

IN THE SUPREME COURT OF OHIO  
2008 TERM

KAUFFMAN RACING EQUIPMENT, L.L.C. : Supreme Court No. 2008-1038  
Plaintiff-Appellee, : On Appeal from the  
vs. : Knox County  
Court of Appeals,  
Fifth Appellate District  
SCOTT ROBERTS, :  
Defendant-Appellant. : Court of Appeals  
Case No. 07CA-14

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**BRIEF OF PLAINTIFF-APPELLEE KAUFFMAN RACING EQUIPMENT, L.L.C.**

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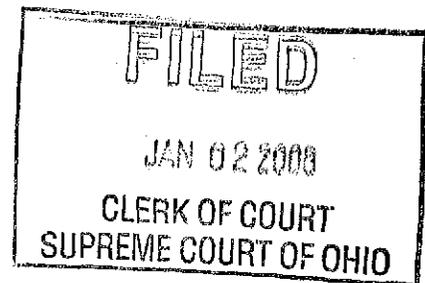
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## STATEMENT OF FACTS

Plaintiff-Appellee Kauffman Racing Equipment, L.L.C. (“KRE”) is a limited liability company with its principal place of business in Ohio. KRE is engaged in the business of selling high performance racing equipment to the public at large. It specializes in after-market engine blocks for Pontiac competition automobiles. The company maintains its sole business office and operations in Glenmont, Knox County, Ohio. KRE has enjoyed a hard-earned reputation in Ohio and throughout the nation for providing and selling quality products. It has customers in all fifty (50) states and averages approximately \$750,000.00 in annual gross sales. (*Id.*, at ¶ ¶ 1- 5).

On February 6, 2006, KRE sold an MR-1 engine block and related equipment to a buyer using the name, Central Virginia Machine. KRE later learned that Defendant-Appellant Scott Roberts (“Roberts”), a resident of the State of Virginia, was the actual purchaser. The purchase price was \$2,873.75. Roberts selected the engine block after viewing KRE’s company website. He placed the order directly with KRE’s business office in Glenmont, Ohio and used a credit card for payment. (Kauffman Aff., at ¶ 6; Roberts Aff., at ¶ ¶ 10-15).

Approximately eight (8) months later, in October 2006, KRE received a telephone call from Roberts. He complained that the engine block was defective. Roberts had not previously expressed any dissatisfaction whatsoever with his purchase during the eight months which had passed since the date of purchase. (Kauffman Aff., at ¶ ¶ 8, 9).

All engine blocks and racing products marketed by KRE are sold on an “as is” basis due to the extreme demands placed on the equipment. Despite the “as is” terms of the sale, KRE nevertheless endeavored to make a good faith effort to verify Roberts’ claim as to the existence of manufacturing defects in the engine block. (*Id.*, at ¶ 10).

KRE offered to have the block shipped back to its plant in Ohio for inspection. The company also proposed that if the engine block were found to be defective through any fault of

its own, it would buy it back at the original purchase price. Roberts accepted the terms and conditions of this proposal. KRE arranged for the engine block to be picked up in Virginia and returned to its Ohio plant. The inspection revealed that the engine block had been substantially modified from its original specifications at the time it was shipped to Central Virginia Machine in February 2006. (*Id.*, at ¶¶ 10-12).

After the inspection was completed, KRE contacted Roberts and asked him who had undertaken the modifications to the engine block. Roberts admitted that Central Virginia Machine had worked on it. KRE informed Roberts that in light of his representations, it would not buy back the engine block. KRE explained that the defects were caused by the modifications made subsequent to sale and delivery of the merchandise and not by the manufacture of the block itself. The engine block was subsequently shipped back to Roberts in Virginia at his request. (*Id.*, at ¶¶ 13-15).

Roberts did not accept this news well. He told KRE that he was going to do everything he could to put it out of business and that KRE would never sell another engine block anywhere to anyone again. This turned out not to be an idle threat. From October 18, 2006 and continuing on an ongoing basis through November, 2006, Roberts knowingly, intentionally, willfully and maliciously posted false information regarding KRE and the engine block in question on the public forum sections of the PerformanceYears.Com, PontiacStreetPerformance.Com, and E-Bay Motors Internet websites. (*Id.*, at ¶¶ 15-17).

