IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

LARRY C. JAMES, *et al.*,	:	
	:	
Plaintiff-Appellants,	:	Case No. CA 027735
	:	
v.	:	
	:	
DAVID HOFFMAN, *et al.*,	:	
	:	
Defendant-Appellees.	:	

REPLY BRIEF OF PLAINTIFF-APPELLANTS TO BRIEF OF DEFENDANT-APPELLEE AMERICAN PSYCHOLOGICAL ASSOCIATION

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I. INTRODUCTION

Both American Psychological Association ("APA") and Sidley Austin LLP and David Hoffman (individually "Sidley" or "Hoffman" and together "Sidley") rely primarily on two strategies to oppose this appeal. They pay as little attention as possible to the fact that, in a defamation case, the tort occurs where the publication occurs; APA's Summary of Argument does not mention defamation at all. And, when they do address publication, they construct a theory of purposeful availment that is unfounded in law or common sense. Followed to its logical conclusion, their theory would mean that in this case, where Plaintiffs in several jurisdictions were defamed by a publication distributed into all of those jurisdictions, no state could assert personal jurisdiction on the basis of publication.

Plaintiffs' Complaint for defamation and the factual material submitted below satisfy – for all Plaintiffs – the three-part test established in *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968), as adopted by the Ohio Supreme Court in *Kauffman Racing Equip., L.L.C. v. Roberts,* 126 Ohio St.3d 81, 2010-Ohio-2551. In their brief, APA challenges all three parts of that test. None of APA's arguments carries the day.

II. REPLY ARGUMENTS

A. The U.S. Supreme Court's recent decision in *Bristol-Myers Squibb* supports exercising personal jurisdiction over the non-resident Plaintiffs' claims.

APA mistakenly argues that the non-Ohio plaintiffs (Banks, Behnke, Dunivin, and Newman) cannot establish personal jurisdiction in Ohio under the reasoning of the U.S. Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). By its own terms, the Court's ruling does not apply in defamation cases, like here, where all Plaintiffs were harmed by the publications of the Reports in Ohio. In fact, the Court's analysis supports a finding of personal jurisdiction here.

In *Bristol-Myers Squibb*, a group of plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb ("BMS") in California state court for damages caused by a BMS drug, Plavix. *Id.* at 1777. Applying the "arising from" prong of the minimum contacts test, the Supreme Court held that the non-resident plaintiffs who did not purchase Plavix in California, did not suffer damage in California, and did not receive treatment in California could not sue BMS in California. As the Court succinctly stated, "*all* the conduct giving rise to the nonresidents' claims occurred elsewhere." *Id.* at 1782.

In so holding, however, the Supreme Court specifically recognized that the same analysis would *not* apply to *defamation* claims like those in *Keeton v. Hustler Magazine*, Inc., 465 US. 770 (1984). There, the Court held that New Hampshire had jurisdiction over defamation claims brought by a non-resident arising out of the publication of defamatory articles circulated in New Hampshire by another non-resident. As the Court explained, "[w]e noted [in *Keeton*] that 'false statements of fact harm both the subject of the falsehood and the readers of the statement.'" *Id.* at 1782 (quoting *Keeton* at 776). "This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents." *Id.*

Here, as in *Keeton*, all Plaintiffs suffered harm to their reputations in Ohio from Defendants' publication of the defamatory statements in Ohio – not only once, as in *Keeton,* but on multiple occasions. (Affidavits of Corrigan, ¶4; Platoni, ¶3; Swenson, ¶¶5-6). Not only was the professional reputation of Plaintiff James, an Ohio resident, centered in Ohio, but other Plaintiffs had well-established reputations among Ohio residents that were harmed by the Reports. Plaintiff Behnke previously taught in Ohio (Behnke Aff., ¶3); Plaintiff Newman had

practiced and resided in Ohio (Newman Aff., ¶12); and Plaintiffs Banks and Dunivin were known to Ohio psychologists (Platoni Aff., ¶3).

Thus, the Court may exercise personal jurisdiction for all Plaintiffs, not only James. Even if that were not the case, the non-resident Plaintiffs could be properly joined under Ohio Rul. Civ. Proc. 20(A), as Plaintiffs' claims arise out of one investigation and one allegedly "collusive" joint-venture, or a common nucleus of operative facts.

B. Sidley and Hoffman's conduct in Ohio as APA's agent is attributable to APA for purposes of determining personal jurisdiction.

