

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27019

KUSTOM CYCLES, INC., d/b/a KLOCK WERKS

Plaintiff/Appellee,

vs.

CLINT BOWYER,

Defendant/Appellant.

Appeal from the Circuit Court
First Judicial Circuit
Davison County, South Dakota

The Honorable Patrick T. Smith, Presiding Judge

PRINCIPAL BRIEF OF APPELLANT CLINT BOWYER

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**Bowyer Petition for Discretionary Appeal from Circuit Court's Order Denying
Defendant's Motion to Dismiss for Lack of Personal Jurisdiction filed 3/6/14**

**Order Granting Petition for Allowance of
Appeal from Intermediate Order filed 4/4/14**

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PRELIMINARY STATEMENT

Defendant Clint Bowyer (“Bowyer”) seeks reversal of an order finding personal jurisdiction based solely on the in-state activities of Plaintiff Kustom Cycles, Inc. d/b/a Klockwerks, Inc. (“Klock”). The underlying action concerns an oral contract for customization by Klock of a motorcycle bought elsewhere by Bowyer. Klock claims to be unpaid, but Bowyer asserts that the agreed consideration was promotional and endorsement services performed by Bowyer.

The facts presented to the Circuit Court, the Hon. Patrick T. Smith presiding, demonstrated that (i) the oral contract at issue was initially conceived and negotiated outside South Dakota; (ii) Bowyer’s performance took place wholly outside South Dakota; (iii) Bowyer never entered South Dakota for any purpose related to the contract; and (iv) Klock brought the motorcycle into the forum from its point of purchase in Minnesota, presented it to Bowyer outside of the forum, returned to South Dakota to perform additional work, and then presented it again to Bowyer outside of the forum.

Judge Smith concluded that Bowyer could be haled into South Dakota based on actions that Klock took within the forum. This conclusion was contrary to law and unsupported by record evidence. Plainly, Klock’s acts cannot bootstrap jurisdiction over Bowyer. Bowyer had no contacts with South Dakota, apart from alleged text messages, emails, and phone calls, which are insufficient to establish jurisdiction. If upheld, Judge Smith’s novel approach would turn the personal jurisdiction analysis on its head by treating a resident party’s conduct as a proxy for

calculating the minimum contacts of its non-resident adversary. Bowyer requests the privilege of oral argument to address these issues.

STATEMENT REGARDING CITATION CONVENTIONS

Appellant Clint Bowyer adopts the following citation conventions: citations to the Hearing Transcript reproduced in the Appendix will be denoted “APP. ____ [HT ____].” Citations to exhibits that the parties presented to the Court to aid in its determination will be denoted “APP. ____ [“Ex. ____.”]”

JURISDICTIONAL STATEMENT

On February 27, 2014, Plaintiff filed Notice of Entry of Findings of Fact and Conclusions of Law and Order Denying Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction. On March 6, 2014, Bowyer timely filed Petition for Discretionary Appeal from the Circuit Court’s Order Denying Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction. On April 4, 2014, this Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order, and Bowyer ordered the transcript and filed his bond pursuant to Chapter 15-26A.

STATEMENT OF THE ISSUES

- I. Has Plaintiff met its burden in demonstrating that Bowyer had sufficient minimum contacts to satisfy “specific jurisdiction,” the only asserted basis of personal jurisdiction?**

The Circuit Court concluded that Bowyer had a substantial connection to South Dakota based on the customization work Klock performed here.

Authority: SDCL §15-7-2

Marschke v. Wratishaw, 2007 SD 125, 743 N.W.2d 402

Daktronics, Inc. v. LBW Tech Co., Inc., 2007 SD 80, 737 N.W.2d 413

Denver Truck and Trailer Sales, Inc. v. Design and Bldg. Servs., Inc.,
2002 SD 127, 653 N.W.2d 88

- II. Does the assertion of personal jurisdiction over Bowyer violate due process and offend traditional notions of fair play and substantial justice?**

The Circuit Court concluded that the assertion of jurisdiction over Bowyer did not violate his due process rights.

Authority: U.S. CONSTITUTION, AMEND. § XIV

Walden v. Fiore, 134 S.Ct. 1115 (2014)

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)

Hanson v. Denckla, 357 U.S. 235 (1958)

STATEMENT OF THE CASE

After Plaintiff had served the Summons and Complaint upon Bowyer, Bowyer moved to dismiss for lack of personal jurisdiction. The parties submitted briefing on the motion, and the Circuit Court held a hearing on November 26, 2013. The Circuit Court orally announced that it would deny the motion. Plaintiff filed its proposed Findings of Fact and Conclusions of Law, and Bowyer timely filed his Proposed Findings of Fact and Conclusions of Law along with Defendant's Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law. On January 14, 2014, the Circuit Court entered Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. On February 27, 2014, Plaintiff filed Notice of Entry of Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

On March 6, 2014, Bowyer timely filed Petition for Discretionary Appeal from the Circuit Court's Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. This Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order, and Bowyer ordered the transcript and filed his bond pursuant to Chapter 15-26A.

STATEMENT OF FACTS

A. Factual Background

Bowyer is a professional race car driver who races for Michael Waltrip Racing in NASCAR's Sprint Cup Series. APP. 28 (Bowyer Affidavit, at ¶ 2). Residing in North Carolina, Bowyer travels to several different states when competing in NASCAR events. *Id.* He has traveled to South Dakota to attend the Sturgis motorcycle rally on three occasions, but was never here as a result of this disputed transaction. *Id.*

Bowyer's first interaction with Brian Klock took place at a NASCAR race in Daytona, Florida, in 2008 when Bowyer was introduced to Klock. *Id.* at 29 (Bowyer Affidavit, at ¶ 3). He saw Klock again at a race that fall in Phoenix. *Id.* Bowyer there mentioned that he was considering buying a Harley-Davidson Screaming Eagle Ultra Classic for a new motorcycle. *Id.* Klock responded that he wanted to build Bowyer a bike themed after Bowyer's 1949 Mercury. *Id.* Klock suggested that Bowyer purchase a standard Harley-Davidson Electra Glide and Klock would modify it to make it look like the Mercury. *Id.* Klock proposed that the "price" would be Bowyer's services in certain promotional and endorsement pieces for Klock and his vendors and special NASCAR access for them. *Id.* at 29-30 (Bowyer Affidavit, at ¶¶ 3, 5).

Out of Klock's initial proposal grew the *quid pro quo* between the parties: in exchange for customization work on the bike, Bowyer would provide Klock certain promotional opportunities and accommodations directly related to NASCAR and the racing business. *Id.* at ¶¶ 3, 5. An individual named Brook Phillips had customized Bowyer's 1949 Mercury, which was to serve as the model for Klock's customization.

Id. at 31 (Bowyer Affidavit, at ¶7). Phillips also met Klock at Phoenix International Raceway and apparently emailed Klock photographs of the 1949 Mercury that Klock used during his customization work. *Id.*; *see also* APP. 47-48. Phillips did not act on Bowyer’s behalf or at his request in doing so. *Id.* at 31 (Bowyer Affidavit, at ¶7).

In furtherance of the agreement, Bowyer purchased a Harley-Davidson at a dealership in Mankato, Minnesota. *Id.* at 29 (Bowyer Affidavit, at ¶ 4). Klock picked up the motorcycle from the Minnesota dealership and began the process of “tricking it out” so it would resemble the Mercury. *Id.*¹ At one point Klock indicated that a painting vendor was not part of the promotional deal and needed to be paid \$5,000. *Id.* at 30 (Bowyer Affidavit, at ¶ 8). Bowyer complied. *Id.*

Klock delivered the cycle to Florida for inclusion in some of the promotional activities, then presented it to Bowyer in North Carolina. *Id.* at 33 (Klock Affidavit, ¶¶ 7-9). This last step would be the consummation of his performance by delivering the completed motorcycle. *Id.* The work was not deemed completed, however, and Klock returned to South Dakota to perform additional work. *Id.* Thereafter, he returned to North Carolina to present it to Bowyer and thereby completed his performance under the oral contract. *Id.*

¹ In Plaintiff’s discovery responses, it was suggested generally that Bowyer or his agents responded to the designs by phone, email, or text message, but Plaintiff did not produce any documentation or other evidence of any such communication or any details in response to a request for production. Regardless, the principal terms of the oral contract were conceived and negotiated in Phoenix.

