

MODERN DAY INTERNET AND *FITCH V. WINE EXPRESS, INC.*: WHY A UNIFORM APPROACH TO SUFFICIENT MINIMUM CONTACTS IS NECESSARY

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The Mississippi Supreme Court recently decided that out-of-state, online retailers may not use contractual tactics to convey title of alcoholic beverages to the consumer upon purchase to thwart liability, and that Mississippi courts can establish personal jurisdiction over online retailers with no physical presence in the state of Mississippi.¹

In 2017, Alcohol Beverage Control (“ABC”) investigated the shipment of alcoholic beverages into Mississippi² which is prohibited under the “Local Option Alcoholic Beverage Control Law.”³ ABC discovered that Wine Express, Inc., Gold Medal Wine Club, and Bottle Deals, Inc. (“Defendants”) maintained websites that allowed for shipment of wine into Mississippi.⁴ The Defendants had sold and directed the shipment of thousands of bottles into the state.⁵ The Mississippi Department of Revenue and the Mississippi Attorney General filed suit against the Defendants in the Chancery Court of Rankin County and sought “injunctive relief, disgorgement, monetary relief, attorneys’ fees[,] and punitive damages.”⁶ The Defendants filed motions to dismiss based on a lack of personal jurisdiction and argued that they were not incorporated nor had a physical presence in Mississippi and all purchases were

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¹ *Fitch v. Wine Express, Inc.*, 297 So. 3d 224, 233 (Miss. 2020).

² *Id.* at 226.

³ *Id.* (citing MISS. CODE ANN. §§ 67-1-1 to -99 (2012)).

⁴ *Id.*

⁵ *Id.* at 227-28 (Defendants profited more than \$200,000.).

⁶ *Id.* at 227. The State amended its complaint for injunctive relief, disgorgement, monetary relief, attorneys’ fees, and punitive damages. *Id.* at 227. The State filed a motion to file a second amended complaint; however, before ruling on the motion, the court concluded it lacked personal jurisdiction over the defendants. *Id.* at 228.

made online.⁷ Additionally, the Defendants contended that title passed to the buyers when the product left the Defendants' respective premises outside of Mississippi.⁸ Conversely, the State argued that the Defendants' intentionally directed their activities at the state because their websites allowed shipments to Mississippi.⁹

The trial court agreed with the Defendants and granted their motions.¹⁰ The State appealed the trial court's dismissal to the Mississippi Supreme Court.¹¹ The court held that, regardless of whether title passed to the consumer, Mississippi's long-arm statute applied, each Defendant had sufficient related minimum contacts, and the Defendants' due process rights were not violated.¹² Accordingly, the court reversed the trial court's dismissal.¹³

Ultimately, the question on appeal was whether the trial court lacked personal jurisdiction over the Defendants.¹⁴ The court utilized a two-part inquiry,¹⁵ to determine whether Mississippi's long-arm statute¹⁶ applied and whether personal jurisdiction satisfied due process.¹⁷ First, the court considered the language of the long-arm statute.¹⁸ Second, to determine whether jurisdiction violated due process, the court followed a three-prong test¹⁹ to determine whether the Defendants maintained sufficient minimum contacts,²⁰ whether the cause of action arose out of or related to the

⁷ *Id.* at 227.

⁸ *Id.* Each Defendants' sales contracts contained a title transfer clause. *See id.*

⁹ *Id.*

¹⁰ *Id.* at 228.

¹¹ *Id.*

¹² *Id.* at 233.

¹³ *Id.*

¹⁴ *See id.* at 228.

¹⁵ *Id.* ("Personal jurisdiction over a nonresident defendant is determined under a two-part inquiry.") (citation omitted).

¹⁶ *Id.* (citing MISS. CODE ANN. § 13-3-57 (2019)).

¹⁷ *Id.* (citing *McDaniel v. Ritter*, 556 So. 2d 303, 308 (Miss. 1989)).

¹⁸ *Id.* at 229.

¹⁹ *Id.* at 230 (citing *Nordness v. Fauchaux*, 170 So. 3d 454, 464 (Miss. 2015) (quoting *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009)).

²⁰ *Id.* at 230-33. The court used the *Zippo* sliding-scale test, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), and the totality-of-the-circumstances approach, *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 759 (7th Cir. 2010). *Fitch*, 297 So. 3d at 230-33.

