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-APPELLEES SIDLEY AUSTIN AND DAVID HOFFMAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

At the core of Defendants Sidley Austin LLP and David Hoffman's (individually, "Hoffman" and jointly with Sidley, "Sidley") Brief are two strategies also adopted by Defendant American Psychological Association ("APA"). First, they minimize the fact that this is a case for defamation, which occurs wherever the defamatory statements are published, read, and cause harm to a plaintiff's reputation. Sidley's Summary of Argument refers to defamation only near its end; APA's Summary of Argument not at all. Instead, Defendants emphasize other types of contacts with a jurisdiction that are most relevant in non-defamation cases.

Second, when Defendants do address publication, they cherry pick language from cases whose facts differ critically from the present facts. Following Defendants' arguments to their logical conclusion, no state could assert personal jurisdiction on the basis of publication that harmed its citizens where like here plaintiffs in several jurisdictions were defamed by a publication distributed into all of those jurisdictions.

Plaintiffs' Complaint for defamation and the factual material submitted below satisfy 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, Sidley challenges Plaintiffs' contentions regarding only the first and second prongs of the *Southern Machine* test: the purposeful availment and "arising from" tests. As demonstrated below, those tests are met both by the nature of the defamation's publication into Ohio and by Defendants' ample other

activities in the state, including in-person interviews of sources without which they could not have constructed the false and defamatory narrative the Reports assert.[1]

II. REPLY ARGUMENTS

A. Sidley published the Reports in Ohio.

Sidley states that because it "merely sent" the Report to the Board of Directors of its Washington, D.C.-based client, APA, it did not publish the Report into Ohio. Sidley Brief, pp. 14-15. That argument is incorrect for two reasons.

First, in publishing the Report to the APA Board and Special Committee twice (the second time after it knew James, an Ohio resident, had denied its assertions), Sidley published to the two Board members who were Ohio residents. (Complaint, ¶¶ 2 n.2, 59, 245, 247, 295, 337; Newman Aff., ¶17; Ex. J). A corporation acts only through its Board, agents or employees. *United States v. Park*, 421 US 658, 668 (1975). Thus, viewing the allegations in the pleadings and the evidence presented in the light most favorable to plaintiffs and making all reasonable inferences in their favor, the Court must conclude that Sidley did publish the Reports into Ohio *when* it published the Reports to the APA Board. A single purposeful act of publishing into Ohio is sufficient for personal jurisdiction. *Fallang v. Hickey*, 40 Ohio St.3d 106, 108 (Ohio 1988).

Second, even if Sidley had not directly circulated the Reports into Ohio would not defeat purposeful availment. The very same argument was expressly rejected by the U.S. Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, the defendants claimed that they, unlike their employer the *National Enquirer*, were not responsible for circulating the defamatory article in California. *Id.* at 789. As the Court explained, the defendants "edited an article that they knew would have a potentially devastating impact" on the plaintiff and "knew that the brunt of

[1] When the court below dismissed Plaintiffs' case, they sued in Washington, D.C., which Defendants said was a "superior" jurisdiction. (Transcript below, p. 12). Because Defendants have moved to dismiss the D.C. action, Plaintiffs must maintain both cases to protect their rights.

that injury would be felt by respondent in the state in which she lives and works." *Id.* at 789-90. Defendants "were primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790.

Here, as in *Calder*, Sidley was a primary participant in defamation directed at Ohio residents, including Plaintiff Larry James and non-plaintiff Dr. Ron Levant – both psychologists licensed by the state of Ohio. Sidley knew the Report would be widely published in Ohio. Its engagement letter specified the Report would be made public, and it was not only foreseeable but certain that the Report would receive wide media attention. In fact, it was published on the website of *The New York Times*, which reached approximately 34,993 readers in Ohio. (*See* AAM Aff.).

B. The Reports did not need to focus solely on Plaintiffs' Ohio activities to satisfy the purposeful availment test.

Sidley contends that "establishing purposeful availment based on the publication of defamatory statements *requires* that the statements concern the plaintiff's relevant activities in the forum," which, according to them, the Reports did not do. (Sidley Brief, p. 16). Again, Sidley is wrong. Although the alleged defamation in *Kaufmann* concerned plaintiff's activities in the forum state, nothing in that case or any U.S. Supreme Court or Ohio Supreme Court case holds that this factor is dispositive.

