SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170244

Facebook, Inc.

v.

K.G.S., individually, and as guardian and next friend of Baby Doe, a minor child

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1170294

Renee L. Gelin

v.

K.G.S., individually, and as guardian and next friend of Baby Doe, a minor child

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1170336

Kim McLeod

v.

K.G.S., individually, and as guardian and next friend of Baby Doe, a minor child

Appeals from Jefferson Circuit Court (CV-17-255)

(Filed Jun. 28, 2019)

BRYAN, Justice.[1]

This case stems from the adoption of "Baby Doe" by his adoptive mother, K.G.S., which was contested by Baby Doe's birth mother, K.R. ("the birth mother"). Details of that contested adoption were reported by the Huffington Post, a Web-based media outlet, and were also disseminated through a Facebook social-media page devoted to having Baby Doe returned to the birth mother. K.G.S. filed an action in the Jefferson Circuit Court ("the trial court") seeking, among other things, an injunction against Facebook, Inc., and certain individuals to prohibit the dissemination of information about the contested adoption of Baby Doe. These appeals follow from the entry of a preliminary injunction granting K.G.S. the relief she seeks.

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[1] These appeals were assigned to Justice Bryan on February 15, 2019.

I. Preliminary Matters

The preliminary injunction that is the basis of these appeals was entered on December 19, 2017. The appeals taken from that order were timely filed within 14 days of the entry of that order, see Rule 4(a)(1)(A), Ala. R. App. P., and on February 9, 2018, this Court received notice from the trial-court clerk certifying the record on appeal as complete on February 6, 2018. Since that time, K.G.S. has engaged in repeated efforts to have the record on appeal supplemented with matters that were not before the trial court at the time it entered the injunction at issue in these appeals, purportedly pursuant to Rule 10(f), Ala. R. App. P. The trial court has facilitated K.G.S.'s efforts by granting her motions to supplement the record to include matters that were not before the trial court at the time it entered the preliminary injunction, such as a second amended complaint filed by K.G.S. on March 12, 2018, transcripts of depositions taken long after the entry of the preliminary injunction at issue on appeal and after the record was certified as complete on February 6, 2018,[2] and e-mails and letters from 2015 that, K.G.S. says, support the preliminary injunction.

It is well settled that Rule 10(f) cannot be used to supplement the record on appeal to include matters that were not before the trial court at the time the order being appealed was entered. See Cowen v. M.S. Enters., Inc., 642 So. 2d 453, 455 (Ala. 1994) (holding that

[2] One such deposition was taken on March 1, 2019, approximately 15 months after the entry of the preliminary injunction.

Rule 10(f) "was not intended to allow the inclusion of material in the record on appeal that had not been before the trial court" and concluding that the trial court erred in granting the appellant's Rule 10(f) motion to supplement the record with evidence that was not provided to the trial court before it entered the judgment supporting the appeal); and Houston Cty. Health Care Auth. v. Williams, 961 So. 2d 795, 810 n.8 (Ala. 2006) ("Rule 10(f) does not allow . . . for the addition to the record on appeal of matters not before the trial court when it entered its decision. . . ."). Accordingly, we conclude that the trial court erred by granting K.G.S.'s motions to supplement the record on appeal to include matters that were not before the trial court at the time it entered the preliminary injunction at issue in these appeals. For purposes of deciding the merits of these appeals, we have considered only the evidence and arguments that were presented to the trial court at the time the preliminary injunction was entered.

Additionally, K.G.S. filed a motion in this Court seeking leave to file a "sur-reply brief," purportedly for the purpose of "further assist[ing] the [Court] in its determination" of the issues presented by these appeals. After reviewing the briefs and arguments filed by the parties pursuant to Rule 28, Ala. R. App. P., and the proposed "sur-reply brief" from K.G.S., we deny K.G.S.'s request for leave to file a "sur-reply brief." See note 15, infra.

II. Background Facts[3] and Procedural History

In June 2015, K.G.S. filed a petition in the Mobile Probate Court to adopt Baby Doe, and, shortly thereafter, the birth mother filed a contest to K.G.S.'s petition for adoption.[4] The birth mother subsequently came in contact with Mirah Riben, "a well-known critic of the United States' adoption system" and a contributor to the Huffington Post. The birth mother shared with Riben her version of the events that led her to contest K.G.S.'s petition to adopt Baby Doe. On July 7, 2015, the Huffington Post, which K.G.S. describes as "a prominent media outlet," published two online articles about Baby Doe's adoption that included the full name of the birth mother; identified K.G.S. by her full name as the prospective adoptive mother of Baby Doe; identified Baby Doe by the name the birth mother had given Baby Doe; and included photographs of Baby Doe. The articles detailed how, after signing a pre-birth consent to allow K.G.S. to adopt Baby Doe, the birth

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[3] The background facts are taken from allegations in K.G.S.'s first amended complaint, which was the controlling complaint at the time the preliminary injunction was entered.

[4] The details of the adoption contest were set forth by the Court of Civil Appeals in a decision affirming a summary judgment in favor of K.G.S. on the birth mother's adoption contest. See K.L.R. v. K.G.S., 264 So. 3d 65 (Ala. Civ. App. 2018) (opinion on application for rehearing) (cert. denied, May 11, 2018). That decision states that physical custody of Baby Doe was removed from the birth mother and transferred to K.G.S. on June 17, 2015, and that the Mobile Probate Court entered a final decree of adoption in favor of K.G.S. on August 24, 2016. Thus, the adoption contest was no longer pending in the Mobile Probate Court when this action was filed in July 2017.

mother notified K.G.S. and K.G.S.'s attorney, before Baby Doe was born, that she had changed her mind about allowing Baby Doe to be adopted; the birth mother, however, never legally withdrew the pre-birth consent to adoption, and K.G.S. obtained custody of and filed a petition to adopt Baby Doe approximately three weeks after Baby Doe was born.

The day after the articles were published, Claudia D'Arcy, a resident of New York state, created a page on Facebook's social-media Web site dedicated to reuniting the birth mother and Baby Doe ("the Facebook page"), which "attached" the articles published by the Huffington Post. The Facebook page also included K.G.S.'s full name and a "number" of photographs of Baby Doe, who was then in the custody of K.G.S. See note 4, supra. After the creation of the Facebook page, K.G.S. was "inundated with appallingly malicious and persistent cyber-bullying." In a letter dated July 28, 2015, K.G.S.'s attorney notified Facebook that the Facebook page needed to be removed because it was in violation of the Alabama Adoption Code, § 26-10A-1 et seq., Ala. Code 1975 ("the Adoption Code"), which, the attorney said, prohibits the disclosure of "any matters concerning an adoption, including parties' actual names." Facebook removed the "cover photo, but refused to delete the [Facebook] page or otherwise prevent it from disseminating its harmful and false message."

On July 7, 2017, approximately two years after the Huffington Post published the articles about Baby Doe's adoption and D'Arcy created the Facebook page,

K.G.S., individually and as the guardian and next friend of Baby Doe, filed an action in the trial court naming Facebook, D'Arcy, Kim McLeod, and Renee Gelin as defendants.[5] K.G.S. filed her first amended complaint on October 20, 2017, adding Jennifer L. Wachowski as a defendant. The first amended complaint alleged that, after K.G.S. filed her adoption petition, D'Arcy, McLeod, Gelin, and Wachowski (hereinafter referred to collectively as "the individual defendants") realized the birth mother was unlikely to succeed in her adoption contest based on Alabama law; that the individual defendants then "conspired to create a sensationalized, salacious, and scandal-driven trial in the court of public opinion to pressure K.G.S. into relinquishing her custody of Baby Doe"; and that Riben "quickly ran with [the birth mother]'s tale of events that combined [Riben]'s biased agenda . . . [with the] nefarious publicity-stunt strategy" of the individual defendants. K.G.S. alleged that McLeod, Gelin, and Wachowski were instrumental in "publicizing" the Facebook page created by D'Arcy and that Gelin and Wachowski, "through their respective blogs . . . , various Facebook posts, and . . . YouTube videos, further publicized the private, confidential adoption of Baby Doe." K.G.S. further alleged that the Facebook page is "persistently updated with various posts, news articles, and YouTube videos at K.G.S.'s expense" and that several videos streamed online by YouTube and posted on the Facebook page

[5] The trial court initially granted K.G.S.'s motion to seal the proceedings below; however, the trial court later unsealed the case but marked the case "confidential."

include Gelin, McLeod, and Wachowski, "all of whom attended and/or participated in filming that took place in Jefferson County." K.G.S. further claimed that the individual defendants, through the Facebook page, have made her "the poster-child for 'predatory' adoptions in the United States."

K.G.S. brought claims alleging negligence per se based on each defendants' violation of certain provisions of the Adoption Code that, she said, "explicitly or implicitly prohibit the public disclosure of matters concerning adoptions"; two counts of invasion of privacy (misappropriation and false light) against the individual defendants only; the tort of outrage/intentional infliction of emotional distress; conspiracy; negligence; and wantonness. The complaint further alleged that Facebook is incorporated in Delaware with its principal place of business in Menlo Park, California; that Gelin is a resident of Pasco County, Florida; that McLeod is a resident of Mobile County; and that Wachowski is a resident of Waupaca County, Wisconsin.

McLeod and Gelin filed separate motions to dismiss the complaint pursuant to Rule 12(b)(6), Ala. R. Civ. P., arguing that K.G.S.'s complaint failed to state a claim against them. Facebook filed a motion to dismiss pursuant to Rule 12(b)(2), (3), and (6), Ala. R. Civ. P., arguing that the trial court lacked personal jurisdiction over Facebook; that Facebook had immunity as to each of the claims asserted by K.G.S. pursuant to the Communications Decency Act of 1996, 47 U.S.C. § 230; that K.G.S.'s claims are barred under the First

Amendment to the United States Constitution; and that venue was improper in Jefferson County, Alabama. Facebook's motion to dismiss was supported by an affidavit from Michael Duffey, a Facebook employee. He testified that Facebook is a Delaware corporation with its principal place of business in Menlo Park, California; that the Facebook Web site and mobile application are available for users to access anywhere in the country (or the world) where there is an Internet connection; that individuals in all 50 states have accounts with Facebook; that Facebook is qualified to do business in all 50 states; and that Facebook has no offices, property, or employees located in Alabama.

On September 20, 2017, before K.G.S. amended her original complaint, Gelin filed an "amended" motion to dismiss K.G.S.'s complaint. In addition to reasserting that the claims against her were due to be dismissed pursuant to Rule 12(b)(6), Gelin also asserted for the first time that the claims were due to be dismissed because the trial court lacked personal jurisdiction over her. See Rule 12(b)(2). Gelin did not attach an affidavit or any other evidence to support her lack-of-personal-jurisdiction defense at that time.

