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Proving A Negative: What Evidence Is Sufficient To Hold A Supplier Liable “As If It Were The Manufacturer” Under R.C. 2307.78(B)(1)?

by Kathleen J. St. John

How much evidence is enough when you’re trying to prove a negative?

That question came up in one of our recent cases, and presents an interesting conundrum. So if you’re interested in an obscure bit of law where personal jurisdiction meets product liability, bear with me as I ruminate over this perplexing problem.

I. The Problem.

Our client was injured when a chair he had purchased two weeks earlier from an online retailer we’ll call Iowa.net broke from under him. Iowa.net is located in Iowa, but has a warehouse in Ohio. The chair was part of a shipment of furniture Iowa.net had ordered from a Los Angeles distributor/wholesaler owned and operated by a Chinese expatriate. We’ll call that company LA.distrib and its owner Mr. Chang.

LA.distrib purchased its products primarily from manufacturers located in China. Mr. Chang made frequent trips to China to find new products and manufacturers. The furniture in question was purchased from a manufacturer he had recently discovered, that we’ll call Yunnan Products.

Given that a brand new chair requiring no assembly collapsed under the weight of an average-sized person, it was pretty clear the product was defective. Indeed, investigation showed that the glue used in assembling the chair had failed. But under the Ohio product liability

statute only the manufacturer is strictly liable for design or manufacturing defects¹; supplier liability -- with certain exceptions² -- is based on breach of express warranty or negligence.³

The exception we sought to apply to Iowa.net and LA.distrib is found in R.C. 2307.78(B)(1). That section provides that a supplier may be held strictly liable “as if it were the manufacturer of that product*** if the manufacturer of that product is not subject to judicial process in this state.” Ohio courts have interpreted the phrase “subject to judicial process” to mean “subject to personal jurisdiction” in this state.⁴

Iowa.net and LA.distrib, not wanting to be held strictly liable for injuries caused by the Chinese manufacturer’s defective chair, filed motions for summary judgment. They asserted it was the plaintiff’s burden to prove that Yunnan Products was not subject to personal jurisdiction in Ohio and that we would not be able to satisfy our burden of proof on that issue.

The challenge presented was in proving a negative, which is the opposite of what plaintiffs typically must prove when personal jurisdiction is raised. Ordinarily, lack of personal jurisdiction is raised as a defense by a foreign defendant who has been served and entered an appearance in the action; and the plaintiff has the burden of proving that the court does indeed have personal jurisdiction over that defendant. In those situations, the plaintiff develops a factual basis for personal jurisdiction by serving written discovery on that

defendant and deposing its corporate representatives.

But here we had a defendant who had been served with process but had not entered an appearance. What exactly did we need to establish to prove that the court lacked personal jurisdiction over this foreign manufacturer sufficient to allow us to proceed against the supplier defendants “as if they were the manufacturer” for purposes of R.C. 2307.78(B)(1)?

II. Proving The Existence Of Personal Jurisdiction.

Proof of personal jurisdiction over a non-resident defendant involves a two prong inquiry. First, it must be established that Ohio’s long-arm statute and applicable rule of civil procedure confer jurisdiction over the defendant. Second, it must be established that the Ohio court’s exercise of jurisdiction would not deprive the non-resident defendant of due process of law under the Fourteenth Amendment to the United States Constitution.⁵

When a foreign manufacturer whose defective product causes injury in Ohio did not directly transact business with the Ohio consumer, and the plaintiff’s claim is based solely on design or manufacturing defect, the only provision of Ohio’s long-arm statute likely to apply is R.C. 2307.382(A)(4).⁶ That provision authorizes personal jurisdiction over a non-resident defendant who causes tortious injury in Ohio through an act or omission outside this state if that non-resident defendant “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[.]”⁷ The analogous rule of civil procedure, Civ. R. 4.3(A)(4), is worded identically, and authorizes service of process over nonresident defendants in the same circumstances.

Thus, in a typical case where the foreign manufacturer raises personal jurisdiction as a defense, the plaintiff will engage in discovery seeking to establish that the foreign manufacturer:

- regularly does or solicits business in Ohio;
- engages in any other persistent course of conduct in Ohio; or,
- derives substantial revenue from goods use or consumed or services rendered in Ohio.

The due process analysis focuses on whether the non-resident defendant maintains “certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁸

The applicable test to determine whether due process is satisfied depends on whether the case involves general or specific jurisdiction. General – or “all purpose” -- jurisdiction extends to claims unrelated to the non-resident defendant’s forum activities. It exists if the corporation has “continuous and systematic contacts” with the forum state so as to render the corporation “at home” in the forum state – which typically limits general jurisdiction to the state of incorporation or principal place of business.⁹ The general jurisdiction analysis will typically not be applicable in efforts to hold the foreign manufacturer liable¹⁰, and, indeed, is probably not applicable at all under Ohio law.¹¹

Specific – or “case-linked” -- jurisdiction is limited to claims that arise out of the defendant’s forum activities. To satisfy due process under a specific jurisdiction analysis, the court applies a three-part test:

- Has the defendant purposefully availed itself of the privilege of

acting in the forum state?

