), 47 Ohio St.2d 133, 351 N.E.2d 466. Rather, "a nonresident's ties must 'create a "substantial connection" with the forum State.' " *Id.*, citing *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528. The question of who initiated contact is but one factor to be considered.

More persuasive is this Court's prior holding in *Krutowsky*. In *Krutowsky*, this Court found that personal jurisdiction did not exist because the defendant had not purposely availed himself of acting in Ohio. In reaching this conclusion, this Court found relevant that the Ohio-based plaintiff had initiated the contact, that the plaintiff had not learned of the defendant by any active advertisement on the part of the defendant, that the defendant did not reside in Ohio, and that the majority of the work had been performed outside of Ohio, among other additional factors.^{FN4} Such reasoning is applicable here. As noted, Military Supply initiated contact with Reynosa. The Texas company had not actively advertised with an intent to create a business relationship with an Ohio company, but instead had responded to Military Supply's business proposal. Although Military Supply argues that Reynosa had "revived" business relations after previously rejecting Military Supply's offer, the fact that the offer remained open for sixty days and that Reynosa reacted within that period is notable. Further, Reynosa was not based in Ohio, had no agents in Ohio, and owned no land in Ohio.

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The work that was performed on the doors never took place in Ohio and was not intended to establish an ongoing relationship between the parties. Rather, the contractual relationship of the parties consisted of a single business transaction.^{FN5} While Military Supply is correct in noting that there had been communication at various times between the parties regarding the door specifications and related matters,^{FN6} such communication by itself is insufficient to rise to the level of minimum contacts. See *Krutowsky, supra*, at 371, 672 N.E.2d 219, citing *Friedman v. Speiser, Krause & Madole, P.C.* (1988), 56 Ohio App.3d 11, 14, 565 N.E.2d 607. See, also, *Patlen, Inc. v. Gardner* (Oct. 15, 1998), Cuyahoga App. No. 73428, unreported. Similarly, while Military Supply relies upon a number of federal cases in which personal jurisdiction was predicated upon a single act, such as entering into a contract, these cases conclude that personal jurisdiction *could* be found, not that it *must* be found. Adhering to the previously recognized admonition by the Supreme Court of Ohio to avoid such broad generalizations in personal jurisdiction cases, this Court declines to adopt such a sweeping rule. See *U.S. Sprint Communications Co. Ltd, supra*, at 185, 624 N.E.2d 1048.

FN4. Also relevant in *Krutowsky* was the fact that payments were made outside Ohio. This factor is not necessarily dispositive, however, because it is just one of several factors a court should review.

FN5. On appeal, Military Supply argues that this Court must accept the trial court's "determination that Reynosa's conduct fell within Ohio's long [-]arm statute" and that this finding "cannot be disturbed on appeal." In support of this proposition, Military Supply relies upon *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1983), 2 Ohio St.3d 160, 162, 443 N.E.2d 184. However, *Duracote* and the cases cited therein stand for the proposition that the Supreme Court of Ohio need not revisit factual findings in manifest weight of the evidence cases, based upon repealed R.C. 2505.31, amended and recodified as

current R.C. 2503.43. As such, this argument is of no concern to this Court.

FN6. Military Supply states that **Reynosa** had purchased additional items and that **Reynosa** had submitted a credit application. The record, however, does not clearly support these claims. Although it appears that items other than doors were shipped to **Reynosa**, no additional purchase orders from **Reynosa** to Military Supply are included in the record. Further, the only credit application in the record is between **Reynosa** and Oshkosh Architectural Door Company, a Wisconsin company. As such, this Court cannot consider such unsupported factual representations. See *McAuley v. Smith* (1998), 82 Ohio St.3d 393, 396, 696 N.E.2d 572.

*4 Accordingly, this Court cannot say that the trial court erred in finding a lack of personal jurisdiction. The judgment of the Summit County Court of Common Pleas is therefore affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

WHITMORE and BATCHELDER, JJ., concur.
APPEARANCES:

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Ohio App. 9 Dist., 2000.
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C**Briefs and Other Related Documents**

**CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin
County.

Ann H. Womer BENJAMIN, Plaintiff-Appellant,
v.

KPMG BARBADOS et al., Defendants-Appellees.
No. 03AP-1276.

April 28, 2005.

Background: Superintendent of Department of Insurance, in her capacity as liquidator of insurance companies, brought negligence action against off-shore accounting firms that provided services to off-shore reinsurers of insurance companies. The Court of Common Pleas, Franklin County, dismissed for lack of personal jurisdiction. Superintendent appealed.

Holdings: The Court of Appeals, Sadler, J., held that:

(1) affidavit did not lay adequate foundation for admission of documents attached to it, and

(2) trial court lacked personal jurisdiction over off-shore accounting firms.

Affirmed.

West Headnotes**[1] Affidavits 21 ⇐18****21 Affidavits**

21k18 k. Use in Evidence. Most Cited Cases
Affidavit by attorney who assisted in the liquidation of Ohio insurance companies failed to lay an adequate foundation for the documents attached to

the affidavit, and thus, the documents were not competent evidence of off-shore reinsurers' contacts with Ohio for purposes of defeating motion to dismiss claims against reinsurers by the Superintendent of the Department of Insurance based on lack of personal jurisdiction, where the affidavit did not establish that attorney had personal knowledge of the circumstances of the preparation, maintenance, and retrieval of the records or of the operation of the business of the insurance companies such that she could reasonably testify that the documents sought to be placed in the record were what they purported to be. R.C. § 2317.40.

[2] Courts 106 ⇐12(2.15)**106 Courts**

106I Nature, Extent, and Exercise of Jurisdiction in General

106k10 Jurisdiction of the Person

106k12 Domicile or Residence of Party

106k12(2) Actions by or Against
Nonresidents; "Long-Arm" Jurisdiction in General

106k12(2.15) k. Transacting or
Doing Business. Most Cited Cases

Off-shore auditing firms that performed audits of off-shore reinsurance companies did not transact business in Ohio in the course of completing its auditing services so as to give Ohio courts personal jurisdiction over firms in negligence action brought by Superintendent of Department of Insurance, even though one firm took three trips to Ohio to collect information over the course of the four years the firm assisted with the off-shore audits, where the firms were located in Bermuda and did not maintain a place of business elsewhere, they were not licensed to do business in Ohio, and they did not market themselves in Ohio. R.C. § 2307.382(A)(1).

Appeal from the Franklin County Court of Common Pleas.

Jim Petro, Attorney General; Kegler, Brown, Hill and Ritter, Roger P. Sugarman, John P. Brody, Loriann E. Fuhrer, and Richard W. Schuermann, Jr., special counsel for appellant.

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Squire, Sanders & Dempsey, L.L.P., C. Craig Woods, Pamela H. Thurston, and Kristen J. Brown, for appellee KPMG Bermuda.
Bricker & Eckler, LLP, Randolph C. Wiseman, and Jennifer A. Goaziou, for appellee KPMG Barbados.

OPINION

SADLER, J.

*1 {¶ 1} This is an appeal by plaintiff-appellant, Ann H. Womer Benjamin ("appellant" or "the Liquidator"), Superintendent of the Ohio Department of Insurance, in her capacity as Liquidator of Credit General Insurance Company ("CGIC") and Credit General Indemnity Company ("CGIND"). The Liquidator appeals from a decision and entry of the Franklin County Court of Common Pleas in which that court granted the motions to dismiss, pursuant to Civ.R. 12(B)(2), filed by defendants-appellees, KPMG Barbados and KPMG Bermuda (collectively, "appellees"), two partnerships domiciled in Barbados and Bermuda, British Virgin Islands, respectively. Specifically, the court granted the motions to dismiss because it found that it lacked personal jurisdiction over appellees, which are accounting firms that provided auditing services to several foreign reinsurance companies that had insured some of CGIC and CGIND's risks.

{¶ 2} Appellant filed her complaint on December 11, 2002, and therein alleges that CGIC and CGIND are insurance companies domiciled in Ohio and are wholly owned by PRS Insurance Group, Inc. ("PRS Group"), a holding company whose principal place of business is located in Beachwood, Ohio. The complaint further alleges that PRS Group wholly or partially owns three Barbados-domiciled reinsurers and one Barbados-based insurance holding company (collectively, "the offshore affiliates") with which CGIC and CGIND entered into reinsurance agreements. Pursuant to those agreements, CGIC and CGIND ceded the risks of underlying insurance policies to the offshore affiliates in exchange for premiums paid.

{¶ 3} According to the complaint, the reinsurance agreements required that the offshore affiliates post collateral the value of which was at least equal to the risks for which they were obligated under the

reinsurance agreements, so that CGIC and CGIND could take the reinsurance credit on their financial statements without having to increase their own loss reserves. In paragraph 17 of the complaint, the Liquidator alleges that the offshore affiliates retained appellees to audit each of their financial statements. Both appellees prepared audited financials for each of the offshore affiliates, and KPMG Barbados principals signed and issued the same for the calendar years 1995, 1996, 1997 and 1998. The Liquidator alleges that, throughout the auditing process, appellees exchanged many pieces of correspondence with PRS Group officials located in Beachwood, Ohio, and that appellees sent copies of virtually all audit-related correspondence to a PRS Group representative in Ohio.

{¶ 4} According to the complaint, the offshore affiliates were insolvent by December 31, 1998, and possibly earlier, but that CGIC and CGIND were unaware of the problem because the offshore affiliates had forwarded to CGIC and CGIND copies of the KPMG-audited financials. The Liquidator alleges that CGIC and CGIND reasonably relied on the audited financials and that appellees "were aware and it was specifically foreseen by them" that the audits were being performed for the benefit of, inter alia, CGIC and CGIND, and that the offshore affiliates would supply copies of the financials to those entities for their use, including filing copies thereof with the Ohio Department of Insurance.

*2 {¶ 5} The Liquidator alleges that appellees owed a duty of reasonable care in the preparation and certification of the offshore affiliates' audited financials, not just to the offshore affiliates themselves, but to CGIC and CGIND as well, and that appellees breached this duty in preparing and certifying inaccurate and false financial statements. She further alleges that had CGIC and CGIND earlier been made aware of the insolvency of the offshore affiliates, these Ohio insurance companies could have increased their loss reserves or sought and obtained reinsurance from solvent reinsurers, but, instead, as a direct and proximate result of appellees' negligence, CGIC and CGIND have been damaged by the non-payment by the offshore affiliates of reinsurance claims due to those entities'

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insolvency and eventual bankruptcy.

{¶ 6} On February 25, 2003, KPMG Bermuda filed its motion to dismiss, arguing the dual grounds of lack of personal jurisdiction, pursuant to Civ.R. 12(B)(2), and failure to state a claim for relief, pursuant to Civ.R. 12(B)(6). KPMG Bermuda attached to its motion the affidavit of Robert D. Steinhoff, who identified himself therein as the Senior and Managing partner at KPMG Bermuda.

{¶ 7} KPMG Bermuda argued that it had not engaged in activity that could be deemed "transacting business" in Ohio, as that term is used in R.C. 2307.382(A)(1), Ohio's long-arm statute. It further argued that the exercise of jurisdiction over KPMG Bermuda would offend traditional notions of fair play and justice because of the absence of the "minimum contacts" necessary to pass muster under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. According to KPMG Bermuda, it did not "purposely avail itself" of the privilege of conducting activities in Ohio and it was not reasonably foreseeable to KPMG Bermuda that its auditing services provided in Bermuda to Barbados-based entities would subject it to the jurisdiction of Ohio courts.

{¶ 8} For her response to KPMG Bermuda's motion, the Liquidator relied primarily upon the affidavit of Kathleen McCain, an attorney retained by the Ohio Department of Insurance to assist with its pre-liquidation efforts to supervise and rehabilitate CGIC and CGIND. Ms. McCain averred that she has continued rendering her services during the liquidation of these two entities, and has served as the custodian of the records thereof since the beginning of the liquidation. Attached to Ms. McCain's affidavit were over 250 pages of documents that Ms. McCain averred are records of CGIC and CGIND. Ms. McCain detailed, in her affidavit, the nature and content of each such record.

{¶ 9} The Liquidator argued that the materials attached to the McCain affidavit prove that KPMG Bermuda had substantial, purposeful contacts with the State of Ohio. Relying on the McCain

documents, she argued that KPMG Bermuda sent at least 25 pieces of correspondence directly to persons in Ohio, and communicated by telephone with persons in Ohio. Also relying on the attachments to the McCain affidavit, the Liquidator argued that KPMG Bermuda personnel knew that CGIC and CGIND were closely integrated with the other PRS-owned entities, including the offshore reinsurers it had been engaged to audit, and also knew that CGIC and CGIND were "[d]ependant [sic]" upon these offshore reinsurers.

*3 {¶ 10} In its reply memorandum, KPMG Bermuda argued that all of the records attached to the McCain affidavit are inadmissible hearsay and cannot be admitted under the "business records exception" to the hearsay rule, which exception is found at Evid.R. 803(6). It also argued that, with or without the documents attached to the McCain affidavit, the Liquidator had not made out a prima facie case that the court could properly exercise jurisdiction over it.

{¶ 11} On June 19, 2003, KPMG Barbados filed its own motion to dismiss. It, too, argued both that the trial court lacked jurisdiction over its person, pursuant to Civ.R. 12(B)(2), and that the complaint failed to state a claim for relief, pursuant to Civ.R. 12(B)(6). KPMG Barbados attached to its motion the affidavit of Jeffrey Gellineau, who identified himself therein as the managing partner of KPMG Barbados.

{¶ 12} KPMG Barbados argued that there is no basis for Ohio courts to exercise jurisdiction over it pursuant to either Ohio's long-arm statute or Civ.R. 4.3(A). It further argued that the exercise of jurisdiction over it would violate the Due Process clause of the Fourteenth Amendment because it not only has not purposely availed itself of the privilege of conducting activities in Ohio, but it has not conducted any activities whatsoever in Ohio. It also argued that it was not reasonably foreseeable to KPMG Barbados that its auditing services provided in Barbados to the offshore affiliates, in connection with which there was no communication with or travel to Ohio, would subject it to the jurisdiction of Ohio courts.

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{¶ 13} In response, the Liquidator once again relied exclusively upon the documents attached to the McCain affidavit to argue that KPMG Bermuda personnel had substantial, purposeful contacts with PRS Group management in Ohio such that she could make out a prima facie case for the exercise of jurisdiction, both under Ohio's long-arm statute and under Due Process principles. As with her opposition to KPMG Bermuda, the Liquidator sought to demonstrate, with the McCain affidavit and attachments, that KPMG Barbados knew that CGIC and CGIND were so closely related to the offshore entities being audited that CGIC and CGIND depended upon the results of the audit for their solvency and viability.

{¶ 14} On November 25, 2003, the trial court issued a decision and entry that, inter alia, granted the motions to dismiss of both KPMG Bermuda and KPMG Barbados. First, the court ruled that the documents attached to the McCain affidavit were inadmissible hearsay and that they do not qualify for the exception for authenticated business records contained in Evid.R. 803(6). Specifically, the court found that appellant had failed to lay a proper foundation for the admissibility of the documents because Ms. McCain testified only to having reviewed the records. The court found that this did not show that Ms. McCain possessed personal knowledge of all of the foundational requisites of Evid.R. 803(6).

*4 {¶ 15} The court found that the Liquidator had failed to make out a prima facie case for the exercise of jurisdiction over either defendant under both the Ohio long-arm statute and under federal Due Process standards. Accordingly, the court granted the motions to dismiss. This appeal timely followed, and the Liquidator assigns two errors for our review:

1. The trial court erred in concluding it could not properly exercise personal jurisdiction over KPMG Bermuda.
2. The trial court erred in concluding it could not properly exercise personal jurisdiction over KPMG Barbados.

{¶ 16} Before proceeding to our discussion of the

assignments of error, we must resolve the preliminary issue, fully briefed by the parties though not separately assigned as error, whether the trial court abused its discretion in excluding from the record the McCain affidavit and the documents attached thereto.

[1] {¶ 17} Appellant argues that the trial court abused its discretion in excluding the affidavit and its attachments pursuant to Evid.R. 803(6) because there is no support in the text of Civ.R. 12(B)(2) for excluding hearsay evidence in passing upon a motion brought thereunder. Appellant directs our attention to several decisions of the federal trial and intermediate appellate courts in which those courts considered affidavits containing hearsay in passing upon motions to dismiss for lack of personal jurisdiction.

{¶ 18} Appellees argue that the trial court correctly concluded that the McCain affidavit lacks reliability because the affiant did not aver that she possesses the requisite personal knowledge to lay an appropriate foundation for any of the attached documents. Appellees direct our attention to decisions wherein federal courts have applied the rules of evidence to affidavits submitted in support of a defense of lack of personal jurisdiction.

{¶ 19} In reply, appellant argues that the documents attached to the McCain affidavit should be considered because they "bear circumstantial indicia of reliability" and could "very well be admissible at trial" as business records and, because many of the documents appear to have been generated by appellees themselves, as admissions of a party-opponent. (Reply Brief of Appellant, at 2.)

{¶ 20} Generally, the admission of evidence is within the discretion of the trial court, and the court's decision will be reversed only upon a showing of an abuse of discretion. *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 21. " 'Abuse of discretion' implies that the court acted in an unreasonable, arbitrary, or unconscionable manner." *Ibid*.

{¶ 21} Our research has revealed no case in which a state court in Ohio has passed upon the question

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whether the rules of evidence and, specifically, Evid.R. 803(6), apply when a court considers a Civ.R. 12(B)(2) motion. The civil rule itself is silent on the issue. However, section 2317.40 of the Ohio Revised Code provides in pertinent part, "[a] record of an act, condition, or event, in so far as relevant, is *competent evidence* if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." (Emphasis added.) "Competence," with respect to business records, has been defined to mean "authenticity." Black's Law Dictionary (8 Ed.2004) 302.

*5 (§ 22) Thus, assuming without deciding, that Evid.R. 803(6) does not operate to bar hearsay evidence from consideration of a Civ.R. 12(B)(2) motion to dismiss filed in an Ohio trial court, R.C. 2317.40 nonetheless imposes basic foundational requirements upon a party seeking to introduce documents into evidence for the purpose of demonstrating that the court's exercise of personal jurisdiction would be proper. The statute contains no limitation as to the type of pretrial motion practice to which it applies. Because we decline to engage in judicial amendment of the statute by reading such a limitation into it, we hold that, pursuant to R.C. 2317.40, the trial court was correct in requiring that the McCain affidavit itself contain statements sufficient to authenticate the documents attached thereto before the same could be considered.

(§ 23) In her affidavit Ms. McCain averred, in relevant part:

1. The following statements are based on my personal knowledge, information and belief.

3. * * * I spent many months on site at Credit General's offices prior to the liquidation. During that time I developed a substantial familiarity with Credit General's records by examining the records and speaking with Credit General employees.

4. For several months after [appellant's predecessor]

was appointed [as liquidator], I continued working at the Credit General offices to assemble, review and organize Credit General's records. Eventually we transferred the records to a warehouse in Columbus, where most are housed today. Some of the records are kept at the office of the Liquidator. I work at the warehouse, and have continued to assemble, review and organize these records.

5. Among the records I have reviewed are statements, memoranda, letters and facsimile transmissions between and among accountants or auditors of the PRS corporate family ("PRS"). * * * These records typically bear the signatures of one or more persons who, according to the records, had participated in the audits and/or the preparation of the financial statements and had attended meetings concerning the same in which some of the documents were recorded, and who signed to indicate that they had participated in the audits and/or meetings concerning the same, and/or had authored and/or reviewed and approved the records. It is evident from a review of such records that they were kept in the course of Credit General's regularly conducted business activity, and that it was Credit General's regular practice to make such records.

(McCain's aff. at 1-2.)

(§ 24) The foregoing statements fail to establish the identity and mode of the documents' preparation, or whether the documents were made in the regular course of business, at or near the time of the act, condition, or event with which they are concerned, such as would qualify the documents as "competent" under R.C. 2317.40. Ms. McCain's review of the records does not establish that she had personal knowledge of the circumstances of the preparation, maintenance and retrieval of the records, or of the operation of the business of CGIC and CGIND such that she could reasonably testify that the documents appellant sought to place in the record are what they purport to be. Because the McCain affidavit fails to lay an adequate foundation for the documents attached thereto, and because appellant offered no affidavit of any person who did have the requisite personal knowledge of the authenticity of the documents, under R.C. 2317.40, the documents were not competent evidence for purposes of defeating the motions to dismiss.

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Accordingly, the trial court did not abuse its discretion in refusing to consider the contents of the documents in passing upon appellees' motions.

*6 {¶ 25} We now turn to the issue of personal jurisdiction raised by the assignments of error. Because a trial court's determination as to whether it has personal jurisdiction over a party is a question of law, an appellate court reviews de novo a decision granting a Civ.R. 12(B)(2) motion. *Cardinal Distribution v. Reade*, 10th Dist. No. 02AP-1204, 2003-Ohio-2880, at ¶ 26.

{¶ 26} When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state's "long-arm" statute and the applicable Civil Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution. *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048, 1051.

{¶ 27} Once appellees challenged the trial court's jurisdiction with their motions to dismiss, appellant bore the burden of establishing that the trial court had jurisdiction over appellees. *Robinson v. Koch Refining Co.* (June 17, 1999), 10th Dist. No. 98AP-900. Absent an evidentiary hearing, the trial court was permitted to dismiss the complaint pursuant to Civ.R. 12(B)(2) only if appellant failed to establish a prima facie case for the court's personal jurisdiction over appellees. *KB Circuits, Inc. v. BECS Technology, Inc.* (Jan. 18, 2001), 10th Dist. No. 00AP-621. If appellant produced sufficient evidence to allow reasonable minds to conclude that the trial court had personal jurisdiction over appellees, then the trial court could not dismiss the complaint without holding an evidentiary hearing. *Ibid.* Moreover, because the trial court did not hold an evidentiary hearing, it was required to "(1) view the allegations in the pleadings and the documentary evidence in the light most favorable to the nonmoving party, and (2) resolve all reasonable competing inferences in favor of the nonmoving party." *Goldstein v. Christiansen*

(1994), 70 Ohio St.3d 232, 236, 638 N.E.2d 541; *Cardinal Distribution*, supra, at ¶ 24.

{¶ 28} Given, however, that the trial court properly refused to consider the McCain affidavit and accompanying documents, the only evidence that was before the court on the issue of personal jurisdiction were the Steinhoff and Gellineau affidavits offered by appellees in support of their motions to dismiss. If these un rebutted affidavits support the conclusion that appellees never transacted any business in Ohio, then the Liquidator failed to meet her burden. See *Upright Robotics v. Legacy Marketing Group, Inc.* (Sept. 3, 1992), 10th Dist. No. 92AP-374. Thus, the next step in our analysis is to examine the Steinhoff and Gellineau affidavits, in light of the requirements of Ohio's long-arm statute and federal due process principles, to determine whether the affidavits contain facts sufficient to demonstrate that Ohio courts cannot properly exercise jurisdiction over appellees.

*7 {¶ 29} Jurisdiction may be general, in cases in which a defendant's "continuous and systematic" activities within the forum state render that defendant amenable to the jurisdiction of the forum state's courts. *Perkins v. Benguet Consol. Mining Co.* (1952), 342 U.S. 437, 445-447, 72 S.Ct. 413, 96 L.Ed. 485. Jurisdiction may also be specific, in cases wherein the causes of action subject of the complaint arise out of or are related to the defendant's specific activity within the forum state. *Nationwide Mut. Ins. Co. v. Tryg Internatl. Ins. Co.* (C.A.6, 1996), 91 F.3d 790, 793.

{¶ 30} In contrast with general jurisdiction, specific jurisdiction may be premised upon a single act of the defendant. *Id.* at 794, citing *McGee v. Internatl. Life Ins. Co.* (1957), 355 U.S. 220, 222, 78 S.Ct. 199, 2 L.Ed.2d 223. "The nature and quality of the act, as well as the circumstances surrounding its commission, must be examined to determine whether personal jurisdiction exists in each case." *Ibid.*, citing *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. In the present case, the Liquidator bases the Ohio courts' jurisdiction over appellees upon appellees' alleged actions taken in connection with a specific transaction, namely, their performance of

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audit services for the offshore affiliates. The Liquidator argues that, in the course of their performance of those services, appellees took actions that constitute "transacting business" in Ohio such that they are amenable to this lawsuit.

{¶ 31} Ohio's long-arm statute provides "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's * * * [t]ransacting any business in this state [.]" R.C. 2307.382(A)(1). The applicable rule of civil procedure is Civ.R. 4.3(A), which states, in pertinent part:

Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's * * * [t]ransacting any business in this state[.]