The first two websites are interactive “bulletin boards” accessible on the World Wide Web to anyone with a computer, a modem, and an Internet service provider. They are of particular interest to members of the general public, including present and prospective customers of KRE, who have an interest in Pontiac racing cars and equipment. The sites are frequently read, consulted, and used by fellow racing enthusiasts. Roberts used the screen name of “drunk’n

Injun” when making the postings on these two websites. The third website is host to an interactive public auction of automotive equipment. Roberts used the screen name “scottr5289” when making postings on this site. The interactive feature on all three websites allows a reader to respond to a posting as well as to post his own comments. (*Id.*, at ¶ 17).

All three of the websites are readily accessible to Internet users in the State of Ohio. Steven Kauffman personally received inquiries regarding Robert’s postings from several individuals who actually read them, including Frank Kegg, Rob Pietrzak, Amy Richcreek, Barb Mellott, and Kenneth Criss. Each of these individuals is a resident of Ohio. (*Id.*, at ¶ 18).

The information published by Roberts was false and misleading. It may be readily inferred from the content of the postings (as well as Roberts’ previous threats), that Roberts maliciously intended to cast KRE in a negative and unpopular light to automobile performance and race car enthusiasts at large who purchase products such as those manufactured by KRE. (*Id.*, at ¶ 19).

Roberts knew his postings were false and misleading. He was well aware that the MR-1 engine block met all specifications and requirements for use in a high performance racing vehicle. As stated earlier, he had verbally admitted to KRE that he was responsible for the modifications made to the engine block after it had been delivered by KRE to Central Virginia Machine. KRE had placed him on notice that these post-sale modifications impaired its functioning and performance. (*Id.*, at ¶ 20).

Roberts’ postings on the Internet interfered with the contracts and business relationships of KRE, causing it pecuniary damage, as well as affecting its reputation in the racing community as a company selling quality products. This harm and the resulting damages were sustained by KRE in the State of Ohio. (*Id.*, at ¶ 21).

KRE responded to Roberts' crusade of slur and smear by commencing a civil suit against him in the Knox County Court of Common Pleas. The complaint alleged that Roberts injured its reputation and business by posting false and malicious statements on the Internet. KRE sought monetary damages from Roberts for 1) defamation, and 2) intentional interference with its contracts and business relationships.

KRE perfected service of process on Roberts pursuant to Civ. R. 4.3. Roberts, in turn, filed a motion to dismiss the complaint on the grounds that the court of common pleas lacked jurisdiction over his person. In an accompanying affidavit, Roberts admitted posting the alleged defamatory statements on the Internet, but claimed that minimum contacts with this state were lacking because he never personally spoke or wrote to anyone in Ohio regarding his Internet postings. (Roberts Aff., at ¶¶ 8-9). KRE answered with a memorandum in opposition and the affidavit of Steven Kauffman, a principal of the company. Kauffman's affidavit recited in detail the transactional history between the parties and included representative examples of the defamatory Internet postings.

The trial court granted the motion to dismiss without a hearing. KRE filed a timely notice of appeal to the Court of Appeals of Knox County, Fifth Appellate District. In a two-to-one ruling, the court of appeals reversed the judgment of dismissal and remanded this case to the court of appeals for further proceedings.

Roberts filed a notice of appeal to this Court from the adverse ruling of the court of appeals. This Court accepted jurisdiction over the appeal and ordered full briefing on the merits.

## ARGUMENT

An Ohio trial court is required to engage in a two-step analysis when determining whether it has jurisdiction over an out-of-state defendant. First, it must determine whether the state's "long-arm" statute and companion 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.

Once Roberts challenged the jurisdiction of the common pleas court by filing a motion to dismiss, the initial burden was on KRE to make a *prima facie* showing of personal jurisdiction. In response to the motion, KRE submitted an affidavit and evidentiary materials detailing the transactional history between the parties and the content of the Internet postings that form the basis of this lawsuit. Because Roberts did not request an evidentiary hearing on his motion, this Court will examine the allegations in the pleadings and the documentary evidence in a light most favorable to KRE and will resolve all competing inferences in its favor. *See Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 236, 1994-Ohio-229, 638 N.E.2d 541. 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.

