Be Careful Whom You "Tag": Social Media Use Might Subject You to Suit in Another State

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by **Michael B. Kent, Jr.**

Can the use of social media from a computer in one state expose you to a lawsuit in another state? According to a federal appeals court, the answer is "yes," at least under certain circumstances. In **Johnson v. Griffin**, the Sixth Circuit Court of Appeals held that self-described "**D-List**" celebrity Kathy Griffin subjected herself to suit in Tennessee by "tagging" a Tennessee company in a tweet that accused the company's CEO of homophobic behavior. The case provides **another example** of the legal risks associated with digital communications.

The case arose from an exchange between the CEO and some teenagers at a restaurant in Franklin, Tennessee. While the CEO was seated for dinner, a group of "boisterous" teens began taking prom pictures nearby. When the CEO asked the group's chaperone to settle them down, one of the teens—a male wearing a red prom dress—confronted the CEO, who responded by telling the teen that he "look[ed] like an idiot." Another teen filmed the interaction and subsequently posted the video to social media. Griffin then retweeted the video to her two million followers, identifying the CEO by name, title, and location. In addition, Griffin "tagged" the CEO's Tennessee-based employer, which resulted in the message going directly to the company's social media account and allowed other social media users to link to the company's profile in their responses. After mounting social media pressure, complaints from its customers, and additional tweets by Griffin, the company fired the CEO. Thereafter, the CEO sued Griffin in a federal court located in Tennessee, alleging that she tortiously interfered with his employment relationship.

Griffin sought dismissal of the suit, arguing that she could not be sued in Tennessee because she lacked "minimum contacts" with that state. Under Supreme Court precedent, "minimum contacts" serve as a constitutional prerequisite to a court's jurisdiction. Without such contacts, a court has no authority to adjudicate claims or enter judgments against a person. In short, Griffin asserted that her tweets, sent from a state other than Tennessee, provided no basis for a court located within Tennessee to hear the claims against her.

The court disagreed. Noting that jurisdiction can be established by "case-related contacts" in addition to generic connections, the court concluded that Griffin intentionally cultivated contacts with Tennessee via the tweets themselves. Not only did her tweets concern actions taken in

Tennessee (the altercation with the teens) by a Tennessee resident (the CEO), she also intended the "brunt of the harm" to "befall [the CEO] in Tennessee" by urging her followers to call for his termination by his Tennessee employer. In the court's view, these actions "plainly affected Tennessee," and "they had real-world consequences for Tennessee" by depriving the CEO of his livelihood and costing the company its leader and customers.

Any doubt over the sufficiency of Griffin's contacts with Tennessee was put to rest, however, by her "tagging" the company in her initial message. By doing so, she "directly communicated with the company's decision-makers about firing" the CEO, which the court found analogous to sending a letter or making a telephone call. Griffin thus intentionally sent her messages into Tennessee, calling for the recipient of those messages to take a specific action within that state. That the tweets simultaneously went into every other state did not "inoculate [Griffin] from personal jurisdiction" within the state she purposefully targeted.

By focusing on the particulars of Griffin's messages in light of the allegations against her, the court made clear that context matters. Not every online action will establish the requisite "minimum contacts" with another state. But the ruling serves as a reminder that social media use and other online activity can have wide-ranging consequences and trigger unforeseen legal repercussions.

Envisage attorneys provide counseling, transactional, and litigation services to individuals and businesses in a variety of areas. If you have questions about this alert or think we might be of assistance to you, you may contact us at (919) 755-1317.

Contract by Emoji? A New Risk of Doing Business in the Digital Age

by Michael B. Kent, Jr.

Can the use of an emoji indicate a legally binding agreement? In ***South West Terminal Ltd. v. Achter Land & Cattle Ltd.***, a Canadian judge answered that question in the affirmative, finding that a contract was formed when one party texted a "thumbs up" emoji to the other. The case illustrates the risks associated with doing business in the digital age and serves as a reminder that care should be taken in the use of electronic messages.

The case arose out of a series of communications between South West Terminal Ltd. and Achter Land & Cattle Ltd. regarding the purchase and sale of flax. After South West texted a group of farmers that it was looking to buy the crop, a representative of Achter contacted a representative of South West to discuss the opportunity. Following a few telephone calls, the South West

representative had a contract drafted, signed it, and took a photograph of it. He then texted the photograph to his contact at Achter, along with the message: "Please confirm flax contract." The Achter representative texted back a "thumbs up" emoji. When Achter subsequently failed to deliver the flax, South West sued, claiming Achter breached the contract.

Achter defended the suit on two grounds. First, it argued that it had never accepted the contract. According to Achter, the "thumbs up" emoji simply constituted an acknowledgment that it had received the flax contract, not that it agreed to the terms of the contract. Second, Achter argued that the contract was invalid under a statute rendering certain contracts unenforceable unless they were signed. Even if the emoji constituted an acceptance, Achter maintained, it did not constitute a signature.

The court saw things differently. Pointing to the parties' prior course of dealing, the court noted that South West and Achter had completed four previous contracts in a similar manner. In each instance, South West's representative texted a photograph of the contract in question accompanied by a request for Achter to confirm the terms. Each time, Achter's representative texted back an affirmative message—"Looks good," "Ok," "Yup," and "Ok," respectively. And on each of those occasions, Achter delivered on the contract as written.

