

IN THE SUPREME COURT OF OHIO  
2008 TERM

KAUFFMAN RACING EQUIPMENT, L.L.C. : Supreme Court No. 08-1038  
Plaintiff-Appellee, : On Appeal from the  
vs. : Knox County  
 : Court of Appeals,  
SCOTT ROBERTS, : Fifth Appellate District  
 :  
Defendant-Appellant. : Court of Appeals  
 : Case No. 07CA-14

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MEMORANDUM OF PLAINTIFF-APPELLEE KAUFFMAN RACING  
EQUIPMENT, L.L.C. IN OPPOSITION TO JURISDICTION

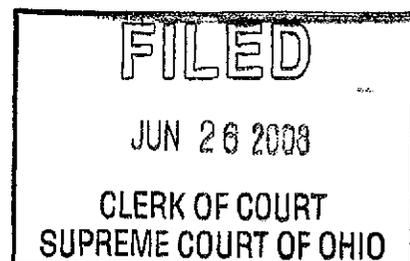
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**TABLE OF CONTENTS**

APPELLEE’S POSITION AS TO WHY THIS CASE DOES NOT INVOLVE  
A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THIS  
IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....1

ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITIONS OF LAW .....5

Response to Appellant’s Proposition of Law No. 1:

The unrebutted affidavit and exhibits filed by KRE were sufficient to make a prima facie showing for the exercise of long-arm jurisdiction over Roberts pursuant to R.C. 2307.382(A)(6). KRE’s evidentiary materials affirmatively established that Roberts, a resident of Virginia, caused tortious injury to KRE, a business domiciled in Ohio, as a result of his intentional and malicious campaign of posting statements on several interactive Internet websites impugning KRE’s business practices and integrity. . . .5

Response to Appellant’s Proposition of Law No. 2:

The unrebutted affidavit and exhibits filed by KRE were sufficient to make a prima facie showing that the exercise of long-arm jurisdiction over Roberts would not violate his rights under the Due Process Clause of the Fourteenth Amendment. KRE’s evidentiary materials affirmatively established that Roberts intentionally and expressly aimed his Internet postings at KRE knowing that it would suffer the brunt of the injury from the defamatory content of the postings in its home state of Ohio. . . . 6

CONCLUSION ..... 10

CERTIFICATE OF SERVICE .....11

APPELLEE'S POSITION AS TO WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THIS  
IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

As the highest judicial tribunal in this state, this Court is responsible for deciding cases that raise important issues of public concern as well as maintaining uniformity in the interpretation of controlling principles of law among the twelve appellate districts. Its resources are most appropriately directed to cases that present: 1) questions of first impression in this state, 2) questions upon which the appellate districts have reached divergent and/or conflicting positions, and 3) applications of settled principles of law to novel fact patterns which are likely to recur in the future. The case at bar does not meet any of these criteria.

The United States Supreme Court, in *Calder v. Jones* (1984), 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804, has already addressed the question of whether a state court may exercise long-arm jurisdiction over an out-of-state defendant in a tort action alleging dissemination of false and defamatory statements. Therein, the High Court held that the putative defamer should reasonably anticipate being "haled" into a court in the plaintiff's home state if the circumstances indicate he knew that the "effects" of his conduct would result in harm to the plaintiff in that jurisdiction.

In *Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 532 N.E.2d 117, this Court provided the lower courts of this state with ample guidance for applying *Calder*. Therein, the Court took an expansive view of *Calder's* "effects" test and held that even one instance of dissemination by the defendant of a defamatory communication into Ohio constitutes a "minimum contact" sufficient to justify the exercise of in personam jurisdiction pursuant to the long-arm statute.

Clearly then, contrary to the assertions of Defendant-Appellant Scott Roberts ("Roberts"), this appeal does not truly present a legal question of first impression in Ohio. Nor has there been any demonstration that the appellate districts in Ohio have reached conflicting

rulings regarding the proper application of *Calder* and *Fallang*.

