

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT SCOTT ROBERTS

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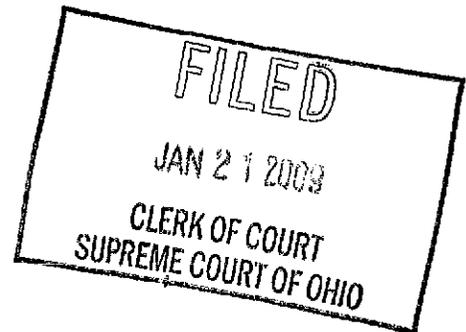


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The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not permit the assertion of jurisdiction in a defamation action over a nonresident defendant who makes the allegedly defamatory statements via the internet from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

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ARGUMENT

Appellee, Kauffman Racing Equipment, L.L.C (“Kauffman Racing”), informs this Court that, if the Court of Appeals decision is affirmed, “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.” (Appellee’s Merit brief, pg. 18.). Appellee even envisions the potential for abuse that “may very well justify imposing reasonable limitations on the reach of Ohio’s long-arm statute.” (Appellee’s Merit Brief, pg. 18).

Appellant submits that “some day” is now and the reasonable limitations envisioned by the Appellee on the reach of Ohio’s long-arm statute already exist in the form of the traditional minimum contacts regime embodied in the Due process Clause of the United States Constitution. If the Court of Appeals decision in this case is upheld, an Ohio resident posting an “unflattering” product review on even a passive consumer internet website bulletin board would be subject to personal jurisdiction in any state where the effects of the review were allegedly felt. If there is nothing more to “minimum contacts” than foreseeability or the “effects test” there is nothing left of the constitutionalization of in personam jurisdiction by virtue of the Due process Clause.

Contrary to Appellee’s assertions, there is no case that has been cited to this Court that has found jurisdiction based on unfocused, passive, non-targeted statements made on an internet website that is available to anyone, anywhere.

Appellee cites *California Software, Inc. v. Reliability Research* (C.D. Cal. 1986), 631 F. Supp. 1356. In *California Software*, a Vermont resident allegedly defamed, via

the internet, a California software provider. The Vermont defendant communicated the allegedly false statements directly with three California residents, each of whom had seriously considered becoming a customer of the plaintiff. The alleged false statements were made by letter, telephone and via a nationally disseminated computer based information service known as the Computer Reliability Forum (the "CRF"), which was operated by defendants. *California Software*, 631 F. Supp at 1358. Unlike in this case, there was ample evidence in *California Software* that the out of state defendant intentionally targeted California customers of the plaintiff by mail, telephone and electronically.

Furthermore, the *California Software* court, on page 1360 and citing *Gonzalez v. Consejo Nacional de Production de Costa Rica* (9th Cir. 1980), 614 F2d 1247, 1254, held as follows:

The mere act of transmitting information through the use of interstate communication facilities is not, however, sufficient to establish jurisdiction over the sender.

The *California Software* court went on to assert limited jurisdiction over the non-resident defendants which was specific to California's long-arm statutes and not applicable in this case. *California Software* at page 1360.

Even in *Calder v. Jones*, (1984), 465 U.S. 783, the allegedly defamatory statements were published in the forum state by a national magazine enjoying a large circulation in and deriving substantial revenue from the forum state. In *Fallang v. Hickey* (1988), 40 Ohio St. 3d 106, the defendant purposely targeted Ohio by intentionally sending an alleged defamatory letter into Ohio.

Appellee also cites *Blakley v. Continental Airlines, Inc.* (2000), 164 N.J. 38, 751 A.2d 538. *Blakley* is of little significance in that the New Jersey Supreme Court declined to answer the jurisdictional question and remanded for further discovery. *Blakely*, 164 N.J. 38, 70, 751 A.2d 538, 557.

In Appellee's Merit Brief, Appellee places substantial reliance on *Becker v. Hooshmand, M.D. v.* (2003), 841 So.2d 561 (Fla. App. 4th Dist). In *Becker* the court upheld personal jurisdiction over a Pennsylvania "chat room" moderator who allegedly made defamatory statements about a Florida resident over the internet. *Becker* at 563. However, the *Becker* court based its decision on Florida's long-arm statute that stated, on page 562, as follows:

Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(b) Committing a tortious act within this state.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state.

