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# Picking Fights in Missouri: Baldwin's Non-Rule Embraces the Minority Approach to Internet Libel Jurisdiction

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# NOTE

# Picking Fights in Missouri: *Baldwin*'s Non-Rule Embraces the Minority Approach to Internet Libel Jurisdiction

*Baldwin v. Fischer-Smith*, 315 S.W.3d 389 (Mo. App. S.D. 2010).

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## I. INTRODUCTION

Personal jurisdiction is not a new concept. Rather, it is one of the oldest principles that form the foundation and structure of the U.S. court system. Thus, when the Internet became available to the general public in 1995,[1] courts were faced with the difficulty of incorporating modern Internet situations into traditional standards of personal jurisdiction.[2] Because personal jurisdiction is rooted in the Fifth and Fourteenth Amendments' Due Process Clauses,[3] the preferred source of guidance in the area of Internet jurisdiction is the U.S. Supreme Court.[4] However, the Supreme Court has remained silent on the issue, leaving the lower courts to decipher the appropriate standard

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1. John L. Sullivan III, *Federal Courts Act as a Toll Booth to the Information Super Highway – Are Internet Restrictions Too High of a Price to Pay?*, 44 NEW ENG. L. REV. 935, 940 (2010).

2. *See* TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 519 (2004).

3. *See* Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102-03 (1987); Pennoyer v. Neff, 95 U.S. 714, 733 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

4. Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 476 (2004). State long-arm statutes also define the scope of personal jurisdiction, but because most long-arm statutes reach the full extent allowed under the Constitution, this Note will focus primarily on personal jurisdiction according to the Due Process Clause. *See infra* notes 62-64 and accompanying text.

themselves.[5] This has led to considerable divergence among the lower courts in deciding Internet-related disputes.[6]

When it comes to Internet libel across state borders, courts have been particularly contradictory.[7] Many courts continue to apply the traditional "effects" tests of *Calder v. Jones*,[8] despite the fact that *Calder* did not involve the Internet. Although many jurisdictions use this test, courts differ in how they interpret the three requirements, especially the second "express aiming" requirement.[9] The minority view is that express aiming requires no more than the mere targeting of a plaintiff who resides in the forum.[10] On the other hand, the majority view is that express aiming requires "something more" than merely targeting a plaintiff who happens to reside in the forum; the defendant must, to some extent, target the forum state as well.[11] Even within the majority view there are varying opinions regarding the extent to which the defendant must target the forum state.[12]

Although *Calder* is the predominant standard of libel jurisdiction, some courts incorporate the personal jurisdiction principles of *Burger King Corp. v. Rudzewicz*[13] into their analyses of libel cases.[14] However, because *Burger King* was a contract case, its test is not always a perfect fit for intentional tort situations.[15] In the alternative, some courts have chosen to apply the framework set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, which is a nontraditional test catered specifically to Internet-related disputes.[16] As if these competing standards were not confusing enough, courts often choose to utilize two or more standards side-by-side instead of committing to only one.[17] This presents problems because courts seldom explain how such seemingly contradictory tests relate to each other.[18]

Before *Baldwin v. Fischer-Smith*,[19] Internet libel jurisdiction was an unsettled issue in Missouri.[20] Because it was an issue of first impression for the

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5. Kyle D. Johnson, Note, *Measuring Minimum Contacts over the Internet: How Courts Analyze Internet Communications to Acquire Personal Jurisdiction Over the Out-of-State Person*, 46 U. LOUISVILLE L. REV. 313, 323 (2007).

6. *See infra* Part III.C-D.

7. *See infra* Part III.C.

8. 465 U.S. 783, 787-89 (1984).

9. *See infra* Part III.C.

10. *See* Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1029 (2d Cir. 1997).

11. *See* IMO Indus., Inc. v. Kiekart AG, 155 F.3d 254, 265 (3d Cir. 1998).

12. *See infra* notes 99-107 and accompanying text.

13. 471 U.S. 462 (1985).

14. *See infra* notes 125-34 and accompanying text.

15. *See infra* Part III.C.

16. *See* 952 F. Supp. 1119 (W.D. Pa. 1997).

17. *See infra* notes 130-32, 163-65 and accompanying text.

18. *See infra* note 129 and accompanying text.

19. 315 S.W.3d 389 (Mo. App. S.D. 2010).

20. *Id.* at 391.

Missouri Court of Appeals, the *Baldwin* court faced numerous possible standards from which to choose.[21] Ultimately, the Missouri Court of Appeals for the Southern District adopted the minority view of the *Calder* effects test.[22] The court found that to satisfy the express aiming requirement of the effects test, a defendant is subject to personal jurisdiction by merely targeting a plaintiff who resides in the forum; no extra targeting of the forum state is necessary.[23] Therefore, the court opted for the looser version of the *Calder* effects test, one that allows the forum state greater leeway in reaching a nonresident defendant.

The competing standards of Internet libel jurisdiction reflect the tensions between the forum state's interest in providing convenient recovery for its injured residents and the defendant's constitutional right to foresee where he might be subject to jurisdiction. In an effort to pursue these two goals as well as integrate modern Internet-related concerns, lower courts have derived numerous divergent tests for Internet libel jurisdiction, leaving the issue in a state of disorder and ambiguity. To analyze this problem, this Note will first survey the historical background of traditional personal jurisdiction principles, with particular emphasis on the U.S. Supreme Court's *Calder* "effects" test.[24] Then, this Note will discuss how the lower courts have interpreted and misinterpreted *Calder*, as they attempt to incorporate Internet-related issues and merge the effects test with other personal jurisdiction standards.[25] Finally, this Note will examine *Baldwin*'s reasoning in light of the competing standards for Internet libel jurisdiction and will recommend what future courts can do to resolve the still-unsettled issues of Internet jurisdiction in Missouri.[26]

## II. FACTS AND HOLDING

Plaintiffs Mark, Carol, Theresa, and Nicole Baldwin[27] are residents of Missouri who operate a business called Whispering Lane Kennel, located near Ava, Missouri.[28] Plaintiffs breed and sell dogs, board them for pay, and exhibit them at various dog shows throughout the country.[29] Plaintiffs work mainly with a breed of dog known as the "Chinese Crested."[30] Defendants

21. *Id.*

22. *See id.* at 395.

23. *Id.* at 396-97.

24. *See infra* Part III.A-B.

25. *See infra* Part III.C-D.

26. *See infra* Parts IV-V.

27. The listed plaintiffs are "husband and wife, daughter, and fifteen-year-old granddaughter, respectively." Appellants' Brief at 2, *Baldwin*, 315 S.W.3d 389 (No. SD30235), 2010 WL 1280632 at *2.

28. *Baldwin*, 315 S.W.3d at 392.

