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, CASE NO.: 08-12328

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This brief is filed on behalf of Tabatha Marshall, a resident of the state of Washington, who was the defendant before the United States District Court for the Middle District of Florida and appellee in the United States Court of Appeals for the Eleventh Circuit. Internet Solutions Corporation, a Nevada corporation claiming to have its principal place of business in Florida, was the plaintiff before the United States District Court for the Middle District of Florida and the appellant in the United States Court of Appeals for the Eleventh Circuit. Internet Solutions Corporation will be referred to herein as "ISC," and Tabatha Marshall will be referred to as "Marshall."

The citations to the record (Doc.) are those to the Docket Entries in the United States District Court for the Middle District of Florida. Citations to the Eleventh Circuit's certification order are cited "C.O.".

In the trial court, i.e., the United States District Court for the Middle District of Florida, ISC sued Ms. Marshall alleging multiple causes of action for defamation *per quod*, defamation *per se*, false light invasion of privacy, trade libel, and injunctive relief, resulting from Ms. Marshall's reporting about ISC on her website. (Doc. 1 – Complaint.) ISC maintains that Ms. Marshall somehow "entered into the state of Florida to commit a tortuous [sic] act." (Doc. 1 – Complaint.)

Ms. Marshall filed a motion to dismiss, asserting a lack of personal jurisdiction both under Florida's long-arm statute, *Fla. Stat.* § 48.193(1), and under the Due Process clause of the Fourteenth Amendment. (Doc. 4 – Motion to Dismiss.) Ms. Marshall maintains that her reporting on matters of public concern outside of Florida, without more, does not bring this action within the ambit of Florida's long-arm statute. (Doc. 5 – Declaration.)

The United States District Court ruled that the exercise of personal jurisdiction over Ms. Marshall in Florida would violate the Due Process clause of the Fourteenth Amendment, because she lacked sufficient minimum contacts with Florida. (Doc. 27 – Order at Page 5-8.) ISC appealed this decision to the United States Court of Appeals for the Eleventh Circuit, which deferred its ruling on that appeal, pending the resolution by this Court of a specific certified question involving the interpretation of Section 48.193(1)(b) of Florida's long-arm statute.

STATEMENT OF FACTS

Tabatha Marshall is a private individual residing in the state of Washington. (Doc. 1 – Complaint.) Ms. Marshall owns and operates an Internet website, www.tabathamarshall.com, from the state of Washington. (Doc. 5 – Declaration at ¶ 14.) Ms. Marshall posts consumer commentary about various businesses in the form of an online "Consumer Reports" type website. (Doc. 1 – Complaint, Composite Exhibit A.) Ms. Marshall's website is of interest to members of the

public, including those who wish to avoid falling victim to *inter alia* "phishing" scams and identity harvesting programs. Ms. Marshall posts information on her site and allows third parties to post comments. (Doc. 1 – Complaint, Composite Exhibit A.)

ISC is a Nevada corporation, claiming its principal place of business in Orlando, Florida. (Doc. 1 – Complaint at ¶ 2.) ISC operates various Internet websites, allegedly for the purpose of advertising employment opportunities. (Doc. 1 – Complaint at ¶ 2 and ¶ 16.) However, ISC has provided evidence that its address is in Southland, Michigan; Los Angeles, California; Washington, D.C.; and Orlando, Florida. (Doc. 1 – Complaint, Composite Exhibit A). Meanwhile, ISC's own website lists offices in New York City, Seattle, Los Angeles, Denver, Boston, Chicago, Barcelona, Milan, London, and Paris, but does not mention a Florida place of business.[1]

Ms. Marshall posted information on her site stating that ISC's business and websites are soliciting job seekers, and encouraging job seekers to conduct their own research before providing the applicant's information to them. (Doc. 1 –

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[1] See http://internetsolutionscorp.com/contact.html (last visited April 13, 2009) (ISC is likely to change this web page once it receives this Brief). See also http://web.archive.org/web/20070810205146/http://internetsolutionscorp.com/contact.html (last visited April 13, 2009) (Internet archive of the ISC contact page, which will demonstrate what the ISC contact page looked like on the date of publication).

Composite Exhibit A.) ISC believes that the posts are unflattering and seeks to suppress Ms. Marshall's reporting by bringing suit for defamation. (Doc. 1 – Complaint at ¶¶ 18-23 and ¶ 55).

QUESTION CERTIFIED

On February 10, 2009, the United States Court of Appeals for the Eleventh Circuit issued an opinion deferring its decision on ISC's appeal pending the certification of the following question to this Court:

> Does posting allegedly defamatory stories and comments about a company with its principal place of business in Florida on a non-commercial website owned and operated by a nonresident with no other connections to Florida constitute commission of a tortious act within Florida for purposes of *Fla. Stat.* § 48.193(1)(b)? (C.O.)

