

ERIC WALKER v. APRIL A. ADAMS and others [\[Note 1\]](#)

2016 Mass. App. Div. 143

September 16, 2016 - November 29, 2016

Appellate Division Northern District

Court Below: District Court, Marlboro Division

Present: Coven, P.J., Nestor & Flynn, JJ.

George E. Bourguignon, Jr., for the plaintiff.

No briefs filed for the defendants.

COVEN, P.J. This case is before this Division in a procedurally awkward position on the issue of personal jurisdiction. Initially, based upon the pleadings alone, a judge determined that the plaintiff's complaint established personal jurisdiction over the defendants. [\[Note 2\]](#) Later, the plaintiff, himself, raised the issue of personal jurisdiction, before the same judge, at an evidentiary hearing on his motion for final judgment and assessment of damages against April A. Adams ("Adams"), James Louis Ortiz ("Ortiz"), and Kirk Webb ("Webb"). In that motion, the plaintiff requested that the court find personal jurisdiction, at a time when all defendants were either defaulted or dismissed from the case. [\[Note 3\]](#) The judge determined that there did not exist personal jurisdiction over Adams, Ortiz, and Webb, and dismissed the claims against these individuals. The judge also, sua sponte, dismissed the claim against Kenneth Dale Shane Bertram ("Bertram"), who had already been defaulted for failing to appear.

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In the interest of justice and in our discretion, we vacate the order of dismissal and return for further findings based on what we determine is the proper standard to determine the issue of personal jurisdiction. [\[Note 4\]](#)

A court of the Commonwealth may exercise personal jurisdiction over a nonresident defendant if the defendant's conduct falls within the limits of the Massachusetts long-arm statute, G.L. c. 223A, § 3(a)-(h). In addition, the exercise of personal jurisdiction must comply with the due process requirements of the United States Constitution. See *Good Hope Indus., Inc. v. Ryder Scott Co.*, [378 Mass. 1](#), 5-6 (1979). Pursuant to G.L. c. 223A, § 3(c):

"A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . (c) causing tortious injury by an act or omission in this commonwealth"

In ruling that no personal jurisdiction existed, the judge specifically demurred on the issue of whether there occurred any defamation. [\[Note 5\]](#) Rather, the motion judge adopted the test articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (*Zippo*), and concluded that there did not exist personal jurisdiction.

In *Zippo*, the Federal court held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* at 1124. The

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court then articulated a "sliding scale" to measure a Web site's contacts with a forum state:

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

Id.

The fault with this interactive/passive application is that it does not account for the theory advanced by the plaintiff: defamatory acts by defendants who knew the plaintiff was a Massachusetts resident and who targeted the plaintiff to injure his reputation. The tortious acts (if existing) may occur here in Massachusetts much like the classic example of an injury occurring in Massachusetts by a person standing across the border, shooting into Massachusetts at a specific individual, and striking and injuring that person. It is not the activity of *Zippo* that is at issue. Rather, the focus is on whether and how the plaintiff was targeted and injured.

In *Calder v. Jones*, 465 U.S. 783 (1984), the Supreme Court adopted an effects test for determining the due process requirement of purposeful availment in the context of defamation cases such that a defendant could expect to be sued in a foreign jurisdiction. *Calder* involved a Florida reporter and editor, employed by the *National Enquirer*, who wrote and edited a libelous article about California entertainer Shirley Jones. *Id.* The Supreme Court held that California jurisdiction properly could be asserted over the reporter and editor. The Court based its determination on the focus that the defendants had intended an act to occur at the forum state, were aware their act would likely have a devastating effect, and knew the injury would be felt in

California, where Jones lived and worked "and in which the National Enquirer had its largest circulation." Id. at 790. At its basic level, the Calder Court found that the intentional conduct was "calculated to cause injury to respondent in California." Id. at 791. [\[Note 6\]](#)

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Calder is useful in the context of the Internet when, in reality, at the instant a defamatory message is posted, it is generally available globally. Courts considering the issue of personal jurisdiction as extended to defamatory Internet communication have applied variants of the Calder effects test. As outlined in one treatise:

"In an effort to make the effects test manageable as thus extended, some courts have adopted a one-size-fits-all version of the test to attempt to provide guidance to lower courts that would make their handling of such cases easier and would also prevent plaintiffs from allowing Calder effects logic to swallow up other important Court messages such as the World-Wide [Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)] principle that foreseeability of harmful effects is not alone sufficient to support jurisdiction. . . .