29. *Id.*

30. *Id.*

Fischer-Smith and Hall, residents of Arizona and Pennsylvania, respectively, are competitors of Plaintiffs in the breeding and exhibiting of Chinese Crested dogs.[31] The controversy arose when Defendants constructed an Internet website, www.stop-whisperinglane.com,[32] which they used to denigrate Plaintiffs and their business.[33] The homepage of the website, titled "STOP-WHISPERING LANE KENNEL," named the three Plaintiffs as owners and listed the location of the kennel in Ava, Missouri.[34] In response to the website, Plaintiffs sued Defendants in Missouri for libel.[35] Defendants filed a motion to dismiss for lack of personal jurisdiction.[36]

Defendants' motion stated that Plaintiffs could not establish personal jurisdiction over them because they failed to show that Defendants had the minimum contacts in Missouri that are required for specific jurisdiction.[37] Although the circuit court found that Plaintiffs sufficiently asserted that Defendants committed libel in Missouri, the court decided that Plaintiffs nevertheless failed to show the minimum contacts necessary for specific jurisdiction over Defendants.[38] Therefore, the circuit court granted Defendants' motion to dismiss for lack of personal jurisdiction.[39]

On appeal to the Missouri Court of Appeals, Southern District, Plaintiffs argued that the trial court erred in dismissing their suit for lack of personal jurisdiction because Missouri had specific jurisdiction over the two nonresi-

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31. *Id.*

32. *Id.* "The website could be viewed by anyone with internet access." *Id.*

33. *Id.* The website contained the following language:

> Welcome[.] This web site has been set-up to help save others from the fraudulent business practices of *Whispering Lane Chinese Cresteds Mark. Carol, Teresa [sic] and Nicole Baldwin*. This site will explain the gross neglect that many dogs have suffered while in their care, up to and including *death!* It will also show the lack of *ETHICS* displayed by these so-called breeders, as evidence of fraud and embezzlement are clearly explained.

Appellants' Brief, *supra* note 27, at 7.

34. *Baldwin*, 315 S.W.3d at 392. The opinion states that it "need[s] not further describe the website content since defendants have not cross-appealed the finding that plaintiffs' libel allegations are adequate." *Id.*

35. *Id.* Plaintiffs also sued Defendants on "other tort theories," which the opinion does not discuss and which are irrelevant to this Note's analysis. *Id.*

36. *Id.*

37. Appellants' Brief, *supra* note 27, at 4. Defendants also argued in their motion that Plaintiffs failed to adequately allege that a tort was committed, in that they failed to show damages. *Id.* Further, Defendants asserted that even if Plantiffs adequately alleged that a tort was committed, the alleged tort was not committed in Missouri. *Id.*

38. *Baldwin*, 315 S.W.3d at 392. Initially, the circuit court allowed Plaintiffs to replead because it had doubts about the jurisdictional allegations. *Id.*

39. *See id.*

dent Defendants under the "effects" test of *Calder v. Jones*.[40] The *Calder* effects test holds that a state can assert personal jurisdiction over a nonresident defendant who has committed (1) an intentional act (2) directed at the state (3) causing harm the defendant knew was likely to be felt in the state.[41] As the first and third parts of the effects test were easily satisfied in this case, Plaintiffs' argument focused primarily on the test's second part.[42]

Plaintiffs argued that *Calder* defines "express aiming" as making the forum state the "focal point" of both the story and the harm suffered from the libelous content.[43] Plaintiffs acknowledged that there are diverging viewpoints with regard to what "express aiming" means.[44] Plaintiffs advocated the minority position, which finds that "express aiming" occurs when a nonresident defendant's tortious conduct adversely affects a resident of the forum state.[45] On the other hand, the majority view of "express aiming" requires "something more" than an intentional act which harms the plaintiff in the forum state, i.e., some sort of additional targeting of the forum state.[46]

In the alternative, Plaintiffs contended that even when applying the stricter majority position, Defendants' actions satisfied the "express aiming" element of the *Calder* effects test.[47] They listed several factors to support their proposition that Defendants made Missouri the focal point of their tortious conduct: (1) Defendants' website specifically targeted both residents of and a business located in Missouri; (2) Defendants were aware that Plaintiffs and their business were located in Missouri; (3) the website listed the exact location of Plaintiffs' kennel in Missouri; (4) Missouri is the dog-breeding capital of the United States; (5) Defendants' website criticized the Missouri dog-breeding business in general; and (6) there is evidence that at least twenty-eight residents of Missouri have accessed the website.[48] Thus, Plaintiffs argued that because Defendants expressly targeted Plaintiffs as residents of Missouri, Plaintiffs' business, which is located in Missouri, and the forum

40. Appellants' Brief, *supra* note 27, at 22; *see* Calder v. Jones, 465 U.S. 783 (1984).

41. Appellants' Brief, *supra* note 27, at 30.

42. *See id.* at 30, 50-52. The first part of the effects test, the requirement of an intentional act, was obviously satisfied, because the libel alleged in this case is an intentional tort. *Id.* at 30. The third part, causing harm felt in the forum, was also clearly satisfied; because all the Plaintiffs reside in Missouri and their business is located in Missouri, the harm caused to Plaintiffs and their business was felt in the forum. *Id.* at 50-52.

43. *Id.* at 30.

44. *Id.* at 32.

45. *Id.* at 31 (citing Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997)).

46. *Id.* (citing Griffis v. Luban, 646 N.W.2d 527, 533 (Minn. 2002)).

47. *Id.*

48. *Id.* at 49-50.

state itself, Defendants had sufficient minimum contacts in Missouri to be subject to personal jurisdiction.[49]

The Southern District agreed with Plaintiffs and held that when a non-resident defendant conducts tortious activity over the Internet and expressly aims such activity at a resident of the forum state for the purpose of causing the resident injury there, the defendant has sufficient minimum contacts to be subject to personal jurisdiction in the forum state.[50]

## III. LEGAL BACKGROUND

Because the U.S. Supreme Court has not yet defined the parameters of personal jurisdiction in Internet cases, lower courts struggle to apply traditional principles of jurisdiction to more modern Internet-related disputes. Therefore, this section will begin by briefly recounting the landmark cases that formed the foundation of personal jurisdiction in the United States. Next, this section will discuss the narrower spectrum of libel jurisdiction, focusing on *Calder v. Jones*. This section then explains how the lower courts have variously interpreted *Calder*'s "effects" test as a standard of personal jurisdiction. Finally, this section will examine the Internet's influence on traditional personal jurisdiction standards and whether the courts can establish a unitary approach to personal jurisdiction in all types of Internet-related disputes.

### *A. Brief History of Personal Jurisdiction*

Although modern principles of personal jurisdiction are rooted in Fourteenth Amendment Due Process, the concept of jurisdiction goes back as early as fifteenth-century England with the common law doctrine of *coram non judice*.[51] The phrase, which translates to "before a person not a judge," meant that there must be a "lawful judicial authority" present in order for a proceeding to yield a legal, binding judgment.[52] Then, in the landmark 1877 decision *Pennoyer v. Neff*, the U.S. Supreme Court for the first time declared that a judgment of a state court lacking personal jurisdiction violates the Fourteenth Amendment's Due Process Clause.[53] The Court stated that in order for a court to obtain personal jurisdiction over a defendant, "he must be brought within its jurisdiction by service of process within the State, or his

49. *See id.* at 50.

50. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 396-97 (Mo. App. S.D. 2010).

51. Burnham v. Superior Court, 496 U.S. 604, 608-09 (1990).

52. *See id.* at 609.

53. 95 U.S. 714, 733 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

voluntary appearance."[54] Therefore, due process permitted service of process to extend no further than the territorial jurisdiction of the forum state.[55]

In the late nineteenth and early twentieth centuries, the limiting of service of process to a forum state's geographical borders experienced a dramatic transformation due to "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity."[56] States began to create legal fictions that allowed them to relax their strict jurisdictional boundaries and reach nonresident defendants.[57] For example, states required that nonresident corporations appoint an in-state agent to receive service of process as a condition of doing business within the forum state.[58] Finally, in the 1945 decision *International Shoe*, the Supreme Court redefined personal jurisdiction by dispensing with the "unbending territorial limits on jurisdiction set forth in *Pennoyer*."[59] The Court held that in order for a court to establish personal jurisdiction over a defendant, the defendant must have "sufficient contacts or ties with the . . . forum to make it reasonable and just according to our traditional conception of fair play and substantial justice."[60] Thus, from this decision, courts have derived the general standard that a nonresident defendant not physically present in the forum may be subject to personal jurisdiction if he has sufficient minimum contacts in the forum state and the litigation arises out of those contacts.[61]

To obtain personal jurisdiction over a defendant, a court must satisfy not only the "minimum contacts" requirements of the Fourteenth Amendment Due Process Clause but also, as a threshold matter, the provisions of its state's long-arm statute.[62] However, because most states' long-arm statutes reach the full extent permitted by the Constitution,[63] lower courts mainly look to decisions of the Supreme Court for guidance in jurisdictional issues.[64] Unfortunately, the Supreme Court has never specifically addressed jurisdic-

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54. *Id.*

55. *See id.*

56. *Burnham*, 496 U.S. at 617.