To the contrary, in *Keeton v. Jones*, 465 U.S. 783 (1984) (decided the same day as *Calder*), the U.S. Supreme Court made it clear that it is not. In *Keeton*, a *non-resident* plaintiff (Keeton) sued a non-resident defendant (*Hustler Magazine*) for defamation in New Hampshire. *Id.* at 772. The defamation did not involve any of Keeton's activities in New Hampshire. Nonetheless, personal jurisdiction was still proper in New Hampshire because the tort occurs *wherever* the defamation is *published. See Keeton*, at 777. Thus, in *Keeton*, the tort was actually

committed by *Hustler in* New Hampshire, even though only a small portion of *Hustler*'s total circulation was in the state. *Id.* at 775; *see also*, *Fallang*, 40 Ohio St.3d at 108 (because "[t]he tort of libel occurs in the locale where the offending material is circulated (published) by the defendant to a third party.").

This principle – the tort of defamation occurs wherever the publication occurs – has been repeatedly reaffirmed by both the United States and Ohio Supreme Courts, including in *Walden v. Fiore,* 134 S. Ct. 1115 (2014), another case on which Sidley mistakenly relies. In *Walden*, the defendant, a DEA agent working in Georgia, was sued in Nevada for illegally seizing cash from the plaintiffs when they passed through the Atlanta airport on their way home to Nevada. *Id.* at 119-20. Significantly, and unlike here, no part of the defendant's conduct occurred in the forum state. *Id.* at 1124.

Not surprisingly, the U.S. Supreme Court unanimously ruled that Nevada could not exert personal jurisdiction over the defendant because "mere injury to a forum resident is not a sufficient connection to the forum." *Id.* As the Court expressly noted, however, the claims brought in *Walden* were materially different from the defamation claims at issue in *Calder*: "the crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff." *Id.* at 1123-24. Indeed "because publication to third parties is a necessary element of libel, the defendants' intentional tort actually occurred *in* California." *Id.* at 1124 (emphasis in the original). "In this way, the 'effects' caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to California, not just to a plaintiff who lived there." *Id. Accord, Kauffman* at ¶¶ 41-44.

This distinction is equally applicable here, and completely undercuts the central and mistaken theme of Sidley's arguments. Unlike in *Walden*, Plaintiffs here are *not* asserting personal jurisdiction over Defendants merely because an Ohio resident was harmed by the Defendants' out-of-state conduct. Rather, by publishing the Reports *in* Ohio, the Defendants committed the tort of defamation *in* Ohio causing reputational harm to each of the Plaintiffs *in* Ohio and to the residents of Ohio. Under *Kauffman*, *Calder*, and *Keeton*, these facts establish purposeful availment in Ohio.

To avoid this conclusion, Defendants attempt to mischaracterize the so-called "focal point" or "targeting" concept. Sidley asserts that "a plaintiff must establish that defendants' activities intentionally targeted the forum state such that the defendants intended the state be the focal point of the publication and the focal point of the alleged harm to the plaintiff ...." (Sidley Brief, p. 15). APA goes further, asserting that Plaintiffs must "show that APA intended the Report for Ohio readers specifically, as distinguished from readers in other states." (APA Brief, p. 11). Both assertions misstate the guidance that should be drawn from U.S. and Ohio Supreme Court precedent discussed above.

As courts and commentators have recognized, the case law regarding "targeted" publication in defamation cases, especially cases that involve electronic distribution of the defamatory statements, "goes in all directions." *Baldwin v. Fischer-Smith*, 315 S.W.3d 389, 394, 397 (Mo. Ct. App. 2010). That lack of clarity results from the disparate facts in the cases, none of which are analogous to the facts of this case. The question of purposeful availment cannot be settled by cherry-picking or paraphrasing propositions from cases whose holdings arose from their particular facts.

According to the Ohio Supreme Court as stated in *Fallang* and refined in *Kauffman*, and supported by U.S. Supreme Court holdings, publication constitutes purposeful availment when the following factors are present:[2]

1. The Reports were published into Ohio by Sidley (to APA Board members resident in Ohio) and APA, which tweeted links to the Reports to its members, including 2800 in Ohio. The Ohio Psychological Association, an APA affiliate, further circulated the Report and encouraged its members to read it. (Behnke, James, Newman Affidavits). Sidley knew that the Reports would be published to APA members.

