

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL CASE NO.: 08-12328-FF

INTERNET SOLUTIONS CORPORATION,

APPELLANT,

vs.

TABATHA MARSHALL,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

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The Honorable Anne C. Conway, United States District Judge

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument in this matter is unnecessary and would not materially assist the Court in its review as the issues before the Court are predominantly issues of law and facts fully present in the pleadings, motions, orders and declarations of record. However, Appellant will participate in oral argument should the Court determine that oral argument will assist the Court in deciding the issues.

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STATEMENT OF JURISDICTION

I. Basis Of District Court's Subject Matter Jurisdiction.

The District Court had subject matter jurisdiction pursuant to 28 *U.S.C.A* §1332 (2008).

II. Basis Of Appellate Court's Jurisdiction.

This Honorable Court has appellate jurisdiction pursuant to 28 *U.S.C.A.* §1291. The district court final order appealed from was entered on April 8, 2008. ISC timely filed its Notice of Appeal on April 29, 2008.

STATEMENT OF THE ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE CAUSES OF ACTION FOR LACK OF PERSONAL JURISDICTION UNDER FLORIDA'S LONG-ARM STATUTE WHERE THE CAUSES OF ACTION ALLEGED WERE BASED IN INTENTIONAL TORT, WHERE THE MATERIAL TORT ALLEGATIONS OF THE COMPLAINT ESTABLISHED INTENTIONAL DEFAMATORY INTERNET POSTS OUTSIDE OF THE FORUM BUT INTENDED TO, AND, IN FACT, CAUSED INJURY TO THE PLAINTIFF IN THE FORUM STATE, WHERE THE MATERIAL ALLEGATIONS OF THE COMPLAINT WERE UNCONTROVERTED BY THE DEFENDANT, AND WHERE THE DEFENDANT HAD NO OTHER MINIMUM CONTACTS WITH THE FORUM IN ADDITION TO THE FALSE STATEMENTS AND INJURY IN THE FORUM TO THE PLAINTIFF.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is an appeal from a final order determining that the District Court did not have personal jurisdiction over MARSHALL. ISC sued MARSHALL alleging multiple causes of action for intentional torts including defamation, trade libel and tortious interference with business relationships resulting from MARSHALL's postings about ISC on her Internet website. (Doc. 1 – Complaint) ISC asserted that MARSHALL entered into the State of Florida through her on-line postings and alternatively acted outside of the State of Florida to cause an injury in Florida. (Doc. 1 - Complaint) MARSHALL filed a motion to dismiss for lack of personal jurisdiction. (Doc. 4 – Motion to Dismiss) MARSHALL did not deny or address the allegations of Internet defamation and other torts alleged in the Complaint; rather, MARSHALL asserted lack of personal jurisdiction based on insufficient commercial or personal minimum contacts with the forum state. (Docs. 4 – Motion to Dismiss and Doc. 5 - Declaration)

II. COURSE OF THE PROCEEDINGS BELOW.

ISC filed its Complaint on November 1, 2007. (Doc. 1 - Complaint) The Complaint asserted causes of action for multiple intentional torts including defamation, trade libel and tortious interference with business relationships. (Doc. 1 – Complaint) On November 20, 2007 MARSHALL filed Defendants' Motion to

Dismiss for Lack of Personal Jurisdiction and Incorporated Memorandum of Law (“Motion to Dismiss”). (Doc. 4 – Motion to Dismiss) In the Motion to Dismiss, MARSHALL asserted, in pertinent part, that the District Court did not have general personal jurisdiction or specific jurisdiction pursuant to §48.193(1)(b), *Fla. Stat.* (2007), Florida’s long-arm statute, because she had not directed any communications “into” the state of Florida, had not targeted her website at a Florida audience, and did not have either personal or commercial contacts with Florida. (Docs. 4 – Motion to Dismiss and Doc. 5 - Declaration)

In support of MARSHALL’s Motion to Dismiss, on November 20, 2007 MARSHALL filed a Supplemental Declaration In Support Of Special Limited Appearance For The Purpose Of Challenging Personal Jurisdiction Over Defendant (“Declaration”). (Doc. 5 - Declaration) The Declaration did not contain *any* averments (other than a general denial that she had not committed any torts in Florida)¹, controverting ISC’s assertions that MARSHALL defamed ISC on her website and caused injury to ISC in Florida. (Doc. 5 - Declaration and Doc. 27-Order at Pages 4-6.) ISC timely filed its Response to Motion to Dismiss for Lack of Personal Jurisdiction on November 30, 2007. (Doc. 12 – Response to Motion to Dismiss) In its response, ISC asserted that MARSHALL was subject to the personal jurisdiction of the District Court by committing *intentional* torts in Florida

¹ MARSHALL’s Declaration states that, “19. I have not committed any tort within the state of Florida.” (Doc. 5 at ¶. 19)

or alternatively outside of Florida, causing harm and injury to ISC's reputation and business in Florida. (Doc. 12 – Response to Motion to Dismiss at Pages 3-8.)