In his memorandum in support of jurisdiction, Roberts attempts to convince this Court that his case provides a basis for applying the principles of due process jurisprudence found in *Calder* and *Fallang* to a defamation lawsuit involving the use of the Internet (as the chosen means of disseminating the false statements), rather than a traditional wire, print, or mail method of communication. According to Roberts, the “unique facts” of this case “will determine the constitutional reach of Ohio’s long-arm statute in a defamation context when the alleged tortious statements were made via the internet by individuals and from computers not located in Ohio.” Unfortunately for Roberts, however, the record on appeal undermines the cogency of his sweeping, exaggerated characterization of what is at stake in this lawsuit.

Roberts’ arguments ignore the procedural posture of his case at the time the trial court ruled on his motion to dismiss. Roberts never requested an evidentiary hearing. Therefore, Plaintiff-Appellee Kauffman Racing Equipment, L.L.C. (“KRE”) only needed to present a *prima-facie* case for the exercise of jurisdiction over Roberts pursuant to Ohio’s long-arm statute. In this regard, the trial court was required to view KRE’s complaint and evidentiary materials in a light most favorable to KRE, as the non-moving party, and to resolve all competing factual inferences in its favor. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 1994-Ohio-229, 638 N.E.2d 541.

The affidavits submitted to the trial court established that KRE is a small business located in Knox County, Ohio. KRE has enjoyed a hard-earned reputation in the car racing community for selling quality engines and related products. The historical background revealed that Roberts, a resident of Virginia, had directed a purchase order to KRE in Ohio for a race car engine block. In accordance with the terms of the purchase, KRE shipped the engine block from its plant in Ohio to Roberts in Virginia.

More than eight months later, Roberts contacted KRE to complain about alleged defects in the engine block. Although the item was sold "as is," KRE endeavored to make a concerted and good-faith effort to resolve his complaint. KRE volunteered to have the engine block shipped from Virginia to Ohio for an inspection. Roberts agreed to this arrangement.

The inspection revealed that the engine block had been materially altered after it had left KRE's facilities in Ohio. KRE determined that the alleged defects were caused by these unauthorized modifications. When informed of these findings, Roberts admitted that the modifications were performed by a third party at his request. Under the circumstances, KRE declined to buy back the engine block and promptly shipped it back to Roberts.

In retaliation, Roberts initiated an aggressive campaign of posting false and disparaging comments on the automotive products section of E-Bay, an Internet bidding forum, and two other interactive Internet websites devoted to racing enthusiasts. All three websites are readily accessible to viewers in Ohio. KRE identified several Ohio residents who had seen and read Roberts' postings. As a result of Roberts' activities on the Internet, KRE's favorable reputation in the racing community was damaged.

In light of the extended transactional history that preceded the defamatory statements at issue, this appeal does not present the Court with a factual scenario involving some naïve, inexperienced Internet user who has been wrongly sued by some deep-pocketed corporation for the purpose of stifling legitimate criticism of the company's products. To be sure, one can envision the potential for abuse in this context, if taken to the extreme. Perhaps this Court will be presented with a compelling fact pattern someday in which an out-of-state retail consumer is slapped with an oppressive lawsuit in retaliation for having posted an unflattering product review on a consumer Internet website regarding a product purchased off-the-shelf in the consumer's home state. Such a case may very well justify this Court's involvement.

The appeal at bar, however, does not present this Court with a set of facts warranting discretionary review. Roberts' campaign to intentionally malign KRE through the use of the Internet cannot be separated from the commercial interstate transaction that preceded it. In light of the extensive history between the parties and Roberts' multiple contacts with KRE in Ohio, the answer to the question whether the maintenance of KRE's Ohio lawsuit against Roberts would offend "traditional notions of fair play and substantial justice" is readily apparent.

