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## Call Me, Maybe: Missouri's Approach to Extraterritorial Personal Jurisdiction on the Basis of Interstate Communications

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## NOTE

# Call Me, Maybe: Missouri's Approach to Extraterritorial Personal Jurisdiction on the Basis of Interstate Communications

*Walters Bender Strohbehn & Vaughan, P.C. v. Mason*, 397 S.W.3d 487 (Mo. Ct. App. 2013).

CALEB WAGNER\*

### I. INTRODUCTION

The issue of where a case can be heard can be crucial to the outcome of the case and is an important part of litigation strategy. In determining whether a court has personal jurisdiction over a defendant, a court looks to the nature and extent of the contacts the defendant has with the forum state and whether or not the litigation arises out of those contacts. In *Walters Bender Strohbehn & Vaughan, P.C. v. Mason*, the Court of Appeals for Missouri's Western District confronted the question of whether it had jurisdiction over a party that had never been in the state of Missouri but had communicated with a Missouri party through phone calls, e-mails, and faxes.<sup>1</sup> In making its determination, the court weighed the intent of the parties and the nature and quality of the contacts.<sup>2</sup> It found that since the defendant had extensive contact with the Missouri party and intended that the Missouri party perform significant work in the state, the defendant was subject to the state's jurisdiction.<sup>3</sup>

This Note discusses the legal doctrine of personal jurisdiction over out-of-state parties in Missouri and how the instant case fits within that regime. It also offers guidance for out-of-state parties conducting business in Missouri, as well as Missouri parties dealing with out-of-state corporations, suggesting ways in which businesses can structure their arrangements to ensure specific forums should litigation become necessary.

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1. *Walters Bender Strohbehn & Vaughan, P.C. v. Mason*, 397 S.W.3d 487 (Mo. Ct. App. 2013).

2. *Id.* at 502.

3. *Id.*

## II. FACTS &amp; HOLDING

Walters Bender Strohhahn & Vaughan (“Walters Bender”), the Plaintiff in this action, was a plaintiff-side personal injury firm based in Kansas City, Missouri.<sup>4</sup> The Defendant, Elizabeth Mason, was a litigation attorney whose practice was based out of New York.<sup>5</sup> In the fall of 2007, Mason was preparing to take a case captioned *Anonymous v. High School for Environmental Studies* (“*Anonymous*”) to trial in New York.<sup>6</sup> The case arose out of the alleged rape of a high school student by one of her teachers.<sup>7</sup> Mason retained Dr. David Corwin, an expert in forensic child psychology, for the trial.<sup>8</sup> Corwin suggested that Mason call Michael Strohhahn, a partner at Walters Bender Strohhahn & Vaughan, about the case.<sup>9</sup> On October 18, 2007, she did so, and Strohhahn expressed interest in the case due to the similarities it shared with a case he had litigated in the past.<sup>10</sup> During the call, Strohhahn expressed concern that Mason’s damages theory was not fully developed and, according to Mason, offered to fly out to New York to discuss the case with her.<sup>11</sup>

Four days later, on October 22, Strohhahn did fly out to New York where he met with Mason and discussed the case.<sup>12</sup> Both parties agreed that, during his trip to New York, Mason offered Strohhahn one-third of her contingency fee to work as co-counsel on the case.<sup>13</sup> When Strohhahn had accepted the offer was a matter of dispute in the litigation.<sup>14</sup> According to Mason, Strohhahn accepted the offer the next day, on October 23, 2007, after he met with the client at Mason’s office.<sup>15</sup> Strohhahn, on the other hand, claimed that he did not accept the offer until he returned to Kansas City and discussed the case with his partners.<sup>16</sup> According to his version of events, he accepted the offer on October 24, 2007, when he called Mason, who was in

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4. *Practice Areas*, Walters Bender Strohhahn & Vaughan, P.C., <http://www.wbsvlaw.com/practice-areas/> (last visited Dec. 20, 2014).

5. *Id.* at 490.