On October 12, 2017, K.G.S., individually and in her capacity as guardian and next friend of Baby Doe, filed a motion for a preliminary injunction pursuant to Rule 65, Ala. R. Civ. P. K.G.S. sought an order requiring Facebook and D'Arcy to deactivate the Facebook page and an order enjoining D'Arcy and McLeod "from discussing matters surrounding . . . this lawsuit until the instant proceeding is fully litigated and resolved."

K.G.S. alleged that the invasion of her and Baby Doe's privacy was an irreparable injury, that she had a reasonable chance of success on the merits of her invasion-of-privacy claim, and that the benefit to her and Baby Doe of removing the source of the principal disseminator of "illegal information" – the Facebook page – far exceeded any burden imposed on the defendants. The motion for a preliminary injunction did not mention Gelin or Wachowski.

After K.G.S. filed her first amended complaint on October 20, 2017, discussed supra, Facebook filed a motion to dismiss the amended complaint and a motion opposing the preliminary injunction. Gelin also filed a motion to dismiss the first amended complaint, reasserting Rule 12(b)(2) and (6) as the grounds for dismissal. Gelin attached an affidavit to support her contention that the trial court lacked personal jurisdiction over her.[6]

On November 29, 2017, K.G.S. filed a motion opposing the motions to dismiss filed by Facebook, Gelin, and McLeod. K.G.S. argued that Gelin's motion to dismiss for lack of personal jurisdiction was due to be denied because (1) she waived any defect in personal jurisdiction because she failed to raise that defense in her first Rule 12(b) motion to dismiss and (2) even if

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[6] The affidavit stated that Gelin is a resident of Florida and has never lived in Alabama; that she has never done business in Alabama; that she has never traveled to or through Alabama, including to film a YouTube video; and that she does not author a "blog," a Web site, or any other publication directed to residents of Alabama.

the defense was not waived, Gelin was subject to personal jurisdiction in Alabama based on the effects in Alabama of her conduct. Gelin filed a response addressing both arguments asserted by K.G.S. and filed a second affidavit to support her argument that she did not have minimum contacts with Alabama to support personal jurisdiction.

In support of her contention that the trial court had personal jurisdiction over Facebook, K.G.S. attached evidence indicating that Facebook was notified – via two letters from K.G.S.'s attorney and a separately filed report of harassment to Facebook filed by K.G.S. – of the existence of the Facebook page, its harmful effects, and its alleged violation of Alabama law; that Facebook responded to K.G.S.'s attorney stating that it would review K.G.S.'s complaints but never "followed up" with K.G.S.'s attorney; and that, in response to K.G.S.'s report of harassment to Facebook, Facebook initially notified K.G.S. that it had removed a photograph of Baby Doe from the Facebook page because the photograph violated Facebook's "community standards" but almost immediately reversed course and notified K.G.S. by e-mail that the photograph of Baby Doe did not violate its community standards. In a letter dated July 28, 2015, K.G.S.'s attorney specifically notified Facebook that its "actions have had an adverse affect on the health and well-being" of K.G.S. K.G.S. argued that "the exercise of jurisdiction over Facebook is proper based on the 'effects' of its conscious, out-of-state conduct in Alabama."

The record indicates that the trial court conducted a hearing on the pending motions to dismiss on November 30, 2017. During that hearing, K.G.S. provided the trial court with an affidavit to support her request for a preliminary injunction, which verified some of her pleadings and set forth the harm K.G.S. and Baby Doe allegedly had suffered because of the information posted on the Facebook page. A transcript of that hearing is not included in the record on appeal.

On December 18, 2017, the trial court entered separate orders denying the motions to dismiss filed by Facebook, Gelin, and McLeod. The following day, the trial court entered a preliminary injunction ordering Facebook and D'Arcy to deactivate the Facebook page and enjoining D'Arcy, Gelin, and McLeod "from publicly discussing, in any way whatsoever, matters surrounding the adoption of Baby Doe and this lawsuit in any public forum." Pursuant to Rule 4(a)(1)(A), which allows an appeal from an order granting an injunction, Facebook, Gelin, and McLeod separately appealed.[7] We consolidated the appeals for the purpose of issuing one opinion.

III. Analysis

A. Appeal No. 1170244 – Facebook

Facebook raises multiple challenges to the propriety of the preliminary injunction. First, Facebook

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[7] D'Arcy did not appeal the trial court's injunction requiring her to deactivate the Facebook page.

argues that the trial court had no authority to enter an injunction requiring it to deactivate the Facebook page because, Facebook argues, the trial court lacks personal jurisdiction over it. Although our review of the trial court's determination that it had personal jurisdiction is before us on appeal from the entry of a preliminary injunction, we will apply the same standard of review that we use when reviewing the denial of a motion to dismiss for lack of personal jurisdiction.

> "'"'An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction.'" Ex parte Lagrone, 839 So. 2d 620, 623 (Ala. 2002) (quoting Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002)). Moreover, "[t]he plaintiff bears the burden of proving the court's personal jurisdiction over the defendant." Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002).'

"Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003).

> "'"In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996), and

> Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829 (11th Cir. 1990), and 'where the plaintiff's complaint and the defendant's affidavits conflict, the . . . court must construe all reasonable inferences in favor of the plaintiff.' Robinson, 74 F.3d at 255 (quoting Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990))." '

"Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, 'the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.' Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002) (citing Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000)). See also Hansen v. Neumueller GmbH, 163 F.R.D. 471, 474-75 (D. Del. 1995) ('When a defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.') (citing Time Share Vacation Club v.

> Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984))."

Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004).

It is well settled that Alabama's long-arm rule, Rule 4.2, Ala. R. Civ. P., "extends the personal jurisdiction of Alabama courts to the limit of due process under the United States and Alabama Constitutions," Hiller Invs., Inc. v. Insultech Grp., Inc., 957 So. 2d 1111, 1115 (Ala. 2006), and that the due process guaranteed under the Alabama Constitution is coextensive with the due process guaranteed by the United States Constitution. "It has long been established that the Fourteenth Amendment [to the United States Constitution] limits the personal jurisdiction of state courts." Bristol-Myers Squibb Co. v. Superior Court of California, 582 U.S. ___, ___, 137 S.Ct. 1773, 1779 (2017). Thus, we must determine if the trial court's assertion of personal jurisdiction over Facebook comports with due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. See generally Ex parte International Creative Mgmt. Partners, LLC, 258 So. 3d 1111, 1114-15 (Ala. 2018).

> "The Due Process Clause of the Fourteenth Amendment permits a forum state to subject a nonresident defendant to its courts only when that defendant has sufficient 'minimum contacts' with the forum state. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The critical question with regard to the nonresident

> defendant's contacts is whether the contacts are such that the nonresident defendant '"should reasonably anticipate being haled into court"' in the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1985), quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980)."

Elliott v. Van Kleef, 830 So. 2d 726, 730 (Ala. 2002).

Since the United States Supreme Court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), two types of personal jurisdiction have been recognized: "'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." Bristol-Myers Squibb, 582 U.S. at ___, 137 S.Ct. at 1780.

> "In the case of either general in personam jurisdiction or specific in personam jurisdiction, '[t]he "substantial connection" between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.' Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed. 2d 92 (1987). This purposeful-availment requirement assures that a defendant will not be haled into a jurisdiction as a result of '"the unilateral activity of another person or a third person."' Burger King [Corp. v. Rudzewicz], 471 U.S. [462,] 475, 105 S.Ct. 2174 [(1985)], quoting Helicopteros Nacionales de Colombia,

> S.A. v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984)."

Elliott, 830 So. 2d at 731.

K.G.S. argued below that the trial court had both general and specific jurisdiction over Facebook, and the trial court did not indicate whether the jurisdiction it was exercising over Facebook was general or specific. Facebook argues that the trial court had neither general nor specific jurisdiction. We will address each basis for the trial court's potential exercise of personal jurisdiction over Facebook.

1. General Jurisdiction

In BNSF Railway Co. v. Tyrell, 581 U.S. ___, 137 S.Ct. 1549 (2017), the United States Supreme Court summarized the minimum requirements of due process as it relates to a state court's exercise of general jurisdiction over a foreign corporation:

> "Goodyear [Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011),] and Daimler [AG v. Bauman, 571 U.S. 117 (2014),] clarified that '[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State.' Daimler, 571 U.S., at 127 (quoting Goodyear, 564 U.S., at 919). The 'paradigm' forums in which a corporate defendant is 'at home,' we explained, are the corporation's

> place of incorporation and its principal place of business. Daimler, 571 U.S., at 137; Goodyear, 564 U.S., at 924. The exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.' Daimler, 571 U.S., at 138, n. 19. We suggested that Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), exemplified such a case. Daimler, 571 U.S., at 138, n. 19. In Perkins, war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. 342 U.S., at 447-448. Because Ohio then became 'the center of the corporation's wartime activities,' Daimler, 571 U.S., at 130, n. 8, suit was proper there, Perkins, 342 U.S., at 448."

581 U.S. at ___, 137 S.Ct. at 1558.

In the present case, there are no factual allegations in the amended complaint to support the trial court's exercise of general jurisdiction over Facebook. Nevertheless, Facebook submitted undisputed evidence that it is not incorporated in Alabama and does not maintain its principal place of business in Alabama. Facebook also presented undisputed evidence that it had no offices, property, or employees located in Alabama, and, thus, it presented prima facie evidence that this was not an "exceptional case" where its operations in Alabama were "'so substantial and of such a nature as to render [Facebook] at home in [Alabama].'" Id.

(quoting Daimler AG v. Bauman, 571 U.S. 117, 138 n. 19 (2014)).

Although K.G.S. did not provide any evidence to rebut Facebook's evidence in this regard, she cites two federal district court decisions[8] that predate the Supreme Court's decisions in Daimler, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011), and BNSF, and she argues that Facebook is subject to general jurisdiction in Alabama because it is registered to do business in Alabama. However, in both Daimler and BNSF, the Supreme Court made it abundantly clear that any precedent that supported the notion that the exercise of general jurisdiction could be based on a simple assertion that an out-of-state corporation does business in the forum state has become obsolete. In BNSF, the Court held that the nonresident defendant corporation was not "at home" in the forum state, and thus not subject to general personal jurisdiction there, despite the fact that the defendant was

[8] See Haney v. Floyd Healthcare Mgmt., Inc., No. 4:08-CV-2393-VEH (N.D. Ala. April 16, 2009) (not selected for publication in F. Supp.) (finding the existence of general personal jurisdiction in Alabama over an [sic] nonresident corporation that was registered to do business in Alabama and had five employees working at a primary-care facility in Alabama that was operated by the foreign corporation); and Johnston v. Foster-Wheeler Constructors, Inc., 158 F.R.D. 496, 503 (M.D. Ala. 1994) (holding that a nonresident defendant had continuous and systematic contacts with the State of Alabama and that the defendant "could reasonably have foreseen being haled into court because it qualified to do business and performed construction work in Alabama and hired the Plaintiff, an Alabama resident, to work on the Florida construction site").