{¶ 32} The phrase "transacting any business" is broad and encompasses more than "contract." *Clark v. Connor* (1998), 82 Ohio St.3d 309, 312, 695 N.E.2d 751. The term "transacting" as utilized in the phrase "transacting any business" encompasses "carrying on business" and "having dealings." *Goldstein*, supra, at 236, 638 N.E.2d 541. "With no better guideline than the bare wording of the statute to establish whether a nonresident is transacting business in Ohio, the court must, therefore, rely on a case-by-case determination." *U.S. Sprint*, supra, at 185, 624 N.E.2d 1048.

*8 {¶ 33} If a defendant is found amenable to suit in Ohio under the long-arm statute and applicable civil rule, then jurisdiction is properly exercised so long as the same would not offend due process principles applicable to the states through the Fourteenth Amendment to the United States Constitution. "The Due Process clause protects an individual's liberty interest in not being subject to

the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-472, 105 S.Ct. 2174, 85 L.Ed.2d 528.

{¶ 34} In *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, the United States Supreme Court held that a state may assert personal jurisdiction over a nonresident defendant if the nonresident has " * * * certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316. (Citation omitted.) The court emphasized that the analysis under the "minimum contacts" rule "cannot simply be mechanical or quantitative," but, rather, whether due process is satisfied depends "upon the quality and nature of the activity." Id. at 319. 1

{¶ 35} Later, in *Burger King*, supra, the court concluded that " * * * the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Id. at 474, quoting *Internatl. Shoe*, supra, at 316. The "minimum contacts" standard serves two functions. First, it protects the nonresident defendant "against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490. Second, it ensures that the states do not encroach on each other's sovereign interest. Ibid. 2

{¶ 36} The nonresident defendant has purposefully established minimum contacts where: the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State * * * where the defendant 'deliberately' has engaged in significant activities within a State * * * or has created 'continuing obligations' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. 3

Burger King

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Burger King, supra, at 475-476 (Emphasis sic.)
(Citations omitted.)

{¶ 37} Furthermore, minimum contacts are satisfied when the defendant foreseeably causes injury in the forum state if " * * * the defendant's conduct and connection with the forum State are such that he *should reasonably anticipate being haled into court there.*" * * * Id. at 474, quoting *World-Wide Volkswagen Corp.*, supra, at 297. (Emphasis added.) The *Burger King* court explained the contours of the "reasonably anticipate" notion in the following manner:

*9 The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. 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[.] * * *

Burger King, supra, at 474-475. (Citations omitted.)

{¶ 38} The exercise of personal jurisdiction over a nonresident defendant will not offend due process principles when the defendant's activities within the state are systematic and continuous. *Internatl. Shoe*, supra, at 319.

And while the casual presence of a corporate agent or a single or isolated act is not enough, "other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Thus where the defendant 'deliberately' has engaged in significant activities within a State * * *, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. * * * [D]ue process is satisfied when a foreign corporation has certain minimum contacts with Ohio such that it is fair that a

defendant defend a suit brought in Ohio and that substantial justice is done.

U.S. Sprint, supra, at 186-187, 624 N.E.2d 1048. (Citations omitted.)

{¶ 39} Personal jurisdiction is not automatically defeated by a lack of physical presence in the forum state. See, e.g., *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 559 N.E.2d 477; *Cardinal Distribution v. Reade*, 10th Dist. No. 02AP-1204, 2003-Ohio-2880, at ¶ 32.

{¶ 40} The United States Supreme Court in the *Burger King* case also stated:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these 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.' * * * Thus courts in 'appropriate cases[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.' * * * These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. * * * [O]n the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. * * *

*10 Id. at 476-477. (Citations omitted.)

{¶ 41} The United States Supreme Court has made it clear that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *Internatl. Shoe* and its progeny." *Shaffer v. Heitner* (1977), 433 U.S. 186, 212, 97 S.Ct. 2569, 53 L.Ed.2d 683. Therefore, guided by the foregoing principles, we must decide whether the Liquidator

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established a prima facie case that the trial court could properly exercise personal jurisdiction over appellees.

{¶ 42} With respect to the motion of KPMG Bermuda, the trial court had before it the affidavit of Mr. Steinhoff. Therein, Mr. Steinhoff avers that KPMG Bermuda is a Bermuda partnership operating in Hamilton, Bermuda, and wholly owned by its partners, all of whom are residents of Bermuda. He states that KPMG Bermuda is a dues-paying member of KPMG International, a Swiss association that does not perform professional services but distributes practice and other guidelines that all members voluntarily follow. KPMG Bermuda is a signatory to a license agreement and a membership agreement with KPMG International, but KPMG Bermuda is solely responsible for its own day-to-day operations.

{¶ 43} Mr. Steinhoff states that KPMG Bermuda has only one office, located in Bermuda, and maintains no other place of business anywhere. It is not licensed to do business in Ohio. It has no operations, bank accounts or assets in Ohio, and does not advertise or market its services to Ohio-based entities. It has "from time to time," provided professional services in Bermuda to Bermuda-based affiliates or subsidiaries of Ohio-based corporations. But none of its employees or partners resides in, or routinely performs work in, the United States. KPMG Bermuda has never performed any accounting or other services to PRS Group, CGIC or CGIND.

{¶ 44} According to Mr. Steinhoff, in 1995, Barbados-based Captech Management Services (Barbados) Ltd., which managed the offshore affiliates, retained KPMG Bermuda to assist KPMG Barbados in auditing the offshore affiliates. KPMG Bermuda did not render an opinion on the offshore affiliates' financial statements. Mr. Steinhoff avers that KPMG Bermuda has never had a contractual relationship with PRS Group, CGIC or CGIND, and has never made oral or written assurances to any Ohio-based PRS-related entity with respect to the audits of the offshore affiliates.

{¶ 45} Over the four years it assisted with the

offshore affiliates' audits, KPMG Bermuda personnel took three trips to the Beachwood, Ohio offices of an entity called PRS Management Group, Inc. The trips lasted from one to two days each, and involved one or two KPMG Bermuda personnel. The trips involved the review of systems and data at PRS Management Group, Inc.

{¶ 46} Mr. Steinhoff states that most of the correspondence originating from KPMG Bermuda respecting the offshore affiliates' audits was sent to local independent managers of KPMG Barbados, but that KPMG personnel corresponded "on several occasions" with PRS Management Group, Inc., employees. But these contacts "were infrequent and were initiated primarily for the limited purpose of obtaining information regarding balances and reserves. This is standard operating procedure during any audit of a reinsurer regardless of whether the insured is an affiliated company or not." (Steinhoff Affidavit, at ¶ 16.) Mr. Steinhoff avers that KPMG Bermuda personnel sent fewer than 20 pieces of written correspondence (including faxes) to individuals in Ohio.

*11 {¶ 47} Finally, Mr. Steinhoff states that it would be difficult and costly for KPMG Bermuda to defend the instant lawsuit in Ohio because its partners and employees involved with the subject matter of the case would be required to travel between Bermuda and Ohio for pretrial and trial proceedings, perhaps for extended periods of time, which would impose a hardship on these individuals, their families and on KPMG Bermuda's business operations.

{¶ 48} Given all of these facts, we find that KPMG Bermuda did not "transact business" in Ohio in the course of completion of its auditing services for the offshore affiliates. Twenty pieces of correspondence with Ohio-based PRS Group personnel over four years does not establish that KPMG Bermuda transacted business in this state. As a general rule, the use of interstate lines of communication such as mail, facsimiles and telephones, does not automatically subject a defendant to the jurisdiction of the courts in the forum state. *Fritz-Rumer-Cooke Co., Inc. v. Todd & Sargent* (Feb. 8, 2001), 10th Dist. No. 00AP-817,

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discretionary appeal not allowed in (2001), 92 Ohio St.3d 1418, 748 N.E.2d 550.

{¶ 49} The several trips that KPMG Bermuda personnel made to Ohio over a four-year period, for the purpose of gathering information about balances and reserves, when such information-gathering is standard procedure for the type of audit KPMG Bermuda was performing, likewise do not constitute the kind of dealings that would render KPMG Bermuda amenable to suit in Ohio. These trips were undertaken by KPMG Bermuda solely in order to perform its obligations under its contracts with the offshore affiliates, and should not be considered in determining whether personal jurisdiction exists. See *Nationwide Mutual Ins. Co. v. Tryg Internat'l Ins. Co.* (C.A.6, 1996), 91 F.3d 790, 796.

{¶ 50} We also find, from the facts adduced, that KPMG Bermuda did not purposely establish minimum contacts in Ohio such as would create a substantial connection with the state sufficient to ensure that Ohio courts' exercise of jurisdiction over KPMG Bermuda would not offend traditional notions of fair play and substantial justice. The quality and nature of KPMG Bermuda's contacts with Ohio do not establish a substantial connection with Ohio such that it was reasonably foreseeable to KPMG Bermuda that it would be haled into court here.

{¶ 51} Moreover, there is no competent evidence of record that KPMG Bermuda could have reasonably foreseen that its activities in Ohio would directly result, as the Liquidator alleges, in the insolvency and ultimate liquidation of CGIC and CGIND. It is unreasonable to subject a foreign auditor to the jurisdiction of courts in a state in which it solicits no business, is not licensed to perform professional accounting services, maintains no assets or property, has not been retained to perform professional accounting services, and visited only a handful of times over a four-year period in connection with its performance of a contract with an entity not domiciled in that state, simply because the foreign reinsurance company that it audited happens to have reinsured the risks of an insurance company domiciled in the state.

*12 {¶ 52} Absent evidence from which reasonable minds could conclude that KPMG Bermuda knew or should have known that its offshore professional activities would harm CGIC or CGIND, the exercise of Ohio courts' jurisdiction in the instant case would offend due process principles. Because the Steinhoff affidavit was the only competent evidence before the trial court, and this affidavit contains no evidence from which reasonable minds could conclude that KPMG Bermuda foresaw or should have foreseen that it would cause harm in this state, the trial court correctly concluded that it lacked jurisdiction over KPMG Bermuda. Accordingly, appellant's first assignment of error is overruled.

{¶ 53} With respect to the motion of KPMG Barbados, the trial court had before it the affidavit of Mr. Gellineau. Therein, he avers that KPMG Barbados is a partnership organized under the laws of Barbados and whose principal place of business is in Hastings, Barbados. The firm also maintains offices in St. Lucia, St. Vincent and Antigua. It is owned by partners who reside in Barbados or in one of the branch office locations, and is affiliated with KPMG International in the same fashion as is KPMG Bermuda. Like KPMG Bermuda, KPMG Barbados has no office in the United States, is not authorized to do business or to practice accounting in Ohio, does not advertise or market its services in Ohio, and maintains no operations, bank accounts or assets in Ohio.

{¶ 54} Mr. Gellineau further avers that no KPMG Barbados employees reside in or routinely undertake work in the United States, and that KPMG Barbados has never rendered auditing or other accounting services to PRS Group, CGIC or CGIND. Captech Management Services (Barbados), Ltd., (a Barbados-based entity) and Captech Management Services (Bermuda), Ltd., (a Bermuda-based entity) engaged KPMG Barbados in 1995 to perform audits for the offshore affiliates. KPMG Barbados did not enter into any contractual relationships with PRS Group, CGIC or CGIND in connection with the rendering of accounting services to the offshore affiliates.

{¶ 55} Mr. Gellineau states that KPMG Barbados'

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primary contacts, for purposes of auditing the offshore affiliates, were with the independent managers of the Barbados-based reinsurers. KPMG Barbados employees never sent any correspondence to individuals in Ohio, and never traveled outside of Barbados or the branch office locations, in connection with the four years of accounting services performed for the offshore affiliates. Finally, Mr. Gellineau states that it would difficult and costly for KPMG Barbados to defend this lawsuit in Ohio, due to its lack of any facilities or business contacts in Ohio and in the United States.

{¶ 56} From these facts, we readily conclude that the trial court lacked jurisdiction over KPMG Barbados. That entity directed no correspondence to Ohio, sent no personnel to Ohio, performed no services in Ohio, had no contractual relations with Ohio entities or persons, maintains no offices in Ohio or any other state, is not authorized to do business or to practice accounting in Ohio, does not advertise or market its services in Ohio, and maintains no operations, bank accounts or assets in Ohio. There is no evidence that KPMG Barbados had reason to believe that its conduct outside of Ohio would directly harm CGIC or CGIND. Thus, we find that the exercise of Ohio courts' jurisdiction over KPMG Barbados would be improper both under Ohio's long-arm statute and under federal due process principles. For the all of the foregoing reasons, appellant's second assignment of error is overruled.

*13 {¶ 57} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.
Judgment affirmed.

BROWN, P.J., and LAZARUS, J., concur.
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Briefs and Other Related Documents (Back to top)

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- 2004 WL 3549619 (Appellate Brief) Brief of Appellee Kpmg Barbados (Mar. 25, 2004) Original Image of this Document with Appendix (PDF)
- 2004 WL 3549621 (Appellate Brief) Brief of Appellee Kpmg Bermuda (Mar. 25, 2004) Original Image of this Document (PDF)
- 2004 WL 3549622 (Appellate Brief) Brief of Appellant (Feb. 05, 2004) Original Image of this Document (PDF)

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**CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin
County.

Anita J. KVINTA,

Plaintiff-Appellee/Cross-Appellant,

v.

Charles J. KVINTA,

Defendant-Appellant/Cross-Appellee,

Mary KVINTA, Third-Party Defendant-Appellant.

No. 02AP-836.

Decided June 5, 2003.

Wife sought a legal separation from husband. The Court of Common Pleas, Franklin County, No. 95DR-01-94, denied husband's motion to dismiss and entered contempt judgment. Husband appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. After dismissing complaint on remand, the Court of Common Pleas, reinstated complaint on wife's new trial motion, held trial, granted legal separation, and awarded wife spousal support. Wife, husband and husband's new partner appealed. The Court of Appeals, Bryant, J., held that: (1) evidence supported common law marriage finding; (2) husband was not entitled to provide additional evidence on common law marriage issue at trial; (3) trial court could find that marriage ended on date of final hearing; (4) trial court was not required to consider new partner's purported marriage to husband; (5) presumption that property acquired during marriage was marital property applied; (6) trial court had in rem jurisdiction over property awarded to wife as spousal support; and (7) new partner was subject to trial court's jurisdiction.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇐80(6)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k80 Determination of Controversy

30k80(6) k. Determination of Part
of Controversy. Most Cited Cases

Order in legal separation proceeding that did not contain express determination that there was no reason to delay and did not dispose of all claims was interlocutory and, thus, merged with final judgment, and thus, appeal from final judgment was sufficient to maintain appeal, even though appeal was predicated on interlocutory order; appeal from final judgment included all interlocutory orders that had merged with it. Rules App.Proc., Rule 3(D).

[2] Divorce 134 ⇐181

134 Divorce

134IV Proceedings

134IV(O) Appeal

134k181 k. Taking and Perfecting Appeal.

Most Cited Cases

Husband failed to timely appeal within 30 days trial court's grant of a new trial in proceeding in which wife sought legal separation, and thus, Court of Appeals did not have jurisdiction to hear claim that new trial motion was not a proper response to trial court's grant of motion to dismiss complaint. R.C. § 2505.02(B)(3); Rules App.Proc., Rule 5(B).

[3] Divorce 134 ⇐184(2)

134 Divorce

134IV Proceedings

134IV(O) Appeal

134k184 Review

134k184(2) k. Parties Entitled to

Allege Error. Most Cited Cases

Husband waived for appellate review claim that trial court erred in applying clear and convincing evidence standard to common law marriage issue in wife's proceeding for legal separation, where husband had urged court to use standard and contended it was correct standard to apply.

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[4] Marriage 253 ⇌ 50(2)**253 Marriage**

253k50 Weight and Sufficiency of Evidence

253k50(2) k. Testimony of Parties or Witnesses. Most Cited Cases

Marriage 253 ⇌ 50(4)**253 Marriage**

253k50 Weight and Sufficiency of Evidence

253k50(4) k. Admissions and Declarations. Most Cited Cases

Marriage 253 ⇌ 50(5)**253 Marriage**

253k50 Weight and Sufficiency of Evidence

253k50(5) k. Cohabitation and Reputation. Most Cited Cases

Under Kansas Law, evidence was sufficient to support trial court's finding that a present agreement existed between parties to enter into a common law marriage; husband called wife and asked her and their children to join him in Kansas to restart their relationship, wife testified a commitment was made to restart prior marriage and continue their lives as before, husband wrote a journal in which he repeatedly referred to wife as his "wife" and wrote letter in which he referred to "our marriage" and signed it "your husband," spouses maintained a sexual relationship, and spouses moved several times together.

[5] Divorce 134 ⇌ 141**134 Divorce**

134IV Proceedings

134IV(L) Trial or Hearing

134k140 Scope of Inquiry and Powers of Court

134k141 k. In General. Most Cited Cases

Husband was not entitled to present additional evidence, in wife's proceeding for legal separation, on whether a common law marriage existed when trial court had already held a prior evidentiary hearing in which court made an express finding that a common law marriage did exist, where husband

had a full opportunity to present evidence at evidentiary hearing, and husband did not identify any evidence not presented at hearing that would have been produced at trial to refute court's finding.

[6] Divorce 134 ⇌ 255**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k255 k. Conclusiveness of Adjudication. Most Cited Cases

Trial court's determination in prior order that marriage "essentially ended" on specified date did not preclude trial court from subsequently concluding in final judgment that marital relationship ended on date of final hearing on complaint for legal separation, pursuant to statutory presumption; statements in prior order were made in conjunction with court's finding that it lacked personal jurisdiction over husband and were not findings regarding the duration of marriage, and trial court found evidence did not support a de facto termination date. R.C. § 3105.171.

[7] Divorce 134 ⇌ 253(2)**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(2) k. Evidence. Most Cited Cases

Husband's new partner failed to establish any evidence of a valid marriage between husband and herself, and thus trial court was under no obligation to consider her purported marriage to husband when it selected marital termination date in wife's legal separation action.

[8] Divorce 134 ⇌ 253(2)**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or

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Assignment

134k253(2) k. Evidence. Most Cited Cases

Husband presented no evidence that property acquired during marriage was his separate property and, thus, presumption that property was marital property applied. R.C. § 3105.171(A)(3)(a)(i).

[9] Divorce 134 ⚡62(5)**134 Divorce**

134IV Proceedings

134IV(A) Jurisdiction

134k58 Jurisdiction of Cause of Action

134k62 Domicile or Residence of Parties

134k62(5) k. Jurisdiction of Person of Nonresident or Actual Notice of Suit. Most Cited Cases

Divorce 134 ⚡253(1)**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(1) k. In General. Most Cited Cases

Trial court had in rem jurisdiction over property husband bought during marriage in state in which wife filed action for legal separation and support, and thus, trial court had jurisdiction to enter judgment awarding property as spousal support, even though court lacked personal jurisdiction over non-resident husband, where husband had notice of wife's request to appropriate property and award it as support. R.C. §§ 3105.171(B), 3105.18(B).

[10] Divorce 134 ⚡252.2**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases

No presumption nor requirement that marital

property be divided equally precluded trial court from awarding to wife as spousal support property that was approximately half the value of husband's acknowledged property interests, in legal separation action brought in state in which wife resided and property was located; a potentially equal division was merely the starting point for trial court analysis. R.C. §§ 3105.171(C), 3105.171(G).

[11] Divorce 134 ⚡252.2**134 Divorce**

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases

Trial court, in awarding wife as spousal support property that was approximately half the value of husband's acknowledged property interests, equitably divided spouses' property in legal separation action brought in state in which wife resided and property was located, given long duration of marriage, husband's income, all of which was outside the reach of the court, and husband's potentially fraudulent conveyance of a one-half interest in property to new partner.

[12] Divorce 134 ⚡65**134 Divorce**

134IV Proceedings

134IV(A) Jurisdiction

134k65 k. Jurisdiction of the Person. Most Cited Cases

Divorce 134 ⚡81**134 Divorce**

134IV Proceedings

134IV(F) Appearance

134k81 k. In General. Most Cited Cases

Husband's new partner waived jurisdictional defenses and voluntarily submitted herself to trial court's jurisdiction in wife's legal separation action in which court awarded property to which new partner claimed an interest, when partner filed written motions to quash a subpoena for financial information and to quash a request for production of

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documents, absent a motion to dismiss complaint based on lack of jurisdiction or insufficient service, even though one motion included a notice of special appearance; special appearances were abolished by procedure rule. Rules Civ.Proc., Rule 12(B).

[13] Divorce 134 ⇌65

134 Divorce

134IV Proceedings

134IV(A) Jurisdiction

134k65 k. Jurisdiction of the Person. Most Cited Cases

Divorce 134 ⇌81

134 Divorce

134IV Proceedings

134IV(F) Appearance

134k81 k. In General. Most Cited Cases

Husband's new partner was subject to trial court's jurisdiction in spouses' legal separation action in which court awarded property to which new partner claimed an interest, when new partner's counsel actively participated in action after trial court reinstated complaint that it had initially dismissed on motion for new trial, despite partner's claim that she was never rejoined in action after grant of new trial, where her counsel filed various written motions supporting memoranda, approved a judgment entry, and appeared for final trial on the merits. Rules Civ.Proc., Rule 12(B).

[14] Divorce 134 ⇌186

134 Divorce

134IV Proceedings

134IV(O) Appeal

134k185 Determination and Disposition of Cause

134k186 k. In General. Most Cited Cases

Trial court, on remand from Court of Appeals' finding that trial court lacked personal jurisdiction over non-resident husband in wife's legal separation, was bound to follow appellate court's ruling pursuant to law of the case doctrine, where Supreme Court dismissed an appeal from Court of Appeals' ruling.

[15] Divorce 134 ⇌62(5)

134 Divorce

134IV Proceedings

134IV(A) Jurisdiction

134k58 Jurisdiction of Cause of Action

134k62 Domicile or Residence of Parties

134k62(5) k. Jurisdiction of Person of Nonresident or Actual Notice of Suit. Most Cited Cases

Non-resident husband had not established residence in state in which wife filed action for legal separation and had not lived in marital relationship in state sufficient to find minimum contacts necessary to establish personal jurisdiction over him, where wife had moved to state with children after husband purchased a home for family to live in, husband only visited family on vacations twice a year, always returned to foreign nation in which he worked, maintained a separate residence in foreign nation, and spouses filed separate tax returns.

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.

Kemp, Schaeffer, Rowe & Lardiere Co., L.P.A., and Harold R. Kemp, for Anita J. Kvinta.

Tyack, Blackmore, & Liston Co., L.P.A., and Thomas M. Tyack, for Charles J. Kvinta.

Frank Macke Co., L.P.A., and Jason Macke, for Mary Kvinta.

Thompson Hine LLP, and S. Craig Predieri, for Deloitte & Touche, LLP.

BRYANT, J.

*1 {¶ 1} Defendant-appellant, Charles J. Kvinta, and third-party defendant-appellant, Mary Kvinta, appeal, and plaintiff-appellee, Anita J. Kvinta, cross-appeals from a July 19, 2002 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting plaintiff a legal separation from defendant and awarding plaintiff marital real estate as payment for spousal support.

{¶ 2} On January 9, 1995, plaintiff filed a complaint against defendant for legal separation. Following plaintiff's service of process on defendant in Kuwait, where he lived and worked, defendant

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moved to dismiss the complaint for (1) lack of jurisdiction over the subject matter because plaintiff could not establish the existence of a common law marriage, (2) lack of personal jurisdiction over defendant, and (3) insufficiency of service of process. The trial court found: (1) a common law marriage existed between the parties as of September 1981, (2) defendant was properly served by ordinary mail pursuant to Civ.R. 4.6(D), and (3) the court had personal jurisdiction over defendant pursuant to Civ.R. 4.3(A)(6) based on defendant's acknowledged ownership of real property in Mansfield, Ohio. Because it found personal jurisdiction under Civ.R. 4.3(A)(6), the court did not determine whether it also had personal jurisdiction pursuant to Civ.R. 4.3(A)(8).

{¶ 3} On defendant's appeal from an April 19, 1999 contempt judgment of the trial court, this court affirmed the trial court's finding that service of process had been perfected on defendant by ordinary mail pursuant to Civ.R. 4.6(D). *Kvinta v. Kvinta* (Feb. 22, 2000), Franklin App. No. 99AP-508 ("*Kvinta I*"). However, this court held the trial court erred in finding personal jurisdiction pursuant to Civ.R. 4.3(A)(6) because, even though plaintiff "has sought a division of property [in this legal separation action], the action is not one arising from [defendant's] interest in, possession, or use of the real property in Mansfield, Ohio." *Id.* This court remanded for the trial court to determine if personal jurisdiction existed over defendant pursuant to Civ.R. 4.3(A)(8).

{¶ 4} On remand, the trial court concluded it lacked personal jurisdiction over defendant pursuant to Civ.R. 4.3(A)(8). Because it found no personal jurisdiction existed, the court vacated its prior contempt judgment against defendant and dismissed plaintiff's complaint for legal separation. (Mar. 9, 2001 Decision.) However, after sustaining plaintiff's motion for new trial, the trial court found it had in rem jurisdiction over the parties' marital status and the Mansfield, Ohio real property, and the court reinstated plaintiff's legal separation action. Following a two-day trial, the trial court issued a final judgment on July 19, 2002, granting plaintiff a legal separation and awarding her the Mansfield property as spousal support payment.

