

IN THE SUPREME COURT OF OHIO

Kauffman Racing Equipment, L.L.C.,	:	Case No. 2008-1038
	:	
Defendant-Appellant,	:	Discretionary Appeal from the
	:	Knox County Court of Appeals,
v.	:	Fifth Appellate District
	:	
Scott Roberts,	:	Court of Appeals
	:	Case No. 07CA-14
Plaintiff-Appellee.	:	

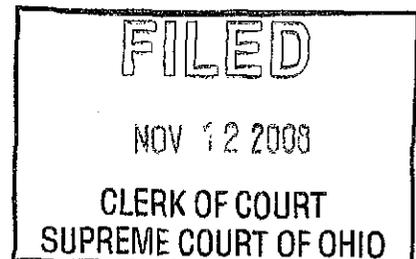
MERIT BRIEF OF APPELLANT SCOTT ROBERTS

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STATEMENT OF FACTS

Kauffman Racing Equipment, L.L.C. ("KRE") is a limited liability company with its principal office located in Glenmont, Ohio. KRE specializes in the sale of after-market engine blocks for Pontiac competition automobiles. (Affidavit of Steven Kauffman, filed March 30, 2007, at paragraph 3, hereinafter Kauffman Aff. P3). KRE has a nationwide reputation and sells its products in all fifty states. (Kauffman Aff. P3).

Scott Roberts ("Roberts") is a resident of the state of Virginia. (Affidavit of Scott Roberts, filed March 1, 2007, at paragraph 2, hereinafter, Roberts Aff. 2). On or about February 6, 2006, Roberts purchased an allegedly defective MR-1 engine block from KRE. This was a one-time purchase. (Roberts Aff. P2.) All negotiations for the purchase of the MR-1 engine block were over the telephone and/or the Internet. (Roberts Aff. P14). Roberts paid for the MR-1 engine block with a credit card over the telephone. (Roberts Aff. P15). Roberts did not visit Ohio at any time regarding the purchase of the MR-1 engine block. (Roberts Aff. P12). At the time of the purchase, Roberts did not anticipate an ongoing relationship with the seller and the purchase was a one-time transaction. (Roberts Aff. P13).

Roberts has been a resident of Virginia for at least thirty years. (Roberts Aff. P3). Roberts is a registered voter in the state of Virginia. (Roberts Aff. P4). Roberts has never lived in Ohio nor physically been in Ohio, and owns no property in Ohio. (Roberts Aff. P5). Roberts neither owns nor has any business interests in Ohio. (Roberts Aff. P6).

The alleged defamatory statements attributed to Mr. Roberts were posted on the public forum section of the PerformanceYears.Com website, the PontiacStreetPerformance.com website and the E-bay Motors website. (Kauffman Aff.

P17). The first two websites are interactive "bulletin boards" accessible to the World Wide Web to anyone with a computer, a modem and an Internet service provider. They are of interest to members of the general public, including present and prospective customers of KRE who have an interest in Pontiac racing cars and equipment. (Kauffman Aff. P17).

The third website hosts an interactive public auction. The interactive feature on all three websites allows the reader of a posting to respond and to post his own comments. (Kauffman Aff. P17).

Roberts did not publish the alleged defamatory statements by sending a letter to any individual in Ohio or elsewhere, nor did he mail any of the alleged defamatory statements to any individuals in Ohio and/or elsewhere. (Roberts Aff. P8). Roberts did not directly communicate or publish the alleged defamatory statements to any person in Ohio. (Roberts Aff. P7).

The websites where the allegedly defamatory statements were posted are interactive "bulletin boards" or "auction sites" accessible on the World Wide Web and accessible to the general public. (Kauffman Aff. P17).

On June 1, 2007, after briefing by the parties and without a hearing, the trial court granted Robert's motion to dismiss on the grounds that the trial court lacked personal jurisdiction over Roberts. KRE filed a timely notice of appeal raising the following two assignments of error.

WHETHER PLAINTIFF-APPELLANT MADE A SATISFACTORY PRIMA FACIE SHOWING THAT THE OHIO LONG-ARM STATUTE CONFERRED PERSONAL JURISDICTION IN THE COURT OF COMMON PLEAS TO ADJUDICATE ITS TORT CLAIM CLAIMS AGAINST DEFENDANT-APPELLEE FOR DEFAMATION AND INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS?

WHETHER PLAINTIFF-APPELLANT MADE A SATISFACTORY PRIMA

FACIE SHOWING THAT THE ASSERTION OF PERSONAL JURISDICTION BY THE COURT OF COMMON PLEAS OVER DEFENDANT-APPELLEE WOULD NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

On April 18, 2008, the Fifth District Court of Appeals, relying on *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804, and *Zippo Manufacturing Co. v. Zippo Dot Com* (1997), 952 F. Supp. 1119, reversed the decision of the Knox County Court of Common Pleas, holding as follows:

Although Kauffman Racing conducted business over the internet, which is accessible worldwide, the defamation impugned the propriety of Kauffman Racing's 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 the harm suffered. Jurisdiction over Roberts is, therefore, proper in Ohio based upon the "effects" of his Virginia conduct in Ohio.

Kauffman Racing Equipment, LLC v. Roberts (5th Dist. 2008), 2008 Ohio 1922, 2008 Ohio App. LEXIS 1695, unreported No. 07-CA-14, at *P33.

Justice Patricia A. Delaney dissented and, relying on *Oasis Corp. v. Judd* (S.D. Ohio 2001), 132 F. Supp. 2d 612, opined that Ohio was not the focal point of Roberts' accusations, nor was there any evidence to suggest that Roberts targeted Ohioans any more vigorously than citizens of any other state. Judge Delaney found Roberts' activity "too attenuated to support a finding of personal jurisdiction under the Due Process Clause." *Kauffman Racing*, 2008 Ohio 1922, at *P44. To hold otherwise would subject online communications to be subject to suit in any state from which the website is accessible and without evidence of express aiming or intentional targeting. *Kauffman Racing*, 2008 Ohio 1922, at *P44.

ARGUMENT

Proposition of Law No 1:

R.C. § 2307.382(A)(3) and R.C. § 2307.382(A)(6) do not authorize assertion of personal jurisdiction over a nonresident defendant in a defamation action when publication of the offending communication occurs over the internet originating from computers not located in Ohio.

The determination of whether a state court has personal jurisdiction over a nonresident requires a two-step analysis. First, the court must look to the words of the state's "long-arm statute" or applicable civil rule to determine whether, under the facts of the particular case, jurisdiction lies. If it does, the court must decide whether the assertion of jurisdiction deprives the nonresident defendant of due process of law. *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *Fallang v. Hickey* (1988), 40 Ohio St. 3d 106, 532 N.E.2d 117.

KRE relied on R.C. 2307.382(A)(3) and R.C. 2307.382(A)(6) as the basis for asserting personal jurisdiction over Roberts in this case.

R.C. § 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:

...

(3) Causing tortious injury by an act or omission 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;....

Roberts did not publish the alleged tortious statements in Ohio. In other words, Roberts did not intentionally circulate or cause the alleged tortious statements to be circulated specifically in Ohio, nor did Roberts communicate, publish or direct the alleged

tortious statements to some person or persons in Ohio. Roberts made the alleged defamatory statements via the internet from computers located in Virginia on public forum "bulletin board" type websites and electronic auction sites which are accessible to anyone, anywhere in the world, who happens to have a computer, a modem and a service provider.

In effect, what has occurred in this case, is that Roberts' electronic signals via the internet were received in Ohio and, like all information on the internet, those electronic signals were accessible in Ohio and virtually in every other state. If placing information on the internet subjects a person to personal jurisdiction in each state in which the information is received or accessed, or where the effects are felt, then a State's limited judicial power over non-residents becomes unlimited. As predicted by Judge Delaney in her dissent, the internet user would be subject to personal jurisdiction in virtually every State.