Because MARSHALL failed to controvert the material tort allegations supporting specific jurisdiction under Florida's long-arm statute, ISC did not file a declaration or affidavit in response to MARSHALL's Declaration. MARSHALL's Declaration merely averred that MARSHALL's website did not target Florida residents or businesses commercially and that MARSHALL did not have personal or commercial contacts with the State of Florida. (Doc. 5 - Declaration)

The District Court determined that ISC sufficiently pled its intentional tort causes of action and that MARSHALL failed to controvert ISC's tort allegations. (Doc. 27 – Order at Page 3.) However, the District Court ruled that personal jurisdiction over MARSHALL would violate the Fourteenth Amendment Due Process Clause because of a lack of minimum contacts with the forum state. (Doc. 27- Order at Page Pages 5-8.).

III. DISPOSITION BELOW.

The District Court ruled that ISC effectively pled tort allegations supporting specific personal jurisdiction over MARSHALL. (Doc. 27 - Order at Page 4.) Further, the Court held that MARSHALL did not controvert the tort allegations in the Complaint. Nonetheless, the District Court ruled that a singular, uncontroverted tortious act affecting the forum was insufficient minimum contacts to support

jurisdiction and, therefore, dismissed ISC's Complaint for lack of personal jurisdiction and ordered the case file closed by the Clerk of the Court. (Doc. 27 - Order at Pages 5-8.)

STATEMENT OF THE FACTS

MARSHALL is a private individual residing in the State of Washington.

(Doc. 1 – Complaint at ¶ 5 and Doc. 27- Order at Page 1.) MARSHALL owns and operates an Internet website, tabathamarshall.com, from the State of Washington.

(Doc. 5 - Declaration at ¶ 14 and Doc. 27 - Order at Pages 1-2.) MARSHALL posts alleged consumer commentary about business and whether the business are engaged in consumer fraud of other unethical or unfair business practices. (Doc. 1 – Complaint, Composite Exhibit A). MARSHALL posts information on the site and allows third parties to post comments. (Doc. 1 – Complaint, Composite Exhibit A) MARSHALL comments and responds to third party commentary. (Doc. 1 – Complaint, Composite Exhibit A)

ISC is a Nevada corporation with its principle place of business in Orlando, Florida. (Doc. 1 - Complaint at ¶ 2 and Doc. 27 - Order at Page 1.) ISC operates various employment-based Internet websites. (Doc. 1 – Complaint at ¶ 2 and ¶ 16 and Doc. 27 - Order at Pages 1-2.)

MARSHALL posted information on her website stating that ISC's businesses are engaged in "phishing", "scamming" or identity theft of consumers. (Doc. 1 - Complaint at ¶ 21 and Composite Exhibit A.) The posts remain perpetually accessible on-line to Internet users. MARSHALL uses her website for the specific purpose of defaming ISC. (Doc. 1 - Complaint at ¶¶ 18-223, and 55.) MARSHALL

targeted ISC, a business which maintains and operates its principal place of business in Florida. (Doc. 1 - Complaint at ¶¶ 11-13.) As a result of MARSHALL's posts, ISC's reputation and business interests have been damaged. (Doc. 1 – Complaint at ¶ 36.)

SUMMARY OF THE ARGUMENT

In the instant cause, the District Court improperly shifted the burden of proof to prove jurisdiction to ISC without meeting the threshold requirement to controvert the material allegations of the Complaint. (Doc. 27 - Order at Page 3.) This was error. Without considering MARSHALL's Declaration, the District Court was required to take all allegations of the Complaint as true. The District Court held that ISC sufficiently pled its tort allegations and the allegations were taken as true by the District Court. (Doc. 27 – Order at Page 4.) Thereafter, the District Court considered MARSHALL's Declaration in relation to the tort allegations of the Complaint and determined that MARSHALL's Declaration *did not* controvert ISC's well-pled and material tort allegations. (Doc. 27 - Order at Pages 4-5.) MARSHALL's Declaration presented mere conclusory denials as to ISC's tort allegations and did not address any of the material intentional tort allegations of the Complaint. Despite determining that MARSHALL failed to controvert the material tort allegations and therefore failed to meet its burden, the District Court, nonetheless, held ISC to the increased burden and quantum of proof. (Doc. 27 - Order at Pages 4-6.) The District Court should have taken as true the well-pled allegations of the Complaint and maintained personal jurisdiction over MARSHALL.

MARSHALL has sufficient continuous minimum contacts with the State of Florida as a result of her continuous posting of defamatory information about a Florida resident. Although MARSHALL operates her website in the State of Washington, the defamatory postings on the website constitute continuous minimum contacts “into” Florida based on the perpetual availability of the defamatory statements on-line to the general public utilizing Internet search engines. MARSHALL directed her defamatory communications “into” Florida by posting false information on her website searchable by any entity or individual interested in ISC. By continuously leaving the posts on-line, thereby making them continuously available to anyone using an Internet search engine, MARSHALL has continuously defamed ISC, a Florida resident.