{¶ 5} Defendant Charles Kvinta and third-party defendant Mary Kvinta appeal from the judgment of legal separation. Defendant Charles Kvinta assigns the following errors:

*2 {¶ 6} "1. The trial court erred by refusing to hear evidence on the issue of common law marriage at the trial on the merits conducted April 24-25, 2002.

{¶ 7} "2. The trial court (Judge S. Brown) erred in failing to recognize, in ruling on objections to a magistrate's report overruling defendant's motion to dismiss that the burden of proof to prove a common law marriage in Ohio judicial proceeding (clear and convincing evidence) was applicable to this case.

{¶ 8} "3. The court erred in ruling the evidence presented to the magistrate for consideration of defendant's motion to dismiss affirmatively proved a common law marriage by clear and convincing evidence.

{¶ 9} "4. The trial court erred in ruling that the presence of real estate in Ohio gave the court in rem jurisdiction in a separate maintenance action to terminate defendant's ownership interest in the real estate.

{¶ 10} "5. The trial court erred in ruling that a pretrial motion must be filed before the court could consider a de facto termination date other than trial date and that the defendant had not presented sufficient evidence as to that issue at trial when the court had made a finding in its March 9, 2001 judgment entry that the marital relation was ended in 1989 or 1990.

{¶ 11} "6. The trial court abused its discretion by awarding to plaintiff 100% of the real estate owned by defendant and third party defendant, Mary Kvinta.

{¶ 12} "7. The trial court erred in granting plaintiff's motion for new trial from the decision and judgment granting defendant's motion to dismiss plaintiff's case."

{¶ 13} Third-party defendant Mary Kvinta assigns

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the following errors:

{¶ 14} “[1.] The trial court erred when it concluded that Mary Kvinta had voluntarily submitted herself to the court's jurisdiction and had waived her right to present defenses under Civ.R. 12

{¶ 15} “[2.] The trial court erred by awarding the real property of Mary Kvinta to the plaintiff, where Mary Kvinta was no longer a party to the case.

{¶ 16} “[3.] The trial court erred by making a declaration regarding the status of the plaintiff as the common law wife of Charles Kvinta and choosing a date of termination that nullifies Mary Kvinta's status as the wife of the Charles Kvinta, in violation of her right to due process under the Ohio and United States Constitutions.”

{¶ 17} In her cross-appeal from the judgment granting legal separation, plaintiff Anita Kvinta assigns the following errors:

{¶ 18} “1. The trial court erred as a matter of law when it found that personal jurisdiction over Mr. Kvinta did not exist.

{¶ 19} “2. The trial court committed error and abused its discretion as a matter of law when it found that personal jurisdiction could not exclusively exist pursuant to Civ.R. 4.3(A)(6).”

[1] {¶ 20} As an initial matter, in a motion filed with this court, plaintiff contends third-party defendant Mary Kvinta failed to comply with App.R. 3(D) by failing to designate the May 17, 1999 order she is appealing. Because Mary Kvinta's first assignment of error is predicated on the May 17, 1999 order, but her notice of appeal designates only the trial court's July 19, 2002 final judgment as the order appealed, plaintiff contends Mary Kvinta's first assignment of error should be dismissed. App.R. 3(D) provides a notice of appeal “shall designate the judgment, order or part thereof appealed from.” Interlocutory orders, however, are merged into the final judgment, and thus, an appeal from the final judgment includes all interlocutory orders merged with it. *Bard v. Society Natl. Bank*

(Sept. 10, 1998), Franklin App. No. 97APE11-1497. Because the May 17, 1999 order did not dispose of all the claims between the parties and did not contain an express determination that there was no just reason for delay, the order was interlocutory. Civ.R. 54(B); *Id.* Accordingly, it merged into the July 19, 2002 final judgment and did not need to be separately identified in the notice of appeal. Plaintiff's motion to dismiss Mary Kvinta's first assignment of error is denied.

*3 {¶ 21} As to the assignments of error raised by the parties, we first address defendant Charles Kvinta's seventh assignment of error, in which defendant asserts the trial court erred in granting plaintiff's Civ.R. 59(A)(7) motion for new trial from the trial court's March 9, 2001 decision and judgment entry dismissing plaintiff's complaint due to lack of personal jurisdiction over defendant. Defendant contends plaintiff's motion for new trial is not a proper response to the trial court's judgment sustaining defendant's Civ.R. 12(B)(2) motion to dismiss plaintiff's complaint. According to defendant, the court's ruling on the motion to dismiss did not constitute a “trial” pursuant to the Ohio Rules of Civil Procedure, and the trial court thus should have denied plaintiff's motion for new trial.

[2] {¶ 22} We preliminarily note that defendant's challenge to the trial court's order granting plaintiff's motion for a new trial is not timely. Pursuant to App.R. 5(B), the time for appealing that order began to run when the order was entered. Because defendant did not appeal within 30 days of that order, we lack the jurisdiction to address the merits of defendant's seventh assignment of error. See, also, R.C. 2505.02(B)(3). Accordingly, defendant's seventh assignment of error is dismissed.

{¶ 23} Defendant's first three assignments of error together assert the trial court erred in finding a common law marriage existed between plaintiff and defendant. Specifically, defendant contends the trial court (1) failed to recognize that clear and convincing evidence is the appropriate burden of proof to prove a common law marriage, (2) erred in ruling that the evidence presented to the magistrate affirmatively proved a common law marriage by

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clear and convincing evidence, and (3) erred in refusing to hear evidence on the issue of common law marriage at the trial on the merits conducted on April 24 and 25, 2002.

{¶ 24} Under R.C. 3105.12(B)(3), a common law marriage is valid in Ohio if it came into existence in another state that recognizes the validity of common law marriages in accordance with the laws of that state. Here, plaintiff alleged her common law marriage with defendant came into existence in Kansas. Therefore, following R.C. 3105.12(B)(3)'s directive, the trial court appropriately looked to Kansas law to determine if plaintiff and defendant had established a valid common law marriage in that state.

[3] {¶ 25} Not able to ascertain the degree of proof necessary to establish a common law marriage under Kansas law, the trial court, as the parties urged, expressly applied Ohio's standard of clear and convincing evidence to determine whether a common law marriage existed. (Mar. 24, 1998 Decision, 7-8.) See *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, 146, 472 N.E.2d 1091 (determining the elements of a common law marriage must be established by clear and convincing evidence). Thus, contrary to defendant's contention, the trial court did apply the clear and convincing standard of proof. To the extent the court erred in using a "clear and convincing" standard of proof rather than some other standard of proof, defendant has waived any error because (1) he urged the trial court to use that standard of proof, and (2) he contends here it was the correct standard of proof to apply in determining whether a common law marriage existed.

*4 [4] {¶ 26} With regard to defendant's second contention, the trial court did not err in its March 24, 1998 decision in finding clear and convincing evidence of a common law marriage between plaintiff and defendant. In Kansas, the elements necessary for a common law marriage are: (1) capacity of the parties to marry, (2) a present marriage agreement between the parties, and (3) a holding out of each other as husband and wife to the public. *In re Estate of Antonopoulos* (1999), 268 Kan. 178, 192-193, 993 P.2d 637. Defendant does

not dispute that sufficient evidence was presented to establish the first and third elements, but he contends clear and convincing evidence was not presented to prove the second element, a present agreement between the parties to enter into a common law marriage.

{¶ 27} Kansas law does not require a marriage agreement between the parties to be in any particular form. *In re Estate of Keimig* (1974), 215 Kan. 869, 872, 528 P.2d 1228. Moreover, the Kansas Supreme Court has held a marriage agreement between the parties may be shown by circumstantial evidence. *Fleming v. Fleming* (1977), 221 Kan. 290, 291, 559 P.2d 329.

{¶ 28} Evidence was presented at the magistrate's hearing that defendant called plaintiff in 1981 and asked her and their children to join him in Kansas to restart their relationship. Plaintiff testified she and defendant made a commitment to each other to restart their marriage and they continued with their lives "like [they] were before." (Tr. 19.) Although defendant argues that "like [they] were before" means he and plaintiff resumed cohabitating, no evidence was presented that the parties ever cohabitated outside of marriage before 1981. Therefore, an inference can reasonably be made that a commitment to live "like [they] were before" refers to a commitment to live in a marital relationship, as the parties previously had between 1966 and 1979.

{¶ 29} Defendant's own writings in 1981 also present evidence of his intent to be married to plaintiff at that time. In October 1981, defendant wrote a journal in which he repeatedly referred to plaintiff as his "wife," and he wrote a letter to plaintiff in which he referred to "our marriage," signing the letter "your husband."

{¶ 30} Additionally, after plaintiff's move to Kansas, the actions of plaintiff and defendant are consistent with the actions of a husband and wife: defendant moved several times due to his job, and plaintiff and their children moved and resided with him in Texas, Oklahoma, and Cyprus; plaintiff and defendant were listed as husband and wife in parish books in Kansas, Oklahoma, and Ohio; they

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maintained a sexual relationship that, according to plaintiff, was monogamous; and defendant designated plaintiff as his wife and beneficiary on insurance policies.

{¶ 31} The foregoing evidence supports the magistrate's and trial court's finding that a present marriage agreement existed between plaintiff and defendant in 1981. The other elements of a common law marriage not being in dispute, the trial court did not err in finding a valid common law marriage between plaintiff and defendant beginning in 1981, and in entering judgment accordingly. (Mar. 24, 1998 Decision and Judgment Entry.)

*5 [5] {¶ 32} Despite the trial court's express finding in its March 24, 1998 decision and judgment entry that a common law marriage existed between plaintiff and defendant, defendant contends the trial court erred at the trial conducted on April 24 and 25, 2002, in refusing to hear evidence on the issue and to reconsider its previous finding. Because the March 24, 1998 decision and judgment entry was an interlocutory order rather than a final judgment in the case, the trial court retained jurisdiction at trial to reconsider its prior decision that a common law marriage existed between plaintiff and defendant. *Featherstone v. CM Media, Inc.*, Franklin App. No. 02AP-65, 2002-Ohio-6747, appeal not allowed (2003), 98 Ohio St.3d 1491, 785 N.E.2d 473.

{¶ 33} Defendant does not contend he did not have a full opportunity at the May 16, 1996 evidentiary hearing to present evidence a common law marriage did not exist between plaintiff and defendant. Nor has he identified any evidence not presented at that hearing that would have been produced at trial to refute the court's finding, journalized in its March 24, 1998 decision and judgment entry, that a common law marriage existed between plaintiff and defendant. Additionally, defendant has demonstrated no prejudice, such as how the result at trial would have been different if the trial court had reconsidered the issue. Thus, defendant has not shown the trial court erred in adhering to the prior ruling that a common law marriage existed. Accordingly, because defendant has failed to demonstrate the trial court

erred in finding clear and convincing evidence of a common law marriage between plaintiff and defendant, defendant's first three assignments of error are overruled.

[6] {¶ 34} Defendant's fifth assignment of error is directed to the trial court's finding in its July 19, 2002 final judgment that the marital relationship terminated on April 23, 2002, the date of the final hearing on plaintiff's complaint for legal separation. Defendant asserts the court should have found a de facto termination date of 1989 to 1990, which the trial court cited in its March 9, 2001 decision and judgment entry as the time when plaintiff and defendant separated and their marriage "essentially ended."

{¶ 35} In cases of divorce and legal separation, we presume the date of the final hearing is the appropriate termination date of the marital relationship. However, the trial court, in its discretion, may select a de facto termination date. R.C. 3105.171(A)(2)(a) and (b); *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 630, 725 N.E.2d 1165; *Badovick v. Badovick* (1998), 128 Ohio App.3d 18, 31, 713 N.E.2d 1066.

{¶ 36} Initially, defendant contends the trial court erred in ruling a pretrial motion must be filed before the court would consider a de facto termination date. Contrary to defendant's contention, the trial court did not affirmatively rule it would not consider a de facto termination date because defendant failed to file a motion requesting same. Rather, the court considered the issue, even though it noted defendant did not file a motion for the court to establish a de facto termination date. After finding defendant did not present sufficient evidence at the final hearing to establish a de facto termination date, the court found the marriage terminated on the date of the final hearing, in accord with the statutory presumption of R.C. 3105.171(A)(2)(a). (July 19, 2002 Decision and Judgment Entry, 6.)

*6 {¶ 37} Next, defendant maintains the trial court, in selecting the date of the final hearing as the termination date of the common law marriage, improperly disregarded its March 9, 2001 judgment

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entry in which it already had determined the marital relationship ended in 1989 to 1990.

{¶ 38} Without question, the trial court stated in its March 9, 2001 decision and judgment entry that plaintiff and defendant's marriage "essentially ended" and the parties separated sometime in late 1989 to mid-1990. The statements, however, were made in conjunction with the court's finding that it lacked personal jurisdiction over defendant and were not the trial court's express findings pursuant to R.C. 3105.171 regarding the duration of the marriage. Further, even if the court found plaintiff and defendant had separated and the marriage "essentially ended" in 1989 or 1990, the court acted within its discretion in selecting the date of trial, rather than the earlier date of separation, as the date the marital relationship legally terminated pursuant to R.C. 3105.171. *Bowen*, supra; *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 689 N.E.2d 112 (determining a trial court does not abuse its discretion in choosing the final hearing date rather than the date of separation as the date a marriage terminates). Accordingly, defendant's fifth assignment of error is overruled.

[7] {¶ 39} Third-party defendant, Mary Kvinta, also takes issue with the marital termination date the trial court selected. Defendant purported to marry Mary Kvinta sometime before February 1997, when defendant conveyed an interest in the Mansfield property to her as his "wife." In her third assignment of error, Mary Kvinta asserts the trial court's decision not choosing an earlier de facto termination date nullified her status as Charles Kvinta's new "wife," thus depriving her of the incidents and benefits flowing from the marriage.

{¶ 40} Although Mary and Charles Kvinta contend they are married, the record reflects no documentary or testimonial evidence that establishes, and no affirmative finding of the trial court that recognizes, the existence of a valid marriage between Charles Kvinta and Mary Kvinta. Moreover, absent evidence in the record to that effect, Mary Kvinta has not shown the trial court was under any obligation to consider her purported marriage to Charles Kvinta when it selected the marital termination date in plaintiff's legal

separation action. Accordingly, third-party defendant Mary Kvinta's third assignment of error is overruled.

{¶ 41} Defendant Charles Kvinta's fourth and sixth assignments of error together assert the trial court erred in awarding real estate located in Mansfield, Ohio, to plaintiff.

{¶ 42} R.C. 3105.171(B) provides that "[i]n divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section. *For purposes of this section, the court has jurisdiction over all property in which one or both spouses have an interest.*" (Emphasis added.) Pursuant to subsection (A)(3)(a) of the statute, "marital property" includes all real property currently owned by either spouse, or in which either spouse currently has an interest, that was acquired by either spouse during the marriage.

*7 {¶ 43} Defendant purchased and took sole title to the real property in Mansfield, Ohio, in 1992. Thereafter, plaintiff and some of the children lived on the Mansfield property as their home. Defendant worked and resided in Kuwait but stayed in the Mansfield home on his visits to the United States.

{¶ 44} On January 9, 1995, when plaintiff filed her complaint for legal separation, she identified and claimed an interest in the Mansfield property and requested the court to award her a judgment of support as a charge against the property. In September 1995, plaintiff filed a notice of lis pendens in the Richland County Recorder's office, the county where the Mansfield property is located, attesting to her marital interest in the Mansfield property. Approximately two years later, in 1997, defendant executed and recorded a quitclaim deed granting third-party defendant Mary Kvinta, as his "wife," an undivided one-half interest in the Mansfield property and retaining an undivided one-half interest in the property for himself.

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{¶ 45} In its April 24, 2001 decision sustaining plaintiff's motion for new trial, the trial court found that although the court lacked personal jurisdiction over defendant, the court had in rem jurisdiction over the Mansfield property and could make an award of support to plaintiff from that property. In its final judgment of legal separation, the trial court (1) expressly found the Mansfield property to be "marital property" pursuant to R.C. 3105.171(A)(3)(a)(i) because defendant had acquired it during his marriage to plaintiff, (2) found defendant owed plaintiff a duty of support that could be satisfied from an award of the property, and (3) awarded plaintiff the property in its entirety. (July 19, 2002 Decision and Judgment Entry.)

[8] {¶ 46} Defendant argues the Mansfield property was his "separate" property because he purchased and held sole title to the property after he and plaintiff separated in 1989 or 1990. As noted, however, the trial court found, and this court has affirmed, plaintiff and defendant were still married at the time defendant purchased the property. One spouse's holding title to property individually does not determine whether the property is marital property or separate property. R.C. 3105.171(H). Rather, a presumption exists that property acquired during marriage is marital property. R.C. 3105.171(A)(3)(a)(i), *Lust v. Lust*, Wyandot App. No. 16-02-04, 2002-Ohio-3629. Because defendant purchased the Mansfield property during his marriage to plaintiff and he has not presented evidence overcoming a presumption the property is marital property, he has not shown the trial court abused its discretion in finding the Mansfield property to be marital property. *Id.*

[9] {¶ 47} Defendant next contends the trial court erred in ruling the presence of the real property in Ohio gave the court in rem jurisdiction to divest defendant of his ownership interest in the property. Defendant argues the court lacked authority in the legal separation action to terminate defendant's ownership interest in the property and award it to plaintiff as payment of spousal support where the court lacked *personal* jurisdiction over defendant.

*8 {¶ 48} A decree of divorce or legal separation

is regarded as a judgment in rem because it determines the marital status, or res, of the parties. *Hager v. Hager* (1992), 79 Ohio App.3d 239, 243, 607 N.E.2d 63, citing *McGill v. Deming* (1887), 44 Ohio St. 645, 11 N.E. 118. Only one of the spouses must be domiciled in the state to give a court jurisdiction to terminate the parties' marriage. *Id.* A court has jurisdiction, pursuant to R.C. 3105.171(B), over all property in which one or both spouses have an interest and has the power to divide the property. Although a court in a divorce or legal separation proceeding must have personal jurisdiction over a nonresident defendant to render a personal or monetary judgment of support against the defendant, personal jurisdiction over the nonresident defendant is not required where the court obtains jurisdiction over the defendant's real property located within the state and applies the property to a support award. *Reed v. Reed* (1929), 121 Ohio St. 188, 167 N.E. 684; *Benner v. Benner* (1900), 63 Ohio St. 220, 58 N.E. 569; *Meadows v. Meadows* (1992), 73 Ohio App.3d 316, 320, 596 N.E.2d 1146. See, also, R.C. 3105.18(B) (providing an award of spousal support may be allowed in real property).

{¶ 49} If a wife brings an action for support against her nonresident husband, seeking appropriation of the husband's real property situated within the state as payment of the requested support, the action is essentially an action in rem. *Reed*; *Benner*, *supra*. In such an action, the trial court has in rem jurisdiction to enter judgment awarding the property as spousal support, despite the court's lacking personal jurisdiction over the nonresident defendant, if the nonresident defendant has been duly served notice of the plaintiff's petition requesting the court to appropriate the property identified in the petition and to award the property as spousal support. *Id.* The property thereby is brought within the control and jurisdiction of the court, which has the power to adjust the parties' rights in the property as an incident of its power to grant a decree of divorce or legal separation. *Reed*, *supra*.

{¶ 50} In this case, service of process of plaintiff's complaint for legal separation was made upon defendant, providing defendant notice of plaintiff's

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request to the trial court to appropriate the Mansfield, Ohio property and award it to plaintiff as support. The property thus properly was brought within the control and jurisdiction of the trial court, which then had the power to adjudicate the parties' rights in the property, including an award of the property to plaintiff as spousal support. R.C. 3105.171(B); *Reed; Benner*; and *Meadows*, supra.

[10] {¶ 51} Even if the court had jurisdiction to award the Mansfield property in this action, defendant contends the trial court abused its discretion in awarding plaintiff the Mansfield property in its entirety, where the court not only ignored R.C. 3105.171(C)(1)'s "requirement" that property be divided equally, but it failed to make written findings of fact supporting its award as required by R.C. 3105.171(G).

*9 {¶ 52} Contrary to defendant's contention, pertinent statutes create neither presumption nor requirement that marital property be divided equally. Instead, a potentially equal division is merely the *starting* point of the trial court's analysis before it considers other factors. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144-145, 541 N.E.2d 1028; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293, paragraph one of the syllabus. According to R.C. 3105.171(C)(1), marital property is to be divided equally unless doing so would be inequitable, in which case the court is to make an equitable division of the property. "[E]quitable does not necessarily mean equal." *Ellars v. Ellars* (1990), 69 Ohio App.3d 712, 720, 591 N.E.2d 783. Instead, the trial court is accorded broad discretion in deciding what division of marital property is equitable under the facts and circumstances of the case. *Cherry*, at paragraph two of the syllabus. For the court to have abused its discretion, we look at the totality of the circumstances and determine whether the court acted unreasonably, arbitrarily or unconscionably in making its award. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 53} Here, due to the trial court's lack of personal jurisdiction over defendant, defendant's income and assets outside of Ohio were not subject

to discovery or the court's jurisdiction. However, evidence produced at trial revealed defendant earned from \$150,000 to \$400,000 annually working overseas in the 1990's, while plaintiff had modest earnings during that period. Moreover, in his response to a request for admission, defendant, through counsel, acknowledged that between 1981 and January 1, 1995, he acquired a total interest in real and/or personal property valued in excess of \$250,000 and less than \$500,000.

{¶ 54} Although the trial court did not have jurisdiction over defendant's assets outside of Ohio, the trial court did have jurisdiction over the Mansfield, Ohio home. The record shows defendant purchased the home for \$124,000 in 1992, and the home was valued at \$136,000 at the time of trial. Notably, the value of the real estate awarded to plaintiff was approximately half the value of defendant's acknowledged property interests. Thus, upon plaintiff receiving her award, an equal or greater portion of the purported property interests remained for defendant.

[11] {¶ 55} Even if, however, defendant did not receive an equal share of the parties' property, the court's division of the property was nevertheless equitable in light of: (1) the long duration of the marriage, (2) defendant's income, all of which was outside the reach of the court, and (3) defendant's conveyance of a one-half interest in the Mansfield property, in which plaintiff had a marital interest, to his purported new wife, Mary Kvinta. Because defendant made the conveyance during the pendency of the legal separation proceedings after he was on notice of plaintiff's claim in the marital property, defendant's conveyance of the property interest arguably is a constructive or actual fraud upon plaintiff designed to defeat any rights she had in the marital property, although the trial court made no express finding in that regard. *Leathem v. Leathem* (1994), 94 Ohio App.3d 470, 473, 640 N.E.2d 1210, appeal not allowed, 70 Ohio St.3d 1454, 639 N.E.2d 793. Under these circumstances, the trial court appropriately exercised its full equitable powers and jurisdiction in this matter, R.C. 3105.11, and acted within its discretion in awarding the Mansfield property to plaintiff in its entirety. Defendant's fourth and sixth assignments

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of error are overruled.

*10 [12] {¶ 56} Third-party defendant Mary Kvinta also claims error regarding the court's award of the Mansfield property. Together, her first two assignments of error assert the trial court violated her right to procedural due process because she was not a proper party to the action when the trial court awarded her interest in the Mansfield property to plaintiff. Mary Kvinta contends she was not a proper party because she never voluntarily submitted herself to the court's jurisdiction or waived her right to present Civ.R. 12 defenses of lack of jurisdiction and insufficient service of process.

{¶ 57} A court obtains personal jurisdiction over a defendant by (1) service of process, (2) the voluntary appearance and submission of the defendant to the court's jurisdiction, or (3) other acts the defendant commits which constitute a waiver of a jurisdictional defense. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156, 464 N.E.2d 538. Pursuant to Civ.R. 12(H), a defendant waives the affirmative defenses of lack of jurisdiction over the person or insufficiency of service of process unless the defenses are presented (1) by motion before pleading pursuant to Civ.R. 12(B), (2) affirmatively in a responsive pleading under Civ.R. 8(C), or (3) within an amended pleading under Civ.R. 15. *State ex rel. The Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 33, 661 N.E.2d 187. The failure to utilize the prescribed methods results in a waiver of the affirmative defenses. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 60, 320 N.E.2d 668.

{¶ 58} In this case, pursuant to plaintiff's request, Mary Kvinta was joined as a third-party defendant on June 22, 1998. Although she did not file an answer and the record does not reflect that personal service had been perfected upon her, Mary Kvinta, through counsel, filed three separate written motions with the trial court in September and October 1998: a September 25 motion to quash a subpoena served upon defendant Smith Barney, Inc. to obtain financial information regarding Mary Kvinta, a September 29 amended motion to quash the subpoena, and an October 13 motion to quash a

request for production of documents served upon Mary Kvinta's counsel. The latter motion included a notice of special appearance by her counsel, but none of the motions included, and there was no separate filing of, a Civ.R. 12 motion to dismiss plaintiff's complaint based on lack of jurisdiction or insufficient service of process. In a May 17, 1999 order, the trial court denied all three of Mary Kvinta's motions and determined that, by filing the motions, she became a proper party to this action and waived her defenses under Civ.R. 12.