For his part, Bowyer arranged for Klock and a number of his guests to attend a NASCAR race in Daytona and to receive special, behind-the-scenes access. *Id.* at 29-30 (Bowyer Affidavit, at ¶ 5). He took time from his racing schedule to meet with Klock and his guests personally at the track. *Id.* He also pulled strings with NASCAR and track officials to permit Klock to ride the motorcycle on the Daytona speedway and to use video from that experience for his publicity and promotional benefit. *Id.*

Bowyer also attended a four-hour photo shoot where he was photographed and videotaped along with the motorcycle, so that Klock could promote his relationship with Bowyer and his work on the motorcycle to maximum effect. *Id.* at 30 (Bowyer Affidavit, at ¶5). Bowyer then agreed to permit Klock to use his name, picture, and other intellectual property rights so the motorcycle could be featured on the cover of industry magazines including NASCAR Illustrated and American Bagger, as well as many high-traffic websites. *Id.* None of these activities took place in South Dakota. *Id.* at ¶ 6.

After delivering the now-completed bike to Bowyer in North Carolina, Klock then sent Bowyer a bill for services, despite the express oral agreement between the parties providing that Klock would perform the customization in consideration of Bowyer's promotional activities and the inside access he provided to Klock. *Id.* at ¶¶ 10-11. Bowyer declined to pay for services that ran contrary to the terms of the agreement, and Klock initiated this suit. *Id.*

B. The November 13 Hearing

At the hearing held on Bowyer's motion to dismiss, both sides submitted argument to the Court. Thereafter, the Court declared its intent to rule from the bench and offered the following analysis:

Although it is a complicated issue, I had the benefit of having some time and a lot of briefs, and I also had a recent jurisdictional case before me in this matter. So I'm pretty well versed in the law.

I don't think it's as easy a case as you think, Mr. Theeler. I don't think it's just a slam dunk, well, of course this is a South Dakota company so this is where jurisdiction is going to lie, but I do think that jurisdiction is appropriate in South Dakota and the reason I do so is because there's a substantial connection to our state.

Not only was there a contract which was negotiated at least in part in our state, but there was affirmative actions on the part of the defendant to have the contract fulfilled in South Dakota. He didn't just say I want you to do this for me, allegedly anyway, and I want you to do it obviously in your shop, and I will arrange for my material, my motorcycle to get from out of your state into your shop. I will give you authority to come get it, and on a second time it was sent back again. And I don't think there's any question that Mr. Bowyer was aware that he was sending his motorcycle into South Dakota to have the contract fulfilled. I think that is action directed at the forum and that is a purposeful availment to the laws of the state of South Dakota.

There is a substantial connection here. All the work was done here. It was negotiated, at least there's some allegations. And I can see that I have not seen a lot of what has been alleged in regards to the negotiating, but I don't think that's important because if it was just a question of emails and telephone calls, we wouldn't have jurisdiction anyway. I think the fact that there was some contacts, it would be naturally expected that those would be made to South Dakota because that's where the work is going to be done, that those coupled with the purposeful availment by sending the bike here, to me, is the difference

between *Marschke* and where we are now. And so it's based upon that that I deny the motion and I find that jurisdiction does rest here.

APP. 55-57 (HT 24:22-26:13). Thereafter, the parties each submitted proposed Findings of Fact and Conclusions of Law and Bowyer submitted Defendant's Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law. Judge Smith adopted Plaintiff's proposed findings and conclusions verbatim and entered the order denying Bowyer's motion.

STANDARD OF REVIEW

Bowyer's challenge to jurisdiction raises a legal question that this Court reviews *de novo*. *Daktronics, Inc. v. LBW Tech Co., Inc.*, 2007 SD 80, ¶2, 737 N.W.2d 413, 416. Klock, as the party asserting personal jurisdiction, has the burden of establishing a *prima facie* case, and "the burden does not shift to the party challenging jurisdiction." *Epps v. Stewart Info. Serv. Corp.*, 327 F.3d 642, 647 (8th Cir. 2003). The Circuit Court may consider affidavits, hear testimony, or hold a fact-finding hearing to determine the operative facts concerning personal jurisdiction. *See Daktronics, Inc. v. LBW Tech Co., Inc.*, 2007 SD 80, ¶3, 737 N.W.2d 413, 416; *See also Stevens v. Redwing*, 146 F.3d 538, 544 (8th Cir. 1998) (noting that "court may inquire, by affidavits or otherwise, into the facts as they exist" to determine whether personal jurisdiction exists).

ARGUMENT

Plaintiff's theory of specific jurisdiction rested on (1) phantom e-mails and text messages, along with alleged phone calls, that would not suffice to establish

jurisdiction even if they had been produced or substantiated;² (2) work that Plaintiff performed in the forum based on the agreement, not activities by Bowyer that were directed at the forum or that gave rise to the breach-of-contract cause of action; (3) Bowyer's past trips to Sturgis, unrelated to the contract or to Plaintiff; and (4) the passage of the motorcycle into and out of the forum.

The undisputed evidence reveals that Bowyer had no reasonable expectation that he might be haled into South Dakota. Indeed, he had no real expectation that he might be subject to a breach of contract action, as he performed all that he promised to perform – and did so at NASCAR events at a far remove from our state. What tangential contact, if any, Bowyer has had with South Dakota that relates to this cause of action does not suffice to constitute “minimal contacts,” the jurisdictional threshold. Plaintiff did not meet its burden, and the Circuit Court erred as a matter of law in concluding otherwise.

I. SOUTH DAKOTA LACKS JURISDICTION OVER BOWYER.

South Dakota's long-arm statute, set out in SDCL §15-7-2, is the basis upon which our courts may exercise personal jurisdiction over residents of other states. Because the long-arm statute is coextensive with constitutional limitations imposed by the Due Process Clause, the dispositive issue is “whether the proposed assertion of jurisdiction comports with federal due process requirements.” *Denver Truck and Trailer Sales, Inc. v. Design and Bldg. Servs., Inc.*, 2002 SD 127, ¶9, 653 N.W.2d 88, 91.

² The Circuit Court agreed with this position, stating: “if it was just a question of emails and telephone calls, we wouldn't have jurisdiction anyway.” APP. 57 (HT 26:5-6).

When evaluating personal jurisdiction, two concepts are in play – that of general jurisdiction and of specific jurisdiction. *Marschke*, 2007 SD 125, ¶15, 743 N.W.2d at 408. Klock has conceded that specific jurisdiction is the sole basis on which it might hale Bowyer into the forum. *See* HT 17:21-18:2. Specific jurisdiction exists if the cause of action arises from or is closely related to the defendant’s contacts with the state.

The inquiry of whether a forum state “may assert specific jurisdiction over a nonresident defendant focuses on the relations among the defendant, the forum, and the litigation.” *Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014) (citation and internal quotation marks omitted). “Some single or occasional acts related to the forum may not be sufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum.” *Denver Truck and Trailer Sales, Inc.* 2002 SD 127, ¶21, 653 N.W.2d at 93. Thus, specific jurisdiction “frequently depends on physical contacts with the forum” and does not merely arise because of communication with a party who resides there. *See Marschke*, 2007 SD 125, ¶22, 743 N.W.2d at 409-10 (quoting *General Electric Co. v. Deutz AG*, 270 F.3d 144 (3rd Cir. 2001)); *see also Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir. 2002) (contact by phone or mail is insufficient on its own to justify the assertion of personal jurisdiction).