Even if this Honorable Court determines that MARSHALL’s Internet posts and commentary do not constitute continuous defamatory communication directly “into” Florida sufficient to establish minimum contacts either under the long-arm statute or under the general minimum contacts test, the defamatory actions resulted in an uncontroverted injury in Florida sufficient to support a determination of foreseeability for due process purposes. In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 804 (1984), the United States Supreme Court established the “effects test” which determines jurisdiction by the resultant effect of an action as the source of the necessary minimum contact with the jurisdiction. By application

of the effects test, the issue is not the amount of the minimum contacts within the forum, but rather whether the defendant could reasonably foresee being haled into court in a forum based on the particular effect or effects in the jurisdiction arising from the defendant's acts.

ISC alleged in its Complaint that it suffered an injury to its business in the State of Florida. (Doc. 1 - Complaint at ¶¶ 36, 44, 51 and 59.) ISC asserted that it suffered an interference with its business relationships and lost clients. (Doc. 1 - Complaint at ¶ 59). Again, MARSHALL's Declaration did not controvert these factual allegations. (Doc. 5 - Declaration) Consequently, ISC pled sufficient material facts, which when taken as true because they were not controverted, demonstrate that even if the tortious act is deemed to have occurred outside of the forum, ISC suffered an injury in Florida to its reputation and business interests and that the injury occurred as a result of MARSHALL's actions. Consequently, ISC pled a prima facie case establishing the District Court's jurisdiction over MARSHALL.

The District Court has jurisdiction over MARSHALL based on minimum contacts with the State of Florida and based on MARSHALL causing a tortious injury to ISC in the State of Florida.

ARGUMENT

I. THE DISTRICT COURT APPLIED AN IMPROPER STANDARD FOR DETERMINING A MOTION TO DISMISS AND ERRED IN SHIFTING THE BURDEN OF PROOF TO ISC TO SHOW A PRIMA FACIE EVIDENTIARY SHOWING OF JURISDICTION.

The District Court placed the *initial* burden of proof upon ISC and at a heightened quantum of proof. (Doc. 27 - Order at Page 3). The District Court determined the initial burden of proof was on ISC, saying that:

“...the plaintiff bears the burden of establishing a prima facie case of personal jurisdiction by ‘[p]resent[ing] enough evidence to withstand a motion for directed verdict.’”

(Doc. 27 – Order at Page 3 quoting *Goforit Entm’t LLC v. Didmedia.com L.P.*, 513 F. Supp. 2d 1325, 1328 (M.D. Fla. 2007). In placing the initial burden of proof on ISC, and at the increased quantum of proof, the District Court misapplied this Honorable Court’s established rule as to the initial burden and quantum of proof when a court considers a motion to dismiss for lack of jurisdiction.

This Honorable Court has ruled that the initial burden of proof in reviewing a motion to dismiss for lack of personal jurisdiction is on the defendant, not the plaintiff. In considering a motion to dismiss for lack of jurisdiction, a district court must take the allegations of a complaint as true to the extent the allegations are uncontroverted by affidavits or deposition testimony of the defendant. *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Where a district court does not hold a discretionary evidentiary hearing on

the motion to dismiss, the defendant may file affidavits and depositions challenging the personal jurisdiction and the material allegations of the complaint. *Id.* at 741. *If* the defendant's affidavits and depositions sufficiently controvert the material allegations of the complaint and are not merely conclusory, *then* the burden of proof shifts to the plaintiff to demonstrate prima facie evidence supporting jurisdiction. *Id.* Consequently, the defendant has the initial burden of proof to controvert the allegations of the plaintiff. If the defendant meets this initial burden, *thereafter*, the plaintiff must provide prima facie evidence sufficient to withstand the heightened standard for a motion for directed verdict rather than the lesser standard for a motion to dismiss. *Id.*

In the instant cause, the District Court shifted the burden of proof to ISC before considering MARSHALL's Declaration. (Doc. 27 – Order at Page 3.) This was error. Without considering MARSHALL's Declaration, the District Court was required to take all allegations of the Complaint as true. The District Court held that ISC sufficiently pled its tort allegations and the allegations were taken as true by the District Court. (Doc. 27 - Order at Page 4.) Thereafter, the District Court considered MARSHALL's Declaration in relation to the tort allegations of the Complaint and determined that MARSHALL's Declaration *did not* controvert ISC's well-pled and material tort allegations. (Doc. 27 - Order at Pages 4-5.) Despite determining that MARSHALL failed to controvert the material tort

allegations and therefore failed to meet its burden, the District Court, nonetheless, shifted the proof burden and held ISC to the increased burden and quantum of proof. (Doc. 27 - Order at Pages 4-6.)