Although the "effects" of the statements may have been felt in Ohio, unlike *Fallang*, there was no direct publication or receipt of the statements in Ohio from any intentional targeting by Roberts. The assertion of personal jurisdiction based only on the effects of Roberts' statements, or even the harm of those statements, renders the constitutional concepts of minimum contacts and fundamental fairness a nullity.

Proposition of Law No 2:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not permit the assertion of jurisdiction in a defamation action over a nonresident defendant who makes the allegedly defamatory statements via the internet from computers located outside of Ohio and without targeting Ohio.

Initially, the assertion and limits of personal jurisdiction were grounded on the person's physical presence within the territorial boundaries of the court. *International Shoe*

Co. v. Washington (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102; *Pennoyer v. Neff* (1877), 95 U.S. 714, 733, 24 L.Ed. 565.

Over time, the United States Supreme Court recognized that “due process requires only that in order to subject a defendant *in personam*, if he be not 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*, 326 U.S. at 316, 66 S.Ct. at 158, 85 L.Ed 278 at 283 (quoting *Millikin v. Meyer* (1940), 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283).

Courts are cognizant that the criteria used to determine the exercise of personal jurisdiction have evolved as communications have advanced and technology has progressed. Nevertheless, neither technology nor advanced communications nor the Internet can eliminate the constitutional limits on a State’s judicial power over non-residents or eliminate the requirement of minimum contacts as expressed in *International Shoe*. In *Hanson v. Denckla* the Court reflected on the effects of technological advances in commerce and communications on personal jurisdiction and stated as follows:

As technological progress has increased the flow of commerce between the States, the need for personal jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe v. State of Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimum contacts” with that State that are a prerequisite to its exercise of power over him.

Hanson v. Denckla (1958), 357 U.S. 235, 250-251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283, 1296 (internal citations omitted).

Although there has been a relaxation of the limits of federal due process protection in the area of personal jurisdiction, minimum contacts remains the touchstone of traditional Due Process Clause analysis. In addition, the due process rights of a defendant should be the court's primary concern when personal jurisdiction is at issue. *Insurance Corp. v. Compagnie Des Bauxites* (1982), 456 U.S. 694, 102 S.Ct 2099, 72 L.Ed.2d 492.

The limits of personal jurisdiction, that is the judicial power of a State over persons outside its border, can generally be analyzed by two methods. If the defendant's contacts with the State are not the basis for the suit, then jurisdiction over the defendant must arise from the defendant's general, persistent but generally unrelated contacts with the State. In order to establish general jurisdiction over the defendant, the defendant's activities in the State must be continuous and systematic. *Helicopteros Nacionales de Colombis, S.A. v. Hall* (1984), 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411.

Obtaining general jurisdiction requires a more demanding standard than is necessary for specific jurisdiction. Specific jurisdiction occurs when the defendant's contacts with the State are also the basis for the suit. In determining specific jurisdiction, the court reviews (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State (purposeful conduct directed at the State); (2) whether the plaintiff's claims arise out of those activities directed at the state; and (3) whether the exercise of jurisdiction would be constitutionally reasonable. *Helicopteros Nacionales de Colombis, S.A. v. Hall* (1984), 466 U.S. 408, 414 n.8, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411.

In this case, KRE argues that Roberts' publication of the alleged tortious statements via the Internet from computers in Virginia caused injury to KRE in Ohio, thereby forming

the basis for Ohio's specific jurisdiction over Roberts. The question becomes whether a Virginia resident electronically transmitting information on public forum bulletin boards in Virginia via the Internet that causes injury in Ohio, subjects the person to jurisdiction in Ohio.

The Fifth District Court of Appeals in this case, and many other courts, have used *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* (W.D. Pa. 1977), 952 F. Supp. 1119, as a model when defining when electronic contacts within a state are sufficient to confer personal jurisdiction. In *Zippo*, the court developed a sliding scale for defining the quality of electronic contacts with a State and when those contacts are sufficient to confer jurisdiction.

At one end of the spectrum are situations where a defendant clearly does business over the internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Website which is accessible to users in a foreign jurisdiction. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site.

Zippo Manufacturing, 952 F. Supp 1119, 1124 (internal citations omitted).

The Fifth District Court of Appeals, in applying *Zippo*, found that Roberts was aware that KRE was located in Ohio, that Roberts' alleged tortious statements impugned KRE's business dealings centered in Ohio and "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." *Kauffman Racing Equipment, LLC v. Roberts*,

2008 Ohio 1922 at *P33.

As stated in the dissent by Judge DeLaney, the majority focused only on the alleged harm of Roberts' statements being felt in Ohio. *Kauffman Racing*, 2008 Ohio 1922 at *P40. That is an insufficient basis to find jurisdiction, either by the effects tests as expressed in *Calder* or by the sliding scale in *Zippo*, both of which require that the defendant expressly aim or direct his tortious conduct at the forum.

The *Zippo* model was developed in a commercial or business context and is factually distinct from this case. As the Fifth District observed, the *Kauffman* case does not involve the transaction of business over the internet. *Kauffman Racing*, 2008 Ohio 1922 at *P32.

In *ALS Scan, Inc. v. Digital Service Consultants* (4th Cir. 2002), 292 F.3d 707, the Fourth Circuit Court of Appeals, integrating the due process requirements of specific jurisdiction, i.e. purposeful conduct directed at the State, and adapting the *Zippo* sliding scale to electronic activity via the internet, developed the following standard: (1) the electronic activity must be purposely directed into the State; (2) with the manifest intent of causing a consequence within the State; and (3) that electronic activity creates in a person within the State, a cause of action cognizable in the State's courts. *ALS Scan*, 292 F.3d at 714.

In *ALS Scan* the issue was whether a Georgia-based Internet service provider subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the internet, in violation of a Maryland corporation's copyrights. In *ALS Scan*, the plaintiff asserted that copies of its copyrighted photographs appeared on two websites that were accessible worldwide. *ALS Scan*, 293 F.3d 707, 710. In applying the

standard that the *ALS Scan Court* developed, the court declined to find personal jurisdiction and, on page 714, held as follows:

Under this standard, a person who simply places information on the internet does not subject himself to jurisdiction in each state into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifest intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

In *Kauffman Racing*, Roberts posted the allegedly defamatory comments on Internet bulletin boards accessible worldwide to anyone with a computer. (Kauffman Aff. P17). Judge Delaney termed these sites as “customer satisfaction forums where people can post comments, suggestions, compliments or grievances on numerous products and services such as vacation resorts, restaurants, and as in this case, automotive components.” Judge Delaney compared these bulletin boards as the “electronic equivalent” of a response card. More importantly, according to Judge Delaney, they are targeted based upon a shared interest in a particular topic rather than based on a geographic location. *Kauffman Racing* 2008 Ohio 1922 at *P38.

Analyzing this case in the context of *Helicopteros*, *Zippo* and *ALS Scan*, and focusing not only on the effects of Roberts’ alleged defamation, but also on the “purposeful activity” directed to the State, it is clear that in *Kauffman Racing* the electronic activity is more like the passive web site whereby information is purposely directed to persons of similar interest rather than any particular geographic location. In other words, the purposeful avilment component of due process is absent, since Roberts simply did not direct the defamatory statements into Ohio via the Internet any more than he directed his statements to any other State.