{¶ 59} Special appearances, where a person would appear in an action without submitting to the court's jurisdiction, were abolished with the adoption of the Rules of Civil Procedure in Ohio. *Maryhew*, supra. The manner for presenting jurisdictional defenses, and waiver of such defenses, is now prescribed in Civ.R. 12. Here, because Mary Kvinta filed three written motions with the trial court without including or filing a separate Civ.R. 12(B) motion to dismiss the complaint based on lack of jurisdiction or insufficient service, she waived the jurisdictional defenses and voluntarily submitted herself to the court's jurisdiction. *Mills*; *Maryhew*, supra, at 158, 464 N.E.2d 538. Thus, she was a proper party to the action. *Id.* Cf. *Maryhew*, supra (finding two requests made orally, not in writing, by defendant's counsel, granted by the trial court, for leave to move or otherwise plead in an action where service was not perfected upon the defendant, did not constitute a waiver of the defendant's jurisdictional defenses).

*11 [13] {¶ 60} Mary Kvinta next contends that, even if she was initially a proper party to this action, the trial court's March 9, 2001 decision and judgment entry dismissed her as a party when it dismissed plaintiff's complaint. Mary Kvinta maintains she was never re-joined in the action after the court granted plaintiff's motion for new trial on April 24, 2001 and reinstated the case.

{¶ 61} The record reflects that subsequent to the trial court's reinstating the case, Mary Kvinta's counsel did not file any motions pursuant to Civ.R. 12(B) objecting to the court's reassertion of jurisdiction over Mary Kvinta. To the contrary, her counsel actively participated in the action and

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submitted to the trial court's jurisdiction by filing various written motions and supporting memoranda, approving a judgment entry, and appearing for the final trial on the merits, although her counsel did not participate in the trial proceedings.

{¶ 62} Under the foregoing circumstances, Mary Kvinta is deemed to have submitted herself to the court's renewed jurisdiction over the case and waived any jurisdictional defenses she could have raised under Civ.R. 12(B) after the case was reinstated. Moreover, where her attorney had an opportunity to participate in the trial and defend her interests in the Mansfield property, Mary Kvinta was not denied procedural due process by the trial court's adjudication of the interests in the real property.

{¶ 63} Accordingly, Mary Kvinta's first two assignments of error are overruled.

{¶ 64} In the two assignments of error presented in her cross-appeal, plaintiff Anita Kvinta asserts the trial court erred in its March 9, 2001 decision in: (1) refusing to again consider, upon this court's remand, whether the trial court had personal jurisdiction over defendant pursuant to Civ.R. 4.3(A)(6) from defendant's owning real property in Ohio, and (2) finding it did not have personal jurisdiction over defendant Charles Kvinta pursuant to Civ.R. 4.3(A)(8) arising out of defendant's living in the marital relationship in Ohio.

{¶ 65} Regarding Civ.R. 4.3(A)(6), plaintiff asserts this court's finding in *Kvinta I*, that the trial court did not have personal jurisdiction over defendant pursuant to Civ.R. 4.3(A)(6), was contrary to law and therefore should not have been followed on remand. Plaintiff's assertion is premised on her contention that the Ohio Supreme Court in a legal separation action in *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.* (1996), 76 Ohio St.3d 374, 667 N.E.2d 1189, found personal jurisdiction existed over the defendant in that case pursuant to Civ.R. 4.3(A)(6).

[14] {¶ 66} Initially, we note the Ohio Supreme Court dismissed an appeal of this court's decision in

Kvinta I. Id., 89 Ohio St.3d 1427. Therefore, on remand, the trial court was bound to follow this court's decision in *Kvinta I* as the law of the case regarding Civ.R. 4.3(A)(6). See, e.g., *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 4, 462 N.E.2d 410.

*12 {¶ 67} Nonetheless, plaintiff's argument regarding Civ.R. 4.3(A)(6) is not well-founded. Contrary to plaintiff's contention, the Supreme Court in *Fraiberg* did not find personal jurisdiction existed pursuant to Civ.R. 4.3(A)(6). Rather, the court expressly decided that whether Civ.R. 4.3(A)(6) established personal jurisdiction in the legal separation action was rendered moot when the court found personal jurisdiction vested under Civ.R. 4.3(A)(8). *Fraiberg* at 379, 667 N.E.2d 1189. The court therefore did not discuss whether Civ.R. 4.3(A)(6) could provide a basis for personal jurisdiction in a legal separation action. *Id.* Plaintiff's second assignment of error is overruled.

{¶ 68} Plaintiff next asserts the trial court erred in its application of law and fact in determining Civ.R. 4.3(A)(8) does not confer personal jurisdiction over defendant.

{¶ 69} Personal jurisdiction over a defendant is premised on that person's minimum contacts with 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* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, quoting *Milliken v. Meyer* (1940), 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State * * *. [I]t is essential in each case that there be some act by which the defendant purposely avails [him]self of the privilege of conducting activities within the forum State * * *." *Kulko v. California Superior Court* (1978), 436 U.S. 84, 93-94, 98 S.Ct. 1690, 1698, 56 L.Ed.2d 132, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283.

{¶ 70} R.C. 2307.382, Ohio's long-arm statute, authorizes the exercise of personal jurisdiction over nonresident defendants. Civ.R. 4.3 provides for

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service and determines the "minimum contacts" necessary to effectuate that jurisdiction. *Kvinta I*, citing *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477. Civ.R. 4.3(A)(8) states, in pertinent part:

{¶ 71} "Service of process may be made outside of this state * * * in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. 'Person' includes an individual * * * who * * * has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

{¶ 72} " * * *

{¶ 73} "Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state[.]"

{¶ 74} In determining the propriety of personal jurisdiction based on Civ.R. 4.3(A)(8), the dispositive issue is "whether the nonresident defendant lived in a marital relationship within the state to an extent sufficient to satisfy the minimum-contacts requirement of constitutional due process." *Fraiberg* at 377-378, 667 N.E.2d 1189. The trial court's determination whether personal jurisdiction exists over a party is a question of law that we review de novo. *Robinson v. Koch Refining Co.* (June 17, 1999), Franklin App. No. 98AP-900.

*13 [15] {¶ 75} According to evidence presented to the trial court, plaintiff and defendant were born and raised in Ohio, initially married in Ohio in 1966, had five children, and then divorced in Ohio in 1979, after which defendant left the state and moved frequently. At defendant's request in 1981, plaintiff and the minor children moved to Kansas, where plaintiff and defendant commenced a common law marriage. Thereafter, plaintiff and the children continued to live and move with defendant to Oklahoma, Texas, and Cyprus. In 1989, plaintiff left Cyprus and moved back to the United States,

living in New Jersey and New York, while some of the children remained with defendant in Cyprus.

{¶ 76} In 1991, defendant moved to Kuwait, where plaintiff visited but did not live. In 1991 or 1992, plaintiff and the minor children moved to Ohio, where defendant purchased a home in Mansfield for plaintiff and the children to live in and sent them money for living expenses. As they had in other places they lived, plaintiff and defendant joined a parish in Mansfield and attended some dinners, events and services together. Plaintiff testified defendant "visited" plaintiff and the children in Ohio during "vacations," usually twice a year for about a month each time, but he always returned to Kuwait where he worked and maintained a separate residence until plaintiff filed her complaint for legal separation. According to plaintiff, during visits to Ohio, defendant attended his son's baseball games, bought suits in Cincinnati, visited a doctor in Cleveland and a dentist in Columbus, and had intimate relations with plaintiff until she filed for legal separation in 1995. Plaintiff and defendant filed separate tax returns, with plaintiff filing as "single" and defendant filing as "head of household." Defendant received some mail at the Mansfield residence, but it was primarily "junk" mail.

{¶ 77} Based upon the evidence, personal jurisdiction of defendant under Civ.R. 4.3(A)(8) has not been established. As the trial court properly concluded, while "defendant has been to Ohio only for visits since plaintiff's move here in 1992, he has not established residence in Ohio nor has he 'lived in the marital relationship' in Ohio sufficient to establish 'minimum contacts' necessary to establish jurisdiction over the person of defendant." (Mar. 9, 2001 Decision, 7-8.) Accordingly, plaintiff's remaining issue on cross-appeal is overruled.

{¶ 78} Having denied plaintiff's motion, dismissed defendant's seventh assignment of error, and having overruled all remaining assignments of error, we affirm the trial court's final judgment in this case.

Motion denied; judgment affirmed.

BOWMAN and LAZARUS, JJ., concur.

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APP 0059

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Not Reported in N.E.2d, 1991 WL 307131 (Ohio App. 5 Dist.)
(Cite as: Not Reported in N.E.2d)

C

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Fairfield
County.

THE BANK OF NOVA SCOTIA,
Plaintiff-Appellee,

v.

G. Ross MCGREGOR, Defendant-Appellant.
No. 19-CA-91.

Dec. 24, 1991.

Civil Appeal from Common Pleas Court, No.
88-CV-SP-0387.

William B. Wilson, Lancaster, for plaintiff-appellee.
Richard F. Swope, Reynoldsburg, for
defendant-appellant.

Before PUTMAN, P.J., and SMART and
WILLIAM B. HOFFMAN, JJ.

OPINION

WILLIAM B. HOFFMAN, Judge.

*1 Defendant-appellant is G. Ross McGregor and
plaintiff-appellee is The Bank of Nova Scotia.

It is undisputed that appellant left Ohio in 1987,
because of an indictment for fraud, illegal
transportation of securities, and wire fraud in the
U.S. District Court, Southern District of Ohio, Case
No. CR-287-073. After McGregor fled the
jurisdiction, he established his residence in Ontario,
Canada, and while there executed a promissory note
to appellee bank. Subsequently, appellant
defaulted on the note, and appellee bank entered a
default judgment against McGregor in the District
Court of Ontario for \$61,312 plus costs.
Subsequently, a default judgment for the same
amount was taken against McGregor in the Court of
Common Pleas of Fairfield County, Ohio, said entry
filed November 15, 1988. On November 29, 1988,
a certificate of judgment was filed with the Clerk of

the Common Pleas Court of Fairfield County,
ostensibly creating a lien on property held jointly by
appellant and his then wife, Maxine McGregor.
Mrs. McGregor subsequently was granted a decree
of divorce by the trial court and was further granted
appellant's interest in the real estate in Fairfield
County. (Case No. 89DR-AG-0411.)

Subsequently, a foreclosure action was brought by
Bank One against both appellant and Maxine
McGregor in Fairfield County Common Pleas Court
in Case No. 88-CVJU-0261. Bank One's
foreclosure action did not reference any of the prior
proceedings or certificate of judgment lien filed by
appellee Bank of Nova Scotia. Subsequently,
appellee bank intervened in Bank One's action by
motion to intervene filed October 24, 1990.

Upon learning of the lien, Maxine McGregor filed a
motion to set aside appellee bank's judgment and
lien for lack of jurisdiction. (Copy attached.) By
entry filed May 30, 1991, the trial court overruled
the subject motion and ordered that the judgment
and lien of The Bank of Nova Scotia "remain in full
force and effect."

Appellant raises the following two assignments of
error:

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT
OVERRULED THE PLAINTIFF APPELLEE'S
MOTION WITHOUT A FULL EVIDENTIARY
HEARING [SIC].

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED WHEN IT FAILED
TO SUSTAIN THE
DEFENDANT-APPELLANT'S MOTION TO
DECLARE THE JUDGMENT VOID AND OF NO
EFFECT AND VACATE THE JUDGMENT.

We discuss the assigned errors in reverse order.

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II

The second assigned error is well taken, and it is sustained.

Our analysis begins with a recognition that the subject lien flows from the Ohio judgment and not from the foreign judgment obtained in Ontario. As maintained by appellant, the trial court was without personal jurisdiction over Ross McGregor when it rendered and filed its November 15, 1988 judgment. R.C. 2307.382(A)(8), commonly called the long-arm statute, provides in pertinent part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

*2 (8) Having an interest in, using, or possessing real property in this state.

There is no nexus between the instant cause of action, a garden variety default action on an unsecured signature loan and McGregor's interest in the subject real property in Ohio. See *Anilas, Inc. v. Kern* (1986), 28 Ohio St.3d 165, at 166. Obviously, had the loan been secured by the subject real property, appellee could make a direct attack on the real estate in question. As pointed out by appellant:

The basic contacts [i.e., the minimum contacts of *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95] must result from conduct or activity in the state. The suit brought against Ross McGregor in the Ohio courts was based on activity which occurred outside of Ohio and did not involve the real estate which is the subject of this action.

(Appellant's brief at 6.)

Had appellee bank availed itself of R.C. 2329.021, et. seq., Ohio's Foreign Judgment Act, and filed its judgment lien based upon the foreign judgment, that lien would be valid and enforceable.

Two additional elements of this appeal require explanation.

First, the fact that appellee obtained notice and service on its adversary party does not confer jurisdiction on that party *instante*. See *Riverside and Dan River Cotton Mills v. Menefee* (1915), 237 U.S. 189 (personal service did not create in personam adjudicatory power over the corporation).

Two, a "direct attack on a judgment alleging no personal jurisdiction need not satisfy requirements of the rule governing relief from judgment." Civ.R. 60(B). *Howard v. Cunard Line Ltd.* (1988), 62 Ohio App.3d 285, reported in OBAR, Vol. 36, 1991.

I

Because the court below was faced with a "law call," there was no need to conduct a full evidentiary hearing in this matter. This first assignment of error is overruled.

Having sustained appellant's assignment of error II, the judgment of the trial court is reversed.

PUTMAN, P.J., and SMART, J., concur.

ATTACHMENT

Certificate of Judgment for Lien upon Lands and Tenements

I, Robert W. Lacey, Clerk of the Court of Common Pleas of Fairfield County, Ohio, do hereby certify that on the 15th day of November, 1988, a judgment or decree was rendered by said Court in favor of The Bank of Nova Scotia, judgment creditor _____, and against G. Ross McGregor, judgment debtor, in the amount of sixty thousand and 00/100 Dollars, (\$60,000.00) with interest at the rate of 11.75% per annum from the 11th day of April, 1988, and _____ Dollars (\$_____) costs, in a certain action then pending in said Court, No. 88 CV SP 0387 on the docket thereof, entitled The Bank of Nova Scotia, Plaintiff, vs. G. Ross

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McGregor, Defendant, which said judgment or
decree is entered in Journal No. (272) CB6-2, Page
(588) 668, in said Court.

WITNESS my hand and the seal of said Court, this
29th day of November, 1988

Robert W. Lacey
*3 Clerk of Courts
by Irene Knight
Deputy

(Seal)

Ohio App.5 Dist.,1991.
Bank of Nova Scotia v. McGregor
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(Cite as: Not Reported in N.E.2d)

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Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Butler
County.

Frank LEONESIO, Plaintiff-Appellant,

v.

James E. CARTER, Defendant-Appellee.
No. CA91-08-136.

May 11, 1992.

John Crist, Middletown, for defendant-appellee.
James R. Kirkland & Associates, James R. Kirkland
and Elaine M. Stoermer, Dayton, for
plaintiff-appellant.

OPINION

WILLIAM W. YOUNG, Judge.

*1 Plaintiff-appellant, Frank Leonesio, and defendant-appellee, James E. Carter, entered into an agreement whereby Carter executed a promissory note in the amount of thirty thousand dollars. The note was payable upon demand. Negotiations with respect to the note occurred at Carter's Michigan residence. Sometime after the note was executed, Leonesio demanded payment. Carter, however, refused to pay any money owing on the note. On March 27, 1991, Leonesio filed a complaint against Carter in the Butler County Court of Common Pleas, seeking to recover the thirty thousand dollars plus ten percent interest per annum from the date of the execution of the note.

Leonesio mailed the complaint to an address in Middletown, Ohio by certified mail.^{FN1} It was returned with the notation "unclaimed." As a result, Leonesio requested the court clerk to mail the complaint to the Middletown address by regular mail. The complaint was mailed on May 7, 1991. The envelope was never returned. On June 6, 1991, Carter, claiming that he is a non-resident of the state of Ohio, entered a special appearance^{FN2} and filed a timely motion to quash service and

dismiss the complaint for lack of personal jurisdiction pursuant to Civ.R. 12(B)(2). The trial court granted Carter's motion on July 5, 1991. Leonesio appeals from the trial court's judgment asserting the following three assignments of error:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY CONSIDERING THE AFFIDAVIT ATTACHED TO THE MOTION TO DISMISS THEREBY ERRONEOUSLY CONVERTING DEFENDANT'S MOTION TO A MOTION FOR SUMMARY JUDGMENT.

Assignment of Error No. 2:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT FOR [sic] DISMISSING THE COMPLAINT DUE TO INSUFFICIENT SERVICE.

Assignment of Error No. 3:

THE TRIAL COURT CANNOT RULE UPON DEFENDANTS [sic] MOTION FILED OUT OF TIME WITHOUT FIRST GRANTING LEAVE TO PLEAD AFTER THE EXPIRATION OF THE TWENTY-EIGHT (28) DAY PERIOD ESTABLISHED UNDER RULE 12.

Leonesio contends in his first assignment of error that the trial court erred by considering affidavits by Carter which were filed in support of Carter's motion to dismiss. We do not agree.

Ohio courts clearly recognize the trial court's authority to consider any pertinent evidentiary materials when determining its own jurisdiction. See *Price v. Wheeling Dollar Savings and Trust Co.* (1983), 9 Ohio App.3d 315; *Grossi v. Presbyterian University Hospital* (1980), 4 Ohio App.3d 51. The Ohio Supreme Court held that federal practice relevant to Ohio Civ.R. 12(B):

recognizes the obligation of a trial court to

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determine at the earliest time whether it has jurisdiction, and authorizes a court to consider outside matter attached to a motion to dismiss for lack of jurisdiction without converting it into a motion for summary judgment if such material is pertinent to that inquiry.

Southgate Development Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 211, 214. The supreme court therefore concluded that materials pertinent to a claim over which a trial court allegedly does not have jurisdiction may properly be considered by the trial court when ruling on a motion to dismiss for lack of jurisdiction. The rationale for such a proposition is that a court of common pleas is a court of general jurisdiction and is competent to determine its own jurisdiction over the subject matter and parties in an action instituted therein. *Grossi, supra*. A court whose jurisdiction is dependent upon the existence of a certain state of facts has jurisdiction to inquire whether such state of facts exists. *Id.*

*2 We therefore hold that it was within the trial court's discretion in the instant action to go beyond the complaint and consider other evidence when ruling on the Civ.R. 12(B)(2) motion to dismiss. Accordingly, appellant's first assignment of error is overruled.

Leonesio contends in his second assignment of error that the trial court erred in granting Carter's motion to dismiss. Leonesio avers that service of process was properly completed upon Carter, and that the trial court had personal jurisdiction over Carter. We do not agree.

Even if we assume that Carter was properly served ^{FN3}, the court was correct in dismissing the action for lack of personal jurisdiction. In order to establish jurisdiction over a person not within the territory of a forum state, fair play and substantial justice require that certain "minimum contacts" be established. *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 158. Personal jurisdiction over an out-of-state defendant is governed by R.C. 2307.382, Ohio's long-arm statute, which states:

[A] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(8) having an interest in, using, or possessing real property in this state [.]

While the plaintiff is entitled to have the factual allegations sustaining personal jurisdiction construed in his favor, the plaintiff must nevertheless first plead or otherwise make a *prima facie* showing of jurisdiction over the defendant. *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79, 85. The record clearly shows that Leonesio failed to meet his burden of showing the existence of personal jurisdiction.

In the instant action, Leonesio argues that Carter owned property in Butler County, Ohio. Carter disputes this allegation, claiming that the property is owned by his father. However, even if Leonesio's assertion is correct, personal jurisdiction over Carter has not been established. The mere presence of property in a state does not establish a sufficient relationship between the owner of the property and the state to support the exercise of jurisdiction over an unrelated cause of action. *Gold Circle Stores v. Chemical Bank-Dommerich Division* (1982), 4 Ohio App.3d 10.

Here, it is undisputed that there is no nexus between the cause of action, a complaint upon a promissory note executed in the state of Michigan, and Carter's alleged interest in the real property in Butler County, Ohio. If the promissory note had been secured by the real property, Leonesio could have made a direct attack on the real estate in question. See *Bank of Nova Scotia v. McGregor* (Dec. 24, 1991), Fairfield App. No. 19-CA-91, unreported. However, since the suit brought against Carter in Butler County was based on activity which occurred outside the state of Ohio, and did not involve the real estate which Carter allegedly owns in the state of Ohio, the trial court lacked *in personam* jurisdiction over Carter.

*3 Accordingly, we overrule Leonesio's second

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assignment of error.

Leonesio's third assignment of error in essence contends that the court below should not have ruled on Carter's motion to dismiss because it was not timely filed. In the case at bar, Carter filed his motion to dismiss thirty-one days after he was served with the complaint. Civ.R. 12(A)(1) provides that the defendant must serve his answer within twenty-eight days after service of the summons and complaint upon him.

Where an issue presented for review to an appellate court was not raised at the trial court level, the issue is deemed waived for purposes of consideration on appeal. The fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected. *Schade v. Carnegie Body Company* (1982), 70 Ohio St.2d 207. In this case, Leonesio failed to raise the issue that Carter did not respond to the complaint within the requisite time period below. Thus, Leonesio waived his right to appeal Carter's procedural error by not bringing it to the trial court's attention.

Leonesio's third and final assignment of error is therefore overruled.

The judgment of the trial court is affirmed.

KOEHLER, P.J., and WALSH, J., concur.

FN1. Carter contends that the Middletown address is his father's residence.

FN2. There is no longer a requirement of a "special appearance" for the purpose of contesting jurisdiction over the person. See Civ.R. 12(B); Staff Note to Civ.R. 12(B); *Ross v. Spiegel, Inc.* (1977), 53 Ohio App.2d 297.


FN3. This court takes no position as to whether or not Leonesio can serve Carter in the state of Ohio. Such a determination need not be made since the trial court lacked personal jurisdiction over Carter pursuant to Ohio's long-arm statute. See

R.C. 2307.382(A)(8); Civ.R. 4.3(A)(3).
Ohio App. 12 Dist., 1992.
Leonisio v. Carter
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ORC Ann. 2307.381

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Practitioner's Toolbox  

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 **Related Statutes & Rules**

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126TH OHIO GENERAL ASSEMBLY *
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* ANNOTATIONS CURRENT THROUGH JULY 1, 2006 *

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2307. CIVIL ACTIONS
LONG-ARM STATUTES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 2307.381 (2006)

§ 2307.381. Definitions

As used in sections 2307.381 [2307.38.1] to 2307.385 [2307.38.5], inclusive, of the Revised Code, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this state.

 **History:**

131 v 646. Eff 9-28-65.


 **Related Statutes & Rules:**

Cross-Reference to Related Statutes:

Court's jurisdiction undiminished, [RC § 2307.38.5](#).

Ohio Rules:

Process: out-of-state service, [CivR 4.3\(A\)](#).

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APP 0067

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TITLE 23. COURTS -- COMMON PLEAS
 CHAPTER 2307. CIVIL ACTIONS
 LONG-ARM STATUTES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS
 JURISDICTION**

ORC Ann. 2307.382 (2006)

§ 2307.382. Personal jurisdiction

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

Practitioner's Toolbox  

 **History**

 **Case Notes & OAGs**

Resources & Practice Tools

 **Practice Manuals & Treatises**

- > [Anderson's Ohio Pretrial Litigation Practice Manual § 2.12](#) Filing And Serving Of Summons And Complaint
- > [Anderson's Ohio Civil Practice with Forms § 150.29](#) The Long-Arm Rule and the Long-Arm Statute
- > [Anderson's Ohio Securities Law and Practice § 2.05](#) Jurisdiction under the Ohio long-arm statute

 **Law Reviews & Journals**

 **Related Statutes & Rules**

 **Comparative Legislation**

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

⚡ History:

131 v 646 (Eff 9-28-65); 136 v H 1358 (Eff 10-1-76); 142 v H 90. Eff 9-9-88.

⚡ Related Statutes & Rules:

Cross-Reference to Related Statutes:

Court's jurisdiction undiminished, RC § 2307.38.5.

Payment of commissions due sales representatives, RC § 1335.11.

Ohio Rules:

Process: out-of-state service, CivR 4.3(A).