In light of this pattern, the question was whether the "thumbs up" emoji constituted a sufficiently similar message of affirmation. The court found that it did. Quoting an online dictionary, the court indicated that the "thumbs up" emoji "is used to express assent, approval or encouragement in digital communications." The emoji thus demonstrated that Achter "okayed or approved" the offer contained in the photographed contract sent by South West, and "a reasonable bystander knowing all of the background would come to the objective understanding that the parties" had formed a contract. Additionally, the court found that the emoji was sufficient under the circumstances to qualify as an "electronic signature." Although the case was admittedly "novel," the court indicated that it reflected "the new reality" of electronic communications to which courts must adjust.

Although the decision of a Canadian court is not binding on parties doing business in North Carolina, our law is similar in several important respects. North Carolina courts have likewise indicated that assent to a contract "is judged by an objective standard"[1] and that "acceptance may be manifested by words or conduct showing that the offeree means to accept."[2] Additionally, North Carolina law allows for electronic signatures, which can include a "symbol … logically associated with a record and executed or adopted by a person with an intent to sign the record."[3] The North Carolina courts have not yet applied these principles to the use of emojis, but the *South West Terminal* decision provides a warning of what can happen when these rules meet the "new reality" of digital communications.

Envisage attorneys help businesses plan, structure, negotiate, and document a variety of transactions across numerous industries and professions. If you have questions about this alert or think we might be of assistance to you, you may contact us at (919) 755-1317.

[1] Schwarz v. St. Jude Medical, Inc., 254 N.C. App. 747 (2017).
[2] T.C. May Co. v. Menzies Shoe Co., 184 N.C. 150 (1922).
[3] N.C.G.S. § 66-312(9).

Suit Challenging COVID-19 "Lockdown" Orders Allowed to Continue

by Michael B. Kent, Jr.

The North Carolina Court of Appeals this month addressed important issues concerning the scope of governmental emergency powers. In ***Howell v. Cooper***, the Court held that the doctrine of "sovereign immunity" did not bar a lawsuit challenging the constitutionality of Governor Cooper's COVID-19 "lockdown" orders. Additionally, the Court concluded that the lawsuit alleged sufficient violations of the North Carolina Constitution. By allowing these claims to proceed, the decision has the potential to shape the way emergency powers are utilized in future crises.

The case was initiated in December 2020 by several bar owners who asserted that the shutdown of their businesses during the COVID-19 pandemic infringed their constitutional rights. The governmental defendants named in the lawsuit argued that these claims should be dismissed, invoking a doctrine known as "sovereign immunity."

Sovereign immunity is a court-created rule that generally protects the state and its officials from being sued for the performance of governmental functions. As the Court of Appeals made clear, however, that doctrine is not absolute, and it "shall not operate to deprive North Carolinians of an opportunity to redress alleged constitutional violations." Where no other adequate remedy exists, the Court held, constitutional provisions become "self-executing," and sovereign immunity cannot prevent the courts from fulfilling their "sacred duty to safeguard" the rights of citizens.

The Court also ruled that the bar owners' lawsuit alleged "colorable" (or legally sufficient) claims under two provisions of the state constitution. The first provision guarantees to all North Carolinians "the enjoyment of the fruits of their own labor." The second provision prohibits the government from depriving any person of "life, liberty, or property, but by the law of the land."

The Court held that both provisions secured to the bar owners "a fundamental right to earn a living from the operation of their respective businesses," which was allegedly violated by the Governor's "blanket prohibition—rather than regulation—of an entire economic sector." Although the Court did not address the merits of that allegation, leaving the constitutional validity of the Governor's orders for later determination, it did rule that the bar owners had articulated a sufficient basis for moving forward with their suit.

The Court's decision was not unanimous, however. One member of the Court dissented on the grounds that the Governor's orders were rational in light of the health and safety concerns posed by the pandemic. For that reason, the dissent thought the bar owners' claims were insufficient. Additionally, the dissent warned that the ruling might unduly limit the government's ability to respond to future emergencies.

The defendants may seek further review from the North Carolina Supreme Court, and even if they do not, there is no guarantee that the Governor's orders will ultimately be found unconstitutional. But if allowed to stand, the Court of Appeals's decision increases the likelihood that future governmental actions, even those justified by public exigencies, will be subject to judicial review when constitutional liberties are at stake.

Envisage attorneys help governments, businesses, and individuals navigate a variety of issues relating to the scope and exercise of governmental authority. In a case filed in parallel with *Howell v. Cooper,* Envisage attorney Anthony Biller acquired the only reported "win" by businesses against Governor Cooper's "lockdown" orders, obtaining a **preliminary injunction** preventing the continued enforcement of the orders against a statewide trade organization and its members. If you have questions about this alert or think we might be of assistance to you, you may contact us at (919) 755-1317.

Phillips v. NCDPI, et al.

Filed Complaint

Motion to Dismiss

Opposition to Defendants' Motion to Dismiss

Filed Order Phillips v NCDPI, et al

Alex Berenson v. President Joe Biden et al.

MINDS INC, TIM POOL, and THE BABYLON BEE LLC, Plaintiffs v ROBERT A BONTA, Attorney General of California in his official capacity, Defendant.