The *ALS Scan* Court likened their standard of analyzing due process involving the electronic media to the standard announced in *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed2d 804. In *Calder*, a California Court could constitutionally exercise personal jurisdiction over a Florida resident whose only material contact with California was a libelous story written in Florida, directed at a California citizen, for publication circulated in California, knowing that the injury would be felt by the California citizen in the state where she lived and worked. *Calder*, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804,812. In *ALS Scan*, the Court declined to find personal jurisdiction based only on an out-of-state person's Internet activity that was not specifically targeted or directed at Maryland. *ALS Scan*, 293 F.3d at 715.

Applying the principles in *Calder* and *ALS Scan* to this case, Roberts did not direct his alleged defamation to Ohio, nor did he intentionally target Ohio residents. Roberts' statements were electronically posted to public forum bulletin boards and, at best, were unfocused, passive and too attenuated to rise to that level of conduct subjecting him to the judicial power of the State of Ohio.

In accord with *ALS Scan* and *Zippo is Oasis Corp. v. Judd* (S.D. Ohio 2001), 132 F. Supp. 2d 612. In *Oasis*, the plaintiff, who was a manufacturer of water coolers, sued an Oklahoma resident in the Southern District of Ohio. The defendant was also president of EPD, an Oklahoma computer software design company. The defendant had never been in Ohio and had never conducted any business in Ohio. *Oasis*, 132 F. Supp 2d 612, 613-614.

In *Oasis*, the plaintiff alleged defamation and trademark dilution resulting from certain postings and allegedly defamatory statements made by the defendant over the

Internet. *Oasis*, 132 F. Supp. 2d at 614. The Internet site never offered any goods or services and never had been used in the commerce of anything beyond ideas.

The court, in *Oasis*, analyzed personal jurisdiction pursuant to R.C. 2307.382(A)(4)(6) and (7) and applied the *International Shoe* line of cases in declining to assert personal jurisdiction in that case. In first determining whether Ohio's long-arm statute was long enough regarding both the trademark and the defamation allegations, the Court held in the negative. *Oasis*, 132 F. Supp. 2d at 621.

Moreover, even if the *Oasis* court had held that it had authority under Ohio's long-arm statute to exercise personal jurisdiction over the defendant, it declined to do so. In the *Oasis* case, as in this case, the plaintiff's claims had their genesis in the defendant's Internet website or use of the Internet. The *Oasis* court, in declining to exercise personal jurisdiction based on Internet usage, opined on pages 622 and 623 as follows:

The Ohio-connected activities of Defendants do not give rise to the causes of action for which Plaintiffs seek redress. Plaintiffs claim that their trademarks have been damaged, their reputations defamed and their privacy invaded, all on Defendants' web site. The computers hosting Defendants' site are not located in Ohio, there has been no meaningful interactivity between the site and a significant number of Ohioans, and the site is not directed toward an Ohio audience. The action that Defendants have taken in Ohio--that is, the communications made directly to *Oasis*--are simply unconnected to the claims asserted by Plaintiffs. This Court, in evaluating the constitutionality of exercising personal jurisdiction over Defendants, must look not to those communications, but only to Defendants' non-commercial web site. As far as this Court has been able to ascertain, no federal court has ever upheld personal jurisdiction solely on the ground that the defendant's web site happened to be accessible from the forum state; this Court shall not be the first. Such jurisprudence would necessarily effectuate an evisceration of the *International Shoe* line in the Internet context, and would lead to nationwide personal jurisdiction over every web site owner for any cause of action arising from the content of his site. Additionally, because the federal courts have thus far refused to embrace such jurisdictional jurisprudence, web site owners certainly do not "have fair warning that (the content of their respective sites) may subject (them) to the jurisdiction of a foreign sovereign," *Burger King*, 471 U.S. at 472, (quoting *Shaffer v. Heitner*, 433

U.S. 186, 218, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (Stevens, J., concurring in judgment), as the strictures of due process require.

The holding in *Oasis* is consistent with *Calder* and *ALS Scan* and with Judge Delaney in her dissent in this case. Subjecting Roberts to suit in Ohio would result in universal jurisdiction based only on the harm or the effects or the foreseeability of the harm or effects and, effectively, eliminate the “minimum contacts” line of cases in the Internet context.

Further, finding personal jurisdiction in this case would expose every Internet user to nationwide personal jurisdiction for any cause of action arising from the content of his/her speech. *Oasis*, 132 F. Supp. 2d at 623. Additionally, because the federal courts and Ohio courts have, thus far, refused to embrace such jurisdictional jurisprudence, Internet users, in general, and this defendant, specifically, do not have fair warning that the content of their speech may subject them to the jurisdiction of a foreign sovereign. *Oasis*, 132 F. Supp. 2d at 623.

Shortly after the Fourth Circuit decided *ALS Scan*, it decided *Young v. New Haven* (4th Cir. 2002), 315 F.3d 256. The issue in *Young* was whether two Connecticut newspapers and certain of their staff (the “newspaper defendants”) subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that allegedly defamed the warden of a Virginia prison. *Young v. New Haven*, 315 F.3d 256, 258. Relying on *ALS Scan*, the *Young* Court held that, in applying *ALS Scan*, a court in Virginia cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their websites or the posted articles at a Virginia audience. *Young*, 315 F.3d 256, 258-259.

The *Young* court pointed out that, if the newspapers’ contacts with Virginia were

sufficient to establish personal jurisdiction, those contacts arose solely from the newspapers' Internet-based activities. The *Young* court then analyzed the jurisdictional issue in the context of *ALS Scan* and noted that that the standard announced in *ALS Scan* for determining specific jurisdiction based on Internet contacts was consistent with the standard used by the Supreme Court in *Calder*. *Young*, 315 F.3d 256 at 262.

In *Young*, the plaintiff urged the Court to find jurisdiction simply because the newspapers posted articles on their Internet websites that discussed the warden and he felt the effects of any libel in Virginia, where he lives and works. *Young*, 315 F.3d 256 at 262. The *Young* court recognized that *Calder* does not sweep so broadly and, in light of *Calder*, emphasized the importance of looking at whether the defendant expressly aimed or directed its conduct toward the forum state. *Young*, 315 F.3d 256 at 262. The *Young* court reasoned that, although the place where the plaintiff feels the alleged injury is relevant to the jurisdictional inquiry, it must ultimately be accompanied by the defendant's own minimum contacts with the state in order to find jurisdiction. *Young*, 315 F.3d 256 at 262.

In *Kauffman Racing*, and as stated by Judge Delaney, the majority focused on the damages and where those damages were felt. *Kauffman Racing*, 2008 Ohio 1922, at *P40. In order to find jurisdiction, however, not only must the Court consider the location or place where the damages were felt, but whether Roberts expressly aimed or manifested an intent to aim his allegedly tortious statements at Ohio or Ohio residents. The record suggests that he did not.

The Sixth Circuit Court of Appeals has considered personal jurisdiction in the context of the Internet and electronic communications. In *CompuServe, Inc. v. Patterson*

(6th Cir. 1996), 89 F.3d 1257, the court had to decide whether CompuServe, headquartered in Ohio, made a prima facie showing that Texas resident Patterson's contacts with Ohio, which were almost entirely electronic in nature, were sufficient under the Due Process Clause to support the district court's exercise of personal jurisdiction over him. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262. In reaching its decision, the Sixth Circuit employed three criteria in making its determination: (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; and (3) the acts of the defendant or the consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. *CompuServe*, 89 F.3d 1257 at 1263, citing *International Shoe Co., v. Washington* (1945), 326 U.S. 310, and *Milliken v. Meyer* (1940), 311 U.S. 457.

