

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

NORTH AMERICAN SOFTWARE, INC.,	:	APPEAL NO. C-100567 TRIAL NO. 10CV-05193
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
C. BILL ELLIOTT,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellant, North American Software, Inc. (“NAS”), appeals the judgment of the trial court dismissing its breach-of-contract and unjust-enrichment claims against defendant-appellee, C. Bill Elliott, for lack of personal jurisdiction over Elliott, a California resident.

NAS is an Ohio corporation based in Cincinnati. It develops and sells computer software to investment professionals. In 2010, NAS filed a complaint against Elliott alleging that, in 1996, Elliott had installed its software under the terms of a licensing agreement; that, in 2003, he had stopped paying for his use of the latest version of the software; and that, with the assistance of a disgruntled former NAS employee, Elliott had circumvented software safeguards and continued to use the software without payment in violation of the licensing agreement. NAS sought

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

monetary damages and injunctive relief. NAS has brought similar suits against a number of its former customers.<sup>2</sup>

Elliott filed a motion to dismiss NAS's claims on the basis that he did not have sufficient contacts with Ohio to be subjected to the jurisdiction of its courts.<sup>3</sup> In response, NAS filed an affidavit in which its president stated that Elliott had made payments for the software in Ohio, that Elliott had regularly contacted NAS's Cincinnati office for technical support and software upgrades, that Elliott and NAS had had 94 contacts by mail, email, or phone between 1996 and 2007, and that Elliott had once transmitted his client database to NAS for conversion. Without holding an evidentiary hearing, the trial court granted Elliott's motion to dismiss.

In two interrelated assignments of error, NAS now contends that the trial court erred in granting Elliott's motion to dismiss for lack of personal jurisdiction, and in improperly weighing the evidence submitted in support of jurisdiction. For the trial court to exercise personal jurisdiction over Elliott, NAS had the burden to demonstrate both (1) that Elliott was amenable to suit under Ohio's long-arm statute and the complementary civil rule,<sup>4</sup> and (2) that the exercise of jurisdiction over Elliott would comport with federal due-process requirements.<sup>5</sup> While NAS was entitled to have the factual allegations sustaining jurisdiction construed in its favor,<sup>6</sup> it nevertheless bore the burden of establishing the court's jurisdiction.<sup>7</sup> We review de novo the trial court's decision regarding personal jurisdiction.<sup>8</sup>

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<sup>2</sup> See, e.g., *N. Am. Software, Inc. v. Nearing* (Mar. 25, 2011), 1st Dist. No. C-100415, and *N. Am. Software, Inc. v. Burchieri* (Mar. 30, 2011), 1st Dist. No. C-100384.

<sup>3</sup> See Civ.R. 12(B)(2).

<sup>4</sup> See R.C. 2307.382 and Civ.R. 4.3.

<sup>5</sup> See *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶28; see, also, *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 1994-Ohio-504, 624 N.E.2d 1048.

<sup>6</sup> See *Kauffman Racing Equip.* at ¶27; see, also, *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 1994-Ohio-229, 638 N.E.2d 541; *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶11.

<sup>7</sup> See *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165.

<sup>8</sup> See *Kauffman Racing Equip.* at ¶26; see, also, *Greene v. Whiteside* at ¶11.

Both the long-arm statute and Civ.R. 4.3 provide for jurisdiction over a person “transacting any business in this state.”<sup>9</sup> The determination of what constitutes “transacting business” depends on the nature and the quality of the activity involved.<sup>10</sup>

Here, the trial court correctly concluded that Elliott had not transacted business in Ohio within the meaning of the long-arm provisions. NAS had solicited Elliott as a customer in Texas. Elliott had installed and used the software in California. He had never travelled to the NAS offices in Ohio and had no Ohio clients. There is no evidence of record that the parties had negotiated for or even discussed the terms of the licensing agreement at any point during their relationship. And NAS failed to demonstrate whether its contacts with Elliott over a period of 11 years were anything besides routine business correspondences or routine updating of software and data. With these facts construed in NAS’s favor, Elliott’s relationship with NAS was as the passive purchaser of its product.

Furthermore, in its complaint NAS did not plead a tort claim that could have permitted it to invoke Ohio’s jurisdiction over a nonresident who causes “tortious injury by an act or omission” in Ohio.<sup>11</sup> Even if the allegations in the complaint were construed as a tort claim for software piracy, those allegations would have involved a copyright violation that NAS could not have raised in state court.<sup>12</sup>

NAS also failed to demonstrate that Elliott, a passive consumer of its services, had sufficient contacts with Ohio to demonstrate that due process would be served by the court’s exercise of jurisdiction.<sup>13</sup> His “conduct and connection” with Ohio

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<sup>9</sup> R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1).

<sup>10</sup> See, e.g., *Ashton Park Apts., Ltd. v. Carlton-Naumann Constr., Inc.*, 6th Dist. No. L-08-1395, 2009-Ohio-6335, ¶15; see, also, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (W.D.Penn.1997), 952 F.Supp. 1119, 1123-1124.

<sup>11</sup> R.C. 2307.382(A)(4).

<sup>12</sup> See *State v. Boyd*, 1st Dist. No. C-090550, 2010-Ohio-4313, ¶7.

<sup>13</sup> See *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154.

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were not the type of activities “such that he should [have] reasonably anticipate[d] being haled into court” in Ohio.<sup>14</sup> The first assignment of error is overruled.

And we find no merit in NAS’s claim that the trial court improperly weighed the evidence submitted on the personal-jurisdiction issue. NAS simply failed to establish a prima facie case supporting jurisdiction. The second assignment of error is overruled

Therefore, we affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.**

To the Clerk:

Enter upon the Journal of the Court on June 17, 2011

per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>14</sup> *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 297, 100 S.Ct. 559.