Furthermore, “the existence of a contract with a nonresident party is not alone sufficient to establish minimum contacts.” *Marschke*, 2007 SD 125, ¶19, 743 N.W.2d at 409. At minimum, “the defendant’s activities must be *purposefully directed* toward the

forum for personal jurisdiction to attach.” *Frankenfeld v. Crompton Corp.*, 2005 SD 55, ¶11, 697 N.W.2d 378, 382 (emphasis in original). As the U.S. Supreme Court recently observed: “it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.” *Walden v. Fiore*, 134 S.Ct. 1115, 1126 (2014). “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.” *Id.* (emphasis supplied) (citation and internal quotation marks omitted).

The requirement of minimum contacts assures that the exercise of jurisdiction does not “offend traditional notions of fair play and substantial justice.” *Frankenfeld*, 2005 SD 55, ¶10, 697 N.W.2d at 382 (quotes omitted). Similarly, it prevents the non-resident defendant from being “haled into the forum solely as a result of random, fortuitous, or attenuated contacts.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

The South Dakota Supreme Court applies a three-part test to determine whether minimum contacts exist:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Marschke, 2007 SD 125, ¶15, 743 N.W.2d at 408. In considering the third prong, the South Dakota Supreme Court has advised: “[a]n important factor bearing upon reasonableness of asserting jurisdiction is to determine if defendant’s conduct and

connection with the forum state are such that he would have reasonably anticipated being brought into court here.” *Miller v. Weber*, 546 N.W.2d 865, 867 (S.D. 1996).

Applying these principles, the Circuit Court lacked personal jurisdiction over Bowyer.

A. Plaintiff failed to establish that Bowyer had sufficient contacts with South Dakota to justify the assertion of personal jurisdiction.

For all intents and purposes, Clint Bowyer is a virtual stranger to South Dakota. The attempt to assert jurisdiction over him is offensive to traditional notions of fair play and substantive justice, so as to violate due process. He has not purposefully availed himself of the forum state’s laws, nor has he undertaken any activities that can fairly be described as “directed at the forum state.” Finally, a defendant in his position could not have reasonably anticipated that he would be haled into this forum.

1. Bowyer did not purposefully avail himself of South Dakota’s forum, nor does the cause of action arise from any activities he directed at that forum.

No paper exchange ties Bowyer to South Dakota. To the extent an informal agreement exists, it was neither conceived nor executed in South Dakota. The preliminary conversations that set the terms of the exchange occurred at Daytona and again in Phoenix. The parties did not have any prior personal or business relationship, but had agreed to this one-time trade of customization services offered in exchange for access to NASCAR races and certain promotional benefits.

The actions Bowyer took in furtherance of the agreement – including the purchase of the motorcycle in Mankato, which Klock picked up and brought to South Dakota, and the series of benefits he later conferred upon Klock – occurred

out of state. Furthermore, Bowyer accepted the customized vehicle at his residence in North Carolina. At no point did Bowyer act within the state or direct activities to the state. In sum, Bowyer lacks sufficient contacts with South Dakota to justify personal jurisdiction.

This conclusion is confirmed by *Marschke v. Wratismaw*, in which this Court held that a Montana car dealer was not subject to personal jurisdiction after selling plaintiff a car in Montana that was delivered to South Dakota by a third-party. The defendant advertised the car in question on the Internet auction site, www.eBay.com. Plaintiff did not bid on the car, but instead called the defendant at his dealership in Montana. The parties communicated over the phone and through email about the terms of a proposed sale, consummating in plaintiff's purchase of the car. Thereafter, plaintiff arranged to have the car shipped to his residence in South Dakota. Upon arrival, plaintiff was unhappy with its condition and sued for breach of contract. The defendant moved to dismiss for lack of jurisdiction. The trial court granted that motion, which this Court affirmed.

This Court found that the contract alone was insufficient to constitute minimum contacts and noted that the parties did not form a long-term relationship, but had instead engaged in "a one-shot deal." *Id.* at ¶¶19, 24. The communications between the parties were not sufficient to establish minimum contacts. Further, the Court emphasized that the defendant "had no physical contact with South Dakota before, during or after the period relevant to the sale of" the car. *Id.* at ¶24.

Just like in *Marschke*, Bowyer had no physical contact with South Dakota related to the allegations and lacked a long-term relationship with Klock. Every aspect of Bowyer's performance under the contract – whether tied directly to NASCAR events or by offering his image and name to aid promotions – occurred elsewhere. Thus, Bowyer did not invoke the privileges and benefits of the forum by acting in the state, and none of Bowyer's actions were purposefully directed at the forum.

2. Bowyer's connection to South Dakota is attenuated, not "substantial," and he had no reasonable expectation of being haled into this forum.

Bowyer has visited South Dakota on three occasions to attend the Sturgis motorcycle rally, but that is his only tangible experience in the state. The only evidence Plaintiff produced in response to interrogatories were emails sent by Brook Phillips. Phillips – who met Klock in Phoenix – emailed pictures of the 1949 Mercury that Klock hoped to replicate because Phillips had built it. *See* APP. 47-48 (Plaintiff's Discovery Responses, Exhibits A and B).

E-mails Phillips sent to Klock cannot serve as the basis for establishing jurisdiction over Bowyer. "[T]he unilateral activity of a third party with some relationship to a nonresident defendant cannot suffice to establish personal jurisdiction." *Frankenfeld*, 2005 SD 55, ¶12, 697 N.W.2d at 382 (citing *Hanson v. Deckla*, 357 U.S. 235, 253 (1958)). Simply put, someone else's contacts are not Clint Bowyer's contacts.

Even if the communications were taken at face value, texts, emails, and phone calls have routinely been deemed insufficient to establish personal jurisdiction over a non-resident. *See, e.g., Viasystems, Inc. v. EBM-Pabst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 594 (8th Cir. 2011) (finding that “scattered emails, phone calls, and a wire-transfer of money” to the forum were insufficient contacts to support jurisdiction); *Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir. 2002) (contact by phone or mail is insufficient on its own to justify the assertion of personal jurisdiction); *Sybaritic, Inc. v. Interport Int’l, Inc.*, 957 F.2d 522, 525 (8th Cir. 1992) (finding that due process prevented jurisdiction where foreign actor’s contract with forum resident was “negotiated, drafted, presented and executed” out of the forum, even though foreign actor visited forum residence once and communicated with forum resident by telephone and mail).

Thus, the only alleged evidentiary connection tying Bowyer to the forum consists of e-mails, texts, and phone calls, none of which Plaintiff produced and most of which consist of communications with third parties whom Plaintiff simply allege were his agents. It is impossible to imagine how two emails from a third party or comments sent by text message on a design in progress could establish sufficient “minimum contacts” to justify jurisdiction. Even the Circuit Court agreed with this proposition. *See* APP. 57 (HT 26:5-6) (“if it was just a question of emails and telephone calls, we wouldn’t have jurisdiction anyway.”)

B. None of the three factors that govern the personal jurisdiction analysis support the assertion of jurisdiction over Bowyer.

Bowyer cannot be said to have “purposefully availed himself” of the forum. There is no evidence to suggest that the breach Plaintiff alleges “ar[ose] from Defendant’s activities directed at the forum state.” The act of entering into a contract with a South Dakota business does not mean that a non-resident purposefully availed himself of the South Dakota forum. That is one of the principal lessons to be drawn from *Marschke*, which held that “the existence of a contract with a nonresident party is not alone sufficient to establish minimum contacts.” *Marschke*, 2007 SD 125, ¶19, 743 N.W.2d at 409. Finally, Bowyer has, at best, an attenuated connection with South Dakota that does not justify subjecting him to jurisdiction within the forum.