57. *Id.*

58. *Id.* States also allowed in-state "substituted service" for nonresident motorists who caused injury in the state and left before process could be served upon them. *Id.*

59. *Id.* at 618; *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

60. *Int'l Shoe*, 326 U.S. at 320.

61. *See Burnham*, 496 U.S. at 618.

62. Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 605 (2003).

63. Jeffrey J. Utermohle, *Maryland's Diminished Long-Arm Jurisdiction in the Wake of* Zavian v. Foudy, 31 U. BALT. L. REV. 1, 6-7 (2001); *see, e.g.*, Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 232 (Mo. 2010) (en banc) (stating that Missouri's long-arm statute is construed to extend personal jurisdiction over nonresident defendants to the extent permissible under the Due Process Clause).

64. Borchers, *supra* note 4, at 476.

tional issues in the context of the Internet.[65] In this vacuum, lower courts struggle to apply traditional, pre-Internet personal jurisdiction principles to contemporary Internet-related disputes.[66] Particularly, in Internet libel cases, courts may rely on two relatively recent Supreme Court cases that dealt with libel jurisdiction.[67]

### *B. Libel Jurisdiction*

In *Keeton v. Hustler Magazine*, Kathy Keeton, a resident of New York, filed a libel claim in New Hampshire against Hustler Magazine, Inc., ("Hustler") an Ohio corporation whose principal place of business was in California.[68] Keeton alleged that Hustler libeled her in five separate issues of its magazine.[69] Although Keeton filed her claim in New Hampshire, her only connection with the state was that a magazine that she assisted in producing was circulated there.[70] Hustler's contacts with New Hampshire involved the sale of approximately 10,000 to 15,000 copies of its nationwide magazine in that state each month.[71]

Although New Hampshire was just one of the fifty states in which *Hustler* magazine was circulated, the Supreme Court held that "[Hustler's] regular circulation of magazines in the forum State [was] sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."[72] While the Court acknowledged the fact that the bulk of the harm done to Keeton had occurred outside of New Hampshire, it stated that such will be true of almost any libel case not filed in the plaintiff's domicile and that there was no reason to confine libel actions to the plaintiff's home state.[73] The Court indicated that while the plaintiff's home forum may be relevant to the determination of the defendant's minimum contacts, it is certainly not dispositive.[74] Instead, the Court instructed that the primary focus is on the *defendant*'s contacts with the forum – not the plaintiff's.[75] Further, although the lower appellate court had been concerned with Keeton's obvious forum-shopping – New Hampshire was the only state in which the statute of limitations had not already run on her claim – the Supreme Court quickly dispensed

65. Johnson, *supra* note 5, at 323.

66. Borchers, *supra* note 4, at 476.

67. *Id.* *See* Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

68. *Keeton*, 465 U.S. at 772.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 773-74.

73. *Id.* at 780.

74. *Id.*

75. *Id.*

with this issue.[76] The Court stated that "[t]he chance duration of statutes of limitations in nonforum jurisdictions has nothing to do with the contacts among [Hustler], New Hampshire, and this multistate libel action."[77]

The same year the Supreme Court decided *Keeton*, it decided another major libel case, *Calder v. Jones*.[78] In *Calder*, Shirley Jones, a resident of California, filed a libel claim in her home state against the National Enquirer, Inc. (the Enquirer), its local distributing company, and two of its employees.[79] The Enquirer was a corporation with its state of incorporation and principal place of business both located in Florida.[80] Although the Enquirer distributed its weekly magazine in all fifty states, its highest circulation was in California.[81] Jones alleged that the Defendants libeled her in one of the Enquirer's magazine articles.[82] The two Defendants, Florida residents who were the author and the editor of the article, claimed that California lacked personal jurisdiction over them.[83] However, the Supreme Court disagreed, holding that jurisdiction was proper in California because the Defendants "knew that the brunt of [Jones's] injury would be felt by [Jones] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation."[84] Thus, the Court found that jurisdiction over Defendants was "based on the 'effects' of their Florida conduct in California."[85]

Although the companion cases of *Keeton* and *Calder* are factually similar, *Calder* is, to some extent, more equitable in that the Plaintiff did not engage in such conspicuous forum-shopping.[86] Further, in *Calder*, the state in which the Plaintiff filed was not only the Plaintiff's home forum but also where the libelous material had its greatest circulation.[87] While *Keeton* and *Calder* do not present a clear rule for libel jurisdiction, their holdings suggest a presumption that a libel plaintiff can obtain jurisdiction over a defendant in any state in which the circulation of the libelous material is both intentional and substantial.[88]

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76. *Id.* at 778-79.
77. *Id.* at 779.
78. 465 U.S. 783 (1984).
79. *Id.* at 785.
80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.* at 785-86.
84. *Id.* at 789-90.
85. *Id.* at 789.
86. Borchers, *supra* note 4, at 477.
87. *See Calder*, 465 U.S. at 785.
88. Borchers, *supra* note 4, at 478.

### C. Calder's "Express Aiming" Requirement

Although both *Keeton* and *Calder* are significant decisions in the area of libel law, it is *Calder*'s "effects" test that has emerged as the standard for personal jurisdiction in intentional tort cases.[89] Unfortunately, this seemingly simple test has proven difficult to apply, thus giving way to a variety of interpretations by the lower courts.[90]

The greatest divergence of opinion has been with regard to the second, "express aiming" requirement.[91] The *Calder* opinion itself vaguely states that the defendant must "know" that the injury will be felt by the plaintiff in the forum state.[92] However, exactly what type of *mens rea* the defendant must possess is unclear from this language.[93] For instance, must the defendant have a "*desire* or *purpose*" to harm the plaintiff in the forum, or need the defendant only be "*aware*" that such harm would occur to the plaintiff in the forum?[94] In the alternative, is jurisdiction proper merely when the defendant "*should have known*" that the harm would occur to the plaintiff in the forum state?[95] Further, *Calder* did not elaborate upon whether the defendant must expressly aim his conduct at the forum state or whether it is sufficient that the defendant aim his conduct at a particular plaintiff who happens to be in the forum state; that is, courts differ on the extent to which the defendant must target the forum state itself.[96]

Although the federal circuits have varying interpretations of the "express aiming" component of the "effects" test, the majority view requires something more than the mere targeting of a plaintiff who happens to reside in the forum state.[97] Yet even within this majority, there are slight variations as to what "something more" entails. For instance, the Fourth, Sixth, and Eighth Circuits have indicated that injury felt by a plaintiff in the forum with-

89. *See* Baldwin v. Fischer-Smith, 315 S.W.3d 389, 392 (Mo. App. S.D. 2010).

90. C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 611 (2006).

91. *Id.* at 618. The express aiming requirement has inspired the most controversy because it is "a concept which does not define itself, and has not been adequately defined." Peter Singleton, *Personal Jurisdiction in the Ninth Circuit*, 59 HASTINGS L.J. 911, 932 (2008).