6. *Id.*

7. *Id.* at 491. The parties were only litigating the issue of damages at trial because the defendants were barred from asserting defenses to liability due to misconduct concerning discovery. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

New York, from his office in Missouri.<sup>17</sup> Both parties concurred that the agreement was oral and that there was not any written proof of the contract.<sup>18</sup>

After the parties reached their co-counsel agreement, they both went to work preparing for the trial. They frequently contacted each other about the case through electronic communications, as Mason worked from New York and Strohbahn worked from Kansas City.<sup>19</sup> At the trial, which began on November 26, 2007, both attorneys worked together to argue the case.<sup>20</sup> Strohbahn, for his part, conducted voir dire, made the opening argument, and questioned witnesses.<sup>21</sup> After four days of trial, the judge declared a mistrial.<sup>22</sup> Mason claimed that Strohbahn committed acts of misconduct during the trial, which Strohbahn denied.<sup>23</sup> Nonetheless, Mason then terminated the co-counsel agreement and offered the same one-third contingency deal to another New York attorney, who helped Mason obtain a \$1,100,000 settlement for her client.<sup>24</sup>

On February 27, 2008, an attorney for the Plaintiff, Strohbahn, notified counsel for the defendants in *Anonymous* that the firm was asserting a lien<sup>25</sup> against the recovery in the case to ensure payment of one-third of the fees.<sup>26</sup> The firm then filed the action at the center of this case on March 3, 2008, claiming that Mason was liable for breach of contract, conversion, unjust enrichment, and quantum meruit.<sup>27</sup>

When the defendants in the *Anonymous* action found out about the lien, they refused to release the settlement payments to Mason and her clients.<sup>28</sup> Mason then filed a motion to declare the lien unenforceable and to have the settlement payments disbursed, and Walters Bender filed a cross-petition to have the lien fully enforced.<sup>29</sup> In June 2008, the New York court held that Walters Bender was entitled to \$5,250, an amount far below the one-third of contingency fees that they sought.<sup>30</sup> The firm appealed the ruling, and on November 10, 2009, the New York Supreme Court, Appellate Division re-

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 491-92.

25. *Id.* at 492. The lien was asserted pursuant to N.Y. JUDICIARY LAW § 475 (McKinney 2008) and MO. REV. STAT. § 484.130 (2000). *Walters Bender Strohbahn & Vaughan, P.C.*, 397 S.W.3d at 492.

26. *Walters Bender Strohbahn & Vaughan, P.C.*, 397 S.W.3d at 492.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

versed the ruling and remanded the case to determine whether Strohbehn was entitled to be paid and, if so, how much he was owed.<sup>31</sup>

On this issue, the trial court found that Strohbehn was entitled to \$109,425.39, or two-thirds of the amount he sought.<sup>32</sup> While these New York proceedings were ongoing, the Missouri circuit court granted Mason's motion to dismiss the Missouri action on the grounds that the doctrine of *res judicata* barred consideration of the case since the New York court had already rendered a judgment on the lien.<sup>33</sup> Walters Bender appealed, and the Western District of Missouri reversed and remanded the case to the circuit court for further proceedings.<sup>34</sup>

The circuit court then held a two-day trial to determine whether it had personal jurisdiction over the action.<sup>35</sup> The proceedings were concerned with only one question: did Strohbehn accept the co-counsel contract in New York or Missouri?<sup>36</sup> The jury found that he had accepted the contract in Missouri, bringing the case within the scope of Missouri's long-arm statute.<sup>37</sup> The court then went to work determining whether Mason's contacts with the state of Missouri were sufficient to exercise personal jurisdiction over her.<sup>38</sup>

On that question, the circuit court entered a judgment on February 21, 2012, that contained detailed findings of facts that largely credited Strohbehn's version of events.<sup>39</sup> The court found that Mason's testimony was oftentimes contradictory and evasive, while Strohbehn's statements were generally credible.<sup>40</sup> Due to the credibility judgments, the court found that Mason's first call to Strohbehn on October 18, 2007, was for the purpose of retaining him and his firm as co-counsel, knowing that they would perform a significant amount of their work in Missouri.<sup>41</sup> The court further found that Mason called Strohbehn on October 24, 2007, the day after he got back from the meeting in New York, "for the purpose of retaining [Walters Bender] to act as trial counsel" and that Strohbehn accepted the offer during that call.<sup>42</sup>

The circuit court found that most of the work performed by Walters Bender was done in Kansas City, Missouri, with the exception of the trial itself.<sup>43</sup> The court further established that Mason, using electronic communications, was regularly in contact with Walters Bender and was aware that

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31. *Mason v. City of N.Y.*, 67 A.D.3d 475, 475 (N.Y. App. Div. 2009).

32. *Walters Bender Strohbehn & Vaughan, P.C.*, 397 S.W.3d at 492.