MARSHALL failed to controvert ISC's material allegations alleging long-arm jurisdiction under §48.193(1)(b), *Fla. Stat.* (2006). (Doc. 5 - Declaration and Doc. 27 – Order Pages 4-5.) Although MARSHALL filed her Declaration in opposition to the District Court's personal jurisdiction over her, the Declaration was insufficient to shift and increase the initial burden of proof to ISC to make a prima facie showing of jurisdiction through opposing affidavits or deposition testimony. MARSHALL's affidavit presented mere conclusory denials as to ISC's tort allegations and did not address any of the material intentional tort allegations of the Complaint.

In MARSHALL's Declaration, as to ISC's claims of the commission of a tort as the basis of jurisdiction, MARSHALL merely averred as follows:

7. I am the owner and host of a website, www.tabathamarshal.com (hereinafter called the "Website"), from my home in Seatac, Washington. (Doc. 5 at ¶. 14)

14. I have never contracted with an internet service provider (ISP) located in Florida. (Doc. 5 at ¶. 14)

15. I have never provided a capability on the Website to distinguish or target Florida individuals or companies (Doc. 5 at ¶. 15)

17. I have never directed any communication, telephonic or written, into the state of Florida for business purposes in connection with the website. (Doc. 5 at ¶. 17)

18. I have never had direct contact with Plaintiff's business associates, vendors, customers, or advertisers. (Doc. 5 at ¶. 18)

19. I have not committed any tort within the state of Florida. (Doc. 5 at ¶. 19)

The allegation of paragraph 19 is a mere conclusory denial and does not address any of the specific material tort allegations of ISC's Complaint. Paragraphs 7, 14, 15, 17, and 18 merely address minimum contacts and the specific direction of the disputed statements to Florida. These averments do not controvert the following material tort allegations of the Complaint: (1) MARSHALL authored and posted defamatory statements about ISC's businesses (Doc. 1 - Complaint at ¶¶ 18-23, 55); (2) MARSHALL knew that ISC's businesses were based in Florida (Doc. 1 - Complaint at ¶ 13); (3) MARSHALL authored and posted the information about ISC's businesses with the express purposes of holding ISC up to ridicule and to dissuade persons from conducting business with ISC (Doc. 1 - Complaint at ¶¶ 32, 35, 37); (4) MARSHALL accused ISC of criminal and fraudulent activities in the conduct of ISC's businesses (Doc. 1 - Complaint at ¶¶ 19, 40, 49); and (5) MARSHALL caused injury to ISC in Florida. (Doc. 1 - Complaint at ¶¶ 23, 35).

In *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006), this Honorable Court ruled that the defendant's affidavits in support of a motion to dismiss for lack of jurisdiction were insufficient to shift the burden of proof from the defendant to the plaintiff because the

defendant website owner did not controvert the plaintiff's material allegations that the website owner edited complaints submitted by other individuals adding words such as "scam", "ripoff" and "dishonest." *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Because the defendant did not controvert these material allegations specifically, this Honorable Court ruled that the defendant did not shift the burden to the plaintiff to prove personal jurisdiction over the defendant, vacated the order dismissing the case, and remanded the matter to the district court to maintain personal jurisdiction. *Id.* at 743-744.

Similar to the defendant in *Whitney Information Network, Inc.*, MARSHALL failed to controvert the material allegations of ISC's Complaint and, therefore, failed to shift to ISC the burden of proving jurisdiction. Because the District Court improperly shifted the burden of proof, the District Court applied the wrong burden of proof. The District Court stated that:

According to Marshall's affidavit, her contacts with Florida were nearly non-existent...ISC has not provided evidence to the contrary.

(Doc. 27- Order at Page 6.) The District Court required ISC to file an affidavit/evidence opposing MARSHALL's minimum contacts averments and challenging claims that personal jurisdiction would be an offence to the Fourteenth Amendment Due Process Clause. (Doc. 27 - Order at page 6.) This was error because MARSHALL never met the threshold requirement for shifting the burden

of proof to ISC. Consequently, the District Court should have taken as true the well-pled allegations of the Complaint and maintained personal jurisdiction over MARSHALL.

II. PERSONAL JURISDICTION OVER MARSHALL DOES NOT VIOLATE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE BECAUSE MARSHALL HAS SUFFICIENT MINIMUM CONTACTS WITH FLORIDA BY COMMISSION OF TORTS DIRECTED AT A FLORIDA RESIDENT.

The Eleventh Circuit and the federal districts courts of Florida apply a two-part inquiry to determine whether a court may properly exercise personal jurisdiction over a defendant. First, the court must determine whether the exercise of jurisdiction is appropriate under the forum state's long-arm statute. Second, the court must determine whether exercising personal jurisdiction would violate the Fourteenth Amendment Due Process Clause. *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007); *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006); *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007). The District Court determined that ISC met its burden under the first prong. (Doc. 27 – Order at Pages 3-5)(“The court assumes for the purposes of deciding the instant motion that the tortious conduct element of the long-arm statute has been satisfied.”) The District Court based its denial of personal jurisdiction on its determination that the exercise of personal jurisdiction in this cause would offend

traditional notions of fair justice and fair play, thereby constituting a violation of the Fourteenth Amendment Due Process Clause. (Doc. 27 - Order at Pages 5-8.)