⚡ Comparative Legislation:

PERSONAL JURISDICTION: FL--Fla. Stat. § 48.193

IL--735 ILCS §§ 5/2-203, 5/2-209

IN--Burns Ind. TR. 4.4

KY--KRS § 454.210

NY--NY CLS CPLR § 301

PA--42 P.S. §§ 5301, 5322

⚡ Practice Manuals & Treatises:

Anderson's Ohio Pretrial Litigation Practice Manual § 2.12 Filing And Serving Of Summons And Complaint

Anderson's Ohio Civil Practice with Forms § 150.29 The Long-Arm Rule and the Long-Arm Statute

Anderson's Ohio Securities Law and Practice § 2.05 Jurisdiction under the Ohio long-arm statute

Practice Checklists:

Master Checklist: Service of Summons, 1-1-8 Ohio Litigation Checklists § 8.01

Checklist: Serving Summons on a Nonresident, 1-1-8 Ohio Litigation Checklists § 8.07

ALR

Applicability, to actions not based on products liability, of state statutes or rules of court predicated in personam jurisdiction over foreign manufacturers or distributors upon use of their goods within state. 20 ALR3d 957.

Construction and application as to isolated acts or transactions, of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state. 27 ALR3d 397.

Construction and application of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

Construction and application of state statutes or rules of courts predicated in personam jurisdiction over nonresidents or foreign corporations on the commission of a tort within the state. 24 ALR3d 532.

Federal or state law, as controlling, in diversity action, whether foreign corporation is amenable to service of process in state. 6 ALR3d 1103.

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Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state. 37 ALR4th 852.

Holding directors', officers', stockholders', or sales meetings or conventions in a state by foreign corporation as doing business or otherwise subjecting it to service of process and suit. 84 ALR2d 412.

In personam jurisdiction over non-resident based on ownership, use, possession, or sale of real property. 4 ALR4th 955.

In personam jurisdiction over nonresident director of foreign corporation under long-arm statutes. 100 ALR3d 1108.

In personam jurisdiction under long-arm statute of nonresident banking institution. 9 ALR4th 661.

In personam jurisdiction, under long-arm statute, over nonresident attorney in legal malpractice action. 23 ALR4th 1044.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action. 25 ALR4th 706.

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Internet Web site activities of nonresident person or corporation as conferring personal jurisdiction under long-arm statutes and due process clause. 81 ALR5th 41.

Obtaining jurisdiction over nonresident parent in filiation or support proceedings. 76 ALR3d 708.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state. 25 ALR2d 1202.

Products liability: in personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes. 19 ALR3d 13.

Religious activities as doing or transaction of business under "long-arm" statutes or rules of court. 26 ALR4th 1176.

Retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions. 19 ALR3d 138.

State's power to subject nonresident individual other than a motorist to jurisdiction of its courts in action for tort committed within state. 78 ALR2d 397.

State statutes or rules of court conferring in personam jurisdiction over nonresidents on the basis of isolated acts or transactions within state as applicable to personal representative of deceased nonresident. 19 ALR3d 171.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transactions within state. 20 ALR3d 1201.

Validity of service of process on nonresident owner of watercraft, under state "long-arm" statutes. 99 ALR2d 287.

What constitutes doing business within state by a foreign magazine, newspaper, or other publishing corporation, for purposes other than taxation. 38 ALR2d 747.

🔗 Law Reviews & Journals:

Beam me into your jurisdiction: establishing personal jurisdiction via electronic contacts in light of the sixth circuit's decision in Compuserve, Inc. v. Patterson. Note. 27 CAP. U.L. Rev. 163 (1998).

🔗 Case Notes & OAGs:

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- ⚡--Long arm jurisdiction
- ⚡Vacation of default judgment

⚡CONSTITUTIONALITY.

APP 0072

Where plaintiff's declaratory judgment claims against defendant arose from the fact that once the defendant's sales to the plaintiff began to drop precipitously, the defendant began insisting upon its contractual right to inspect plaintiff's facilities, the exercise of personal jurisdiction over the defendant would not pass constitutional muster: International Pizza Co. v. C&F Packing Co., 858 F. Supp. 696, 1994 U.S. Dist. LEXIS 15422 (S.D. 1994).

The constitutionality of RC §§ 2307.38.1 to 2307.38.5 is no longer debatable: Bruney v. Little, 8 Ohio Misc. 393, 222 N.E.2d 446 (CP 1966).

✦GENERALLY.

Where a trial court determines its personal jurisdiction without an evidentiary hearing, it must view the allegations in the pleadings and documentary evidence presented by the parties in the light most favorable to the nonmoving party, resolving all reasonable competing inferences in favor of the nonmoving party. Despite an absence of face-to-face meetings in Ohio and the absence of a physical place of business in Ohio for a nonresident defendant, Ohio courts may retain jurisdiction based on other forms of contact or communication: Ricker v. Fraza/Forklifts of Detroit, 160 Ohio App. 3d 634, 828 N.E.2d 205, 2005 Ohio App. LEXIS 1838, 2005 Ohio 1945, (2005).

As the injured failed to establish personal jurisdiction, arguments on forum non conveniens were moot; the injured presented no facts that established jurisdiction while the licensee of the car rental company did set forth facts that established that his rental car business was located and operated solely within Illinois and that he conducted no business in Ohio. Fish v. Nottoli, 2003 Ohio App. LEXIS 5598, 2003 Ohio 6275, (Nov. 17, 2003).

Contacts of Missouri-based company were insufficient to allow Ohio long-arm jurisdiction, as an Ohio corporation initiated contact and nothing suggested that the Missouri company reasonably anticipated being subject to suit in Ohio. Am. Office Servs. v. Sircal Contr., Inc., 2003 Ohio App. LEXIS 5361, 2003 Ohio 6042, (2003).

Relatively insignificant business in the State of Ohio was insufficient to confer personal jurisdiction over a seller in a suit alleging that the buyer purchased a car not designated with salvage title; the exercise of personal jurisdiction failed to comport with the due process requirements of the Fourteenth Amendment of the U.S. Constitution. Lewis v. Horace Mann Ins. Co., 2003 Ohio App. LEXIS 4747, 2003 Ohio 5248, (Oct. 2, 2003).

Nonresident drug store chain purchasing products from a distributor that conducted portions of its business in Ohio had minimum contacts with the state sufficient to make Ohio courts' exercise of personal jurisdiction over the chain not unfair. Cardinal Distribution v. Reade, 2003 Ohio App. LEXIS 2566 (June 5, 2003).

Ohio's long-arm statute is not coterminous with federal constitutional limits: Bird v. Parsons, 289 F.3d 865, 2002 U.S. App. LEXIS 9543 (2002).

The Ohio court did not patently and unambiguously lack personal jurisdiction over a nonresident defendant who was alleged to have converted assets belonging to the estate of an Ohio resident: State ex rel. Toma v. Corrigan, 92 Ohio St. 3d 589, 752 N.E.2d 281, 2001 Ohio LEXIS 2150 (2001).

The exercise of in personam jurisdiction over a nonresident defendant, who was a subscriber to computer network service in the service's home state, was proper where subscriber entered "shareware" agreement with service, and was an entrepreneur who purposely employed the service to market his computer software product and state had interest in resolving dispute because the agreements were governed under that state's law:

CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1996 U.S. App. LEXIS 17837 (6th Cir. 1996).

Since appellee did not continuously reside in Ohio, the state long-arm statute was clearly not applicable to appellant who lived in a different state and who did not have sufficient minimum contacts with Ohio that would give the trial court personal jurisdiction: Stanek v. Stanek, 1994 Ohio App. LEXIS 4261 (12th Dist. 1994).

Revised Code § 2307.38.2 and CivR 4.3 are intended to reach to the full outer limits of litigation which is permissible consistent with federal due process of law limitations: Columbus Show Case Co. v. CEE Contracting, Inc., 75 Ohio App. 3d 559, 599 N.E.2d 881, 1992 Ohio App. LEXIS 3652 (1992).

A two-tier analysis is still required whenever personal jurisdiction is premised solely on conduct of the defendant as delineated in Ohio's long-arm statute because the cause of action must have arisen from that conduct: General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1990 U.S. Dist. LEXIS 18949 (S.D. 1990).

If the Ohio long-arm statute does not provide a basis for the exercise of personal jurisdiction over the nonresident defendant, jurisdiction is unavailable even if the exercise of such would not violate due process: General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1990 U.S. Dist. LEXIS 18949 (S.D. 1990).

Ohio courts had jurisdiction over an out-of-state defendant who sold a misrepresented art work to an Ohio art gallery: Cincinnati Art Galleries v. Fatzle, 70 Ohio App. 3d 696, 591 N.E.2d 1336, 1990 Ohio App. LEXIS 5615 (1990).

Where an out-of-state defendant did not physically appear in this state and was first solicited for business by plaintiff, and where the course of dealing between the parties was not expected to occur in Ohio, insufficient "minimum contacts" exist to confer personal jurisdiction over the defendant by a court in this state, even where there have been frequent mail and telephone communications between the parties in their respective states: Friedman v. Speiser, Krause & Madole, P.C., 56 Ohio App. 3d 11, 565 N.E.2d 607 (1988).

An Ohio court does not have personal jurisdiction over a Pennsylvania corporation, in connection with a claim for the negligent handling and testing of a urine specimen, when the corporation does not actively solicit business in Ohio and its testing facilities are located in Pennsylvania, and when there is no showing that the corporation owns property or maintains offices in Ohio, or that the testing kit used by an Ohio hospital to take and ship the urine specimen was obtained directly from the Pennsylvania corporation; the facts that the foreign corporation participated as one of many parties in the preparation of the protocol for taking the urine specimen, and that the specimen was actually taken in Ohio, do not make the corporation amenable to suit in an Ohio court: Powell v. Bethesda Hospital, Inc., 42 Ohio App. 3d 164, 537 N.E.2d 711 (1988).

If a district court determines to decide the issue of in personam jurisdiction solely on the basis of written materials, the plaintiff is required only to make a prima facie case of jurisdiction, that is, he need only demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. However, if the court concludes that the written submissions have raised issues of credibility or disputed issues of fact which require resolution, it may conduct a preliminary evidentiary hearing. Where this occurs, the plaintiff must show by a preponderance of the evidence that jurisdiction exists: Cooley v. Grosshandler, 711 F. Supp. 380 (S.D. 1988).

In personam jurisdiction was established where: A) defendant originated and maintained required contacts with Ohio by his letters and telephone calls to plaintiff and by designating his brother, an Ohio resident, and an Ohio attorney to pursue his claims with plaintiff in Ohio;

B) cause of action arose from defendant's activities in Ohio; C) there were substantial Ohio forum connections because: 1) plaintiff had strong interest in a convenient forum for resolution of dispute that had the possibility of affecting its relations with all its shareholders, and 2) defendant implicated Ohio law by his position that the amendment was illegal under Ohio law and by his threat of legal action; D) burden on defendant was not unduly heavy because (1) long before plaintiff filed suit defendant was represented by an Ohio attorney, and (2) for a period of nine months defendant was able to press his claim on the plaintiff and to cause meetings to be held between attorneys and officers of plaintiff and his chosen representatives without traveling to Ohio: American Greetings Corporation v. Cohn, 839 F.2d 1164 (6th Cir. 1988).

Before a federal court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum; there also must be a basis for the defendant's amenability to service of summons. Under Federal Rule of Civil Procedure 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the state in which it sits to determine whether an out-of-state defendant is amenable to service: Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987).

An Ohio court lacks jurisdiction over a nonresident defendant who maintained no offices or employees in Ohio, accepted no orders in Ohio, made no deliveries in Ohio, had no control over distributors and whose only Ohio contacts in a five year period were promotional mailings and one or two visits: R.L. Lipton Distributing v. Dribeck Importers Inc., 811 F.2d 967 (6th Cir. 1987).

Plaintiff's failure to establish any facts which would support a finding of personal jurisdiction and valid service of process under the three point test marking the greatest reach of the Ohio long-arm statute renders bare allegation of jurisdiction subject to successful attack: Baltimore & Ohio R. Co. v. Mobile Tank Car Serv., 673 F. Supp. 1436 (N.D. Ohio 1987).

The Ohio long-arm statute is co-extensive with the constitutional limits of personal jurisdiction which are that the defendant must have minimum contacts with the forum state: Brown v. Florida Keys Aqueduct Authority, 614 F. Supp. 87 (S.D. 1985).

The following factors should be considered as establishing the necessary "minimum contacts," in order for a court to obtain in personam jurisdiction over a non-resident defendant: (1) established activity by non-resident in the forum state; (2) non-resident takes advantage of privileges and benefits of forum state; (3) non-resident solicits business through agents or advertising reasonably calculated to reach the forum state; (4) it is foreseeable that non-resident will litigate in the forum state; and (5) convenience to the litigants and fairness of requiring non-residents to come to the forum state: Kleinfeld v. Link, 9 Ohio App. 3d 29, 457 N.E.2d 1187 (1983).

"Minimum contacts" does not mean "any contacts," and to so determine would be inconsistent with the due process clause of USConst amend XIV: Culp v. Polytechnic Institute of New York, 7 Ohio App. 3d 352, 455 N.E.2d 698 (1982).

The exercise of long-arm jurisdiction in Ohio depends not only upon the nonresident having sufficient minimum contacts with Ohio to satisfy due process but also upon the fulfillment of one of the specified circumstances found in CivR 4.3(A) and RC § 2307.38.2(A): Ohio State Tie & Timber, Inc. v. Paris Lumber Co., 8 Ohio App. 3d 236, 456 N.E.2d 1309 (1982).

Satisfaction of due process requirements of minimum contacts, fairness, and substantial justice is a necessary condition precedent to valid service of process upon out-of-state defendants: Culp v. Polytechnic Institute of New York, 7 Ohio App. 3d 352, 455 N.E.2d 698 (1982).

The test to determine whether sufficient minimum contacts between the defendant and the forum state exist, so as to support the exercise of jurisdiction under RC § 2307.38.2 and not to offend due process is as follows: first, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; second, the cause of action must arise from the defendant's activities there; finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable: Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980).

A foreign railroad corporation having no tracks in Ohio and maintaining two offices in this state for the purpose of soliciting freight traffic to be carried over the corporation's out-of-state lines does not have the necessary minimum contacts with Ohio such as to make it fair for the corporation to defend a suit in this jurisdiction based on a cause of action arising from the corporation's business in Missouri and to satisfy the requirement of substantial justice under the due-process clause of USConst amend XIV: Wainscott v. St. Louis-San Francisco Ry. Co., 47 Ohio St. 2d 133, 351 N.E.2d 466 (1976).

The due-process clause of USConst amend XIV requires a determination that a foreign corporation has certain minimum contacts with Ohio such that it is fair that a defendant defend a suit brought in Ohio and that substantial justice is done: Wainscott v. St. Louis-San Francisco Ry. Co., 47 Ohio St. 2d 133, 351 N.E.2d 466 (1976).

Under the Ohio long-arm statute, the cause of action must arise from the activity upon which personal jurisdiction is based: Dayton Casting Co. v. Full Mold Process, Inc., 404 F. Supp. 670 (S.D. 1975).

When comparable legislation has been construed in other jurisdictions prior to the enactment of an Ohio statute, the interpretation put on the law elsewhere is to be given great weight in construing the Ohio statute: In-Flight Devices Corp. v. Van Dusen Air, 65 Ohio Op. 2d 279, 466 F.2d 220 (6th Cir. 1972).

In enacting RC § 2307.38.2 the Ohio legislature intended to extend the jurisdiction of its courts to the constitutional limits with respect to subsection (A)(1) dealing with the transaction of any business in the state as the basis for jurisdiction: In-Flight Devices Corp. v. Van Dusen Air, 65 Ohio Op. 2d 279, 466 F.2d 220 (6th Cir. 1972).

A foreign corporation cannot be held to be subject to the jurisdiction of an Ohio court under the provisions of RC §§ 2307.38.1 to 2307.38.5, inclusive, where no representative or agent of the foreign corporation ever came into Ohio, the money value of the single business transaction was not substantial, and there was no tortious injury to anyone in Ohio: McHugh v. Prestodial, Inc., 18 Ohio Misc. 111, 241 N.E.2d 102 (CP 1968).

The reach of Ohio's long-arm statute, RC §§ 2307.38.1 through 2307.38.5, is construed to co-extend with the due process requirements of USConst amend XIV: Didactics Corp. v. Welch Scientific Co., 19 Ohio Misc. 167, 291 F. Supp. 890 (N.D. Ohio 1968).

Under Ohio law, service can be made under the long-arm statute only when personal jurisdiction is authorized by RC § 2307.38.2 relating to the transaction of business in Ohio, contracts to supply services or goods in Ohio, or tortious injury by an act or omission in Ohio: Edw. J. Moriarty & Co. v. General Tire & Rubber Co., 18 Ohio Misc. 156, 289 F. Supp. 381 (S.D. 1967).

Division (B) of the long-arm statute, RC § 2307.38.2, limits jurisdiction based solely on this section to the causes of action, and under circumstances described, in the section: Seilon, Inc. v. Brema S.P.A., 41 Ohio Op. 2d 267, 271 F. Supp. 516 (N.D. Ohio 1967).

The Ohio Legislature intended the long-arm statute to give Ohio courts jurisdiction to the limits of the due process clause of USConst amend XIV, except where the statute provides otherwise: Seilon, Inc. v. Brema S.P.A., 41 Ohio Op. 2d 267, 271 F. Supp. 516 (N.D. Ohio 1967).

Where personal jurisdiction is sought against three alien corporations in an action for an alleged conspiracy, performed outside Ohio, to breach the contract which plaintiff had with one of the defendants, it is not effective as to the other two defendants, when neither of them is shown to come within RC § 2307.38.2(A)(4) concerning defendants with regular and substantial contacts with this state: Seilon, Inc. v. Brema S.P.A., 41 Ohio Op. 2d 267, 271 F. Supp. 516 (N.D. Ohio 1967).

To uphold substituted service upon a nonresident under the Ohio long-arm statute, adherence to the minimum contacts standard requires proof that the foreign corporation, in deriving substantial revenue from goods used or consumed in the state, have minimum contacts: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✦ ABSENCE FROM STATE, TOLLING.

The tolling provisions of RC § 2305.15 apply to a defendant who is absent from the state even though he is amenable to process under RC § 2307.38.2, the "long-arm" statute: Wright v. Univ. Hosp. of Cleveland, 55 Ohio App. 3d 227, 563 N.E.2d 361 (1989).

The tolling provisions of RC § 2305.15 apply to a defendant who is absent from the state even though he is amenable to process under RC § 2703.20, the "long-arm" statute: Barile v. Univ. of Virginia, 30 Ohio App. 3d 190, 507 N.E.2d 448 (1986).

By virtue of the provisions of RC § 2305.15, the period of limitation for the commencement of an accrued action provided in, inter alia, RC § 2305.10, ("within two years after the cause thereof arose") against a person who is out of the state does not begin to run until he comes into the state. Service of summons on a non-resident under RC § 2307.38.1 et seq. (the so-called "long arm" statute), is within time where, because of his absence from the state, the statute of limitations has not run against the cause of action: Mercer v. Jones, 18 Ohio App. 2d 57, 246 N.E.2d 583 (1968).

✦ ACCOUNTS RECEIVABLE, PURCHASE OF.

Ohio courts have jurisdiction over an action brought by an Ohio debtor against a foreign person engaged in the business of factoring, who purchased the Ohio debtor's future accounts receivable in an out-of-state transaction, where the suit involves the underlying sales transaction and the purchaser's involvement in the transaction is so great as to give the assignee control over consummation of such sale: Gold Circle Stores v. Chemical Bank, 4 Ohio App. 3d 10, 446 N.E.2d 194 (1982).

✦ ADVERTISING.

Ohio courts did not acquire jurisdiction over an out-of-state auto restorer where an Ohio resident initiated contact by responding to an ad in a national magazine: Krutowsky v. Simonson, 109 Ohio App. 3d 367, 672 N.E.2d 219, 1996 Ohio App. LEXIS 487 (1996).

A successor in interest to a playground equipment manufacturer was subject to personal

jurisdiction although he had no employees, office or agent located in the state where such successor had sold goods in the state for several years and had circulated advertisements, catalogues and other promotional material to addresses within the state during that time: Hoover v. Recreation Equip. Corp., 763 F. Supp. 210 (N.D. Ohio 1989).

California motel franchisee's advertising in Ohio was not enough to satisfy requirements of Ohio's long-arm statute: Coleman v. Chen, 712 F. Supp. 117 (S.D. 1988).

Where a motel chain maintains a substantial corporate presence in Ohio and engages in substantial advertising in the state to build its reputation as a reputable national motel chain, in personam jurisdiction under RC § 2307.38.2 is available over the defendant in a personal injury action in which the plaintiff alleges that she was injured in a slip and fall accident while a paying guest at one of defendant's motels in Tennessee: Repp v. Holiday Inns, Inc., 624 F. Supp. 851 (S.D. 1985).

✚AGENTS, ENTRY INTO STATE.

Where the agents of an out-of-state university enter Ohio for the purpose of recruiting student-athletes into the athletic program of the university, that university may be held subject to the personal jurisdiction of the courts of Ohio, for causes of action related to the activities of its agents within the state of Ohio: Barile v. Univ. of Virginia, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981).

✚AIRCRAFT.

In an action arising out of the sale of an aircraft alleged to be defective, nonresident broker's brief ownership of the aircraft when it was hangared in Ohio did not constitute transaction of business for purposes of RC § 2307.38.2 where broker was not involved in selecting the hangaring location and did not engage in contract negotiations: Kobill Airways Ltd. v. National Flight Servs., Inc., 92 F. Supp. 2d 689, 2000 U.S. Dist. LEXIS 4836 (N.D. Ohio 2000).

Minnesota corporation that sold and conducted prebuy inspection of airplane purchased by an Ohio partnership was subject to in personam jurisdiction by failing to let the Ohio partnership know of various defects rendering the airplane unairworthy: Douglas v. Modern Aero, Inc., 954 F. Supp. 1206, 1997 U.S. Dist. LEXIS 4589 (N.D. Ohio 1997).

Defendant's participation in negotiating the aircraft lease agreement in Ohio amounted to transacting business in Ohio: Hammond v. Pegasus International, 1990 Ohio App. LEXIS 5582 (5th Dist. 1990).

✚APPEAL.

Absent a patent and unambiguous lack of jurisdiction, appeal from a decision overruling a CivR 12(B)(2) motion to dismiss based upon lack of personal jurisdiction will generally provide an adequate legal remedy which precludes extraordinary relief through the issuance of a writ of prohibition: Goldstein v. Christiansen, 70 Ohio St. 3d 232, 638 N.E.2d 541, 1994 Ohio LEXIS 1981 (1994).

✚ASBESTOS EXPOSURE.

Long-arm jurisdiction over a Canadian asbestos mining corporation was proper where the

defendant made significant sales in Ohio over a twenty-five year period, where plaintiff's decedent's death was allegedly caused by exposure in Ohio to the asbestos fibers, and where it was reasonable, given the circumstances, to assert jurisdiction over the defendant corporation: Smith v. GAF Corp., 583 F. Supp. 1101 (S.D. 1984).

ATTORNEYS.

When an Ohio client sued, in Ohio, a Rhode Island law firm, which represented him in a lawsuit in Rhode Island, Ohio Const. art. I, § 16 did not require an Ohio trial court to exercise personal jurisdiction over the law firm because art. I, § 16 did not give the client unlimited access to the courts, as that access was limited by the jurisdictional requirements and geographical boundaries of the State of Ohio, under Ohio R. Civ. P. 4.3 and Ohio Rev. Code Ann. § 2307.382, and the Ohio Constitution did not control the actions of residents of the State of Rhode Island, and the fact that an Ohio court did not have personal jurisdiction over the firm and its lawyer did not deprive the client of a legal remedy, as he could sue in Rhode Island or in federal court. Gerber v. Blish & Cavanagh, 2006 Ohio App. LEXIS 2097, 2006 Ohio 2252, (May 8, 2006).

When an Ohio client sued, in Ohio, a Rhode Island law firm, which represented him in a lawsuit in Rhode Island, the Ohio trial court did not have personal jurisdiction over the law firm or its lawyer because the firm's only contacts with Ohio were its contacts with the client, in the course of its representation and efforts to collect fees from the client, and this was insufficient to establish personal jurisdiction over the firm under Ohio R. Civ. P. 4.3(A) or Ohio Rev. Code Ann. § 2307.382. Gerber v. Blish & Cavanagh, 2006 Ohio App. LEXIS 2097, 2006 Ohio 2252, (May 8, 2006).

Jurisdiction over a Kentucky attorney was proper where he agreed to assist an Ohio law firm in representing Ohio residents injured in Kentucky, with the fees to be split: Pratt & Buchert v. Smith, 94 Ohio App. 3d 266, 640 N.E.2d 614, 1994 Ohio App. LEXIS 1720 (1994).

The defendant-attorneys coming into Ohio to take the depositions of an expert witness they had retained amounted to "transacting business" in Ohio: Ucker v. Taylor, 72 Ohio App. 3d 777, 596 N.E.2d 507, 1991 Ohio App. LEXIS 956 (1991).