SUMMARY OF THE ARGUMENT

This Court has been asked, by the United States Court of Appeals for the Eleventh Circuit, to determine the whether posting information on a non-commercial website can satisfy Florida's long-arm statute, when that website is located outside of the state and owned by a nonresident defendant, and in the absence of so much as an allegation, let alone proof that any Florida resident has ever accessed the website. Ms. Marshall believes that it cannot.

One way to satisfy Florida's long-arm statute is by alleging that a nonresident defendant has committed a tortious act within Florida. This standard can be met based on telephonic, electronic, or written communications that are

transmitted into this State. In order for a communication to be "into this State," logic would dictate that the communication must be somehow directed at Florida, and at the very least, someone in Florida must have received the communication. Neither allegation has been made in this case. Ms. Marshall's website was not directed at the state of Florida, and ISC has failed to allege that any third party in Florida has even read Ms. Marshall's allegedly defamatory communications. As a result, Ms. Marshall's Internet website could not possibly satisfy the requirements of Florida's long-arm statute, as a tortious act committed in Florida.

Additionally, as a policy matter, this Court should take this opportunity to review the language of Section 48.193(1)(b) and to require that, at a minimum, the courts of this state engage in at least a bare minimum review of the underlying claim before determining that a tortious act has occurred within the state when long-arm jurisdiction is asserted involving First Amendment protected activity. A failure to do so would allow the Florida long-arm statute to stand as a weapon in the arsenal of those who would seek to stifle legitimate criticism solely by properly pleading their complaints. A state that values free speech and whose public policy clearly disfavors SLAPP suits must require more than simple incantations of unprovable facts before its long-arm statute can be employed to chill public debate on matters of public concern.

STANDARD OF REVIEW

The question of law certified by the United States Court of Appeals for the Eleventh Circuit regarding personal jurisdiction is reviewed *de novo*. *See Kephart v. Hadi*, 932 So.2d 1086, 1089 (Fla. 2006).

ARGUMENT

In order to evaluate whether a Florida court may properly exercise personal jurisdiction over a particular defendant, it must engage in a two-part analysis. *Renaissance Health Publ'g, LLC v. Resveratrol Partners, LLC*, 982 So.2d 739, 741 (Fla. 4th D.C.A. 2008) (citing *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla. 1989)). "First, there must be sufficient facts to bring the action within the ambit of the long-arm statute; if the statute applies, the next inquiry is whether there are sufficient 'minimum contacts' to satisfy [federal] due process requirements." *Id.* However, the only question before this Honorable Court is whether Marshall's alleged conduct satisfies the first part of the test. The 11th Circuit will, once this Court has answered its question, provide its opinion on the Federal due process clause.

Unfortunately, there is considerable confusion amongst the various judicial authorities in Florida, regarding the application of the first step in this analysis, as it applies to nonresident defendants. *Compare Korman v. Kent*, 821 So.2d 408, 411 (Fla. 4th DCA 2002) (section 48.193(1)(b) is not satisfied merely by the

occurrence of injury in Florida) *with Wood v. Wall*, 666 So.2d 984, 986 (Fla. 3d DCA 1996) (allegations of intentional tortious acts by defendants in their states of residence specifically calculated to cause injury in Florida sufficient to create jurisdiction under (1)(b)) *and Allerton v. State Dep't of Ins.*, 635 So.2d 36, 40 (Fla. 1st DCA 1994) (jurisdiction proper under (1)(b) where Florida plaintiff "injured by the intentional misconduct of a nonresident corporate employee expressly aimed at him"). In order to settle this confusion, at least in the context of certain Internet communications, the United States Court of Appeals for the Eleventh Circuit has asked this Court to focus solely on the applicability of Section 48.193(1)(b) to non-commercial websites that are located outside of Florida.

Florida's long-arm statute provides for personal jurisdiction over nonresident defendants under specific circumstances. *Fla. Stat.* § 48.193 (2008). The first subsection of 48.193 establishes personal jurisdiction when a claim arises from the defendant's forum-related contacts. *Id.* § 48.193(1). Actions that give rise to such specific jurisdiction include committing a tortious act in Florida. *Id.* § 48.193(1)(b). This Court has held that making "telephonic, electronic, or written communications into this State" can amount to the commission of a "tortious act within this state" under section 48.193(1)(b), "provided that the tort alleged arises from such communications." *Wendt v. Horowitz*, 822 So.2d 1252, 1253 (Fla. 2002).

The issue of when a communication should be considered as "into this State," for the purpose of satisfying section 48.193(1)(b), has been raised in the instant dispute between ISC and Marshall. Recognizing that this area of Florida law seems unsettled, the Eleventh Circuit has asked this Court to clarify the meaning of the phrase "into this State," as used in the *Wendt* opinion. More specifically, this Court is asked to issue an opinion that expressly states whether allegedly defamatory statements were made "into this State," when those statements were concerning a company with its principal place of business in Florida and were merely published on a non-commercial website owned and operated by a nonresident with no other connections to Florida, and in the absence of an allegation that the content of the website was ever read by a third party, let alone by anyone in the state of Florida.

