IN THE MISSOURI SUPREME COURT

Supreme Court No. SC 90205

DONALD L. BRYANT, JR.

Plaintiff - Appellant

v.

SMITH INTERIOR DESIGN GROUP, INC. and WILLIAM KOPP,

Defendants - Respondents.

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE EASTERN DISTRICT

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Defendants-Respondents Smith Interior Design Group, Inc., and William Kopp deny that they are subject to the jurisdiction of the Courts of the State of Missouri. Without waiving said denial, Defendants-Respondents admit that this appeal is properly within the appellate jurisdiction of the Supreme Court of Missouri for the purposes of reviewing the dismissal of Plaintiff-Appellant's cause of action by the Trial Court, and Defendants-Respondents make their appearance herein and respond to Plaintiff-Appellant's Appeal for that limited purpose.

STATEMENT OF FACTS

Plaintiff Bryant owns residences in St. Louis County, Missouri, and in New York City, New York on the island of Manhattan. L.F. Vol. I, pp. 6, 62. Defendant-Respondent William Kopp is a resident of Palm Beach, Florida. L.F. Vol. I, p. 62. Defendant-Respondent Smith Interior Design Group, Inc., (hereinafter "Smith Interior") is a Florida corporation with its principal place of business in Palm Beach, Florida. L.F. Vol. I, p. 62.

Bryant claims that he engaged Kopp and his corporation to provide interior design services involving the purchase of furniture and other household items for Bryant's Manhattan Co-op in New York. Each of Bryant's claims arises from his dissatisfaction with Defendants Kopp and Smith Interiors' performance of these services and with the fees Kopp charged for his services.

As alleged in the Amended Petition, in early 2006 acquaintances of Bryant and his ex-wife recommended that his ex-wife contact Kopp about decorating an apartment they planned to purchase in New York. L.F. Vol. I, p. 63. After Bryant's ex-wife first spoke with Kopp, Kopp traveled to St. Louis to meet with the Bryants to examine the furniture in the Bryants' home and to get ideas for decorating the New York apartment. L.F. Vol. I, p. 63.

In June of 2006, Bryant purchased the co-op apartment located in Manhattan. Mr. Bryant and his wife subsequently divorced. L.F. Vol. I, p. 64. In July of 2007, Bryant alleges that he contacted Kopp in Florida to arrange a meeting to discuss Kopp providing interior design services for Bryant's New York

residence. L.F. Vol. I, p. 64. In that meeting, Kopp made some recommendations for some furniture pieces and other household items, and Bryant made selections based on these recommendations. L.F. Vol. I, p. 64.

Bryant alleges that, in August of 2007, Kopp mailed a document from Florida containing an invoice and other information concerning the selected items. L.F. Vol. I, p. 65. Bryant sent a payment to Defendants in Florida based on this document. L.F. Vol. I, p. 65. Defendants subsequently sent Bryant three additional sets of documents relating to the interior design services for the New York residence in October, November, and December of 2007. L.F. Vol. I, pp. 65-66. During this period Bryant and his agent, Tanya Breck, contacted Kopp in Florida inquiring about the status of the selected items and the commission Defendants were being paid. L.F. Vol. I, pp. pp. 65-67.

In December of 2007, Bryant instructed Kopp to proceed with the installation of the furniture and household items in Bryant's Manhattan residence. L.F. Vol. I, p. 67. Bryant informed Kopp that he would pay the balance of the wholesale costs for the items, but that he would withhold payment of any commissions until he could review the backup invoices. L.F. Vol. I, p. 67. In response to this request, Kopp sent copies of the invoices and other backup documentation relating to the items to Bryant in St. Louis. L.F. Vol. I, p. 68. Bryant then wired three more payments in December of 2007 to Defendants in Florida. L.F. Vol. I, pp. 67-68.

Kopp traveled to New York on December 14, 2007 to install the furniture and other household items. L.F. Vol. I, pp. 68-69. Between January and February, 2008 the parties had several communications by email and mail in an attempt to resolve the ongoing dispute as to Defendants' services and the commissions being charged. L.F. Vol. I, pp. 69-70.

PROCEDURAL HISTORY

Bryant filed his initial Petition on March 21, 2008, which purported to set forth causes of action against Defendants for fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, unjust enrichment, and violation of Missouri's Consumer Protection Statute. L.F. Vol. I, p. 5. Defendants moved to dismiss for lack of personal jurisdiction on the basis that Plaintiff's Petition failed to allege facts demonstrating Defendants had sufficient minimum contacts with Missouri for the Court to acquire personal jurisdiction, and that the allegations in Plaintiff's Petition failed to satisfy the requirements of Missouri's "Long-Arm Statute." L.F. Vol. I, p. 39.