92. Calder v. Jones, 465 U.S. 783, 789-90 (1984) ("[Defendants'] intentional, and allegedly tortious, actions were expressly aimed at [the forum state]. [Defendants wrote and] edited an article that they knew would have a potentially devastating impact upon [Plaintiff]. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works . . . .").

93. *See* Floyd & Baradaran-Robison, *supra* note 90, at 618.

94. *Id.*

95. *Id.*

96. *See id.* at 618-19.

97. *See* IMO Indus., Inc. v. Kiekart AG, 155 F.3d 254, 265 (3d Cir. 1998).

out other contacts of the defendant is not enough to satisfy *Calder*.[98] However, none of these circuits spells out exactly what those "other contacts" might be.[99]

Other circuits have been more illustrative of what constitutes "something more." These circuits also keep close to *Calder*'s language by maintaining that simple "knowledge" of harmful effects in the forum state will suffice. For instance, the First Circuit has held that to satisfy the express aiming requirement, the defendant must be aware that a substantial portion of the harm would occur in the forum state.[100] The Fifth Circuit more specifically states that to satisfy the express aiming requirement, the defendant cannot merely target a particular plaintiff who is located in some unidentified place; rather, the defendant must *know* the forum state in which the plaintiff will experience the brunt of the harm.[101] In other words, the fact that the plaintiff resides and suffers harm in the forum state is not enough to fulfill the intentional targeting requirement of the *Calder* effects test.[102]

Yet other circuits have expanded *Calder* to include an element of specific intent with regard to the forum state. The Third Circuit stated that the defendant's mere targeting of a plaintiff who he knows is located in the forum is insufficient; the defendant must "'manifest behavior intentionally targeted at and focused on' the forum."[103] Both the Ninth Circuit and the Tenth Circuit have held that express aiming requires more than just *foreseeability* of harmful effects in the forum state;[104] it requires that the defendant intentionally

98. *See* Johnson v. Arden, 614 F.3d 785, 797 (8th Cir. 2010) ("We therefore construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction."); Air Prods. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 552 (6th Cir. 2007) ("The Sixth Circuit, as well as other circuits, have narrowed the application of the *Calder* 'effects test,' such that the mere allegation of intentional tortious conduct which has injured a forum resident does not, by itself, always satisfy the purposeful availment prong."); ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir. 1997) (stating that mere injury to the plaintiff in the forum, "when unaccompanied by other contacts . . . is ultimately too unfocused to justify personal jurisdiction").

99. *See, e.g.*, *Johnson*, 614 F.3d at 797 (failing to explain what "additional contacts" with the forum state are required to confer personal jurisdiction); *ESAB Grp.*, 126 F.3d at 626 (failing to describe the "other contacts" that must accompany injury to the plaintiff in the forum).

100. Noonan v. Winston Co., 135 F.3d 85, 90-91 (1st Cir. 1998).

101. Revell v. Lidov, 317 F.3d 467, 475 (5th Cir. 2002).

102. *Id.* at 473.

103. IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998) (quoting *ESAB Grp.*, 126 F.3d at 625 (4th Cir. 1997)).

104. Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1077 (10th Cir. 2008); Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir. 2006).

target the forum state with knowledge that the plaintiff will suffer harm there.[105]

Finally, in a case factually similar to *Baldwin*, *Tamburo v. Dworkin*,[106] the Seventh Circuit also asserted its requirement of specific intent in the *Calder* effects test.[107] In that case, Tamburo, an Illinois resident who designed software for dog breeders, sued Kristen Henry, Roxanne Hayes, Karen Mills, and Steven Dworkin, dog breeders who were located in Colorado, Michigan, Ohio, and Canada, respectively, due to libelous statements they posted on their websites regarding Tamburo.[108] The main issue on appeal to the Seventh Circuit was "whether the defendants 'purposefully directed' their conduct at the forum state" according to the *Calder* effects test.[109] The court recognized that there were numerous viewpoints regarding the express aiming requirement of *Calder*.[110] However, the Seventh Circuit ultimately held that "[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder*'s express-aiming requirement."[111]

In contrast to the majority of circuit courts that believe the defendant must, at a minimum, *knowingly* target the forum state, the minority of circuits holds that something less than "awareness" of effects in the forum state will suffice. The Second Circuit states that the defendant must have "reason to believe" that the brunt of the injury would be felt in the forum.[112] In effect, a defendant may be subject to personal jurisdiction if a court determines that he *should have known* his conduct would cause harmful effects in the forum state.[113] Yet, by far the most liberal interpretation of the *Calder* effects test is that of the Eleventh Circuit, which maintains that a defendant may be subject to personal jurisdiction if he commits an intentional tort expressly aimed at a resident of the forum state, the effects of which are suffered by the resident in the forum.[114] This rule basically states that jurisdiction is proper wherever the victim of an intentional tort resides. Thus, unlike the other circuits' standards of the "express aiming" component, the Eleventh Circuit requires no *mens rea* with regard to the forum state.

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105. *Dudnikov*, 514 F.3d at 1077; Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997).

106. Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 567 (2010).

107. *See id.* at 707-08.

108. *Id.* at 698. Defendants had libeled Tamburo on their website by posting statements accusing him of theft, hacking, selling stolen goods, and calling on readers to boycott his products. *See id.*

109. *Id.* at 702.

110. *Id.* at 704.

111. *Id.* at 707.

112. Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1029 (2d Cir. 1997).

113. *See id.*

114. Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008).

Although several Missouri cases cite *Calder*,[115] no case had interpreted the express aiming requirement of the effects test until *Baldwin v. Fischer-Smith*.[116] The closest any Missouri case had come to offering guidance on issues of libel jurisdiction was the recent Supreme Court of Missouri case, *Bryant v. Smith Interior Design Group, Inc.*[117] In that case, Bryant, a Missouri resident, filed claims of fraudulent misrepresentation and fraudulent concealment against Smith Interior, a Florida corporation, and its president, William Kopp, a Florida resident.[118] Because *Bryant* is a fraudulent misrepresentation case, not a libel case, it did not touch upon the *Calder* test. However, because it involved nonresident defendants committing an intentional tort against a Missouri plaintiff, the court still had to analyze the defendants' minimum contacts in Missouri for purposes of determining specific jurisdiction.[119]

In evaluating the defendants' minimum contacts, the court looked to whether the defendants "purposefully avail[ed]" themselves of the privilege of conducting activities in the forum and asked whether the litigation arose out of such activities.[120] The court found that the defendants possessed the requisite minimum contacts in Missouri because they knowingly mailed fraudulent documents to the plaintiff in Missouri and thus purposefully availed themselves of the privilege of conducting business in the forum.[121]

The *Bryant* court's "purposefully avail" language derives from the famous personal jurisdiction case, *Burger King Corp. v. Rudzewicz*.[122] That case, which was decided by the U.S. Supreme Court a year after *Calder*, stated that for jurisdiction to be proper, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[123] The Court's primary focus was not on the defendant's intent to cause injury in the forum, but instead on the activities by which the defendant deliberately reached out to do business with a corporation located in the forum.[124]

However, *Burger King* also refers to the standard as requiring that the defendant "purposefully direct[] his activities at residents of the forum," that

115. *See, e.g.*, State *ex rel.* William Ranni Assocs., Inc. v. Hartenbach, 742 S.W.2d 134, 138 (Mo. 1987) (en banc); Beckers v. Seck, 14 S.W.3d 139, 144 (Mo. App. W.D. 2000); Elaine K. v. Augusta Hotel Assocs. Ltd. P'ship, 850 S.W.2d 376, 378 (Mo. App. E.D. 1993); Breen v. Jarvis, 761 S.W.2d 638, 640 (Mo. App. E.D. 1988).