In a similar case involving a purchase transaction described by the judge as having gone seriously "awry" resulting in an aggressive campaign by an out-of-state purchaser to unfairly disparage the seller by means of defamatory Internet postings, a Maine court offered the following justification for requiring the purchaser to defend herself in the home jurisdiction of the seller:

. . . Maine has a "legitimate interest" in ensuring that its local businesspeople can seek redress for allegedly tortious conduct against them. Defamation may affect the reputations of Maine residents even if it occurs via a widespread medium, and a defendant's use of the Internet should not prevent an injured party from pursuing relief where the injury occurs.

*Cohen v. Zaic* (Me. Sup. May 23, 2007), 2007 Me. Super. LEXIS 105, at \*13.

The court's comments closely track the reasons given by this Court in *Fallang* for requiring an out-of-state defendant to come to Ohio and defend himself in a defamation lawsuit arising from a single letter mailed by him to an Ohio recipient in which he maligned the reputation and integrity of the plaintiff, an Ohio physician. The court of appeals in the case at bar was absolutely correct in its ultimate conclusion that Roberts was not entitled to special treatment merely because he chose the Internet, rather than the U.S. mail, to maliciously impugn the business reputation of KRE. Accordingly, this case does not present a substantial constitutional question or a question of public or great general interest. As a result, this Court should exercise its discretion in favor of declining jurisdiction over Roberts' appeal.

## ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

When determining whether it has personal jurisdiction over an out-of-state defendant, the trial court is required to engage in a two-step analysis. First, it must determine whether the state's "long-arm" statute and applicable civil rule confer personal jurisdiction. Second, it must consider whether the exercise of personal jurisdiction under the statute and the rule would deprive the defendant of his right to due process of law as guaranteed under 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.

Roberts did not request an evidentiary hearing on his motion to dismiss. In the absence of a hearing, the burden was on KRE to make a prima facie showing of personal jurisdiction to overcome Roberts' motion. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165. For reasons that follow, KRE made the required *prima facie* showing for the exercise of jurisdiction over Roberts pursuant to Ohio's long-arm statute in a manner consistent with the demands of constitutional due process of law.

### **Response to Appellant's Proposition of Law No. 1:**

**The un rebutted affidavit and exhibits filed by KRE were sufficient to make a prima facie showing for the exercise of long-arm jurisdiction over Roberts pursuant to R.C. 2307.382(A)(6). KRE's evidentiary materials affirmatively established that Roberts, a resident of Virginia, caused tortious injury to KRE, a business domiciled in Ohio, as a result of his intentional and malicious campaign of posting statements on several interactive Internet websites impugning KRE's business practices and integrity.**

The first prong of the test for determining the existence of personal jurisdiction was easily satisfied in this case. Division (A)(6) of R.C. 2307.382, Ohio's long-arm statute, authorizes a trial court in this state to exercise jurisdiction over an out-of-state defendant for the purpose of adjudicating a cause of action arising from that person's "[c]ausing 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.” Civ. R. 4.3(A)(9) tracks the language of the long-arm statute and expressly authorizes the clerk of courts to make service of process on the out-of-state defendant under the same criteria specified in the statute.

The affidavit of Steven Kauffman specifically alleged that Roberts, a resident of Virginia, used the Internet to disseminate false and malicious statements that were intended to defame KRE and injure its business in Ohio. Attached to the affidavit were copies of several of the Internet postings. The opinion of the court of appeals contains several quotations from these postings. (Opinion, at ¶¶ 17-21). The affidavit established that Roberts knew that KRE was domiciled in Ohio and that it conducted its business activities from an Ohio address. The court of appeals expressly found that “Roberts’ act of posting messages on various Internet sites was ‘committed with the purpose of injuring’ Kauffman Racing, and such purpose is clearly seen in the content of Roberts’ postings.” (*Id.*, at ¶ 22).

KRE obviously met its burden of presenting a *prima facie* case for the exercise of jurisdiction under Division (A)(6) of the long-arm statute. Roberts presented no evidence in rebuttal. Therefore, the court of appeals correctly held that “Ohio’s long-arm statute and Civ. R. 4.3(A) confer jurisdiction on the trial court.” (*Id.*).

