

SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)	
PPG INDUSTRIES, INC.,)	
)	No. SC97006
Relator,)	
)	Missouri Court of Appeals,
v.)	Eastern District No. ED106348
)	
THE HONORABLE MAURA B.)	
McSHANE CIRCUIT JUDGE, CIRCUIT)	Circuit Court of St. Louis County
COURT OF ST. LOUIS COUNTY,)	No. 17SL-CC04092
MISSOURI,)	
)	Division 2
Respondent.)	

RELATOR’S REPLY BRIEF

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**ATTORNEYS FOR RELATOR PPG
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INTRODUCTION

Respondent's Brief continually maintains that PPG Industries, Inc. ("PPG") somehow mischaracterized the nature of this lawsuit by stating that Plaintiff Hilboldt Curtainwall, Inc.'s ("Plaintiff") cause of action arises from the mere posting of information on a website. Yet, Plaintiff's cause of action stems entirely from PPG's posting of information to a website. The mere posting of information to a website is not conduct that can make a defendant subject to jurisdiction under the Missouri long-arm statute. Plaintiff attempts to advance its argument by citing to a "myriad of contacts between PPG and the State of Missouri to establish that PPG has sufficient minimum contacts" to support personal jurisdiction. All of these contacts, however, are unrelated to the underlying lawsuit.

The facts of this case are simple. Plaintiff does not allege it was PPG's customer. Plaintiff does not allege that it ever had a business relationship with PPG on the subject project. Plaintiff did not seek out PPG for a business relationship, and PPG did not seek out Plaintiff for a business relationship. Plaintiff is not PPG's customer with respect to the subject project. PPG did not ship its product to Plaintiff or Finishing Dynamics, LLC ("FD") in Missouri. Instead, PPG shipped its product to FD in Georgia. The only connect that Plaintiff and PPG have with respect to the facts in this case is that Plaintiff typed PPG's web address into its browser and read text on PPG's website. In sum, PPG has no connection to the state of Missouri vis-à-vis this case and PPG has no relationship with Plaintiff vis-à-vis this case.

Respondent's Brief cites to a number of cases that have drastically different fact patterns than the instant case. Plaintiff's entire argument in favor of personal jurisdiction over PPG rests on PPG's mere posting of information to its website. In *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010), which applied Missouri law and adopted the analysis in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) a court cannot base specific personal jurisdiction over the mere posting of information to a website. Further, there is no connection between Plaintiff's claim and PPG's connections with Missouri. PPG is a company incorporated and headquartered in Pennsylvania. It has no contractual relationship with Plaintiff and it did not ship any product to Plaintiff in Missouri. Respondent's exercise of specific personal jurisdiction over PPG thus fails to satisfy due process requirements.

The trial court erroneously asserted personal jurisdiction over PPG and this assertion was plain error. PPG requests that this Court issue a permanent writ to Respondent, prohibiting the trial court from exercising personal jurisdiction over PPG.

ARGUMENT

- I. Relator PPG is entitled to an order prohibiting Respondent from exercising personal jurisdiction over it because Missouri Courts lack specific jurisdiction over corporate defendants not domiciled in Missouri where, as here, the plaintiff's cause of action against the foreign defendant does not arise from or relate to any of the defendant's in-state activities.**
- A. The trial court erred when it exercised personal jurisdiction over PPG because PPG's maintenance of a website accessible in Missouri does not satisfy the Missouri long-arm statute.**

Plaintiff's only alleged basis for satisfying the Missouri long-arm statute is that PPG committed a tort within the State of Missouri by making a statement on its website, which was accessible in Missouri. *See* Petition ¶ 20 (A039) ("PPG made these representations in the course of PPG's business and through its marketing materials including, but not limited to, its website."). Respondent argues that the trial court's exercise of personal jurisdiction was proper because under *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227 (Mo. 2010), PPG's "extraterritorial acts" had consequences in Missouri, thus satisfying the Missouri long-arm statute.