The due process prong tests the reasonableness of the foreseeability of the eventuality of a potential suit against the defendant in the forum. The Supreme Court of the United States stated the foreseeability issue very simply, saying: “The foreseeability that is critical to the due process analysis is...that the defendant’s conduct and connection with the forum state are such that he should reasonably expect to be haled into court there.” *World Wide Volkswagen Corp. v. Woodson*, 44 U.S. 286, 295, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). The United States Supreme Court has established two types of standards or tests to determine whether the defendant has sufficient contacts with the forum state to satisfy due process in the forum. The tests are: (1) the “minimum contacts test”; and (2) the “effects test”. By application of either test, MARSHALL has sufficient contact with Florida so that she reasonably should have foreseen being haled into court in the jurisdiction.

A. Marshall Is Subject To The Jurisdiction Of The District Court Because Marshall Has Sufficient Continuous Minimum Contacts With Florida Through the Commission Of Tortious Acts Into The State Of Florida.

In *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed. 790 (1984), the Supreme Court established the “minimum contacts” test to be applied by the court to help determine foreseeability. Under this test, the more

contact a defendant has with a state by reaching out to the state, the greater the likelihood that jurisdiction will lie.

Although MARSHALL operates her website in the State of Washington, ISC asserts that MARSHALL's defamatory postings on the website constitute continuous minimum contacts into Florida based on the perpetual availability of the defamatory statements on-line to the general public.

A federal court must construe a forum's long-arm statute as the forum state's highest court would construe the long-arm statute. *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Where the forum state's highest court has not addressed an issue directly, a federal district court must follow federal circuit courts of appeal precedent. *See American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007) citing *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir. 1999) and *Mehlenbach v. Jitaru*, No. 04-cv-1118, 2005 U.S. Dist. Lexis 42007, 2005 WL 4585859, at 11 (M.D. Fla. June 6, 2005).

The Supreme Court of Florida in *Wendt v. Horowitz*, 822 So. 1252 (Fla. 2002) ruled that the physical presence of an intentional tortfeasor is not necessary for personal jurisdiction if a communication is directed "into" Florida. However, in *Wendt* the Florida Supreme Court did not address specifically the definition of the term "into" as it relates to posting on the Internet defamatory information about an

individual or entity resident in the forum state. *Id.* Additionally, the Florida Supreme Court does not otherwise have a controlling opinion on the issue. Consequently, this Court should look to federal court precedent in determining the issue of whether perpetual on-line posts available to the general public through Internet search engines constitute continuous publications to a forum state sufficient to support jurisdiction under the State of Florida's long-arm statute or the minimum contacts test.

ISC's counsel has been unable to locate any Eleventh Circuit opinion stating the Eleventh Circuit's position on whether posting defamatory information on the Internet for general public access and viewing constitutes publication of the statements "into" a forum state for the purposes of personal jurisdiction. In *Whitney Information Network, Inc.*, 199 Fed. Appx 738, this Honorable Court addressed Internet defamation based on alleged defamatory postings on a website. However, the issue the Court dealt with was whether the provisions and protections of the Digital Millennium Copyright Act removed the matter from the District Court's jurisdiction where the plaintiff claimed that the defendant had acted in the capacity as an author or editor of defamatory material rather than just as a website host for other posters. *Id.* at 744. The Court did not address due process and fairness issues such as minimum contacts, the location of the posting, or whether the posting had been directed into the state of Florida in any fashion. *Id.*

The Second Circuit Court of Appeals in *Best Van Lines v. Walker*, 490 F. 3d 239 (2nd Cir. 2007) specifically addressed long-arm jurisdiction in the context of Internet defamation. However, this case is distinguishable based on the restrictive nature of the New York long-arm statute. The Second Circuit upheld the United States District Court, Southern District of New York's, ruling that posting defamatory information on the Internet was insufficient to establish personal jurisdiction under the long-arm statute of New York. In its opinion, the Second Circuit specifically addressed minimum contacts, but did not rule on the issue. Instead, the Second Circuit ruled that alleged defamatory Internet posting did not confer jurisdiction under the New York long-arm statute. *Id.* The New York long-arm statute, 35 N.Y. C.P.L.R. § 302(a), *specifically exempts tort causes of action for defamation from long-arm jurisdiction.* Because the lawmakers of New York determined to exempt defamation actions, the Second Circuit determined that the New York courts were constrained to exercise the full limits of federal jurisdiction. *Id.* Defamation in New York can never constitute a “minimum contact” for jurisdictional purposes. Florida's long-arm statute does not contain a similar exemption and, therefore, Florida residents are entitled to the full protection of federal law.

The Second Circuit analyzed the minimum contacts framework of U.S. Supreme Court law² and remarked that the New York long-arm statute created a “gap” between New York’s protected right and the federal constitutionally protected rights. *Id.* A fair reading of the opinion suggests that, but for the statutory exemption of the New York long-arm statute prohibiting defamation as a basis for long-arm jurisdiction, the Second Circuit would find that defamatory Internet posts otherwise would be a sufficient minimum contact to support personal jurisdiction in federal courts.