**Response to Appellant’s Proposition of Law No. 2:**

**The un rebutted affidavit and exhibits filed by KRE were sufficient to make a prima facie showing that the exercise of long-arm jurisdiction over Roberts would not violate his rights under the Due Process Clause of the Fourteenth Amendment. KRE’s evidentiary materials affirmatively established that Roberts intentionally and expressly aimed his Internet postings at KRE knowing that it would suffer the brunt of the injury from the defamatory content of the postings in its home state of Ohio.**

Roberts acknowledges that *Calder* sets the standard for determining whether the courts of the state of the plaintiff's residence may, consistent with Fourteenth Amendment notions of fair play and substantial justice, exert personal jurisdiction over an out-of-state defendant to adjudicate a claim for making false and defamatory statements. In *Calder*, the Court stated, in unambiguous language, that the out-of-state defamer may be compelled to defend himself in the plaintiff's home state if he were aware that his statements would have a substantial and injurious effect on the plaintiff in that jurisdiction. *Id.*, 465 U.S. at 789-790, 104 S. Ct. 1487.

Roberts is correct in his assertion that the "effects" test adopted in *Calder* requires more than mere foreseeability of harm. In *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.* (C.A. 9, 2000), 223 F.3d 1082, 1087, the federal court of appeals articulated a three-pronged standard for assessing whether the "effects" test has been satisfied in a particular case: "[t]o meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state."

The language of Roberts' Internet postings supplies the most compelling evidence that he was engaged in a deliberate and intentional course of harmful conduct. In one posting, Roberts stated that KRE sold him a "useless" engine block and warns that "when I'm (*sic*) done Steve Kauffman will be able to attest to its worth." (Opinion, at ¶ 17). In another message posted the same day, he wrote, "I guess it doesn't matter that the day I got it all of the defects existed (*sic*) and nothing I have done caused them. But don't worry about that. What I loose (*sic*) in dollars, I will make up in entertainment at their expense (*sic*)." (*Id.*, at ¶ 19). The following day, he posted a new message that dispels any lingering doubt regarding the malicious motive behind his postings: "I have a much a much bigger and dastardly plan than that and this is the perfect place to start." (*Id.*, at ¶ 21).

Roberts has not disputed his authorship of these postings, nor has he suggested that his intentions were somehow misinterpreted or were otherwise benign. Thus, the court of appeals had a substantial factual basis for finding that “Roberts’ act of posting messages on various Internet sites ‘was committed with the purpose of injuring’ Kauffman Racing, and such purpose is clearly seen in the content of Roberts’ postings.” (*Id.*, at ¶ 22).

Roberts posits, however, that “even if [he] knew that his alleged defamatory statements which he posted over the Internet could cause harm,” the evidence does not indicate that he “expressly aimed” those statements at Ohio. He contends that “[t]he record in this case is devoid of any contacts sufficient to confer jurisdiction by the state of Ohio over [him].” Roberts’ contentions fail to take into account the very salient fact that because he did not request an evidentiary hearing, KRE is entitled to have all competing inferences from the evidence resolved in its favor.

The court of appeals had little difficulty disposing of similar arguments offered by Roberts in the proceedings below. As to Roberts’ assertion that he was unaware that “Ohio residents would access the site[s],” the court found this “unconvincing.” (*Id.*, at ¶ 33). As to his self-serving claim that he was ignorant of the likelihood that KRE would suffer the harmful effects to its business in Ohio, the court of appeals responded by stating the following:

The alleged defamation concerned a business located in Ohio and the business practices of an Ohio resident. Roberts was aware of these facts when he posted his messages. Although Kauffman Racing conducted business over the Internet, which is accessible worldwide, the defamation impugned the propriety of Kauffman Racings’ business dealings, which are centered in Ohio. The brunt of the harm, in terms of injury to Kauffman Racing’s professional reputation and business, was suffered in Ohio. In sum, Ohio is the focal point both of the defamation and of the harm suffered. Jurisdiction over Roberts is, therefore, proper in Ohio based upon the ‘effects’ of his Virginia conduct in Ohio.