33. *Id.* The circuit court made its ruling on June 18, 2009. *Id.*

34. *Id.*

35. *Id.* at 492-93. The trial took place on January 30 and February 1, 2012. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 493.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

they were performing their work in Missouri.<sup>44</sup> On the basis of these findings, the court found that Missouri could properly assert personal jurisdiction over the New York defendant.<sup>45</sup> The court then decided that the value of Strohbehn's services was governed by the principles of collateral estoppel and thus that the New York court's assessment of \$109,425.39 would stand.<sup>46</sup> The court also tacked on \$39,141.35 in prejudgment interest.<sup>47</sup>

Mason appealed the judgment on two grounds: that the Plaintiffs' claims were precluded due to the New York litigation, and that Missouri lacked personal jurisdiction over her.<sup>48</sup> The Missouri Court of Appeals for the Western District first rejected Mason's claim preclusion argument, finding that the Missouri litigation was not a collateral attack on the New York judgment.<sup>49</sup> The court then went on to find that even though Mason had never been physically present in Missouri, the court could exercise personal jurisdiction over her on the basis of her electronic communications with people located in the forum state.<sup>50</sup>

### III. LEGAL BACKGROUND

In Missouri, courts employ a two-step process in determining whether an exercise of personal jurisdiction over an out-of-state defendant is proper.<sup>51</sup> First, courts determine whether or not the defendant's conduct falls within the purview of the state's long-arm statute. Then, courts decide whether exercising personal jurisdiction would offend the Due Process Clause of the Fourteenth Amendment as interpreted by the U.S. Supreme Court and Missouri appellate courts.<sup>52</sup> In analyzing the due process issue, Missouri courts use a "five-factor test" and a "double five-factor" test to determine whether personal jurisdiction is appropriate.<sup>53</sup>

#### A. Missouri's Long-Arm Statute

Missouri's long-arm statute, codified as Missouri Revised Statute Section 506.500, reads as follows:

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44. *Id.*

45. *Id.*

46. *Id.* at 493-94.

47. *Id.* at 494.

48. *Id.*

49. *Id.* at 498.

50. *Id.* at 503.

51. *Id.* at 498 (quoting *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 331 (Mo. 2010) (en banc)).

52. *Id.* at 498-99.

53. MO. BAR CLE, MO. CIVIL PROCEDURE § 54.06(E)(2)(e) (3d ed. 2007).

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

\* \* \*

(2) The *making of any contract within this state*;<sup>54</sup>

Subsection (2) specifically states that making a contract within the state will subject an out-of-state party to the statute.<sup>55</sup> In most cases, it is relatively easy for courts to determine the state in which a contract was made. However, when the negotiations and agreement are done through phone calls or emails with a party in a different state, these determinations are more complex. In Missouri, courts have held that a contract is made in the state in which acceptance occurs.<sup>56</sup>

In *Poor Boy Tree Service, Inc. v. Dixie Electric Membership Corp.*,<sup>57</sup> the Missouri Court of Appeals, Southern District, held that a contract was not made in the state of Missouri when a Louisiana party called into Missouri and the Louisiana party accepted the contract.<sup>58</sup> The court held that a contract is made in the state “where the acceptor speaks into the phone.”<sup>59</sup> Thus, even though the Louisiana party called into the state of Missouri, the court found that the contract was made in Louisiana since the Louisiana party accepted the final offer.<sup>60</sup> Therefore, when determining whether a contract has been made in the state pursuant to the long-arm statute, courts look to the location of the accepting party. If the party that accepted the contract did so within the state, Missouri courts may exercise jurisdiction over subsequent litigation arising out of that contract pursuant to the long-arm statute.

### *B. The Due Process Clause*

#### 1. Federal Cases

Beginning with *Pennoyer v. Neff*, the U.S. Supreme Court has recognized that judgments in state courts could be challenged as violations of due

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54. MO. REV. STAT. § 506.500 (2000) (emphasis added).

55. *Id.*

56. *Wilson Tool & Die, Inc. v. TBDN-Tenn. Co.*, 237 S.W.3d 611, 615 (Mo. Ct. App. 2007).

57. 390 S.W.3d 930 (Mo. Ct. App. 2013).

58. *Id.* at 930-31.