This Court’s analysis in *Daktronics* – on which Plaintiff relied below – does not say otherwise. *Daktronics* involved a three-year contract under which the Defendant would serve as a consultant to help exploit business opportunities in China. The contract “contemplated continuous contacts between [Defendant’s CEO] and Daktronics.” 2007 SD 80, ¶14, 737 N.W.2d at 419.³ This Court observed that “even a single act can support jurisdiction if it creates a substantial connection with the forum,” *Daktronics*, 2007 SD 80, ¶14, 737 N.W.2d 413, but the facts justified the

³ By contrast, the *Marschke* court emphasized that the parties’ relationship was a “one-shot deal,” as is the case here with Plaintiff and Bowyer. Apart from the one-time exchange of customization for access to NASCAR races and certain promotional benefits, Bowyer and Plaintiff had no prior personal or business relationship.

conclusion that such a connection was created. Among other things, this Court found that:

(1) [Defendant] Tang telephoned, e-mailed and faxed Daktronics executives in South Dakota; (2) she visited Daktronics' headquarters in South Dakota at the expense of Daktronics; (3) while in South Dakota, Tang and Daktronics discussed a potential business relationship; (4) after her visit, Tang sent e-mails to and telephoned South Dakota; (5) Tang and Daktronics entered into a three-year consulting agreement, partially executed in South Dakota; (6) in accordance with the agreement, Tang sent status reports and reimbursement requests to South Dakota; and (7) Tang received payment for her services and reimbursement for her expenses from South Dakota.

Id. at ¶9. This analysis is consistent with cases in other jurisdictions addressing personal jurisdiction in the context of a breach-of-contract lawsuit, which look to acts within the forum by the non-resident as a necessary condition of jurisdiction.⁴

What proved sufficient to establish minimum contacts in *Daktronics* is entirely absent here. Unlike the Defendant in *Daktronics*, the contractual obligation was not incurred in South Dakota, nor was it conceived or agreed to here. Bowyer had no physical contact with South Dakota that related to the motorcycle customization that gives rise to Plaintiff's claim. Plaintiff, not Bowyer, acted within the forum pursuant

⁴ Compare, e.g., *Alaska Telecom v. Schafer*, 888 P.2d 1296 (Ala. 1995) (finding that minimum contacts existed where the Defendant, in addition to forming a contract with an Alaskan, solicited and negotiated the contract with the Alaskan entity, executed the contract in Alaska, performed a significant portion of his services in Alaska, mailed his invoices to Alaska, and was paid by checks drawn on an Alaskan bank) with *Buxton v. Wyland Galleries of Hawaii*, 657 N.E.2d 708 (Ill.App. 4th 1995) (finding minimum contacts not present in breach-of-contract action where Hawaii seller shipped painting purchased in Hawaii to residence of Illinois buyer and painting destroyed in fire en route and emphasizing single, isolated transaction that grew out of negotiations and agreement that took place outside the forum). See also *infra Lakeside Bridge & Steel Co. v. Mountain State Const. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979).

to the contract. Every aspect of Bowyer's performance – i.e., the consideration that he agreed to exchange for the work that Plaintiff agreed to perform – occurred outside of the forum. In evaluating the events that relate to the cause of action and Plaintiff's allegations in support thereof, Bowyer's connection to the forum is tangential, at best.

So, on what factor did the Circuit Court hang its conclusion that Bowyer was subject to personal jurisdiction in South Dakota? Bowyer was subject to jurisdiction, according to the Circuit Court, because Klock performed his part of the *quid pro quo* here in South Dakota. It adapted this reasoning, even though the contract was not fulfilled until Klock presented the completed motorcycle to Bowyer in North Carolina.

To trigger jurisdiction, “the defendant’s activities must be *purposefully directed* toward the forum for personal jurisdiction to attach.” *Frankenfeld*, 2005 SD 55, ¶11, 697 N.W.2d at 382. Here, Bowyer’s connection to South Dakota arises “solely as a result of random, fortuitous, or attenuated contacts.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Thus, it was no more a matter of jurisdictional happenstance that there was *any* contact with the forum state.

It is undisputed that all such contact with the forum came on Plaintiff's side of the ledger and was part of Plaintiff's performance under the contract that Plaintiff alleged was breached. Nonetheless, the Circuit Court concluded that personal jurisdiction existed over Bowyer on the basis of Plaintiff's conduct within the forum. As will be shown, the Circuit Court was mistaken.

II. PERSONAL JURISDICTION OVER BOWYER CANNOT DERIVE FROM PLAINTIFF'S CONDUCT WITHIN THE FORUM – THE CIRCUIT COURT'S CONCLUSION TO THE CONTRARY VIOLATES DUE PROCESS.

The Circuit Court, though acknowledging that the Motion presented a close call, concluded that personal jurisdiction existed. The Court appears to have been swayed by evidence that traced the movement of the motorcycle in and out of the forum. *See* FF, ¶¶21-22. The Circuit Court found that “Bowyer took affirmative actions to have the customization of his property, to wit, the Harley Davison [sic], performed in South Dakota.” *Id.* at ¶20. But Bowyer did not take any such “affirmative action” – Klock did. All of Bowyer’s performance took place elsewhere.

Taking the allegations as true, Plaintiff brought the motorcycle into the forum from Minnesota, performed initial customization work here, and presented it to Bowyer outside the forum in order to consummate his performance. But, because more work remained to be done, Klock returned the motorcycle to South Dakota to complete customization work, did so, and then returned it to Bowyer outside the forum a second time.

Plaintiff’s actions are not a means by which to bootstrap personal jurisdiction over Defendant. To the contrary, “it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.” *Walden v. Fiore*, 134 S.Ct. 1115, 1126 (2014); *see also Hanson v. Denckla*, 357 U.S. at 353 (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”).

Klock's actions are not a proxy for Bowyer for purposes of the personal jurisdiction analysis. There is no such thing as vicarious jurisdiction over a non-resident defendant based on the resident's performance in the forum state.

Accordingly, Klock's actions of taking the motorcycle into South Dakota from Minnesota or taking it back from North Carolina to South Dakota cannot furnish a basis to assert personal jurisdiction over Bowyer.

This Court has never held that the actions by a resident Plaintiff pursuant to a contract within the forum can furnish a basis to find that the non-resident Defendant has availed himself of jurisdiction within the forum. Other courts have long since rejected this proposition. *See, e.g., Lakeside Bridge & Steel Co. v. Mountain State Const. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979) (“The principal contact relied upon here as a basis for jurisdiction is performance of contractual obligations by the plaintiff, not the defendant, in the forum state. The First, Seventh, and Tenth Circuits have held that this is not sufficient, by itself, to confer jurisdiction over an out-of-state defendant, at least when the contract does not require the plaintiff to perform in the forum state.”).

Furthermore, the U.S. Supreme Court once again rejected the bootstrap theory of personal jurisdiction in an opinion issued earlier this year:

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 Due process requires that a defendant be haled into 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.

Walden, 134 S. Ct. at 1122, 1123 (second sentence quoting *Burger King*, 471 U.S. at 475). Here, the Circuit Court urges the opposite proposition – that Klock’s performance in South Dakota suffices to establish that Bowyer has a substantial connection with the forum.

The Circuit Court reached this conclusion in the face of evidence affirmatively showing that Bowyer was a virtual stranger to South Dakota and that the contract was conceived, negotiated, and consummated elsewhere. In the final analysis, if the Circuit Court’s determination is upheld, Bowyer would be haled into the forum because Kustom Cycles performed its work here. This lax jurisdictional analysis foreshadows a dangerous retreat from foundational due process principles that are intended to drive the personal jurisdiction analysis, not be casualties of it. Respectfully, the Circuit Court’s reasoning is unpersuasive and does not warrant the strained conclusion that it rendered.

The Court’s also reasoning undermines the constitutional touchstone of due process. “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.” *Walden*, 131 S. Ct. at 1122. Restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.” *Hanson v. Denckla*, 357 U.S. at 251. Those limitations protect individual liberty and reflect the constitutional design at the heart of our federalist system – they cannot be so easily circumvented.

CONCLUSION

There is no lawfully valid basis upon which South Dakota may assert personal jurisdiction over Clint Bowyer in this breach-of-contract action. The Order denying Bowyer’s Motion to Dismiss should be reversed and remanded with instructions to dismiss the Complaint for lack of personal jurisdiction.

Date: June 11, 2014.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of being heard on these issues at oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant’s Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in

13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 5,216 words.

/s/ Alex M. Hagen
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Principal Brief, with attached Appendix, was sent by e-mail for electronic filing to:

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all on June 11, 2014.