- Did the cause of action arise from the defendant’s forum activities?
- Does the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable?¹²

Merely placing a product into the “stream of commerce” with the knowledge that the product might arrive in the forum state will not be sufficient to satisfy due process.¹³ Instead, the defendant “must have engaged in additional conduct which shows an intent to serve the forum state’s market.”¹⁴ Such additional conduct might include “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.”¹⁵

When the manufacturer enters an appearance in the action and raises the personal jurisdiction defense, the plaintiff has the burden of proving that the court has personal jurisdiction over that defendant.¹⁶ Whether personal jurisdiction exists is a question of law that is determined based upon the evidence.¹⁷ The plaintiff’s burden of proof varies depending on whether the court makes its decision on the documentary evidence alone, or whether it holds a hearing with oral testimony. If the former, the plaintiff’s burden is merely to set forth a prima facie case of personal jurisdiction.¹⁸ If the latter, the plaintiff must establish personal jurisdiction by a preponderance of the evidence.¹⁹

III. Proving Lack Of Personal Jurisdiction Over The Manufacturer So As To Hold The Supplier Liable As If It Were The Manufacturer.

So what happens when, instead of having to prove that the court has personal jurisdiction over the non-resident manufacturer, the plaintiff instead bears the burden of proving that the court lacks jurisdiction over that entity?

The only Ohio case to date on this issue is *Hawkins v. World Factory, Inc.*²⁰ In that case, the plaintiff was injured when a tire she was inflating on a newly-purchased wheelbarrow exploded. The wheelbarrow was purchased from Kmart, who purchased it from a distributor, World Factory, Inc., who purchased it from a Chinese manufacturer. The plaintiff and her husband filed suit against Kmart and World Factory, but not against the manufacturer. Instead, they sought to hold World Factory liable as if it were the manufacturer pursuant to R.C. 2307.78(B).

On appeal from the grant of summary judgment to World Factory, the plaintiffs argued that ruling was improper because World Factory “failed to produce any evidence to establish any of the requirements of Ohio’s Long Arm Statute apply to the manufacturer” and that the supplier could thus be held liable as if it were the manufacturer.²¹ Rejecting this argument, the appellate court found that although lack of personal jurisdiction is an affirmative defense for the manufacturer to raise had it been joined as a party, for purposes of R.C. 2307.78(B) lack of personal jurisdiction over the manufacturer is an element of the plaintiffs’ claim of supplier liability. It was thus plaintiffs’ burden to come forward with evidence on this issue, a burden which they failed to satisfy as they merely relied on the allegation in their complaint that the manufacturer was not subject to judicial process.

What evidence should the *Hawkins* plaintiffs have provided to avoid summary judgment on their R.C.

2307.78(B) claim? Recall that under R.C. 2307.382(A)(4), jurisdiction against the nonresident only exists if it “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[.]” If the manufacturer isn’t present in the lawsuit, how does one establish the manufacturer’s lack of Ohio-based activity sufficient to show the absence of long-arm jurisdiction over it?

In our case, we provided deposition testimony from Mr. Chang and from a representative of Iowa.net concerning the specifics of the transaction. They testified that when Iowa.net emailed Chang the purchase order for the 150 items of furniture including the chair, Chang created and sent a separate purchase order to the manufacturer in China. The purchase order did not provide shipping instructions, and the manufacturer itself did not get involved in shipping the product. Instead, Iowa.net arranged to have a freight forwarder pick up the furniture in China and have it shipped to the Ohio warehouse. No monies were exchanged for this sale in Ohio between Mr. Chang’s Los Angeles distributorship and the Chinese manufacturer.

Chang testified he selected Yunnan Products to provide merchandise to his wholesale business during a trip to China, and that any communications he had with them were conducted in Chinese. When he first evaluated Yunnan Products as a potential supplier, it was their relationships with large customers in Europe that caused him to see them as a suitable business partner. If Yunnan Products had comparable relationships with vendors in the United States, we argued, it was reasonable to assume that Chang would have relied on those relationships as a selling point.

Finally, although Yunnan Products had a website, our clients had never visited it. And although the defendants argued that the English language component of that website proved the company conducted business in the United States,²² we pointed out that the English language version was accessed by clicking on a United Kingdom flag, and that the website’s interactive functions appeared to be inoperative.²³

Was the foregoing evidence sufficient to prove the Ohio court’s lack of personal jurisdiction over the Chinese manufacturer? We hadn’t actually proved that Yunnan Products did not regularly do or solicit business in Ohio, or that it failed to engage in any other persistent course of conduct in Ohio, or that it did not derive substantial revenue from goods used or consumed in Ohio. We’d merely shown that nothing about this transaction, or about the way the defendant wholesaler conducted business with the Chinese manufacturer, gave rise to an inference that the manufacturer conducted business in Ohio.