116. *See* Baldwin v. Fischer-Smith, 315 S.W.3d 389, 394 (Mo. App. S.D. 2010).

117. 310 S.W.3d 227 (Mo. 2010) (en banc).

118. *Id.* at 230.

119. *Id.* at 232.

120. *Id.* at 232-33.

121. *Id.* at 234-35.

122. 471 U.S. 462 (1985).

123. *Id.* at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

124. Floyd & Baradaran-Robison, *supra* note 90, at 607-08.

the defendant "purposefully establish 'minimum contacts' in the forum state," and that the defendant "purposefully avail[] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[125] Due to these varying formulations of the "purposeful availment" standard, the test leads to different results in different cases.[126]

Because *Burger King* is a contract case, not an intentional tort case, some courts have chosen to confine the purposeful availment standard to contract disputes.[127] Other courts have either equated the two tests and used them interchangeably[128] or utilized both without explaining their relationship.[129] Regardless of how the lower courts view the relationship between *Calder* and *Burger King*, the Supreme Court has adopted two apparently divergent standards for personal jurisdiction, with *Calder* leading the intentional tort cases and *Burger King* guiding the contract cases.[130] While the *Calder* line of cases places more emphasis on the defendant being, to varying degrees, aware of a particular plaintiff's identity and residence in the forum,[131] the *Burger King* line of cases does not require the defendant to target any specific plaintiff in the forum.[132] Rather, *Burger King* requires that the defendant's business activities have a foreseeable effect in the forum in general.[133] This distinction raises the question: why is knowledge of the plaintiff's identity and location so vital in the *Calder* test but not in the *Burger King* analysis?[134]

Professors C. Douglas Floyd and Shima Baradaran-Robison of Brigham Young University Law School opine that in both contexts, the Supreme Court is concerned with whether the defendant has sufficient notice of the particular geographical location in which he could be subject to suit.[135] For instance, in

125. *Id.* at 621 (quoting *Burger King*, 471 U.S. at 472) (internal quotation marks omitted).

126. *Id.*

127. *Id.* at 623-24. *See, e.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802-03 (9th Cir. 2004); Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 455 (3d Cir. 2003); Remick v. Manfredy, 238 F.3d 248, 257-60 (3d Cir. 2001).

128. Floyd & Baradaran-Robison, *supra* note 90, at 622-23; *see, e.g.*, Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1131 (9th Cir. 2003); ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 625-26 (4th Cir. 1997); Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 595-96 (E.D. Va. 2003).

129. Floyd & Baradaran-Robison, *supra* note 90, at 624; *see, e.g.*, Griffis v. Luban, 646 N.W.2d 527, 532 (Minn. 2002).

130. Floyd & Baradaran-Robison, *supra* note 90, at 633.

131. *Id.* at 636.

132. *Id.* at 627.

133. *Id.*

134. *Id.* at 636.

135. *Id.* This "notice" is not to be confused with the notice required by service of process. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) ("We are likewise unable to conclude that the service of the process within the state upon an

commercial transaction cases following *Burger King*, the defendant should reasonably anticipate being haled into court in any state where he purposefully avails of the privilege of conducting business activities; thus, no additional knowledge of the exact plaintiff being harmed is required.[136] Floyd and Baradaran-Robison believe that most intentional tort cases can be treated similarly: if a defendant has engaged in tortious conduct that he knows will create a risk of harm in the forum state, he should reasonably expect being subject to suit in that state.[137]

On the other hand, the professors argue that some intentional tort cases *do* require that the defendant have extra knowledge of the plaintiff's identity and location in order for the defendant to be properly notified of the location in which he could be subject to personal jurisdiction.[138] For example, in libel cases, the brunt of the harm occurs where the plaintiff's reputation is damaged, which depends on where the plaintiff is most well-known, naturally tending to be where the plaintiff lives and works.[139] Therefore, merely engaging in defamatory conduct does not automatically signal to the defendant the state in which he will be subject to jurisdiction.[140] Rather, for the defendant to adequately foresee where he could be subject to suit, the defendant must have some additional knowledge of the plaintiff's identity and location.[141]

Missouri courts do not seem to have taken a direct stance on the relationship between the *Calder* and *Burger King* standards. Although *Bryant* applied the *Burger King* standard to a fraudulent misrepresentation case, which is an intentional tort action, the situation that gave rise to the tort was a business deal gone wrong.[142] The court might have thought that the *Calder* effects test was inappropriate given the contractual context of the case. Whatever the reasoning, the *Bryant* court chose to utilize the *Burger King* purposeful availment standard without the slightest mention of *Calder*.

### *D. Internet Jurisdiction*

Although courts frequently apply the *Calder* effects test to Internet intentional tort cases, there exists another line of cases that is especially tailored to Internet law. Since the advent of the World Wide Web, courts have been searching for a unitary approach to personal jurisdiction in all Internet cas-

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agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit . . . .").

136. Floyd & Baradaran-Robinson, *supra* note 90, at 636.

137. *Id.* at 637.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 230-31 (Mo. 2010) (en banc).

es.[143] Because the Supreme Court has remained relatively silent with regard to Internet jurisdiction, the legal world has instead looked to innovative cases among the lower courts for guidance.[144]

The first pioneer of Internet personal jurisdiction was *Inset Systems, Inc. v. Instruction Set, Inc.*[145] from the United States District Court of Connecticut.[146] In this case, Inset Systems, a Connecticut corporation, registered for the federal trademark "INSET"; subsequently, Instruction Set, a Massachusetts corporation, began using the Internet domain address "INSET.COM" to advertise its own goods and services.[147] Inset Systems then sued in its home forum of Connecticut, alleging Instruction Set's actions constituted trademark infringement.[148] Instruction Set argued that the court lacked personal jurisdiction because Instruction Set did not have sufficient minimum contacts in Connecticut.[149] However, the court disagreed, holding that "since [Instruction Set] purposefully directed its advertising activities toward this state on a continuing basis . . . it could reasonably anticipate the possibility of being haled into court here."[150] Although Instruction Set's website was available to all states – not just Connecticut – the court found that because of the continuous availability of the defendant's advertisements to any Internet user, the defendant purposefully availed itself of conducting business in the forum state.[151] Therefore, under the *Inset System* court's reasoning, a website that advertised a defendant's goods and services could subject the defendant to personal jurisdiction in any state in which that website could be viewed.[152]

*Inset System*'s extremely liberal understanding of Internet jurisdiction was consistent with the emerging view that purposeful availment occurred wherever a website could be viewed.[153] However, another case soon came along and supplanted *Inset System*'s loose standard of Internet jurisdiction with a more stringent framework. Like *Inset System*, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[154] was a federal district court decision that achieved a surprisingly robust following from other courts.[155]

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143. Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1149 (2005).

144. *See id.* at 1156.

145. 937 F. Supp. 161 (D. Conn. 1996).

146. Yokoyama, *supra* note 143, at 1156.

147. *Inset*, 937 F. Supp. at 162-63.

148. *Id.* at 163.

149. *Id.* at 164.

150. *Id.* at 165.

151. *Id.*

152. *See id.*

153. Yokoyama, *supra* note 143, at 1157.

154. 952 F. Supp. 1119 (W.D. Pa. 1997).