The federal district courts for the state of Pennsylvania have addressed the Internet jurisdictional issues substantially, but in commercial or negligence contexts rather than the intentional tort context. See *Pierce, et al. v. Hayward Industries, Inc., et al.*, 2006 U.S. Dist LEXIS 16472 (Pa. 2006); *Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W. Pa. 1993); *Mar-Eco, Inc. v. T & R and Sons Towing and Recovery, Inc. et al.*, 937 A.2d 512 (P.A. 2003). In *Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W. Pa. 1993), the *Zippo* district court acknowledged that courts have difficulty with determining personal jurisdiction arising out of Internet/website causes of action because of the changing communication environment resulting from the explosion and growth of

² See *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 790 (1984) and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct.1482, 79 L.Ed. 804 (1984).

the Internet, saying:

The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant.

Id. at 1123-1124.

The *Zippo* Court established a sliding scale for determining whether personal jurisdiction should exist in the use of commercial websites³. The *Zippo* sliding scale balances the level of interactivity and targeting of the forum to determine whether in commercial business context Internet use can subject a non-resident defendant to personal jurisdiction in a foreign forum based the defendant's Internet contact. Basically, in the commercial use of a website, the more an entity does business over the Internet and the more interactive the website is, the more likely the chance that the foreign forum will be able to exercise jurisdiction over the Internet defendant. *Id.* at 1123-1124. Even if a business entity does not specifically direct communications to a forum, but rather creates an environment and accessibility for a foreign forum to access and use the website, the Internet user is likely to be subject to the foreign jurisdiction. If an Internet user merely posts information without targeting any particular forum or entity in the forum, then the

³ The *Zippo* case provides an excellent overview and consideration of cases involving various district court rulings relating to a determination of personal jurisdiction in various Internet-related circumstances. However, *Zippo* addresses the issue from a commercial perspective rather than from a tort perspective.

Internet user is far less likely to be subjected to personal jurisdiction in a foreign forum.

Pierce specifically addressed jurisdiction based on the use of the Internet and negligence actions. *Pierce* established a two-part test: (1) the “interactivity” sliding scale of *Zippo*; (2) and a direct causal connection between the use of the website and the cause of action or injury. *Pierce, et al. v. Hayward Industries, Inc., et al.*, 2006 U.S. Dist LEXIS 16472 (D. PA 2006). The *Pierce* Court distinguished personal injury cases from commercial cases based on the lack of connection between an injury and the use of a website. *Id.* However, *Pierce* only refers to personal injury based on negligence or product liability and it does not address intentional torts.

The *Pierce* Court stated that personal injury cases with no causal connection to the use of the website should not confer personal jurisdiction based on the mere existence of the website. *Id.* ISC agrees that personal jurisdiction should not lie when injury occurs resulting but is unrelated to the website. For instance, if a tire dealer sells tires through the internet and a resident of Florida buys the tire resulting in an injury after a blow-out, then the website owner might not have foreseen an action in Florida. However, this reasoning does not apply to intentional acts of the website owner intending to injure a party in the subject forum. The intentional

nature of the conduct supporting the intentional tort distinguishes these causes of action.

The instant case meets the *Pierce* and *Zippo* tests even though those cases considered tortuous acts via the Internet in a commercial or negligence contexts.

First, the instant cause falls between the extremes of the *Zippo* scale.

MARSHALL's website is interactive. By MARSHALL's admission, it is weblog/website "hosted" by MARSHALL. (Doc. 5 - Declaration at ¶ 14). The website allows members of the general public to post comments and derogatory statements concerning ISC and others. (Doc. 1 - Complaint, Composite Ex. "A.") Additionally, MARSHALL responds to individuals who post on her site and comments on the posts. (Doc. 1 - Complaint, Composite Ex. "A.") MARSHALL did not merely post information on the website. She authored and posted derogatory information specifically relating to an identified entity in a foreign forum.

There is a direct causal connection between ISC's asserted causes of actions and injuries and MARSHALL's use and maintenance of her website. ISC alleged that MARSHALL uses her website for the specific purpose of defaming ISC. (Doc. 1 - Complaint at ¶¶ 18-223, and 55.) ISC asserted that MARSHALL targeted ISC, a business which maintains and operates its principal place of business in Florida. (Doc. 1 - Complaint at ¶¶ 16-23.) MARSHALL's Declaration did not controvert

these factual allegations. (Doc. 5 - Declaration) MARSHALL's defamatory statements specifically related to a Florida entity to cause an injury to the entity and its business interests operated from its principal offices located in Orlando, Florida. The causes of action asserted by ISC are directly and proximately related to MARSHALL's postings on her website.