(*Id.*).

The two principal cases relied upon by Roberts are inapposite. *Heffernan v. Options Associates, Inc.* (June 8, 2001), 1<sup>st</sup> Dist. No. C-000634, 2001 Ohio App. LEXIS 2522 was not an “express aiming” case. The two defendants, a Massachusetts corporation and one of its employees, had entered into a contract with a disability insurer in Maine to conduct a market survey of attorney positions in Cincinnati, Ohio. The insurer used the results of the survey to deny a disability claim filed by the plaintiff, an attorney in Cincinnati. The plaintiff sued the defendants on a theory of fraud.

The First District Court of Appeals upheld the common pleas court’s dismissal of the out-of-state defendants on jurisdictional grounds. The court of appeals reasoned that “the contract under which the report in question was prepared had been entered into with a company operating in Maine.” *Id.*, at \*6. Because the defendants were simply fulfilling their contractual obligation to the third-party, the facts failed to establish that they had engaged in an intentional act expressly aimed at the plaintiff in Ohio. Therefore, the “effects” test of *Calder* was not implicated. In stark contrast, however, Roberts and KRE in the case herein dealt directly with each other.

In *Cadle Company v. Schlichtman* (C.A. 6, 2005), 123 Fed. Appx. 675, the United States Court of Appeals for the Sixth Circuit relied on an exception to *Calder* recognized in one of its earlier opinions, *Reynolds v. International Amateur Athlete Federation* (C.A. 6, 1994), 23 F.3d 1110. In *Reynolds*, the court held that a federal district court in Ohio may not exercise personal jurisdiction over an out-of-state defendant in an instance where the allegedly defamatory statement pertained to the plaintiff’s activities in a jurisdiction outside of Ohio. *Id.*, at 1120. Citing *Reynolds*, the hearing panel in *Cadle* ruled that a federal district court sitting in Ohio could not exercise jurisdiction over a resident of Massachusetts who was accused by the Ohio plaintiff of posting a defamatory story about the latter’s activities in the state of Massachusetts,

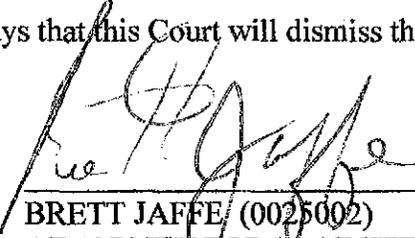
and not Ohio. 123 Fed. Appx., at 679-680.

Briefly stated, the facts in *Cadle* are readily distinguishable from those in the case at bar. Roberts' Internet postings were directly related to KRE's business activities in the state of Ohio. Therefore, the *Reynolds* exception would not apply.

### CONCLUSION

Roberts' case differs from *Calder* only in the choice of the medium used to disseminate the defamatory statements. *Calder* involved a paper and ink medium distributed to a national readership whereas Roberts used a newer electronic medium known as the Internet. The court of appeals aptly noted that "[t]oday, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As to the ability to harm has grown, so must the law's ability to protect the innocent." (Opinion, at ¶ 34). Roberts has not offered any compelling reason for concluding that his use of the Internet as the chosen method of disseminating his defamatory attacks on KRE should shield him from having to answer for his conduct in a court in Ohio.

For the foregoing reasons, KRE prays that this Court will dismiss this appeal.

  
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Plaintiff-Appellee Kauffman Racing Equipment, L.L.C. in Opposition to Jurisdiction was served upon William J. Kepko and Sherry M. Phillips, Kepko & Phillips, L.L.C., Attorneys for Defendant-Appellant Scott Roberts, 1 East Vine Street, Mount Vernon, Ohio 43050 by regular U.S. Mail this 26<sup>th</sup> day of June, 2008.



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