### **Appellee's Counter-Proposition of Law No. 1:**

**R.C. 2307.382(A)(6) authorizes an Ohio trial court to exercise long-arm jurisdiction over an out-of-state tortfeasor who causes injury to an Ohio-domiciled business by maliciously posting on interactive Internet websites defamatory statements that are specifically intended to impugn its commercial practices, integrity, and reputation.**

The first prong of the test for determining the existence of personal jurisdiction is easily satisfied in this case. Division (A)(6) of R.C. 2307.382, the long-arm statute, authorizes an Ohio trial court 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. The affidavit recited a detailed chronological history of the dealings and communications between the parties. This history clearly established that Roberts knew that KRE was domiciled in Ohio and that it conducted its business activities from an Ohio address.

In the following language, the panel majority of the court of appeals concluded that the content of Roberts' postings provided ample evidence that the requirements of R.C. 2307.382(A)(6) for the exercise of long-arm jurisdiction had been satisfied:

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.

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

"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."

Later the same day, Roberts added:

"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]."

The following day, October 19, 2006, Roberts wrote:

"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)<sup>1</sup> \* \* \* Here is another good board to visit! \* \* \* Just trying to help other potential victims." (Emoticons omitted).

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

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. \* \* \*

Opinion, at ¶¶ 15 -22.

In his brief, Roberts cannot refer to any evidence sufficient to rebut the prima facie case presented by KRE. 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.*).

#### **Appellee's Counter-Proposition of Law No. 2:**

**The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not prohibit an Ohio trial court from exercising long-arm jurisdiction over an out-of-state tortfeasor who expressly targets defamatory postings on the Internet against an Ohio-domiciled business knowing that it would suffer the brunt of the injury from the content of those postings in its home state of Ohio.**

The controlling authority for assessing the extent to which 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 is the United States Supreme Court decision in *Calder v. Jones* (1984), 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804. In that case, Hollywood actress Shirley Jones filed a lawsuit in a California state court against a reporter and editor based on an allegedly libelous article published in the *National Enquirer* magazine. The article accused Jones of failing to meet her professional obligations due to heavy drinking.

The individual defendants responded with a motion to dismiss, raising legal arguments similar to those made by Roberts in the case at bar. They argued that they were residents of the State of Florida and requiring them to defend the lawsuit in the State of California would violate their rights under the First and Fourteenth Amendments. The High Court rejected their constitutional challenge, noting that the harmful “effects” of the defendant’s conduct were directly felt in the plaintiff’s home state:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.

*Id.*, 465 U.S. at 790, 104 S. Ct. at 1487 (footnote and internal citations omitted).

The Court stated that the intentional nature of the tortious conduct was also a significant factor that rendered it fair to require the defendants to defend themselves in the plaintiff’s home forum. Under these circumstances, the Court concluded that “[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.” *Id.*

The individual defendants in *Calder* asserted that their situation warranted different treatment than their employer (who did not contest jurisdiction), because they had “no direct economic stake in their employer’s sales in a distant State.” *Id.*, 465 U.S. at 789, 104 S. Ct. at 1487. The Supreme Court was not persuaded. It upheld the California court’s exercise of personal jurisdiction over them because they knew that the “effects” of their conduct would result in harm to the plaintiff in that state. The Court held that “[u]nder the circumstances, petitioners must ‘reasonably anticipate being haled into court there to answer for the truth of the statements made in their article.’” The absence of any monetary benefit to them was irrelevant. *Id.*, 465 U.S. at 790, 104 S. Ct. at 1487 (internal citation omitted).

In *Fallang v. Hickey* (1988), 40 Ohio St. 3d 106, 532 N.E.2d 117, this Court took an expansive view of the “effects” test announced in *Calder*. In that case, defendant Long, a physician in South Carolina, mailed a letter to defendant Hickey, a physician in Ohio. The letter included defamatory remarks about the plaintiff, a surgeon who practiced in the same Ohio hospital as Hickey. In retaliation for the plaintiff’s involvement in the revocation of his hospital privileges, defendant Hickey distributed defendant Long’s defamatory letter to the media and members of the local medical community. The plaintiff sued Hickey and Long in the court of common pleas for defamation and related causes of action.