For the reasons set forth below, Ms. Marshall argues that materials, which were published on her non-commercial website, were not directed at Florida, and therefore are not communications that were made "into the State," within the meaning of the *Wendt* opinion. Since those materials are not communications that were made "into the State," they do not constitute the commission of a tortious act within Florida for purposes of *Fla. Stat.* § 48.193(1)(b).

I. The Eleventh Circuit Court of Appeal asks this Court to clarify the circumstances under which a nonresident defendant, who operates a non-commercial website outside of Florida, has communicated a defamatory message "into this State," such that she has committed a tortious act in Florida.

This Court has held that making "telephonic, electronic, or written communications *into this State*" can amount to the commission of a "tortious act within this state" under section 48.193(1)(b), "provided that the tort alleged arises from such communications." *Id.* (emphasis added). The Eleventh Circuit has identified a latent ambiguity in the highlighted phrase of the *Wendt* opinion, as applied to information which is published to the general public on an Internet website, with no real indication that statements made were directed at any particular state, nor with any indication that they ever passed by the eyes of a living soul in Florida.

One potential resolution of this ambiguity would lie in an opinion, issued by this Court, clarifying the phrase "into this State." With that solution in mind, Ms. Marshall proposes that a reasonable interpretation of the phrase dictates that information, which is published on the Internet, must at the very least actually be read in Florida by a Florida resident. Additionally, such information should be in some way specifically directed *at* the state of Florida before it is considered to be a communication made "*into* this State." All subsequent authority in this brief is offered in support of this interpretation.

This Court is certainly aware that any attempt to chill protected speech should be considered very carefully – especially when the speech is on the World Wide Web. *See Reno v. A.C.L.U.*, 521 U.S. 844 (1997). This forum permits the weak and powerless to establish a presence alongside the large and powerful – and allows even a single person to act as a journalist or publicist. *See id.* at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."). "It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'" Id. at 852 (quoting *A.C.L.U. v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). However, ISC seeks to chill this celebration of the diversity of human opinion by creating a climate of fear in which any word about a Florida entity must be weighed, and every thought suppressed, out of fear of SLAPP litigation by those who may wish to stifle the speaker's factual reports or constitutionally-protected opinion.

Allowing jurisdiction to be asserted in this case would contribute to that climate of fear, and would require an implicit finding that expressing negative opinions on a website, without anything more, automatically constitutes enough of a cognizable "injury" to allow for assertion of long-arm jurisdiction against residents throughout the country, by the Florida courts. Essentially, ISC's position

is: *If you talk about Florida, you come to court in Florida.* Finding that jurisdiction applies under such minimal facts would constitute an application of long-arm jurisdiction that is inconsistent with all logic and reason, and which would likely render Florida' long-arm statute unconstitutional. It would certainly cause it to be a valuable weapon in the arsenal of those who would use our courts as their pawns in filing unsupportable SLAPP litigation to punish critics with expensive foreign litigation.

If jurisdiction attaches in this case, then the cases that follow will create a chilling effect upon the entire web. Any travel writer wishing to write about his experience at a Florida resort will need to hire local counsel in Florida to both vet the content of his publication, and to defend him if the resort is not pleased with its review. Political writers will no longer be able to comment on the actions of our politicians for fear of being dragged from their home jurisdiction to any court in Florida. The operative question when determining personal jurisdiction will become: "Who was criticized?" Under the rule sought by ISC, if the subject of discussion is in Florida, then Florida jurisdiction attaches, and the mere rote recitation of sufficient allegations will be sufficient to drag speakers and authors to this state to defend protracted legal proceedings despite the absence of any true justiciable issue. However, it is important to note that in this case, ISC has not

even managed to recite the required allegations, and thus, answering the 11th Circuit's question in the affirmative would be doubly erroneous.

The old rules pertaining to letters, phone calls, and newspaper publication do not easily apply when it comes to a webpage. Nevertheless, the logic applying to them can easily fit the bill if this Court keeps in mind that in order for the tort of defamation to exist, a third party must read the allegedly defamatory content, and the content must enter Florida by the defendant's hand. Otherwise, there is no defamation and there is no long-arm jurisdiction.

Internet speech is entitled to the highest level of constitutional protection. *A.C.L.U.*, 521 U.S. at 863. This Court should not establish new and illogical rules simply because the medium is electronic. The Internet is not so new, nor so novel, that it requires a complete disregard for logic or common sense in this case. See *Gorman v. Ameritrade Holding Corp*, 293 F.3d 506, 510 (C.A.D.C. 2002) "[c]yberspace is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar."