Three days before the hearing date on Defendants' Motion to Dismiss, Bryant filed a motion seeking leave to file an Amended Petition and requested a hearing on shortened time at the same time as Defendants' Motion to Dismiss. L.F. Vol. I, p. 56. The Court granted Bryant leave to file the Amended Petition on July 28, 2008. L.F. Vol. I, p. 154. Defendants renewed their Motion to Dismiss directed at the Amended Petition, which was granted by the Trial Court in its Order and Judgment on August 11, 2008. L.F. Vol. II, pp. 158-175, 232.

Bryant then appealed the judgment to the Missouri Court of Appeals for the Eastern District. The Court of Appeals issued its Opinion on April 14, 2009, finding that Bryant had failed to allege facts demonstrating that Defendants Kopp and Smith Interiors had sufficient minimum contacts with Missouri to support the exercise of personal jurisdiction, and affirming the Trial Court's Order and Judgment. This Court granted transfer by its Order of September 1, 2009.

POINTS RELIED ON

I. **THE COURT OF APPEALS DID NOT ERR IN AFFIRMING DISMISSAL FOR LACK OF PERSONAL JURISDICTION BECAUSE PLAINTIFF FAILED TO PLEAD FACTS DEMONSTRATING THAT DEFENDANTS HAVE SUFFICIENT**

MINIMUM CONTACTS WITH THE STATE OF MISSOURI IN THAT PLAINTIFF HAS FAILED TO ALLEGE FACTS WITH PARTICULARITY DEMONSTRATING THAT PLAINTIFF'S CAUSE OF ACTION AROSE FROM FRAUDULENT COMMUNICATIONS "PURPOSEFULLY DIRECTED" AT MISSOURI RESIDENTS

Callahan v. Harvest Bd. Intern., Inc., 138 F.Supp.2d 147 (D.Mass. 2001)

Childers v. Schwartz, 262 S.W.3d 698 (Mo.App. W.D. 2008)

Norman v. Fischer Chevrolet Oldsmobile, 50 S.W.3d 313 (Mo.App. E.D. 2001)

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING DISMISSAL FOR LACK OF PERSONAL JURISDICTION BECAUSE THE COURT OF APPEALS PROPERLY APPLIED THE FIVE-FACTOR MINIMUM CONTACTS ANALYSIS AND FOUND THAT PLAINTIFF FAILED TO ALLEGE FACTS SHOWING

THAT DEFENDANTS HAD MINIMUM CONTACTS WITH MISSOURI

Farris v. Boyke, 936 S.W.2d 197 (Mo.App. S.D. 1996)

Johnson Heater Corp. v. Deppe, 86 S.W.3d 114 (Mo.App. E.D. 2002)

State ex rel. Barnes v. Gerhard, 834 S.W.2d 902 (Mo.App. E.D. 1992)

III. THE CIRCUIT COURT DID NOT ERR BY GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION BECAUSE DEFENDANTS ARE NOT SUBJECT TO THE JURISDICTION OF THIS COURT UNDER MISSOURI'S LONG-ARM STATUTE IN THAT PLAINTIFF'S CLAIMS DO NOT ARISE FROM THE COMMISSION OF

TORTIOUS ACTS IN THE STATE OF MISSOURI AND PLAINTIFF'S CLAIMS DO NOT ARISE FROM THE TRANSACTION OF BUSINESS IN MISSOURI

Anderson Trucking Service, Inc. v. Ryan, 746 S.W.2d 647 (Mo.App. E.D. 1988)

Wilson Tool & Die, Inc. v. TBDN-Tennessee Co., 237 S.W.3d 611 (Mo.App. E.D. 2007)

ARGUMENT

STANDARD OF REVIEW

When the defendant raises the issue of personal jurisdiction in a motion to dismiss, the plaintiff has the burden to show that the circuit court's exercise of jurisdiction is proper. *Childers v. Schwartz*, 262 S.W.3d 698, 701 (Mo.App. W.D. 2008). The plaintiff must show that the defendant engaged in one of the acts listed

in Missouri's long arm statute and that sufficient minimum contacts with Missouri exist to justify the exercise of jurisdiction over the defendant. *Stavrides v. Zerjav*, 848 S.W.2d 523, 527 (Mo.App. E.D. 1993). The sufficiency of the evidence to make a prima facie showing that the trial court may exercise personal jurisdiction is a question of law which the Court of Appeals will review independently on appeal. *Id*. If the trial court does not state any specific grounds on which it based the jurisdictional dismissal, the Court of Appeals will presume the dismissal was based upon one of the grounds presented by the defendant, and on appeal the Court will affirm the dismissal if any ground can sustain the Court's action. See *Aldein v. Asfoor*, 213 S.W.3d 213, 215 (Mo.App. E.D. 2007).