Defendant Long argued that the act of sending a single letter to Ohio fell short of creating the “minimum contacts” necessary for a court of this state to exercise *in personam* jurisdiction. This Court rejected the proposition that the jurisdiction of a state court to adjudicate a defamation claim against an out-of-state defendant should turn on the scale or frequency of the publication of the defamatory statements. Instead, the Court held that even a single publication of a defamatory statement in the plaintiff’s home state is sufficient for its courts to exercise long arm jurisdiction over the out-of-state defendant.

As in *Calder*, this Court focused on the intent of the out-of-state defendant in disseminating the defamatory statements and the “effects” of his conduct on the plaintiff in Ohio:

Long argues that ‘it is neither convenient nor fair to require \* \* \* [him] to defend himself in Ohio.’ The United States Supreme Court has indicated that a high degree of unfairness is required to erect a constitutional barrier against jurisdiction. This is especially true in a case (such as the one herein) in which the defendant has intentionally directed his activity at forum residents, and the “effects” of the activity occur in the forum state.

Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits the assertion of jurisdiction in a defamation action over a nonresident defendant who deliberately sends an allegedly defamatory letter into Ohio.

*Id.*, 40 Ohio St. 3d at 108, 532 N.E.2d at 120 (internal citations omitted).

Consistent with *Calder* and *Fallang*, KRE made the requisite “prima facie showing” for the assertion of personal jurisdiction over Roberts. KRE is an Ohio limited liability company with its principal place of business in Ohio. (Kauffman Aff., at ¶ ¶ 2-3). Its complaint plainly alleges that Robert’s conduct was intentionally calculated to cause harm to KRE’s reputation as a supplier of quality engine blocks and equipment to the racing community and to interfere with its business relationships. The complaint further alleges that KRE has suffered the very injuries and damages that Roberts intended to inflict. (Compl., at ¶ ¶ 12-14, 16-19). The affidavit of Steven Kauffman supplied detailed facts to support each of the allegations in the complaint.

The essence of Roberts’ argument is an attempt to persuade this Court that his use of the Internet, rather than the more primitive (but historically recognized) medium of paper-and-ink to disseminate his malicious attacks on KRE is a factual distinction of critical importance that should somehow shield him from having to answer in an Ohio court for his wrongdoing. His brief posits that “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.” (Roberts Brief, at 19).

He proposes that his selection of an electronic instrumentality of communications (the Internet), accessible to anyone in Ohio with a computer, modem and service provider, should somehow endow him with a cloak of jurisdictional protection that is unavailable to a would-be defamer who utilizes a less sophisticated medium of communication.

Roberts made the same argument to the court of appeals. The two-judge majority was not persuaded:

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 [\*\*14] in Ohio. See, *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804; *World-Wide Volkswagen*, supra at 297-298.

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.

Kauffman Racing's sole assignment of error is sustained.

Opinion, at ¶¶ 33-35.

Although the issue is one of first impression for this Court, courts in other jurisdictions have rejected the distinction that Roberts seeks to draw between defamatory communications transmitted by new technologies versus more traditional means. For example, in *California Software, Inc. v. Reliability Research* (C.D. Cal. 1986), 631 F. Supp. 1356, a case decided only two years after *Calder*, the defendants argued that *Calder* should not apply to defamation and tortious interference claims arising from communications transmitted on a "computer bulletin

board” (the predecessor to today’s Internet).

The federal district court disagreed and held that the dissemination of defamatory statements on the “computer bulletin board” by a Vermont resident concerning the products and services of the plaintiff, a California software provider, constituted sufficient contacts with the plaintiff’s home state for the court to exercise limited diversity jurisdiction over the individual defendant (and his corporate employer) pursuant to the California long-arm statute. The court explained:

Unlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching. Thus, while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts.

*Id.*, 631 F. Supp. at 1363.