2. The Reports were read by many Ohio residents. Consequently, they damaged the reputations of James and other Plaintiffs with Ohio connections in concrete ways. (Behnke, Corrigan, Newman, Platoni, and Swenson Affidavits). As one example, Steven Fought, then a candidate for John Boehner's Ohio congressional seat, tweeted: "Two key players involved in the @apa-CIA/DoD torture scheme were Ohioans: Larry James @wrightstate and Ron Levant @uakron." (Newman Aff.; Exhibits E-G). As another example, James' dean forwarded the Report to Wright State University officials, including the University's attorney. (James Aff.).

3. The defamatory Reports drew on seven interviews with Ohio residents, including a then-current APA Board member (Dr. Shullman). Hoffman conducted at least two interviews in Ohio (with James and Dr. Ron Levant) and arranged for Dr. Levant's computer to be searched in Ohio for APA documents he created in Ohio, allegedly in furtherance of the "collusive" joint enterprise. (Report, p. 7). James and Levant, along with Dr. Trudy Bond, another Ohio resident Hoffman interviewed, were critical to the narrative he constructed, not merely incidental witnesses.

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[2] For efficiency, we cite factors relevant to all Defendants and will incorporate this material by reference into our Reply to APA's Brief.

4. The allegedly collusive acts described in the Reports, which span 10 years, include acts by APA officials who were Ohio-licensed psychologists and residents at the time of the acts. Those acts included voting on key issues described in the Reports as well as other communications taken in furtherance of the alleged joint enterprise (Report, pp. 313-317; Behnke Aff., Exhibits A and B).

The other cases cited by Sidley (Sidley Brief, pp. 16-18) do not compel a different result. In addition to being non-binding on this Court, they are all readily distinguishable. None of the defendants in those cases published the alleged defamation into the forum state and, unlike here, none of the defendants relied on sources from the forum state in furtherance of their defamation.[3]

Sidley's extensive reliance on *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), is particularly misplaced. In *Reynolds*, the plaintiff, an Olympic gold-medal-winning track star from Ohio, brought the action against the International Amateur Athletic Federation ("IAAF") for publishing a press release in London, England, announcing that Reynolds had tested positive for banned substances following a track meet in Monte Carlo. Like the plaintiffs in *Walden*, Reynolds effectively asserted personal jurisdiction against the nonresident defendant, IAAF, solely because it could reasonably foresee that its statements would be disseminated in Ohio and that the brunt of Reynolds' injury would occur in Ohio. *Id.* at

[3] *See Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010) (defendant did not purposefully avail himself of Texas where his allegedly libelous statements were not made in, or directed to, residents of Texas and did not rely on sources in Texas); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2010) (Texas did not have personal jurisdiction over a non-resident defendant based upon alleged defamation contained in an article posted on a passive internet bulletin board hosted by Columbia University in New York that did not draw on any Texas sources); *Cadle v. Schlichtmann*, 123 Fed App 675, 679 (6th Cir. 2005) (Ohio did not have personal jurisdiction over defendant who merely posted alleged defamation on out-of-state website, with no evidence that an Ohio resident had used the site).

1120. The Sixth Circuit easily distinguished the relevant jurisdictional facts from those in *Calder*, including:

- Reynolds was an international athlete, whose professional reputation was not centered in Ohio.
- The report of his test results did not emanate from Ohio: the sample was taken in Monaco, analyzed in France, and confirmed by arbitration in Germany.
- The defendant distributed its press release in London, England, not in Ohio; third-party Ohio periodicals disseminated the defamatory statements.
- The release concerned events that all occurred in Monaco. [*Id.* at 1120.]

Here, of course, the facts are materially more like those in *Calder* than *Reynolds*. Plaintiff James' professional reputation is centered in Ohio, and other Plaintiffs have connections to Ohio that created reputations in the state that have been damaged by the Reports (Affidavits of Corrigan ¶4; Platoni ¶3; Swenson ¶6). Finally, Sidley distributed the Reports in Ohio and knew that James, and others named, would suffer harm in Ohio.