59. *Id.*

60. *Id.*

process under the Fourteenth Amendment.<sup>61</sup> In the landmark case of *International Shoe Co. v. Washington*, the Court held that a state can exercise personal jurisdiction over an out-of-state party if that party has sufficient contacts with the forum state.<sup>62</sup> The Court established the standard that the defendant must have sufficient minimum contacts with the forum state so that “maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>63</sup> The Court cautioned that minimum contacts inquiries are not mechanical or quantitative, but instead require determinations of “the quality and nature of the activity in relation to the fair and orderly administration of the laws.”<sup>64</sup>

In *McGee v. International Life Insurance Co.*, the Supreme Court held that the defendant, a life insurance company, had minimum contacts with the forum state even though it conducted no business there.<sup>65</sup> It held that since the company had mailed the contract into the state and had accepted premiums sent by the beneficiary, a resident of the forum, it was reasonable for the state to exercise jurisdiction over the defendant.<sup>66</sup>

In *Hanson v. Denckla*, the Court further expounded on the standard for minimum contacts under the Due Process Clause.<sup>67</sup> There, the Court found that for the requisite minimum contacts to be present, it is necessary 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.”<sup>68</sup> The Court further held that “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State.”<sup>69</sup>

The Supreme Court further defined the requirements of the Due Process Clause in *World-Wide Volkswagen v. Woodson*, a case where the defendant’s product caused an injury in a state where the defendant transacted no business and had no intentional contacts.<sup>70</sup> Though it was foreseeable that the product would end up in the state through the “stream of commerce,” the Court held that the foreseeability requirement of the Due Process Clause was significantly more strenuous.<sup>71</sup> It held that the defendant’s contacts with the forum state must be sufficient to allow the defendant to anticipate being “haled into court there.”<sup>72</sup>

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61. 95 U.S. 714 (1877).

62. 326 U.S. 310, 320 (1945).

63. *Id.*

64. *Id.* at 319.

65. 355 U.S. 220, 223-24 (1957).

66. *Id.*

67. 357 U.S. 235 (1958).

68. *Id.* at 253.

69. *Id.*

70. 444 U.S. 286, 295 (1980).

71. *Id.* at 297-98.

72. *Id.* at 297.



In *Burger King Corp. v. Rudzewicz*, the Court found jurisdiction to be proper over a non-resident defendant even though he had never entered the state.<sup>73</sup> The Court noted that the defendant, a franchisee of Burger King, had developed a substantial and ongoing business relationship with Burger King's corporate headquarters, which was located in the forum state.<sup>74</sup> On this basis, personal jurisdiction was proper even though the defendant was never physically present in the state.<sup>75</sup> The Court noted that jurisdiction could not be found based on mere "random, fortuitous, or attenuated" contacts, but since the franchisee had purposefully availed himself to the benefits of doing business with a resident of the forum, it was reasonable for the state to exercise jurisdiction over him.<sup>76</sup>

## 2. Missouri Cases

Missouri courts, when discussing whether there are sufficient minimum contacts over a non-resident defendant, rely on a five-factor test. In *Conway v. Royalite Plastics, Ltd.*, the Supreme Court of Missouri held that courts must consider the following five factors: "1) the nature and quality of the contact; 2) the quantity of those contacts; 3) the relationship of the cause of action to those contacts; 4) the interests of Missouri in providing a forum for its residents; and 5) the convenience or inconvenience to the parties."<sup>77</sup> Missouri appellate courts have held that of these factors, "the first three are of primary importance, while the last two are of secondary importance" in weighing the due process concerns.<sup>78</sup>

If these five factors are met, and the court determines that there are sufficient minimum contacts, many courts in Missouri will, at their discretion, consider a second set of five factors to determine whether the exercise of jurisdiction comports with the "fair play and substantial justice" requirement of *International Shoe Co. v. Washington*.<sup>79</sup> These factors are: "1) the burden on the defendant; 2) the interest of the forum state; 3) the plaintiff's interest in obtaining relief; 4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and 5) the shared interest of the several states in furthering fundamental substantive social policies."<sup>80</sup> Taken together, this "double five-factor" test provides Missouri courts with a framework for considering challenges to the state's jurisdictional authority. Though many courts employ both five-factor tests, the Supreme Court of Missouri has held that they are not required to do so, as long as they deter-

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73. 41 U.S. 462, 476 (1985).

74. *Id.* at 479-80.

75. *Id.* at 487.

76. *Id.* at 474-76.

77. 12 S.W.3d 314, 318 (Mo. 2000) (en banc).

78. *Dillaplain v. Lite Indus., Inc.*, 788 S.W. 2d 530, 534 (Mo. Ct. App 1990).

