IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-272

INTERNET SOLUTIONS CORPORATION,
APPELLANT**,**
v.

TABATHA MARSHALL,
APPELLEE**.**

ON QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
LOWER TRIBUNAL CASE NO.: 08-12328

BRIEF OF AMICUS CURIAE, MEDIA BLOGGERS ASSOCIATION, INC. IN SUPPORT OF APPELLEE, TABATHA MARSHALL

Beusse Wolter Sanks Mora & Maire, P.A.
Terry M. Sanks
tsanks@iplawfl.com
Florida Bar No.: 0154430
Kevin W. Wimberly
kwimberly@iplawfl.com
Florida Bar No.: 0057977
390 N. Orange Ave.
Suite 2500
Orlando, FL 32801
Local Counsel for Amicus Curiae

Ronald D. Coleman
rcoleman@goetzfitz.com
Goetz Fitzpatrick, LLP
One Penn Plaza – Suite 4401
New York, NY 10119
General Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS ii

IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

APPLICABLE STATE LAW..... 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT..... 4

I. Extending Florida's Long-Arm Statute to include bloggers similarly situated to Ms. Marshall will stifle the flow of free speech on the Internet while extending personal jurisdiction to unprecedented levels. 4

II. Informational websites and blogs foster comment and criticism, and they do not constitute targeted communications into any one State. 6

III. Answering the certified question in the affirmative will create tension with 47 U.S.C. § 230 11

CONCLUSION..... 13

CERTIFICATE OF SERVICE 15

CERTIFICATE OF FONT COMPLIANCE 16

TABLE OF CITATIONS

Cases

Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) 12

Becker v. Hooshmand, 841 So.2d 561 (Fla. 4th DCA 2003).....8

Ben Ezra, Weinstein, & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000) 12

Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) 12

Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) 12

Doe v. America Online, Inc., 783 So.2d 1010 (Fla. 2001) 11

Donato v. Muldow 865 A.2d 711 (N.J. Super. Ct. 2005) 12

Healix Infusion Therapy, Inc. v. Helix Health, LLC, 2008 U.S. Dist. LEXIS 34562 (S.D. Tex. Apr. 25, 2008).....9

Reno v. American Civil Liberties Union, 521 U.S. 851 (1997).....6

Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) 9

Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla.1989).....2, 3

Wendt v. Horowitz, 822 So.2d 1252 (Fla. 2002).....6, 13

Whitney Info. Network, LLC v. Xcentric Ventures, LLC, 347 F. Supp. 2d 242 (M.D. Fla. 2003).....7

Statutes

47 U.S.C. §230 ..... 3, 11, 12

Fla. Stat. §48.193 .....5, 7

IDENTITY AND INTEREST OF AMICUS CURIAE

The Media Bloggers Association (the "MBA") is a non-partisan organization that includes independent and amateur bloggers, professional bloggers and professional writers who operate their own personal weblogs (blogs), as well as blogs that focus on the development of media blogging, citizen journalism, and related endeavors. Media bloggers play a valuable social role and complement free speech by holding media organizations accountable for their reporting, commenting on the state of the media, and supplementing local news coverage. The MBA also provides its members with access to legal and financial resources of the sort available to traditional media organizations. One such resource is BlogInsure, a liability insurance program for bloggers which provides coverage for legal claims based on defamation, invasion of privacy and copyright infringement or similar allegations arising out of blogging activity.

The MBA's membership has a concrete interest in the extent to which Florida courts assert personal jurisdiction over MBA members and those similarly situated based on the speech published on their blogs, whether that speech is the work of the owner of a member's blog or a commenter on the blog. In the latter case, open comments may be a fundamental feature of a blog, and a blog owner should not have to choose whether to publish readers' comments based on the fear of being hailed into a distant court to defend a defamation claim.