In reversing the district court, which held the contacts too tenuous to support the exercise of personal jurisdiction, the Court of Appeals considered that Patterson sent e-mails to CompuServe alleging that certain of CompuServe's software infringed on trademarks held by Patterson. Patterson demanded \$100,000.00 to settle the case. *CompuServe*, 89 F.3d 1257 at 1261. Patterson also entered a written contract with CompuServe which provided for the application of Ohio law. Patterson purposefully perpetuated his relationship with CompuServe via repeated electronic communications with its system in Ohio. Patterson also marketed his wares in Ohio. In addition, the relationship between Patterson and CompuServe was continuous. *CompuServe*, 89 F.3d 1257 at 1264-1265.

Although factually distinguishable from the instant case, certain conclusions and some guidance may be drawn from the *CompuServe* case. In *CompuServe*, Patterson regularly and persistently sent e-mails to CompuServe. E-mails allow computer network users to send messages to each other which are received at an electronic mailbox identified by the recipient's distinct name and address. *Compuserve*, 89 F.3d 1257 at 1269, citing *United States v. Baker* (E.D. Mich. 1995), 890 F. Supp 1375. The e-mails are analogous to telephone calls or letters in that they are specifically directed to or target other specific Internet or network users. The *CompuServe* Court found these e-mails to be consistent with the purposeful availment component of the due process analysis given this Court's decision in *U.S. Sprint Communications Co. Limited Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 624 N.E.2d 1048. In the *U.S. Sprint* case, this Court held that a foreign corporation "transacted business" in Ohio and was, therefore, subject to personal jurisdiction, where it frequently made long-distance telephone calls to Ohio to sell its products. *CompuServe*, 89 F.3d 1257 at 1265.

In *Kauffman Racing*, Roberts did not make the alleged defamatory statements via e-mails to any resident in Ohio nor to any other specific network user. As the majority stated in the appellate decision and in Kauffman's affidavit, Roberts posted the alleged defamatory statements on public forum bulletin boards of internet sites dedicated to automobile racing equipment, performance and related subjects, accessible to anyone with a computer. (Kauffman Aff. P16, P17). As Judge Delanay stated in her dissent, these bulletin boards are like customer satisfaction forums targeted on a shared interest rather than to a geographic location or individual. *Kauffman Racing*, 2008 Ohio 1922 at *P38. As such, there is no evidence that Roberts targeted anyone in Ohio more than he targeted

anyone anywhere else. *Kauffman Racing*, 2008 Ohio 1922 at *P41.

Shortly after *CompuServe*, the Sixth Circuit considered *Bird v. Parsons* (6th Cir. 2002), 289 F.3d 865. In *Bird*, the Court decided that by accepting the business of over 4,000 Ohio residents, a defendant who maintained a website on which Ohio residents can register domain names has satisfied the purposeful-availment requirement of due process. *Bird*, 289 F.3d at 874.

The *Bird* court characterized the website at issue in the case as an “interactive” website that reveals a specific intended interaction with residents of the forum state. *Bird*, 289 F.3d at 875. In *Kauffman Racing* there is no evidence that Roberts specifically intended interaction with residents of Ohio or any state via e-mails or the operation of a website.

The bulletin boards where Roberts posted the allegedly defamatory statements are more analogous to a passive website or semi-interactive website rather than specific e-mails or an active website. Courts have consistently held that the maintenance of a passive website, i.e., a website that simply passively posts information such as addresses, products, prices and other information, is not sufficient to extend a state’s judicial power over non-citizens. For example, the Sixth Circuit held that:

The maintenance of NGS’s website, in and of itself does not constitute the purposeful availment of the privilege of acting in Michigan. An Internet website by its very nature can be accessed internationally. By maintaining a website in Pennsylvania, NGS is no more benefitting from the laws of Michigan than from the laws of any other state. The level of contact with a state that occurs simply from the fact of a website’s availability on the Internet is therefore an “attenuated” contact that falls short of purposeful availment.

Neogen Corp v. Neo Gen Screening, Inc. (6th Cir. 2002), 282 F.3d 883; *in accord, Jennings v. AC Hydraulic* (7th Cir. 2004), 383 F.3d 546; *Bridgeport Music, Inc. v. Still N The Water*

Pub. (6th Cir. 2003), 327 F.3d 472; *Toys "R" Us, Inc. v. Step Two, S.A.* (3rd Cir. 2003), 318 F.3d 446; *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.* (4th Cir. 2003), 334 F.3d 390; *Soma Med. Int'l v. Standard Chartered Bank* (10th Cir. 1999), 196 F.3d 1292; *Mink v. AAAA Development LLC* (5th Cir. 1999), 190 F.3d 333; *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997), 130 F.3d 414; *Malone v. Berry* (10th Dist. 2007), 174 Ohio App.3d 122; *Blue Flame Energy Corp. v. Ohio Dept. of Commerce* (2006), 171 Ohio App.3d 514.

In 2005, the Sixth Circuit Court of Appeals decided *The Cadle Company v. Schlichtmann* (6th Cir. Ct. App. 2005), 123 Fed. 675, 2005 U.S. App. LEXIS 2097, which was a defamation case in the Internet context. In the *Cadle* case, Massachusetts resident Jan Schlichtmann was sued for defamation by an Ohio-based debt collector. *Cadle*, 123 Fed. 675, 676.

Cadle and Schlichtmann were involved in protracted litigation. Schlichtmann established a website to inform others of what he believed were the unlawful business practices of Cadle in Massachusetts, where Schlichtmann resided. Schlichtmann also informed Massachusetts state regulators about Cadle's practices, sent a demand letter to Cadle in Ohio and made certain statements to a local television station in Youngstown, Ohio. *Cadle*, 123 Fed. 675, 676.

In response to Schlichtmann's activities, Cadle filed a lawsuit against Schlichtmann in Ohio for defamation and violation of Ohio Deceptive Trade Practices. Schlichtmann moved to dismiss for lack of personal jurisdiction. The trial court granted the motion and Cadle appealed, arguing that Schlichtmann's website, the demand letter sent to Cadle in Ohio and the comments to the Ohio television station conferred jurisdiction over Schlichtmann. *Cadle*, 123 Fed. 675, 676.

The Sixth Circuit Court of Appeals discussed the assertion of personal jurisdiction based on contacts arising from the Internet. The Sixth Circuit had previously held that the operation of a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction, even where the website enables the defendant to do business with residents of the forum state, because such activity does not approximate physical presence within the state's borders. *Cadle* 123 Fed. 675 at 677, citing *Bird v. Parsons* (6th Cir. 2002), 289 F3d 865, 871.

Of particular relevance in *Cadle* were the Sixth Circuit's comments at p. 679 regarding defamatory statements which reach into the forum state and the court's treatment of *Calder v. Jones*. In distinguishing *Calder*, the Sixth Circuit opined as follows:

"Nothing on the web site specifically targets or is even directed at Ohio readers, as opposed to the residents of other states.

The law does not require that people avoid using the Internet altogether in order to avoid availing themselves of the laws of every state.

The Sixth Circuit affirmed the trial court's decision to dismiss because there were no repeated online contacts with Ohio residents and the website was not directed toward Ohio in its content or in its target audience. *Cadle*, 123 Fed. 675 at 680.

The above analysis applies equally in this case. Roberts did not direct his alleged defamatory statements to Ohio residents, as opposed to residents of any other state. There is no evidence that Roberts targeted Ohio residents, nor did he make repeated online contacts with Ohio residents. Although his comments may have been read by Ohio residents, "foreseeability" and the "effects test", without more, are insufficient to confer jurisdiction.

The United States District Court for the Northern District of Ohio recently decided a

case involving defamation allegedly perpetrated on the Internet via e-mails. In *Wargo v. Lavandeira* (N.D. Ohio, Oct. 3, 2008), Unreported No. 1:08 CV 02035, 2008 U.S. Dist. LEXIS 80592, the plaintiff, an Ohio resident, alleged that defendant defamed her by posting allegedly defamatory comments on a website owned and operated by the defendant. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *3. Defendant, a California resident, operated a website from California on servers that were located in Budapest, Hungary. The website is generally accessible through any Internet port and permits interactivity from viewers. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *3. The website was an amalgam of celebrity gossip about musicians, actors and other notable figures and also contained links to other sites where viewers could purchase goods and services. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *3.

