

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-CP-26-6158
Appellate Case No. 2019-001054

Kevin Ralph RichardAppellant,

v.

Facebook, Inc., a Delaware Corporation and and Maleko
Kirk Malepeai, IndividuallyDefendants.

Of which Facebook, Inc., a Delaware Corporationis the Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1. DID THE CIRCUIT COURT ERR IN DISMISSING KEVIN RICHARD'S SUIT AFTER FINDING IT LACKED PERSONAL JURISDICTION OVER FACEBOOK, INC.?**
- 2. DID THE CIRCUIT COURT ERR IN FINDING THAT FACEBOOK WAS IMMUNE FROM LIABILITY PURSUANT TO THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. SECTION 230, AND THEREBY DISMISSING APPELLANT'S LAWSUIT?**

STATEMENT OF THE CASE

On October 31, 2018, Appellant filed with the Horry County Court of Common Pleas (with Civil Action No. 2018CP2606158) an action against Respondent Facebook and Defendant Malepeai for defamation, civil conspiracy, outrage and intentional infliction of mental/emotional distress (R. pp. 27-34). On January 14, 2019, Respondent Facebook filed a Motion to Dismiss under Rules 12(b)(2) and 12(b)(6), SCRCF as well as a Memorandum in support (R. pp. 58-76). On February 25, 2019, Appellant filed a Memorandum in Opposition to Respondent Facebook's Motion to Dismiss (R. pp. 77-83).

Respondent Facebook's Motion to Dismiss was heard before the Honorable Benjamin Culbertson on April 2, 2019. Judge Culbertson took the motion under advisement and ruled that both parties were to submit a proposed Order within 15 days for his consideration.

On May 22, 2019, the signed Order Granting Respondent Facebook's Motion to Dismiss was filed with the court (R. pp. 2-23). Judge Culbertson dismissed Appellant's causes of action against Respondent Facebook citing lack of personal jurisdiction over Respondent Facebook and finding that Respondent Facebook is immune from Appellant's lawsuit pursuant to the Communications Decency Act 47 U.S.C. 230. On May 31, 2019, Appellant filed and submitted to Judge Culbertson a Motion to Reconsider Order of Dismissal as to Respondent Facebook arguing that the Motion was premature and, further, that the court does have personal jurisdiction over Respondent Facebook and that the outrage and "intentional conduct" of Respondent Facebook is obviously inconsistent with any Congressional protection afforded to online entities like Respondent Facebook (R. pp. 84-85). On June 4, 2019, a Form 4 Order was filed with the Court denying Appellant's Motion to Reconsider (R. pp. 24-26). This appeal followed.

STATEMENT OF THE FACTS

Respondent Facebook, Inc., a Delaware Corporation operates a social networking website that allows people to communicate with fellow users and has over 2 billion users worldwide and over 2 million users in South Carolina. Respondent Facebook boasts they don't tolerate bullying and harassment and removes content that appears to purposefully target private individuals with the intention of degrading or shaming them.

Appellant Kevin Richard is the owner of Filet's restaurant located at 2120 Sea Mountain Highway 17 in the North Myrtle Beach section of Horry County, South Carolina. Defendant Maleko Malepeai is a former employee of Filet's restaurant.

Throughout the month of December 2016, Defendant Malepeai published via his Facebook account false and defamatory statements concerning the Appellant. These communications were intentional, substantial, and unreasonable with the tendency to harm the reputation of the Appellant as to lower him in the estimation of the community and deter third persons from associating or dealing with him or his business; further, these communications were vulgar, salacious, and defamed Appellant's daughter, as well.

The communications made by Defendant Malepeai on Respondent Facebook were unprovoked by the Appellant and the content of the electronic harassment constituted harassment in the second degree under South Carolina laws. Defendant Malepeai was arrested on July 18, 2017 pursuant to an arrest warrant issued on December 18, 2016 based on the facts giving rise to this matter. The police Incident Report regarding the matter states that Defendant Malepeai, "via his Facebook account, engaged in a pattern of intentional, substantial and unreasonable intrusion into the private life of his former employer [Appellant] causing mental and emotional distress."

(R. p. 86)

A friend of Appellant's, William "Billy" Riggs, notified Respondent Facebook of the multiple false and defamatory posts, which included statements about Appellant such as, "Kevin Richard said, everybody knew I had sex with my kids", "...[Kevin] you really are a flaming faget, I don't has any problem with you excessive compulsive disorder psychopath maniac uneducated f*****ass, just keep your hands off our children", "Kevin Richard said who is going to try and take me to jail for killing niggas?", "Kevin Richard said he came and my life gave me a whole new outlook I could never afford because of my crack and gaming problem 40,000/70,000 [dollars] each go around." (-all excerpts from posts dated December 13).