"doing business" in the forum state, because the defendant was not incorporated in the forum state and it did not maintain its principal place of business in the forum state. The Court also held that the defendant was not "so heavily engaged in activity in [the forum state] 'as to render [it] essentially at home' in that State," despite the fact that the defendant had over 2,000 miles of railroad track and more than 2,000 employees working in the forum state. BNSF, 581 U.S. at ___, 137 S.Ct. at 1559. In making that determination, the Court looked to the entirety of the defendant's activities and concluded that "'[a] corporation that operates in many places can scarcely be deemed at home in all of them.'" Id. (quoting Daimler, 571 U.S. at 139 n. 20).[9] See also Daimler, 571 U.S. at 130 n. 8 (noting that the Court's recognition of general jurisdiction in Perkins "'should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction' based on nothing more than a corporation's 'doing business' in a forum" (quoting Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144 (1966))).

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[9] Facebook also presented undisputed evidence that it was qualified to do business in every state. As noted above, in Daimler the Supreme Court noted that "[a] corporation that operates in many places can scarcely be deemed 'at home' in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." 571 U.S. at 139 n. 20 (citing Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1142-44 (1966)).

Thus, we conclude that the Supreme Court has firmly rejected any notion that a nonresident defendant's "doing business" in a forum state is sufficient, in and of itself, to subject the out-of-state defendant to the general personal jurisdiction of the forum state. Accordingly, because K.G.S. pleaded no facts in support of general jurisdiction and Facebook presented undisputed evidence that it was not incorporated in Alabama, that its principal place of business was not in Alabama, and that its operations in Alabama are not so substantial or of such a nature as to render it "at home" in Alabama, we conclude that the Fourteenth Amendment does not allow for the trial court's exercise of general jurisdiction over Facebook in the present case.

2. Specific Jurisdiction

Although the question of general jurisdiction looks to whether an out-of-state defendant is essentially "at home" in the forum state, the question of specific jurisdiction concerns whether the underlying controversy "'arises out of or relate[s] to the defendant's contacts with the forum.'" Daimler, 571 U.S. at 127 (quoting Helicopteros Nacionales de Columbia [sic], S.A. v. Hall, 466 U.S. 408, 414 n. 8 (1984)).

> "Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. von Mehren & Trautman, Jurisdiction to

> Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); see Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 782 (1988). . . . In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.' von Mehren & Trautman 1136."

Goodyear, 564 U.S. at 919.

In Walden v. Fiore, 571 U.S. 277, 291 (2014), the Supreme Court summarized the minimum contacts necessary for the exercise of specific jurisdiction over a nonresident defendant:

> "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on "the relationship among the defendant, the forum, and the litigation."' Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case.
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> "First, the relationship must arise out of contacts that the 'defendant himself' creates with the forum State. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). Due process limits on the State's adjudicative authority

principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties. See World-Wide Volkswagen Corp. [v. Woodson, 444 U.S. 286,] 291-292 [(1980)]. We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984) ('[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction'). . . . Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.' Rush [v. Savchuk], 444 U.S. [320,] 332 [(1980)].

"Second, our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. See, e.g., International Shoe [Co. v. Washington, 326 U.S. 310,] 319 [(1945)] (Due process 'does not contemplate that a state may make binding a judgment in personam against an individual . . . with which the state has no contacts, ties, or relations'); Hanson [v. Denckla, 357 U.S. 235,] 251 [(1958)] ('However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that

State that are a prerequisite to its exercise of power over him'). Accordingly, we have upheld the assertion of jurisdiction over defendants who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State, Burger King, supra, at 479-480, or by circulating magazines to 'deliberately exploi[t]' a market in the forum State, Keeton, supra, at 781. And although physical presence in the forum is not a prerequisite to jurisdiction, Burger King, supra, at 476, physical entry into the State – either by the defendant in person or through an agent, goods, mail, or some other means – is certainly a relevant contact. See, e.g., Keeton, supra, at 773-774.

"But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him. See Burger King, supra, at 478 ('If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot'); Kulko v. Superior Court of Cal., City and County of San Francisco, 436 U.S. 84, 93 (1978) (declining to 'find personal jurisdiction in a State . . . merely because [the plaintiff in a child support action] was residing there'). To be sure, a defendant's contacts with the forum State

> may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. See Rush, supra, at 332 ('Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of International Shoe, however, must be met as to each defendant over whom a state court exercises jurisdiction'). Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State. Burger King, 471 U.S. at 475 (internal quotation marks omitted)."

571 U.S. at 283-86.

Facebook argues that K.G.S. failed to demonstrate that any of its suit-related conduct created sufficient minimum contacts with Alabama for the exercise of specific jurisdiction. The only "conduct" of Facebook described in the first amended complaint is that "Facebook removed the [Facebook] page's cover photo, but refused to delete the [Facebook] page or otherwise prevent [the Facebook page] from disseminating its harmful and false message." The first amended complaint alleged that this action (or inaction) came in response to the July 2015 letter to Facebook from K.G.S.'s attorney; K.G.S.'s affidavit clarified that she received responses from Facebook after she filed a report of

harassment with Facebook regarding the Facebook page. K.G.S. also submitted evidence indicating that Facebook sent her attorney a "form" response after he contacted Facebook to ask that the Facebook page be removed in which Facebook stated that it would "look into [the] matter shortly."[10]

K.G.S. argues that this "conduct" was sufficient to establish specific jurisdiction over Facebook in Alabama. Specifically, she argues that "Facebook acted intentionally, knowingly, and expressly in aiming its conduct toward Alabama in a manner that caused harm to a particular Alabama citizen . . . after it responded multiple times to Alabama citizens and took and/or failed to take certain actions with respect to [the] Facebook page that wholly pertained to an Alabama adoption." K.G.S.'s brief, at 25. She contends that, pursuant to Calder v. Jones, 465 U.S. 783 (1984), the trial court can exercise specific jurisdiction over Facebook so long as (1) Facebook committed an intentional tort, (2) Facebook's intentional conduct was expressly aimed at Alabama, (3) the brunt of the harm caused by Facebook's intentional conduct was suffered in Alabama, and (4) Facebook knew the harm from its

[10] Facebook presented undisputed evidence that it had no offices or employees in Alabama, and K.G.S. presented no evidence in rebuttal to demonstrate that Facebook's removal of the cover photograph from the Facebook page or its decision not to delete the Facebook page occurred in Alabama.

intentional conduct was likely to be suffered in Alabama.[11]

In Calder, an actress residing in California brought an action in California alleging that two defendants, who were Florida residents, wrote and edited a defamatory article about her, which was published in

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[11] Because the exercise of specific jurisdiction is based on an analysis of the defendant's suit-related conduct that was "purposefully directed" to the forum, we do not consider – and K.G.S. has not asked us to consider – the general fact that the Facebook Web site and mobile application are available for users in Alabama to access. This case does not arise out of or relate to the fact that the Facebook Web site or mobile application is available to be accessed by anyone in Alabama with an Internet connection. As set forth above, the claim against Facebook arose out of Facebook's failure to remove the Facebook page, which was created by a resident of New York state, after it was notified of the allegedly unlawful activity on the page and the harm it was causing. Notably, courts that have addressed the question have concluded that the general accessibility of Facebook's Web site or mobile application in a forum does not provide a sufficient connection to the forum to support the exercise of general or specific jurisdiction. See, e.g., Harrison v. Facebook, Inc., No. 18-0147-TFM-MU (S.D. Ala. Jan. 17, 2019) (report and recommendation of magistrate judge), report and recommendation adopted (S.D. Ala. March 8, 2019) (not reported in F. Supp.); Georgalis v. Facebook, Inc., 324 F. Supp. 3d 955 (N.D. Ohio 2018); Gullen v. Facebook.com, Inc., No. 15 C 7681 (N.D. Ill. Jan. 21, 2016) (not reported in F. Supp.) (holding that because the plaintiff failed to allege that Facebook "targets its alleged biometric collection activities at Illinois residents, the fact that its site is accessible to Illinois residents does not confer specific jurisdiction over Facebook"). See also Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796, 803 (7th Cir. 2014) (holding that an online merchant's operation of an interactive Web site, in and of itself, is insufficient to confer specific jurisdiction over the merchant in every state from which the Web site can be accessed).

a national magazine that had its largest circulation in California. The United States Supreme Court held that California had personal jurisdiction over the two Florida defendants "based on the 'effects' of their Florida conduct in California." Calder, 465 U.S. at 789. This was so, the Court held, because the defendants were "not charged with mere untargeted negligence," but, instead, their "intentional, and allegedly tortious, actions were expressly aimed at California." Id. (emphasis added). The Court found that California was "the focal point both of the story and of the harm suffered." Id. at 789. The defendants' defamatory article was "expressly aimed" at California because it "concerned the California activities of a California resident," it was "drawn from California sources," and it caused the plaintiff to suffer "the brunt of the harm" in California, where the magazine had its largest circulation. Id. at 788-89. The defendants knew that "the brunt of that injury would be felt by respondent in the State in which she lives and works and in which [the national magazine] has its largest circulation." Id. at 789-90. Thus, the Court held, the defendants "must 'reasonably anticipate being haled into court' [in California] to answer for the truth of the statements made in their article." Id. at 790.

Thirty years after issuing its decision in Calder, the Supreme Court revisited and clarified that decision in Walden. In Walden, the defendant, a Georgia police officer, was working as a deputized agent of the Drug Enforcement Administration at an airport in Atlanta. The plaintiffs had flown from Puerto Rico to Atlanta,

where they planned to take a connecting flight to Las Vegas. The defendant was notified by officials in Puerto Rico that the plaintiffs had approximately $97,000 in cash in their carry-on luggage, and the defendant approached the plaintiffs as they were at their departure gate for their flight to Las Vegas. After a drug-sniffing dog inspected the plaintiffs' luggage, the defendant seized the cash and informed the plaintiffs that their cash would be returned if they could provide a legitimate source for the cash, which, the plaintiffs had explained, was their winnings from gambling. The plaintiffs departed for Las Vegas without the cash; the following day, the plaintiffs' attorney in Nevada telephoned the defendant seeking a return of the plaintiffs' cash. At some point thereafter, the defendant drafted an affidavit, which, the plaintiffs' alleged, was false and misleading, to show probable cause for forfeiture of the funds; however, no forfeiture action was ever filed, and the cash was later returned to the plaintiffs. The plaintiffs sued the Georgia defendant in Nevada, seeking money damages for, among other things, the defendant's wrongful seizure of their cash without probable cause and willfully seeking forfeiture while withholding exculpatory information.