The plaintiff in *Wargo* argued that jurisdiction lies in Ohio because, as a result of her e-mails posted on defendant's website, she was harassed, lost her employment and received harm to her reputation in Ohio. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *11. *Wargo* alleged jurisdiction pursuant to R.C. 2307.382(A)(6) and cited the *Kauffman Racing* case in support of her argument. The *Wargo* Court, however, distinguished *Kauffman*, stating that *Kauffman* was predicated on the defendant's Ohio transactions with Kauffman. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *11.

The court in *Wargo* instead relied on *Oasis Corp v. Judd* (S.D. Ohio 2001), 132 F.Supp 2d 612), and found that the website in the *Wargo* case had no conduct inherently associated with Ohio. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *12. The court, citing *Cadle Co. v. Schlichtmann* (N.D. 2004), 2004 U.S. Dist. LEXIS 29015, 2004 WL 3630539, stated

at *17 as follows:

The record indicates that the instant website is not specifically directed to Ohio, but instead, is available anywhere there is internet access. Further the record establishes that the website's level of interactivity does not establish specific jurisdiction over the Defendants.

The *Wargo* Court also distinguished *Calder v. Jones*, suggesting that the website was not directed to Ohio over any other State. *Wargo*, 2008 U.S. Dist. LEXIS 80592 at *19.

The Second Circuit also considered an Internet defamation case and personal jurisdiction in *Best Van Lines, Inc. v. Walker* (2d Cir. 2007), 490 F.3d 239. Best Van Lines ("BVL") was a New York-based moving company. Defendant was an Iowa resident and the proprietor of a not-for-profit internet website that provided information and opinions about household movers, generally derogatory. Walker operated the website from his home in Iowa. *Best Van Lines*, 490 F.3d 239, 240-241. In August, 2003, Walker posted derogatory comments about BVL on defendant's website. BVL sued Walker in New York for defamation and other claims. *Best Van Lines*, 490 F.3d 239, at pg. 240.

The *BVL* Court analyzed the jurisdictional issues utilizing the *Zippo* sliding scale and in the context of whether the conduct out of which BVL's claim arose was a "transaction of business" according to New York's long-arm statutes and whether the defendant purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the protection of its laws. *Best Van Lines*, 490 F.3d 239 at 253.

The *BVL* court first discussed Walker's Black List Report, which the court determined to be "allegedly defamatory statements posted on a website accessible to readers in New York." *Best Van Lines*, 490 F.3d 239 at 253. The court determined that

“Walker’s listing of BVL on his Black List arises solely from the aspect of the website from which anyone -- in New York or throughout the world -- could view and download the allegedly defamatory article.” *Best Van Lines*, 490 F.3d 239 at pg. 253. The *Best Van Lines* court noted that “the mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum.” *Best Van Lines*, 490 F.3d 239 at 253, quoting *Jennings v. AC Hydraulic A/S* (7th Cir. 2004), 383 F.3d 546, 549-50 and citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.* (4th Cir. 2002), 293 F.3d 707, 713-715. The *Best Van Lines* court went on to state that the “nature of Walker’s comments does not suggest that they were purposefully directed to New Yorkers rather than to a nationwide audience. *Best Van Lines*, 490 F.3d 239 at 253.

The *BVL* court reached the same conclusion regarding the allegedly defamatory statement about BVL posted as a response to a user’s question. The court found no distinction or difference that a statement prompted from someone somewhere else, alone, would make any difference in the jurisdictional analysis. *Best Van Lines*, 490 F.3d 239 at 254.

Finally, the *BVL* court considered website donations that Walker accepted and whether these donations may have placed Walker at the “clearly doing business” end of the *Zippo* scale. The court considered this feature of the website to be the most interactive. *Best Van Lines*, 490 F.3d 239 at 254. The court concluded, however, that there was no nexus between the donations and the alleged defamatory statements and, therefore, was too attenuated to confer jurisdiction in New York. *Best Van Lines*, 490 F.3d

239 at 254-255.

It is noted that the *BVL* court discussed only the due process case so as to review New York's jurisprudence under its long-arm statute. The court expressed no opinion on whether jurisdiction would have passed Fourteenth Amendment muster. *Best Van Lines*, 490 F.3d 239 at 255.

The Fifth Circuit in *Revell v. Lidov* (5th Cir. 2002), 317 F.3d 467, also discussed defamation originating on an Internet bulletin board. Lidov, who was a professor at the Harvard Medical School, wrote an allegedly defamatory article suggesting that the terrorist bombing of Pan Am Flight 103 was a conspiracy among senior members of the Reagan Administration. The article singled out Oliver "Buck" Revell who was an Associate Deputy Director of the FBI. Lidov posted the article on an interactive website maintained by the School of Journalism of Columbia University. *Revell v. Lidov*, 317 F.3d 467, 469. Revell, a resident of Texas brought suit in the Northern District of Texas against Columbia University, whose principal offices are in New York and Lidov, a Massachusetts resident. Revell alleged damage to his professional reputation in Texas and defamation. Lidov had never been in Texas, did not conduct business there and, apparently, did not know that Revell resided in Texas. *Revell*, 317 F.3d 467 at 469.

The *Revell* court applied traditional Due Process analysis to the issues raised in the case and discussed specific jurisdiction, applying the *Zippo* scale to resolve the issue. *Revell*, 317 F.3d 467 at 470-471. The plaintiff urged the *Revell* court to abandon the *Zippo* standard because of what the plaintiff characterized as the uniqueness of the defamation claims and their inherent ability to inflict injury in far-flung jurisdictions and because *Zippo*

was in tension with *Calder v. Jones. Revell*, 317 F.3d 467 at 471-472.

The court declined to abandon *Zippo*, distinguished *Calder* and, on page 473, declined to assert jurisdiction, holding as follows:

We find several distinctions between this case and *Calder* – insurmountable hurdles to the exercise of personal jurisdiction by Texas courts. First, the article written about *Revell* contains no reference to Texas, nor does it refer to the Texas activities of *Revell*, and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California.

A number of state courts have also considered defamation claims via the Internet. In *Griffis v. Luban* (2002), 646 N.W.2d 527, *Griffis*, an Alabama resident, sued *Luban*, a Minnesota resident, in Alabama state court and obtained a default judgment. When *Griffis* filed the Alabama judgment in Minnesota, *Luban* challenged the jurisdiction of the Alabama Court. *Griffis*, 646 N.W.2d 527 at 529.

The plaintiff in *Griffis* relied on *Calder v. Jones* (1984), 465 U.S. 783, focusing only on the effects of *Luban*'s defamation felt in Alabama. *Griffis*, 646 N.W.2d 527 at 532. In other words, *Griffis* argued that jurisdiction existed in Alabama because the harmful effects of an intentional tort committed in another jurisdiction were primarily felt in the forum.

Griffis alleged that *Luban* posted derogatory remarks concerning *Griffis*' credentials as an Egyptologist on an internet forum for users that addressed a specific topic and allowed participants to exchange information and engage in discussions or debate by posting messages on the website. The forum, termed a "newsgroup", was public and messages posted there could be accessed anywhere by any person with Internet access. *Griffis*, 646 N.W.2d 527 at 530.