A. <u>In order to support the exercise of personal jurisdiction over a nonresident defendant, under Florida's long-arm statute, a written Internet communication must, at a minimum, be read by a party in this state.</u>

This Court has established that Florida's long-arm statute can be satisfied by telephonic, electronic, or written communications that are made <u>into</u> Florida by a nonresident defendant. *Wendt*, 822 So.2d at 1253. However, this Court's prior

decision was rendered in a case where it was clear that someone in Florida actually read the allegedly defamatory content. The fact is, the tort of defamation is not complete until a third party, who is not the subject of the statement, reads the content. See *Granda-Centeno v. Lara*, 489 So.2d 142 (Fla. 3d DCA 1986) (no reader, no defamation).

In order to sustain a cause of action for defamation in Florida, the plaintiff must allege that (i) there were false statements of fact, (ii) published to a third person, (iii) which caused damage to the plaintiff. *See, e.g., Valencia v. Citibank*, 728 So.2d 330 (Fla. 3d DCA 1999); *Granda-Centeno*, 489 So.2d at 142. Applying the *Wendt* standard to the second element above, in the context of an Internet communication, the third person must be a Florida resident and, at the very least, must have read the communication *in* Florida. Otherwise, it is hard to fathom how such Internet communications could be considered "*into* this State." However, ISC has not alleged that Ms. Marshall's Internet communication was read by anyone anywhere, let alone in Florida.

If a defamatory statement is shouted in the forest, and no one is around to hear it, there can be no cause of action. *Granda-Centeno*, 489 So.2d at 142. Similarly, if an allegedly defamatory statement, written in the state of Washington, is published on a non-commercial website, which is hosted in Washington, and read in Saskatchewan, how can that be considered to be a tortious transmission into

Florida under the Florida long-arm statute? As a matter of logic and public policy, recognizing the potential burden on Free Speech that an affirmative answer would impose,[2] this Court should rule that it cannot.

B. This Court should determine that, when publishing information on a non-commercial website located outside of the state, a nonresident defendant has communicated a message "into this State," only when there is some portion of that website which is directed at Florida.

Assuming *arguendo* that ISC had at least alleged that a Florida resident had read Ms. Marshall's website in Florida: This alone should still be insufficient to satisfy Florida's long-arm statute as a tortious act committed in Florida, where Ms. Marshall did not target Florida with any of her Internet communications. The position that ISC has taken in this matter – that anyone who discusses a resident of this state on the Internet can be dragged from his or her home jurisdiction to any court in Florida – is patently illogical and unsupported by any prior case law. In order to show that this is true, a careful look must be taken at the facts from the most recent controlling decision from this Court.

In *Wendt*, a nonresident attorney and nonresident law firm were haled into a Florida court, as third-party defendants, based upon legal advice that was provided to a Florida resident. *Wendt*, 822 So.2d at 1254. More specifically, Horowitz

[2] To say nothing for the fact that an affirmative answer would likely render the long-arm statute unconstitutional.

communicated directly with Wendt, with full knowledge that Wendt resided in Florida, concerning the applicability of Florida statutes to Wendt's business activities within the state. *Id.*

There was a clear level of knowledge and intent to target Florida, apparent in Horowitz's alleged actions, that is missing from ISC's allegations regarding Ms. Marshall's behavior. For example, Horowitz made phone calls to Florida residents and sent letters to Florida in response to an investigation by the Florida Division of Securities. *Id.* He also drafted loan documents intended for use in Florida. *Id.* at 1257. These communications originated in Horowitz's home state of Michigan and terminated in Florida, and this Court held that such communications could, if properly alleged, provide the basis for personal jurisdiction under *Fla. Stat.* § 48.193(1)(b). *Id.* at 1260.

A clear line can be drawn between the facts in *Wendt* and those alleged in the instant matter. Specifically, the communications at issue in *Wendt* were (i) consciously directed at Florida and its residents, (ii) concerning activities known to be happening in Florida, along with analysis of Florida's statutes concerning those activities, and (iii) made with knowledge that Florida was the state where any damage caused by those communications would be felt. None of these factors apply to any information that Ms. Marshall has ever published on her website.

Beyond these obvious distinctions, one must take special note of the fact that *Wendt* did not involve Internet communications of the type alleged by ISC. Therefore, mechanically applying the rule from *Wendt* to Ms. Marshall's web page is not the most logical course. Contrary to what ISC would have this Court believe, not all modes of Internet communication function the same. Not every Internet communication can easily be analogized to phone calls made and letters or emails sent. Each different type of Internet communication incorporates different levels of interaction between senders, and the forum state. As such, each type of Internet communication potentially raises unique questions of whether personal jurisdiction should attach. As an example, ISC's arguments and cited authority suggest that they hope to convince this Court that, for the purposes of satisfying Florida's long-arm statute, "Internet" and "World Wide Web" are synonymous – they are not.[3]

The Stanford University Residential Computing Website illustrates this common technological misperception extremely well. According to Stanford University, the Internet is defined as follows:

> A global network connecting millions of computers in more than 100 countries. Each computer on the Internet is called a "host" and each host is independent, allowed to choose which Internet services to use

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[3] *See The Difference Between the Internet and the World Wide Web*, found at http://www.webopedia.com/DidYouKnow/Internet/2002/Web_vs_Internet.asp (last visited April 13, 2009).

