

2004

# MLEADS ENTERPRISES, INC., Defendant and Appellant, vs. BRITTNEY FENN, Plaintiff and Appellee : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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**MLEADS ENTERPRISES, INC.,**

Defendant/Appellant,

Case No. 20041072 - SC

**vs.**

(Oral Argument Requested)

**BRITTNEY FENN,**

Plaintiff/Appellee.

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APPEAL FROM A COURT OF APPEALS DECISION REVERSING AN ORDER OF  
THE THIRD DISTRICT COURT (SALT LAKE COUNTY, SANDY DIVISION,  
THE HONORABLE JUDGE DENISE P. LINDBERG) DISMISSING THIS  
LAWSUIT

(Trial Court Case No. 030400108)

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## I. INTRODUCTION

The Opposition Brief (“Opposition”) Appellee Brittney Fenn (“Fenn”) filed ignores the Record. The only contacts Appellant Mleads Enterprises, Inc. (“Mleads”) had with Utah was a single email Ms. Fenn fortuitously accessed in Utah. The Record is uncontroverted that Mleads did not intend for any message to be transmitted to any Utah resident and Mleads could not have known that Ms. Fenn would review the single email in Utah. This case presents the Utah Supreme Court an opportunity to hold that due process of law and personal jurisdiction in the Internet age is still a meaningful bar to being haled into court in a foreign jurisdiction based upon random and fortuitous events.

Faced with the most minimal jurisdictional facts, Ms. Fenn resorts to speculation outside the Record about Mleads’s other business operations and what Mleads would have done had Ms. Fenn responded to the single email. The Court’s review is properly restricted to the Record and to the findings below<sup>1</sup>. For the first time in this lawsuit, Ms. Fenn argues that she should have been allowed to conduct additional discovery regarding Mleads’s activities unrelated to the lawsuit. These arguments were not raised below and were not designated as issues on Ms. Fenn’s

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<sup>1</sup>Ms. Fenn’s Opposition repeatedly refers to “findings” of the Court of Appeals. This is improper. A Court of Appeals makes conclusions of law and any findings of fact were made by the trial court.

appeal to the Court of Appeals. Accordingly, Ms. Fenn’s speculations are not properly before the court.

Mleads did not aim its communications to the State of Utah or to any of its residents. The Court of Appeals’ “single email rule” renders any protection for personal jurisdiction illusory and creates a dangerous precedent. Consequently, the judgment of the Court of Appeals should be reversed.

## **II. DISCUSSION**

### **A. MS. FENN MISSTATES THE RECORD ON THE ISSUE OF PURPOSEFUL INTENT**

Ms. Fenn argues the e-mail at issue “was sent directly to a . . . a specific location . . . in Utah.” (Opposition, p. 14.)<sup>2</sup> In truth, Mleads caused an email to be sent to an address which, unbeknownst to Mleads, a Utah resident accessed. The e-mail in question was addressed to Brittney Fenn at <[BAF@heartslc.com](mailto:BAF@heartslc.com)>. Ms. Fenn’s email address – like every email address – is location neutral. An email address alone does not reveal the location at which messages sent to it will be viewed. Indeed, the trial court concluded “Mleads had no knowledge, prior to the email being sent . . . that a solicitation would be directed to a resident of [the State of Utah].” (Record, p. 88.)

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<sup>2</sup> Ms. Fenn also notes that “[t]he e-mail was . . . addressed to and received by a Utah resident,” (Opposition, p. 15), and that Mleads “sent an . . . email directly to a Utah resident.” (Opposition, p. 12; *see also* Opposition, p. 13 (“[Mleads] sent one [message] directly to Ms. Fenn in Sandy, Utah”); Opposition, p. 12 (“Mleads . . . delivered the offending email to Ms. Fenn’s home computer”).)

The Court of Appeals reiterated “Mleads did not know specifically that the agent would send an email to Fenn or to any Utah resident.” (*See* Court of Appeals Decision, at \*P2 (emphasis added).) Courts uniformly recognize that the sender of an email cannot control the location at which the email may be viewed. An “e-mail [can be] retrieved from anywhere in the world.” *Kaempe v. Myers*, 2001 U.S. Dist. LEXIS 18386 (S.D. Ind. 2001) (emphasis added); *see also Hydro Eng'g. Inc. v. Landa, Inc.*, 231 F. Supp. 2d 1130, 1134 (D. Utah 2002) (citing *Kaempe* for the same proposition). Thus, the unequivocal facts in the Record are that Mleads did not purposefully direct any messages to the State of Utah.