Other courts have recognized that the ability of a putative defamer to reach a far-wider audience by using the Internet is a compelling factor favoring the exercise of long-arm jurisdiction by a court in the victim’s home state. For example, in *Blakey v. Continental Airlines, Inc.* (2000), 164 N.J. 38, 46 & 63-71, 751 A.2d 538, 543 & 552-557, the New Jersey Supreme Court opined: “Although advances in electronic and Internet technology have created new ways to communicate, the sources of personal jurisdiction remain constant. Specific jurisdiction may be exercised over non-resident defendants by applying traditional principles of jurisdictional analysis *irrespective of the medium* through which the injury was inflicted.” (emphasis added).

*Becker v. Hooshmand* (Fla. App. 2003), 841 So.2d 561 merits special recognition because the Florida Court of Appeals in that case was asked to extend the rationale of pre-Internet appellate authority very similar to *Fallang* (*i.e* involving a single defamatory letter mailed from out-of-state), to an action involving a defamatory posting by an out-of-state defendant over the Internet. The plaintiff therein, a physician and resident of Florida, filed suit in

his home state against an Internet “chat room” moderator who resided in Pennsylvania. He alleged that the defendant “ha[d] posted numerous defamatory comments about him that were targeted to Florida residents, or people likely to seek medical care in the state of Florida, which resulted in injury to his reputation and business.”

The defendant filed a motion to dismiss on jurisdictional grounds. The trial court denied the motion and the court of appeals affirmed, stating:

[T]his court has previously held that committing a tortious act under Florida's long arm statute does not require that a physical tort occur in this state. *Similarly, this court has concluded that mailing a letter into the State of Florida was sufficient to find that tortious conduct took place in the state. Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994).* Additionally, this court has held that making a defamatory statement over the telephone constitutes the commission of a tortious act for purposes of Florida's long arm statute. *We find that the communications that form the basis of the allegations in this case are analogous to cases previously decided by this court [.]*

*Id.*, 841 So. 2d at 562-563 (emphasis added, other internal citations omitted).

Counsel for Roberts have made a valiant effort by citing a compilation of non-Ohio cases that purportedly support their client’s position that the due process protections of the Fourteenth Amendment place his Internet crusade to destroy KRE beyond the reach of an Ohio court. However, most of those cases simply cannot be squared with the clear direction given by the U.S. Supreme Court in *Calder* and its companion case of *Keeton v. Hustler Magazine, Inc.* (1984), 465 U.S. 783, 104 S.Ct. 1473, 79 L.Ed. 2d 790. *See* Patrick J. Borchers, Symposium: Personal Jurisdiction in the Internet Age: Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction (2004), 98 Northwest Law Review 473 .

In the cited law review article, Professor Borchers of the Creighton University Law School analyzes in detail three of the cases cited and relied upon by Roberts – *Young v. New Haven Advocate* (C.A. 4, 2002), 315 F.3d 256; *Revell v. Lidov* (C.A. 5, 2002), 317 F.3d 467; and *Griffis v. Luban* (Minn. 2002), 646 N.W.2d 527 – and observes that each “is very hard to

square with *Calder and Keeton*.” *Id.*, at 482. Expanding on this observation, he states “I do not mean to suggest that in every Internet libel case the plaintiff ought to have an unlimited choice of fora. But *Young*, *Revell* and *Griffis* are instances of respected courts (two federal circuits and the Minnesota Supreme Court) distorting one (*Calder*) and completely ignoring the other (*Keeton*) of the two directly relevant Supreme Court opinions.” *Id.*, at 488.

The New Jersey Appellate Division, in *Goldhaber v. Kohlenberg* (2007), 395 N.J. Super. 380, 928 A.2d. 948, was somewhat less acerbic than Professor Borchers in its assessment of this line of authority. The New Jersey court stated that cases such as *Griffis* and *Young* should be limited to factual scenarios involving “the mere posting of messages upon such an open forum by a resident of one state that could be read in a second state.” *Id.*, 395 N.J. Super. at 387, 928 A.2d at 953. The court explained:

Those courts that have declined to find jurisdiction upon the basis of mere posting of messages upon an open on-line forum have done so either on the basis that there was insufficient evidence that the alleged tortfeasor had directed or focused the defamatory comments to the forum state or on the basis that the site in question was passive, as opposed to active or interactive. Consideration of whether the defamatory comments were directed or focused to the forum state has been described as a “targeting-based” analysis.