155. Yokoyama, *supra* note 143, at 1166-67.

*Zippo*'s framework for determining personal jurisdiction in Internet cases is based on the level of interactivity of the website at issue.[156] The standard set out a "continuum, or 'sliding scale,' for measuring Web sites, which fall into one of three general categories: (1) passive, (2) interactive, or (3) integral to the defendant's business."[157] Passive websites, which simply display information to online viewers, do not implicate personal jurisdiction over the defendant website creator.[158] Interactive websites, which allow Internet users to communicate with the site host, may subject the website creator to personal jurisdiction, depending on the level of interactivity and the extent to which the site is used for commercial purposes.[159] Finally, "integral" websites, which defendants use to enter into contracts with out-of-state individuals through the repeated, online transfer of computer files, undoubtedly trigger the exercise of personal jurisdiction.[160]

Despite the fact that *Zippo* came not from the Supreme Court but from a federal district court, six federal circuits have chosen to recognize or adopt its sliding scale means for determining personal jurisdiction in Internet cases.[161] Although *Zippo* was a trademark infringement case, its sliding scale approach has been applied to a variety of other Internet-based claims.[162] In the area of Internet libel, many courts apply both *Calder* and *Zippo* side-by-side, asserting that they are not in tension.[163] Some courts use *Zippo* as a threshold analysis; if the website is sufficiently interactive under *Zippo*, the court proceeds to the *Calder* effects test.[164] Other courts use a sort of *Calder/Zippo* hybrid test for Internet libel jurisdiction.[165] However, the *Zippo* framework does not always make practical sense when applied to certain causes of action, particularly Internet libel.[166] For instance, one might ask how the interactivity of a website has anything to do with the harm suffered by a plaintiff.[167] Despite the *Zippo* test's less-than-perfect fit in the area of Internet libel, courts more often look to *Zippo* than many Supreme Court decisions.[168]

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156. Rice & Gladstone, *supra* note 62, at 618.

157. *Id.*; *see Zippo*, 952 F. Supp. at 1124.

158. *Zippo*, 952 F. Supp. at 1124.

159. *Id.*

160. *Id.*

161. Rice & Gladstone, *supra* note 62, at 622-23.

162. *See* Borchers, *supra* note 4, at 478.

163. *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 471-72 (5th Cir. 2002).

164. *See, e.g.*, *id.* at 472.

165. *See, e.g.*, Carefirst of Md., Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 398-99 (4th Cir. 2003).

166. *See id.* at 399-400.

167. *See* Yokoyama, *supra* note 143, at 1176.

168. *Id.*

Before *Baldwin*, Missouri state courts had only one "website" case;[169] this case did not mention *Zippo*, and, given that it concerned contracts, was not particularly enlightening in the area of Internet libel jurisdiction.[170] Therefore, *Baldwin* presented the Missouri Court of Appeals for the Southern District with the opportunity to pave the way for future cases by setting the standard for Internet libel jurisdiction in Missouri.

## IV. INSTANT DECISION

In *Baldwin v. Fischer-Smith*, the issue presented was whether the out-of-state Defendants were subject to personal jurisdiction in Missouri under the *Calder* effects test when they published a website that libeled Plaintiffs and their business in Missouri.[171] Defendants moved to dismiss, arguing that the court lacked personal jurisdiction because Defendants did not have the minimum contacts required by due process.[172] When the circuit court granted Defendants' motion, Plaintiffs raised three points on appeal to the Missouri Court of Appeals, Southern District, the principal of which was that personal jurisdiction was proper because Defendants had the minimum contacts to satisfy due process under the *Calder* effects test.[173]

In an opinion authored by Chief Judge Daniel Scott, the appellate court sided with Plaintiffs, holding that when a nonresident defendant expressly aims his tortious conduct at a resident of the forum state for the purpose of causing the resident injury there, the defendant has sufficient minimum contacts to be subject to personal jurisdiction in the forum state.[174] In its analysis, the court relied on the traditional requirements of the *Calder* effects test: (1) intentional conduct (2) explicitly targeting the forum state (3) with the defendant's knowledge that the plaintiff would likely suffer injury in the forum state.[175] The court noted that, while it is "reasonably straightforward" to apply this test to ordinary defamation cases, the situation becomes much more complex when the Internet is involved.[176] The court acknowledged that this issue, Internet libel jurisdiction, was one of first impression in Missouri.[177]

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169. *See* State *ex rel.* Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D. 2000).

170. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 394 (Mo. App. S.D. 2010); *see Beer Nuts*, 29 S.W.3d at 830.

171. *Baldwin*, 315 S.W.3d at 392.

172. *Id.*

173. *Id.*

174. *Id.* at 396-97.

175. *Id.* at 393 (citations omitted) (internal quotation marks omitted).

176. *Id.* at 393-94 (citations omitted).

177. *Id.* at 391-92. There is one prior Missouri Internet jurisdiction case, but the court states that it is "of little value" as precedent for its analysis in this case. *Id.* at 394.

First, the court analyzed the case under the *Calder* effects test.[178] It stated that the present dispute, like most cases, turns on the meaning of the second *Calder* requirement, that of "express aiming."[179] The court recognized that there has been substantial confusion with regard to the express aiming component, and it listed three of the many approaches that other courts have taken.[180] First, some courts hold that "targeting" means simply making "an effort to reach an individual in the forum."[181] Second, other courts maintain that express aiming requires "intent to target the forum state itself."[182] Finally, still others state that mere "foreseeability of effects within the forum" is sufficient.[183] The court noted that Plaintiffs' brief outlined approximately seventy cases on the issue of "express aiming" alone, but the court refused to commit to one standard to fit all Internet libel cases.[184] Rather, the court stated, "Our more modest goal is to properly review the case before us and let others ponder the grand scheme of things."[185]

As Missouri precedent provided little to no guidance on the issue of Internet libel jurisdiction, the court decided to follow the reasoning of *Tamburo v. Dworkin*,[186] another dog-breeding case recently decided by the Seventh Circuit, both because it was so factually similar[187] and it reflected the court's views.[188] *Tamburo* held that "[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder*'s express-aiming requirement."[189]

Because the Southern District found that there was "no meaningful difference between *Tamburo*" and the present case, it reached the same outcome as the *Tamburo* court.[190] Thus, the court found that Defendants had the requisite minimum contacts to be subject to personal jurisdiction in Missouri.[191] Then, the court admitted that, due to the various interpretations of "express aiming," it could just as easily have reached a different result on the same set

178. *Id.* at 392-94.
179. *Id.* at 394.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 395.
185. *Id.*
186. 601 F.3d 693 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 567 (2010).
187. For a summary of the facts and issues of *Tamburo*, see *supra* notes 107-11 and accompanying text.
188. *Baldwin*, 315 S.W.3d at 395.
189. *Tamburo*, 601 F.3d at 707.
190. *Baldwin*, 315 S.W.3d at 397.
191. *Id.*

of facts.[192] The court explained its own analysis by listing five of the reasons it came to its conclusion.[193]

First, the court stated that it was not convinced *Calder* requires any additional targeting of the forum state itself, instead of simply targeting a known resident of the forum and causing injury there.[194] In support of this proposition, the court alluded to *Burger King Corp. v. Rudzewicz*,[195] which stated that personal jurisdiction over a nonresident defendant is proper if he "purposefully directed" his conduct "*at residents of the forum*" and the litigation arises out of that conduct.[196] Second, the court maintained that even if *Calder* does require express aiming at both the plaintiff and the forum state, the present case meets that requirement because Defendants' website not only made libelous statements about the Plaintiffs, but also made disparaging remarks about the dog-breeding laws in Missouri.[197] Third, the court indicated that it was not worried about the occasionally-raised concern of subjecting a defendant to personal jurisdiction in too many fora; the fact that a defendant is potentially subject to jurisdiction in many other states has no legal effect whatsoever on the amount of the defendant's minimum contacts with the forum state.[198] Fourth, the court noted that the Supreme Court of Missouri recently expressed the view that if "'the actual content of communications with a forum gives rise to intentional tort causes of action,' . . . 'this alone constitutes purposeful availment.'"[199] Finally, the court's fifth reason for its decision consisted of one brief declaration: "[I]f you pick a fight in Missouri, you can reasonably expect to settle it here."[200]

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192. *Id.* at 394, 397.