C. Sidley's other activities in Ohio in preparation of the Report also establish purposeful availment.

Even if Defendants' publication of the Reports into Ohio were not sufficient alone to confer jurisdiction, their other activities in Ohio would be: specifically, the in-person and other interviews and the computer search described above. Sidley contends that these interviews should not count because they resulted from the interviewees' decision to reside in Ohio, not from its deliberate action to engage with the state. (Sidley Brief, p 11).

In so arguing, Sidley cites no case involving defamation, let alone defamation arising out of a report that was a product of interviews conducted in the forum with its residents.[4] The cases

[4] *See Calphalon v. Rowlette*, 228 F3d 718, 722 (6th Cir. 2000) (declaratory judgment concerning contractual rights; non-resident's telephone, fax, and two visits to plaintiff's Ohio office); *Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 650 (6th Cir. 2016) (defendants set forth ethical standards necessary for an institution, including Catholic-affiliated hospitals in Michigan, to call itself "Catholic"); *Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418, 420 (11th Cir. 1986) (breach of employment contract; advertisement offering employment opportunities

it does cite have no relevance here, where the interviews are directly related to the Reports' defamatory content, *infra*, and where Defendants entered the state through emails and phone calls and physically, on multiple occasions.

Likewise, Sidley's argument (without factual support) that the information obtained from these interviews could have been otherwise obtained without entering Ohio, merely proves the point: Hoffman made the deliberate choice to enter Ohio. In fact, Hoffman stated that he wanted to meet with James in person and proposed times to meet in Dayton. (James Aff., ¶4 & Ex. A). In sum, Sidley purposefully availed itself of Ohio.

D. Plaintiffs' claims arise out of Sidley's activities in Ohio.

The second requirement of the *Southern Machine* test "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only that the causes of action, of whatever type, *have a substantial connection with* the defendant's instate activities." *Kauffman Racing*, *supra*, at ¶ 70 (internal quotation and citations omitted) (emphasis added). Further, a "lenient standard … applies when evaluating the 'arising from' criterion." *Id.* (internal quotation and citations omitted).

First, Sidley does not and cannot dispute that Plaintiffs' defamation claims are substantially connected to Sidley's publication of the Reports into Ohio. Instead, it merely repeats its contention that APA, not Sidley, published the Reports. (Sidley Brief, p. 21). Given that Sidley did publish the Reports into Ohio, *see supra*, this activity alone supports the "arising from" test.

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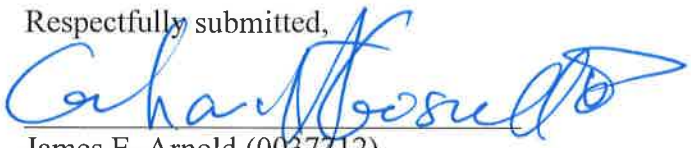
out of state and sending an agent to interview plaintiff); *Novak v. NanoLogix, Inc.*, N.D. Cal. No. 5:13-CV-01971, 2014 WL 991119, at *4 (March 11, 2014) (breach of contract action; conduct of a third party to introduce plaintiff to CEO of non-resident defendant; no evidence CEO sought out the meeting or solicited plaintiff); *Pace v. Platt*, N.D. Fla. No. 3:01-CV-471, 2002 WL 32098709 (Sept. 10, 2002) (various constitutional torts; in dicta, interviewing three third-party witnesses in Florida as part of a criminal investigation of plaintiff, an Ohio resident).

Second, Plaintiffs' defamation claims are also substantially connected to Sidley's other activities in Ohio. Hoffman could not have created his over-arching narrative of "collusion," or claimed that it was based on a thorough investigation, but for the interviews of key witnesses in Ohio. (Complaint, ¶¶ 2 FN 2, 240, 295, 296, 316, 337, 359, 380, 399, 419, 439, 456, 477, 503, 505, 524). In fact, Hoffman stated that James in particular was "critical" for a thorough review. (James Aff., Ex. A). Likewise, Hoffman relied on his interview of Dr. Bond, an Ohio psychologist who had repeatedly attacked James in Ohio, to construct his narrative. Hoffman cites her 47 times, more than all but one of Plaintiffs' other accusers. He fails, however, to disclose that her complaint against Dr. James in Ohio was found meritless by Ohio authorities. (Report, pp. 494, 497, 498, 501-504, 520; James Aff.).

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 Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction should be reversed.

Respectfully submitted,



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