> as well as make available to the Internet community. *The Internet is not synonymous with the World Wide Web.*[4] (emphasis added).

A chat room conversation, an email transmission, voice-over-IP telephony conversations, instant message sessions, and the World Wide Web all travel over the Internet. Nevertheless, this does not make them all the same technology, nor does it make the law that applies to Internet phone service apply the same to a World Wide Web page, which the same source defines as follows:

> A system of Internet servers that support documents specially formatted in a markup languaged [sic] called HTML. These documents support text, graphics, audio, and video files, but most importantly, links to other documents through hyperlinks, allowing you to move from one document to the next, essentially traversing the Web. The World Wide Web can be accessed through software called Web browsers. The World Wide Web is not synonymous with the Internet.[5]

The Web is a subset of the Internet, but the two terms are not synonymous and should not be confused – neither in fact nor in applying the law.[6]

The importance of these semantic differences can be more easily understood when put into the context of a real case, which was decided by Florida's Court of Appeals for the Fourth District in 2003. *See Becker v. Hooshmand*, 841 So.2d 561

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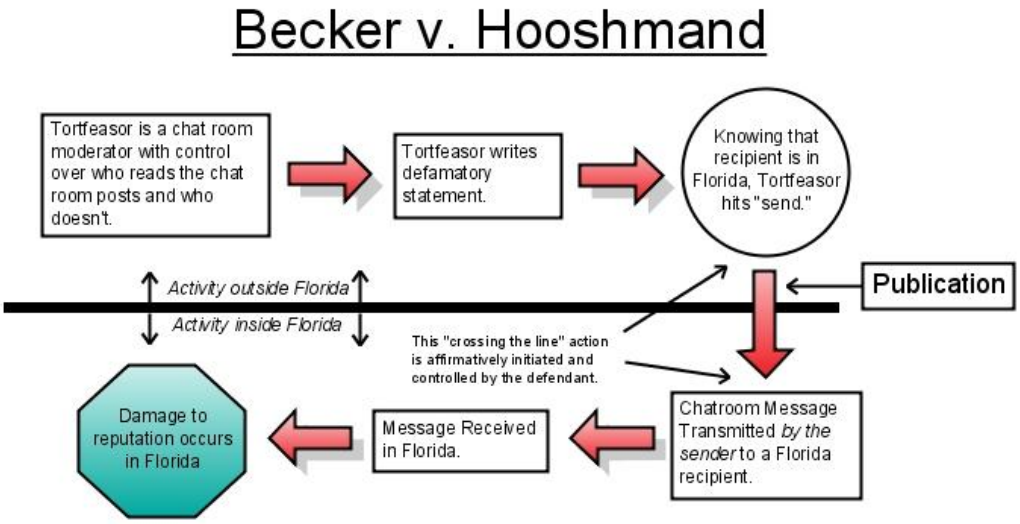
[4] *Stanford University Residential Computing Information and News*, found at http://rescomp.stanford.edu/info/glossary/ (last visited April 13, 2009).
[5] *Id.*
[6] *See also*, Rinaldo Del Gallo, *Who Owns The Web Site?: The Ultimate Question When A Hiring Party Has A Falling-Out With The Web Site Designer*, 16 J. MARSHALL J. COMPUTER & INFO. L. 857 (1998) (providing a highly technical discussion of the difference between *the Internet* and *the World Wide Web*).

(Fla. 4th DCA 2003). In *Becker*, the tortfeasor was the *moderator* of a chat room – the person with the power to exclude or include participants in the chat room.[7] The application of jurisdiction in that case was logical, since the tortfeasor had to take an *affirmative* act in order to "cross the line" between *out-of-Florida* conduct and the *in-Florida* effect. The tortfeasor could have continued the discussion, exercising his power as chat room moderator to exclude Floridians.



As that court put it, defamatory comments posted in an Internet chat room "that were *targeted to* Florida residents, or people likely to seek medical care" in Florida, are electronic communications that fall within Section 48.193(1)(b). *Becker*, 841 So.2d at 561 (emphasis added).