193. *Id.* at 397-98.

194. *Id.* This was a departure from *Tamburo*, which required specific intent to target the forum state. *See Tamburo*, 601 F.3d at 708.

195. 471 U.S. 462 (1985).

196. *Baldwin*, 315 S.W.3d at 397 (quoting *Burger King*, 471 U.S. at 472).

197. *Id.* at 397-98. Defendants' website stated:

> MO has the most LAX laws when it comes to the safety and concern of animals being housed and kept for breeding. This is why MO is knows [sic] as the Puppy Mill capitol of the WORLD. Commercial dog breeders from other parts of the U.S. often relocate to MO to make their living off of dogs and puppy sales as there are few laws to force them to raise the animals in a clean, healthy environment. There are more breeders in MO than in most other states combined! Because there are not enough state inspectors many breeders are able to breed and raise dogs in filthy, disgusting conditions.

*Id.* at 398.

198. *Id.*

199. *Id.* (quoting Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 235 (Mo. 2010)).

200. *Id.* (citing Revell v. Lidov, 317 F.3d 467, 476 (5th Cir. 2002)).

In its conclusion, the court once again asserted that it did not intend to set a universal standard for all Internet libel jurisdiction cases.[201] Rather, the court stated, "We merely decided this case."[202] Because the court found that Defendants satisfied the express aiming requirement of the *Calder* effects test, it held that Defendants had sufficient minimum contacts to be subject to personal jurisdiction in Missouri.[203] Thus, the Southern District reversed the trial court's dismissal and remanded the case for further proceedings.[204]

## V. COMMENT

Before *Baldwin*, Internet jurisdiction was, for the most part, unsettled territory in Missouri. Unfortunately, that is still true post-*Baldwin*. Because Internet libel jurisdiction was an issue of first impression in Missouri,[205] the *Baldwin* court had the opportunity to influence the standard of personal jurisdiction for all subsequent intentional tort cases involving the Internet in Missouri. Instead, the court decided to confine its opinion to the facts of the case, even explicitly stating that it did not intend to create "a decisional model to fit all situations"[206] or "any universal rule about personal jurisdiction in [I]nternet cases."[207] Therefore, the court left the matter of Internet jurisdiction in Missouri in as much perplexity and ambiguity as before.

Despite the fact that *Baldwin* refrained from creating a standard for Internet libel jurisdiction, the "non-rule" that it used should nonetheless be subject to critique, as future cases may look to it for guidance. The court interpreted *Calder*'s express aiming requirement, but only in the interest of deciding the case.[208] Faced with numerous "divergent" and "somewhat irreconcilable" analyses by other lower courts,[209] the court ultimately construed the express aiming component as requiring that a defendant expressly aim his tortious conduct at the plaintiff for the purpose of causing the plaintiff injury in the forum.[210] The court stated that it was "not persuaded" that to satisfy the express aiming component, a defendant must intentionally target the forum state itself.[211] This understanding of the express aiming requirement comports with the minority view, which does not require any extra focus on the forum.[212] In other words, the mere targeting of a plaintiff who resides in

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 399.
205. *Id.* at 391.
206. *Id.* at 395.
207. *Id.* at 398.
208. *See id.* at 393-94.
209. *Id.* at 392.
210. *Id.* at 397 (quoting Tamburo v. Dworkin, 601 F.3d 693, 709 (7th Cir. 2010)).
211. *Id.*
212. *See supra* notes 112-14 and accompanying text.

the forum – even without knowledge that the plaintiff lives in the forum – is sufficient to subject a defendant to personal jurisdiction.

The court's reason for adopting this minority position was due to the language of *Burger King*, which stated that the "minimum contacts" aspect of personal jurisdiction is satisfied when a defendant has "'purposefully directed' his activities at residents of the forum."[213] But using the *Burger King* "purposeful availment" standard in interpreting the *Calder* effects test is misguided for several reasons.

First, *Baldwin* failed to recognize the different personal jurisdiction requirements of intentional tort cases versus contract cases. On the surface, the "purposeful availment" language of *Burger King* seems more appropriate for commercial contract disputes than intentional tort cases. When one thinks of a defendant benefiting from conducting activities in the forum state, it usually brings to mind some kind of commercial transaction, rather than any sort of tortious behavior. More importantly, the purposeful availment standard disregards the unique aspects of minimum contacts in libel cases. Because *Burger King* is a contract case[214] and *Calder* is a libel case,[215] it is only natural that the type of activity that would establish the defendant's minimum contacts for personal jurisdiction varies with the kind of claim raised. For example, in a contract case, an out-of-state defendant may establish minimum contacts in the forum state by repeatedly corresponding with the plaintiff's office in the forum state, sending notices and payments to the forum state, or entering into a long-term relationship with a company that is incorporated in the forum.[216] On the other hand, in a libel case, a nonresident defendant may establish minimum contacts in the forum state by publishing libelous statements about the plaintiff in a newspaper that circulates in the forum state,[217] on national TV,[218] or on the Internet.[219]

Because libel cases do not require any interaction between the parties to establish minimum contacts, they should require a more stringent standard of notifying the defendant that he or she may be subject to suit in the forum state. Particularly, courts should demand that the defendant at least be aware that the plaintiff resides in the forum state. *Burger King*, which was decided subsequent to *Calder*, differs from *Calder* in that it has no requirement that the defendant have knowledge of the plaintiff's identity and location.[220] Although this extra knowledge of the plaintiff's whereabouts is not necessary to

213. *Baldwin*, 315 S.W.3d at 397 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

214. *See Burger King*, 471 U.S. at 468.

215. *See* Calder v. Jones, 465 U.S. 783, 784 (1984).

216. *E.g.*, *Burger King*, 471 U.S. at 480-81.

217. *E.g.*, *Calder*, 465 U.S. at 789-90.

218. *E.g.*, Holmes v. TV-3, Inc., 141 F.R.D. 692, 696 (W.D. La. 1991).

219. *E.g.*, Internet Solutions Corp. v. Marshall, 611 F.3d 1368, 1370 (11th Cir. 2010) (per curiam).

220. *See supra* notes 131-32 and accompanying text.

give the defendant notice of potential jurisdiction in claims of contract and most intentional torts,[221] libel jurisdiction, by its very nature, should require that the defendant be aware of who and where the particular plaintiff is.[222] As opposed to most other intentional torts and contracts cases, in which the defendant almost certainly must engage in some form of interaction or communication with the plaintiff, in cases of libel, a defendant can publish defamatory statements about the plaintiff in the absence of any actual interaction. As a result, a defendant can very easily libel a plaintiff without knowing where the plaintiff resides.

A fundamental principle of personal jurisdiction is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[223] This foreseeability aspect of personal jurisdiction analysis is vital to "traditional notions of fair play and substantial justice"[224] because it allows the defendant to avoid the risk of suit in a particular jurisdiction by either acquiring insurance or leaving the state.[225] Therefore, a state should not be able to assert jurisdiction over a defendant who publishes defamatory material about a plaintiff but has no knowledge of where that plaintiff lives, because the defendant would not have sufficient foreseeability that he could be subject to suit in the plaintiff's home forum.