79. *See, e.g., id.*

80. *Id.* at 535.

mine “whether the defendant has purposely availed itself of the privilege of doing business in this state such that it reasonably could anticipate being haled into court here.”<sup>81</sup>

Missouri cases have tended to emphasize that due process inquiries are inherently fact-intensive. For instance, in *Bryant v. Smith Interior Design Group*, the Supreme Court of Missouri found that the state could exercise jurisdiction over a Florida company that sent advertisements to Missouri and came to Missouri to discuss doing interior design work for the plaintiff at his New York apartment.<sup>82</sup> The court held that even though the plaintiff initiated the business relationship in another state and the work would be done in another state, it was proper for the court to exercise jurisdiction over the defendant.<sup>83</sup> The court held that since the defendant sent mail advertisements of its services to a resident of Missouri, it had purposefully availed itself of conducting business in the state.<sup>84</sup>

In *State ex rel. Metal Service Center of Georgia, Inc. v. Gaertner*,<sup>85</sup> the Supreme Court of Missouri held that the state could exercise jurisdiction over a company on the basis of a contract that was not made, negotiated, or solicited in Missouri.<sup>86</sup> The court held that since the contract called for the work to be performed in Missouri and the defendant corporation sent the products that were to be worked on into the state, the defendant had manifested an intent to avail itself of the laws of Missouri, and thus finding personal jurisdiction would not offend due process principles.<sup>87</sup>

The Missouri Court of Appeals, Western District, further articulated an expansive view of personal jurisdiction in *Tempmaster Corp. v. Elmsford Sheet Metal Work, Inc.*<sup>88</sup> There, the defendant did not ship any products into the state of Missouri and all of the contractual negotiations took place outside Missouri.<sup>89</sup> However, the court found the exercise of jurisdiction to be proper on the basis that the contract called for the manufacture of over one million dollars’ worth of products in Missouri.<sup>90</sup> Applying these precedents, the Western District considered the question of whether a court could have jurisdiction over a party whose sole connection with the state was using electronic communications to make a personal services contract with a party in the state.<sup>91</sup>

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81. *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 233 n.4 (Mo. 2010) (en banc).

82. *Id.* at 229.

83. *Id.* at 235.

84. *Id.*

85. 677 S.W.2d 325 (Mo.1984) (en banc).

86. *Id.* at 327.

87. *Id.*

88. 800 S.W.2d 45 (Mo. Ct. App 1990).

89. *Id.* at 46.

90. *Id.* at 47-48.

91. *Walters Bender Strohhahn & Vaughan, P.C. v. Mason*, 397 S.W.3d 487, 502 (Mo. Ct. App. 2013).

## IV. INSTANT DECISION

The Court of Appeals' opinion, written by Judge Alok Ahuja and joined by Judges Mark Pfeiffer and Victor Howard,<sup>92</sup> began by discussing the claim preclusion issues raised by Mason.<sup>93</sup> It then addressed the personal jurisdiction issues, deciding the questions concerning the applicability of Missouri's long-arm statute and due process issues respectively.<sup>94</sup> This section discusses the court's holdings on all of these issues in turn.

A. *Claim Preclusion*

The court began by discussing Mason's arguments in favor of claim preclusion, where she argued that the instant action was barred on the grounds of *res judicata*, collateral estoppel, claim-splitting, and the Full Faith and Credit Clause of the U.S. Constitution.<sup>95</sup> Essentially, she argued that these doctrines barred the court from interfering with the decisions of the New York courts.

The court began by pointing out that the laws of the jurisdiction that rendered a judgment determine the preclusive effect of that judgment.<sup>96</sup> Since the prior judgment was rendered in New York,<sup>97</sup> it was New York's claim preclusion laws that provided the rules of decision.<sup>98</sup> Since New York courts had treated the different remedies available to discharged attorneys – the retaining lien, the charging lien, and the plenary action – as cumulative and non-exclusive, the court did not need to find that a remedy under one of those theories precluded litigation under another.<sup>99</sup> However, the specific issue of the value of attorney services precluded subsequent determinations once that value has been determined.<sup>100</sup> Thus, the Missouri court was barred from re-litigating the issue of the reasonable value of Walter Bender's services.<sup>101</sup>

However, the court pointed out that a collateral attack was not made against the New York judgment.<sup>102</sup> Instead, the court found that Walters Bender proceeded in accord with New York law.<sup>103</sup> It held that Walters

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92. *Id.* at 490.

93. *Id.* at 493-94.

94. *Id.* at 498.

95. *Id.* at 494.

96. *Id.*

97. *Id.* at 492.

98. *Id.* at 494.

99. *Id.* at 495 (citing *Levy v. Laing*, 43 A.D.3d 713 (N.Y. App. Div. 2007) (citing *Butler, Fitzgerald & Potter v. Gelmin*, 235 A.D.2d 218 (N.Y. App. Div. 1997))).

100. *Id.*

101. *Id.* Essentially, Missouri courts are barred from collaterally attacking the determination that the firm is owed \$109,425.39.

102. *Id.* at 498.