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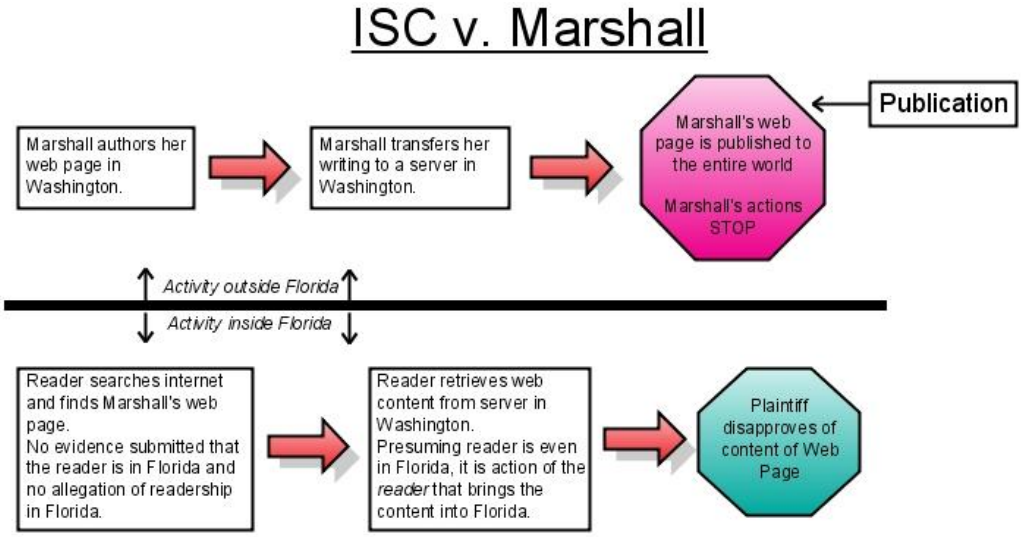
[7] *See* Kristi Bergemann, *A Digital Free Trade Zone And Necessarily-Regulated Self-Governance For Electronic Commerce: The World Trade Organization, International Law, And Classical Liberalism In Cyberspace*, 20 J. MARSHALL J. COMPUTER & INFO. L. 595, 604 (2002) (discussing the duties of a chat room moderator).

However, in the case at bar, Tabatha Marshall published her thoughts on the Web. This act was completed in the State of Washington. Her Internet provider delivered the content to server computers in Washington. Nothing on the site was "published" to a Florida computer unless (and until) the *reader* reached up into Washington and retrieved it. Had Tabatha Marshall scrawled a defamatory statement on a wall in Seattle-Tacoma International Airport, knowing full well that some Florida-bound passengers might possibly travel through that airport on a given day, this would not have created jurisdiction in Florida – and neither should her Washington publication of a Web page. The logic of her actions (and the actions of a potential reader) are illustrated below (and assume *arguendo* that there was a reader in Florida).



C. For the purpose of satisfying Florida's long-arm statute, requiring that at least some portion of a nonresident's non-commercial website be directed at Florida is consistent with prior decisions of this Court and others.

The same analogy, as depicted above, can be discussed in other cases decided by other Florida courts. Whether the case involves a phone call into Florida, a letter being mailed to Florida, an email being sent *over the Internet* into Florida, or a chat room with Florida invitees, the logic is always the same – the tortfeasor took an affirmative act to publish the information into Florida – as was the case in *Becker v. Hooshmand*. If this Court were to clarify, as Ms. Marshall proposes, the application of Section 48.193(1)(b) as requiring an affirmative act by nonresidents communicating "into the State," it would resolve much confusion on the subject, while leaving undisturbed several previous decisions which are compatible with that standard.

As a first example, shortly after the *Wendt* decision, this Court applied the rule for telephonic communications to a dispute involving phone calls that originated outside of Florida. *See Acquardo v. Bergeron*, 851 So.2d 665 (Fla. 2003). In *Acquardo*, the defendants were accused of making defamatory statements about Ms. Bergeron, a Florida resident, in a telephone conversation between residents of Massachusetts and Florida. *Id.* at 668. The statements were made with full knowledge that the listener was in Florida and that the object of the allegedly defamatory statement was a Florida resident. *Id.* Appropriately, this

Court found that Florida's long-arm statute had been satisfied by these alleged facts, and under the interpretation of Section 48.193(1)(b), which Ms. Marshall is advancing here, this case would have been decided the same way.

Since *Acquardo* and *Wendt* were decided, other Florida courts have extended their principles to cases involving Internet websites that are owned and operated by nonresidents of Florida. *See, e.g., Whitney Info. Network, LLC v. Xcentric Ventures, LLC*, 347 F. Supp. 2d 242 (M.D. Fla. 2003). In *Whitney Info. Network*, the defendants owned and operated a websites, e.g., www.ripoffreport.com, which were purportedly maintained as consumer advocacy sites, providing information reports about business that routinely "scam" customers. *Id.* at 1244. The plaintiffs in that case, who were residents of Florida, alleged that the defendants had published false statements of fact about their websites, concerning business activities conducted in Florida. *Id.* at 1244-45.