The United States Court of Appeals for the Ninth Circuit, applying the Calder "effects test," held that the Nevada court could exercise personal jurisdiction over the nonresident defendant because he "'expressly aimed' his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a 'significant

connection' to Nevada." Walden, 571 U.S. at 282. The Ninth Circuit Court of Appeals further held that "the delay in returning the funds to [the plaintiffs] caused them 'foreseeable harm' in Nevada." Id. In a unanimous decision authored by Justice Thomas, the United States Supreme Court reversed the judgment of the Court of Appeals and held that Nevada could not exercise personal jurisdiction over the defendant. The Court discussed its decision in Calder at length and stated that the "crux" of its holding in Calder was "that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff," and that "[t]he strength of that connection was largely a function of the nature of the libel tort." Id. at 287. The Court noted that in Calder "the 'effects' caused by the defendants' article – i.e., the injury to the plaintiff's reputation in the estimation of the California public – connected the defendants' conduct to California, not just to a plaintiff who lived there." Id. at 288. "That connection," the Court held, "combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction." Id.

In applying those principles from Calder to the facts in Walden, the Court in Walden concluded that the defendant did not have sufficient minimum contacts with Nevada to justify the exercise of personal jurisdiction in a Nevada court. The Court noted that "no part of [the defendant's] course of conduct occurred in Nevada" and that the defendant "never traveled to, conducted activities within, contacted anyone in, or

sent anything or anyone to Nevada." Id. at 288-89. "In short," the Court held, "when viewed through the proper lens – whether the defendant's actions connect him to the forum – [the defendant] formed no jurisdictionally relevant contacts with Nevada." Id. at 289. The Court rejected the Court of Appeals' basis for the exercise of personal jurisdiction, stating:

> "The Court of Appeals reached a contrary conclusion by shifting the analytical focus from [the defendant]'s contacts with the forum to his contacts with [the plaintiffs]. See Rush [v. Savchuk], 444 U.S. [320,] 332 [(1980)]. Rather than assessing [the defendant]'s own contacts with Nevada, the Court of Appeals looked to [the defendant]'s knowledge of [the plaintiffs'] 'strong forum connections.' [Fiore v. Walden,] 688 F.3d [558,] 577-579, 581 [(9th Cir. 2012)]. In the court's view, that knowledge, combined with its conclusion that respondents suffered foreseeable harm in Nevada, satisfied the 'minimum contacts' inquiry. Id., at 582.
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> "This approach to the 'minimum contacts' analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis. [The defendant]'s actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional

> analysis. See Rush, supra, at 332. It also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself.
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> "Relying on Calder, [the plaintiffs] emphasize that they suffered the 'injury' caused by [the defendant]'s allegedly tortious conduct (i.e., the delayed return of their gambling funds) while they were residing in the forum. Brief for Respondents 14. This emphasis is likewise misplaced. As previously noted, Calder made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."

571 U.S. at 289-90 (footnote omitted; emphasis added).

Notably, the Court also rejected the notion that the contacts of the plaintiffs' Nevada attorney with the defendant in Georgia sufficed to create a contact between the defendant and Nevada, stating that such a "contact" is "precisely the sort of 'unilateral activity' of a third party that 'cannot satisfy the requirement of contact with the forum State.'" Id. at 291 (quoting Hanson, 357 U.S. at 253). In sum, the Court held: "The proper focus of the 'minimum contacts' inquiry in intentional-tort cases is '"the relationship among the defendant,

the forum, and the litigation."' Calder, 465 U.S. at 788. And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." Walden, 571 U.S. at 291 (emphasis added).

K.G.S. cites several decisions from other jurisdictions applying Calder that, she says, support the trial court's exercise of jurisdiction over Facebook. However, K.G.S. does not mention Walden in her brief on appeal, and none of the authorities cited in K.G.S.'s brief apply Walden, despite the fact that it is a unanimous decision of the United States Supreme Court applying and clarifying Calder.[12] Relying on that authority, K.G.S. argues that "Calder and its progeny make clear . . . that, in addition to an affirmative act, there must be 'something more' that allows the court to conclude [that] the

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[12] See, e.g., Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), and Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244 (10th Cir. 2000). Panavision is distinguishable from the present case because, in that case, although it did not apply Walden, there was some evidence indicating that the nonresident defendant aimed his trademark infringement at California, where the movie and television industry is centered, and not just at the plaintiff, a California business that held a registered trademark in connection with motion-picture camera equipment and "promote[d] its trademarks through motion picture and television credits and other media advertising." 141 F.3d at 1319. Intercon, on the other hand, did not apply the Calder "effects test" to its minimum-contacts analysis; thus, it provides little support for K.G.S.'s position before this Court, which is bound to apply both Calder and Walden to the facts of this case. Even so, unlike the circumstances in this case, in Intercon there was evidence indicating that the nonresident defendant purposefully directed e-mail from its subscribers to the plaintiff's Oklahoma-based server, thus making direct use of the plaintiff's property in Oklahoma, the forum state.

defendant knew or should have known that its tortious conduct would have effects on certain individuals in the forum state." K.G.S.'s brief, at 21. However, the Supreme Court in Walden expressly rejected the notion that specific jurisdiction may be exercised based on the foreseeability of harm suffered in the forum state. See Walden, 571 U.S. at 289. As noted above, the Ninth Circuit Court of Appeals cited the foreseeability of the harm occurring in the forum as a basis for holding that the Nevada court had specific jurisdiction over the Georgia defendant, but the Supreme Court found that "[t]his approach to the 'minimum contacts' analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." Id. See also Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1069-70 (9th Cir. 2017) ("In Walden, the Supreme Court rejected our conclusion that the defendants' 'knowledge of [the plaintiffs'] "strong forum connections," ' plus the 'foreseeable harm' the plaintiffs suffered in the forum, comprised sufficient minimum contacts. [571 U.S. at 288-89,] 134 S.Ct. at 1124-25 (citation omitted).").

In light of the above, we cannot say that K.G.S. demonstrated that Facebook's suit-related conduct created a "substantial connection" with Alabama. To the extent that K.G.S. relies on the contacts Facebook made with K.G.S. and her attorney in response to the complaints she and her attorney filed with Facebook about the Facebook page, those contacts are insufficient to establish minimum contacts with Alabama. As the Supreme Court stated in Walden: "[I]t is the defendant, not the plaintiff or third parties, who must

create contacts with the forum State." 571 U.S. at 291 (emphasis added). Facebook's contacts with Alabama that were made merely in response to K.G.S.'s or her attorney's contact with Facebook are "precisely the sort of 'unilateral activity' of a third party that 'cannot satisfy the requirement of contact with the forum State.'" Id. at 291 (quoting Hanson, 357 U.S. at 253). Further, to the extent that Facebook's failure to act to remove the Facebook page can be analyzed separately from the responses it sent to K.G.S. and her attorney, we can only conclude that this intentional conduct was expressly aimed at K.G.S. herself, and not at Alabama as a forum. Under Walden, this "contact" is insufficient to demonstrate that Facebook created a "substantial connection" with Alabama when it failed to act to remove the Facebook page. See Walden, 571 U.S. at 289 (holding that a defendant's intentional actions outside the forum did not create sufficient contacts with the forum "simply because [the defendant] allegedly directed his conduct at plaintiffs whom he knew had . . . connections [to the forum]"). Focusing, as we must, on the suit-related contacts Facebook itself created with Alabama – not Facebook's contacts with K.G.S. or K.G.S.'s contacts with Alabama – we must conclude that there is an absence of suit-related conduct that creates a substantial connection with Alabama. Thus, we must conclude that the Fourteenth Amendment does not allow for the exercise of specific jurisdiction over Facebook under the particular facts of this case. See Ex parte Citizens Prop. Ins. Corp., 15 So. 3d 511, 515 (Ala. 2009) ("The issue of personal jurisdiction '"stands or falls on the unique facts of [each] case."'" (quoting Ex

parte I.M.C., Inc., 485 So. 2d 724, 725 (Ala. 1986) (quoting and adopting trial court's order))).[13]

Accordingly, for the reasons set forth above, the Fourteenth Amendment does not allow the trial court to exercise general or specific personal jurisdiction over Facebook. "'A judgment rendered against a defendant in the absence of personal jurisdiction over that defendant is void.'" Bank of America Corp. v. Edwards, 881 So. 2d 403, 405 (Ala. 2003) (quoting Horizons 2000, Inc. v. Smith, 620 So. 2d 606, 607 (Ala. 1993)). Because the trial court did not have jurisdiction to enter a preliminary injunction against Facebook, that injunction is void. Because a void judgment will not support an appeal, see Tidwell v. State Ethics Comm'n, 599 So. 2d 12 (Ala. 1992), Facebook's appeal is due to be dismissed. Because the trial court lacked personal jurisdiction over Facebook at the time the preliminary injunction was entered, the trial court is instructed to dismiss K.G.S.'s claims against Facebook.

B. Appeal No. 1170294 – Gelin

Gelin also appealed from the preliminary injunction, which enjoined Gelin from "publicly discussing, in

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[13] Because we have concluded that K.G.S. did not establish that Facebook had sufficient minimum contacts with Alabama to satisfy due process, we need not consider "whether the exercise of personal jurisdiction over the nonresident defendant comports with '"traditional notions of fair play and substantial justice."'" Elliott, 830 So. 2d at 731 (quoting Brooks v. Inlow, 453 So. 2d 349, 351 (Ala. 1984), quoting in turn International Shoe, 326 U.S. at 316).

any way whatsoever, matters surrounding the adoption of Baby Doe and this lawsuit in any public forum." On appeal, Gelin first argues that the "most fundamental error below is that the trial court lacked personal jurisdiction" over her. Gelin's brief, at 17. Before the trial court, Gelin asserted that she lacked sufficient minimum contacts with Alabama to support the trial court's exercise of personal jurisdiction over her. In response, K.G.S. argued (1) that Gelin's assertion of a personal-jurisdiction defense came too late because, although the defense was available to her at the time, it was not asserted in Gelin's first motion asserting a Rule 12(b) defense, see generally Rule 12(b), (g), and (h)(1), Ala. R. Civ. P., and (2) that, under the Calder "effects test," Gelin's intentional conduct was aimed at Alabama in a manner that satisfied the requirement of minimum contacts with Alabama to support the exercise of personal jurisdiction.