103. *Id.*

Bender's decision to assert a lien before personally suing Mason was proper under the laws of that state.<sup>104</sup> The court further held that the trial court was in compliance with New York law when it gave preclusive effect to the determination that the reasonable value of attorney fees was \$109,425.39.<sup>105</sup> In closing, the court stated that since the Missouri action was consistent with the New York litigation and did not constitute a collateral attack on the judgment, the case could go forward.<sup>106</sup> It further held that even though Mason was appealing the New York judgment, the pendency of the appeal did not change the judgment's preclusive effect in Missouri courts.<sup>107</sup>

### B. Personal Jurisdiction

The court stated that Missouri courts make determinations of personal jurisdiction using a two-step process.<sup>108</sup> First, it must evaluate whether the defendant's conduct falls within the scope of the state's long-arm statute.<sup>109</sup> If this step is satisfied, the court then determines whether the defendant has sufficient minimum contacts with the state to comply with due process requirements.<sup>110</sup>

#### 1. Missouri's Long-Arm Statute

The court began with a discussion of Missouri's long-arm statute, which grants jurisdiction over parties who have made a contract within the state.<sup>111</sup> It stated that, for the purposes of the statute, a contract is made where acceptance occurs.<sup>112</sup> It went on to quote the Missouri Court of Appeals, Southern District's ruling in *Poor Boy Tree Service, Inc. v. Dixie Electric Membership Corp.*, which stated that "a contract is made in the state where the acceptor speaks into the phone."<sup>113</sup> Since the trial court found that Strohhahn had accepted Mason's offer over the phone when he was in Kansas City, it held that the contract was made in Missouri for the purposes of the

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104. *Id.* ("The two remedies are cumulative, not exclusive, and may properly co-exist.").

105. *Id.*

106. *Id.*

107. *Id.* at 497 (citing *Plaza PH2001 L.L.C. v. Plaza Residential Owner LP*, 98 A.D.3d 89 (N.Y. App. Div. 2012)).

108. *Id.* at 498 (citing *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. 2010) (en banc)).

109. *Id.*

110. *Id.*

111. *Id.* at 498-99.

112. *Id.* at 498 (citing *Wilson Tool & Die, Inc. v. TBDN-Tenn. Co.*, 237 S.W.3d 611, 615 (Mo. Ct. App. 2007)).

113. 390 S.W.3d 930, 931 (Mo. Ct. App. 2013).

long-arm statute and thus that the exercise of jurisdiction under the statute was proper.<sup>114</sup>

## 2. Minimum Contacts Under the Due Process Clause

The court then discussed the issue of whether exercising jurisdiction comported with the Due Process Clause of the Fourteenth Amendment.<sup>115</sup> Its analysis began by quoting the requirement, stated by *International Shoe Co. v. Washington*, that the defendant's contacts with the forum state must be extensive enough that "maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>116</sup> It further stated that "[w]hen evaluating minimum contacts, the focus is on whether 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."<sup>117</sup> It then went on to explain that the core principle of the due process analysis is the foreseeability that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>118</sup>

The court then explained that there are two species of personal jurisdiction: general and specific.<sup>119</sup> General jurisdiction exists when the defendant's contacts with the forum state are so systematic and pervasive that the state may assert jurisdiction in any cause of action.<sup>120</sup> Specific jurisdiction, on the other hand, exists when the suit arises directly from the defendant's contacts with the forum state.<sup>121</sup> The court quoted *Bryant v. Smith Interior Design Group*, which held that "[i]n some cases, single or isolated acts by a defendant in a state, because of their nature and quality and the circumstances of their commission, provide sufficient minimum contacts to support jurisdiction for liability arising from those acts."<sup>122</sup>

However, the mere fact that Mason entered into a contract with a Missouri resident does not, without more, create a basis for personal jurisdiction.<sup>123</sup> Instead, the question of whether the execution of a contract with an out-of-state party justifies jurisdiction is a "multifaceted, fact-specific inquiry" with "prior negotiations," "contemplated suture consequences," "the

114. *Walters Bender Strohbehn & Vaughan, P.C.*, 397 S.W.3d at 498-99.

115. *Id.* at 499.

116. *Id.*

117. *Id.* (citing *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. 2010) (en banc) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

118. *Id.* (citing *People's Bank v. Frazee*, 318 S.W.3d 121, 129 (Mo. 2010) (en banc)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 499 (quoting *Bryant*, 310 S.W.3d at 233) (internal quotation marks omitted).