/s/ Alex M. Hagen
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27019

KUSTOM CYCLES, INC., d/b/a KLOCK WERKS

Plaintiff/Appellee,

vs.

CLINT BOWYER,

Defendant/Appellant.

Appeal from the Circuit Court
First Judicial Circuit
Davison County, South Dakota

The Honorable Patrick T. Smith, Presiding Judge

**BRIEF OF APPELLEE KUSTOM CYCLES, INC.,
d/b/a KLOCK WERKS**

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PRELIMINARY STATEMENT

Kustom Cycles, Inc. d/b/a Klock Werks (“Klock”) seeks an affirmation of an Order entered by the Circuit Court ruling that Defendant Clint Bowyer (“Bowyer”) is subject to the personal jurisdiction of the South Dakota Court based on his purposeful availment of the South Dakota forum, his retention of services to be performed within the South Dakota forum and his request on two separate occasions that his property be transported into the South Dakota forum for the express purpose of performing the contract at issue.

The facts presented to the Circuit Court, the Honorable Patrick T. Smith presiding, demonstrated that (1) the contract at issue was negotiated partially within the South Dakota forum, (2) Bowyer took affirmative actions to procure services within the South Dakota forum, (3) after purchasing certain property, Bowyer arranged for such property to be transported into the South Dakota forum for the performance of the contract at issue, and (4) on a second occasion Bowyer again requested his property be transported into the South Dakota forum.

Judge Smith ruled that Bowyer purposefully availed himself of the privilege of acting in South Dakota and invoked the benefits and protections of its laws, that the action at issue arose from the activities of Bowyer directed at the South Dakota forum and that the acts of Bowyer have a substantial connection with South Dakota such as to make the exercise of South Dakota jurisdiction over Bowyer reasonable. This ruling was well supported by existing case law and prior decisions of the South Dakota Supreme Court.

STATEMENT REGARDING CITATION CONVENTIONS

Citations to the Circuit Court's Findings of Fact reproduced in the Appendix hereto will be cited as "APP. ____ (FF ____)." Citations to the hearing transcript reproduced in the Appendix hereto will be cited as "APP. ____ (HT ____)." The citations to the affidavit of Brian Klock reproduced in the Appendix hereto will be cited as "APP. ____ (Klock Aff. ____)." Citations to the affidavit of Clint Bowyer reproduced in the Appendix hereto will be cited as "APP. __ (Bowyer Aff. ____)." Citations to the Principal Brief of Appellant Clint Bowyer will be cited as "Bowyer Brief ____."

JURISDICTIONAL STATEMENT

On February 27, 2014, Plaintiff filed Notice of Entry of Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. On March 6, 2014, Bowyer filed a Petition for Discretionary Appeal from the Circuit Court's Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. On April 4, 2014, this Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order.

STATEMENT OF THE ISSUES

- I. Given the fact that the contract at issue was negotiated partially in South Dakota, that the substance of the contract at issue was services to be performed within South Dakota and that on two separate occasions, Defendant arranged for his property to be transported into South Dakota for the purposes of performing the contract, has Plaintiff met its burden in demonstrating that sufficient minimum contacts exist for the exercise of personal jurisdiction?

Based on the facts presented, the Circuit Court concluded that personal

jurisdiction exists for Defendant Clint Bowyer.

Authority:

SDCL §15-7-2

Daktronics, Inc. v. LBW Tech Co., Inc., 2007 SD 80, 737 N.W.2d 413

Marschke v. Wratishaw, 2007 SD 125, 743 N.W.2d 402

Guthmiller v. Deloitte & Touche, LLP, 2005 SD 77, 699 N.W.2d 493

- II. Given that Bowyer directed communications at the South Dakota forum, procured services to be provided within South Dakota and arranged for the transportation of his property into South Dakota on two separate occasions, does the assertion of personal jurisdiction over Bowyer violate due process and offend traditional notions of fair play and substantial justice?

The Circuit Court concluded that the assertion of personal jurisdiction over Bowyer did not violate his due process rights.

Authority:

U.S. CONSTITUTION, AMEND. § XIV

Walden v. Fiore, 134 S.Ct. 1115 (2014)

Borger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)

Hanson v. Denckla, 357 U.S. 235 (1958)

STATEMENT OF THE CASE

After Plaintiff served the Summons and Complaint upon Bowyer, Bowyer moved to dismiss for lack of personal jurisdiction pursuant to SDCL 15–6–12(b)(2). The parties submitted briefs on the motion, and the Circuit Court held a hearing on November 26, 2013. The Circuit Court denied the motion. Plaintiff filed its proposed

Findings of Fact and Conclusions of Law, and Bowyer filed his Proposed Findings of Fact and Conclusions of Law along with Defendant's Response to Plaintiffs Proposed Findings of Fact and Conclusions of Law. On January 14, 2014, the Circuit Court entered Findings of Fact and Conclusions of Law and an Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. On February 27, 2014, Plaintiff filed Notice of Entry of Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

On March 6, 2014, Bowyer filed a Petition for Discretionary Appeal from the Circuit Court's Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. This Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order.

STATEMENT OF FACTS

Kustom Cycles, Inc. d/b/a Klock Werks ("Klock Werks") is a South Dakota corporation which specializes in the designing of motorcycle parts and the customization of motorcycles. Clint Bowyer ("Bowyer") is a professional race car driver and resident of North Carolina.

On or about November 9, 2008, Brian Klock ("Klock") met with Casey Bowyer, the brother of Bowyer, Bowyer himself and Brook Phillips, President of Total Performance, Inc. at a NASCAR track in Phoenix, Arizona. APP. 32 (Klock Aff. ¶ 2). At that time, Bowyer requested that Klock Werks customize a motorcycle for him to match an existing Mercury automobile previously designed and customized by Brook Phillips of Total Performance, Inc. (the "Mercury"). *Id.*

A few days later, for the purposes of facilitating the customization of a motorcycle, Brook Phillips of Total Performance, Inc. e-mailed the Plaintiff at its location in Mitchell, South Dakota to provide several images of the Mercury previously customized for Bowyer by his company for the express purpose of similarly customizing Bowyer's motorcycle. *Id.* (Klock Aff. ¶ 3).

Thereafter, Bowyer purchased a 2009 Harley Davidson FLHTCI Classic from the Harley Davidson dealership in Mankato, Minnesota. Bowyer then requested via phone call that Klock Werks travel to Mankato, Minnesota for the purpose of picking up said motorcycle and transporting it back to Mitchell, South Dakota for customization by Klock Werks. Klock Werks then traveled to Mankato, Minnesota, picked up the motorcycle owned by Bowyer at the Harley Davidson dealership and transported it back to Mitchell, South Dakota as requested. *Id.* (Klock Aff. ¶ 4).

A few days later, Brook Phillips again e-mailed the Plaintiff at its location in Mitchell, South Dakota to provide several images of the Mercury for the purpose of rendering designs for the customization of Bowyer's motorcycle to match. APP. 33 (Klock Aff. ¶ 5). Based on these images, Klock Werks provided to Bowyer via e-mail several designs and renderings of proposed customizations for approval. *Id.* (Klock Aff. ¶ 6). Bowyer approved these renderings via a combination of calls and text messages to Mitchell, South Dakota. *Id.* Based on these approvals, Klock Werks proceeded to complete the agreed-upon customizations in a timely and workmanlike manner. *Id.* (Klock Aff. ¶ 7).

During February of 2009, at the request of Bowyer, Klock Werks delivered the customized motorcycle to Daytona, Florida. *Id.* Klock Werks then transported the bike from Daytona, Florida to Richard Childress Racing in Welcome, North Carolina. *Id.* While

there, Bowyer test drove the customized motorcycle and requested that Klock Werks transport the motorcycle back to Mitchell, South Dakota to make final adjustments and minor alterations in addition to the customizations previously provided. *Id.* (Klock Aff. ¶ 8).¹ At the request of Bowyer, Klock Werks transported the motorcycle back to Mitchell, South Dakota a second time and completed the requested work over the following weeks in a workmanlike manner. *Id.* (Klock Aff. ¶ 9). While Klock Werks was performing these final adjustments, Casey Bowyer, the brother and agent of Defendant Clint Bowyer, sent an e-mail to the corporate office of Klock Werks in Mitchell, South Dakota, and therein requested photos of the customized motorcycle and the work being performed thereon. *Id.* (Klock Aff. ¶ 10).