I. **THE COURT OF APPEALS DID NOT ERR IN AFFIRMING DISMISSAL FOR LACK OF PERSONAL JURISDICTION BECAUSE PLAINTIFF FAILED TO PLEAD FACTS DEMONSTRATING THAT DEFENDANTS HAVE SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MISSOURI IN THAT PLAINTIFF HAS FAILED TO ALLEGE FACTS WITH PARTICULARITY DEMONSTRATING THAT PLAINTIFF'S**

CAUSE OF ACTION AROSE FROM FRAUDULENT COMMUNICATIONS "PURPOSEFULLY DIRECTED" AT MISSOURI RESIDENTS

The due process clause of the Fourteenth Amendment limits the power of a court to exercise personal jurisdiction over a nonresident defendant such that a non-resident defendant must have sufficient minimum contacts with the forum state so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Childers v. Schwartz*, 262 S.W.3d 698, 702 (Mo.App. W.D. 2008), citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). For purposes of the minimum contacts analysis "[t]he defendant's contacts with the forum state **must be purposeful** and such that defendant should reasonably anticipate being haled into court in the forum state." *Consolidated Elec. & Mechanicals, Inc. v. Schuerman*, 185 S.W.3d 773, 776 (Mo.App. E.D. 2006). [Emphasis supplied.] "The basic due process test is whether the defendant has **purposefully availed** itself of the privilege of conducting activities within the forum state." *Farris v. Boyke*, 936 S.W.2d 197, 201 (Mo.App. S.D. 1996).

Based on the facts of this case, the Court of Appeals found that "From the inception, the exclusive focal point of the business relationship as set forth in the Amended Petition was Appellant's New York co-op apartment, and not his residence in Missouri." See Opinion, p. 11. These facts included that a) Bryant solicited Defendants, residing in Florida, for their services; b) services were

provided in New York or Florida, not Missouri, c) no goods were purchased in or delivered to Missouri, and d) the actual installation and physical work was performed in New York. See Id. Thus both the Trial Court and the Court of Appeals found that Defendants did not "purposefully avail" themselves of Missouri as a forum and do not have sufficient minimum contacts with Missouri to satisfy traditional notions of fair play and substantial justice.

Bryant alleges that the Court of Appeals erred "in failing to recognize that, where communications are alleged to be fraudulent and form the basis for the litigation, they are sufficient to support an exercise of [personal] jurisdiction." Appellant's Substitute Brief, p. 13. Defendants respectfully submit that the Court of Appeals did not err in this regard, because Plaintiff failed to allege facts demonstrating that his cause of action arose from fraudulent communications, failed to allege facts showing that any such communications were purposefully or voluntarily directed to the State of Missouri, and because Plaintiff's cause of action, such as it is, arose from the personal services agreement between the parties.

This case arises from a dispute as to the parties' performance of an agreement for the provision of interior decorating services, including the commissions charged for those services. Plaintiff's Amended Petition alleged that there was no express agreement between the parties concerning the amount of the commissions under the agreement. LF Vol. I, p. 64. Rather, Bryant alleged that he "understood", based on his conversations during a meeting with Defendant Kopp,

as well as the custom and practice of the interior design industry, that Defendants would charge the "standard and reasonable" commission of 20% to 30%. LF Vol. I, p. 64.

Bryant goes on to allege that the initial invoices he received did not state whether or not they included commissions, and that he paid the invoices based on his understanding of the agreement and the custom and practice of the industry. LF Vol. I, pp. 65-66. As the Court of Appeals correctly pointed out, it is the initial meeting and conversations, and the "agreement which [Plaintiff] believed and understood had been reached" which form the "factual basis" for Bryant's allegations that the subsequent invoices and mailings from Kopp were misleading or constituted misrepresentations. See Opinion, p. 13, note 2. **Yet Plaintiff does not allege that this meeting or these conversations occurred in Missouri or were directed by Defendants to Missouri**. Opinion, p. 13, note 2; LF Vol. I, pp. 64, 67.

In response to Plaintiff's request, Defendants sent documents to Plaintiff and made other communications regarding fees and commissions which Plaintiff now contends were not part of the original agreement between the parties. Plaintiff alleges that when he calculated the commissions based on documents provided to him by Defendants (at Plaintiff's request), they averaged over 50%. LF Vol. I, p. 68.

Yet, after Plaintiff purportedly learned this, the parties *continued* to carry out the agreement, which included having the furniture and decorations installed in

Plaintiff's New York apartment, and Plaintiff alleges that he continued to offer to "negotiate a fair and acceptable commission" to resolve the dispute. LF Vol. I, pp. 68-70. The Amended Petition generally alleges that Defendants' failed to perform under the agreement and "failed to meet the minimal standards of the interior design industry" for numerous other reasons, mostly involving Defendants' aesthetic choices as interior designers in their decoration of the New York apartment. See LF Vol. I, pp. 69, 76-82

To succeed on a fraud claim, a plaintiff must prove the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speakers knowledge of its falsity, or ignorance of its truth; (5) the speakers intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearers ignorance of the falsity of the representation; (7) the hearers reliance on the representation being true; (8) the hearers right to rely thereon; and (9) the hearers consequent and proximately caused injury. *Trimble v. Pracna*, 167 S.W.3d 706, 712 n. 5 (Mo. 2005). See also *Brown v. Mickelson*, 220 S.W.3d 442 (Mo.App. W.D. 2007)(Party proceeding on fraudulent concealment based on failure to disclose facts which defendant had duty to disclose still required to prove elements of fraud.) Furthermore, parties are required to plead the presence of fraud with particularity. *Grasse v. Grasse*, 254 S.W.3d 174, 180 (Mo.App. E.D. 2008)("Vague, generalized assertions and bare conclusions" insufficient to state claim for fraud).