*Id.*, 395 N.J. Super. at 387-388, 928 A.2d at 953. The court ruled that New Jersey’s exercise of long-arm jurisdiction over the defendant under the particular facts before it did not run afoul of the cited line of cases because “as opposed to the cases cited earlier, there is, in our judgment, evidence that the author of these messages did, indeed, target them to New Jersey.” *Id.*, 395 N.J. Super. at 389, 928 A.2d at 953.

Roberts places special emphasis on the unpublished ruling of the United States Court of Appeals for the Sixth Circuit in *Cadle Company v. Schlichtman* (C.A. 6, 2005), 123 Fed. Appx. 675. In that case, the Sixth Circuit relied on an exception to *Calder* which it had recognized in its earlier decision in *Reynolds v. International Amateur Athlete Federation* (C.A. 6, 1994), 23 F.3d

1110. In *Reynolds*, the Sixth Circuit held that the bare fact of an adverse “effect” on the plaintiff in Ohio is not sufficient for an Ohio court to exercise personal jurisdiction over an out-of-state defendant when the alleged defamatory statements pertained to activities of the plaintiff that were conducted in *another* jurisdiction. *Id.*, at 1120. Citing *Reynolds*, the *Cadle* panel ruled that a federal district court sitting in Ohio could not exercise jurisdiction over a resident of Massachusetts who operated a semi-interactive website and whose allegedly defamatory postings about the Ohio plaintiff referred to that latter’s activities in Massachusetts, not Ohio. *Id.*, at 679-680.

*Cadle* is easily distinguishable on the facts. Roberts’s Internet postings were concerned with KRE’s manufacturing and marketing activities in Ohio, not another state. Therefore, the *Reynolds* exception is inapplicable.

There is some language in *Cadle* that, at first blush, might suggest that the *Calder* “effects” test for invoking jurisdiction over an out-of-state defamer is triggered only if his Internet postings are targeted exclusively at viewers in the state in which the lawsuit is filed. The *Cadle* panel remarked that “nothing on the [defendant’s] website specifically targets or is even directed at Ohio readers, as opposed to residents of other states.” 123 Fed. Appx. at 679. The Supreme Court opinion in *Calder*, however, does not support such a narrow reading.

The communications medium used to disseminate the defamatory statements in *Calder* was a magazine with a national readership. The statements were targeted at a resident of California (actress Shirley Jones), but certainly were not intended to be read exclusively by fellow residents of that state. The record showed that the National Enquirer had a national circulation of five million with 600,000 copies circulated in California. *Id.*, 465 U.S. at 785, 104 S. Ct. at 1484. In critiquing similar language in the Fourth Circuit’s opinion in *Young*, Professor Borchers stated:

But conceived of this way, it is hard to see how jurisdiction could exist under either the *Calder* or *Keeton* factual scenarios. There was nothing about the National Enquirer that was particularly directed at Californians, except that it was known to be read in California and the article in question concerned a Californian. Thus, in *Calder* the only real "targeting" of California was that the plaintiff resided there, but, of course, that same connection was present in *Young*. *Keeton* lacked even this modest connection; the only connection there was that distribution of about one percent of the magazines in question might have inflicted some tangential reputational injury on the plaintiff.

*Id.*, at 484-485.

In the final analysis, the questionable language in *Cadle* was not essential to the outcome reached in that appeal and should be regarded as *obiter dictum*. Moreover, it should be pointed out that being an unpublished opinion, *Cadle* does not represent the "Law of the Circuit" under the Sixth Circuit's rules for binding precedent. It therefore has limited precedential value.

Roberts' reliance on the opinion of the United States District Court for the Southern District of Ohio in *Oasis Corp. v. Judd* (S.D. Ohio 2001), 132 F. Supp. 2d 612 is similarly misplaced. The factual record in *Oasis* revealed that before the Oklahoma-domiciled defendants commenced their campaign of disparaging and harassing postings on the Internet, they did not have any contractual or business relationship with the plaintiff, an Ohio manufacturer of water coolers. The motive behind the defendants' postings was their belief that a defect in one of the plaintiff's water coolers had caused the office building in which they were tenants to burn down.