Defendant-attorney's acceptance of a retainer mailed from Ohio and participation in telephone and mail exchanges with plaintiff did not vest Ohio courts with personal jurisdiction over defendant: Goldstein v. Opolka, 1990 Ohio App. LEXIS 4992 (10th Dist. 1990).

BANKS, FINANCIAL INSTITUTIONS.

The fact that an Ohio bank acquired a New York bank and its accounts did not provide a basis for jurisdiction over a merchant account customer of the acquired bank where the customer never communicated with anyone in Ohio concerning the account: Keybank Natl. Assn. v. Tawill, 128 Ohio App. 3d 451, 715 N.E.2d 243, 1998 Ohio App. LEXIS 3159 (1998).

Mere forwarding of a check through the federal bank system by an out-of-state bank is an insufficient basis upon which to permit the exercise of personal jurisdiction: Micro Experts, Inc. v. Edison Technologies, Inc., 122 Ohio App. 3d 394, 701 N.E.2d 1033, 1997 Ohio App. LEXIS 3544 (1997).

Long-arm jurisdiction is proper over an out-of-state bank which provides data and draft processing services for Ohio insurance accounts, allegedly resulting in a loss to an account holder through impostor transactions: Jackson v. State St. Bank & Trust Co., 110 Ohio App. 3d 388, 674 N.E.2d 706, 1996 Ohio App. LEXIS 832 (1996).

⚡BREACH OF WARRANTY.

Where the defendant impliedly warranted the "tooling" of a machine it sold the plaintiff and subsequently breached that warranty, the course of action arose from the contract negotiated in Ohio between the plaintiff and defendant, and thus, arose from business transacted in Ohio: KDI Precision Products, Inc. v. Radial Stampings, 620 F. Supp. 786 (S.D. 1985).

To comply with RC § 2307.38.2(A)(5) relating to an injury in Ohio by reason of a breach of warranty made in the sale of goods outside the state, it is essential that an injury occur in Ohio and that the person causing the injury regularly does business in the state: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

⚡CHILD SUPPORT.

Where an obligor is current on a foreign child support order and has not caused a tortious injury in Ohio, an Ohio court lacks personal jurisdiction over the obligor: Bigley v. Bigley, 90 Ohio App. 3d 310, 629 N.E.2d 45, 1993 Ohio App. LEXIS 4609 (1993).

Revised Code § 3115.32 provides a twenty-day period in which an obligor may contest registration of a foreign child support order. However, the obligor is free to assert any relevant defenses, including lack of personal jurisdiction, in a subsequent enforcement or modification action. An obligor's occasional visits to Ohio and a short stay for employment purposes only do not confer personal jurisdiction: Hudgins v. Hudgins, 80 Ohio App. 3d 707, 610 N.E.2d 582, 1992 Ohio App. LEXIS 3753 (1992).

A failure to support one's minor children constitutes a tortious act or omission in Ohio conferring in personam jurisdiction under CivR 4.3(A)(3): Wayne Cty. Bur. of Support v. Wolfe, 71 Ohio App. 3d 765, 595 N.E.2d 421, 1991 Ohio App. LEXIS 1521 (1991).

Failure to pay child support arrearages constitutes a tortious act or omission in this state for the purpose of in personam jurisdiction: Hostetler v. Kennedy, 69 Ohio App. 3d 299, 590 N.E.2d 793, 1990 Ohio App. LEXIS 3953 (1990).

An alleged tortious failure to support an illegitimate child is insufficient to support long-arm jurisdiction under RC § 2307.38.2(A)(6) where there has been no prior determination of paternity: State ex rel. Stone v. Court, 14 Ohio St. 3d 32, 470 N.E.2d 899 (1984).

Failure of a father to support an illegitimate child in accordance with the laws of the state of Illinois constitutes a tortious act within the meaning of the long-arm statute of such state: Poindexter v. Willis, 23 Ohio Misc. 199, 256 N.E.2d 254 (CP 1970).

⚡CHOICE OF LAW PROVISION.

Based on the choice of law provision in the agreement and numerous administrative business proceedings within Ohio, a nonresident sales representative could reasonably anticipate an action being brought in an Ohio court: Hercules Tire & Rubber Co. v. Murphy, 133 Ohio App. 3d 97, 726 N.E.2d 1080, 1999 Ohio App. LEXIS 3543 (1999).

⚡CIVIL RULE 4.3, RELATION TO.

The long-arm jurisdictional provisions of RC § 2307.38.2(A) and CivR 4.3(A) are consistent and complement each other; CivR 4.3(A)(8) complements and, in fact, supplements the statute. However, to the extent that RC § 2307.38.2(A) and CivR 4.3(A) conflict, CivR 4.3(A) controls: Cornelius v. Cornelius, 1999 Ohio App. LEXIS 5188 (2nd Dist. 1999).

The provisions of RC § 2307.38.2 and CivR 4.3(A) are consistent and complement each other. To the extent that they conflict, CivR 4.3(A) controls: Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div., 76 Ohio St. 3d 374, 667 N.E.2d 1189, 1996 Ohio LEXIS 590 (1996).

✶CO-CONSPIRATOR'S CONTACTS.

Federal courts in Ohio have not adopted the conspiracy theory which would impute a co-conspirator's jurisdictional contacts with the forum to a foreign defendant seeking dismissal. Unilateral activity of another party or a third person is not an appropriate consideration in determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction: Iron Workers Local No. 17 v. Philip Morris, Inc., 23 F. Supp. 2d 796, 1998 U.S. Dist. LEXIS 14629 (N.D. Ohio 1998).

✶CORPORATE INTERNAL AFFAIRS.

Ohio follows the general rule that courts will not take jurisdiction of the internal affairs of a foreign corporation. Where, however, the court has both subject matter and personal jurisdiction it is discretionary with the court as to whether it will exercise jurisdiction, and a number of considerations will be weighed and balanced. Election of officers of the Dayton, Ohio, branch of the NAACP is in reality an internal affair of a local organization, despite the fact that the NAACP itself is incorporated in New York. Thus the court may enjoin the election of new officers where the organization violates its own rules for elections: Dickerson v. NAACP, 3 Ohio Op. 3d 472 (CP 1973).

✶CORPORATE OFFICERS.

Ohio's long-arm statute and rule may provide personal jurisdiction over an out-of-state corporate officer who is alleged to have committed fraud: Heritage Funding & Leasing Co. v. Phee, 120 Ohio App. 3d 422, 698 N.E.2d 67, 1997 Ohio App. LEXIS 2852 (1997).

Doctors who signed correspondences sent to Ohio in their corporate capacities and not in their individual capacities were not subject to personal jurisdiction in Ohio: Cincinnati Sub-Zero Products v. Augustine Medical, 800 F. Supp. 1549, 1992 U.S. Dist. LEXIS 12476 (S.D. 1992).

Where a federal district court clearly has personal jurisdiction over a foreign corporation under Ohio's long-arm statute and plaintiff demonstrates a prima facie case for application of the alter ego doctrine and disregard of the corporate entity, the court may also properly assert personal jurisdiction over the corporate officers involved: Central Investment Corp. v. Mutual Leasing, 24 Ohio Op. 3d 393, 523 F. Supp. 74 (S.D. 1981).

Where corporate agents of defendant foreign corporation were in Ohio on instruction of its officers regarding California contracts, they are not thereby agents of those individual corporate officers for purposes of the Ohio long-arm statute: Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974).

✦CREDIT CARDS.

Where a credit card issuer which knows that one of its cardholders has moved to another state allows that cardholder to make purchases in the latter state with the card, then bills the cardholder at her new address for such purchases, the issuer has sufficient minimum contacts with the latter state to permit the assertion of personal jurisdiction by the courts of that state in disputes arising from that contact: Lachman v. Bank of Louisiana, 510 F. Supp. 753 (N.D. Ohio 1981).

✦DUE PROCESS.

Trial court erred in exercising personal jurisdiction over an action by a Canadian law firm against clients, alleging fraud, fraudulent transfer of real property, and breach of contract for failure to pay the firm's fees for services rendered, as the clients' ownership of real property was unconnected to the contract for legal services and accordingly, it violated due process under U.S. Const. amend. XIV to allow the trial court to confer jurisdiction on that basis alone pursuant to Ohio Rev. Code Ann. § 2307.382 and Ohio R. Civ. P. 4.3(A)(6). Prouse v. Dimarco, 2006 Ohio App. LEXIS 1405, 2006 Ohio 1538, (Mar. 30, 2006).

Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382, has less reach than the Due Process Clause because of a more restrictive interpretation of the "arising from" prong. The United States Court of Appeals for the Sixth Circuit thus concludes that the Ohio Supreme Court rejected the "but for" approach to personal jurisdiction under the Due Process Clause and that the long-arm statute requires a "proximate cause" relationship between a plaintiff's personal injury claim and the defendant's conduct in Ohio. Brunner v. Hampson, 2006 U.S. App. LEXIS 5007 (6th Cir. Feb. 28, 2006).

In a diversity action alleging improper use of Ohio plaintiffs' ideas for a television show, an Ohio district court had jurisdiction over a California producer and production company under Ohio Rev. Code Ann. § 2307.282(A)(6), but due process prevented an exercise of jurisdiction. The relationship between the parties was brief and was limited to the potential creation of one season of the show, defendants never went to Ohio, and any breach of contract or fraud occurred in California or some place other than Ohio. Costaras v. NBC Universal, Inc., 2005 U.S. Dist. LEXIS 33341 (N.D. Ohio Dec. 15, 2005).

✦DUE PROCESS GENERALLY.

In personam jurisdiction was not consistent with RC § 2307.38.2 or due process where the contract was made, performed and allegedly breached in Pennsylvania and had no connection with the defendant's activities in Ohio: Records Deposition Service, Inc. v. Henderson & Goldberg, P.C., 100 Ohio App. 3d 495, 654 N.E.2d 382, 1995 Ohio App. LEXIS 128 (1995).

✦EMPLOYEE RECRUITMENT COMPANY.

Revised Code § 2307.38.2 did not confer jurisdiction over an out-of-state employer in an action by an Ohio employee recruitment company: Sales Consultants v. Buehler Lumber Co., 79 Ohio App. 3d 289, 607 N.E.2d 94, 1992 Ohio App. LEXIS 1941 (1992).

✦EMPLOYMENT AGREEMENT.

RC § 2307.382 and CivR 4.3 did not confer jurisdiction against the nonresidents on a claim that they breached an employment agreement. The parties' dealings did not satisfy the

"minimum contacts" requirement under the due process clause. The defendants also lacked the "continuous and systematic" contacts required for the exercise of general jurisdiction: Joffe v. Cable Tech, Inc., 163 Ohio App. 3d 479 (2005).

✦FEDERAL COURTS GENERALLY.

Residents of California, who used to be employed by the corporation, were granted their motion to dismiss the corporation's complaint that alleged misappropriation of trade secrets, trademark infringement, and unfair and deceptive trade practices because the corporation could not meet its burden with regard to the standard for "doing business" in Ohio under the long arm statute, RC § 2307.382(A); however, the court did not feel that the corporation should lose its right to pursue its claims in an appropriate jurisdiction, and therefore transferred the case to the appropriate federal district court in California. Sreco-flexible, Inc. v. Fernandez, 2003 U.S. Dist. LEXIS 16592 (N.D. Ohio Sept. 23, 2003).

To exercise jurisdiction, a United States District Court must find that the Ohio long-arm statute, RC § 2307.382, permits the exercise of jurisdiction comporting with due process; where jurisdiction is determined solely on the basis of the current record, plaintiff need only make only a prima facie showing of jurisdiction. Internet Secret Catalogue, Inc. v. Zdrok, 2003 U.S. Dist. LEXIS 16159 (S.D. Ohio Aug. 28, 2003).

Pursuant to RC § 2307.38.2, federal court did not have jurisdiction over hotel operator and company maintaining hotel's elevators in damage action brought by Ohio plaintiffs who were injured in Nevada when the elevator they were riding in fell several floors where both the injuries and the alleged negligence occurred in Nevada and neither defendant was incorporated in Ohio: Pittcock v. Otis Elevator Co., 8 F.3d 325, 1993 U.S. App. LEXIS 28309 (1993).

Ohio long arm statute did not grant district court jurisdiction over nonresident defendants on basis of creation of debt obligation in favor of plaintiff, an Ohio resident, where stipulation was not guarantee of debenture and no rights inured to plaintiff thereunder, and no obligation arose from privilege defendant exercised in forum state: Union Liberty Life Ins. Co. v. Ryan, 772 F. Supp. 366, 1991 U.S. Dist. LEXIS 11598 (S.D. 1991).

The question of whether an Ohio state court or a federal district court sitting in a diversity case can exercise in personam jurisdiction is often reduced to determining whether such an extent of jurisdiction to a nonresident is consistent with due process: General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1990 U.S. Dist. LEXIS 18949 (S.D. 1990).

✦FOREIGN COUNTRIES.

Foreign corporation that allegedly conspired with domestic companies to fix prices was subject to personal jurisdiction under Ohio's longarm statute, Ohio Rev. Code § 2307.382(A) (6), (7), because it allegedly caused tortious injury to Ohio purchasers. In re Foundry Resins Antitrust Litig., 2005 U.S. Dist. LEXIS 30981 (S.D. Ohio Nov. 23, 2005).

The procedural and substantive policies of other nations whose interests are affected by the forum state's assertion of jurisdiction over an alien defendant must be taken into account; and great care must be exercised when considering personal jurisdiction in the international context: Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).

Where a Japanese component manufacturer was aware that its product could reach California but had no office or agents there and had no control over the distribution system by way of

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which its products found their way into the state, the act of placing its goods into the stream of commerce was an insufficient ground for exercise of the state's long-arm jurisdiction: Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).

✦FORUM SELECTION CLAUSE.

Trial court had jurisdiction to enter a default judgment against a renter as the appellate court had enforced an identical forum selection clause in 30 prior appeals and had found that Ohio courts had jurisdiction to address the complaints; further, the appeals had raised the identical minimum contacts claim and it had been rejected. Preferred Capital, Inc. v. Wheaton Trenching, Inc., 2006 Ohio App. LEXIS 1486, 2006 Ohio 1554, (Mar. 31, 2006).

Forum selection clause in a commercial contract between for-profit business entities is prima facie valid. When a commercial agreement contains a valid forum selection clause, a minimum contacts analysis is not appropriate because the parties have waived the due process/ minimum contacts requirement for personal jurisdiction and have consented to the jurisdiction of the court system specified in the clause: Preferred Capital, Inc. v. Power Eng. Group, Inc., 163 Ohio App. 3d 522 (2005).

Florida lessees were not bound by an equipment lease agreement's forum selection clause, which designated the lessor's Ohio assignee's principal place of business as the forum for litigating disputes arising out of the agreement, because the clause was the product of fraud or overreaching and litigating the suit in Ohio would be unfair and inconvenient to the lessees. The court lacked personal jurisdiction over Florida lessees because the lessees were Florida residents doing business in Florida, they had negotiated the equipment lease agreement with the lessor in New Jersey, the lease agreement was to be performed in Florida, and the lessees did not know the assignee or have any knowledge, at the time they signed the lease agreement, that the lessor had already assigned its rights under the agreement to the assignee. Preferred Capital, Inc. v. Sarasota Kennel Club, 2005 U.S. Dist. LEXIS 15238 (N.D. Ohio July 27, 2005).

A forum selection clause which provided that neither party could object to jurisdiction in Georgia did not clearly exclude an action in Ohio, if Ohio had jurisdiction: Valmac Industries, Inc. v. Ecotech Machinery, Inc., 137 Ohio App. 3d 408, 738 N.E.2d 873, 2000 Ohio App. LEXIS 1571 (2000).

✦FRANCHISES.

Even though the primary impetus for making the contract came from the franchisee in Ohio, defendant, a California resident satisfied the minimum contacts standard by creating the franchise relationship: Sherman v. McDonald, 1991 Ohio App. LEXIS 373 (2nd Dist. 1991).

✦FRAUD.

Nonresident automobile seller was subject to Ohio's long-arm statute where the seller contracted to supply goods to buyer and the seller's alleged acts of negligent misrepresentation and intentional fraud caused injury in Ohio by omission: Highway Auto Sales v. Auto-Konig of Scottsdale, 943 F. Supp. 825, 1996 U.S. Dist. LEXIS 19777 (N.D. Ohio 1996).

✦INSURANCE.

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In an action for personal injury and negligence following a vehicle accident, since the driver and her husband resided in Ohio and received assurances of good faith while in Ohio from a Louisiana insurer, the insurer's communications provided sufficient contacts within Ohio to confer jurisdiction, and the driver stated sufficient elements of fraud to put the insurer on notice. Mcintyre v. Rice, 2003 Ohio App. LEXIS 3509, 2003 Ohio 3940, (July 24, 2003).

Foreign corporate participant in international reinsurance pool was not subject to in personam jurisdiction where its sole contact with the state in remitting funds in event of net loss and maintaining collateral account in state was insufficient: Nationwide Mut. Ins. Co. v. Tryg Intern. Ins. Co., 91 F.3d 790, 1996 U.S. App. LEXIS 18363 (6th Cir. 1996).

An out-of-state individual does not "transact business" in Ohio by sending a letter to an insurance agent in Ohio requesting coverage under another person's automobile liability coverage: Nationwide Mut. Ins. Co. v. Baker, 105 Ohio App. 3d 336, 663 N.E.2d 1325, 1995 Ohio App. LEXIS 2801 (1995).

Personal jurisdiction was properly asserted over a foreign insurer which transacted business in Ohio pursuant to RC § 2307.38.2(A)(1), when it located insurance for an Ohio insured, received a substantial commission and was an essential participant in negotiations: Beacon Insurance Co. v. The Highway Equipment Co. et. al., 1991 Ohio App. LEXIS 1487 (1st Dist. 1991).

Where an insurer provides liability insurance as to a manufacturer's products, litigation in a state where the products are sold is foreseeable for purposes of jurisdiction over the insurer: Chace v. Dorcy Int'l., Inc., 68 Ohio App. 3d 99, 587 N.E.2d 442, 1991 Ohio App. LEXIS 752 (1991).

The mere fact that an insurer is licensed to do business in Ohio does not establish that the insurer has the necessary minimum contacts with Ohio for purposes of personal jurisdiction: Speck v. Mutual Serv. Life Ins. Co., 65 Ohio App. 3d 812, 585 N.E.2d 509, 1989 Ohio App. LEXIS 5141 (1990).

Alleged acts of a defendant in wrongfully obtaining the proceeds of a life insurance policy, all of which occurred in another state, if proven to be fact, come within the provision of RC § 2307.38.2(A)(6) and enable an Ohio court to obtain, by reason of certified mail service, jurisdiction over the person of the defendant: Ramsier v. Western & Southern Life Ins. Co., 34 Ohio Misc. 2d 30, 518 N.E.2d 615 (CP 1987).

INTERNET.

Personal jurisdiction was proper over the Cayman defendants where they used the Internet to solicit the plaintiff for eye surgery and had an Ohio doctor provide pre-surgery treatment: Edwards v. Erdey, 118 Ohio Misc. 2d 232, 770 N.E.2d 672, 2001 Ohio Misc. LEXIS 51 (CP 2001).

INTERNET TIES.

Because the Ohio debt collector had not alleged that any interaction or exchange of information occurred between the lawyer, who resided in Massachusetts, and Ohio residents via the lawyer's website, personal jurisdiction over the lawyer in Ohio did not exist based on the nature of the website. Cadle Co. v. Schlichtmann, 2005 U.S. App. LEXIS 2097, 123 Fed. Appx. 675, (6th Cir. Feb. 8, 2005).

✚JOINDER OF CLAIMS.

Once an Ohio court acquires personal jurisdiction over a nonresident defendant for claims arising in Ohio, CivR 18(A) permits joinder of related claims that do not arise in Ohio, as long as granting jurisdiction for all claims does not deprive defendant of the right to due process of law: United States Sprint Communications Co. P'ship v. K's Foods, 68 Ohio St. 3d 181, 624 N.E.2d 1048, 1994 Ohio LEXIS 8, 1994 Ohio 504, (1994).

✚JOINT VENTURE.

The provisions of a joint venture agreement that the venture was organized in Ohio and had its principal place of business in Ohio, was by itself insufficient to invest the federal court with personal jurisdiction, under the Ohio long-arm statute, absent a showing of purposeful acts by the nonresident in Ohio, in furtherance of the agreement: Air Transport, Inc. v. Ransom Aircraft Sales, 61 Ohio Op. 2d 403, 333 F. Supp. 1106 (S.D. 1971).

✚JURISDICTION.

Florida-based viatical insurance contract brokers which were served with a suit claiming violations of federal and Ohio law by an Ohio insurer's receiver under RC § 2307.382(A) were denied dismissal despite a claim that an exercise of personal jurisdiction was improper because the evidence supported the conclusion that (1) the brokers were "transacting business" within the meaning of the Ohio statute, (2) the brokers had purposely availed themselves of the benefits of Ohio law, (3) the brokers' contacts were related to the dispute's operative facts, and (4) the connection between the brokers' conduct and the forum was sufficient to support jurisdiction without offending the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Wuliger v. Positive Living Res., 410 F. Supp. 2d 701, 2006 U.S. Dist. LEXIS 2011 (2006).

Court denied defendant's motion to dismiss plaintiff's trademark infringement and unfair competition action for lack of personal jurisdiction because defendant's contacts with the State of Ohio were sufficient to warrant a prima facie finding of jurisdiction under Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382(a)(1). Defendant provided product and sales videotapes of its gutter products to distributors and dealers in Ohio. Gutter Topper, Ltd. v. Hart & Cooley, Inc., 2005 U.S. Dist. LEXIS 9335 (S.D. Ohio May 6, 2005).

When the liquidator of two insolvent Ohio insurers sued two foreign auditors for negligent audits of the insurers' foreign reinsurer, and the auditors moved to dismiss for lack of personal jurisdiction, it was not shown, under Ohio Rev. Code Ann. § 2307.382(A)(1) or Ohio R. Civ. P. 4.3(A), that it was proper for an Ohio court to exercise personal jurisdiction over the auditors because the auditors solicited no business, were not licensed, kept no assets or property in, and were not retained to perform services in Ohio, and one auditor visited Ohio only a few times and sent a small amount of correspondence to Ohio, in connection with performing its contract with a foreign entity, and the fact that the auditors audited a reinsurer which reinsured the risks of Ohio insurers was not sufficient, under federal due process, to assert personal jurisdiction over the auditors. Benjamin v. KPMG Barbados, 2005 Ohio App. LEXIS 1860, 2005 Ohio 1959, (Apr. 28, 2005).

✚LEASE.

In a case involving a dispute over a lease option purchase, the requirements for long-arm jurisdiction under Ohio Rev. Code Ann. § 2307.382 were not satisfied because a lessor did

not engage in any negotiations with a lessee or have any ongoing contacts in Ohio; moreover, the bulk of the contacts within Ohio were not generated by the lessor. Kroger Co. v. Malease Foods Corp., 2006 U.S. App. LEXIS 3112 (6th Cir. Feb. 9, 2006).

✚MEDICAL MALPRACTICE.

Long-arm jurisdiction was not proper against Kentucky medical providers for alleged malpractice where they practiced solely in Kentucky, but accepted Ohio patients and had Ohio telephone directory listings: Estate of Poole v. Grosser, 134 Ohio App. 3d 386, 731 N.E.2d 226, 1999 Ohio App. LEXIS 2877 (1999).

✚MEETINGS IN OHIO.

Where virtually all of the meetings concerning a building project, both before (negotiations) and after construction (arbitration and settlement) took place in Ohio, long-arm jurisdiction over nonresident defendant was proper: Health Care Indust. v. Logan Park Care Center, 573 F. Supp. 360 (S.D. 1983).

✚MERGER, SURVIVING CORPORATION.

Since under RC § 1701.82(A) a surviving corporation after a merger is liable for all claims against any constituent corporation, an injured party may gain jurisdiction over the surviving corporation if he can establish Ohio contacts sufficient to gain jurisdiction under Ohio's long-arm statute, RC § 2307.38.2, over the constituent corporation: Duris v. Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982).

✚MINIMUM CONTACTS.

Maryland court lacked personal jurisdiction over an Ohio company where there were insufficient minimum contacts and the company could not reasonably be haled into court in Maryland: Rita Ann Distrib. V. Brown Drug Co., 164 Ohio App. 3d 145 (2005).

✚MOTION TO DISMISS.

A motion to dismiss should be granted where there are no grounds for the court's assumption of personal jurisdiction over a defendant: Universal Coach, Inc. v. New York City Transit Auth., Inc., 90 Ohio App. 3d 284, 629 N.E.2d 28, 1993 Ohio App. LEXIS 4285 (1993).