The U.S. Supreme Court has held that the relationship between client and attorney is a quintessential principal-agent relationship. *Commissioner v. Banks,* 543 U.S. 426, 436 (2005). APA argues, however, that its attorneys' contacts in Ohio should not be imputed to it because they were not its agents and because it did not ratify or "accept" the Hoffman Reports. (APA Brief, pp. 15-19). Those assertions are unfounded.

1. Sidley's engagement with APA created an agency relationship that was not negated because it involved an "independent" investigation.

APA asserts that the otherwise universal agency relationship between lawyers and their clients does not hold when the lawyer is hired to conduct "an independent review" (APA Brief, p. 16). APA's argument incorrectly assumes that this form of independence obliterates all other aspects of its agency relationship with Sidley. It does not. They were engaged by APA, not by an independent committee, and therefore owed a fiduciary duty that is the essence of the agency relationship. APA defined and then refined the scope of their engagement and established a committee of the Board to which Hoffman reported. Moreover, the engagement letter gives APA the right to terminate the engagement "at any time for any reason." (Newman Aff., Exhibit I: Sidley and APA Engagement Letter; Complaint ¶ 187; Report, p. 68).

Thus, APA retained ultimate power over an engagement in which the lawyers were its fiduciaries. As this Court has previously stated, if the "power of control" over the work performed is reserved to the principal, the "mere fact that the principal does not exercise control over his agent, but chooses to leave details of the work to the latter's discretion, does not alter the relations of the parties, or make the agent an independent contractor." *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App.3d 468, 484 (1999) (citations omitted). While the facts of that case involved a car dealership rather than a law firm, the principle remains: the lawyer's exercise of discretion defined by the terms of engagement does not remove the agency relationship.

APA's reliance on *Hanson v. Kyanst*, 24 Ohio St. 3d 171 (1986) is misplaced. That case found no agency relationship between a coach and a lacrosse player because the coach's control was only incidental to an educational opportunity in which the student voluntarily participated. Here, APA's "power of control" over the terms of the engagement was formed by contract and was central to the relationship.

2. APA relied on and benefited from the Hoffman Reports.

Even if the Court were to find that there was not otherwise an agency relationship, Sidley's contacts would still be imputable to APA because APA ratified the Hoffman Reports and, therefore, the conduct of the investigation that produced them, including research in Ohio without which the Reports' narrative could not have taken the form it did.[1]

APA ratified its lawyers' conduct by relying on and benefiting from the Reports.

First, its reliance was most dramatically demonstrated when it fired Dr. Behnke immediately after receiving the initial version of the Report. (Complaint, ¶¶ 34, 150, 250).

[1] APA Board members have admitted the Reports contain "many inaccuracies." APA re-hired Sidley to fix some of them, but it hasn't. Two versions of the Report remain on APA's website without corrections. (Resnick, Aff.; Complaint ¶ 32).

Reliance was further demonstrated by Dr. Kaslow's statements to the media supporting the Report's conclusions. (Complaint, ¶¶ 257-265).

Second, the benefits to APA were equally clear. The investigation was intended to demonstrate that APA was responding forthrightly to allegations that it had colluded with government officials to support torture. That response centered around the Report's defamatory allegations against a few APA officials and former officials, including Plaintiffs Behnke and Newman. As a result, the APA Board was able to claim that any wrongdoing resulted only from acts by what Dr. Kaslow referred to as a "small underbelly"– thus protecting the organization itself and Board members who had been equally involved in the events (Complaint, ¶¶ 258-264; *https://goo.gl/scx8b5*).

APA's Brief also asserts:

- A "client's receipt of a document from its counsel does not constitute 'acceptance' in a legal sense"; that requires "the manifestation of assent." (APA Brief, p. 19). The acts described above clearly manifest assent.
- APA did not formally "receive" the Hoffman Report (APA Brief, p.19, fn. 6). The APA procedure for formally receiving a report applies, however, only to reports from a "component or affiliate of APA" that are scientific in nature ("reports shall reflect the most appropriate and relevant scientific data"). (https://goo.gl/cVpqn7).

3. Sidley and Hoffman's contacts with Ohio may be imputed to APA.

When an agency relationship exists, or when the principal later ratifies the conduct of an agent, the attorney-agent's contacts with a jurisdiction may be imputed to its client to find specific jurisdiction. *See Daynard v. Ness, Motley, Loadholt, Richardson, & Pool, P.A.,* 290 F.3d 42, 55 (1st Cir. 2002); *Beavers v. Riley Built, Inc. Beavers v. Riley Built, Inc.,* Civil Action

No. 3:14-cv-539-DJH, 2017 WL 5633258 *19 (W.D. Ky., Nov. 21, 2017) (collecting cases); *Genesis Ins. Co. v. Alfi*, 425 F.Supp. 2d 876, 887 (S.D. Ohio 2006) (collecting cases).