Ms. Fenn speculates that Mleads “certainly can require information regarding the location of the main residence for potential recipients prior to sending out their emails . . . It would not take much to do so.” (Opposition, p. 13.) This argument ignores that an email address is not location-specific. Ms. Fenn does not, and cannot, explain how Mleads could have translated <BAF@heartslc.com> to reveal the location of her main residence.

Ms. Fenn’s argument also is contrary to the findings below. As the trial court found, the third party marketing company hired by Mleads did not provide “any personal or contact information about [Ms. Fenn] prior to the transmission of the [e-mail] nor would have provided such information even if requested by Mleads.” (Record, p. 88.) Even if the Internet permitted emails to be viewed only in select

locations, the Record is uncontroverted that the single email was sent by a third party marketing company which did not (and would not) communicate the location of the recipient of the email. Ms. Fenn's unsupported conclusion that "it would not take much to" "require information regarding the location of the main residence for potential recipients prior to sending out their emails" should be disregarded.

Ms. Fenn has not cited any fact in the Record indicating Mleads knew or could have known the "main residence" of the account holder of <BAF@heartslc.com>. The Record in this case is clear that Mleads had no knowledge of Ms. Fenn's state of residence and that the only jurisdictional facts at bar are a single location-neutral email address.

**B. MS. FENN IMPROPERLY SPECULATES ABOUT EVIDENCE NOT IN THE RECORD**

The Opposition is filled with speculation and presumption about what Mleads could have been doing. For example, Ms. Fenn argues Mleads "hired a Florida based company to send . . . emails, presumably all over the country." (Opposition, p. 14.) Ms. Fenn further opines that while the total number of e-mails is not known they "probably number at least in the tens-of-thousands," (Opposition, p. 14) and that "[t]he solicitation would be and probably has been sent to computer terminals all over the world, including to other Internet users in Utah." (Opposition, p. 18.) Ms. Fenn's speculations ignore this Court's pronouncement that "[the Court's] power of review is strictly limited to the record presented on appeal. . . . Parties claiming error



below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record.” Gorostieta v. Parkinson, 2000 UT 99, P15 (Utah 2000). The Court should disregard Ms. Fenn’s speculations regarding Mleads’s alleged other contacts with the State of Utah because they are unsupported by any facts in the Record or citations thereto.

**C. DUE PROCESS REQUIRES “SOMETHING MORE” THAN PLACING PRODUCTS OR EMAILS IN THE STREAM OF COMMERCE**

Ms. Fenn analogizes to cases involving products released into the stream of commerce and cases involving interactive web sites. (*See, e.g.*, Opposition, p. 11 (citing Asahi Metal Indus Co., Ltd. v. Superior Court, 480 U.S. 102, 107 (1987)); Opposition p. 17 (citing iAccess, Inc. v. WEBcard Techs., Inc., 182 F. Supp. 2d 1183, 1187 (D. Utah 2002)). These cases are unavailing. In effect, Ms. Fenn argues merely marketing over the Internet is sufficient to confer personal jurisdiction on a defendant. Courts have summarily rejected arguments that the advent of the Internet renders decades of due process jurisprudence moot. With the Internet, as with every other means of communication, there must be “something more” to comport to constitutional due process.

Ms. Fenn’s reliance on “stream of commerce” authority does not support the proposition Ms. Fenn proffers. Due process jurisprudence, including the cases Ms. Fenn cites, consistently provides that merely injecting a product into the stream of

commerce is not sufficient to support jurisdiction:

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi Metal Indus Co., Ltd. v. Superior Court, 480 U.S. 102, 107 (1987) (emphasis added) (quoted at Opposition, p. 11). Ms. Fenn relies on the “additional conduct” analysis in Asahi and speculates that the additional conduct is present here. However, the Record is absent any facts of such additional conduct. Moreover, the basic principle of Asahi is controlling: merely placing a product in the stream of commerce is insufficient to confer personal jurisdiction. Applying Asahi to the present case, the single email Ms. Fenn received is insufficient to hale Mleads into court in Utah.

The operation of an Internet website can constitute the purposeful availment of a forum state “if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.” Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126-27 (W.D. Pa. 1997) (holding that the defendant’s decision to conduct business via the Internet with Pennsylvania residents constituted purposeful

availment). Merely because the Internet is a network of computers which are globally connected does not render the Fourteen Amendment moot any more than interstate phone lines rendered the purposeful availment requirement irrelevant. As the court stated in iAccess:

It is true that a website may form the basis of personal jurisdiction. Courts analyze the level and type of activity conducted on the website in question to determine jurisdiction. A passive website that does no more than make information available cannot by itself form the basis of jurisdiction. Courts require “something more” than a website's existence that indicates the defendant purposefully directed its activities in a substantial way toward the forum state to find personal jurisdiction.

iAccess, Inc. v. WEBcard Techs., Inc., 182 F. Supp. 2d 1183, 1187 (D. Utah 2002).