Plaintiff need only make a prima facie showing of personal jurisdiction under the "transacting any business" basis in order to defeat a motion to dismiss for lack of jurisdiction: L.B. Cleveland, Inc. v. Metal Purchasing Co., 1990 Ohio App. LEXIS 586 (8th Dist. 1990).

✚MOTION TO QUASH SERVICE.

Where there is no proof of record establishing the existence of minimal contacts between Ohio and a nonresident corporation at the time service of summons on the corporation was made under RC §§ 2307.38.2 and 2307.38.3, a motion to quash such service should be sustained: Lantsberry v. Tilley Lamp Co., 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971).

⚡PATENT/TRADEMARK INFRINGEMENT.

In a patent infringement case, the court lacked personal jurisdiction over a holding company whose subsidiary made and sold allegedly infringing products. There was no agency relationship between the subsidiary and the holding company sufficient to confer personal jurisdiction, nor was there a sufficient basis to pierce the corporate veil in order to obtain jurisdiction; an overlap in the officers and directors of the two entities, without more, did not warrant piercing the veil, and the holding company offered evidence that it did not manage or control the subsidiary and that it was adequately capitalized. Invacare Corp. v. Sunrise Med. Holdings, 2004 U.S. Dist. LEXIS 28169 (N.D. Ohio Dec. 15, 2004).

Where nonresident defendant in patent infringement suit had sales representative in state and gained substantial revenue from sales there, RC § 2307.38.2 applied even though relatively little of the revenue was derived from defendant's allegedly tortious conduct: Imperial Prods., Inc. v. Endura Prods., Inc., 109 F. Supp. 2d 809, 2000 U.S. Dist. LEXIS 6109 (S.D. 2000).

In a suit for design patent infringement and trademark infringement, the locus of the injury alleged was where defendant's infringing sales took place, rather than defendant's principal place of business: LSI Industries, Inc. v. Hubbell Lighting, Inc., 64 F. Supp. 2d 705, 1999 U.S. Dist. LEXIS 19044 (S.D. 1999).

In a patent infringement action brought by an Ohio corporation, which held an exclusive license to a patent for a welding helmet, and an Ohio resident, who held all right and title to and interest in the patent, against a Swedish corporation and its Swedish owner, in personam jurisdiction under RC § 2307.38.2 was proper over the defendants, where the defendants specifically gave a Pennsylvania distributor an exclusive sales contract in Ohio, and the alleged patent infringement occurred through the advertising and sale of defendants' production in Ohio: Gor-Vue Corp. v. Hornell Elektrooptik AB, 634 F. Supp. 535 (N.D. Ohio 1986).

⚡PATERNITY.

The court lacked personal jurisdiction over a nonresident defendant in a paternity action where the child was not conceived in Ohio and the parties never lived in a marital relationship in Ohio: State ex rel. Wayne Cty. Child Support Enforcement Agency v. Tanner, 146 Ohio App. 3d 765, 768 N.E.2d 679, 2001 Ohio App. LEXIS 4953 (2001).

The requirements of due process are pertinent in a paternity action. Ohio courts do not have personal jurisdiction over a nonresident putative father where conception occurred in another state: Gaisford v. Swanson, 83 Ohio App. 3d 457, 615 N.E.2d 266, 1992 Ohio App. LEXIS 5566 (1992).

A paternity action is properly dismissed for lack of personal jurisdiction over an out-of-state defendant where neither the requirements of RC § 2307.38.2 and CivR 4.3 nor of RC § 3111.06 are satisfied: Massey-Norton v. Trammel, 61 Ohio App. 3d 394, 572 N.E.2d 821 (1989).

⚡PERSISTENT COURSE OF CONDUCT.

The phrase "persistent course of conduct" in RC § 2307.38.2(A)(4) and (5) contemplates a quality of contacts in Ohio different from those involved in a regular doing of business in Ohio: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

PERSONAL JURISDICTION.

District court did not have personal jurisdiction under Ohio Rev. Code Ann. § 2307.382 over the Canadian booking agency where there was no factual basis to show that the booking agency supplied any goods in Ohio, and the injuries to the U.S. Citizens did not arise from the booking agency's advertising or solicitation of business in Ohio, but allegedly from the condition of the facilities and equipment provided by the booking agency at the site of the hunt, even though the decision to go to Canada in the first place presumably resulted from the booking agency's solicitations in Ohio. A "but for" relationship between the solicitation and the injuries clearly existed, but one could not reasonably say that the solicitations in Ohio were the proximate cause of the fire and explosion at the cabin in Canada. Brunner v. Hampson, 2006 U.S. App. LEXIS 5007 (6th Cir. Feb. 28, 2006).

PLEADINGS.

Where petition merely alleged that defendant might reasonably have expected plaintiff to use, consume, or be affected by the defendant's goods in this state, and failed to allege that defendant regularly does or solicits business, engages in persistent course of conduct or derives substantial revenue from goods used or consumed within the state, such petition failed to allege facts sufficient to obtain jurisdiction over the defendant: Wright v. Automatic Valve Co., 20 Ohio St. 2d 87, 253 N.E.2d 771 (1969).

PROCEDURE--RES JUDICATA.

Where a prior action was dismissed on a finding of lack of personal jurisdiction, res judicata did not preclude that issue from being relitigated in a subsequent proceeding: CTI Audio, Inc. v. Fritkin-Jones Design Group, Inc., 144 Ohio App. 3d 449, 760 N.E.2d 842, 2001 Ohio App. LEXIS 2738 (2001).

PRODUCTS LIABILITY.

In a products liability case that was based on diversity jurisdiction under 28 U.S.C.S. § 1332, the court granted a foreign air bag manufacturer's motion to dismiss for lack of personal jurisdiction because Ohio did not have long-arm jurisdiction over the manufacturer pursuant to Ohio Rev. Code Ann. § 2307.382(A)(4-5). There was no general jurisdiction because the manufacturer maintained no presence in Ohio, physical, corporate, financial, or otherwise, and there was no specific jurisdiction because the manufacturer did not purposefully avail itself of the privileges of doing business in Ohio. Lum v. Mercedes Benz, USA, LLC, 2006 U.S. Dist. LEXIS 8428 (N.D. Ohio Feb. 10, 2006).

Neither of the defendants in a products liability action was subject to Ohio's long-arm jurisdiction where one defendant had no contacts with Ohio other than a single sale of a winding machine and the other merely supplied non-defective replacement parts: Sherry v. Geissler U. Pehr GmbH, 100 Ohio App. 3d 67, 651 N.E.2d 1383, 1995 Ohio App. LEXIS 1073 (1995).

The bare assertion that a non-resident manufactured a product which was placed into a stream of commerce which foreseeably might flow into Ohio, without more, is insufficient to bring the manufacturer within the scope and extent of Ohio's long-arm jurisdiction as governed by RC § 2307.38.2: Mellott v. Dico Co., 7 Ohio App. 3d 52, 454 N.E.2d 146 (1982).

A foreign bus manufacturer which sells a passenger bus designed primarily for over-the-road

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interstate travel to a purchaser operating a bus line within the continental United States must reasonably expect his product to be used in the state of Ohio, within the meaning of the Ohio long-arm statute: Stewart v. Bus and Car Co., 19 Ohio Misc. 129, 293 F. Supp. 577 (N.D. Ohio 1968).

The continuous sale and shipment of defendant Illinois corporation's products to an Ohio company over a five-year period from which the Illinois corporation derived substantial revenue sufficiently connected the Illinois corporation with Ohio to permit substituted service on it in an Ohio personal injury action arising out of the alleged use of the defendant corporation's milk jug handle: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✦PROHIBITION.

Prohibition will not issue to prevent a court from exercising jurisdiction over a nonresident based on RC § 2307.38.2 and CivR 4.3 where jurisdiction is not patently and unambiguously lacking: Clark v. Connor, 82 Ohio St. 3d 309, 695 N.E.2d 751, 1998 Ohio LEXIS 1830 (1998).

Prohibition is an appropriate remedy to vindicate a nonresident's right to due process thereby preventing a trial court from improperly asserting personal jurisdiction over him: State ex rel. Connor v. McGough, 46 Ohio St. 3d 188, 546 N.E.2d 407 (1989).

✦PROPER SERVICE.

Where service on a Florida corporation was made by certified mail and the Florida corporation, over which personal jurisdiction was sought to be obtained under the Ohio long-arm statute, made no showing that it was not properly notified of the pending Ohio action, service was properly made under the Ohio Rules of Civil Procedure and would not be quashed: Air Transport, Inc. v. Ransom Aircraft Sales, 61 Ohio Op. 2d 403, 333 F. Supp. 1106 (S.D. 1971).

✦PURPOSEFUL ACTION TEST.

When viewed in the light most favorable to the publishers, there was evidence that the author was subject to personal jurisdiction under Ohio Rev. Code Ann. § 2307.382 where the author had resided in Ohio when he wrote the majority of an allegedly infringing book, the book was transcribed in Ohio, the author resided in Ohio when he entered the contract to publish his book, and as a result, the publishers had presented evidence that the author transacted business related to their copyright claim in Ohio. Warner v. Genth, 2005 U.S. Dist. LEXIS 13421 (S.D. Ohio July 5, 2005).

District Court had personal jurisdiction over declaratory judgment action where patentee purposefully directed its activities with regard to patent toward Ohio residents by addressing warning letters to the alleged infringer, an Ohio corporation, and by entering into an exclusive licensing agreement with infringer's competitor: Akro Corp. v. Luker, 45 F.3d 1541, 1995 U.S. App. LEXIS 1190 (Fed. Cir. 1995).

The "purposeful action test" was not met where agents of plaintiff solicited the contract with defendant in Maryland, all contract negotiations took place in Maryland, the defendant owned no property in Ohio, maintained no branch office in Ohio, and was not qualified to transact business in Ohio: Nationwide Life Ins. Co. v. Hampton Supply, Inc., 829 F. Supp. 915, 1993 U.S. Dist. LEXIS 15671 (S.D. 1993).

✦PURPOSEFUL AVAILMENT.

The defendants did not purposefully avail themselves of the benefits of acting in Ohio for purposes of the litigation at issue. The cause of action did not arise from the defendants' activities in Ohio: Healthcare Capital, LLC v. Healthmed, Inc., 213 F. Supp. 2d 850, 2002 U.S. Dist. LEXIS 19284 (S.D. 2002).

When a contractual supplier or dealer performs, at the request of the buyer, a service for the convenience of the buyer, the dealer has reached out beyond one state to create continuing relationships and obligations with citizens of another. It is the relationship between the parties -- an obligation to perform -- not where the goods end up, that determines purposeful availment: Lyman Steel Corp. v. Ferrostaal Metals Corp., 747 F. Supp. 389, 1990 U.S. Dist. LEXIS 11881 (N.D. Ohio 1990).

Voluntarily filing a lawsuit, through one's agent, where the facts similarly arise from the same series to events as another lawsuit in the forum can be deemed an indication of purposeful availment of the forum: Lyman Steel Corp. v. Ferrostaal Metals Corp., 747 F. Supp. 389, 1990 U.S. Dist. LEXIS 11881 (N.D. Ohio 1990).

Sufficient contact between nonresident defendant and forum state exists when, even though it is not licensed to do business in Ohio and maintains no offices or property in Ohio, defendant: 1) sells its product line through manufacturer's representatives, 2) provides promotional materials to its representatives, 3) controls prices charged to customers, and 4) determines which customers are entitled to credit extensions; and further, defendant's executives have visited manufacturer's representatives and have accompanied them on customer calls, because such activities show that defendant purposefully availed itself of the privilege of acting in Ohio and that a substantial enough connection with the forum state exists to make reasonable the exercise of jurisdiction in a cause of action arising out of defendant's activities in the state: Mead Corporation v. Stuart Hall Company, 679 F. Supp. 1446 (S.D. 1987).

Where a Florida resident has purposefully availed himself of business opportunities in Ohio, including contacting and contracting with an Ohio resident for the development and production of an invention which was to be manufactured by an Ohio corporation, and has made misrepresentations concerning the business arrangements in Ohio, there have been sufficient minimum contacts with Ohio to render him subject to personal jurisdiction under RC § 2307.38.2: Welsh v. Gibbs, 19 Ohio Op. 3d 333, 631 F.2d 436 (6th Cir. 1980).

A Canadian corporation that purposefully avails itself of the privilege of transacting business in Ohio is subject to jurisdiction under the Ohio long-arm statute in an action in federal court for patent infringement: Graham Engineering Corp. v. Kemp Products Ltd., 418 F. Supp. 915 (N.D. Ohio 1976).

✦REGULARLY DOES OR SOLICITS BUSINESS.

The phrase "regularly does or solicits business" in RC § 2307.38.2(A)(4) and (5) contemplates contacts or activities in Ohio: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✦SUBSTANTIAL REVENUE.

Where a foreign corporation derived an average of \$ 150,000 annually from the sale of its products in the state out of total sales exceeding \$ 2,000,000, the evidence established that

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the corporation derived substantial revenue from the state, within the meaning of RC § 2307.382(A)(4). Irizarry v. E. Longitude Trading Co. Ltd., et al., 296 F. Supp. 2d 862, 2003 U.S. Dist. LEXIS 24688 (2003).

Substantial revenue, within the meaning of RC § 2307.382(A)(4), is a flexible term, and the trial court has considerable latitude in determining what constitutes substantial revenue; a non-resident defendant may derive substantial revenue from goods consumed in the state without regularly doing or soliciting business in the state or without engaging in any other persistent course of conduct in the state. Irizarry v. E. Longitude Trading Co. Ltd., et al., 296 F. Supp. 2d 862, 2003 U.S. Dist. LEXIS 24688 (2003).

Independent manufacturer's representative was not subject to in personam jurisdiction under RC § 2307.38.2 requiring the tortfeasor to derive "substantial revenue" from goods used or consumed or services rendered where he recognized only \$ 1,920.60 in commission on the sale of vacuums in Ohio and this amount was approximately 5% of the total commission received on the account: Hoover Co. v. Robeson Industries Corp., 904 F. Supp. 671, 1995 U.S. Dist. LEXIS 17118 (N.D. Ohio 1995).

The fact that a manufacturer derived substantial income from its Ohio business and sent its employees to install and service its equipment in Ohio was sufficient minimum contact to subject it to long-arm jurisdiction under RC § 2307.38.2: Stolle Corp. v. Bryant Symons & Co., 710 F. Supp. 682 (S.D. 1988).

"Substantial revenue" as used in RC § 2307.38.2(A)(5) is a flexible term and a trial court necessarily has some latitude in determining what constitutes "substantial revenue": Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).

In a personal injury suit wherein jurisdiction of the federal court is predicated upon diversity of citizenship and the foreign corporate defendant enters its appearance for the limited purpose of moving to dismiss the action, whether or not the defendant is deriving "substantial revenue," within the meaning of RC § 2307.38.2(A)(4) from sales or other activities in Ohio is a relative determination, depending to a great extent upon the facts of each particular case: Stewart v. Bus and Car Co., 19 Ohio Misc. 129, 293 F. Supp. 577 (N.D. Ohio 1968).

The meaning of the word "substantial" as used in RC § 2307.38.2 is to be gauged by all the circumstances surrounding the transaction with respect to which it has been used: McHugh v. Prestodial, Inc., 18 Ohio Misc. 111, 241 N.E.2d 102 (CP 1968).

Varying with each nonresident business the words "substantial revenue" as used in RC § 2307.38.2(A)(4) and (5) would not involve nor intend any fixed minimum: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✦TELEVISION SOLICITATION.

A district court may assert personal jurisdiction under Ohio's long arm statute over an out-of-state medical center that solicited Ohio patients by means of television broadcast evangelists because the center purposefully availed itself of the privilege of acting in Ohio: Creech v. Roberts, 908 F.2d 75, 1990 U.S. App. LEXIS 11731 (6th Cir. 1990).

✦TORTIOUS INJURY.

Deprivation of funds and depletion of estate assets of decedent amounted to a tortious injury and were sufficient to establish personal jurisdiction over non-resident defendant under RC §

2307.382 and Ohio R. Civ. P. 4.3(A). Toma v. Toma, 2003 Ohio App. LEXIS 3855, 2003 Ohio 4344, (2003).

The defendant's actions met the requirements of RC § 2307.38.2(A)(6) where a fair reading of the complaint and documentary materials showed that he committed tortious acts outside Ohio, while knowing full well that the stock involved was of an Ohio corporation; assuming that these acts were committed solely in his capacity as a corporate officer, this would not immunize him, since officers may be liable for the tortious or fraudulent acts of the Corporation: Herbruck v. Lajolla Capital, 2000 Ohio App. LEXIS 4668 (9th Dist. 2000).

A tortious injury is not considered to have occurred in Ohio simply because a party continues to suffer from the effects of the injury after returning to Ohio; thus, since plaintiff's injuries did not occur in Ohio, the trial court lacked personal jurisdiction over defendants under RC § 2307.38.2(A)(4) and CivR 4.3(A)(4): Robinson v. Koch Ref. Co., 1999 Ohio App. LEXIS 2682 (10th Dist. 1999).

Where the plaintiff asserted that she and her son have been subjected to or threatened with physical abuse by defendant within the meaning of RC § 3109.22(A)(3), to the extent that threats and/or physical abuse could constitute tortious conduct within the state of Ohio, such tortious conduct was sufficient for purposes of RC § 2307.38.2(A)(3): In re Holbert, 1997 Ohio App. LEXIS 4102 (10th Dist. 1997).

In order for Ohio courts to establish personal jurisdiction over nonresident relators for alleged tortious cashing of checks charged to an account located in an Ohio bank, due process requires that there be more than the contact of the ultimate cashing and charging of the checks; there must be some form of direct contact: State ex rel. DeLuca v. Krichbaum, 1995 Ohio App. LEXIS 1354 (7th Dist. 1995).

International Amateur Athletic Federation's press release from London citing a positive drug test and suspension of plaintiff did not cause tortious injury in Ohio: Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110, 1994 U.S. App. LEXIS 10806 (6th Cir. 1994).

Ohio court could exercise in personam jurisdiction over out-of-state defendant where plaintiff alleged that defendant conspired with Ohio residents to tortiously interfere with contract: Perry v. Kempton, 864 F. Supp. 37, 1994 U.S. Dist. LEXIS 13557 (S.D. 1994).

Plaintiff made prima facie showing that the IAAF conducted tortious activity in Ohio where there were uncontroverted allegations of defamation and interference with business relationships: Reynolds v. International Amateur Athletic Fed., 841 F. Supp. 1444, 1992 U.S. Dist. LEXIS 8625 (S.D. 1992).

The district court obtained jurisdiction over Swiss defendants pursuant to the Ohio long-arm statute and the due process clause of the United States Constitution in an action under state tort law and the RICO statute by the defendants entering into a contract with an Ohio corporation, maintaining an agent in Ohio, and allegedly reaching into Ohio to acquire plaintiff's trade secrets by fraud, deception, or theft: General Environmental Science Corp. v. Horsfall, 753 F. Supp. 664, 1990 U.S. Dist. LEXIS 18609 (N.D. Ohio 1990).

When the receipt of a phone call, the mailing of several correspondences, and the placement of several phone calls are considered in the context of whether they constituted the causing of tortious injury to a person or persons in Ohio by an act outside Ohio committed with the purpose of injuring such persons, a substantial enough connection with Ohio has been established to make the exercise of in personam jurisdiction reasonable: Ahrendt v. Palmetto Federal Savings and Loan Association, 680 F. Supp. 1125 (S.D. 1987).

Viewing the pleadings in the light most favorable to the non-moving party, plaintiffs established a prima facie case for jurisdiction where they alleged that the theft and conversion of their catalogue and customer lists occurred upon defendant's departure from Ohio and that the contract allegedly interfered with was executed in Ohio: Innovative Digital Equipment v. Quantum Technology, 547 F. Supp. 983 (N.D. Ohio 1984).

Under RC § 2307.38.2(A), personal jurisdiction existed over defendant Illinois corporation in a suit for tortious interference with plaintiff's employment agreement, where defendant utilized both mail and telephone to contact plaintiff's employee while he was in Ohio, with the result that he left his established position of employment and place of residence in Ohio and relocated in Illinois, and where defendant's acts were purposeful and it was reasonably foreseeable that they would have consequences in Ohio: Premix, Inc. v. Zappitelli, 561 F. Supp. 269 (N.D. Ohio 1983).

The provisions of RC § 2307.38.2(A)(4) and (5) require that the injury which is the basis of the complaint must occur in the state of Ohio: Grossi v. Presbyterian Univ. Hosp., 4 Ohio App. 3d 51, 446 N.E.2d 473 (1980).

Where a foreign corporation introduces poisonous substances into a body of water, causing injuries in Ohio, this constitutes the causing of tortious injuries by an act of omission in Ohio, even though the substances emanated from a manufacturing plant located outside of the state of Ohio: State ex rel. Brown v. BASF Wyandotte Corp., 67 Ohio Op. 2d 239 (CP 1974).

In-Flight Devices Corp. v. Van Dusen Air, 466 F.2d 220 (1972) held that it had been the legislature's intent to exercise "long-arm" jurisdiction as far as the due process clause of the constitution would allow. Thus, a three-fold mode of analysis in jurisdictional cases where jurisdiction is predicated upon a single act of the defendant was adopted: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state, (2) the cause of action must arise from the defendant's activities there, (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable: Akron Tire Supply Co. v. Gebr. Hofmann KG, 390 F. Supp. 1395 (N.D. Ohio 1974).

Where the jurisdictional fact in the language of the long-arm statute is the commission of a tortious act within the state of the forum, such tortious act is not confined to the traditional concepts of a tort, but includes any act committed in the forum involving a breach of duty that imposes liability upon the actor in damages: Poindexter v. Willis, 23 Ohio Misc. 199, 256 N.E.2d 254 (CP 1970).

The scope of RC § 2307.38.2(A)(3) is limited to a tortious occurrence in which the causing act or omission as well as the resulting tortious injury occur in Ohio, and the occurrence of the tortfeasor's act or omission in Ohio establishes the tortfeasor's contact with Ohio out of which contact arises the cause of the action against the tortfeasor: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

To comply with RC § 2307.38.2(A)(4) relating to a tortious injury by an act or omission outside the state, it is essential to establish that a tortious injury occurred in Ohio and that the person causing the injury regularly does business in the state: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✦TRANSACTIONING BUSINESS.

Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382, provided that the court could exercise jurisdiction over defendants because they had transacted business in Ohio. Further,

the exercise of personal jurisdiction over defendants comported with the Due Process Clause. Morel Acoustic, Ltd. v. Morel Acoustics USA, Inc., 2005 U.S. Dist. LEXIS 32864 (S.D. Ohio Sept. 7, 2005).

Supreme Court of Ohio broadly interprets the "transacting any business" language of Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382(a)(1). Gutter Topper, Ltd. v. Hart & Cooley, Inc., 2005 U.S. Dist. LEXIS 9335 (S.D. Ohio May 6, 2005).

✦TRANSACTIONING BUSINESS IN OHIO.

When viewing the contacts of corporate officers and directors with Ohio in the aggregate, they "transacted" business within the permissible reach of the Ohio Long-Arm Statute, Ohio Rev. Code Ann. § 2307.382. In their attempt to obtain settlement and defense funds from the insurer's affiliate in Ohio, they prosecuted negotiations, carried on business, and dealt with the affiliate on a regular basis that was more than a one-shot transaction between two parties. Genesis Ins. Co. v. Alfi, 2006 U.S. Dist. LEXIS 16984 (S.D. Ohio Mar. 23, 2006).

Where the parties had a contract for parts to be manufactured in Ohio that was part of an extended course of dealing, the agreement certainly fell under the "transacting business" prong of RC § 2307.382(A)(1) and Ohio R. Civ. P. 4.3(A)(1). T & W Forge, Inc. v. V & L Tool, Inc., 2005 U.S. Dist. LEXIS 24619 (N.D. Ohio Oct. 21, 2005).

Defendant's actions in purchasing a horse in Ohio and using an Ohio court to enforce a foreign judgment constituted transacting business in Ohio: Hall v. Tucker, 161 Ohio App. 3d 245, 2005 Ohio App. LEXIS 2518 (2005).

Seller of a business in New Jersey to an Ohio company transacted business in Ohio, and an Ohio court's exercise of jurisdiction over the seller did not violate due process: Directory Concepts, Inc. v. Smith, 2004 Ohio App. LEXIS 3306, 2004 Ohio 3666, (2004).

Dismissal of complaint against a Texas law firm was proper based on where the firm did not transact any business in Ohio, agree to the terms of the agency's fee schedule, consent to the agency's forum selection clause, or undertake any systematic or continuous activity in Ohio such that jurisdiction could be asserted under RC § 2307.382(A)(1). Marvel Consultants, Inc. v. Friedman & Feiger, 2003 Ohio App. LEXIS 4744, 2003 Ohio 5249, (Oct. 2, 2003).