Respondent's Brief heavily relies on *Bryant*, but this reliance is misplaced because *Bryant* did not involve the posting of information to a website. *Id.* Moreover, Missouri courts have previously held that the requirements of the Missouri long-arm statute were not satisfied merely because the plaintiff read an advertisement that was sent by a defendant to a plaintiff in the state of Missouri. *See Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d 346, 351 (Mo. App. E.D. 1983).

Furthermore, the facts of *Bryant* are distinguishable from the instant case because *Bryant* involved more than “unilateral activity” as the basis for personal jurisdiction. *Id.* at 235. Specifically, the plaintiff contracted with the defendant, a Florida company, to provide design services for plaintiff’s New York apartment. *Id.* at 230. Thereafter, defendant purchased furniture for plaintiff’s New York apartment, corresponded with plaintiff “by mail at his home in Missouri *on at least seven occasions,*” exchanged telephone calls, and faxes. *Id.* at 230-32 (emphasis added). In holding that the trial court had properly exercised personal jurisdiction over the defendant, the court acknowledged that personal jurisdiction must be based on something more than mere “unilateral activity.” *Id.* at 235 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Further, the court also acknowledged that, “...mailings alone often may not provide a sufficient basis for personal jurisdiction...” *Bryant*, 310 S.W.2d at 235 n.5. In sum, jurisdiction was based on more than mere unilateral activity. *Id.* at 235. In the instant case, it is not. Respondent has not cited to a single case holding that the mere posting of information to a website accessible in Missouri satisfies the Missouri long-arm statute.

B. Respondent erred in exercising personal jurisdiction over PPG because the exercise of specific jurisdiction over PPG violates its rights under the Fourteenth Amendment’s Due Process Clause as Plaintiff’s claim is not connected to PPG’s activity in Missouri.

Respondent makes two main points in its argument that the trial courts exercising of personal jurisdiction satisfied the Due Process Clause: (1) Missouri courts have not adopted the *Zippo* test to analyze the sufficiency of minimum contacts; and (2) the nature, quality

and quantity of PPG's contacts with the state of Missouri support the trial court's exercising of personal jurisdiction over PPG.

Respondent, however, fails to acknowledge that the principles in *Zippo* are wholly consistent with existing Missouri law. See *Bryant*, 310 S.W.2d at 235 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In addition, there can be no personal jurisdiction over PPG because none of PPG's contacts with Missouri relate to Plaintiff's cause of action. See *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41, 49 (Mo. 2017) ("Only if the instant suit arises out of Norfolk's contacts with Missouri does Missouri have specific jurisdiction.").

1. The Court should adopt the *Zippo* test, and under the *Zippo* test there is no personal jurisdiction over PPG.

Contrary to Respondent's assertion, the court would not need to overrule *Bryant* to find that there is no personal jurisdiction over PPG. Indeed, the application of the *Zippo* test would be wholly consistent with *Bryant* because *Bryant* acknowledges that personal jurisdiction cannot be based on "unilateral activity." *Id.* at 235 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Here, there is no relationship between Plaintiff and PPG other than Plaintiff's accessing of PPG's website within the state of Missouri.

Moreover, this Court, in *Andra v. Left Gate Property Holding, Inc.*, 453 S.W.3d 216 (Mo. 2015), has recognized that "the *Zippo* test has been adopted by several jurisdictions, including the Eighth Circuit." *Id.* at 227. In *Andra*, the plaintiff used the eBay website to purchase an automobile from the defendant, based in Texas. *Id.* at 228. Ultimately, the Court held that it did not need to adopt the *Zippo* test to obtain personal jurisdiction over the defendant because there were sufficient contacts outside the Internet

to support personal jurisdiction. *Id.* at 228. The court then went on to list nine different contacts between plaintiff and defendant, including the listing of defendant's product on the eBay website, defendant's multiple telephone calls made to plaintiff, defendant's mailing of a contract from Missouri to Texas, and defendant's delivery of a car from Texas to Missouri. *Id.* All nine of these contacts were related to the plaintiff's underlying cause of action. *Id.* Based on these contacts, the court held that it did not need to undertake a *Zippo* analysis because plaintiff's causes of action arose out of defendant's contacts with him in Missouri. *Id.* at 227-228.