The dispute between Plaintiff and the Defendants is a dispute as to the reasonableness of Defendants' commissions, pursuant to the agreement between the parties and the standards in the industry. To the extent Plaintiff alleges the invoices and mailings were misleading for not disclosing Defendants' commissions, those allegations are predicated on the agreement between the parties arising from conversations and representations which were not alleged to have occurred in Missouri. LF Vol. I, p. 64. Plaintiff has failed to set forth with particularity what purportedly "fraudulent" statements were purposefully directed to Defendants and has generally failed to satisfy the strict requirements of pleading a fraud claim.

From the face of Plaintiff's Amended Petition, it is clear that this case is a dispute over the performance of a personal services agreement, not a fraudulent scheme being purposefully directed at forum residents by out-of-state entities as Plaintiff suggests. The distinction between a party who "purposefully directs" its activities at the forum, such as by advertising or soliciting business or otherwise seeking out residents in the forum state, and one who merely responds to solicitations or requests from a forum resident is clearly demonstrated in the recent case of *Childers v. Schwartz, 262 S.W.3d 698 (Mo.App. W.D. 2008).* In *Childers*, the plaintiffs sought out the defendant, who resided in California, and solicited his help in selling their Missouri real estate. The parties orally agreed to a referral fee, which was ultimately paid to the defendant from a Missouri account. *Id. at 703*. The defendant subsequently drafted a written referral agreement and sent it to

plaintiffs in Missouri, and proceeded to assist the plaintiffs in four more sales of Missouri property under that agreement. *Id*. Throughout this process, the defendant made numerous phone calls and sent numerous emails to the plaintiffs in Missouri. *Id*.

The plaintiffs brought suit against the defendant when they were informed by their attorney that the referral agreement (a document drafted by the defendant and sent to Missouri) was not legal in Missouri. *Id. at 700.* As in this case, the plaintiffs in *Childers* framed their claims in tort, alleging negligent misrepresentation and tortious interference with contract. Obviously, the tort causes of action in *Childers* "arose from" the purportedly tortious interstate communications with the forum state (i.e. the referral agreement and the representations made by the defendant in emails and phone calls).

Nevertheless, **the Court of Appeals focused on the underlying agreement and course of conduct between the parties, including "prior negotiations and contemplated future consequences" in determining whether minimum contacts existed**. *See Id. at 703-704*. The Court of Appeals, focusing on the fact that the plaintiffs had solicited defendant's services and that the defendant's performance under the agreement had occurred in another state, found that defendant did not "purposefully avail" himself of the privilege of conducting activities in Missouri. *Id.* See also *Norman v. Fischer Chevrolet Oldsmobile, 50 S.W.3d 313, 317 (Mo.App. E.D. 2001)*(In defamation action based on statements made in a letter sent by defendant to a Missouri attorney, letter could not

constitute purposeful availment because "this was not a contact initiated by defendant.") The mail and telephone communications in this case similarly cannot create minimum contacts for the same reason: The communications were **made in response to contact initiated by the *Plaintiff***, and not by Defendants "purposefully availing" themselves of the privilege of conducting activities within the Missouri forum.

Setting aside the issue of whether Plaintiff has actually plead that fraudulent communications were directed to him in Missouri, Plaintiff overstates the applicable legal principle by arguing for a bright-line, absolute rule that the requirements of the minimum contacts analysis are satisfied as a matter of law whenever a cause of action can be framed as having arisen from fraudulent or otherwise tortious communications sent to a forum. Plaintiff would have the Courts ignore both the relationship and course of conduct between the parties, including whether those communications were made in response to requests or solicitations from the forum resident. Such a rule is plainly in contradiction of Missouri law, including as set forth in *Childers* and *Norman*.

Nonetheless, Plaintiff argues that Missouri law is inconsistent with the jurisprudence of several Federal Courts of Appeals, which have purportedly adopted such a bright-line rule. Defendants disagree and respectfully submit that no Federal Court of Appeals has abandoned the principle of purposeful availment or the requirement that the non-forum defendant's contacts with the forum state be voluntary.