APPLICABLE STATE LAW

Florida's long-arm statue, Fla. Stat. §48.193 provides as follows:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself, and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
> (b) Committing a tortious act within this state.
> …
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or
> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

The Florida Supreme Court has held that determining the propriety of the exercise of long arm jurisdiction in Florida is a two-step inquiry. *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla.1989). The first step is to determine if the plaintiff has established sufficient jurisdictional facts to subject the defendant to Florida's long arm jurisdiction. *Id.* at 502. Once the first criterion has been satisfied, the second inquiry is whether the defendant possesses sufficient minimum contacts with Florida to satisfy constitutional due process requirements. *Id.* at 500. The initial burden falls on the plaintiff to plead the basis for service under the long-arm statute. *Id.* at 502. The plaintiff may satisfy this initial burden

either by alleging the language of the statute without pleading supporting facts, or by alleging specific facts that indicate that the defendant's actions fit within one of the sections of Florida's long-arm statute, Section 48.193. *Id.*

SUMMARY OF THE ARGUMENT

Amicus curiae files this brief to urge this Court not to extend the Florida long-arm statute to reach what is in effect any non-commercial Internet website in the world, regardless of its connection to this State. Such a wide-ranging assertion of jurisdiction for defamation by long-arm jurisdiction would violate the First Amendment of the United States Constitution's guarantee of free speech by chilling protected journalism and commentary on the Internet. A finding that content or comment on a blog such as Ms. Marshall's, which is for all meaningful purposes located in another state, constitutes "a tortious act within Florida" would be contrary to case law and would offend the constitutional policy, based on principles of due process, underlying personal jurisdiction. Amicus also urges the Court to decline to extend the Florida long-arm statute because of the conflict such an extension would create with 47 U.S.C. §230, which immunizes website operators from liability arising from the defamatory postings of others.

ARGUMENT

I. Extending Florida's Long-Arm Statute to include bloggers similarly situated to Ms. Marshall will stifle the flow of free speech on the Internet while extending personal jurisdiction to an unprecedented scope.

The Media Bloggers Association ("MBA") serves approximately 2,000 bloggers and website owners with its various programs.[1] As the Internet expands in both volume of communication and across international boundaries, blogging has become one of the fastest growing forms of communication in the world.[2] As forums for expressing and exchanging ideas, and reviewing cultural, consumer and other offerings, the number and influence of blogs has grown an unprecedented rate for a new form of communication. Every MBA member is a publishing blogger who engages in some form of original online expression, whether blogging about legal issues, entertainment, personal growth or engaging in traditional grassroots news reporting. Atop the 2,000 MBA bloggers stand hundreds of thousands of readers who regularly read or subscribe to, or who merely stumble upon, MBA member blogs at any given time. Extending Florida's long-arm

[1] *See* MEDIA BLOGGERS ASSOCIATION LAUNCHES EDUCATION, LEGAL ADVISORY AND LIABILITY INSURANCE PROGRAM FOR BLOGGERS, available at http://www.mediabloggers.org/mba-announcement/media-bloggers-association-launches-education-legal-advisory-and-liability-insurance-program-for-bloggers (last visited April 17, 2009).

[2] *See* STATE OF THE BLOGOSPHERE/2008, available at http://technorati.com/blogging/state-of-the-blogosphere/ (last visited April 17, 2009).

jurisdiction over an out-of-state website that is merely acting as a forum for both (1) blogging publishers to review and comment and (2) readers who comment on blog posts would muffle this expression and utterly undermine the free speech guarantee of the First Amendment by making blogging prohibitively risky. For almost all bloggers, the potentially devastating cost and inconvenience of defending even against the most obviously meritless defamation litigation in a foreign state would be unfathomable, and many would simply stop publishing.

Moreover, such a result would be contrary to Florida law. This State's legislature has explicitly extended this State's judicial power over activities that do not occur within Florida only to claims arising from specific, enumerated activities. Fla. Stat. §48.193(f) extends the jurisdiction of the Florida courts to "injury to persons or property within this state arising out of an act or omission by the defendant outside this state," but *only* where a defendant has (1) engaged in "solicitations or service activities within [Florida];" or (2) placed a tangible product within the stream of commerce such that it flows into Florida. *See id*. Neither of these grants of extraterritorial jurisdiction applies here.