As noted by the *Zippo* Court, the Internet is a new and evolving frontier. The "into" requirement of the *Wendt* decision is not viable in the modern Internet world. Unlike sending a letter or making a phone call directly to someone as a method of publication of a defamatory statement, which is a one-time publication act requiring specific direction of the communication to a designated recipient, Internet posters do not need to direct their defamatory communications anywhere to accomplish a goal of injury to a party's reputation or business interests in their home state or abroad. With the availability of Internet search engines such as "Google" and "Yahoo," an individual seeking to defame an entity need not post directly to any individual or any state. The defamer may simply post on any website and the post will be available continuously to any party in any forum who does an Internet search of the defamed entity. The defamatory statement remains available on the Internet perpetually and is published every time a search is conducted of the defamed entity. *See Compare Inset Systems, Inc. v. Instructions Set*, 937 F. Supp 161, 165 (D. Conn. 1996)(holding that Internet advertisements were continuous and

substantial contact because “...unlike television and radio advertising, the advertisement is available continuously to any Internet user.”) The traditional rules for defamatory publication for the purposes of personal jurisdiction simply do not apply to the Internet instead of the publisher having to forward the damaging material directly to the recipient, now the third party to whom the defamatory poster publishes comes to the publisher. As noted by the *Zippo* Court, a defamer can engage in willful misconduct “... throughout the world from his desktop [computer]”.

On-line defamatory statements are springing defamation traps. In the business world, and in personal life, more and more people have Internet access and routinely rely on Internet search engines to become informed on business, people, and topics of interest or concern. Prior to entering into business relations, many individuals conduct Internet searches to learn information about potential future partners, vendors, clients, etc. Since the Internet posts are in writing, many individuals or entities treat the information on the Internet as more credible than if the statements were made orally or in a less accessible medium to the public. Finally, because the Internet allows immediate on-line anonymous commentary through web logs, blogs, etc., in a short period of time a body of reinforced defamatory material can be created with an air of legitimacy to the detriment of the aggrieved individual or entity. In very short order, a defamer can create an

accessible environment which causes third parties to refuse to do business with the injured party without the defamer ever having to leave his home or to otherwise verify his/her derogatory statements. The defamation is assured to reach the targeted audience, which is any entity or business considering, or actively engaged in, an association with the defamed party. The defamatory information springs out of the Internet when the Internet search engine trip wire is activated by a third party seeking information. This is the reality, and the danger, of the Internet.

As a matter of public policy, it is fair for jurisdiction lie in the forum state where the defamed party resides or is located rather than where the defamer resides or is located. If the latter is applied, a defamer can defame across the world with relative impunity and force the aggrieved parties to enforce their property rights and reputations in the defamer's home forum at considerable expense. This circumstances which will chill the enforcement of rights by injured parties and embolden the defamers to engage in malicious and willful misconduct.

By virtue of MARSHALL maintaining a website to post her defamatory statements perpetually for access by the general public, MARSHALL directed communications "into" Florida by posting generally on her website. By leaving the posts on-line continuously, thereby making them continuously available to anyone using an Internet search engine, MARSHALL has continuously maintained contact with Florida. Therefore, this Court should adopt the reasoning of *Zippo*, *Pierce* and

Compare Inset Systems, Inc., and direct the District Court to maintain personal jurisdiction over MARSHALL.

B. MARSHALL Is Subject To The Jurisdiction Of The District Court Because MARSHALL Committed Tortious Acts Intending To Cause, And In Fact Resulting In, An Injury To ISC In The State of Florida.

Even if this Honorable Court determines that MARSHALL's Internet posts and commentary do not constitute continuous defamatory communication directly "into" Florida sufficient to establish minimum contacts either under the long-arm statute or under the general minimum contacts test, the actions resulted in an injury in Florida sufficient to support a determination of foreseeability for due process purposes. In an opinion issued the same day as the *Keeton* opinion, the United States Supreme Court recognized that foreseeability for due process purposes may also be determined by the considering the in-forum effects resulting from the defendant's actions outside of the forum. In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 804 (1984), the United States Supreme Court established the "effects test" which determines jurisdiction by the resultant effect of an action as the source of the necessary minimum contact with the jurisdiction. By application of the effects test, the issue is not the amount of the minimum contacts within the forum, but rather whether the defendant could reasonably foresee being haled into court in a forum based on the particular effect or effects in the jurisdiction arising from the defendant's acts.

In *Calder*, the Supreme Court found that the California court could exercise jurisdiction over a foreign defendant who allegedly had committed tortious acts outside of California but which were focused toward a California resident and caused an injury to the resident in the State of California. *Id.* The Supreme Court found jurisdiction existed because the “story” of the defamation and the harm was focused on the resident to occur in California. *Id.* at 789. In short, the effect of the defendant’s actions occurred in California regardless of where the acts were committed. A fair reading of the Supreme Court’s ruling is that jurisdiction would lie anywhere where the injured party resides if the tortious act “focused” on the injured party. The Supreme Court stated that it was difficult to conceive how a defendant who allegedly engaged in a focused act which inevitably results in harm to the injured party in the home forum could not have reasonably foreseen being called into court in the forum where the tortious act caused a damaging effect to the injured party. *Id.*

The District Court in this matter cited *Calder* for the proposition that a tort act requires additional minimum contacts with the forum for personal jurisdiction and treated the case as a “minimum contacts” case rather than as an “effects test” case. (Doc. 27- Complaint at Page 6.) As a result, the District Court misapplied *Calder* in reaching the decision to dismiss ISC’s Complaint.