In its order denying Gelin's motion to dismiss, the trial court did not indicate the basis for its conclusion that "it has jurisdiction over [Gelin]." In other words, the order does not indicate whether the trial court believed it had jurisdiction over Gelin because she had not timely raised the personal-jurisdiction defense or because Gelin had sufficient minimum contacts with Alabama.[14] Under these circumstances, where the trial

[14] Notably, in its order denying Facebook's motion to dismiss, the trial court specifically concluded that Facebook had "minimum contacts . . . with the State of Alabama." The order denying Gelin's motion to dismiss does not make any finding regarding Gelin's having minimum contacts with Alabama.

court did not specify a basis for its ruling, Gelin was required to present an argument in her principal brief on appeal, in compliance with Rule 28(a)(10), Ala. R. App. P., stating why neither ground was a valid basis for asserting personal jurisdiction over her. See Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006). However, in her principal brief on appeal, Gelin argues only that she does not have sufficient minimum contacts with Alabama; she does not address the other potential basis for the trial court's order – that her assertion of the personal-jurisdiction defense was untimely. Gelin's failure to do so results in a waiver of this issue on appeal.

> "In order to secure a reversal, 'the appellant has an affirmative duty of showing error upon the record.' Tucker v. Nichols, 431 So. 2d 1263, 1264 (Ala. 1983). It is a familiar principle of law:
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> > " 'When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue.'
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> "Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006) (footnote omitted) (emphasis added). This waiver, namely, the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a

> basis for its judgment, results in an affirmance of that judgment. Id. That is so, because 'this court will not presume such error on the part of the trial court.' Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added)."

Soutullo v. Mobile Cty., 58 So. 3d 733, 738-39 (Ala. 2010).

Accordingly, we must conclude that the issue whether the trial court had personal jurisdiction over Gelin is waived on appeal. See generally Afassco, Inc. v. Sanders, 142 So. 3d 1119, 1124 (Ala. 2013) (noting that the defense of lack of personal jurisdiction is subject to waiver).[15] Therefore, we turn now to address Gelin's direct challenges to the preliminary injunction entered against her.

Gelin first argues that the preliminary injunction suffered from a procedural deficiency that requires dissolution of the injunction against her. Specifically, she contends that the trial court could not enter a

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[15] Because we have concluded that this issue is waived on appeal because Gelin did not raise it in her opening brief on appeal, we see no basis for allowing K.G.S. to file a "sur-reply brief" to address Gelin's argument concerning the timeliness of her Rule 12(b)(2) motion, which was asserted for the first time in Gelin's reply brief. The remainder of K.G.S.'s "sur-reply brief" purports to address the "procedural flaws" Gelin raised on appeal. However, Gelin raised these "procedural flaws" in her opening brief, and K.G.S. did not respond to those arguments in her appellee's brief filed pursuant to Rule 28(b), Ala. R. App. P. K.G.S.'s failure in this regard is not a basis for granting her motion to file a "sur-reply brief."

preliminary injunction against her because K.G.S. never moved for a preliminary injunction against her. Indeed, K.G.S.'s motion for a preliminary injunction sought an order requiring Facebook and D'Arcy "to deactivate the Facebook page" and an order enjoining "D'Arcy and Kim McLeod from discussing matters surrounding . . . this lawsuit until the instant proceeding is fully litigated and resolved." In the motion, K.G.S. identified conduct by D'Arcy and McLeod that she alleged supported her motion and alleged that D'Arcy and McLeod "are the most persistent and harmful posters on the [Facebook] page." Gelin, however, is not mentioned anywhere in the motion for a preliminary injunction.

Rule 65(a)(1), Ala. R. Civ. P., provides: "Notice. No preliminary injunction shall be issued without notice to the adverse party." We agree that the trial court had no authority to issue a preliminary injunction against Gelin when there is no indication that Gelin was given notice that K.G.S. sought to enjoin her conduct or actions in any way. Cf. State v. Brady, [Ms. 1180002, May 31, 2019] ___ So. 3d ___ (Ala. 2019) (holding that a trial court acts without authority when it grants relief that no party before it sought). There is no indication in the record that Gelin assumed, despite K.G.S.'s failure to explicitly seek to enjoin Gelin, that K.G.S.'s motion for a preliminary injunction as to other defendants sought to enjoin her in some way. Even assuming that Gelin received notice that the trial court would consider K.G.S.'s motion for a preliminary injunction at the November 30 hearing – at which the trial court was also

considering all pending motions to dismiss – Gelin's notice of a hearing on K.G.S.'s motion for a preliminary injunction, when Gelin had not been given notice that K.G.S. sought to enjoin Gelin's actions in some way, does not satisfy the requirements of Rule 65(a)(1). Further, even if it became obvious at the November 30 hearing that K.G.S. sought to enjoin Gelin's conduct in some way, this Court has indicated that a defendant must be given sufficient notice so that the defendant has an opportunity to prepare an opposition to the injunction. See Ciena Corp. v. Jarrard, 203 F.3d 312, 319 (4th Cir. 2000) (holding that "[b]ecause a preliminary injunction is unlimited in duration, its entry always requires notice to the opposing party sufficient to give that party an opportunity to prepare an opposition to entry of an injunction" (quoted with approval in Southern Homes, AL, Inc. v. Bermuda Lakes, LLC, 57 So. 3d 100, 105 (Ala. 2010))). Thus, even if Gelin learned at the November 30 hearing that K.G.S. sought to enjoin her conduct in some way, that "notice" was not sufficient to satisfy Rule 65(a)(1).

Accordingly, we reverse the order entering the preliminary injunction against Gelin and remand this case with instructions to the trial court to dissolve the preliminary injunction against Gelin. However, the trial court's determination that it had personal jurisdiction over Gelin must be upheld because Gelin waived her challenge to the trial court's determination in that regard for purposes of this appeal.

C. Appeal No. 1170336 – McLeod

McLeod appeals from the preliminary injunction, which enjoined her from "publicly discussing, in any way whatsoever, matters surrounding the adoption of Baby Doe and this lawsuit in any public forum." McLeod argues, among other things, that K.G.S. failed to demonstrate that she was entitled to an injunction.

> "'The decision to grant or to deny a preliminary injunction is within the trial court's sound discretion. In reviewing an order granting a preliminary injunction, the Court determines whether the trial court exceeded that discretion.' SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co., 931 So. 2d 706, 709 (Ala. 2005). As to questions of fact, the ore tenus rule is applicable in preliminary-injunction proceedings. See Water Works & Sewer Bd. of Birmingham v. Inland Lake Invs., LLC, 31 So. 3d 686, 689-90 (Ala. 2009). As this Court recently noted in Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1176 (Ala. 2008), however,
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> > "'[t]o the extent that the trial court's issuance of a preliminary injunction is grounded only in questions of law based on undisputed facts, our longstanding rule that we review an injunction solely to determine whether the trial court exceeded its discretion should not apply. We find the rule applied by the United States Supreme Court in similar situations to be persuasive: "We review

> the District Court's legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed. 2d 1017 (2006). . . .'

"(Emphasis omitted.)

"The plaintiff bears the burden of producing evidence sufficient to support the issuance of a preliminary injunction. Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003). The requirements for a preliminary injunction are well known:

> "'"Before entering a preliminary injunction, the trial court must be satisfied: (1) that without the injunction the plaintiff will suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff is likely to succeed on the merits of the case; and (4) that the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff."'

"Blount Recycling, LLC v. City of Cullman, 884 So. 2d 850, 853 (Ala. 2003) (quoting Blaylock v. Cary, 709 So. 2d 1128, 1130 (Ala. 1997))."

Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 77-78 (Ala. 2009).

McLeod first argues that K.G.S. failed to demonstrate a likelihood of success on the merits of her claims. Initially, we note that K.G.S. sought a preliminary injunction only on the basis of the likelihood of success of her underlying invasion-of-privacy claim; accordingly, we limit our discussion of the likelihood-of-success element to that claim.

This Court has recognized four "distinct theories of recovery for the tort of invasion of privacy." Regions Bank v. Plott, 897 So. 2d 239, 243 (Ala. 2004).

> "'"It is generally accepted that invasion of privacy consists of four limited and distinct wrongs: (1) intruding into the plaintiff's physical solitude or seclusion; (2) giving publicity to private information about the plaintiff that violates ordinary decency; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; or (4) appropriating some element of the plaintiff's personality for a commercial use."'
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> "Butler v. Town of Argo, 871 So. 2d 1, 12 (Ala. 2003) (quoting Johnston v. Fuller, 706 So. 2d 700, 701 (Ala. 1997)). 'Although all of these claims concern, in the abstract, the concept of being left alone, each tort has distinct elements and establishes a separate interest that may be invaded.' Doe v. High-Tech Inst., Inc., 972 P.2d 1060, 1065 (Colo. Ct. App. 1998); see also Nathan E. Ray, Note, Let There Be False Light: Resisting the Growing Trend

> Against an Important Tort, 84 Minn. L. Rev. 713, 718 (2000)."

Regions Bank, 897 So. 2d at 243.

In K.G.S.'s amended complaint, she specifically alleged invasion-of-privacy claims based on "misappropriation" and "false light," which are the third and fourth forms of invasion of privacy set forth above. However, other than a general allegation that "each of the four forms of invasion of privacy are present," K.G.S., in the motion for a preliminary injunction, sought to prove only a likelihood of success on a claim of invasion of privacy based on "giving publicity to private information about the plaintiff that violates ordinary decency" – the second form of invasion of privacy set forth above. Although this specific form of invasion of privacy is not included as a separate claim in the first amended complaint, there was no objection below to the trial court's considering this form of invasion of privacy as the basis for the preliminary injunction; therefore, we will consider whether K.G.S. demonstrated a likelihood of success on a claim of invasion of privacy based on McLeod's giving publicity to private information about K.G.S. and Baby Doe.[16]

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[16] To the extent the trial court entered the preliminary injunction based on the likelihood of success on the merits of the two invasion-of-privacy claims specifically raised in K.G.S.'s first amended complaint, we agree with McLeod that such a conclusion would be error, because K.G.S. failed to present any evidence to support a conclusion that she had a likelihood of success on the merits of either of those claims. See Blount Recycling, LLC v. City of Cullman, 884 So. 2d 850, 855 (2003) ("[W]hile Rule 65, Ala. R.

> "In regard to a claimed invasion of privacy based on a defendant's giving publicity to private information, this Court has adopted the language and reasoning of Restatement (Second) of Torts § 652D (1977). Johnston[v. Fuller], 706 So. 2d [700,] 703 [(Ala. 1997)]. Section 652D states:
>
> > "'One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> >
> > > "'(a) would be highly offensive to a reasonable person, and
> >
> > > "'(b) is not of legitimate concern to the public.'"