The district court in *Oasis* acknowledged that the decision of the United States Supreme Court in *Calder* "appears to support Plaintiff's position" that Ohio was an appropriate venue to assert jurisdiction. *Id.*, 132 F. Supp. 2d at 623. Nevertheless, the court believed it would be unfair to require the Oklahoma defendants to defend themselves in a court located in Ohio in the absence of a prior transactional or other relationship between the parties. The district court also deemed it significant that the plaintiff was an international corporation "whose reputation is not centered in Ohio." *Id.*, at 624.

The United States District Court for the Northern District of Ohio recognized the significance of this distinction in *Wargo v. Lavandeira* (N.D. Ohio, Oct. 3, 2008), No. 1:08cv02035, 2008 U.S. Dist. LEXIS 80592. In that case, the complaint alleged that the defendant, a California-based operator of an interactive website, posted as its “Email of the Day” an e-mail authored by the plaintiff, a resident of Ohio. The posting included the plaintiff’s full name, work e-mail address, and the name of her employer. The complaint further alleged that plaintiff lost her job as a result of numerous harassing and threatening e-mail messages and telephone calls that were generated in response to the e-mail posting.

The *Wargo* court distinguished the Fifth District ruling in *Kauffman* based on the following rationale:

The Plaintiffs draw the Court's attention to the decision in *Kauffman Racing Equipment, LLC v. Roberts*, 2008 Ohio 1922, 2008 Ohio App. Lexis 1695, 2008 WL 1821374 (Ohio App. 5th Dist. 2008), in which the court found it had jurisdiction over the defendant. *Kauffmann* involved the sale of a racing performance engine block by the plaintiff, an Ohio limited liability company, to the defendant, a Virginia resident. When the sale went awry, the defendant alleged posted defamatory comments regarding the plaintiff on the internet. *Unlike the instant matter, the court in Kauffman found jurisdiction over the alleged tortuous (sic) internet comments predicated on the defendant's Ohio transactions with Kauffman.*

*Id.*, at \*11 (emphasis supplied). The *Wargo* court elected to follow *Oasis*, explaining that “the plaintiff’s alleged wrongs were drawn *solely* from the content of the defendants’ website. \* \* \* Focusing on the defendants’ conduct, the [*Oasis*] Court determined that neither the Oklahoma defendants nor their website had an inherent connection with Ohio.” *Id.*, at \*12 (emphasis supplied).

Roberts’ remonstrations are unpersuasive due to his inclination to view the underlying facts of this case myopically. He seeks refuge in a body of precedent from other jurisdictions that have dealt with attempts by plaintiffs to sue out-of-state defendants in their home forums

involving claims arising entirely from the defendants' mere act of posting untrue, embarrassing, or critical messages on an Internet website, bulletin board, or blog.

Unfortunately for Roberts, his is not a case of "mere posting." This Court is not presented with a factual scenario involving a naïve, inexperienced Internet user who has been unfairly singled out by some large multi-national corporation for the purpose of stifling legitimate criticism of its products.

To be sure, one can envision the potential for abuse in this context, if taken to the extreme. Perhaps this Court might someday be presented with a compelling fact pattern in which an out-of-state retail consumer is slapped with an oppressive lawsuit in retaliation for posting 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 imposing reasonable limitations on the reach of Ohio's long-arm statute.

Roberts, however, conveniently ignores an integral fact in this case; that the parties did have an antecedent transactional history which had gone "awry," and which supplied the motive behind the defamatory Internet postings by Roberts, *see Wargo, supra*. This prior transactional history takes Roberts' case out of the realm of the "mere posting" cases and supplies the additional facts needed to demonstrate the "express aiming" or targeting required by *Calder*'s "effects" test. *See Cohen v. Zaic* (Me. Sup. May 23, 2007), 2007 Me. Super. LEXIS 105.