The *Griffis* court rejected an expansive view of *Calder* and refused to find jurisdiction based on *Calder* merely because the plaintiff was located in the forum state and therefore felt the effects of the alleged intentional tortious conduct there. *Griffis*, 646 N.W.2d 527 at 533-534. The *Griffis* court, on pages 535-536, concluded as follows:

While the record supports the conclusion that Luban's statements were intentionally directed at Griffis, whom she knew to be an Alabama resident, we conclude that the evidence does not demonstrate that Luban's statements were "expressly aimed" at the state of Alabama. The parties agree that Luban published the allegedly defamatory statements on an internet newsgroup accessible to the public, but nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself. The newsgroup on which Luban posted her statements was organized around the subjects of archeology and Egyptology, not Alabama or the University of Alabama academic community.

According to Griffis, Luban's messages were widely read by her colleagues, the other amateur Egyptologists who participated in the *sci.archaeology* newsgroup. The Minnesota Supreme Court responded, at 646 N.W.2d 527, 536, as follows:

The fact that messages posted to the newsgroup could have been read in Alabama, just as they could have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant's conduct.

The Alabama Supreme Court also considered the purposeful avilment of due process. In *Ex parte Gregory* (2006), 947 So.2d 385, the Alabama Supreme Court held that, whether jurisdiction is general or specific, the nexus between the defendant and the forum state must rise out of an action of the defendant that was purposefully directed toward the forum state. *Gregory*, 947 So.2d 385 at 388 (citations omitted).

The Court of Civil Appeals of Alabama had the occasion to decide a defamation case committed over the Internet in *Novak v. Benn* (Ala. Civ. App.

2004), 896 So.2d 513. In *Novak*, the plaintiff alleged that the defendant, using a screen name (i.e. Internet pseudonym) in an electronic forum for persons interested in the keeping of pet fish, defamed the plaintiff, who was a lawyer. *Novak*, 896 So.2d 513 at 514. The Court in *Novak*, in declining to assert jurisdiction, concluded that simply because the forum where the statements were made was accessible to anyone, wherever located, who had a computer and an Internet connection, it cannot be said that the defendant expressly aimed his tortious conduct at the forum state. *Novak*, 896 So.2d 513 at 520.

In spite of technology and the electronic global revolution known as the Internet, the cases cited demonstrate that the touchstone of personal jurisdiction is still minimum contacts. Those contacts must demonstrate that the defendant purposefully availed himself of the privilege of acting in the forum state. With respect to electronic defamation originating over the Internet, all the cases, without exception, require that the offending statements be aimed or directed into the forum. In this case, there is no evidence, whatsoever, that Roberts directed his comments to Ohio or Ohio residents.

CONCLUSION

The decision below is fundamentally wrong in that it misconstrues the constitutionally mandated requirement as expressed in *Calder v. Jones*, and every case since *International Shoe*, that the defendant expressly aim his tortious conduct at the forum. By focusing only on the harm and by concentrating only on the foreseeability or the effects of the harm, the lower court has ignored the fundamental requirement that Roberts

must have minimum, purposeful contacts with the forum. There is no doubt that the judicial power of a state over non-residents has increased with the advent of enhanced communications, particularly with the use of the Internet. However, the touchstone of personal jurisdiction and due process is still minimum contacts and traditional due process analysis.

The lower court decision could be disastrous for Internet users and online communicators. If the decision is not reversed, every internet user and online communicator, in Ohio and literally everywhere, will be subject to suit in every state and jurisdiction where the World-Wide Web is available. These Internet users and online communicators will be subject to suit without any evidence of express aiming, intentional targeting, or a manifest intent to do so. Roberts' online activity is too attenuated, too random and too unfocused to subject him to suit in Ohio.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of MERIT BRIEF OF APPELLANT SCOTT ROBERTS was served upon the following person, by regular U.S. mail, postage prepaid, this 12th day of November, 2008.

Mr. Brett Jaffe, Esq.
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A handwritten signature in black ink, appearing to read 'William J. Kepko', written over a horizontal line.

William J. Kepko (0033613)

IN THE SUPREME COURT OF OHIO

Kauffman Racing Equipment, L.L.C.,	:	Case No. 2008-1038
	:	
Defendant-Appellant,	:	Discretionary Appeal from the
	:	Knox County Court of Appeals,
v.	:	Fifth Appellate District
	:	
Scott Roberts,	:	Court of Appeals
	:	Case No. 07CA-14
Plaintiff-Appellee.	:	

APPENDIX TO MERIT BRIEF OF APPELLANT SCOTT ROBERTS

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IN THE SUPREME COURT OF OHIO

Kauffman Racing Equipment, L.L.C. :

08-1080

Appellee, :

On Appeal from the Knox
County Court of Appeals,
Fifth Appellate District

v. :

Scott Roberts, :

Court of Appeals
Case No. 07CA-14

Appellant. :

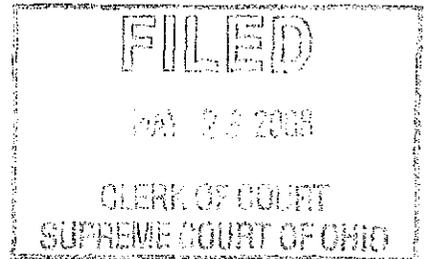
NOTICE OF APPEAL
OF APPELLANT SCOTT ROBERTS

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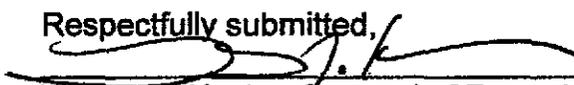
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COUNSEL FOR APPELLEE KAUFFMAN RACING EQUIPMENT, L.L.C.

Notice of Appeal of Appellant Scott Roberts

Appellant, Scott Roberts, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Knox County Court of Appeals, Fifth Appellate District, entered in the Court of Appeals Case No. 07CA-14 on April 18, 2008. This case involves a substantial constitutional question and is one of public or great general interest.

By: Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of NOTICE OF APPEAL OF APPELLANT SCOTT ROBERTS was served upon the following persons, by regular U.S.mail, postage prepaid, this 28th day of May, 2008.

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IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

APR 18 2008

COURT OF APPEALS
KNOX COUNTY, OHIO

KAUFFMAN RACING EQUIPMENT, LLC :

Plaintiff-Appellant :

-vs- :

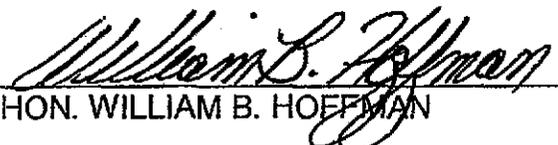
SCOTT ROBERTS :

Defendant-Appellee :

JUDGMENT ENTRY

Case No. 07-CA-14

For the reasons stated in our accompanying Memorandum-Opinion, the matter is reversed and remanded to the trial court for further proceedings consistent with this opinion and the law. Costs assessed to appellee.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

FILED

APR 18 2008

**COURT OF APPEALS
KNOX COUNTY, OHIO**

**COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

**KAUFFMAN RACING EQUIPMENT,
L.L.C.**

Plaintiff-Appellant

-vs-

SCOTT ROBERTS

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 07-CA-14

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Knox County Court of
Common Pleas, Case No. 07OT01-004

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendant-Appellee

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Hoffman, P.J.

{¶1} Plaintiff-appellant Kauffman Racing Equipment, LLC ("Kauffman Racing") appeals the June 1, 2007 Judgment Entry entered by the Knox County Court of Common Pleas, which granted defendant-appellee Scott Roberts' Motion to Dismiss for Lack of Personal Jurisdiction.

STATEMENT OF THE FACTS AND CASE

{¶2} Kauffman Racing is an Ohio Limited Liability Company engaged in the business of selling engine blocks and related high performance racing equipment. It maintains its sole business office and operations in Glenmont, Knox County, Ohio. Kauffman Racing specializes in the sale of after-market engine blocks for Pontiac competition automobiles. The company averages approximately \$750,000 in annual gross sales.