Ex parte Birmingham News, Inc., 778 So. 2d 814, 818 (Ala. 2000).

Civ. P., 'does not explicitly require that oral testimony be presented at a preliminary injunction hearing, some type of evidence which substantiates the pleadings is implicitly required by subsection (a)(2) of the rule.'" (quoting Bamberg v. Bamberg, 441 So. 2d 970, 971 (Ala. Civ. App. 1983))); Butler v. Town of Argo, 871 So. 2d 1, 12 (Ala. 2003) ("A false-light claim does not require that the information made public be private; instead, the information made public must be false." (some emphasis added)); and Bell v. Birmingham Broad. Co., 266 Ala. 266, 269, 96 So. 2d 263, 265 (1957) (noting that an individual's "privacy . . . may not be lawfully invaded by the use of his name and picture for commercial purposes without his consent, not incidental to an occurrence of legitimate news value" (emphasis added)).

In her motion for a preliminary injunction, K.G.S. argued:

> "In addition to receiving considerable publicity, the [Facebook] page, Ms. D'Arcy, and Ms. McLeod unlawfully provide, and continue to unlawfully provide, confidential and personal information about K.G.S. and Baby Doe's adoption that [is] not of public concern and would be extremely offensive to any reasonable person. Significantly, in plain violation of the . . . Adoption Code and Alabama confidentiality laws, K.G.S.'s name and Baby Doe's likeness have been utilized and referenced incessantly. The frequent use of K.G.S.'s name and Baby Doe's likeness on the [Facebook] page, alone, are sufficiently private and offensive to satisfy this particular invasion of privacy tort because of states' 'overriding public policy of protecting from harmful publicity parties to and the subject of adoption proceedings.' In re Adoption of H.Y.T., 458 So. 2d 1127, 1128 (Fla. 1984).
>
> " . . . Confidentiality is the very essence of the adoption process, and by openly disclosing K.G.S.'s name and Baby Does's [sic] likeness, K.G.S. and Baby Doe have been subject to the very harms adoption laws were intended to prevent."

(Footnote omitted.)

We agree that the Adoption Code, considered as a whole, is a clear statement by the legislature that adoption proceedings, whether the adoption is contested or

not, are intended to be confidential. See, e.g., § 26-10A-24(f), Ala. Code 1975 ("All references to the names of the parties in the [contested adoption] proceedings shall be by initial only."); § 26-10A-26, Ala. Code 1975 ("Only the initials of the natural parents and the [adoption] petitioner shall be indicated in all pleadings and briefs" filed in an appeal from a final judgment of adoption); and § 26-10A-31, Ala. Code 1975 (providing for the confidentiality of the records and proceedings in an adoption case, except upon order of the court). Citing the requirement in § 26-10A-24(f) that all references to the names of parties to a contested adoption must be by initials only, K.G.S. argued that, by disclosing her name on the Facebook page, McLeod violated that part of the Adoption Code and invaded her privacy.[17]

It is axiomatic, however, that a claim of invasion of privacy based on a defendant's giving publicity to private information about the plaintiff can succeed only if the plaintiff can prove that the publicized information was actually private at the time it was publicized. See Abernathy v. Thornton, 263 Ala. 496, 498, 83 So. 2d 235, 237 (1955) ("'There can be no privacy in that

[17] McLeod argues that § 26-10A-24(f) and other parts of the Adoption Code cannot be applied to prevent third parties, like her, from publicizing information about the contested adoption – after that information is obtained from sources outside confidential court documents – without violating her right to freedom of speech and expression under the First Amendment to the United States Constitution. For the reasons set forth herein, we need not consider this specific contention to resolve the issues presented on appeal.

which is already public.'" (quoting Charles Hepburn, Cases on the Law of Torts, p. 504 (1954))); Faloona v. Hustler Magazine, Inc., 799 F.2d 1000, 1006 (5th Cir. 1986) (stating "the obvious" that "the tortious disclosure of private facts 'applies only to private facts'" (quoting Faloona v. Huster [sic] Magazine, Inc., 607 F. Supp. 1341, 1359 (N.D. Texas 1985))); Grimsley v. Guccione, 703 F. Supp. 903, 910 (M.D. Ala. 1988) ("[A] defendant who merely gives further publicity about a plaintiff concerning information already made public cannot be held liable" for an invasion of privacy based on giving publicity to private information.).

In her motion for a preliminary injunction, K.G.S. identified the invasion of privacy at issue as the posting of her full name and photographs of Baby Doe on the Facebook page. Although we agree that K.G.S.'s full name – i.e., her identity as the prospective adoptive parent in a contested adoption case involving Baby Doe – was intended to be confidential, we must agree with McLeod that, at the time McLeod publicized K.G.S.'s full name and photographs of Baby Doe on the Facebook page, that information was not private but, instead, had already been made public by what K.G.S. described as "a prominent media outlet" – the Huffington Post. It is undisputed that the Facebook page was not created until after the Huffington Post published its two-part article using K.G.S.'s full name and identifying her as the petitioner in the contested adoption proceeding involving Baby Doe. The article also published photographs of Baby Doe and very specific details about the facts underlying the adoption contest.

Thus, because it was undisputed that K.G.S.'s name and Baby Doe's likeness were made public before McLeod ever publicized that information on the Facebook page, K.G.S. has not demonstrated a likelihood of success on the merits of her claim that McLeod invaded her privacy by publicizing private information by "using K.G.S.'s name and Baby Doe's likeness on the [Facebook] page."[18]

Accordingly, we conclude that K.G.S. failed to demonstrate a likelihood of success on the merits of her invasion-of-privacy claim to support the entry of a preliminary injunction against McLeod. Based on our conclusion in this regard, we pretermit discussion of McLeod's additional challenges to the preliminary

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[18] Of course, there could be no invasion of privacy of this kind in relation to any information McLeod allegedly publicized about the contested adoption that was already public information. To the extent that the record contains some indication that K.G.S. believed that McLeod had publicized information about the contested adoption that she might believe was not "already public" at the time it was publicized, we will not address that suggestion in the record as an alternate basis for affirming the trial court's injunction against McLeod because, under the particular circumstances of this case, we conclude that it would violate McLeod's due-process rights. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) (holding that this Court may affirm a trial court's judgment on any valid legal ground supported by the record, unless due process requires notice at the trial level that was omitted). A preliminary injunction is a "drastic remedy," Ormco Corp. v. Johns, 869 So. 2d 1109, 1114 (Ala. 2003), and K.G.S. did not specifically raise this argument in her motion for a preliminary injunction or include any facts to support this argument in her affidavit in support of the preliminary injunction, and neither party directly addresses this argument in their briefs on appeal.

injunction. We reverse the order granting the preliminary injunction entered against McLeod and remand the case with instructions that the trial court dissolve the preliminary injunction.

IV. Conclusion

In appeal no. 1170244, the preliminary injunction entered against Facebook is void for lack of personal jurisdiction; therefore, Facebook's appeal of the preliminary injunction is due to be dismissed and the trial court is instructed to dismiss K.G.S.'s claims against Facebook. In appeal no. 1170294, the order entering the preliminary injunction against Gelin is reversed for lack of notice, and the case is remanded with instructions to the trial court to dissolve the preliminary injunction issued against Gelin. In appeal no. 1170336, we reverse the preliminary injunction against McLeod, and we remand this case with instructions to the trial court to dissolve the preliminary injunction issued against McLeod.

1170244 – APPEAL DISMISSED WITH INSTRUCTIONS.

1170294 – REVERSED AND REMANDED WITH INSTRUCTIONS.

1170336 – REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Wise, Sellers, and Mendheim, JJ., concur.

Bolin, J., concurs in the result.

Stewart and Mitchell, JJ., recuse themselves.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BIRMINGHAM DIVISION

KGS INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND, Plaintiff,	)	
V.	)	Case No.: CV-2017-000255.00
FACEBOOK INC, D'ARCY CLAUDIA, GELIN RENEE L, MCLEOD KIM ET AL, Defendants.	)	

ORDER

(Filed Jul. 23, 2019)

This matter comes before the Court on the Defendant Facebook, Inc.'s Motion to Stay Pending Issuance of Certificate of Judgment.

The Court is also in receipt of that certain opinion entered by the Alabama Supreme Court in case numbers 1170244, 1170294, and 1170336. In accordance with same, it is therefore **ORDERED, ADJUDGED, and DECREED as follows**:

1. Any and all claims asserted by the Plaintiff, KGS, individually and as guardian and next friend as Baby Doe, a minor child, against the Defendant Facebook, Inc., are hereby DISMISSED, with prejudice;

2. The preliminary injunction issued against the Defendant Renee L. Gelin, is hereby DISSOLVED;

3. The preliminary injunction issued against the Defendant Kim McLeod is hereby DISSOLVED;

4. The Defendant Facebook, Inc.'s Motion to Stay Pending Issuance of Certificate of Judgment is hereby MOOT.

5. The hearing set in this matter for Monday, July 29, 2019 at 10:30 A.M., concerning several motions filed by the parties, is hereby CANCELLED.

Costs are hereby taxed as paid.

DONE this 23rd day of July, 2019.

/s/ DONALD E. BLANKENSHIP
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BIRMINGHAM DIVISION

KGS INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND, Plaintiff,	)	
V.	)	Case No.: CV-2017-000255.00
FACEBOOK INC, D'ARCY CLAUDIA, GELIN RENEE L, MCLEOD KIM ET AL, Defendants.	)	

ORDER

(Filed Dec. 19, 2017)

Before the Court is Plaintiffs' Motion for a Preliminary Injunction, pursuant to Rule 65 of the *Alabama Rules of Civil Procedure*. It is well settled in Alabama that a plaintiff seeking a preliminary injunction has the burden of proving all of the following:

(1) That without the injunction the party would suffer irreparable injury;

(2) That the party has no adequate remedy at law;

(3) That the party has at least a reasonable chance of success on the ultimate merits of the case; and

(4) That the hardship imposed on the party opposing the preliminary injunction, would not unreasonably outweigh the benefit accruing to the party seeking the injunction. *See, e.g.*, *Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1176 (Ala. 2008).*

Having reviewed the pleadings, K.G.S.'s affidavit in support of the preliminary injunction, the Motion, the Response in Opposition thereof, and the oral arguments of counsel, the Court finds that a preliminary injunction is necessary to curtail the disclosures and narrative concerning the private, contested adoption of Baby Doe by K.G.S. This information seems to be fostered, disseminated, and hosted by the Facebook page entitled "Bring Baby [Doe] Home."