At first glance, the facts in *Whitney Info. Network* would appear to be analogous to the dispute between ISC and Ms. Marshall. However, unlike Ms. Marshall, the *Whitney Info. Network* defendants operated their website as a commercial business and specifically directed its content at Florida. *Id.* The *Whitney Info. Network* defendants' websites allowed users to view reports about Florida companies, in isolation, by providing a query option that limited search results to Florida. *Id.* at 1244. Reports concerning the Whitney Info. Network,

Inc. were among these Florida-specific reports and were the subject of the lawsuit. *Id.* at 1245. The *Whitney Info. Network* defendants also solicited advertising to appear on websites with a feature that allowed advertisers to select Florida consumers as the target audience. *Id.* In promotional materials, designed to attract such advertising, the *Whitney Info. Network* defendants included an example page that purposely featured advertising to Florida consumers and touted the availability of "rip-off reports" about Florida companies. *Id.* Also, the meta tags for the *Whitney Info. Network* defendants' websites specifically included the string "Florida" as a keyword. *Id.*

The above-described behavior of the *Whitney Info. Network* defendants provided an overwhelming basis for determining that they had targeted their websites at the state of Florida and its residents. Such specific targeting of the forum state justified the Middle District of Florida's holding that Florida's long-arm statute applied to torts that arose from the contents of those websites. *Id.* Ms. Marshall's position is that a clear distinction can be drawn between those websites and her own.

In yet another example, the Florida Court of Appeals for the Fourth District analyzed the applicability of Section 48.193(1)(b) to an Internet website that was operated as an online storefront. *See Renaissance Health Publ'g, LLC v. Resveratrol Partners*, LLC, 982 So.2d 739 (Fla. 4th DCA 2008). In *Renaissance*

Health Publ'g, the court found that "[t]he defendants' *interactive web site* which *sells product to Florida residents* is akin to the chat room in *Becker*[*v. Hooshmand*]."). *Id.* at 742 (emphasis added). Again, this scenario is patently different from Ms. Marshall's website, which sells no products, and makes no attempt to target Florida.

ISC did not allege in its complaint that Ms. Marshall made any communication *into* Florida, within the meaning of this phrase as described in the above-cited decisions. On the contrary, ISC's complaint alleges that Ms. Marshall "published statements to the general public via the world-wide internet." (Doc. 1 – Complaint at ¶ 28.) Given the fact that a Floridian could possibly have, at some point, retrieved the web page from Washington, ISC argues that the long-arm statute should apply. However, until a third party reads the website (provided it is even capable of being held legally defamatory) – the alleged torts are incomplete. See, *Granda-Centeno v. Lara*, 489 So.2d 142. Ms. Marshall respectfully requests that this Court distinguish between Internet websites that directly target Florida and its residents, either through commercial activities or through publishing information directed towards Florida, and those that publish general information to a global audience. Further, Ms. Marshall asks that this Court would hold up her non-commercial website as an example of the latter, and that this Court recognize that in order for the long-arm statute to apply, a publisher or speaker must do

something more than merely talk about Florida for the Florida long-arm statute to apply.

D. The Public Policy of this state disfavors SLAPP suits. The Florida long-arm statute should be interpreted to respect this public policy and the First Amendment.

This case is a classic example of a strategic lawsuit against public participation, commonly referred to as a SLAPP suit. SLAPPs are lawsuits aimed at silencing a plaintiff's opponents. The purpose of a SLAPP is not to win, but to intimidate the SLAPP defendant and to chill petition and/or free speech rights. The court in *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 816, 33 Cal.Rptr.2d 466 (1994), explained the characteristics of SLAPP suits as follows:

> *SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit; only to tie up the defendants' resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit, its ability to combat the plaintiff in the political arena is substantially diminished. [Citations omitted]*
>
> *Thus, while SLAPP suits "masquerade as ordinary lawsuits," the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. [Citations omitted]*

See also Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161, 691 N.E.2d 935 (1998) (same); *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187, 198 (D.

Conn. 2005) (same); George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PAGE ENVTL. L. REV. 3, 708 (1989).

By any definition, plaintiffs who bring SLAPP suits "win" simply by dragging victims into court and draining their (and the courts') resources. That is ISC's obvious intent in this case as even a perfunctory review of the Complaint and attached Exhibits will show the frivolous nature of ISC's claims. The Florida Legislature has made it clear that such suits are intolerable by providing an accelerated review process for potential SLAPP suits. *See* § 720.304(4)(c) *Fla. Stat.* (2008). This law mandates that speed is of the essence in dispensing with SLAPPs. "It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts." *Id.*

However, § 720.304(4), *Fla. Stat.* (2008) does not directly apply to this case. Nevertheless, the clear articulate of the public policy in this state should convince this Court to take care with how far it may wish to allow the long-arm statute to roam.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the U.S. Supreme Court affirmed that the First Amendment demands that citizens be permitted to discuss and publish matters of public concern with a wide berth – giving discussion its necessary "breathing room." However, *Sullivan* is rendered meaningless if the substantive protection it provides may be circumvented