The instant case is entirely distinguishable from *Andra* because Plaintiff's cause of action did not arise out of PPG's contact with Respondent in the state of Missouri. However, the dictum in *Andra* is instructive because it suggests that the *Zippo* test could be applied to the proper set of facts. *Id.* at 227-228. The facts of the instant case line up perfectly for the application of the *Zippo* test.

Plaintiff has made no allegation that it interacted with PPG's website beyond simply reading the text on the website. Plaintiff did not allege that in this case it had ordered PPG's product from PPG's website and that the product was shipped to Missouri. Plaintiff did not allege that it entered into a contract in this case with PPG through PPG's website. Plaintiff simply alleges that PPG posted information to a website. Petition ¶¶ 15–20 (A038–39). The “mere posting” of information on a website that is accessible in Missouri is alone insufficient to confer personal jurisdiction. *Johnson*, 614 F.3d at 796. Indeed, even if the Court does not apply the *Zippo* test, Plaintiff's unilateral activity

of accessing PPG's website within the state of Missouri is insufficient to support the exercise of specific personal jurisdiction. *See Bryant*, at 235 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

In an effort to circumvent the potential consequences of applying the *Zippo* test, Respondent devotes two pages of its brief to analyzing the contents of PPG's website. Respondent's Brief, pp. 18-20. Respondent argues that because customers can request samples, send emails to PPG, or "share" PPG's website to their Twitter or Facebook accounts, there should be personal jurisdiction if this Court applies the *Zippo* test. Respondent's Brief, pp. 18-20. This evidence, however, was not before the trial court and should not be considered by this Court in its jurisdictional analysis. However, even if allegations about PPG's website are considered, it would not change the analysis because Plaintiff has not alleged that it actually used any of the "interactive" features for the project at issue in this litigation and the cause of action did not arise out of these "interactive" features. *See, e.g., Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002) (applying the *Zippo* test and holding "For specific jurisdiction we look only to the contact out of which the cause of action arises—in this case the maintenance of the internet bulletin board. Since this defamation action does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website need not be considered."); *Shrader v. Biddinger*, 633 F.3d 1235, 1243 (10th Cir. 2011) ("The maintenance of a website does not in and of itself subject the owner or operator to personal jurisdiction, even for actions relating to the site, simply because it can be

accessed by residents of the forum state.”); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 254 (2d Cir. 2007) (construing New York long-arm statute and *Zippo*); *see also State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41, 49 (Mo. 2017) (“Only if the instant suit arises out of Norfolk’s contacts with Missouri does Missouri have specific jurisdiction.”).

2. Plaintiff’s claim against PPG did not arise out of PPG’s contacts with Missouri.

Although Respondent devoted a significant portion of her Brief to discussing and analyzing PPG’s Missouri contacts, they are wholly unrelated to this case, Respondent failed to tie any of PPG’s Missouri activity to any part of Plaintiff’s claim against PPG. Showing that connection, however, is one essential part of proving the constitutionality of the Court’s exercise of specific personal jurisdiction over PPG. *See Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017); *see also State ex rel. Norfolk*, 512 S.W.3d at 49 (“Only if the instant suit arises out of Norfolk’s contacts with Missouri does Missouri have specific jurisdiction.”).

Respondent’s failure to connect any of PPG’s Missouri activity to Plaintiff’s claim against PPG is fatal to the trial court’s theory of personal jurisdiction. *See Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1781 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011) (“[a] corporation’s ‘continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’”)); *see also State ex rel. Norfolk*, 512 S.W.3d at 48-49 (Mo. 2017) (“Because Norfolk has

purposefully availed itself of the opportunity to do business in Missouri, it was subject to specific jurisdiction in Missouri. But that jurisdiction would exist **only over claims that are related to those contacts.**”) (Emphasis added). Unrelated suits can be brought in the forum only when the forum has general jurisdiction. *State ex rel. Norfolk S. Ry.*, 512 S.W.3d at 49.