Accordingly, the Defendants Facebook, Inc. and Claudia C. D'Arcy are hereby ORDERED and DIRECTED to deactivate the Facebook page entitled "Bring Baby [Doe] Home".

The Court further ORDERS and DIRECTS Defendants Claudia C. D'Arcy, Kim McLeod, and Renee Gelin from publicly discussing, in any way whatsoever, matters surrounding the adoption of Baby Doe and this lawsuit in any public forum.

In accordance with Rule 65(c) of the *Alabama Rules of Civil Procedure*, the Court ORDERS and DIRECTS Plaintiff K.G.S. to post $1000.00 with the Court as a security bond for the payment of costs, damages, and reasonable attorneys' fees as may be incurred or suffered by any party who is ultimately found to have been wrongfully enjoined or restrained

herein. The Clerk of Court is hereby ORDERED and DIRECTED to receive that stated amount.

DONE this 19th day of December, 2017.

/s/ DONALD E. BLANKENSHIP
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BIRMINGHAM DIVISION

KGS INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND, Plaintiff,	)	
V.	)	Case No.: CV-2017-000255.00
FACEBOOK INC, D'ARCY CLAUDIA, GELIN RENEE L, MCLEOD KIM ET AL, Defendants.	)	

ORDER

(Filed Dec. 18, 2017)

This matter comes before the Court on the Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint. The Defendant files its Motion to Dismiss based on Ala. R. Civ. P. Rules 12(b)(2), (3) and (6). After reviewing the submissions on file and after hearing the arguments of Counsel, the Court makes the following finding(s):

1. The Plaintiff has stated a claim upon which relief can be granted;

2. Based on the minimum contacts that the Defendant has with the State of Alabama, venue is proper in Jefferson County, AL and therefore the Court has jurisdiction over the Defendant;

3. At a later date, upon the filing of a properly crafted Motion, the Court will determine whether a genuine issue of material fact exists and thereby whether the Defendant is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED, and DECREED that the Defendant Facebook, Inc.'s Motion to Dismiss the Plaintiff's First Amended Complaint is hereby DENIED.

DONE this 18th day of December, 2017.

/s/ DONALD E. BLANKENSHIP
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA

[SEAL]

August 23, 2019

1170244 Facebook, Inc. v. K.G.S., individually, and as guardian and next friend of Baby Doe, a minor child (Appeal from Jefferson Circuit Court: CV-17-255).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on August 23, 2019:

Application Overruled. No Opinion.
Bryan, J. – Parker, C.J., and Bolin, Shaw, Wise, Sellers, and Mendheim, JJ., concur. Stewart and Mitchell, JJ., recuse themselves.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 28, 2019:

Appeal Dismissed with Instructions.
Bryan, J. – Parker, C.J., and Shaw, Wise, Sellers, and Mendheim, JJ., concur. Bolin, J., concurs in the result. Stewart and Mitchell, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs

of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of August, 2019.

/s/ Julia Jordan Weller
Clerk, Supreme Court of Alabama

Alabama Rules of Civil Procedure

II. Commencement of action; service of process, pleadings, motions, and orders.

Rule 4.2.

Process. Basis for and methods of out-of-state service.

(a) *In-state service.* All process may be served anywhere in this state and, when authorized by law or by these rules, may be served outside this state.

(b) *Basis for out-of-state service.* An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States; or, the person or entity is sued in the capacity of guardian of a ward, or executor, administrator, or other personal representative of an estate, for the acts or omissions of a decedent or ward, and the person or entity so sued does not otherwise have sufficient contacts with this state in that capacity, but the decedent or ward would have been deemed to have sufficient contacts with this state if the action could have been maintained against the decedent or ward.

(dc) *District court rule.* Rule 4.2 applies in the district courts.

[Adopted 10-14-76, eff. 1-16-77; Amended eff. 10-1-95; Amended eff. 8-1-2004.]

Committee Comments on 1977 Complete Revision

Committee Comments on Complete Revision to Rules 4, 4.1, 4.2, 4.3, and 4.4, effective August 1, 2004

Committee Comments to Amendment to Rule 4.2 Effective August 1, 2004

This rule has been completely rewritten and now combines the provisions for territorial limits of service. New subdivision 4.2(a) was formerly Rule 4(b). Subdivision 4.2(b) is taken from former 4.2(a)(1)(B). New 4.2(b) is, in effect, Alabama's "long-arm statute." The structure of former 4.2 included a "laundry list" of types of conduct that would subject an out-of-state defendant to personal jurisdiction in Alabama, as well as containing the "catchall" clause now contained in new 4.2(b). Because the "catchall" clause has consistently been interpreted to go to the full extent of federal due process, see, for example, *Martin v. Robbins*, 628 So.2d 614, 617 (Ala.1993), it is no longer necessary to retain the "laundry list" in the text of the Rule. The so-called "laundry list," former Rule 4.2(a)(2)(A)-(H), read as follows:

"(2) SUFFICIENT CONTACTS. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's:

"(A) transacting any business in this state;

"(B) contracting to supply services or goods in this state;

"(C) causing tortious injury or damage by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, aircraft, boat or watercraft in this state;

"(D) causing tortious injury or damage in this state by an act or omission outside this state if the person 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;

"(E) causing injury or damage in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person might reasonably have expected such other person to use, consume, or be affected by the goods in this state, provided that the person 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;

"(F) having an interest in, using, or possessing real property in this state;

"(G) contracting to insure any person, property, or risk located within this state at the time of contracting;

"(H) living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising from alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state. . . ."

Note from the reporter of decisions: The order amending Rules 4, 4.1, 4.2, 4.3, 4.4, 6(a), 7(b)(2), 17(a), 22(c), and 26(b), Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

K.G.S., Individually, and as Guardian and Next Friend of BABY DOE, a minor child,	)	**Civil Action No.: 2017-000255**
Plaintiffs,	)	
v.	)	
FACEBOOK, INC., CLAUDIA C. D'ARCY, KIM MCLEOD, RENEE L. GELIN, JENNIFER L. WACHOWSKI, and Fictitious Parties "A-Z,"	)	**FILED UNDER SEAL AND SHOULD NOT BE DISCLOSED ABSENT COURT ORDER.**
Defendants.	)	

FIRST AMENDED COMPLAINT

(Filed Oct. 20, 2017)

COME NOW, Plaintiffs K.G.S.,[1] individually, and as Guardian and Next Friend of Baby Doe, a minor child, and by and through their undersigned counsel of record, hereby file this First Amended Complaint against Defendants Facebook, Inc., Claudia C. D'Arcy, Kim McLeod, Renee L. Gelin, Jennifer L. Wachowski,

[1] In accordance with Alabama's Adoption Code, Ala. Code § 26-10A-1, *et seq.*, and consistent with this State's and many others' overriding public policy interests in protecting all of the parties involved in an adoption proceeding from harmful publicity, this Complaint will refer to the parties to the adoption by their initials, and the minor-child anonymously.

and Fictitious Parties A-Z. In support of this Complaint, Plaintiffs state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to Ala. Code § 12-11-30(1), as the amount in controversy exceeds $10,000.

2. Venue is proper in this Court pursuant to Ala. Code § 6-3-2 and § 6-3-7, as a substantial part of the events giving rise to these claims occurred in Jefferson County, Alabama.

PARTIES

3. Plaintiff K.G.S. is an Alabama citizen, resident of Jefferson County, Alabama, and over 19 years of age.

4. Plaintiff Baby Doe is an Alabama citizen, resident of Jefferson County, Alabama, and minor child represented by and through his Guardian and Next Friend, K.G.S.

5. Defendant Facebook, Inc. is a Delaware corporation with its principal place of business in Menlo Park, California.

6. Defendant Claudia D'Arcy is a New York citizen, resident of Ulster County, New York, and over 19 years of age.

7. Defendant Kim McLeod is an Alabama citizen, resident of Mobile County, Alabama, and over 19 years

of age. Ms. McLeod has participated in and/or directed YouTube videos that were filmed in Jefferson County, Alabama.

8. Defendant Renee L. Gelin, also known as "Lynn Johansenn," is a Florida citizen, resident of Pasco County, Florida, and over 19 years of age. Ms. Gelin, through her pseudonym Lynn Johansenn, has authored a number of posts and articles about K.G.S. and the contested adoption of Baby Doe on the internet.

9. Defendant Jennifer L. Wachowski is a Wisconsin citizen, resident of Waupaca County, Wisconsin, and over 19 years of age. Ms. Wachowski, through her blog "Musings of a Birthmom" and other conduits, has authored a number of posts and articles about K.G.S. and the contested adoption of Baby Doe on the internet.

10. Fictitious Parties A-Z, whether singular or plural, are those persons, enterprises, and/or entities (and their parents, subsidiaries, predecessors, successors, partners, members, shareholders, employees, agents and other persons acting for or on their behalf): (1) who themselves or through their agents defamed and/or invaded Plaintiffs' privacy; (2) who themselves or through their agents engaged, participated, benefitted from, and/or otherwise were directly or indirectly involved in disclosing confidential information alleged herein; and (3) who themselves or through their agents conspired with and/or aided and abetted Defendants or their agents to commit the underlying torts, all of

whose true names and legal identities are unknown to Plaintiffs at this time, but who will be added by amendment, individually and jointly, when ascertained, and are liable to Plaintiffs, as set forth in more detail below. Fictitious Defendants A-Z must be joined as parties in this action because, without them, complete relief cannot be afforded among those already parties; or Fictitious Defendants A-Z may be joined in this action because the relief sought by Plaintiffs against the Defendants is joint, several, or alternative with respect to or arising out of the same transaction, occurrence or series of transactions or occurrences and common questions of law or fact will arise in this action.

FACTS

I. BACKGROUND

11. In or around June of 2015, K.G.S. adopted Baby Doe.

12. Soon thereafter, K.R., Baby Doe's biological mother, contested said adoption.

II. DISCLOSURE OF THE CONTESTED ADOPTION PROCEEDINGS

13. Upon information and belief, Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, Jennifer L. Wachowski, and/or Fictitious Parties A-Z came to the realization that, pursuant to Alabama's Adoption Code, Ala. Code § 26-10A-1, *et seq.*, which is a version of the Uniform Adoption Code most states have

codified, K.G.S. lawfully adopted Baby Doe, and thus, K.R. and her supporters would likely not succeed in a court of law.

14. Correspondingly, Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, Jennifer L. Wachowski, and/or Fictitious Parties A-Z insidiously and wrongfully sought and/or conspired to create a sensationalized, salacious, and scandal-driven trial in the court *of public opinion* to pressure K.G.S. into relinquishing her custody of Baby Doe.