The contrary case cited by APA is not applicable. *Haar v. Amendaris Corp.*, 31 N.Y.2d 1040, 294 N.E. 2d 855 (N.Y. App. Div. 1973) involved specific personal jurisdiction over an attorney-agent's conduct on behalf of a principal-client. The appellate opinion cited by APA adopts in whole the dissent in the court below. That dissent states:

> This is not an action between defendant and a third party, but rather between plaintiff as agent for defendant and defendant principal. ***In the former situation I would not hesitate to find jurisdiction***, but I conclude differently under the facts of this case."

Haar v. Armendaris Corp., 40 AD 2d 769, 769 (N.Y. App. Div. 1972) (emphasis added).

Appellees have made a prima facie case that an agency relationship existed between APA and Sidley, and Sidley's contacts in Ohio should be imputed to APA.

C. APA purposefully availed itself of Ohio.

APA's principal argument for why it should not be deemed to have purposefully availed itself of Ohio is that it did not "intentionally target" Ohio by publishing to "an Ohio-specific audience" when it made the Reports available to everyone on its website and tweeted a link to the Reports to its Twitter followers, including those in Ohio. (APA Brief, p. 11). Nothing in the governing case law, however, requires that "APA intended the Report for Ohio readers specifically, as distinguished from readers in other states." *Id.* In fact, the opposite is true.

As more fully discussed in Plaintiffs' Sidley Reply at pp. 3-5, the defamations at issue in *Calder* and *Keeton* were contained in *national* publications, and neither was published for readers in the forum states *specifically* as distinguished from readers in other states. Likewise, the defamation at issue in *Kauffman Racing* was posted on the internet, "ostensibly for the entire world to see." 12 Ohio St.3d 81, ¶42. Rather, the dispositive factor in all these cases is that the defendant purposefully published a defamatory statement into the forum state intentionally

directed at a resident in the forum state, where the brunt of the injury would be felt. (Plaintiffs' Opening Brief, pp. 10-12, discussing *Calder*, *Keeton*, and *Kaufman Racing*).

None of the cases relied upon by APA are to the contrary, and all are distinguishable. *Walden v. Fiore,* 134 S. Ct. 1115 (2014), and *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994) are discussed in Plaintiffs' Sidley Reply, p. 4 & 7. In the interest of efficiency, we rely on that discussion.[2] In short, there is no legal basis for APA's assertion that it can avoid litigating in Ohio simply because it made the Reports generally available outside of Ohio.

Moreover, APA's argument would have this Court ignore that its conduct was directed at the forum and its residents to a greater degree than the defendants in *Calder*, *Keeton*, and *Kauffman Racing*. As detailed in Plaintiffs' Opening Brief at pp. 6-7: (1) APA sent emails and letters to witnesses, including at least three witnesses in Ohio, urging their cooperation with Hoffman and his investigation;[3] (2) the Report was published twice to APA's Board, which included two members who were Ohio residents; (3) APA affirmatively "tweeted" the Report, directly reaching approximately 1,392 active followers in Ohio; and (4) APA's membership in Ohio received email notice from APA that the Report was available online. In short, APA did far more than posting the Reports on its website for all the world to see.

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[2] In the two other defamation cases cited by the APA, *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010), and *Cadle v. Schlichtmann*, 123 Fed App. 675, 679 (6th Cir. 2005), the defendants did not publish the alleged defamation into the forum state, and unlike here, none of the defendants relied on forum sources.

[3] APA contends that these contacts with Ohio do not count because similar emails and letters were also sent to other potential interviewees outside of Ohio. APA Brief, p. 14 (citing *Walden*). Again, there is no legal authority that purposeful and affirmative contacts with a forum state do not count simply because defendant had similar contacts with persons in other states, and certainly *Walden* says no such thing.

D. Plaintiffs' claims arise out of APA's contacts with Ohio, including publishing the Reports in Ohio and other actions in Ohio.