Defendants' forum-related activities,²¹ and whether jurisdiction comported with fair play and substantial justice.²²

The court interpreted the long-arm statutory language as applicable to any corporation or person doing business in Mississippi²³ and further determined that the Defendants operated a virtual store in Mississippi, and thus concluded the Defendants fell within the statute's reach.²⁴ The court applied two minimum contacts tests to analyze the Defendants' online activity and held that the Defendants had sufficient minimum contacts under both tests because their online activities were directed at Mississippi.²⁵ Additionally, the court rejected the Defendants' contractual argument and asserted that they willingly and knowingly held themselves out to do business in Mississippi.²⁶ The Defendants did not allege a lawsuit in the state would be burdensome; however, the court stated that Mississippi courts have an interest in resolving disputes involving the state.²⁷

The Mississippi Supreme Court correctly found that the trial court erred in dismissing this case due to lack of personal jurisdiction; however, given the current digital age, the court should have announced the adoption of a minimum contacts test to evaluate online activity. Instead of stating it has not adopted a test²⁸ and then proceeding to use both the *Zippo* sliding scale test²⁹ and the totality-of-the-circumstances approach,³⁰ the court should have announced its adoption of the totality-of-the-circumstances approach.

Judicial discretion is vital to the legal system, but consistency is equally as important. As the world grows increasingly interconnected, the lower courts need clarity on how to correctly, and similarly, approach the due process requirement of minimum

²¹ *Fitch*, 297 So. 3d at 233 ("There is no dispute that the State's claims arise out of and are related to the Defendants' activities with[in] Mississippi.")

²² *Id.* (citing *Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 113 (1987)).

²³ *Id.* at 229.

²⁴ *Id.* at 229-30.

²⁵ *Id.* at 233.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 231, 233.

²⁹ *Id.* at 231-33.

³⁰ *Id.*

contacts for online retailers with little to no *physical* presence in Mississippi. Although the *Zippo* test and the totality-of-the-circumstances approach are similar,³¹ the lack of clarity could lead to discrepancies among the courts and potential due process violations.

In 1997, the *Zippo* court recognized that, “the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages,”³² and hypothesized that personal jurisdiction could be proper when it was directly proportionate to the extent of the online activity.³³ The court’s theory gave birth to the infamous “sliding scale” test, which created loosely defined categories of clearly doing business, a middle ground, and merely passive online interaction.³⁴ Now, the internet is a pivotal part of peoples’ day-to-day lives and an integral part of the world economy. In today’s world, blurred categories are inapplicable and the adoption of a rule that focuses on the defendant’s intentional acts is better suited to fit today’s needs.³⁵

In fact, the Mississippi Supreme Court has expressed its preference for a test that conveys intentionality, “[P]ersonal jurisdiction . . . require[s] . . . evidence that the nonresident purposefully—not accidentally or unknowingly—engaged in minimum contacts within the forum state”³⁶ While the *Zippo* test is similar,³⁷ the totality-of-the-circumstances approach better encapsulates the court’s fondness of intentionality in addition to meeting the legal demands of the modern era of the internet.³⁸

Today, it would be difficult to ascertain that anything on the internet is merely passive. This modern-day predicament gives rise to numerous issues and to protect a defendant’s due process rights, as well as to maintain judicial consistency, courts need proper guidance. By adopting the totality-of-the-circumstances approach, which looks at the *intentional* conduct to determine whether

³¹ See *id.* at 231-32.

³² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

³³ See *id.* at 1124.

³⁴ See *id.*

³⁵ See *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 759 (7th Cir. 2010).

³⁶ *Nordness v. Faucheux*, 170 So. 3d 454, 461 (Miss. 2015).

³⁷ See *Fitch v. Wine Express, Inc.*, 297 So. 3d 224, 232 (Miss. 2020) (citation omitted).

³⁸ See *id.*

personal jurisdiction is proper,³⁹ Mississippi courts would be better enabled to recognize and consider the all-encompassing impact of the modern-day internet. Should this approach be adopted, Mississippi courts ought to include factors such as internet purchases are not a unilateral action by the customer,⁴⁰ and the use of zip codes to calculate shipping costs constitutes purposely holding one's self out for business with the forum state.⁴¹ Had the court adopted the totality-of-the-circumstances approach, *Fitch v. Wine Express, Inc.* could have served as a due process minimum contacts requirement model for Mississippi judges and assisted their analysis of a defendant's online actions and guided their determination on whether an online retailer intentionally, and purposefully, held itself out to do business in Mississippi.

In sum, the court correctly decided to reverse the trial court's order granting the Defendants' motions to dismiss for lack of personal jurisdiction. However, the court added vagueness to an increasingly important area of law. Given that the internet becomes more dominant every day, clarity will soon become essential, and if the court had adopted the totality-of-the-circumstances approach, it would have given Mississippi courts an applicable approach on what constitutes sufficient minimum contacts.

³⁹ See *Hemi Grp.*, 622 F.3d at 758-59.

⁴⁰ See *id.*

⁴¹ See *id.* at 757-58.