Plaintiff suggests that its bright-line rule has been adopted by the Eighth Circuit based on the opinion in *Oriental Trading Co. Inc. v. Firetti*, 236 F.3d 938 (8th Cir. 2001), which involved fraudulent communications targeted at residents of the forum state. The case is distinguishable for the simple fact that in *Oriental Trading* **it was defendants who had sought out and solicited business from the plaintiff in the forum state**. *Id. at 941*. The defendants initiated the business relationship, and sought out the plaintiff as the target of their fraud, "**purposely directing** their fraudulent communications at residents of Nebraska[.]" *Id.*

As this Court has previously stated, "Like any standard that requires a determination of 'reasonableness', the 'minimum contacts' test of *International Shoe* is **not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present**." *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 382 (Mo. banc 1979), citing *Kulko v. Superior Court of California, Etc.*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). What Plaintiff suggests is plainly a rule of "mechanical application." Under Plaintiff's interpretation, any allegation that purportedly fraudulent or misleading communications were sent to the forum will automatically create personal jurisdiction, without regard to the facts of the case. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479, 105 S.Ct. 2174 (1985).

The principle set forth in cases such as *Oriental Trading* is that interstate communications are sufficient alone to show minimum contacts under a specific set of circumstances: Fraudulent communications **purposefully directed** at forum

residents. These cases do not *do away* with the requirement that the contacts with the forum state be "purposeful" or "voluntary" under the facts of the case, within the meaning those terms have in a personal jurisdiction analysis. Federal law and Missouri law both distinguish purposefully directed frauds or other tortious acts targeted at forum residents from cases where the non-forum defendant is merely responding to the acts of the forum resident, such as where a forum resident solicits a contractor for out-of-state services, and where performance is necessarily carried out through interstate communications.

If Defendants' interpretation were correct, then even a single alleged misrepresentation made in response to a solicitation from the forum state would satisfy the requirement of minimum contacts under any set of circumstances. That is plainly not the case. *Callahan v. Harvest Bd. Intern., Inc*., 138 F.Supp.2d 147, 164 (D.Mass. 2001) involved an allegation that fraudulent misrepresentations had been sent to the plaintiff in the forum state. The plaintiff in *Callahan* (like the Plaintiff here) relied on the First Circuit's opinion in *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661 (1st Cir. 1972), for the principle that an out-of-state sender of a fraudulent misrepresentation has purposefully availed itself of the privilege of conducting activities within the forum as a matter of law. Although *Callahan* plainly "arose from" a purportedly fraudulent misrepresentation sent to the forum, the District Court found this was not dispositive:

> In *Murphy*, on which the plaintiff relies, the defendant intentionally initiated a transaction with a Massachusetts resident. In the present case,

> the defendants were responding to a letter which happened to be sent by a Massachusetts resident … **The distinction is significant…jurisdiction may not rest on the 'unilateral activity of another party or a third person,' and the contacts by the defendant must be voluntary**.

In the cases cited by Plaintiff the defendants had purposefully and voluntarily directed fraudulent communications into the forum. See *Lewis v. Fresne*, 252 F.3d 352 (5th Cir. 1999)(Defendants sent communications into state soliciting forum resident in securities fraud scheme); *Murphy v. Erwin-Wasey*, Inc. 460 F.2d 661 (1st Cir. 1972)(Out-of-state Defendants solicited services from consultant residing in forum state); *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990)(Scheme to defraud insurance company residing in forum out of life insurance proceeds which were properly payable to another forum resident); *FMC Corp. v. Varanos*, 892 F.2d 1308 (7th Cir. 1990)(RICO claim arising from numerous fraudulent communications and invoices by office manager of subsidiary directed at parent corporation in forum.) These cases do not abandon the requirement that such communications be purposefully directed at the forum and "voluntary" under the circumstances, i.e., not in direct response to acts of the forum plaintiff. Moreover, these cases are factually distinct from this case, where a forum resident solicited an out-of-state defendant to enter into a personal services contract to be wholly performed in other states, and who received communications in the forum state solely because he was located there. Had

Plaintiff been located in his residence in New York, where the agreement was to be carried out, Defendants would have communicated with him there.

Plaintiff has simply failed to allege facts showing that Defendants targeted or otherwise purposefully directed fraudulent communications at a Missouri resident or purposefully availed themselves of the privilege of performing activities in the State of Missouri. The Court of Appeals properly looked beyond the manner in which Plaintiff has framed his Petition and took into account the agreement and course of conduct between the parties. See Opinion, pp. 7-10. Defendants respectfully submit that Plaintiff has failed to bear his burden of demonstrating that Defendants have sufficient minimum contacts with the State of Missouri to support the exercise of personal jurisdiction over Defendants.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING DISMISSAL FOR LACK OF PERSONAL JURISDICTION BECAUSE THE COURT OF APPEALS PROPERLY APPLIED THE FIVE-FACTOR MINIMUM CONTACTS ANALYSIS AND FOUND THAT PLAINTIFF FAILED TO ALLEGE FACTS SHOWING THAT DEFENDANTS HAD MINIMUM CONTACTS WITH MISSOURI