While the Florida courts have cautiously added to this limited statutory grant of long-arm jurisdiction beyond the state's bounds by its definition what is actually considered to be "within" those bounds, they have done so only in incrementally. Thus, for purposes of Fla. Stat. §48.193(b), providing for jurisdiction based on a

tortious act committed "within this state," it is enough for a defendant to commit a tort via by directing her "telephonic, electronic, or written communications *into Florida*" so long as the cause of action arose from those communications. *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002) (emphasis added). The Florida Supreme Court has not extended this judge-made extension of the finite legislative grant of jurisdiction over those who never enter the state to the posting of information on an out-of-state website. Because of the potentially limitless application of such a ruling by virtue of the Internet's ubiquity, the MBA urges the Court to consider the severe consequences of such a revolutionary development. Such a further judicial extension of the long-arm statute beyond anything contemplated by the Legislature would affect otherwise constitutionally protected speech and virtually no other "act" that could be construed as a tort. This Court should reject Appellant's invitation to make this State the national clearing house for defamation litigation.

II. Informational websites and blogs foster comment and criticism, and they do not constitute targeted communications into any one State.

Extension of the long-arm jurisdiction to defamation actions based on Internet communications in particular would be particularly unjustifiable. As Justice Stevens stated in *Reno v. American Civil Liberties Union*, 521 U.S. 851 (1997), "[w]hile anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods, publishers may either

make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege." Here the Appellee did the former. She did not charge for her website's services; her site merely acted as a forum where discouraged job applicants could gather to exchange information about corporations they believed were engaging in questionable practices, without reference to geography.[3] But Ms. Marshall did not restrict the website's content to companies or users in Florida, or to those outside Florida. Nor did she in any way target the state of Florida or anyone in it, nor solicit Florida residents to read and comment on her web page. *See Whitney Info. Network, LLC v. Xcentric Ventures, LLC*, 347 F. Supp. 2d 242 (M.D. Fla. 2003) (finding a specific targeting of Florida when a website operator used "Florida" in metatags, allowed advertisers to target Florida consumers, and touted Florida-specific reports and queries). Like most people who operate an informational website, Ms. Marshall had no particular concern or interest with geographical restrictions or targets, and she allowed those participating in the forum to choose their topics and their content as they saw fit. This further shows that Ms. Marshall did not tortiously target Florida as in *Whitney*.

In asking this Court whether Appellant's activities were sufficiently Florida-directed to satisfy §48.193(b), the Eleventh Circuit in this case cited *Becker v.*

[3] We also note that several of the comments on Ms. Marshall's blog which are included as Exhibit "A" to the Complaint actually *defend* VeriResume.

Hooshmand, 841 So.2d 561, 561-63 (Fla. 4th DCA 2003) as expanding on the traditional concept of jurisdiction based on communications into the State. But in *Becker*, quite unlike here, the communications were *directed* at Florida residents, such as by mailing a letter into Florida or making a defamatory telephone call to a Florida resident. Ms. Marshall engaged in no such activity. By allowing a third-party commenter to post *about* VeriResume, whose activities are not restricted to Florida, there was no invitation by Ms. Marshall, nor any direct communication by her with a Florida resident or corporation. To extend *Becker* to include situations where jurisdiction can be based solely on the location of the *subject* of a communication – without any other purposeful contact with the State – would be revolutionary and patently unconstitutional on due process grounds alone.

While the question before this Court is not related to the minimum contacts portion of the personal jurisdiction analysis, a recent Texas case may be helpful in explaining how a blog such as Ms. Marshall's is not "aimed" at a particular state.[4] In *Healix Infusion Therapy, Inc. v. Helix Health, LLC*, the U.S. District Court for the Southern District of Texas found that even where a blog: 1) cited the work of Texas residents, 2) linked to a map showing how many Texas residents had visited the blog, 3) allowed commenters to post on the blog, and 4) appeared on a Texas-based blog directory, its owner was not subject to personal jurisdiction in Texas

[4] The MBA recognizes that cases from federal courts in Texas are not binding upon this Court, however this case is beneficial for illustrative purposes.