Further, the *Baldwin* court's chosen standard was erroneous because, in fearing an excessively strict express aiming requirement, it went too far in the other direction and applied a toothless version of the *Calder* effects test. *Baldwin* is correct that, even under the stricter interpretation of the express aiming requirement, the defendants satisfied the *Calder* effects test by specifically insulting Missouri's lenient dog laws in addition to targeting the plaintiffs.[226] Nevertheless, the court stated that it did not believe that such additional targeting of the forum state is required under *Calder*.[227] While the *mens rea* with regard to the forum state need not be as demanding as specific intent, the defendant should, at the very least, be aware of the geographical scope of his tortious conduct. Yet the Southern District in *Baldwin* seemed content to hold that merely libeling a plaintiff, regardless of any additional knowledge of the tort's effect on the forum, is sufficient to establish personal jurisdiction over the defendant.[228]

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221. *See supra* notes 131-33 and accompanying text.

222. *See supra* notes 134-37 and accompanying text.

223. World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 297 (1980).

224. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted).

225. Floyd & Baradaran-Robison, *supra* note 90, at 634.

226. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 397-98 (Mo. App. S.D. 2010).

227. *Id.* at 397.

228. *See id.* at 397.

Finally, the existence or absence of personal jurisdiction turns on the extent of the *defendant's* contacts with the forum state, not the plaintiff's.[229] If the *Baldwin*/minority view regarding the express aiming requirement were correct, personal jurisdiction in libel cases would always be proper in the plaintiff's home state, regardless of the defendant's contacts with the forum. While the Supreme Court has recognized that the plaintiff's location naturally influences personal jurisdiction analysis, it has never found that the plaintiff's home state conclusively determines the scope of jurisdiction over the defendant.[230] Of course, a libel defendant often will have knowledge of the plaintiff's identity and location and thus be subject to personal jurisdiction in the forum state. The Internet could make it easier or more difficult for a libel defendant to discover who and where the plaintiff is. On one hand, the Internet is a cheap and convenient research tool that can find any person almost instantly. On the other hand, most online users employ screen names and e-mail addresses, which sometimes indicate people's names but rarely their locations. But the ease with which a defendant is able to research the plaintiff does not and should not loosen the standard and permit jurisdiction over a defendant whose only connection with the forum state is that he libeled a plaintiff who happens to live there.

Although *Baldwin* was the first Missouri case dealing with Internet libel jurisdiction, the court did not utilize the *Zippo* framework in its analysis. Yet this omission was laudable, for the *Zippo* test has proven to be an illogical approach to Internet jurisdiction.[231] Particularly in libel cases, the level of interactivity of a defendant's website has "little relevance" to issues of personal jurisdiction.[232] Liability attaches once the defamatory message is published; it makes no difference whether the defendant engages in further interaction or dealings with the message recipients.[233] Even the most passive website is perfectly capable of displaying a libelous statement that could subject the website host to liability.[234] The interactivity of a defendant's website has no bearing on the extent to which the defendant has targeted the forum state.[235] Therefore, the *Baldwin* court properly disregarded the *Zippo* sliding scale.

While *Baldwin* correctly ignored *Zippo* in its *Calder* analysis, the court failed to determine a standard that adequately balanced Missouri's interests in protecting its plaintiffs with nonresident defendants' interests in foreseeability of personal jurisdiction. Instead of adopting the still-plaintiff friendly position that a defendant need merely have knowledge of the plaintiff's residence

229. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984).
230. *See id.*
231. *See* Borchers, *supra* note 4, at 489.
232. *Id.*
233. *Id.*
234. *Id.*
235. *See id.*

in the forum, the court embraced the most toothless standard on the express aiming spectrum: no additional targeting of the forum state is necessary. *Baldwin*'s view of the express aiming component is analogous to that of the Eleventh Circuit, which holds that a defendant may be subject to personal jurisdiction if he commits an intentional tort expressly aimed at a person who happens to reside in the forum state.[236] No other circuit court of appeals has embraced such a liberal, watered-down version of *Calder*.[237]

The *Baldwin*/minority view of the *Calder* effects test ignores the U.S. Supreme Court's mandate of "fair play" to the defendant[238] in favor of protecting residents of the forum state. This "protectionist" position advances state concerns of sheltering its in-state plaintiffs at the expense of nonresident defendants' constitutional right to the foreseeability of potential fora. Without the due process requirement of foreseeability, any "random, fortuitous, or attenuated"[239] interaction with a state could implicate the defendant in a lawsuit. Unless the defendant has deliberately availed himself of the "benefits and protections of the forum's laws,"[240] he should not be forced "to submit to the burdens of litigation in that forum."[241]

In addition, as aforementioned, the test for specific jurisdiction depends on the *defendant's* – not the plaintiff's – contacts with the forum state.[242] A plaintiff-centered standard of personal jurisdiction allows protectionist states to bully nonresident defendants, when the entire purpose of the minimum contacts doctrine is to protect out-of-state defendants from facing far-off court battles. In fact, the U.S. Supreme Court has stated that the principle of minimum contacts "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and "acts to ensure that the [s]tates . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[243] Thus, the minimum contacts requirement relieves defendants of having to travel hundreds of miles to litigate in a state where they have no connections and prevents the states from asserting more jurisdictional power over nonresident defendants than the Constitution permits.

Although *Baldwin* deliberately resisted setting a standard for Internet libel jurisdiction, such a stance has nonetheless influenced Missouri case law by creating even more confusion in the already-complex area of Internet personal jurisdiction. While *Baldwin* did not attempt to create a unitary rule for all Internet jurisdiction situations, that probably will not prevent future courts

236. Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008).

237. *See supra* notes 97-114 and accompanying text.

238. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

239. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citations omitted) (internal quotation marks omitted).

240. *Id.* at 476 (citations omitted) (internal quotation marks omitted).

241. *Id.*

242. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984).

243. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

from following its approach, particularly when similar cases arise. Hopefully, if the Supreme Court of Missouri is faced with an Internet libel case in the future, that court will seize the opportunity to set the permanent standard of Internet libel jurisdiction. With any luck, that court would improve upon the non-rule that the *Baldwin* court applied.

Instead of the loose interpretation of the express aiming requirement that *Baldwin* utilized, Missouri should adopt a version of the *Calder* effects test that recognizes the importance of giving notice to the defendant. The test should be narrowly tailored to libel cases only, because personal jurisdiction principles vary depending on the cause of action.[244] Specifically, the standard should require that the defendant have actual knowledge of the plaintiff's identity and location before he can be subject to personal jurisdiction in the forum. Otherwise, the relationship between the defendant and the forum state is too attenuated to comport with "'traditional notions of fair play and substantial justice.'"[245]

## VI. CONCLUSION

Although *Baldwin* failed to set the standard for Internet libel jurisdiction in Missouri, future courts may nonetheless follow its narrow decision as precedent. While the Southern District admirably refused to utilize the *Zippo* framework, it regrettably incorporated *Burger King*'s contract-focused reasoning into the effects test. In adopting the minority view of the *Calder* effects test, the court failed to observe that libel cases, in particular, should require that the defendant have knowledge of the plaintiff's identity and location in the forum state in order to be subject to personal jurisdiction there. Thus, *Baldwin* loosened the important constitutional guarantee of providing adequate notice to the defendant of the jurisdictional scope of his potential liability. Due to the court's misguided holding, it is perhaps fortunate that *Baldwin* specifically avoided establishing any type of jurisdictional rule. Hopefully, the next time the issue of Internet libel jurisdiction is presented to a Missouri court, the Supreme Court of Missouri will seize the opportunity to establish the standard – the *correct* standard – once and for all.

244. *See supra* notes 127-34 and accompanying text.

245. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations omitted).