{¶3} On February 6, 2006, Kauffman Racing sold an MR-1 engine block and related equipment to a buyer, using the name "Central Virginia Machine", for the purchase price of \$2,873.75. Kauffman Racing subsequently learned Roberts was the actual purchaser of the MR-1 engine block at issue herein. Roberts selected the engine block after viewing Kauffman Racing's Internet site. Approximately eight months after the purchase, in October, 2006, Roberts telephoned Kauffman Racing, complaining the engine block was defective. Roberts had not expressed to Kauffman Racing any dissatisfaction with the item prior to this time.

{¶4} Although the engine blocks and racing products marketed by Kauffman Racing are sold "as is" due to the extreme demands placed on the equipment, Kauffman Racing chose to make an effort to verify Roberts' claim of manufacturing defects in the

engine block. Kauffman Racing proposed the engine block be shipped to Ohio, for inspection, and if the part was found defective as a result of Kauffman Racing's doing, the company would buy back the engine block at the original purchase price. Roberts accepted the terms and conditions of this arrangement. Kauffman Racing arranged for the engine block to be picked up in Virginia, and returned to its Ohio plant.

{115} Upon inspection, Kauffman Racing found the engine block had been substantially modified from the original specifications in which it had been shipped to Central Virginia Machine, in February, 2006. Kauffman Racing contacted Roberts, inquiring as to whom had undertaken the modifications of the engine block. Roberts admitted Central Virginia Machine had worked on the part. Kauffman Racing advised Roberts it would not buy back the engine block as the defects of which he complained were the result of modifications made subsequent to the sale and delivery of the part, and not by the manufacturer of the block itself. Kauffman Racing shipped the engine block to Roberts in Virginia. Thereafter, from October 18, 2006, through November, 2006, Roberts posted a number of statements on the bulletin board pages of Internet sites dedicated to automobile racing equipment, performance, and related subjects.

{116} As a result of these postings, Kauffman Racing filed a Complaint in the Knox County Court of Common Pleas, alleging Roberts had injured the company's reputation and business by posting false and malicious statements on the Internet. Kauffman Racing sought monetary damages from Roberts for defamation and intentional interference with contracts and business relationships. Kauffman Racing perfected service of process on Roberts pursuant to Civ. R. 4.3. In response, Roberts filed a motion to dismiss for lack of personal jurisdiction. Via Judgment Entry filed June

1, 2007, the trial court granted Roberts' motion to dismiss, and dismissed Kauffman Racing's Complaint.

{¶7} It is from this judgment entry Kauffman Racing appeals, raising the following assignment of error:

{¶8} "I. THE COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION TO DISMISS PLAINTIFF-APPELLANT'S COMPLAINT FOR LACK OF JURISDICTION OVER HIS PERSON."

{¶9} We review a trial court's judgment granting a motion to dismiss for lack of personal jurisdiction de novo. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, at ¶ 10. To defeat a non-resident defendant's motion to dismiss premised upon jurisdictional grounds, a plaintiff must make a prima facie demonstration the trial court has personal jurisdiction over the defendant. See *Yauger v. Hamilton Sorter Co.* (Oct. 18, 1993), Butler App. No. CA93-02-030; *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307. A prima facie showing is made where the plaintiff produces sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction over the defendant. *Id.* at 307. In making this determination, a trial court must "view allegations in the pleadings and the documentary evidence in a light most favorable" to the plaintiff and resolve "all reasonable competing inferences" in favor of the plaintiff. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 1994-Ohio-229; *Giachetti* at 307.

{¶10} In deciding whether Ohio has jurisdiction over non-resident defendants, a court must engage in a two-step analysis. *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183, 624 N.E.2d 1048;

Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc. (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477. The court must first determine whether Ohio's long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer jurisdiction. *U.S. Sprint Communications* at 184, 624 N.E.2d 1048; *Kentucky Oaks Mall Co.* at 75, 559 N.E.2d 477. Second, the court must determine whether granting jurisdiction would deprive the non-resident of due process of law under the Fourteenth Amendment to the United States Constitution. *Id.*

{¶11} The Ohio long-arm statute, section 2307.382 of the Ohio Revised Code, provides, in pertinent part:

{¶12} "(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:

{¶13} ** * *

{¶14} "(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;"

{¶15} Under the first prong of the *U.S. Sprint* test, we must decide whether Kauffman Racing has presented a prima facie case establishing the trial court has limited personal jurisdiction over Roberts under R.C. 2307.382. The evidence before the trial court shows, from a computer outside of Ohio, Roberts posted messages about Kauffman Racing on a number of websites.

{¶16} On October 18, 2006, Roberts posted the following message on the forum page of the Performance Years website:

{¶17} "Bought a MR-1 Block from Kauffman in march [sic] of this year * * * Now, I have and have had since the day the block was delivered, a USELESS BLOCK. I didn't say worthless! I plan to get a lot of mileage out of it[.] And when i'm [sic] done Steve Kauffman will be able to attest to its worth."

{¶18} Later the same day, Roberts added:

{¶19} "I did send it back. They still have it. Steve Kauffman admitted on the phone that he got similar numbers on the sonic test as i [sic] did but he won't take it back because I did some work to it and have had it to [sic] long. 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 expence [sic]."

{¶20} The following day, October 19, 2006, Roberts wrote:

{¶21} "You don't seem to understand. As far as Steve kauffman [sic] is concerned the issue is resolved. * * * Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is the perfect place to start. * * *(LOL)
1 * * * Here is another good board to visit! * * * Just trying to help other potential victims." (Emoticons omitted).

{¶22} On the EBay Automotive site, more of the same is found. We find 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. As such, we find Ohio's long-arm statute and Civ. R. 4.3(A) confer jurisdiction on the trial court.

¹ "LOL" is on-line jargon for "Laugh Out Loud".

{¶23} Although we find the trial court has limited personal jurisdiction over Roberts under Ohio's long-arm statute and Civ. R. 4.3(A), our inquiry is not finished. We also must consider whether the jurisdiction granted under the long-arm statute is consistent with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (Quotation omitted).

{¶24} The Due Process Clause protects an individual from being subject to the binding judgments of a forum in which he has not established any 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, quoting *Internatl. Shoe Co.*, supra. Due process is satisfied if a forum has either specific or general jurisdiction over a non-resident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414-415, 104 S.Ct. 1868, 80 L.Ed.2d 404, fns. 8 and 9. Specific jurisdiction turns upon the relationship between the defendant, forum, and litigation, and exists only when the litigation at hand arises out of or relates to a defendant's "minimum contacts" with the forum. *Burger King* at 472, 105 S.Ct. 2174, 85 L.Ed.2d 528. General jurisdiction, on the other hand, is based upon "continuous and systematic" contacts with the forum that are unrelated to the underlying litigation. *Helicopteros* at 415, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 9.

{¶25} In order for a trial court to assert limited personal jurisdiction over an out-of-state defendant, three criteria must be satisfied: (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; and (3) the acts of the defendant or the consequences caused by the defendant must

have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. *South Mach. Co. v. Mohasco Indus., Inc.* (6th Cir. 1968), 401 F.2d 374, 381.

{¶26} Regardless of the classification, jurisdiction is proper only when the party “ ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws’ .” *Burger King* at 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The “purposeful availment” requirement - the Constitutional touchstone of personal jurisdiction - ensures a party will only be haled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state. *Burger King*, 471 U.S. at 475-476, 105 S.Ct. 2174, 85 L.Ed.2d 528.