123. *Id.*

terms of the contract,” and “the parties’ course of dealing” all being factors for the court to consider.<sup>124</sup>

Though the formation of a contract with a Missouri resident is not fully sufficient to satisfy the minimum contacts requirement, prior Missouri cases found jurisdiction to be proper when the contract “contemplate[d] the performance of substantial services in Missouri, and the defendant maintain[ed] substantial contact with the Missouri resident during the contract’s performance.”<sup>125</sup>

The first such case the court discussed was *State ex rel. Metal Service Center of Georgia, Inc. v. Gaertner*,<sup>126</sup> a case in which the Supreme Court of Missouri held that an out-of-state company was subject to the jurisdiction of a Missouri court.<sup>127</sup> There, a Georgia corporation entered into a contract with a Missouri corporation where it agreed to send metal products into the state for the Missouri corporation to work on, after which the products would be shipped back to Georgia.<sup>128</sup> A dispute arose between the parties, and the Missouri corporation sued in a St. Louis trial court.<sup>129</sup> On appeal, the Supreme Court of Missouri reasoned that, even though the contract was made in Georgia, personal jurisdiction was proper because the agreement contemplated the work being done entirely in Missouri and performed on products shipped into the state by the Georgia corporation.<sup>130</sup>

Similarly, in an earlier case, the Western District Court of Appeals found jurisdiction over a New York corporation solely on the basis that the contract it entered into contemplated the manufacture of over one million dollars’ worth of equipment in Missouri, which would be shipped to New York.<sup>131</sup> This was despite the fact that all of the pre-contractual negotiations occurred outside of Missouri and the New York corporation never shipped any products into the forum state.<sup>132</sup>

After discussing these precedents, the court stated that their holdings were not limited to contracts for the manufacture of products, but also applied to personal services contracts.<sup>133</sup> For this proposition, the court cited *Commercial Design, Inc. v. Dean/Dale & Dean Architects*,<sup>134</sup> a case that held that

124. *Id.* (quoting *People’s Bank v. Frazee*, 318 S.W.3d 121, 129 (Mo. 2010) (en banc)).

125. *Id.* at 499-500.

126. 677 S.W.2d 325, 328 (Mo.1984) (en banc).

127. *Walters Bender Strohbahn & Vaughan, P.C.*, 397 S.W.3d at 500 (citing *State ex rel. Metal Serv. Ctr. of Ga., Inc.*, 677 S.W.2d at 326).

128. *Id.* (citing *State ex rel. Metal Serv. Ctr. of Ga., Inc.*, 677 S.W.2d at 326).

129. *Id.* (citing *State ex rel. Metal Serv. Ctr. of Ga., Inc.*, 677 S.W.2d at 326).

130. *Id.* (citing *State ex rel. Metal Serv. Ctr. of Ga., Inc.*, 677 S.W.2d at 327-28).

131. *Walters Bender Strohbahn & Vaughan, P.C.*, 397 S.W.3d at 500 (citing *Tempmaster Corp. v. Elmsford Sheet Metal Works, Inc.*, 800 S.W.2d 45, 46 (Mo. Ct. App 1990)).

132. *Id.* (citing *Tempmaster Corp.*, 800 S.W.2d at 46).

133. *Id.*

134. 584 F. Supp. 890 (Mo. Ct. App. 1984).

Missouri could exercise personal jurisdiction over a Mississippi defendant who used letters and telephone calls to solicit the Missouri party to perform design services.<sup>135</sup> The court noted that the earlier decision found the due process requirements to be met even though the contract was for professional services in an out-of-state building.<sup>136</sup> The court further stated that even though the trial would not take place in Missouri, it was likely that much of the pretrial work would take place in the lawyer's office, which in this case was located in Missouri.<sup>137</sup>

Applying these precedents, the Western District held that the trial court was correct in exercising its jurisdiction over Mason.<sup>138</sup> It found that Mason intentionally contacted Strohbehn by phone to solicit him and his firm to perform costly services in the state of Missouri.<sup>139</sup> It noted that she provided the information necessary for Walters Bender to perform its services and remained in contact with the firm through electronic communications.<sup>140</sup> Given these contacts with the forum state, the court held that once Mason breached the agreement, she could reasonably anticipate being sued in a Missouri court.<sup>141</sup> Thus, her contacts were sufficient to support a finding of personal jurisdiction pursuant to the Due Process Clause.<sup>142</sup>

The court then addressed Mason's argument that mere telephone or mail contacts with the forum are insufficient by themselves to support personal jurisdiction.<sup>143</sup> It addressed Mason's argument that she had never been physically present in Missouri, finding it unpersuasive.<sup>144</sup> The court stated that the Supreme Court of Missouri had previously held that the act of mailing documents into the forum state gave rise to jurisdiction when the documents were "sufficiently significant to [the] particular cause of action."<sup>145</sup> There, the Supreme Court had emphasized that the determination of minimum contacts was "an ad hoc process," not a "mechanical application."<sup>146</sup>

After all, in the modern economy, many defendants conduct business by mail or electronic communications inside states in which they are not physically present.<sup>147</sup> If a party "purposefully direct[s] communications to a person in another state, jurisdiction may be proper even if that party was never

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135. *Walters Bender Strohbehn & Vaughan, P.C.*, 397 S.W.3d at 500.