Respondent Facebook responded to Mr. Riggs, upon receiving notification of these atrocious statements, and advised that the language contained in the posts did not go against any of their specific "Community Standards" and refused to remove the statements and/or delete Defendant Malepeai's account. They further stated that Mr. Riggs could "unfriend", "unfollow" or "block" Malepeai (R. pp. 89-97).

Under Respondent Facebook's Community Standards page it states that they will remove content that "glorifies violence or celebrates the suffering or humiliation of others" (R. p. 98) and also states that they "have higher expectations for content that we call cruel and insensitive, which we define as content that targets victims of serious physical or emotional harm." (R. p. 101)

Since Respondent Facebook failed to remove these defamatory statements, Appellant has suffered extreme emotional distress, mental anguish and humiliation and filed an action in the Horry County Court of Common Pleas (with Civil Action No. 2018CP2606158) against Respondent Facebook and Defendant Malepeai for defamation, civil conspiracy, outrage and intentional infliction of mental/emotional distress (R. pp. 27-34).

STANDARD OF REVIEW

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." *Id.* "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct.App.2008).

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint

should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

ARGUMENT

1. DID THE CIRCUIT COURT ERR IN DISMISSING KEVIN RICHARD'S SUIT AFTER FINDING IT LACKED PERSONAL JURISDICTION OVER FACEBOOK, INC.?

I. GENERAL JURISDICTION

The Circuit Court erred in finding that it lacked personal jurisdiction over Facebook, Inc because the Court has both general jurisdiction over Facebook, Inc. pursuant to Section 36-2-802 of the South Carolina Code (2003) and specific jurisdiction over Respondent Facebook, Inc. pursuant to the long arm statute (S.C. code Ann Section 36-2-903) and the due process analysis. Section 36-2-802 of the South Carolina Code (2003) governs general jurisdiction and states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." "A court may assert general jurisdiction if the defendant has an 'enduring relationship' with the forum state." *Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510. If an individual has an "enduring relationship" with the State, he may be sued here even if the cause of action did not arise in South Carolina. *See id.* ("General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action...."). To satisfy the "enduring relationship" requirement of general jurisdiction, the defendant's contacts must be "continuous and systematic" as well as "so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities." *See id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)); *Coggeshall v. Reach*, 376 S.C. 12, 655 S.E.2d 476 (2007) ("An enduring relationship is indicated by contacts that are substantial, continuous, and systematic."). Furthermore, the

defendant's contacts with the forum must satisfy the due process clause. *Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510.

Facebook, Inc, is a corporation existing in the state of Delaware, with a headquarters in the state of California. It does not have an office in the State of South Carolina. However, it is an internet based Social Media website that allows its users to upload photos, videos, comments, information about themselves, create personal pages as well as business pages, market and sell items. There are an estimated 2 Billion users of Facebook worldwide, with over 2 million Facebook users in the State of South Carolina. Many of these users, and many users who are residents of the state of South Carolina, use Facebook as their livelihood. Facebook is routinely used to sell products, whether it be make-up, monogrammable bags, clothing, or fitness and nutrition plans, thousands of Facebook users, many in the state of South Carolina use their Facebook page to earn a living. In addition, Facebook engages what is commonly referred to as ad-targeting, wherein Facebook uses a person's profile (information he or she posts about themselves) location (i.e., the state of South Carolina), and demographic (age, socio-economic status, etc.) to specifically and strategically place advertisements on his or her Facebook page that he/she would be more likely to be interested in. Specifically, an advertiser, can target certain Facebook users based on their location (State, County, City, Zip code), Age, Gender, Interests (which is known by what the Facebook user has liked, or clicked on while using Facebook---data information that is gathered by Facebook), connections, relationship status (single, divorced, married, kids), languages, and education, workplaces.

As such, business is conducted daily in the state of South Carolina with the use of Facebook, and it doesn't appear that Facebook has any intention of ceasing this relationship with the users of the State of South Carolina. Facebook intentionally targets specific users based on

their individual data information and then uses that information to make money from advertisers who wish to reach a particular audience, many of which are South Carolina residents. Facebook wants this Court to believe that they are simply a forum, but that is certainly not the case. Facebook transacts so much business in the state of South Carolina that it also has a company called Facebook Payments, Inc that is a foreign corporation registered to do business in the state of South Carolina with a filing date of March 2011, and has a registered agent in the State of South Carolina and is currently in good standing. An internet search of "Facebook payments, Inc." reveals that this is a separate company formed by Respondent Facebook so that current Facebook users can link their debit card to the messenger app's settings section and send mobile peer-to-peer payments to their friends by striking up a conversation. Once two friends engage in dialogue, a "\$" icon will appear above the keyboard. All users have to do is enter the amount they wish to transfer and select the pay option. Facebook payments users can also fund and complete transactions to third-party companies that advertise on the platform as well. Once the payment is successfully processed, Facebook transfers the value of the transaction to the developer offering the content the consumer wishes to purchase.