because such contact was not *aimed* at Texas. *Healix Infusion Therapy, Inc. v. Helix Health, LLC,* 2008 U.S. Dist. LEXIS 34562, *19-*20 (S.D. Tex. Apr. 25, 2008). Even under such circumstances, wrote the *Healix* court, the allegedly defamatory content was "not directed specifically at Texas," but, rather, "was presumably directed at the entire world." *Healix* at *23 (quoting *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002)). The fact that Texas is part of the "entire world" was no matter—a universal audience, the court explained, was not one that could be described as "directed" at Texas. Similarly, Ms. Marshall's posts and the third-party comments on her blog cannot be construed, for constitutional purposes, as communications "into" the State of Florida. If they are, everything is.

Such a result would be inimical to the First Amendment. Blogging and independent Internet publishing have become the Free World's most powerful form of checks and balances, especially for consumers. A bad experience at a restaurant or a superb stay at a hotel may prompt a user to share her experience on the easiest, cheapest and most widely accessible format for communication, the Internet. And, reviews and criticisms of businesses on the Internet naturally motivate firms to please customers. Blogs with open comments enable interested persons to criticize and comment both negatively *and* positively, to the benefit of consumers seeking information and business seeking excellence.

Yet if Appellant were to prevail here, millions of Internet website owners,

including MBA members, would be compelled to edit or delete postings relating to their constitutionally-protected opinions, thoughts, feelings or experiences, merely because such posts could relate to someone in a certain state. The effect of so much expression being silenced due to bloggers' reasonable fear of being forced to defend themselves against defamation claims in far-off jurisdictions at devastating expense and inconvenience would be a massive chilling of free speech. Should Florida's long-arm statute be exploited to extend the threat of defamation liability to websites that do not target any resident of Florida, but merely discuss a company or person found in Florida, the revolution in free expression that is the Internet—that fundamental online town square where ideas and opinions are shared in a unprecedented realization of the concept of truly free speech—will be snuffed out.

The First Amendment does not protect only lofty political expression. If Appellants were to prevail here, no longer will one be able to log onto popular websites such as "TripAdvisor" to read reviews written *by* real users about specific destinations.[5] Families planning a trip to Disney World would not be able to search for authentic, unedited and "real people" travel reviews or to read suggestions for where to take their children to eat—for what Internet publisher would risk publishing, for worldwide consumer perusal, other consumers' submissions of "best" and "worst" restaurant experiences in Orlando and risk

[5] *See* TripAdvisor® website, available at http://www.tripadvisor.com/ (last visited April 17, 2009).

subjecting herself to defending against a tort action in Florida?

And that is the easy case, for "everyone" knows where Disney World is. But most people do not know whether the businesses with which they interact have owners, or affiliates, or other significant interests in this State that could be "harmed" by blog posts or comments. Should Florida's long-arm jurisdiction extend to websites that merely discuss a company or person who happens to reside in Florida, free speech on the Internet would be frozen solid by the always-looming threat of defamation claims by unknown firms in what is likely an unknown state by someone who has no basis whatsoever for assuming that his statements—much less those of a commenter on his website or blog—could have an effect in the State of Florida. Neither Florida law, nor any policy interest of this State, nor the United States Constitution, can justify such an outcome.

III. Answering the certified question in the affirmative will create tension with 47 U.S.C. § 230

This Court has already had the opportunity to examine 47 U.S.C. § 230 ("Section 230") in detail in *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001). Amicus also understands that the dissenters in that opinion did not agree with the proposition that Section 230 was intended to create "unfettered Internet

speech."[6] But such a broad reading of the law is not required where, as here, precedent and statutory text are clear: A person in Appellee's position is, under Section 230, completely immune from liability for the defamatory comments posted on her blog by third-party content providers.[7] Furthermore, case law and the plain language of the statute reveal that bloggers and discussion forum operators such as Ms. Marshall and those represented by the MBA fall under Section 230's definition of "interactive service provider."[8]

Given this immunity for persons similarly situated to Ms. Marshall, answering the certified question in the affirmative would not only create a tension between the undeniable purpose of Section 230 in immunizing interactive service providers from the words of third party content providers, but, as shown above, it would also create a chilling effect on speech that does not fall under Section 230, such as when it is the interactive service provider itself (i.e., a blogger) who is making the speech.