As discussed above, the minimum contacts test is one of "reasonableness" and requires a fact-intensive inquiry. To determine whether a defendant has sufficient minimum contacts to permit a Missouri court to exercise personal

jurisdiction over them, courts will consider the following five factors: 1) the nature and quality of the contacts; 2) the quantity of those contacts; 3) the relationship of the cause of action to those contacts; 4) the interest of Missouri in providing a forum for its residents; and 5) the convenience to the parties. *Consolidated Elec. & Mechanicals, Inc. v. Schuerman, 185 S.W.3d 773, 776 (Mo.App. E.D. 2006).* "The first three factors are of primary importance and the last two are of secondary importance." *Mead v. Conn, 845 S.W.2d 109, 112 (Mo.App. 1993).* The Court of Appeals carefully and properly applied these factors to the factual allegations in Plaintiff's Amended Petition and correctly found that, as a matter of Missouri law, Defendants failed to make a prima facie showing of the requisite minimum contacts to satisfy the constitutional requirements of due process.

1) NATURE AND QUALITY OF CONTACTS.

As set forth above, the contacts with the State of Missouri that form the basis of Plaintiff's claims in the Amended Petition arose from **Plaintiff initiating contact with Defendants while *Plaintiff* was in the State of Missouri,** in order to request services for his New York residence. Defendants sent communications to Plaintiff in St. Louis solely in response to a request for services made by Plaintiff. These communications related to an agreement that was not entered into in Missouri and was not to be performed in Missouri.

Defendants' subsequent mailing of documents to Plaintiff in St. Louis and responding by email or telephone to Plaintiff's requests for information were all incidental and pursuant to Plaintiff's request for services, not through Defendant's

solicitation of Plaintiff's business. As the Court of Appeals properly found here, the law is clear that "interstate facilities, such as telephones and mail, are **secondary or ancillary factors** which 'cannot alone provide the minimum contacts required by due process.'**"** *Consolidated Elec. & Mechanicals, Inc. v. Schuerman, 185 S.W.3d 773, 777 (Mo.App. E.D. 2006), citing Bell Paper Box, Inc. v. Trans Western Polymers, Inc., 53 F.3d 920, 923 (8th Cir.1995); see also Farris v. Boyke, 936 S.W.2d 197, 201 (Mo.App. S.D. 1996); TSE Supply Co. v. Cumberland Natural Gas Co., 648 S.W.2d 169, 170 (Mo.App.1983).* Thus, in *Johnson Heater Corp. v. Deppe, 86 S.W.3d 114 (Mo.App. E.D. 2002),* a Wisconsin resident made several phone calls to Missouri to inquire about purchasing an HVAC system from a Missouri corporation. He also sent faxes and mailings to the Missouri corporation and mailed a check to Missouri to pay for the HVAC system. *Id*. The Court held that these contacts were insufficient to create the substantial connection with Missouri necessary to satisfy due process requirements. *Id*.

In addition to interstate communications, the Amended Petition alleges that Bryant's ex-wife contacted Kopp and asked him to travel to St. Louis to view the furniture in their home "to get ideas for decorating an apartment they planned to purchase in New York." L.F. Vol. I, p. 64. Bryant does not allege that any action by Kopp during this visit to St. Louis was wrongful or formed the basis of any of his claims against Defendants. As the Court of Appeals found, this visit does not support purposeful availment of the forum in that "Appellant alleges that Kopp

visited Missouri to discuss the business arrangement, but this visit occurred before the New York apartment was purchased by Appellant, and more than a year before any business arrangements were formally concluded between Appellant and Respondents." Opinion, p. 8.

The Court of Appeals also found that, while Bryant alleged sending payments from Missouri to Defendants, under Missouri law, "[a] financial loss of a Missouri resident as a result of out-of-state activities does not make [the defendant] amenable to the courts of this state." Opinion, p. 9 citing *Anderson Trucking Serv. Inc. v. Ryan*, 746 S.W.2d 647, 649 (Mo.App. E.D. 1988).

In its Opinion, the Court of Appeals convincingly analogized the extent and nature of contacts with the forum in this case with *State ex rel. Barnes v. Gerhard*, 834 S.W.2d 902 (Mo.App. E.D. 1992), and *Farris v. Boyke*, 936 S.W.2d 197 (Mo.App. S.D. 1996) where "far more substantial contacts" were found not to support the exercise of personal jurisdiction. See Opinion, pp. 12-13. As discussed in the Court of Appeals' detailed analysis, which Defendants commend to the Court, *Barnes* and *Farris* involved communications with Missouri residents and visits to Missouri relating to subject matters located in other states, and did not involve non-forum residents intentionally targeting Missouri residents or otherwise "purposefully availing" themselves of the forum.

Based on the nature and quality of the contacts alleged by Bryant, Defendants simply could not reasonably expect to be haled into Court in Missouri as the Trial Court and Court of Appeals properly found.