{¶27} The development and advances in technology have required Federal and State Courts to tackle unique situations such as the one presented in the instant action. In *Zippo Manufacturing Co. v. Zippo Dot Com* (1997), 952 F. Supp. 1119, the United States District Court, W.D. Pennsylvania, addressed the issue of personal jurisdiction over a non-resident defendant in the “doing business over the Internet” context, and remarked:

{¶28} “In *Hanson v. Denckla*, the Supreme Court noted that ‘[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase.’ *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S.Ct. 1228, 1237-39, 2 L.Ed.2d 1283 (1958). Twenty seven years later, the Court observed jurisdiction could not be avoided ‘merely because the defendant did not *physically* enter

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the forum state.' *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184. The Court observed that:

{¶29} " '[]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.' *Id.*

{¶30} "Enter the Internet, a global "super-network" of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide.' *Panavision Intern., L.P. v. Toeppen*, 938 F.Supp. 616 (C.D.Cal.1996) (citing *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 830-48(E.D.Pa.1996)). 'In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses.' *Id.* The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. * * *.

{¶31} "Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183-84. ***Different results should not be***

reached simply because business is conducted over the Internet." *Zippo*, supra, at 1123-1124. (Emphasis added).

{¶32} We recognize the instant action does not involve the same factual scenario as *Zippo*, supra, however, we find that decision instructive. In the decade plus which has passed since *Zippo*, supra, was decided, the Internet has evolved beyond what the average person could ever have imagined. The Internet knows no state boundaries. The Internet has also become accessible at virtually every coffee shop in the world. A non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state.

{¶33} In his Brief to this Court, Roberts asserts, "There is no evidence that he targeted Ohio residents or even targeted a business whose customers were limited to Ohio." Roberts adds, he did not know "Ohio residents would access the site." We find Roberts' argument unconvincing. 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 Racing's business dealings, which are centered in Ohio. The brunt of the harm, in terms of the 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. See, *Calder v. Jones*

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(1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804; *World-Wide Volkswagen*, supra at 297-298.

{¶34} Today, 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 the ability to do harm has grown, so must the law's ability to protect the innocent.

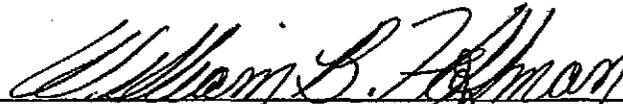
{¶35} Kauffman Racing's sole assignment of error is sustained.

{¶36} The matter is reversed and remanded to the trial court for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.

Farmer, J. concurs

Delaney, J. dissents


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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answer for the truth of the statement made in their article.” *Id.* at 789-90, 104 S.Ct. 1482 (citations omitted).

{¶40} The majority in this case focuses only upon the alleged harm of Roberts’ actions being felt in Ohio. However, this is insufficient based upon the “effects test”, which also requires that the defendant expressly aim his tortious conduct at the forum. *Id.* See also, *Cadle v. Schlichtmann, et al.*, Case No. 4:03CV2151, 2004 WL 3630539 (N.D. Ohio) (in order to establish personal jurisdiction based upon defamatory commercial advertising on website, a defendant must “purposefully direct” activities toward the state of Ohio).

{¶41} In this matter, Roberts’ posting were accessible around the world and there is no evidence or allegation Roberts directly targeted, solicited or interacted with Ohio residents via the bulletin board. Even though Roberts knew Kauffman Racing was located in Ohio, Kauffman Racing did not show that Roberts had expressly aimed his tortious conduct at Ohio, thus “minimum contacts” with Ohio as it relates to the bulletin board messages was never created for purposes of long-arm jurisdiction.

{¶42} Even assuming Roberts knew the postings could be accessible and read by Ohio residents; this is insufficient contact to warrant exercise of personal jurisdiction. See, *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003)(“** * [m]ere operation of a commercially interactive web site does not subject the operator to jurisdiction anywhere in the world. Rather there must evidence that the defendant “purposely availed” itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.”); and *Young v. New Haven Advocate, et al.*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003)(Connecticut newspaper did not target readers of

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Virginia simply by making its content available online; a Virginia court could properly exercise jurisdiction under the "effects test" only if newspaper had manifested an intent to target and focus on a Virginia audience).

{¶43} This conclusion is supported by other cases addressing Internet activity and long-arm jurisdiction. See, *Novak v. Benn*, 896 So.2d 513 (Ala. Civ. App 2004) (defendant's disparaging comments about the plaintiff, a resident of Alabama, in an Internet forum did not subject him to suit in Alabama without a showing the defendant purposefully directed his comments to Alabama); *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002), *cert.denied*, 538 U.S. 906 (2003) (a Minnesota resident posting a message on the Internet challenging Alabama teacher's credentials did not subject Minnesota resident to suit in Alabama under *Calder* "effects test" even though she knew plaintiff lived and worked in Alabama); *Oasis Corp., et al. v. Judd, et al.*, 132 F.Supp.2d 612 (S.D. Ohio 2001) (Oklahoma residents launched a "gripe site" on Internet concerning products of Ohio company; trial court concluded Ohio was not the "focal point" of the website's accusations because "[w]hile it is obvious that Oasis, an Ohio company is the subject of the Defendants' web site, there is no evidence to suggest that Defendants have targeted Ohioans, as an audience for their site any more vigorously than Oregonians, Oklahomans or Omanis", therefore it lacked jurisdiction under the "effects test").¹

{¶44} Under the facts of this case, I find Roberts' activity to be too attenuated to support a finding of personal jurisdiction under the Due Process Clause. To hold otherwise,

¹ Kauffman Racing's reliance upon the Ohio Supreme Court's opinion in *Fallang v. Hickey* (1988) 40 Ohio St.3d 106, 532 N.E.2d 117, is misplaced. In *Fallang*, the Court found personal jurisdiction under Ohio long-arm statute because the defendant committed an intentional act by mailing a defamatory letter to a resident in Ohio. The Court stated this "single purposeful contact is enough to satisfy the requirements of due process". *Id.* at 108. In this case, there is no evidence Roberts intentionally acted to target any Ohio resident with the bulletin board messages.

FILED
IN THE COURT OF COMMON PLEAS KNOX COUNTY
COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

2007 JUN -1 AM 8:30

KAUFFMAN RACING EQUIPMENT, LLC.

MARY JO HAWKINS
CLERK OF COURTS

PLAINTIFF,

-VS-

SCOTT ROBERTS

DEFENDANT.

Case No. 07OT01-0004

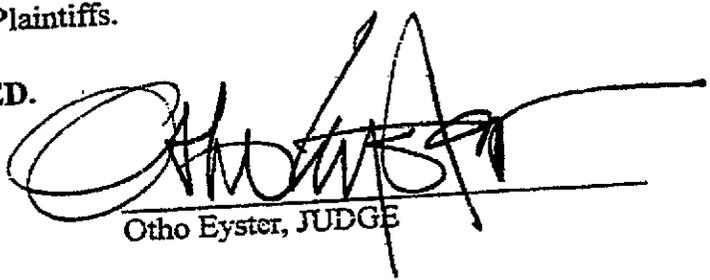
Judge Otho Eyster

JUDGMENT ENTRY

This matter came before the Court on the Motion Of Defendant Scott Roberts To Dismiss and the Court having considered the pleadings, memorandums and the applicable law finds this Court lacks personal jurisdiction over the Defendant, Scott Roberts, and it is

ORDERED Defendant's Motion To Dismiss is granted and this action is hereby dismissed. Costs to Plaintiffs.

IT IS SO ORDERED.



Otho Eyster, JUDGE

Close Code 8

cc:
Brett Jaffe, Esq.
William Kepko, Esq.

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

Amendment XIV.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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2307.382

Statutes and Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2307: CIVIL ACTIONS

2307.382 Personal jurisdiction.

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.

(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.

Effective Date: 09-09-1988