In *Cohen*, the facts before the Maine Superior Court established that the allegedly defamatory Internet postings by the out-of-state defendant were directly related to her discontent with an earlier purchase of merchandise from the plaintiff, a marketer of vegetarian and raw food books and products based in Maine. The court rejected the defendant's argument, similar to the one made here by Roberts, that her limited contact with the forum state should shield her from suit in that jurisdiction:

Zaic correctly points out that her problems with Cohen stemmed from an Internet transaction gone awry. She argues that one transaction \* \* \* should prevent Maine courts from assuming jurisdiction. If this were a simple breach of contract issue or a lawsuit solely arising from arranging the transaction \* \* \* Zaic's view might prevail. Cohen's complaints, however, involve ongoing, allegedly tortious activity and communication initiated by Zaic and impacting Cohen. The bitter online dispute that arose between the two women transcends the single transaction \* \* \*. On that basis, \* \* \* it was reasonable for Zaic to anticipate a lawsuit in Maine, and it was reasonable for Zaic to anticipate that her continued comments about Cohen's Maine business could result in litigation in this forum, whether or not she thought Cohen actually was damaged by her comments. If Zaic's statements tended to injure Cohen in her profession, they would constitute slander per se, and special damages would be presumed.

*Id.*, 2007 Me. Super. LEXIS at \*10 – 11 (internal citations and footnote omitted).

The Maine court emphasized the state's interests in providing a forum for its citizens whose reputations are unfairly maligned by an out-of-state defendant using a communications medium so readily accessible to an audience in the plaintiff's home state:

Also, Maine has a "legitimate interest" in ensuring that its local business people 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.

*Id.*, at \*13.

The defamatory and injurious Internet postings in this case are directly related to the commercial sales transaction initiated by Roberts with KRE and conducted by telephone and over the Internet. (Roberts Aff., at ¶¶ 10-11). The transaction inextricably tied Roberts to activities within Ohio. The engine block and equipment were shipped from KRE's plant in Ohio to Roberts in Virginia. Roberts later accepted KRE's offer to arrange for the return of the engine block to Ohio for inspection. The inspection actually occurred in Ohio. Robert's displeasure with the outcome of the inspection conducted in KRE's plant in Ohio provided the impetus for his intensive and aggressive campaign to defame and injure KRE's reputation as a reliable, trustworthy and honest Ohio-domiciled business. (Kauffman Aff., at ¶¶ 2-22).

The court of appeals correctly found that the content of Roberts' Internet postings furnished the most compelling evidence that he was engaged in a deliberate and intentional course of harmful conduct directed against KRE in Ohio. (Opinion, at ¶¶ 19-21). 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). It is difficult to imagine a more clear-cut case of "express aiming" at an Ohio resident.

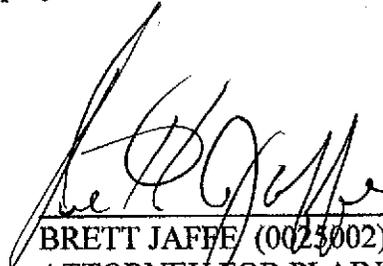
In sum, Roberts intentionally utilized a means of communication which is readily accessible in Ohio. He knew or reasonably should have known that the harmful "effects" to KRE's reputation and business would be felt in Ohio. Under the foregoing circumstances, it would not offend traditional notions of fair play and substantial justice to require Roberts to come to Ohio and defend his actions. *See Cohen*, 2007 Me. Super. LEXIS at \*13 ("While it may be inconvenient for Zaic to defend the suit in Maine, her conduct exacerbated the situation and she had not met her burden to demonstrate that handling the litigation through her local counsel would be unfair or unjust"). The court of appeals was correct in concluding that "[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." (Opinion, at ¶ 32).

### CONCLUSION

Roberts' case differs from *Calder* only in the choice of the medium used to disseminate the defamatory statements. 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

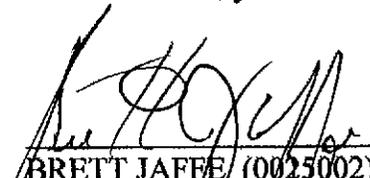
standards regarding the acceptability of certain discourse have been lowered. As to the ability to harm has grown, so must the law's ability to protect the innocent." (Opinion, at ¶ 34). Roberts has failed to provide any compelling reason for concluding that his use of the Internet as the chosen medium for disseminating his defamatory attacks on KRE should somehow provide a legal basis for shielding him from having to answer for his conduct in a court in Ohio.

For the foregoing reasons, KRE prays that this Court will affirm the judgment of the court of appeals.

  
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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief 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 2<sup>nd</sup> day of January, 2009.

  
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