2) QUANTITY OF CONTACTS.

Here the contacts consisted of mailing documents to Missouri and a few communications in response to Bryant's questions and requests, and a single visit at the request of Bryant's ex-wife more than a year before any business arrangements were formally concluded between Bryant and Defendants. In its analysis of this element, the Court of Appeals found that the quantity of contacts between Defendants and the forum state were "limited, and somewhat tenuous[]," pointing out that "The mailings of documents into a state, when the business relationship is focused on goods and services provided out of state, are not sufficient to satisfy the requirements of the due process clause as these actions do not demonstrate that Respondents 'purposefully availed [themselves] of the privilege of conducting activities within' Missouri." Opinion, p. 10, citing *Farris v. Boyke*, 936 S.W.2d 197, 201 (Mo.App. S.D. 1996).

3) THE RELATIONSHIP OF THE CAUSE OF ACTION TO THOSE CONTACTS.

Again, the relationship of the cause of action to Defendants' contacts with Missouri was entirely incidental. "From the inception, the exclusive focal point of the business relationship as set forth in the Amended Petition was Appellant's New York co-op apartment, and not his residence in Missouri." Opinion, p. 11. In short, apart from being the place where Bryant happened to be when Defendants needed to contact him, the State of Missouri has **no relationship** to the causes of action he alleges.

ELEMENTS 4) THE INTEREST OF MISSOURI IN PROVIDING A FORUM FOR ITS RESIDENTS AND 5) THE CONVENIENCE OR INCONVENIENCE TO THE PARTIES

As set forth above, elements 4) and 5) are secondary in the minimum contacts analysis. The Court of Appeals analyzed these elements together in its Opinion, pointing out that under Missouri law, while Missouri may have an interest in providing a forum for a Missouri resident arising from a personal service agreement to be completed in another state, "any such interest is secondary." Opinion, p. 11, citing *Aldein v. Asfoor*, 213 S.W.3d 213 (Mo.App. E.D. 2007).

Furthermore, the Plaintiff here not only alleged that he owns a residence in New York, but "alleges in his pleadings that 'he was scheduled to move into [the residence in New York] in December of 2007." Opinion, p. 11. This residence was the site of the property and work in question, and presumably the site of any witnesses regarding the workmanship of Defendants. Id. Thus, the Court found "no legitimate reason" why a party should not be willing to travel to a state where he owns property in order to litigate his claims regarding that property. Id.

Defendants submit that Missouri has little interest in providing a forum to a purported New York resident, and whose cause of action arose from his own decision to proactively seek out-of-state services from a Florida resident relating to a residence in New York City. Defendants respectfully suggest that the Trial

Court and Court of Appeals' decisions were entirely proper and correct on these elements.

III. THE CIRCUIT COURT DID NOT ERR BY GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION BECAUSE DEFENDANTS ARE NOT SUBJECT TO THE JURISDICTION OF THIS COURT UNDER MISSOURI'S LONG-ARM STATUTE IN THAT PLAINTIFF'S CLAIMS DO NOT ARISE FROM THE COMMISSION OF TORTIOUS ACTS IN THE STATE OF MISSOURI AND PLAINTIFF'S CLAIMS DO NOT ARISE FROM THE TRANSACTION OF BUSINESS IN MISSOURI

Because the Court of Appeals found that insufficient minimum contacts existed to establish personal jurisdiction over the Defendants, the Court did not address this issue. Opinion, p. 6. Missouri's "Long-Arm Statute," §506.500 R.S.Mo. states in relevant part that:

> a. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state[.]

Even though all of Plaintiff's claims arise out of his personal service agreement between Plaintiff and Defendants for work on Plaintiff's Manhattan co-op, Plaintiff has not alleged a breach of contract. The reason is obvious: For purposes of long-arm jurisdiction, a contract is made where acceptance occurs. *Wilson Tool & Die, Inc. v. TBDN-Tennessee Co.*, 237 S.W.3d 611 (Mo.App. E.D. 2007). In this case, acceptance clearly occurred when Plaintiff contacted Defendants in Florida and Defendants accepted Plaintiff's request for services.

1. PLAINTIFF'S CLAIMS DO NOT ARISE FROM THE COMMISSION OF A TORT IN MISSOURI.

Plaintiff's claims (i.e., fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation and violation of Missouri's Consumer Protection Statute) are allegedly premised on Plaintiff's assertion that the invoices and documents sent by Defendants to Plaintiff "did not reflect the agreement [Plaintiff] believed and understood had been reached as to the commission Kopp was to be paid and the basis for same, as well as charging for items not agreed to by Bryant, such as travel expenses." L.F. Vol. I, p. 67. However, as discussed above in Defendants' First Point Relied On, Plaintiff has *not* alleged that the meeting at which this "agreement which [Plaintiff] believed and understood had

been reached" occurred in Missouri. See L.F. Vol. I, pp. 64, 67; see pp. 15-16, *supra*.