The fact as to which party initiated the business dealings, although relevant, is not determinative on the issue of "transacting any business" in Ohio. There was evidence, sufficient to withstand a motion to dismiss, that the parties' course of dealing satisfied the requirements for an Ohio court to exercise jurisdiction: Long v. Grill, 155 Ohio App. 3d 135, 2003 Ohio App. LEXIS 5018 (2003).

Settlement negotiations concerning out-of-state litigation did not constitute transacting business in Ohio: Matrix Essentials, Inc. v. Harmon Stores, Inc., 205 F. Supp. 2d 779, 2001 U.S. Dist. LEXIS 23946 (N.D. Ohio 2002).

Although nonresident president of company was actively involved in negotiations which led to nonresident's signing of a reseller agreement with distributor located in Ohio, the court did not have personal jurisdiction over nonresident in breach of contract action as the agreement was negotiated and signed outside of Ohio: Diebold, Inc. v. Firstcard Fin. Serv., 104 F. Supp. 2d 758, 2000 U.S. Dist. LEXIS 10234 (N.D. Ohio 2000).

Plaintiff made a prima facie showing of personal jurisdiction where the defendant was a trustee of an Ohio trust whose beneficiaries resided in Ohio, and a director of an Ohio corporation that pays her compensation and whose minority shareholder resides in Ohio:

Klug v. Trivison, 137 Ohio App. 3d 838, 739 N.E.2d 1243, 2000 Ohio App. LEXIS 2335 (2000).

A Texas resident did not transact business in Ohio by executing a guaranty agreement in Texas on behalf of a Texas business: Mustang Tractor & Equip. Co. v. Sound Environmental Serv., Inc., 104 Ohio Misc. 2d 1, 727 N.E.2d 977, 1999 Ohio Misc. LEXIS 60 (CP 1999).

In copyright infringement suit, negotiation of authorship and distribution of book at issue constituted transaction of business for purposes of RC § 2307.38.2: Walker v. Concochy, 79 F. Supp. 2d 827, 1999 U.S. Dist. LEXIS 21171 (N.D. Ohio 1999).

There was a sufficient basis for Ohio jurisdiction where the Kentucky defendants contacted Ohio residents with an offer to sell a business and conducted negotiations while the plaintiffs were located in Ohio: Renaissance Specialties, Inc. v. Molloy, 107 Ohio Misc. 2d 1, 736 N.E.2d 109, 1999 Ohio Misc. LEXIS 73 (1999).

Where nonresident subcontractor placed telephone orders with plaintiff Ohio supplier and accepted and paid for plaintiff's goods, it was subject to personal jurisdiction in Ohio: Advanced Polymer Sciences, Inc. v. Phillips Indus. Servs., 34 F. Supp. 2d 581, 1998 U.S. Dist. LEXIS 18848 (N.D. Ohio 1999).

Ohio could exercise personal jurisdiction over a nonresident defendant in a breach of contract action where defendant transacted business in Ohio by negotiating and executing the contract by way of telephone calls and mailings to the Ohio resident: Cole v. Miletic, 133 F.3d 433, 1998 U.S. App. LEXIS 204 (6th Cir. 1998).

The defendant's preparation of a private placement memorandum for distribution to prospective investors constituted transacting business in Ohio: Corporate Partners, L.P. v. Natl. Westminster Bank PLC, 126 Ohio App. 3d 516, 710 N.E.2d 1144, 1998 Ohio App. LEXIS 1714 (1998).

Patentee was not subject to personal jurisdiction where he had some contacts with Ohio, but they were not a competent producing cause of the declaratory judgment action: Pharmachemie B.V. v. Pharmacia S.P.A., 934 F. Supp. 484, 1996 U.S. Dist. LEXIS 10741 (D.Mass. 1996).

A Michigan church organization transacted business in Ohio by negotiating and entering into a construction contract with an Ohio contractor via an Ohio agent: Floyd P. Bucher & Sons, Inc. v. Spring Valley Architects, Inc., 85 Ohio Misc. 2d 5, 683 N.E.2d 875, 1996 Ohio Misc. LEXIS 86 (CP 1996).

Kentucky amusement park's mere solicitation of customers in Ohio was not sufficient for the exercise of in personam jurisdiction in Ohio: Cruz v. Kentucky Action Park, Inc., 950 F. Supp. 210, 1996 U.S. Dist. LEXIS 20678 (N.D. Ohio 1996).

Long-arm jurisdiction was proper over a New York manufacturer where three percent of its products, with a warranty, were distributed to Ohio: Morgan Adhesives Co. v. Sonisor Instrument Corp., 107 Ohio App. 3d 327, 668 N.E.2d 959, 1995 Ohio App. LEXIS 4983 (1995).

A defendant is not required to have been physically present in the forum state. The defendant transacted business in Ohio by agreeing to provide a tax accountant for an Ohio partnership and to oversee the accountant's work: Dynes Corp. v. Seikel, Koly & Co., Inc., 100 Ohio App. 3d 620, 654 N.E.2d 991, 1994 Ohio App. LEXIS 5157 (1994).

Whether goods aggregating almost \$ 3 million over three years were actually delivered to

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plaintiff's facilities in Ohio or were simply deposited "F.O.B." at defendant's facility in Illinois, following sale to plaintiff, it is clear that the defendant has transacted business in the state of Ohio or, at the very least, contracted to supply goods within Ohio: International Pizza Co. v. C&F Packing Co., 858 F. Supp. 696, 1994 U.S. Dist. LEXIS 15422 (S.D. 1994).

The International Amateur Athletic Federation's letters and phone calls to plaintiff did not establish minimum contacts where the federation was based in England, owned no property and transacted no business in Ohio, and did not supervise US athletes in Ohio: Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110, 1994 U.S. App. LEXIS 10806 (6th Cir. 1994).

A nonresident corporate defendant may be found to have transacted business in Ohio, despite maintaining no physical presence in the state, where it negotiated by phone, facsimile and mail for the sale of beds to an Ohio corporation for resale in Ohio: Pharmed Corp. v. Biologics, Inc., 97 Ohio App. 3d 477, 646 N.E.2d 1167, 1994 Ohio App. LEXIS 4213 (1994).

Ohio court could exercise personal jurisdiction over out-of-state defendant who, over the course of seven years, ordered millions of dollars of steel doors from plaintiff where plaintiff manufactured the doors, thus affecting Ohio's economy and defendant became the owner of the doors the moment they left the grounds of plaintiff's factory: Steelcraft Service Co., Inc. v. Enseco Corp., 815 F. Supp. 234, 1993 U.S. Dist. LEXIS 3153 (S.D. 1993).

A corporate nonresident, for the purposes of personal jurisdiction, is "transacting any business," within the plain and common meaning of the phrase, where the nonresident corporation initiates, negotiates a contract, and through the course of dealing becomes obligated to make payments to an Ohio corporation: Hammill Mfg. Co. v. Quality Rubber Prod., Inc., 82 Ohio App. 3d 369, 612 N.E.2d 472, 1992 Ohio App. LEXIS 4507 (1992).

Plaintiff made prima facie showing that the IAAF transacted business in Ohio by showing that the IAAF makes eligibility determinations with respect to Ohio athletes and arguably enters into contractual relationships with those athletes: Reynolds v. International Amateur Athletic Fed., 841 F. Supp. 1444, 1992 U.S. Dist. LEXIS 8625 (S.D. 1992).

Simply furnishing the financial means for a third party to launch a hostile tender offer does not constitute "transacting business" in Ohio: General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1990 U.S. Dist. LEXIS 18949 (S.D. 1990).

Under Ohio rule, "transacting business" is not an issue of whether the transaction created an impact on Ohio commerce but, instead, whether the nonresident transacted business in Ohio: General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1990 U.S. Dist. LEXIS 18949 (S.D. 1990).

A commercial nonresident lessee, for purposes of personal jurisdiction, is "transacting any business" within the plain and common meaning of the phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio: Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc., 53 Ohio St. 3d 73, 559 N.E.2d 477, 1990 Ohio LEXIS 338 (1990).

Where the Michigan hospital did not transact any business in Ohio, plaintiff's claim for payment for personal services must be dismissed: Greenwood v. Addison Community Hosp. Auth., 62 Ohio Misc. 2d 138, 593 N.E.2d 509, 1990 Ohio Misc. LEXIS 110 (CP 1990).

Exercise of jurisdiction over a Swedish chemical company which manufactured one of the chemicals involved in an explosion at a fireworks manufacturing plant was unreasonable and violated due process because the Swedish company transacted no business in Ohio: Sturqill

v. Chema Nord Delekkemi Nobel Industries, 687 F. Supp. 351 (S.D. 1988).

The court may, within the due process requirements of USConst amend V, exercise in personam jurisdiction predicated upon a single act of defendant because: 1) The intentional act of entering into a contractual relationship with a resident of Ohio is sufficient to show defendant purposely availed itself of the privilege of acting in the forum state; 2) The breach of contract entered into with an Ohio resident as the event which does the damage within Ohio satisfies the requirement that the cause of action arises from defendant's actions within Ohio; 3) An inference that the exercise of jurisdiction over defendant is reasonable arises since the two above elements are met and no unusual facts suggest that the reasonableness criterion is not met: Wright International Express, Inc. v. Roger Dean Chevrolet, Inc., 689 F. Supp. 788 (S.D. 1988).

Court has personal jurisdiction over foreign corporation based on unsolicited contacts, phone calls, and correspondences even though no agent ever actually entered Ohio: Gold Circle Stores v. Body Maven, 711 F. Supp. 897 (S.D. 1988).

Nonresident one-time-only guarantor is subject to long-arm jurisdiction because: 1) by the intentional act of entering into a contractual relationship with a resident of Ohio, nonresident has purposefully acted within Ohio; 2) by voluntarily signing the guaranty without which credit would not have been furnished, the Ohio principal's default was event that made guaranty agreement the basis for the court action; 3) it is reasonable for Ohio to require nonresident to honor his guaranty which was the essential element of receiving credit from an Ohio resident: Reliance Electric Co. v. Luecke, 695 F. Supp. 917 (S.D. 1988).

A default judgment was void for lack of in personam jurisdiction despite defendant's solicitation of business; mere solicitation of business by agents of a foreign corporation is not "transacting business" under RC § 2307.38.2(A)(1): Howard v. Cunard Line Ltd., 62 Ohio App. 3d 285, 575 N.E.2d 489 (1988).

The receipt of a phone call, the mailing of several correspondences, and the placement of several phone calls do not rise to the level of "transacting business" under long-arm statute; therefore, the court cannot find that these acts had a substantial enough connection with Ohio to make the exercise of jurisdiction reasonable: Ahrendt v. Palmetto Federal Savings and Loan Association, 680 F. Supp. 1125 (S.D. 1987).

In light of its business activities within the State of Ohio, including physical contacts within Ohio, defendant could reasonably have foreseen being sued in an Ohio Court: Mead Corporation v. Stuart Hall Company, 679 F. Supp. 1446 (S.D. 1987).

Acting pursuant to a decedent's instructions in going to Ohio while he was alive to perform services in respect to his personal property amounts to "transacting* * * business in this state," within the meaning of RC § 2307.38.2(A)(1): Ramsier v. Western & Southern Life Ins. Co., 34 Ohio Misc. 2d 30, 518 N.E.2d 615 (CP 1987).

An Ohio federal court may exercise in personam jurisdiction over a Michigan limited partnership which directly or through its agent mailed a subscription agreement to an Ohio plaintiff for his signature, thus freely and intentionally allowing an Ohio resident to make a substantial investment in the partnership: Bernie v. Waterfront Ltd. Dividend Housing Assn., 614 F. Supp. 651 (S.D. 1985).

Where a nonresident defendant has freely and intentionally entered into a contractual relationship with an Ohio corporation and has supplied a high pressure water pump and technical assistance, where the cause of action arose out of defendant's activities in Ohio, in that the pump failed to perform, and where the acts of the defendant had a substantial enough connection with Ohio to make reasonable the exercise of personal jurisdiction, long-

arm jurisdiction comports with due process: Cincinnati Milacron Indus. v. Aqua Dyne, Inc., 592 F. Supp. 113 (S.D. 1984).

Even though the defendant had no physical contacts with Ohio for the specific transactions at issue, the long-arm jurisdiction was proper where the defendant purchased some 433 tons of paper worth over \$ 216,000 from the plaintiff, the alleged breach of contract arose from the contract with the Ohio seller, defendant was an "active" rather than "passive" buyer, and it was reasonable for the defendant to foresee a foreign suit: Miami Paper Corp. v. Magnetics, Inc., 591 F. Supp. 52 (S.D. 1984).

Even though a nonresident defendant has been transacting business in Ohio by virtue of the sale of its products, RC § 2307.38.2 does not permit personal jurisdiction over such a defendant when the cause of action did not arise from or out of the defendant's doing business in Ohio: Berning v. BBC, Inc., 575 F. Supp. 1354 (S.D. 1983).

Colorado defendant's actions in initiating contact with Ohio plaintiff by visits and telephone calls, followed by personal correspondence with plaintiff was sufficient to support in personam jurisdiction under the Ohio long-arm statute: Priess v. Fisherfolk, 535 F. Supp. 1271 (S.D. 1982).

The ordering of goods from an Ohio resident by telephone from Kentucky by a Kentucky resident, which goods are to be shipped to Kentucky by the Ohio resident, does not constitute the transaction of business in Ohio by the Kentucky resident who ordered the goods, even though the goods had to be specially ordered to meet the needs of the Kentucky resident, and even though it may impact on Ohio commerce: Ohio State Tie & Timber, Inc. v. Paris Lumber Co., 8 Ohio App. 3d 236, 456 N.E.2d 1309 (1982).

The single act of picking up a check drawn on an Ohio bank for a personal loan from a person in Ohio and delivering it to another in New York is insufficient to establish that the New York resident was transacting business in the state of Ohio. Forcing him to come to Ohio to defend would violate his due process rights: Schmelzer v. Cally, 531 F. Supp. 92 (N.D. Ohio 1982).

Where a company doing business in Ohio mails a purchase order to a company doing business in Michigan, for products manufactured in Michigan, and where the Ohio company subsequently signs an acknowledgment granting jurisdiction in the Michigan courts over any litigation arising out of the agreement between the parties, sufficient minimum contacts with the state of Michigan have been established and jurisdiction in the Michigan courts is proper: Alpha Industries, Inc. v. Tube Machinery Corp., 6 Ohio App. 3d 58, 453 N.E.2d 1114 (1982).

In personam jurisdiction over the defendant was justified where (1) the events leading up to and including the execution of the contract took place in Ohio, and defendant took the initiative in contacting plaintiff in Ohio; (2) throughout the term of the contract, defendant returned to the plaintiff's headquarters in Ohio, on a periodic basis for company meetings; and (3) defendant forwarded all orders to and received shipments from Ohio: Neff Athletic Lettering Co. v. Walters, 524 F. Supp. 268 (S.D. 1981).

Defendant foreign corporation's conduct of repeatedly contacting plaintiff in Ohio and inducing him to leave his job in Ohio for promised employment with the defendant is a sufficient basis for the exercise of personal jurisdiction under Ohio's long-arm statute. Further, defendant could have reasonably anticipated its possible liability to suit in Ohio as a result of these acts. Finally, defendant, because of its size, is more able to bear the expense of litigating in Ohio than is the individual plaintiff to litigate elsewhere: Garrett v. Ruth Originals Corp., 10 Ohio Op. 3d 430, 456 F. Supp. 376 (S.D. 1978).

An order for the purchase of machinery by an Oregon corporation from an Ohio corporation was signed and mailed in Oregon. The entire transaction was initiated and completed by

sales agents of the Ohio corporation in Oregon. The machinery was manufactured in Ohio and shipped to and used in Oregon; it was not custom-made to plans or specifications detailed by the Oregon corporation. Held: The transaction does not establish such "minimum contacts" in Ohio so as to charge the Oregon corporation with "transacting any business in Ohio" which would thereby subject it to the jurisdiction of the Ohio courts, under RC § 2307.38.2: NRM Corp. v. Pacific Plastic Pipe Co., 36 Ohio App. 2d 179, 304 N.E.2d 248 (1973).

Where meaningful and lengthy contract negotiations took place in Ohio during which the defendant's vice president resided in Ohio and where the plaintiff Ohio corporation had a considerable financial interest in the performance of its contracts, defendant buyers could be subjected to suit under Ohio's long-arm statute, RC § 2307.38.2: M&W Contractors, Inc. v. Arch Mineral Corp., 466 F.2d 1339 (6th Cir. 1972), [reversing 335 F. Supp. 972].

Where a Minnesota corporation entered into contract negotiations involving a substantial order for the manufacture of goods with a firm which it necessarily knew was based in Ohio and which had its production facilities there, under the Ohio long-arm statute it was fair to assert personal jurisdiction over the Minnesota corporation in an action for breach of contract by it and an action for tort based on the claim of the Ohio corporation of damage to its business reputation because of the act of the Minnesota corporation in stopping payment on a check issued to satisfy outstanding obligations under the purchase contract: In-Flight Devices Corp. v. Van Dusen Air, 65 Ohio Op. 2d 279, 466 F.2d 220 (6th Cir. 1972).

Evidence in an action against a foreign plastic hose manufacturer and another for conspiring to violate the Sherman Act was sufficient to sustain a finding that the manufacturer was "transacting business" in Ohio for the purpose of the state long-arm statute pursuant to which service of process was made: Edw. J. Moriarty & Co. v. General Tire & Rubber Co., 18 Ohio Misc. 156, 289 F. Supp. 381 (S.D. 1967).

In determining whether a defendant served with summons by reason of this section, the "long-arm statute," has had the minimal contacts with this state that will permit the use of this method of obtaining personal jurisdiction over a corporation without violation of its rights to due process of law, visits of its vice president to this state in the negotiation with the plaintiff corporation of a contract to construct custom-designed industrial machinery for it and in commencing performance under the resulting contract constitute transacting business in this state: American Compressed Steel Corp. v. Pettibone Mulliken Corp., 40 Ohio Op. 2d 14, 271 F. Supp. 864 (S.D. 1967).

A defendant has sufficient contacts with Ohio to be subjected to its long-arm statute where it entered into a contract for the construction of a factory by the plaintiff corporation, which has its principal place of business in Ohio, where it executed the contract after the defendant had signed, where part of the plaintiff's duties under the contract were performed here, and the defendant sent several of its employees to Ohio for training by the plaintiff: Seilon, Inc. v. Brema S.P.A., 41 Ohio Op. 2d 267, 271 F. Supp. 516 (N.D. Ohio 1967).

One who contracts to supply goods to be delivered in Ohio or to render services in Ohio is subject to substituted service under RC § 2307.38.2(A)(1) and (2) in a cause of action arising out of such a contract: Busch v. Service Plastics, Inc., 11 Ohio Misc. 131, 261 F. Supp. 136 (N.D. Ohio 1966).

✚--LONG ARM JURISDICTION.

A finding that the court had specific jurisdiction over defendants, who were involved in proceedings concerning life insurance policies, because they transacted business in Ohio under the long-arm statute, Ohio Rev. Code Ann. § 2307.382, comported with the

requirements of the Due Process Clause because: (1) defendants purposefully availed themselves of causing a consequence in Ohio; (2) defendants' contacts with Ohio were related to the operative facts in that a receiver's claims against them arose from defendants' contacts and resulting transactions in Ohio; and (3) the consequences of defendants' actions had a substantial contact with Ohio because Ohio had a strong interest in the sale of worthless insurance policies to an Ohio entity. Javitch v. Neuma, Inc., 2006 U.S. Dist. LEXIS 3561 (N.D. Ohio Jan. 31, 2006).

Receiver sought to recover from defendants for the alleged sale of worthless life insurance policies, but defendants moved to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of jurisdiction. The court denied the motion because defendants' direction of documents to Ohio for a business decision and payment of money for life insurance policies satisfied the broad definition of transacting business under Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382, and because a finding of specific jurisdiction comported with the requirements of the Due Process Clause. Javitch v. Neuma, Inc., 2006 U.S. Dist. LEXIS 3561 (N.D. Ohio Jan. 31, 2006).

VACATION OF DEFAULT JUDGMENT.

Where the nonresident defendant filed a motion for vacation of a default judgment on the basis of lack of personal jurisdiction, the court was required to hold an evidentiary hearing on that issue prior to denying the motion: CompuServe, Inc. v. Trionfo, 91 Ohio App. 3d 157, 631 N.E.2d 1120, 1993 Ohio App. LEXIS 5009 (1993).

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ORC Ann. 2307.385


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126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH
OCTOBER 26, 2006 *

* ANNOTATIONS CURRENT THROUGH JULY 1, 2006 *

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2307. CIVIL ACTIONS
LONG-ARM STATUTES

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ORC Ann. 2307.385 (2006)

§ 2307.385. Court's jurisdiction undiminished

A court of this state may exercise jurisdiction on any other basis authorized in the Revised Code notwithstanding sections 2307.381 [2307.38.1] to 2307.385 [2307.38.5] *, inclusive, of the Revised Code.

 **History:**

131 v 647. Eff 9-28-65.

 **Section Notes:**

FOOTNOTE

* [Revised Code §§ 2307.38.3, 2307.38.4](#) repealed, 7-1-71.

 **Related Statutes & Rules:**

Ohio Rules:

Process: out-of-state service, [CivR 4.3\(A\)](#).

Source: [Legal](#) > [States Legal - U.S.](#) > [Ohio](#) > [Statutes & Regulations](#) > OH - Ohio Statutes, Constitution, Court

Rules & ALS, Combined 

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§ 2307.385. Court's jurisdiction undiminished

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Source: [Legal > States Legal - U.S. > Ohio > Statutes & Regulations > OH - Ohio Statutes, Constitution, Court Rules & ALS, Combined](#) 

TOC: [Ohio Statutes, Constitution, Court Rules & ALS, Combined > /.../ > LONG-ARM STATUTES > § 2307.39. Enforcement of agreement to be governed by Ohio law and to submit to jurisdiction of Ohio courts](#)

ORC Ann. 2307.39

PAGE'S OHIO REVISED CODE ANNOTATED
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 **Practitioner's Toolbox**



 [History](#)

 [Section Notes](#)

* CURRENT THROUGH LEGISLATION PASSED BY THE
126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 26, 2006 *
* ANNOTATIONS CURRENT THROUGH JULY 1, 2006 *

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2307. CIVIL ACTIONS
LONG-ARM STATUTES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 2307.39 (2006)

§ 2307.39. Enforcement of agreement to be governed by Ohio law and to submit to jurisdiction of Ohio courts

(A) Except as provided in division (C) of this section, any person may bring a civil action in a court of this state against an individual, corporation, or other person who is a resident of, incorporated under the laws of, or otherwise engaged in the conduct of business in a foreign nation or a province, territory, or other political subdivision of a foreign nation, against a foreign nation, or against a province, territory, or other political subdivision of a foreign nation upon a cause of action that arises out of or relates to a contingent or other contract, agreement, or undertaking, whether or not it bears a reasonable relation to this state, if the contract, agreement, or undertaking contains both of the following provisions:

(1) An agreement by the parties to be governed in their rights and duties under the contract, agreement, or undertaking, in whole or in part, by the law of this state;

(2) An agreement by the parties to submit to the jurisdiction of the courts of this state.

(B) The court shall not stay or dismiss a civil action brought in accordance with division (A) of this section on the ground of inconvenient forum. In the civil action, the court shall apply the law of this state as agreed upon by the parties.

(C) This section applies to a transaction covered by [section 1301.05 of the Revised Code](#) unless the transaction is subject to a limitation on choice of law specified in division (B) of that section. This section does not apply to a contract, agreement, or undertaking for labor or personal services or for a consumer transaction, as defined by [section 1345.01 of the Revised Code](#).

(D) This section does not limit or deny, and shall not be construed as limiting or denying the enforcement of a provision respecting choice of law or choice of forum in a contract,

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agreement, or undertaking to which this section does not apply.

History:

♦ 144 v H 221. Eff 10-23-91.

Section Notes:

Not analogous to former RC § 2307.39 (RS §§ 5028, 5031; S & C 960; 70 v 138, § 53; 94 v 271; GC § 11277; Bureau of Code Revision, 10-1-53), repealed 133 v H 1201, § 1, eff 7-1-71.

The provisions of § 5 of HB 221 (144 v --) read as follows:

SECTION 5. Section 2307.39 of the Revised Code, as enacted by this act, applies to contingent or other contracts, agreements, or undertakings that are entered into on or after the effective date of this act and to contingent or other contracts, agreements, or undertakings that were entered into prior to that date and that are related to civil action commenced on or after that date.

Source: [Legal > States Legal - U.S. > Ohio > Statutes & Regulations > OH - Ohio Statutes, Constitution, Court Rules & ALS, Combined](#)

TOC: [Ohio Statutes, Constitution, Court Rules & ALS, Combined > /.../ > LONG-ARM STATUTES > § 2307.39. Enforcement of agreement to be governed by Ohio law and to submit to jurisdiction of Ohio courts](#)

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