Respondent Facebook has continuous and systematic contacts with the residents of the State of South Carolina, arguably close to half the population of South Carolina, and therefore the Circuit Court erred in finding it lacked general jurisdiction over Facebook.

II. SPECIFIC JURISDICTION

Courts may also have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 222 (2008). Under the long arm statute, a court may exercise

personal jurisdiction over an individual acting directly or through an agent for causes of action arising from the individual's:

- (1) transacting any business in this State;
- (2) contracting to supply services or things in the State;
- (3) commission of a tortious act in whole or in part in this State;
- (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (5) having an interest in, using, or possessing real property in this State;
- (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
- (7) entry into a contract to be performed in whole or in part by either party in this State; or
- (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, S.C. Code Ann. § 36-2-803 (Supp.2008).

Traditionally, our courts have conducted a two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct.App.2008). However, a more recent trend compresses the analysis into a due process assessment only. *Id.* at 431, 665 S.E.2d at 664-65; *see also Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."). Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial

justice. *Coggeshall*, 376 S.C. 12, 655 S.E.2d 476 (2007). "Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being hauled into court there." *Power Prods.*, 379 S.C. at 431-32, 665 S.E.2d at 665.

All parties to this action, other than Facebook reside in Horry County, South Carolina. Personal Jurisdiction is proper in South Carolina as to the specific suit-related conduct which was stated with reasonable particularity that support an exercise of specific jurisdiction over Facebook. With respect to the Long Arm Statute, as mentioned previously in this brief, it is clear that Facebook conducts and transacts business in this state, and has availed itself through the use of its services to users located in South Carolina, through the creation of accounts, ability to market and sell their products, and to exchange payments through its website. In addition, it is clear that while, Facebook may have arguments as to why it is not liable for any comments made/posted on their social media website, those arguments speak to the liability for their acts, and not the simple question of jurisdiction to hear the allegations brought by Appellant. While Respondent Facebook may disagree about its liability, exercising jurisdiction over Facebook is a separate issue from its liability for the allegations. Appellant brought an action alleging that Facebook caused tortious damage to him in South Carolina by allowing defamatory statements to be published on its website and by failing and refusing to remove them once notified of the defamatory statements (R. pp. 27-34). Respondent Facebook regularly does or solicits business, and derives substantial revenue from services rendered in South Carolina, and therefore section (4) of the long arm statute is met as well. As stated above, Respondent Facebook routinely profits from the advertisers who choose to place advertisements with Facebook because of its ability to strategically target certain users, and that activity takes place with South Carolina residents, both buying the products being

advertised, and placing the advertisements for their products through Facebook as well. As such, the long arm statute applies in that Respondent Facebook has had multiple contacts with South Carolina including subsections (1) (2) (3) and (4) of the long arm statute, all of which allow South Carolina to exercise personal jurisdiction.

In addition to the long arm statute, Appellant has also satisfied the criteria for due process, in that Facebook (the nonresident defendant) established minimum contacts with the State of South Carolina and the exercise of jurisdiction is fair. Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Id.* at 432, 665 S.E.2d at 665. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Id.* To support a finding of due process, both prongs must be satisfied. *Id.* To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct.App.2004). The *Moosally* court stated:

It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case. *Moosally*, 358 S.C. at 332, 594 S.E.2d at 884-85 (internal citations omitted). Respondent Facebook has clearly "directed his activities to residents of South Carolina and

Appellant's cause of action arises out of and relates to those activities. Respondent Facebook has purposefully offered its services to all residents of the State of South Carolina, and a substantial portion of the population of South Carolina uses its services on a routine basis. In addition, Facebook, Inc. itself acknowledges the business transactions that take place in South Carolina because it has registered with the Secretary of State as a foreign corporation with the authority to do business in our state through Facebook Payments. As such, any and all payments made through Facebook are subject to the laws of our state and it would seem that Facebook would be afforded the protection of our laws, should it be necessary. As such, the first prong of the two-prong test, (minimum contacts with the forum state) have been met.