15. To that end, the Huffington Post, a prominent media outlet, and one of its contributors, Mirah Riben, who are both always ostensibly looking for a new story to captivate their worldwide readership and simultaneously derive substantial profits and notoriety, came into contact with K.R. and her supporters.

16. Ms. Riben, a well-known critic of the United States' adoption system, quickly ran with K.R.'s tale of events in a manner that combined her own biased agenda, the Huffington Post's finically [sic]-oriented goals, and Ms. McLeod, Ms. D'Arcy, Ms. Gelin, Ms. Wachowski, and/or Fictitious Parties A-Z's nefarious publicity-stunt strategy.

17. Indeed, on or around July 7, 2015, the Huffington Post published two articles written by Ms. Riben entitled "Wrongful Adoption: Return Baby [Doe], Part I and Part II." *See* Mirah Riben, *Wrongful Adoption, Return Baby [Doe], Part I and Part II*, Huffington Post, July 7, 2015, attached hereto as Exhibit "A."

18. Eager to use this story to bolster her reputation, gain notoriety, criticize the adoption system, and humiliate K.G.S. into rectifying a perceived wrong, Ms. Riben wrote – and the Huffington Post edited – the articles without conducting elementary journalistic due diligence.

19. A day after Ms. Riben's articles were published, in an effort to further publicize K.R.'s case and Ms. Riben's articles, Ms. D'Arcy, a popular blogger associated with Ms. Riben, created a page on Defendant Facebook's website (hereinafter, the "Facebook Page" or the "Page") entitled "Bring Baby [Doe] Home."

20. The Facebook Page attached Ms. Riben's articles, and, in plain violation of Alabama's Adoption Code and Alabama confidentiality laws, **likewise included K.G.S.'s full name and a number of unauthorized photographs of Baby Doe in prominent places throughout the Page.** From the outset, Ms. McLeod, Ms. Gelin, Ms. Wachowski, and/or Fictitious Parties A-Z were instrumental in publicizing the Page, its contents, and its message.

21. Moreover, Ms. Gelin and Ms. Wachowski, through their respective blogs (Saving Our Sisters and Musings of a Birthmom), various Facebook posts, and collaborations with media personality Amber Geislinger that rendered lengthy YouTube videos, further publicized the private, confidential adoption of Baby Doe.

22. Over a short period of time, due to Facebook and the Page's widespread popularity, and by and

through the willful and intentional actions of Ms. McLeod, Ms. Gelin, Ms. D'Arcy, Ms. Wachowski, and/or Fictitious Parties A-Z, K.G.S. was inundated with appallingly malicious and persistent cyber-bullying that continues to this day.

23. Facebook was quickly notified of the unlawful discourse the Page facilitated by K.G.S.'s counsel. In a letter dated July 28, 2015, K.G.S.'s attorney told Facebook that Alabama's Adoption Code prohibited the disclosure of any matters concerning an adoption, including parties' actual names, and therefore, the Page needed to be removed.

24. In response, Facebook removed the Page's cover photo, but refused to delete the page or otherwise prevent it from disseminating its harmful and false message.

25. To date, the Page has over 7,000 "likes" and is persistently updated with various posts, news articles, and YouTube videos at K.G.S.'s expense. In fact, several of the YouTube videos posted on the Page include Ms. McLeod, Ms. Gelin, and Ms. Wachowski, all of whom attended and/or participated in filming that took place in Jefferson County.

26. Ultimately, the Page, Ms. McLeod, Ms. D'Arcy, Ms. Gelin, and Ms. Wachowski have helped make K.G.S. the poster-child for "predatory" adoptions in the United States by, among other things, playing into existing societal prejudices against economic classism and America's adoption system, and further

perpetuating and expounding upon Ms. Riben's false, one-sided, and wholly misleading narrative.

27. As a result, the Page, Ms. McLeod, Ms. D'Arcy, Ms. Gelin, and Ms. Wachowski, in violation of the Uniform Adoption Code, Alabama confidentiality laws, Plaintiffs' right to privacy, and various duties owed to Plaintiffs, have caused Plaintiffs to suffer irreparable harm.

III. HARM RESULTING FROM DEFENDANTS' ACTS AND OMISSIONS

28. As noted above, not long after the Facebook Page was created, K.G.S. and Baby Doe were adversely affected in virtually every aspect of their lives.

29. The aforementioned cyber-bullying got to be so bad that K.G.S. had to deactivate all of her social media accounts, including her own Facebook page.

30. K.G.S. also began to receive, and continues to receive, hateful messages from random individuals and organizations inside and outside the State of Alabama via telephone, email, or regular mail.

31. At present, the hateful messages that K.G.S. and her family have received number in the hundreds.

32. Many of K.G.S.'s business associates, friends, and certain family members saw the articles, posts, and videos, and now view K.G.S. in a different light than before.

33. All of these consequences have, among other things, emotionally scarred K.G.S., cast her in a false light, interfered with her right to parent a newly adopted son, and invaded her and Baby Doe's privacy.

34. Without judicial intervention, K.G.S. and Baby Doe will continue to suffer irreparable harm.

CAUSES OF ACTION

COUNT I: NEGLIGENCE PER SE – VIOLATION OF CONFIDENTIALITY PROVISIONS OF ALABAMA'S ADOPTION CODE, ALA. CODE § 26-10A-1, *ET SEQ.*

35. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

36. The doctrine of negligence per se is based upon the principle that, when an act is required by an express provision of law, the legislature has adopted an absolute standard of care that replaces the common-law reasonably prudent person standard. *See Allen Trucking Co., Inc. v. Blakely Peanut Co.*, 340 So. 2d 452, 453 (Ala. Civ. App. 1976). Accordingly, anyone who violates that law with resultant injury to an individual to whom the law was intended to protect is liable regardless of the circumstances; proof of a violation of the law *is* proof of negligence. *Id.* (emphasis added).

37. Several provisions within Alabama's Adoption Code, Ala. Code § 26-10A-1, *et seq.*, explicitly or implicitly prohibit the public disclosure of matters

concerning adoptions. These provisions represent Alabama's and most other states' public policy of protecting parties to and subject of adoption proceedings. To illustrate, § 26-10A-31 generally demands confidentiality for all documents and hearings related to a particular adoption. *See* § 26-10A-31. Notably, for purposes of this case, § 26-10A-24(f) unequivocally provides that any references to the names of parties to a *contested* adoption proceeding "shall be by initial only."

38. Defendants, in direct violation of the Alabama Adoption Code, disclosed and/or permitted the disclosure of facts, names of parties, and other pieces of information related to a private, contested adoption.

39. Plaintiffs, as parties to the private, contested adoption, are precisely the individuals the legislature intended to protect when it enacted the Adoption Code's confidentiality provisions.

40. As a direct and proximate result of Defendants' breaches of said confidentiality provisions, Plaintiffs have suffered, and will continue to suffer, substantial damages.

COUNT II: INVASION OF PRIVACY – MISAPPROPRIATION

41. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

42. Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, and Jennifer L. Wachowski, without

K.G.S.'s consent, commercially utilized K.G.S.'s name, Baby Doe's name, and Baby Doe's photograph to humiliate, harass, and/or embarrass Plaintiffs.

43. Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, and Jennifer L. Wachowski profited from the unauthorized use of K.G.S.'s name, Baby Doe's name, and Baby Doe's likeness.

44. As a direct and proximate result of these Defendants' actions, Plaintiffs have suffered, and will continue to suffer, substantial damages.

COUNT III: INVASION OF PRIVACY – FALSE LIGHT

45. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

46. Alabama has long recognized that a wrongful intrusion into one's private activities constitutes the tort of invasion of privacy.

47. Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, and Jennifer L. Wachowski gave publicity to a matter concerning Plaintiffs, which placed them in a false and negative light in order to harass, humiliate, and/or intimidate Plaintiffs.

48. Defendants Kim McLeod, Renee L. Gelin, Claudia D'Arcy, and Jennifer L. Wachowski knew of and/or acted with reckless disregard as to the falsity of

the publicized matter and the false light in which Plaintiffs were placed.

49. As a direct and proximate result of these Defendants' actions, Plaintiffs have suffered, and will continue to suffer, substantial damages.

COUNT IV: OUTRAGE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

50. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

51. Defendants' actions were so outrageous and calculated, in that Defendants intended and plotted to inflict emotional distress or should have known that emotional distress was the likely result of their conduct.

52. Defendants' conduct was so outrageous in character and extreme in degree so as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society.

53. As a result of Defendants' conduct, K.G.S. was caused to suffer and continues to suffer severe emotional distress.

COUNT V: CIVIL CONSPIRACY

54. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

55. Defendants recklessly, willfully, and intentionally conspired with one another in callous disregard for Plaintiffs' rights and interests to accomplish the torts described herein. Furthermore, Defendants conspired to cast K.G.S. in a false light and publicize private confidential adoption information in order to harass, humiliate, and/or intimidate Plaintiffs.

56. In accordance with Defendants' scheme, and by entering into this conspiracy, Defendants have permitted, encouraged, and induced all of the wrongful and tortious acts discussed above.

57. Plaintiffs have suffered, and continue to suffer, severe, immediate and irreparable harm, damage, and injury due to the wrongful acts committed in the course of the conspiracy.

COUNT VI: NEGLIGENCE

58. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

59. Defendants owed Plaintiffs a duty to apprise themselves of the confidentiality laws related to adoptions.

60. Defendants breached their duties by failing to adhere to confidentiality laws regarding adoption and the disclosure thereof.

61. As a result of Defendants' breaches, Plaintiffs have suffered, and will continue to suffer, substantial damages.

COUNT VII: WANTONNESS

62. Plaintiffs adopt and re-allege all of the foregoing paragraphs of this Complaint as if fully set forth herein.

63. Defendants had a duty to adhere to the confidentiality provisions of the Alabama's Uniform Adoption Code.

64. Defendants breached their duty to the Plaintiffs and the general public by unlawfully mentioning and further disseminating the full name of a party to a private, contested adoption to the public.

65. Instead, Defendants wantonly failed to adhere to the Alabama and Uniform Adoption law of confidentiality in adoption cases.

66. As a result of the wanton actions or inactions of Defendants, Plaintiffs have suffered, and will continue to suffer, substantial damages.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Court enter a judgment in their favor and against Defendants as follows:

A. For actual damages, consequential damages, punitive and exemplary damages;

B. Disgorgement of any profits received due to Defendants' wrongful conduct;

C. For attorneys' fees, court costs and expenses; and

D. For such other and further relief sought above or to which Plaintiffs may show themselves justly entitled at law or in equity.

Respectfully submitted,

/s/ *Andrew P. Campbell*
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[Certificate Of Service Omitted]