Even though PPG’s unrelated activities here are relevant *only* to a Missouri court’s exercise of general personal jurisdiction over PPG, Respondent claims to have set forth this activity *not* to assert general jurisdiction, but instead to show that PPG has “‘minimum contacts’ with the State of Missouri to satisfy due process” under *International Shoe* and *Andra*. Respondent’s Brief, pp. 20–21. However, both of these cases recognized the fundamental distinction between general jurisdiction and specific jurisdiction. *See Goodyear*, 564 U.S. at 923–24 (explaining how *International Shoe*, “endeavoring to give specific content to the ‘fair play and substantial justice’ concept,” classified into two categories—what courts today call general jurisdiction and personal jurisdiction—cases involving out-of-state corporate defendants); *see also Andra v. Left Gate Property Holding, Inc.*, 453 S.W.3d 216, 226–27 (Mo. 2015) (discussing the difference between specific personal jurisdiction and general personal jurisdiction).

This Court noted in *Andra* that, “courts since *International Shoe* have looked at whether a defendant purposefully avails itself of the ‘privilege of conducting activities within a state’ through ‘systematic and continuous’ contacts.” *Id.* at 227. Purposeful availment, by itself, however, does not create specific jurisdiction unless the claims arise

out of that purposeful activity. *Id.* at 227; *see also State ex rel. Norfolk*, 512 S.W.3d at 48.

Respondent obscures the lack of any connection between its claims and PPG's Missouri-based activities by invoking a "five factor" test for jurisdiction applied at times by the Missouri Court of Appeals. Respondent's Brief, pp. 13–14. This Court, however, has never adopted that test as the law of Missouri. *See, e.g., Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 233 n.4 (Mo. 2010). Specifically, this Court held:

While courts can use the five-factor test if it seems useful in a particular case, it is simply a tool to assist them in resolving the ultimate issue whether the defendant has purposely availed itself of the privilege of doing business in this state such that it reasonably could anticipate being haled into court here. To the extent that court of appeals cases suggest that this five-factor approach is required in Missouri, or that it is used commonly in other state and federal courts (other than the Eighth Circuit), they are in error.

Id. Further, United States Supreme Court has subsequently held that courts cannot use "sliding scale approach to specific jurisdiction holding that such approach "resemble[ing] a loose and spurious form of general jurisdiction." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. The five-factor approach used in Respondent's Brief is essentially the same sliding scale approach rejected in *Bristol-Myers Squibb*.

The trial court's decision below illustrates the danger of the unapproved five-factor approach in Missouri. After it set forth the unrelated activity in Missouri—and having made no attempt to tie Plaintiff's claims to the activity—the trial court held, "After considering the nature, quality and quantity of PPG's contacts with the forum state

and the relation of the cause of action to these contacts, the Court finds that PPG’s extensive contacts with Missouri satisfy due process.” Order, at p. 3 (A092). Respondent’s Brief does not bolster the trial court’s position. Purporting to apply this five-factor test that has never been adopted by this Court, *Respondent devotes not a single sentence addressing the relationship of the cause of action to PPG’s contacts.* Rather, as the trial court did below, Respondent simply lists the unrelated contacts and declares them “sufficient to establish minimum contacts here.” Respondent’s Brief, at p. 14. Indeed, Respondent spends a far larger portion of its brief addressing the test’s last two factors—interest of Missouri in providing a forum for its residents, and the convenience to the parties¹—even though these factors, on the approach’s own terms, have “only secondary importance.” See *Longshore v. Norville*, 93 S.W.3d 746, 752 (Mo. App. E.D. 2002). The Due Process Clause requires more. Activity unrelated to alleged activity causing injury cannot serve as the basis for specific jurisdiction of unrelated contacts because such a test would eviscerate the notion of general jurisdiction. Even if the five-factor test had some probity before *Bristol-Myers Squibb*, it is clearly not the law now under due process analysis. *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (holding that courts cannot use a “sliding scale approach to specific jurisdiction holding that such approach “resemble[ing] a loose and spurious form of general jurisdiction.”).