Shortly thereafter the motorcycle was again delivered, this time directly to Richard Childress Racing in Welcome, North Carolina. *Id.* (Klock Aff. ¶ 11). Thereafter, a dispute over the bill arose and the parties were unable to resolve the issue. *Id.* (Klock Aff. ¶ 12).

At the hearing held on Bowyer's motion to dismiss, both sides submitted argument to the Court. Thereafter, the Court denied Bowyer's motion and found that

¹ In Defendant's Petition for Discretionary Appeal with this Court, Defendant, for the first time, asserted that Klock chose to bring the motorcycle back to South Dakota rather than doing so at the request of Bowyer. No affidavit, testimony or other evidence presented to the Circuit Court supports this version of events. Defendant, in his Principal Brief, now indicates "the work was not deemed completed, however, and Klock returned to South Dakota to perform additional work." Bowyer Brief at 6. The only evidence presented to the Circuit Court on the issue was the Affidavit of Brian Klock, which indicated, "[o]n or about February 17, 2009, Defendant test rode the customized motorcycle and requested that Plaintiff transport it back to Mitchell, South Dakota for final adjustments and alterations," and "[o]n or about February 18, 2009, at the request of Defendant, Plaintiff transported the customized motorcycle back to Mitchell, South Dakota and completed such requested alterations and adjustments over the following weeks in a workmanlike manner." APP. 33 (Klock Aff. ¶¶ 8,9).

jurisdiction did exist.

STANDARD OF REVIEW

The issues presented in this appeal raise questions of law which this Court reviews de novo. *Daktronics, Inc. v. LBW Tech Co., Inc.*, 2007 SD 80, ¶2, 737 N.W.2d 413, 416.

A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. “Our standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment—is the pleader entitled to judgment as a matter of law?” Thus, all reasonable inferences of fact must be drawn in favor of the non-moving party and we give no deference to the trial court's conclusions of law.

Guthmiller v. Deloitte & Touche, LLP, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496

(quoting *Vitek v. Bon Homme County Bd. of Com'rs*, 2002 SD 100, ¶ 7, 650 N.W.2d 513, 516).

ARGUMENT

I. JURISDICTION OVER BOWYER EXISTS IN SOUTH DAKOTA.

From inception of the contract, through negotiation, performance and completion, Bowyer personally, and via a number of agents, purposely and frequently availed himself of the privilege of acting in South Dakota. Not only was Bowyer's motorcycle transported into the state at his direct request on two occasions, but Bowyer entered into a contract to procure services to be provided in South Dakota. As such, Bowyer is subject to the jurisdiction of this Court.

A. Plaintiff has established that Bowyer had sufficient contacts with South Dakota to justify the assertion of personal jurisdiction.

“Construing the United States Supreme Court’s precedent regarding federal due process requirements [the South Dakota Supreme Court has] established a three-step test to determine whether minimum contacts exist and due process is satisfied.” *Daktronics, Inc. v. LBW Tech. Co., Inc. and Ling Tang*, 2007 SD 80, ¶6, 737 N.W.2d 413, 417.

First, the Defendant must purposefully avail himself the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from Defendant’s activities directed at the forum state. Finally, the acts of Defendant must have substantial connection with the forum state to make the exercise of jurisdiction over Defendant a reasonable one.

Id. Bowyer has not only purposefully availed himself of the privilege of acting in South Dakota, this action has arisen from those activities directed at South Dakota and also have a substantial connection with South Dakota such as to make the exercise of South Dakota jurisdiction over Bowyer reasonable.

1. Bowyer purposefully availed himself of the South Dakota forum.

This Court has held “where individuals purposefully derive benefit from their interstate activities. It may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; the due process clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” *Daktronics*, 2007 SD 80 at ¶13, 737 N.W.2d at 418 (internal citations and quotations omitted). While the United States Supreme Court has stated that an “individual’s contract with an out-of-state party alone cannot establish sufficient minimum contacts in the other party’s home forum, the Court also recognized that even a single act can support jurisdiction if it creates a substantial connection with the

forum.” *Daktronics*, 2007 SD 80 at ¶14, 737 N.W.2d at 419 (internal citations and quotations omitted).

Here, although some contact took place outside of South Dakota, numerous communications of Bowyer and his various agents were directed at South Dakota. Further, Bowyer specifically requested that his property, to-wit, the Harley Davidson Motorcycle, be transported into South Dakota to be customized. During the course of said customizations, a number of communications and negotiations regarding the details of the customizations were directed at South Dakota. Following the original delivery of the motorcycle to Daytona, Florida, Bowyer specifically requested that certain alterations and modifications be made and that the motorcycle be transported again into South Dakota for the purpose of accomplishing these modifications.

In support of his argument, Bowyer relies on *Marschke v. Wratishaw*, 2007 SD 125, 743 N.W.2d 402. However, the current case is distinguishable from *Marschke*. In *Marschke*, the Plaintiff, a South Dakota resident, located a car advertised on the internet auction site E-bay and called the seller, a Montana car dealer, via a 1-800 number posted on the website. *Marschke*, 2007 SD 125 at ¶3, 743 N.W.2d at 404. The parties negotiated a deal via telephone and e-mail which resulted in the South Dakota Plaintiff purchasing the car in Montana. *Marschke*, 2007 SD 125 at ¶4, 743 N.W.2d at 404. The South Dakota Plaintiff then personally arranged for a motor carrier to transport the car to Billings before arranging for his employer to transport the vehicle back to South Dakota *Marschke*, 2007 SD 125 at ¶5, 743 N.W.2d at 404. Upon receiving it, the South Dakota Plaintiff was unhappy with its condition and filed a suit for breach of contract *Marschke*, 2007 SD 125 at ¶6, 743 N.W.2d at 404–05. The Court found that jurisdiction did not exist over the

Montana car dealer due in large part, as Defendant cites in his Brief, to the fact that Defendant “had no physical contact with South Dakota before, during or after the period relevant to the sale of” the car. *Marschke*, 2007 SD 125 at ¶22, 743 N.W.2d at 410; Defendant’s Brief at 9–10.

Defendant contends that Bowyer also had no physical contact with South Dakota in the current case. This is simply not true. Not only once, but twice, Bowyer arranged for the transportation of his physical property, i.e. his motorcycle, into South Dakota. In *Marschke*, the Plaintiff took ownership of the car in Montana, and then arranged for it to be transported to South Dakota. This is not analogous to what occurred here. Here, Bowyer purchased a motorcycle in Minnesota. He then requested that Klock Werks transport his motorcycle to South Dakota to be customized. Upon delivering Bowyer’s motorcycle to Florida and then to North Carolina, Bowyer again requested that his motorcycle be transported to South Dakota for further modifications.

The current case is less analogous to *Marschke* than it is to another recent case: *Daktronics, Inc. v. LBW Tech Co., Inc. and Ling Tang*, 2007 SD 80, 737 N.W.2d 413. In *Daktronics*, the Plaintiff, Daktronics, a South Dakota corporation, entered into a contract with a Nevada Corporation, LBW Tech Co. and its president Ling Tang, a California resident, for LBW Tech Co. and Tang to secure contracts for Daktronics in China. *Daktronics*, 2007 SD 80 at ¶1, 737 N.W.2d at 415. Tang visited South Dakota on only one occasion and the parties’ agreement was reached via e-mail, telephone and facsimile, yet the South Dakota Supreme Court held that the requirements of due process were satisfied and that personal jurisdiction over the defendant did exist. *Daktronics*, 2007 SD 80 at ¶¶1, 9, 18, 737 N.W.2d 415, 417, 420.