Indeed, just as Section 230 gives Internet service providers legal breathing

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[6] The MBA also respectfully notes that the three dissenting Justices are presently on the bench.

[7] *See e.g., Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000).

[8] *See, e.g., Donato v. Muldow* 865 A.2d 711 (N.J. Super. Ct. 2005) (finding discussion forum operator who allowed allegedly defamatory comments to appear on his forum immune under Section 230).

room to police their networks for "indecent" material, a rational limitation of the reach of Florida's long-arm statute will prevent bloggers from what would be equally rational if this Court were to refuse to curb that reach: Rendering any conceivable "Florida" topic taboo from online postings, including not only business and consumer reviews and commentary but news and analysis of broad commercial and political import. As far-fetched as this sounds, if the specific certified question were answered affirmatively by this Court, it stands to reason that Florida businesses and residents would become taboo subjects for rational bloggers and Internet publishers of all sorts not willing to keep at the ready a round trip ticket and a hefty retainer for litigation in Florida's courts. The effect would be, in other words, to make "Florida" the unspeakable "F-word" of the Internet!

CONCLUSION

Based on the constitutional, legal and policy arguments above, the MBA respectfully requests that this Court find that Tabatha Marshall's website does not meet the *Wendt* requirement of having committed a tort via telephonic, electronic, or written communications into this State merely by virtue of being read on a computer in this State. To conclude that any general website that happens to discuss a certain business or person within a state but that is not affirmatively directed to that state, and whose owner has no minimum contacts with that state, would undermine years of First Amendment jurisprudence by placing unreasonable

litigation and liability burdens on the entire world based on no more than allegations concerning speech. We ask that this Court answer the certified question in the negative and decline to open the floodgates to a torrent of speech-based litigation that the Framers of the Constitution, and the people of this State as embodied in the Florida Legislature, never intended.

Dated: April 20, 2009

/s/ Kevin W. Wimberly
Beusse Wolter Sanks Mora & Maire, P.A.
Terry M. Sanks
tsanks@iplawfl.com
Florida Bar No.: 0154430
Kevin W. Wimberly
kwimberly@iplawfl.com
Florida Bar No.: 0057977
Local Counsel for Amicus Curiae

Ronald D. Coleman
rcoleman@goetzfitz.com
Goetz Fitzpatrick, LLP
One Penn Plaza – Suite 4401
New York, NY 10119
General Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2009, a true and correct copy of the foregoing has been served by regular U.S. Mail, Federal Express, and/or e-mail upon the following:

Keith E. Kress, Esq. (Attorney for Appellant) (via U.S. Mail)
2295 S. Hiawassee Road, Suite 407
Orlando, FL 32835

Marc J. Randazza, Esq. (Attorney for Appellee) (via U.S. Mail and e-mail)
781 Douglas Avenue
Altamonte Springs, FL 32714
MRandazza@FirstAmendment.com

/s/ Kevin W. Wimberly
Beusse Wolter Sanks Mora & Maire, P.A.
Terry M. Sanks
tsanks@iplawfl.com
Florida Bar No.: 0154430
Kevin W. Wimberly
kwimberly@iplawfl.com
Florida Bar No.: 0057977
390 N. Orange Ave.
Suite 2500
Orlando, FL 32801
Local Counsel for Amicus Curiae

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirement of Fla. R. App. P. 9.210(2). This brief is typed in Times New Roman 14-point font.

/s/ Kevin W. Wimberly
Beusse Wolter Sanks Mora & Maire, P.A.
Terry M. Sanks
tsanks@iplawfl.com
Florida Bar No.: 0154430
Kevin W. Wimberly
kwimberly@iplawfl.com
Florida Bar No.: 0057977
390 N. Orange Ave.
Suite 2500
Orlando, FL 32801
Local Counsel for Amicus Curiae