¹ In this respect, Respondent states that most of the witnesses and evidence in this case will be based in Missouri. Respondent’s Brief, at p. 15. But a large part of the evidence *in any case* is likely to exist wherever the plaintiff resides and sues. That is not enough to create jurisdiction.

Respondent's reliance on *Longshore v. Norville*, 93 S.W.3d 746 (Mo. App. E.D. 2002), is misplaced. Respondent's Brief, at p. 14. That case involved the defendant's decision to mail a letter directly to plaintiff in Missouri as part of a conspiracy to defraud him. 93 S.W.2d at 753. The plaintiff's claim arose directly out of that conspiracy. *Id.* This case, by contrast, involves the posting of information onto a passive website directed at no particular state and no particular party. Respondent compares the "single letter" in *Longshore* to PPG's business activity in Missouri. Respondent's Brief, at p. 14. However, without a connection between PPG's Missouri limited activity and Plaintiff's claim, *Longshore* is inapposite.

Finally, it is unclear what Respondent seeks to gain from observing (correctly) that "this case has no relationship at all to PPG's 'home' base in Pennsylvania – aside from PPG's incorporation in that state." Respondent's Brief, at p. 15. Regardless of a controversy's connection to the defendant's domicile, courts in that State may exercise personal jurisdiction over at-home defendants unrelated to activity there without constitutional restriction. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780.

Given that Plaintiff's cause of action does not relate to PPG's Missouri contacts, the trial court's exercise of personal jurisdiction over PPG for Plaintiff's claim is unconstitutional.

C. Jurisdictional discovery is not warranted.

Respondent argues that Plaintiff should "be permitted to conduct limited discovery on the issue of specific jurisdiction." Respondent's Brief, at p. 21. However, there is not

a single additional fact that Plaintiff could glean from jurisdictional discovery to support “specific jurisdiction.” Plaintiff admitted in its Answer to Petition for Writ of Prohibition that, “Plaintiff does not allege that it was PPG’s customer, that it ever had a business relationship with PPG on the subject project, that PPG had sought Plaintiff out for a business relationship, or that PPG sold the coating at issue to Plaintiff or FD in Missouri.” Relator’s Petition for Writ of Prohibition, at ¶ 10 (A04); Respondent’s Answer to Petition for Writ of Prohibition, at ¶ 10). (A106). Further, Plaintiff has not alleged that it interacted with PPG’s website in any way other than reading text that PPG had posted to the website.

Based on the allegations and facts of the case, there would be no additional discovery that would be probative of any jurisdictional issue. Plaintiff has based its entire jurisdictional argument on PPG’s contacts with Missouri that are unrelated to this action, an approach rejected by this court in *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017). *See* Respondent’s Brief, at p. 14 (“[T]hen surely the nature, quality, and quantity of PPG’s contacts with Missouri—filing 37 lawsuits in this state; being registered to do business in this state; operating at least 63 retail stores within this state; advertising jobs within this state; maintaining approved applicators for its product in this state; and routinely having sales representatives visit the state to promote its products—is sufficient to establish minimum contacts here.”). These facts are already before this court, and there is nothing that Plaintiff could learn from jurisdictional discovery to advance its argument in favor of personal jurisdiction.

Plaintiff has already dragged PPG, a company headquartered and based in Pennsylvania, into Missouri on an alleged claim that is in no way related to PPG's contacts with Missouri. Plaintiff should not be permitted to now conduct a fishing expedition to uncover facts that would not assist in its jurisdictional argument.

CONCLUSION

For the reasons above, this Court should grant PPG's Petition and issue a Permanent Writ of Prohibition directing Respondent to take no further action against PPG in this case except to dismiss it for lack of personal jurisdiction.

Dated: July 27, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03
2. This brief complies with the limitations contained in Rule 84.06(b).
3. Per Rule 84.06(C), the word count of this brief is **3,955** as determined by

Microsoft Word 2010.

4. The brief was prepared using “Times New Roman” font in 13 point size, in

Microsoft Word 2010.

/s/ William J. Gust _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on registered counsel via the Missouri Courts E-filing System on **July 27, 2018**, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03(a).

/s/ William J. Gust _____