A crucial factor which closely ties the transaction here to the South Dakota forum is the place of performance of the contract. In *Marschke*, the car was purchased and transaction completed in Montana. *Marschke*, 2007 SD 125 at ¶¶4–5, 743 N.W.2d at 404. As such, the contract between the parties was executed (performed) completely out-of-state. Even in *Daktronics*, where jurisdiction was held to exist, the defendant entered into an agreement to act as consultant for Daktronics in China. *Daktronics*, 2007 SD at 80 ¶1, 737 N.W.2d at 415. As such, the contract contemplated performance outside the forum, but jurisdiction was held to exist. Here, the contract was for the customization of the Defendant’s motorcycle, an act which occurred almost exclusively *within* the forum at Plaintiff’s facility in Mitchell, South Dakota.

In addition, the type of contract at issue here provides another parallel to *Daktronics* and distinguishes the facts before this Court from those in *Marschke*. The contract at issue in *Marschke* provided for the sale of goods, a contract for the purchase of a car. This sale-of-goods contract was much more likely to result in a “one-shot deal” as such contracts do not create a continuing connection to the forum as the contract is performed. The sale-of-goods contract was performed by both parties nearly instantaneously at the moment of delivery and payment. As such, the connection to the forum is less substantial. Here, as in *Daktronics*, the contract is one for services: the customization of a motorcycle owned by Bowyer. A services contract contemplates a continued connection between the out-of-state party and the forum as the requested services are completed and the contract is performed, especially if the requested services are performed within the forum. While purchasing goods in a “one-shot deal” may not constitute purposeful availment, requesting the performance of services to be provided

within the forum gives rise to a more substantial connection with the forum and, therefore, also tends to indicate purposeful availment.

In a footnote to his Principal Brief, Defendant references certain persuasive authorities including *Alaska Telecom v. Schafer*, 888 P.2d 1296 (Ala. 1995), *Buxton v. Wyland Galleries of Hawaii*, 657 N.E.2d 708 (Ill. App 4th 1995) and *Lakeside Bridge & Steele Co. v. Mountain State Const. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979). Bowyer Brief p. 18, n.4. It should be noted that in each of these cases involving a contract for services, the courts found adequate minimum contacts existed to exercise personal jurisdiction. Minimum contacts were only found lacking in the cases involving contracts for the sale of goods.

Defendant also cites a number of 8th Circuit Court of Appeals decisions, including *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589 (8th Cir. 2011), *Porter v. Berall*, 292 F.3d 1073 (8th Cir. 2002) and *Sybaritic, Inc. v. Interport Intern., Inc.*, 957 F.2d 522 (8th Cir. 1992) which stand for the proposition that communications alone are not adequate to establish minimum contacts. Bowyer Brief at 16. It should be noted that none of these cases involved a contract for services to be performed within the forum and in none of these cases did the Defendants arrange for their property to be transported into the forum on multiple occasions. These cases are easily distinguishable from the facts before this Court.

Given these facts and established law, the Defendant has purposefully availed himself of the privilege of acting in South Dakota.

2. This action arises from the activities the Defendant directed at the forum.

Here, the cause of action, breach of contract, is directly related to the activities of Defendant in South Dakota. As evidenced by the e-mails and Affidavit of Brian Klock, the contract was negotiated in part in South Dakota and performed almost completely in South Dakota. The entry of Defendant's motorcycle into the forum not once but twice was for the purpose of completing the contractual agreement between the parties; therefore, the second prong of the due process test is satisfied.

3. The Exercise of Jurisdiction over Defendant in South Dakota is Reasonable.

Given the contact cited above and the physical presence of both Defendant and his property in South Dakota on numerous occasions, the Defendant has had a substantial connection with South Dakota adequate to make the exercise of jurisdiction over the Defendant reasonable. The South Dakota Supreme Court has held that in making this determination, the Court must consider the "burden on the Defendant, the interest of the forum state and the Plaintiff's interest in obtaining relief and the interests of other states in securing the most efficient resolution of controversies." *Daktronics*, 2007 SD 80 at ¶17, 737 N.W.2d at 419–20 (internal citations and quotations omitted). The United States Supreme Court has held, and the South Dakota Supreme Court has cited, that because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.*

Here, Bowyer engaged in economic activity in South Dakota by requesting that his motorcycle be transported into the state for the purpose of customization. Via the use of e-mail, telephone and text message, Bowyer communicated throughout the process of customization with Klock Werks in South Dakota without difficulty. Upon delivery of the motorcycle to Florida, he requested it be transported back to South Dakota for further modifications, thereby demonstrating traveling to and from South Dakota and communicating with various parties here on a routine basis is not overly burdensome.

II. THE EXERCISE OF PERSONAL JURISDICTION UNDER THESE FACTS DOES NOT VIOLATE DUE PROCESS.

Under South Dakota law, the question of whether personal jurisdiction exists and the question of whether constitutional due process is satisfied are one and the same.

The determination of whether the Court has personal jurisdiction over a defendant is normally a two-step analysis. First, the applicable state long-arm statute, here SDCL § 15-7-2, must be satisfied and second, the Court's exercise of jurisdiction must comport with due process. In South Dakota, the analysis collapses into one step: the due process analysis. Due process allows a Court to exercise personal jurisdiction over a non-resident defendant only if doing so is consistent with traditional notions of fair play and substantial justice and if the defendant has sufficient “minimum contacts” with the forum state. The contacts are sufficient if the defendant “should reasonably anticipate being haled into court there, because he has performed some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The inquiry is whether the defendants have directed their activities toward residents of the forum and whether the litigation arises out of those activities.

Estate of Witko v. Hornell Brewing Co., 156 F.Supp.2d 1092, 1096 (D.S.D. 2001)(internal quotation and citations omitted).

The South Dakota Supreme Court has accurately articulated this standard in previous cases, and the requirements, based on the facts before the Court, are satisfied.

Supra, 11–17. Defendant asserts that the exercise of personal jurisdiction over Bowyer violates his due process rights and amounts to “bootstrapping.” But this assertion overlooks Bowyer’s use of agents and third parties to purposefully avail himself of the South Dakota forum, his request that services be performed for him within the South Dakota forum and the arrangement for the transportation of his property into the forum on two separate occasions. A review of the cases cited by Defendant in Section II of Defendant’s Brief indicates the contacts with the forum in the case before this Court are much more significant than in the cases Defendant cites where due process rights were violated. Defendant quotes the United States Supreme Court language in *Walden v. Fiore*, 134 S.Ct. 1115, 1126 (2014), stating, “It is the Defendant, not the Plaintiff or third parties, who must create contacts within the Forum state.” However, this quotation would be more complete had Defendant included the preceding sentence which indicates, “The proper focus of the ‘minimum contacts’ inquiry in intentional-tort cases is the relationship among the defendant, the forum, and the litigation. And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.” *Id.* (internal quotations and citations omitted). As the preceding quote indicates, *Walden* did not involve the voluntary entry into a contractual agreement with a party in the forum, but rather involved an intentional tort. *Id.* In *Walden*, various parties traveled to Georgia. While in Georgia at the Hartsfield-Jackson Atlanta International Airport, a Georgia police officer searched these individuals and seized certain property while the individuals were waiting to board a plane to Nevada. *Id.* at 1118–20. Upon returning to Nevada, these individuals filed a lawsuit against the Georgia police officer in the United States District Court for the District of Nevada. *Id.* The United States Supreme Court held that personal jurisdiction did not exist

in Nevada under these facts. *Id.* at 1126. The facts before this Court are easily distinguishable from those in *Walden*. In *Walden* there was no contractual agreement with any party in the Nevada forum, the police officer did not arrange for transportation of his property into the Nevada forum. The police officer did not request that services be performed for him in the Nevada forum and no negotiations related to the incident occurred within the Nevada forum.

In support of his argument Defendant also cites *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hansen*, the issue focused on whether a Florida state Court violated due process by exercising personal jurisdiction over a Delaware trustee, given that the Delaware Trustee and Trust had no connection with the Florida forum. *Id.* at 238–44. *Hanson* is also easily distinguishable from the case before this Court. The Delaware Trustee did not direct communications into the Florida forum. *Id.* at 251. The Delaware Trustee did not enter into any contractual agreement with any party in Florida. *Id.* at 238–44. And the Delaware Trustee did not arrange for any trust property to enter the Florida forum. *Id.* at 251. As such, like *Walden*, *Hansen*, did not involve a voluntary contractual agreement for services to be provided within the forum or involve the defendant arranging for the transportation of property into the forum.