Did this satisfy our burden of proof, and should the burden of coming forward with evidence have shifted at some point to the defendant supplier who had an interest in establishing that the manufacturer did indeed conduct business in Ohio? In this latter respect, the plaintiff might want to file an affirmative motion for summary judgment on the jurisdictional issue, thus shifting the burden of producing some evidence onto the defendant supplier.

Finally, is the lack of personal jurisdiction for purposes of R.C. 2307.78(B)(1) a question for the judge or the jury? When personal jurisdiction is raised as a defense, its existence is a question of law for the court. Does that hold true when the lack of personal jurisdiction

is an element of plaintiff's claim against the supplier?

These questions were never answered in our case as it settled before the court ruled on the motions.²⁴ But they continue to present some interesting issues to be resolved in future lawsuits.

End Notes

1. R.C. 2307.73(A).
2. R.C. 2307.78(B).
3. R.C. 2307.78(A).
4. *Hawkins v. World Factory, Inc.*, 5th Dist. No. CT2012-0007, 2012-Ohio-4579, ¶16; *Potts v. 3M Company*, 8th Dist. No. 87977, 2007-Ohio-1144, ¶10; *Evans v. Mellott Mfg. Co.*, 4th Dist. No. 98CA838, 2000 Ohio App. LEXIS 2824, *31.
5. *Kauffman Racing Equipment, LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, ¶28 (citing *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.2d 181, 183-184, 624 N.E.2d 1048 (1994)).
6. If the personal injury claim was based on breach of warranty, the long arm statute would grant the Ohio court jurisdiction over the non-resident defendant if that defendant "might reasonably have expected [the injured person] to use, consume, or be affected by the goods in this state" and "provided that [the non-resident defendant] also 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." R.C. 2307.382(A)(5).
7. R.C. 2307.382(A)(4).
8. *Id.* at 316.
9. *See, e.g., Daimler AG v. Bauman*, ___ U.S. ___, 134 S.Ct. 746, 187 L.Ed. 2d 624 (2014).
10. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S. Ct. 2846, 180 L.Ed. 796 (2011).
11. *See, e.g., National Strategies, LLC v. Naphcare, Inc.*, N.D. Ohio No. 5:10-CV-0974, 2010 U.S. Dist. LEXIS 137975, *8-9 ("A continuing debate exists among federal courts in Ohio as to whether Ohio law recognizes general jurisdiction or whether personal jurisdiction over an out-of-state defendant can be established only if Ohio's long arm statute is satisfied.")
12. *Kauffman Racing Equipment v. Roberts*, 126 Ohio St.3d 81, 88 (2010) (citing *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002)).
13. *J. McIntyre Machinery, Ltd. v. Nicastro*, ___ U.S. ___, 131 S.Ct. 2780, 180 L.Ed. 2d 765 (2011).
14. *Lum v. Mercedes Benz, USA, LLC*, 433 F.Supp.2d 853, 856 (N.D. Ohio 2006).
15. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).
16. *Fralely v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, ¶11.
17. *Id.* at ¶11.
18. *Id.*
19. *Wood v. Fliehman*, 193 Ohio App.3d 454, 2011-Ohio-2101, ¶28 (quoting *Friedman v. Speiser, Krause & Madole, P.C.*, 56 Ohio App.3d 11, 13-14 (1988)).
20. 5th Dist. No. CT2012-0007, 2012-Ohio-4579. Although there are several other cases dealing with summary judgments to suppliers under R.C. 2307.78(B)(1), none address the issue of what a plaintiff must prove to avoid summary judgment. In *Evans, supra*, n.4 and in *State Farm Fire & Cas. Co. v. Kupanoff*, 83 Ohio App.3d 278(1992), the manufacturers, who entered appearances in the action, waived the defense of personal jurisdiction, which waivers conferred personal jurisdiction over those defendants. And in *Potts, supra*, n.4, the plaintiff unsuccessfully argued that the phrase "subject to judicial process" meant subject to institution of judicial proceedings, and thus did not apply to the bankrupt manufacturers.
21. *Id.* at ¶15.
22. Conducting business in the United States, generally, without evidence that the foreign defendant specifically targeted the forum, would not be sufficient to satisfy due process. *See, Nicastro, supra*, n.13.
23. Having an interactive website "where the user may exchange information with the host computer" may provide evidence of targeting the market depending on the "level of interactivity and the commercial nature of the exchange of information that occurs on the Web site." *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123-1124 (W.D. Pa. 1997).
24. Because the settlement was confidential, the facts of the case and identities of the parties have been modified in this article.