Applying the effects test to a claim of an *intentional* tort, can any prospective defendant not reasonably expect to be sued where the plaintiff conducts business or resides if the defendant has engaged in activity specifically designed to disparage and damage the plaintiff? Certainly, MARSHALL in this cause knew that her statements were damaging and designed to harm ICS's business interests and reputation, both of which were plainly based in Orlando, Florida. ISC sufficiently pled facts supporting MARSHALL's intent, the focus of her statements, and a resulting injury to ISC in Florida. MARSHALL's Declaration did not controvert these allegations. (Doc. 5 - Declaration). Any exercise of personal jurisdiction over MARSHALL cannot be a surprise to MARSHALL or be unfair to her considering the intentional nature and the specific focus of MARSHALL's alleged misconduct.

This Honorable Court, other federal circuits, and some district courts of appeal of Florida have followed the effects test of *Calder*, although not necessarily citing to *Calder*, and have ruled that personal jurisdiction exists where a tort act is committed outside of the forum state with a resulting injury occurring in the forum state.⁴ Here again, the Florida Supreme Court has no direct ruling on this point.

⁴ See *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, and 421 F.3d 1162, 1168 (11th Cir. 2005); *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir. 1999)(out-of-state tortious act affected contracts insuring property in Florida); *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997)(injury occurred in Illinois against Illinois corporation where tortious act resulted in customer canceling an order); *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993)(venue

The United States District Court, Middle District of Florida, in *American Color Graphics, Inc.* noted that the Florida Supreme Court does not have a controlling decision on the issue of whether an injury in Florida alone creates personal jurisdiction over an out-of-state defendant and the various state district courts of appeal have conflicting decisions. See *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007) citing *Casita v. Maplewood Equity Partners*, 960 So. 2d 854, 856-57 (Fla. 3d DCA 2007) and *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993). Therefore, this Honorable Court should look to federal precedent.

This Honorable Court, without specifically referencing the *Calder* effects test, previously recognized that personal jurisdiction over an out-of-state defendant may exist “in circumstances where an out-of-state defendant commits a tort that produces an injury in Florida.” See *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, and 421 F.3d 1162, 1168 (11th Cir. 2005) and *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir. 1999)(out-of-state tortious act affected contracts insuring property in Florida) *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007). The District Court in this matter cited this authority in its disputed order. (Doc. 27 - Order) This

in tortious interference claim proper in the forum state where plaintiff was injured by a loss of clients); *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007).

Honorable Court broadly interpreted §48.193(1)(b) to confer jurisdiction over a foreign defendant where the injury resulting from a tort occurs in the forum state.

The District Court in this matter determined that as a matter of law a single tortious act alone is insufficient to establish jurisdiction without other minimum contacts with the forum showing purposeful availment. (Doc. 27 - Order at Page 6.) This statement of law is not supported by this Court's decision in *Horizon* and other federal and state court decision. *See Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Circ. 1997) (injury occurred in Illinois against Illinois corporation where tortious act resulted in customer canceling an order); *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993)(venue in tortious interference claim was proper in the forum state where plaintiff was injured by a loss of clients). In both *Horizon* and *Posner*, this Court ruled that a single tortious act resulting in an injury in the forum state constitutes a sufficient minimum contact for jurisdiction in the forum, and made no mention of the necessity for other multiple minimum contacts in addition to the forum contact created by the injury in the forum.

ISC alleged in its Complaint that it suffered an injury to its business in the State of Florida. (Doc. 1 at ¶¶ 36, 44, 51 and 59.) ISC asserted that it suffered an interference with its business relationships and lost clients. (Doc. 1 at ¶ 59). Again, MARSHALL's Declaration did not controvert these factual allegations. (Doc. 5 - Declaration) Consequently, ISC pled sufficient material facts, which when taken as

true because they were not controverted, demonstrate that even if the tortious act is deemed to have occurred outside of the forum, ISC suffered an injury in Florida to its reputation and business interests and that the injury occurred as a result of MARSHALL's actions. Consequently, ISC pled a prima facie case establishing the District Court's jurisdiction over MARSHALL.

CONCLUSION/RELIEF REQUESTED

WHEREFORE, ISC respectfully requests this Honorable Court reverse the District Court's order dismissing ISC's cause of action and remand the matter to the District Court to maintain personal jurisdiction over MARSHALL.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This brief contains 8551 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June, 2008 a true and correct copy of the foregoing has been filed with the Clerk of the Court of the Eleventh Circuit Court of Appeals via CM/ECF. I further certify that the foregoing document and the notice of electronic filing by first class, or express mail, has been served upon the following:

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