APA mistakenly contends that Plaintiffs have failed to satisfy the "arising from" element of *Southern Machine*, arguing that APA's contacts with Ohio have nothing to do with any of the defamatory statements contained in the Reports. In so arguing, APA would have this Court ignore the obvious: Plaintiffs' defamation claims arise out of the publication of the Reports in Ohio. *See Fallang v. Hickey*, 40 Ohio St.3d 106, 107 (1988) ("The tort of libel occurs in the locale where the offending material is circulated (published) by the defendant to a third party."). By publishing the Reports in Ohio, APA committed defamation in Ohio, and this activity alone fulfills the "arising from" test.

Even if that were not the case, Plaintiffs' claims also arise from APA's other conduct in Ohio, including its explicit authorization for and support of Hoffman's investigation. Moreover, Sidley's conduct in Ohio as APA's agent is attributable to APA for purposes of the "arising from" test.

Nothing in *Bristol-Myers Squibb* holds to the contrary. In that case, the Court pointed out that there was no claim that Plavix, the BMS product at issue, was designed or developed in California. *Bristol-Myers Squibb, supra,* at 1781. Here, the offending product, the Report, was in part "designed and developed" – as those terms apply to an investigatory report – in Ohio through the activities of APA and its agents Sidley in Ohio. Hoffman interviewed seven Ohio residents (including a then-member of the APA Board), at least two of them in Ohio, and searched the home computer of former APA president Dr. Levant. The Ohio interviews (especially those of James, Levant, and a principal critic of Plaintiffs, Dr. Bond) were key to the Reports' narrative of collusion – a narrative that included activities undertaken by APA officials in Ohio. (Plaintiff's Opening Brief, pp. 15-16; Report, p. 12; Complaint ¶¶ 6, 44, 86). Hoffman's

work in Ohio was facilitated by APA's leadership, who, among other actions, sent emails and letters into Ohio urging the Ohio witnesses cooperate with his investigation. (Plaintiffs' Opening Brief, pp. 17-18).

Simply put, the Reports were a product of the Defendants' activities in Ohio.

E. APA has not shown and cannot show that litigating in Ohio is unreasonable.

APA argues that exercising personal jurisdiction over APA in Ohio would be unreasonable, an argument not joined by its co-defendants. Where the first two elements of the *Southern Machine* test are satisfied, a strong inference arises that the third element is also established. (Plaintiff's Opening Brief, p. 20; cases cited therein). In fact, APA must present a "compelling case" that this is the "unusual case" where the exercise of jurisdiction would be unfair or unreasonable. *Id.* It has utterly failed to do so.

APA has presented no actual evidence that litigating this case in Ohio will create any undue or substantial burden on it. While it is located in DC, it is a national organization with over 117,500 members across the United States and an Ohio affiliate. (Complaint, ¶47). APA is a well-heeled and sophisticated entity fully capable of defending itself in Ohio, where it is registered as a charity to solicit business. (Newman Aff., Exhibit K).

Nor is there any basis to conclude that litigating in Ohio will be more inconvenient, costly, and inefficient than any other forum. Plaintiffs reside in Ohio, North Carolina, California, and DC. (Complaint, ¶¶38-42). Defendants Hoffman and Sidley are from Illinois. (Complaint, ¶45-46). The witnesses are scattered around the country. Thus, any forum will be "inconvenient" to most parties and witnesses.

Finally, the fact that Plaintiffs filed an identical lawsuit in DC in response to the trial court's dismissal has no bearing on the reasonableness test. Plaintiffs filed the DC action to protect their rights, after APA and Sidley informed the Trial Court that DC was a "superior"

forum. Defendants have now moved to dismiss in DC, leaving Plaintiffs no choice but to pursue both actions. More to the point, the test is not whether DC is itself a "reasonable" forum, but whether litigating in Ohio results in a "high degree of unfairness." *Calder*, *supra,* at 788-89. APA has not satisfied that test.

III. CONCLUSION

For the foregoing reasons, and those set forth in Plaintiff-Appellants' Opening Brief, the order of the Trial Court granting the Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction should be reversed.

Respectfully submitted,

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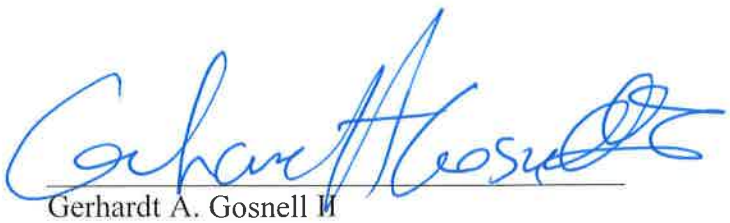

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