"The largest number of courts have treated internet defamation like other defamation situations and have tried to determine where the harm was intended to be felt."

R.C. Casad, W.M. Richman & S.E. Cox, Jurisdiction in Civil Actions § 8.03[3][e], at 239 (4th ed. 2015).

The logic of this jurisdictional approach is compelling. Personal jurisdiction is tied to where harm was actually targeted. It would be more difficult for a court to allow jurisdiction simply based on where a plaintiff lives or works based on the assumption that the acts would damage the plaintiff's general reputation. Nor is it possible to base jurisdiction simply on where the Web server is located. "The jurisdictional focus should be about what was posted and where it was aimed." Id.

In this case, the focus was on Zippo principles unsuitable to this case. We conclude that for personal jurisdiction to be supported based upon a defamatory Internet communication originating outside of Massachusetts, for the defamatory act to be considered as having occurred in Massachusetts for the purposes of G.L. c. 223A, § 3(c), the court must find that the Massachusetts resident harmed was specifically targeted, the publisher knew that such person lived in Massachusetts, and the defendant intended to harm that individual's reputation in Massachusetts. We return this case for further hearing consistent with this decision. The dismissal against Bertram is vacated; he shall remain in default. [\[Note 7\]](#)

So ordered.

FOOTNOTES

[\[Note 1\]](#) Melba Newman Adams, Kenneth Dale Shane Bertram, Sam Crane, Jennifer Marie Easter, James Louis Ortiz, and Kirk Webb.

[\[Note 2\]](#) The docket indicates that Jennifer Marie Easter (Ohio), James Louis Ortiz (Texas), and Kirk Webb (Texas) by motion challenged the issue of personal jurisdiction. April A. Adams (South Carolina) filed a motion to dismiss, but it does not appear personal jurisdiction, at least according to the docket sheet, was raised as an issue. The motions that were filed are not part of the record.

[\[Note 3\]](#) The evidentiary hearing occurred on July 22, 2015. Prior to the hearing, the plaintiff dismissed his claims against Jennifer Marie Easter and Melba Newman Adams (Florida). Plaintiff also stated prior to the hearing that Sam Crane was "never found," from which it can be inferred that he was never served, and the docket does not indicate a return of service against Sam Crane. Kenneth Dale Shane Bertram (Mississippi) had been defaulted on November 25, 2014. A motion for entry of judgment had been allowed against April A. Adams, James Louis Ortiz, and Kirk Webb on March 27, 2015, for failing to answer interrogatories.

[\[Note 4\]](#) Apart from the plaintiff, himself, reintroducing the issue of personal jurisdiction that appears to have been resolved in his favor early in these proceedings, we make no judgment on whether the issue was waived. *American Int'l Ins. Co. v. Robert Seuffer GmbH & Co. KG*, [468 Mass. 109](#) (2014). Generally, "[b]y filing a special appearance in the . . . action to challenge the jurisdiction of the court over his person, [a person has] subjected himself to the court's jurisdiction . . . and [i]s bound by the judge's implied determination that the court had jurisdiction." *Smith v. Arnold*, [4 Mass. App. Ct. 614](#) , 616 (1976). See *Madden v. Madden*, [359 Mass. 356](#) , 362 (1971) (court's ruling that it has personal jurisdiction is binding "unless set aside on appeal or other direct attack"). Bertram never appeared and is not foreclosed from challenging jurisdiction if suit on the judgment is brought in his home forum of Mississippi. "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge the judgment on jurisdictional grounds in a collateral proceeding." *Bassett v. Blanchard*, [406 Mass. 88](#) , 90-91 (1989), quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

[\[Note 5\]](#) There was evidence presented at the evidentiary hearing that the plaintiff was referred to as a pedophile. Imputation of a crime is defamatory per se, in that it requires no proof of special damage. *Lynch v. Lyons*, [303 Mass. 116](#) , 118-119 (1939). The statement must be communicated to at least one person other than the plaintiff to satisfy the publication requirement. *Brauer v. Globe Newspaper Co.*, [351 Mass. 53](#) , 56 (1966). The motion judge's findings do not address this requirement.

[\[Note 6\]](#) In *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Supreme Court affirmed *Calder* by stating that reputation-based effects of alleged defamatory conduct, which are felt in the forum state, meet the minimum contacts requirement of due process. Justice Thomas, in writing for the Court, also expressly declined to confront the question of personal jurisdiction in Internet defamation cases. *Id.* at 1125 n.9.

[\[Note 7\]](#) See note 4, *supra*.