The court in iAccess analogized creating a web site to placing a product in the stream of commerce: “[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.” Id. The court reached a similar result in Stewart v. Hennesey, noting that “[f]or purposes of specific jurisdiction, the critical factor becomes the minimum contacts the website creates with the forum state.”

Stewart v. Hennesey, 214 F. Supp. 2d 1198, 1201 (D. Utah 2002).

**D. WHETHER ADDITIONAL DISCOVERY IS APPROPRIATE IS NOT BEFORE THE COURT**

In her Opposition, Ms. Fenn submits for the first time that she should have been allowed to conduct additional discovery. (*See, e.g.*, Opposition at p. 14.) However,

Ms. Fenn failed to raise this issue in either the trial court or before the Court of Appeals. Accordingly, Ms. Fenn has waived this issue.

In order to preserve an issue for appeal “the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, P 14 (2002) (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). In this case, Ms. Fenn did not move the trial court for additional discovery. Mleads filed a Motion to Dismiss in response to the Complaint supported by the Declaration of Shay Tyler. As noted by the trial court, “[t]he Opposition memorandum [filed by Ms. Fenn in response] [was] not supported by affidavit.” (Record, p. 84 (emphasis added).) That opposition (Record, pp. 53-64) nowhere requested additional discovery or even suggested that additional discovery would be appropriate. Because Ms. Fenn failed to present “the issue [of additional discovery] to the trial court in such a way that the trial court ha[d] an opportunity to rule on th[e] issue,” Ms. Fenn failed to preserve the issue on appeal. It is fundamentally unfair for Mleads now, for the first time before the Utah Supreme Court, to have to defend against claims of what might have been discovered. Accordingly, the Court should reject this argument.

**E. SUBJECTING MLEADS TO PERSONAL JURISDICTION IN UTAH DOES NOT COMPORT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE**

The facts of this case are uncontroverted: Ms. Fenn seeks to recover ten dollars

(\$10.00) in statutory damages for a single email that Mleads could not have known would have been viewed in Utah. Ms. Fenn has not suffered any personal injuries and is not seeking to make herself whole for any injury to her business, person or property. The State of Utah's interest is not as strong in this case as it would be if Ms. Fenn were seeking to vindicate actual injury. The burden for Mleads to defend against this case in Utah is significant when compared to Ms. Fenn's alleged injury. Conferring personal jurisdiction based upon a single email offends traditional notions of fair play and justice and renders any restrictions on personal jurisdiction illusory.

### **III. CONCLUSION**

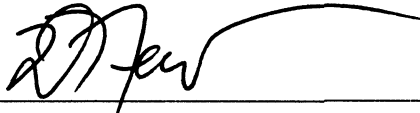
Ms. Fenn seeks to confer personal jurisdiction on Mleads based upon a single email. Mleads did not know Ms. Fenn was a Utah resident nor did Mleads intend for any message to be transmitted to any Utah resident. Both the trial court and the Court of Appeals came to this conclusion. The evidence in the Record is Mleads did not purposefully direct the e-mail in question to any residents of Utah. Accordingly, Mleads did not purposefully avail itself to this jurisdiction. Faced with such minimal facts, Ms. Fenn seeks to prejudice the court with speculations outside of the Record.

The Utah Supreme Court is faced with a clear Record and a fundamental legal question: whether a single email alone is sufficient to confer personal jurisdiction. Finding personal jurisdiction based upon a single email would overturn decades of due process jurisprudence and effectively allow any defendant to be haled into court across

state lines without meaningful contact to the state. Therefore, Mleads respectfully requests the Court reverse the Court of Appeals and restore personal jurisdiction as a meaningful bar to being haled into court in a foreign jurisdiction based upon random and fortuitous contacts.

DATED this 6<sup>th</sup> day of July, 2005.

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## PROOF OF SERVICE

The undersigned certifies that on this 6 day of July, 2005, I caused the foregoing **REPLY BRIEF OF APPELLANT** (original and 10 copies to Clerk; and 2 copies to Appellee) to be sent via First Class U.S. Mail to the Utah Supreme Court at the following address:

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PO Box 140230  
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and I also caused the same to be served via First Class U.S. Mail on the following party:

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I declare under penalty of perjury under the laws of the State of Utah and the United States that the foregoing is true and correct and that this declaration was executed on July 6, 2005 at Seattle, Washington.

  
Jeff Yates