The second prong is the fairness prong, "under the fairness prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. *NV Sumatra Tobacco Trading, Co.*, 379 S.C. at 91, 666 S.E.2d at 223. With respect to factor (1), Facebook has been offering this service and conducting this activity since approximately 2004/2005. It has specifically been offering the payment option since 2011, with no indication that it this activity will cease. With respect to factor (2), Facebook had every opportunity to remove the defamatory words that were being posted on their website and published via Facebook. In failing to remove these horrific, defamatory statements, Facebook violated its own Community Standards Policy wherein it states that they will remove content that glorifies violence or celebrates the suffering of humiliation of others," (R. p. 98) its also states that they "have higher expectations for content that we call cruel and insensitive, which we define as content that targets victims of serious physical or emotional harm." (R. p. 101) These statements certainly qualified as glorying violence and celebrating the humiliation of Appellant. As such, in failing to

remove statements that violate their own policy, Respondent Facebook is complicit in and actively participating in and allowing the dissemination of these defamatory statements and inflicting emotional distress. With respect to Factor (3) all of the other parties are located in Horry County, SC with the exception of Respondent Facebook. In addition, Respondent Facebook is an extremely wealthy corporation and has much more means than either Appellant or the other Defendant, Malepeai, have, and therefore it is much more inconvenient to Plaintiff and Defendant Malepeai to travel to another jurisdiction to have this case heard. On the contrary, it is not that inconvenient for Respondent Facebook to travel to South Carolina for the adjudication of this action. Finally, with respect to factor (4), South Carolina has a large interest in exercising jurisdiction in this case. While people will often speak and write defamatory remarks about another person, those remarks typically cannot do as much damage, unless said remarks are disseminated to a larger audience. Respondent Facebook provides the ability for defamatory comments and statements to be made known to the entire city, county, state, and potentially the nationwide, and globally. Facebook's wide-reaching audience brings extensive damage to this situation, and quite often other residents of South Carolina are in this same position. If Facebook wants to do business in South Carolina and have the ability to profit off of our residents, and have the ability to reach our residents with its advertisers, then it shouldn't escape the jurisdiction of our Courts, and our court's ability to protect and adjudicate cases for its residents.

2. DID THE CIRCUIT COURT ERR IN FINDING THAT FACEBOOK WAS IMMUNE FROM LIABILITY PURSUANT TO THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. SECTION 230, AND THEREBY DISMISSING APPELLANT'S LAWSUIT?

Facebook claims immunity from Plaintiff's claims pursuant to 47 U.S.C. Section 230, also known as the Communications Decency Act, which essentially provides immunity for interactive computer services for information that is created and developed by third parties. This statute hinges on whether or not the cause of action requires the court to treat the defendant as the publisher or speaker of content provide by another. *Barnes v. Yahoo!, Inc*, 570 F.3d at 1101-02. As such, while this Act may apply to Mr. Richard's actions for defamation/libel per se, it would not however, apply to his causes of action against Facebook for outrage and intentional infliction of emotional distress. Those causes of action do not require Appellant to establish Facebook as the publisher of the vulgar and false statements. Outrage is defined as, "one who by extreme outrageous conduct intentionally or recklessly causes severe emotional distress to another and is subject to liability for such emotional distress. *Ford v. Hunston*, 157, 276, S.E.2d 776 (1981).

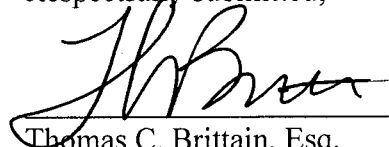
Respondent Facebook was notified of Defendant Malepeai's posts and responded that an employee/agent of Facebook had reviewed the posts and did not feel that they needed to be removed and further stated, "we understand that it may still be offensive or distasteful to you" (R. pp. 89-92), conveying that to Respondent Facebook, making false statements that Appellant was a homosexual, was raping his own daughter, was a racist, a drug addict, etc, was not on its face offensive or distasteful. By refusing to remove these posts and delete Defendant's Malepeai's account Respondent Facebook not only failed to follow its own policies and procedures, it became an active participant and also inflicted emotional distress upon Appellant through the vulgar, vile

and repulsive statements posted about him. The actions of Respondent Facebook were intentional, they were reckless, and they inflicted emotional distress upon Mr. Richard so severe that no reasonable person should be expected to endure it. Such behavior is not subject to the Communications Decency Act, and Facebook is not immune from liability for said acts and should be required to appear in Horry County, South Carolina and take responsibility for its intentional and reckless actions.

CONCLUSION

The Circuit Court erred in dismissing Appellant's lawsuit for lack of personal jurisdiction and finding that the Communications Decency Act provides immunity to Respondent Facebook, as such Appellant respectfully requests this honorable court reverse the order of the Circuit Court.

Respectfully submitted,



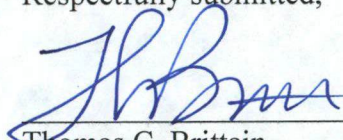
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Dated: February 6, 2020

CERTIFICATE OF COUNSEL

We hereby certify that Appellant's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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