136. *Id.*

137. *Id.* at 500-01.

138. *Id.* at 501.

139. *Id.* at 502.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (citing *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 235 n.6 (Mo. 2010) (en banc)).

146. *Id.*

147. *Id.*

physically present in the forum.”<sup>148</sup> The fact that Mason’s contacts were by phone, email, and fax did not prevent Missouri from exercising personal jurisdiction over her, the court held, stating that “it is the nature of her communications with Walters Bender, not the medium through which those communications occurred, which is decisive.”<sup>149</sup> Since Mason did not raise the issue of the “reasonableness factors,” the court did not address whether the exercise of jurisdiction was unreasonable even if there were minimum contacts.<sup>150</sup> Thus, the court affirmed the trial court’s ruling, finding that the exercise of personal jurisdiction over Mason was proper.<sup>151</sup>

## V. COMMENT

The instant decision, taken in conjunction with *Poor Boy Tree Service, Inc.*,<sup>152</sup> provides an important lesson for parties negotiating contracts in Missouri. These cases underscore the importance of being the acceptor of the contract if the negotiations are with an out-of-state party. If the contractual relationship ends up going poorly, it is strongly in the party’s interest to litigate the dispute on its home turf. Litigating in a party’s home state reduces the costs of litigation, as the party will not have to travel to another state and secure representation from a lawyer licensed to practice in the forum state. Of course, if the other party is in a closer, bordering state, these concerns may not be as important. But in the case of parties to a contract that are located hundreds or even thousands of miles apart, the issue of the court’s location represents a significant cost concern. Thus, when parties are negotiating a contract over the phone or through e-mail, it may be worthwhile to consider accepting a marginal offer instead of making a counteroffer. At the very least, Missouri parties should factor in the potential costs of litigating a dispute at home versus doing so in another state when formulating their negotiation strategies for long-distance contracts.

The instant case makes it clear that Missouri courts will be willing to exercise extraterritorial personal jurisdiction on the basis of purely electronic communications even if the defendant has never been present in the state. However, the determination of whether jurisdiction is proper will continue to be based on a variety of factors relating to the quality of those contacts. Courts are certainly likely to strongly consider whether the contract contemplated the performance of substantial work in the state of Missouri. They are also likely to look to whether the out-of-state party solicited the Missouri party to enter the contract, as well as to how extensive the communications between the parties were and whether the out-of-state party was aware that it

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148. *Id.* at 502 (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

149. *Id.* at 502-03.

150. *Id.* at 503.

151. *Id.*

152. 390 S.W.3d 930 (Mo. Ct. App. 2013).



was communicating with a Missouri resident. The courts will continue to see “purposeful availment” as an important touchstone.

The instant decision represents a sound extension of previous personal jurisdiction precedent. Though communications between contracting parties have become more complex in the digital age, it remains necessary that courts conduct a detailed analysis of the contacts with the forum state to determine jurisdictional issues. Here, it was clear that the defendant manifested the intent for a Missouri resident to perform services in the state and that she should therefore be subject to the court’s jurisdiction for litigation arising out of those services.

## VI. CONCLUSION

In the instant case, the Court of Appeals for the Western District of Missouri held that the court could exercise personal jurisdiction over an out-of-state party on the basis of phone calls and electronic communications with the state when the cause of action arose from those contacts. The court found that since the New York party intentionally solicited the Missouri party to work on her case, knowing that significant portions of the work would be performed in Missouri, the minimum contacts test had been satisfied.<sup>153</sup> Going forward, it appears that Missouri courts will be willing to find that the minimum contacts test has been met on the sole basis of phone calls and electronic communications so long as the subject matter of those communications expresses an intent by the out-of-state party to conduct business with the Missouri party. This ruling is a sensible application of existing precedent to new technology, which will provide litigants and courts with a predictable, yet flexible, framework for considering personal jurisdiction.

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153. *Walters Bender Strohhahn & Vaughan, P.C.*, 397 S.W.3d at 502.