Plaintiff further alleges that "Defendants' performances have failed to meet the minimal standards of the interior design industry and their representations regarding their interior design work at the New York co-op." L.F. Vol. I, p. 69. Plaintiff attached a lengthy exhibit detailing Defendants' breaches of the "minimal standards" of interior design, which consist of complaints regarding Kopp's performance of the personal service agreement and aesthetic disagreements between Bryant and Kopp. The following are excerpts of Bryant's complaints:

> Bryant relied upon the recommendation of Kopp to select a piece that fit Mr. Bryant's desires as to the overall decoration scheme and feel which Mr. Kopp had asserted to Mr. Bryant he would achieve. **Upon Mr. Bryant's viewing of the table after it had been delivered, Mr. Bryant was, to say the least, shocked. The table was totally out of harmony of design and scale and feel of the furnishings and style Mr. Bryant had otherwise selected**. L.F. Vol. I, p. 77. [Emphasis supplied.]
>
> In addition to failing to comply with Mr. Bryant's design layout, Mr. Kopp ordered a different sofa than what he had shown Mr. Bryant. **In fact, Mr. Bryant selected that sofa after he sat in it and found it to be very comfortable and at a very acceptable seating depth**. **However, the sofas that Mr. Kopp had delivered had a deeper seating depth, which**

made them very difficult to sit in without putting a large pillow behind one's back. Thus, these sofas are unacceptable to Mr. Bryant. L.F. Vol. I, p. 78. [Emphasis supplied.]

As discussed in Defendants' First Point On, Plaintiff's allegations are garden-variety breach of contract claims, i.e. that Defendants failed to carry out their obligations under an agreement and that Defendants charged fees for their services that were not contemplated by the agreement.

In essence, Plaintiff has framed his allegations as "fraud," because acceptance of the agreement by Defendants in Florida would constitute a Florida contract. Defendants respectfully submit that the purported causes of action set forth in Plaintiff's Petition do not arise from the commission of tortious acts in Missouri by Plaintiffs. If anything, the allegations amount to a breach of a contract that was entered into in Florida and was to be performed in New York. In sum, Plaintiff's allegations cannot serve as a basis for application of Missouri's Long-Arm Statute.

2. PLAINTIFF'S CAUSE OF ACTION DOES NOT ARISE FROM THE TRANSACTION OF BUSINESS IN THE STATE OF MISSOURI.

The only allegations of the "transaction of business" in Missouri contained in the Amended Petition are those relating to the services provided for Plaintiff's

Manhattan Co-op, as well as a bare allegation that Defendants previously provided interior design services for another Missouri resident. There are no allegations that Defendants advertised or solicited Bryant's business in Missouri, that Defendants shipped goods to or from Missouri, or that any contract was entered into in Missouri.

While the phrase "transaction of business" has been given a broad interpretation by Missouri Courts in applying the long-arm statute, "Transitory, incidental, unrelated acts involving the State of Missouri or its residents are insufficient." *Anderson Trucking Service, Inc. v. Ryan*, 746 S.W.2d 647, 659-660 (Mo.App. E.D. 1988)(Trucking company's application for permit to use highways and occasional use of Missouri highways insufficient to demonstrate transaction of business in state sufficient to support application of long-arm statute). This is particularly true of "Transitory or incidental activities within the forum state but which are **essentially interstate**." *Id*. Here, the mere delivery of documents to Plaintiff in St. Louis through the mail system, emails and phone calls regarding a business agreement to be carried out in New York, are clearly incidental activities that are essentially "interstate" in nature. Therefore, Plaintiff has not plead facts demonstrating that Plaintiff's claims arose from the "transaction of business" in the State of Missouri.

CONCLUSION

Based on the facts and law set forth above, Plaintiff's Petition clearly fails to demonstrate that Defendants had sufficient minimum contacts with the State of

Missouri for the Circuit Court to exercise personal jurisdiction over Defendants under the Due Process Clause of the Constitution of the United States of America.

For all of these reasons, Defendants-Respondents Smith Interior Design Group, Inc. and William Kopp hereby respectfully request that this Honorable Court affirm the Opinion of the Missouri Court of Appeals for the Eastern District and the judgment of the Circuit Court of St. Louis County, Missouri, dismissing Plaintiff's Petition for lack of personal jurisdiction over Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains **7,262** words, including the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 97-2003. The undersigned counsel further certifies that the accompanying disk has been scanned and is free of viruses.

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JAMES M. DOWD

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 9th day of October, 2009, two (2) copies of the foregoing Brief of Respondents and one diskette was served via first class mail, postage prepaid, on the following: John R. Musgrave and Ryan K. Manger, Thompson Coburn LLP, Counsel for Plaintiff, One U.S. Bank Plaza, St. Louis, MO 63101, FAX (314) 552-7000.

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