procedurally by merely reciting the proper pleading requirements. Courts across the country have employed this logic in cases and have demanded that in cases where plaintiffs have filed defamation claims against anonymous speakers, that plaintiffs preliminarily show that their claims are not just properly pled, but that they overcome some degree of validity before courts will strip them of their anonymity. See *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009) ("[W]hen a trial court is confronted with a defamation action in which anonymous speakers or pseudonyms are involved, it should, . . .determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters . . .and . . . balance the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure."); *Ecommerce Innovations L.L.C. v. Does 1-10*, No. MC-08-93-PHX-DGC, slip op. at 1 (D. Ariz. Nov. 26, 2008) ("To obtain the identity of an anonymous poster, [Plaintiff] must show that it would survive a motion for summary judgment on all elements of . . . [a] defamation claim . . . not dependent upon knowing the identity of the anonymous poster."); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172 (Cal. App. 6 Dist. 2008) (holding that a plaintiff must "make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena

seeking his or her identity"); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. Div. 1 2007) (requiring the party seeking to identify an anonymous speaker must demonstrate that it would survive a motion for summary judgment on all of the elements within that party's control); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (concluding that "the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously"); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) ("[T]he plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of [an] unnamed defendant.")

Similarly, whether this Court is prepared to rule that the long-arm statute extends to cases such as the one at bar, it should mandate that, before any plaintiff can establish that the long-arm statute applies under 48.193(b) in a defamation case, it must make a showing sufficient to overcome a directed verdict, so as to minimize the possibility that Florida-based plaintiffs will abuse the legal system by filing un-meritorious SLAPP suits against out of state publishers with no connection to this state other than the fact that they may write about a Florida entity.

Such a ruling would be consistent with the language of Section 48.193(b), as the long-arm statute does not say that a plaintiff must merely allege that the defendant has committed a tortious act, but that the defendant must have actually committed a tortious act in this state. Accordingly, it seems to be required that a court should, at the least, determine that it is more likely than not that the plaintiff was actually defamed. The absence of this threshold inquiry allows for a reading of 48.193(b) that is far too open for abuse when free speech principles are at stake.

If this Court were to so hold, it would not (by a long shot) be at the forefront of applying First Amendment principles to its long-arm statute in defamation actions.

New York prohibits the exercise of long-arm jurisdiction over defamation defendants specifically because of the New York legislature's recognition of the chilling effect that "libel tourism" creates. See *Best Van Lines v. Walker*, 490 F.3d 239, 245 (2d Cir. 2007); ("[T]he Advisory Committee intended to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them. It did not wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests, as the New York Times was forced to do in Alabama.").

While the Florida legislature did not seek to completely bar defamation suits from long-arm jurisdiction, the Florida legislature also has not evidenced a desire to allow the long-arm statute to be used to chill online discussion of Florida topics, without a minimum review of the plaintiff's allegations. Accordingly, regardless of how this Honorable Court rules on the specific question presented by the 11th Circuit, it may (and should) interpret Section 48.193(b) as requiring, in speech-related cases, more than a mere proper allegation by a corporation that it has been defamed in order to allow long-arm jurisdiction to attach.

II. This Court should refrain from deciding whether the exercise of personal jurisdiction over a nonresident defendant, who has published allegedly defamatory information concerning a Florida resident on a non-commercial website located outside the state, would comport with federal due process requirements.

Much of ISC's initial brief focuses on establishing that Tabatha Marshall has sufficient minimum contacts with the state of Florida such that the exercise of personal jurisdiction over her in this state would not offend traditional notions of fair play and substantial justice. Aside from being completely factually and legally unsupportable, this characterization of the issue misinterprets the question certified by the United States Court of Appeals for the Eleventh Circuit, which deals solely with applicability of Florida's long-arm statute to non-commercial websites that are owned, operated, and published outside of Florida. As described above, any determination of whether a Florida court may exercise personal jurisdiction over a

nonresident defendant involves a two-step analysis. The Eleventh Circuit has asked this Court for a ruling on the first step, which involves an interpretation of a Florida statute; ISC would have this Court rule on the second, which involves an interpretation of the United States Constitution. This is not properly before this Honorable Court, and the Eleventh Circuit will, once the certified question is resolved, address the due process question.

CONCLUSION

For the foregoing reasons and under the facts on record, this Court should determine that Tabatha Marshall's web page could not be considered a transmission into Florida, nor any other kind of tortious act in the state of Florida for the purposes of satisfying Fla. Stat. § 48.193(1)(b). Such a result adequately safeguards every American's First Amendment protected right to freedom of expression without disturbing numerous prior decisions that correctly found jurisdiction in telephonic, electronic, or written communications "into this State," where such communications were targeted at Florida.

For the reasons set forth above, this Honorable court should answer the 11th Circuit's certified question in the negative, and should take this opportunity to interpret the Florida long-arm statute as requiring at least a minimum inquiry into the validity of any defamation claim (or any other claim when First Amendment principles are in play) before allowing jurisdiction to statutorily attach.

Dated: April 13, 2009 ***WESTON, GARROU, WALTERS & MOONEY***

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I HEREBY CERTIFY that on the 13th 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:

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CERTIFICATE OF FONT COMPLIANCE

This brief complies with the font requirements of Fla. R. App. P. 9.210(2). It is typed in Times New Roman 14 point, proportionately spaced type.

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