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

In *Becker*, it is obvious that the minimum contacts were not only the alleged defamatory statements but the defendant's status as a chat room moderator who had engaged in solicitation or service activities within the state of Florida. In other words,

the *Becker* court, in addition to the electronic transmissions, required significant ongoing solicitations and/or service activities by the non-resident defendant in order to impose personal jurisdiction on the non-resident.

It is clear that the Fifth District Court of Appeals and Appellee rely on *Calder* to assert jurisdiction in this case. *Calder* does appear to prescribe a simple foreseeability test or "effects" test for asserting jurisdiction over nonresidents who commit torts in the forum state. Numerous courts have struggled with the import of *Calder*, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always give rise to personal jurisdiction. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.* (9th Cir. 2000), 223 F.3d 1082, 1097.

Most, if not all courts, agree, however, that merely asserting that the defendant knew or should have known that his intentional acts would be felt in the forum state is not enough to establish jurisdiction under the "effects test." *IMO Industries, Inc. v. Kickert AG* (3rd Cir. 1998), 155 F.3d 254, 265. In *IMO*, the Third Circuit stated that the United States Supreme Court in *Calder* made it clear that foreseeability of effects in the forum state is not enough to justify long-arm jurisdiction. Instead, the plaintiff must point to contacts which demonstrate that the defendant expressly aimed its tortious conduct at the forum. *IMO Industries, Inc. v. Kickert AG* (3rd Cir. 1998), 155 F.3d 254 at p. 265. Foreseeability of causing injury in another state is not sufficient for exercising personal jurisdiction. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462 at p. 474, 105 S. Ct. 2174 at p. 2183. In other words, the foreseeability that is critical to the due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. *World-Wide*

Volkswagen Corp. v. Woodson (1980), 444 U.S. 286 at p. 297, 100 S. Ct. at p. 567. The knowledge that harm will be suffered or felt in the forum state when unaccompanied with other contacts is too unfocused to justify personal jurisdiction. *ESAB Group, Inc. v. Centricut, Inc.* (1997, 4th Cir. S. Caro.), 126 F.3d 617, 625.

Numerous courts have required specific targeting of residents of the forum. In *Delta Media Group, Inc. v. The Kee Group*, (N.D.E.D.2007), 2007 U.S. Dist. LEXIS 80878, the plaintiff, Delta Media Group ("Delta") an Ohio Corporation, sued Greyhound, a Michigan resident for patent infringement. Greyhound is an information technology company providing services to clients in the Detroit, Michigan area. *Delta* at *3. Greyhound moved to dismiss on the basis of a lack of personal jurisdiction.

In *Delta*, the Court, citing *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968), stated that the *sine qua non* of in personam jurisdiction is the purposeful avilment requirement as developed by *Burger King*. *Delta* at *7. In the *Delta Media* case, the plaintiff, relying on *Calder v. Jones*, did not allege any actions by Greyhound in Ohio. *Delta* at *8. "The entire universe of factual jurisdictional allegations against Greyhound consists of plaintiff's contentions that (1) Greyhound 'had to know' that the allegedly infringing material used on Kee's website came from Delta; and (2) Greyhound 'had also to know' that using the allegedly infringing material would cause injury to Delta in Ohio." *Delta* at *8 . In essence, the plaintiff was arguing that the actions of Greyhound occurring in Michigan caused damage to the plaintiff in Ohio and the damage was felt in Ohio. *Delta* at *8.

The *Delta Media* Court, in reviewing *Calder v. Jones*, acknowledged that the "effects test" as expressed in *Calder* is interpreted narrowly by the Sixth Circuit. *Delta* at

*10. The Delta Court, in declining to assert personal jurisdiction over Greyhound, held, at *11, as follows:

"[T]he mere allegation that the plaintiff feels the effect of the defendant's tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998). Allegations of forum-based injury of the kind made by Plaintiff against Greyhound, standing alone, are insufficient to establish purposeful availment by a defendant not alleged to have had any actual contacts with the forum. See *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177-78 (6th Cir. 1992); *Wallace v. Herron*, 778 F.2d 391, 394 (7th Cir. 1985). As the Supreme Court reiterated in a case decided after *Calder*, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King*, 471 U.S. at 474. Defendants rightly point out that acceptance of Plaintiff's "injury only" argument as a sufficient basis for exercise of personal jurisdiction effectively would permit jurisdiction in the home forum of any plaintiff, and would render the deeply-rooted [*12] minimum contacts requirement entirely superfluous. Accordingly, the Court concludes that Plaintiff has not made a prima facie case of personal jurisdiction over Greyhound.

See also, *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp.2d 1011(D. Kan. 2006) (defendant's website insufficient to support jurisdiction the site was not directed to forum users). *Jackson v. California Newspapers Partnership*, 406 F. Supp.2d 893 (N.D. Ill. 2005) (in a defamation case, court found that defendants were not subject to personal jurisdiction in Illinois based on a website because the site was not directed to Illinois residents). *Subsalve USA Corp. v. Watson Manufacturing, Inc.*, 392 F. Supp.2d 221 (D.R.I. 2005) (passive website did not reflect an intention to direct business activity toward forum state). *Burleson v. Toback*, 391 F. Supp.2d 401 (M.D.N.C. 2005) (defendants did not purposefully target their allegedly defamatory statements at forum). *Bible & Gospel Trust v. Wyman*, 354 F. Supp.2d 1025 (D. Minn. 2005) (allegedly defamatory statements not specifically directed to Minnesota

residents). *Medinah Mining, Inc. v. Amunatequi*, 237 F. Supp.2d 1132 (D. Nev. 2002) (no jurisdiction where allegedly defamatory statements were not expressly aimed at forum state). *Bailey v. Turbine Design, Inc.* 86 F. Supp.2d 790 (W.D. Tenn. 2000) (in a defamation suit, defendants not subject to personal jurisdiction based solely on operation of passive website). *Barrett v. Catacombs Press*, 44 F. Supp.2d 717 (E.D. Pa. 1999) (defendant's posting of allegedly defamatory material on her own passive websites did not justify jurisdiction in the absence of targeting residents of Pennsylvania).

In order to subject Appellant, Scott Roberts ("Roberts") to the jurisdictional power of the state, constitutional due process requires an inquiry into Roberts contacts with Ohio. Those contacts must demonstrate a purposeful act by Roberts expressly aimed at the forum state, whereby Roberts should reasonably anticipate being haled into court in Ohio. *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286 at p. 297, 100 S. Ct. at p. 567; *Bancroft & Masters, Inc. v. Aglsta Nat. Inc.* (9th Cir. 2000), 223 F.3d 1082 at p. 1087. The inquiry and the record in this case suggest that Roberts has no contacts whatsoever with the forum state. There is no evidence that he targeted Ohio residents or even targeted a business whose customers were limited to Ohio. Roberts did not publish the alleged defamatory comments in Ohio and there is no allegation that the brunt of the alleged injury was suffered in Ohio. Roberts committed no act in Ohio such that Roberts should reasonably anticipate being haled into court in Ohio.

CONCLUSION

The United States Supreme Court's constitutionalization of in personam jurisdiction serves to ensure fairness in the system. It prevents a plaintiff from forcing a defendant to litigate in a distant and inconvenient forum. In this case, Roberts posted his alleged tortious comments over the Internet or the World Wide Web. His comments are no more accessible in Ohio than anywhere else. The record before the Court demonstrates that Roberts electronic postings and his contacts with Ohio are too random and unfocused to assert personal jurisdiction. If the decision of the Fifth District Court of Appeals is upheld, every online user will be subject to potential litigation in every jurisdiction where the communication is received. The result would be the evisceration of the constitutionalization of in personam jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of REPLY BRIEF OF APPELLANT SCOTT ROBERTS was served upon the following person, by regular U.S. mail, postage prepaid, this 21st day of January, 2009.

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