Two cases cited by Defendant in Section II of Defendant’s Brief do involve contractual agreements. The first is *Lakeside Bridge & Steele Co. v. Mountain State Const. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979). However, *Lakeside* is also distinguishable from the facts before this Court. In *Lakeside* the Plaintiff, Lakeside Bridge & Steele Co., a Wisconsin corporation, entered into a contract with Mountain State Const. Co., a West Virginia corporation. *Id.* at 597–99. The contract provided for the sale of goods,

specifically structural assemblies to be delivered to Gathright Dam and Reservoir in Virginia. *Id.* Mountain State did not arrange for its property to be transported into the Wisconsin forum on two separate occasions and, importantly, *Lakeside Bridge and Steele Co.* involved a contract for a sale of goods not a contract for services as in the case before this Court. *Id.*

Also of utmost importance is the fact that the Seventh Circuit Court of Appeals, in subsequent cases, limited its holding in *Lakeside*. Writing about the *Lakeside* decision, in *Madison Consulting Group v. State of S.C.*, 752 F.2d 1193 (7th Cir. 1985) the Seventh Circuit Court of Appeals indicated:

“[this Court] similarly stressed the unique facts of *Lakeside* in the process of distinguishing a Wisconsin Supreme Court decision, *Zerbel v. Federman & Co.*, 48 Wis.2d 54, 179 N.W.2d 872 (1970), which had upheld personal jurisdiction under somewhat similar circumstances. First, the court noted that in the Wisconsin case, in contradistinction to *Lakeside*, ‘[t]he defendant had initiated the negotiations’ that led to the contract at issue. 597 F.2d at 599. Second, the contract in *Lakeside* was for the manufacture of goods, while the contract in the Wisconsin case was for services...

Id. at 1197. Both of these characteristics which the Seventh Circuit Court of Appeals found adequate to support due process are present in the case before this Court. Pursuant to the applicable standard of review, Klock’s Affidavit, and the Circuit Court’s Findings of Facts, Defendant initiated the negotiations. *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496; APP. 32 (Klock Aff. ¶ 2); APP. 10 (FF ¶ 3). Also, the contract at issue in the case before this Court is one for services.

In addition, the Seventh Circuit went on to write in *Madison Consulting Group*:

Moreover, Judge Tone, the very author of the opinion in *Lakeside*, soon thereafter spoke again for the court in a decision that established another important limitation on the *Lakeside* doctrine. *See Wisconsin Electrical Manufacturing Co. v. Pennant Products, Inc.*, 619 F.2d 676 (7th

Cir.1980). The court therein held that two visits by agents of the nonresident defendant to the forum state in connection with the negotiation and performance of the contract with the plaintiff are enough, in our opinion, to distinguish this case from *Lakeside*.

Madison Consulting Group v. State of S.C., 752 F.2d 1193, 1200 (internal quotations omitted). Here, on two occasions, in connection with performing the contract, the Defendant's property was transported into the forum at his request. The Defendant also reached out to the forum through a number of agents, to include his request directly to Klock that Klock transport Defendant's property into the forum on his behalf.

The second case which involved a contractual agreement cited by Defendant is *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which, as here, involved a contract for services (in the form of a franchise agreement). *Id.* at 463–66. However, in *Burger King*, the U.S. Supreme Court held that the District Court's exercise of jurisdiction pursuant to Florida's long arm statute did not offend due process. *Id.* at 487. As such, the case before this Court can be clearly distinguished from those where due process was violated and falls more closely in line with those where the exercise of personal jurisdiction was found to comply with due process requirements.

CONCLUSION

The Circuit Court correctly held that South Dakota may assert personal jurisdiction over Bowyer. The Order denying Bowyer's Motion to Dismiss should be affirmed.

Dated this 15th day of July, 2014.

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I hereby certify that Appellee's Brief complies with the Type Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 5,755 words.

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The undersigned attorney hereby certifies that the foregoing Appellee's Brief, with attached Appendix, was sent by e-mail for electronic filing to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27019

KUSTOM CYCLES, INC., d/b/a KLOCK WERKS

Plaintiff/Appellee,

vs.

CLINT BOWYER,

Defendant/Appellant.

Appeal from the Circuit Court
First Judicial Circuit
Davison County, South Dakota

The Honorable Patrick T. Smith, Presiding Judge

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**Bowyer Petition for Discretionary Appeal from Circuit Court's Order Denying
Defendant's Motion to Dismiss for Lack of Personal Jurisdiction filed 3/6/14**

**Order Granting Petition for Allowance of
Appeal from Intermediate Order filed 4/4/14**

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INTRODUCTION

This case centers on a one-time deal in which Klockwerks, Inc. (“Klock”) offered to customize Clint Bowyer’s motorcycle in exchange for access to NASCAR races and certain promotional benefits that Bowyer agreed to provide. Klock and Bowyer conceived the trade in Phoenix and Klock consummated his end of the deal by final delivery of the motorcycle to Bowyer’s home in North Carolina. Bowyer never set foot in South Dakota relative to the contract, and nothing he did to fulfill his end of the bargain had the slightest connection to our state.

As the party asserting personal jurisdiction in this breach-of-contract action, Klock has the burden of establishing that sufficient contacts exist to justify asserting jurisdiction over Bowyer. Klock also must establish that the assertion of personal jurisdiction comports with due process. Klock fails on both counts.

To defend the result below, Klock asks this Court to adopt an expansive theory of specific jurisdiction that would transform how minimum contacts are measured and that would eviscerate the due process protections that are at the heart of the personal jurisdictional analysis. For reasons that follow, the Circuit Court’s determination that personal jurisdiction existed should be rejected and the matter should be remanded with instructions to dismiss the Complaint for lack of personal jurisdiction.

ARGUMENT

A. *In personam* jurisdiction must be based on the activities of the out-of-state defendant, not the in-state plaintiff, and Klock’s novel argument to the contrary should be rejected.

Klock maintains that South Dakota has jurisdiction over Bowyer not because Bowyer was physically present here (he wasn’t), or because his performance under the contract was directed at the forum (it wasn’t), but because Klock performed customization work in the forum on a motorcycle that Bowyer owned. This concept of specific jurisdiction is really a theory of *vicarious* jurisdiction, in which actions undertaken by the in-state plaintiff become a jurisdictional hook by which to ensnare the out-of-state defendant.

Bowyer is a stranger to South Dakota and his performance under the contract – including providing access to NASCAR and participating in promotions that featured the motorcycle – took place elsewhere. The only evidence in the record that connects Bowyer to South Dakota consists of texts or phone calls that he allegedly made, as recounted in Klock’s affidavit. Other communications, made by third parties but ascribed to Bowyer by Klock, fail to rise to the level of “minimum contacts” on their own. As Judge Smith observed, the quality and quantity of these communications are negligible, at best, and would not suffice to justify asserting jurisdiction over Bowyer. *See* APP. 57 (HT 26:5-6) (“if it was just a question of emails and telephone calls, we wouldn’t have jurisdiction anyway.”)

Perhaps recognizing that the communications are insufficient to make his case, Klock focuses attention on work that he performed under the contract in South

Dakota. For example, Klock contends that “the contract was for customization of the Defendant’s motorcycle, an act which occurred almost exclusively *within* the forum at Plaintiff’s facility at Mitchell, South Dakota.” See Appellee’s Responsive Brief, at 15. Bowyer did not perform the “act” in question, yet Klock maintains that his acts on his property while he had custody and possession of the motorcycle are somehow grounds to yoke Bowyer into South Dakota.

Klock also seeks to re-christen the contract, describing it as a “services contract” to be performed within the forum. To describe Klock’s performance in terms of a “services contract” strains that concept to the point of incoherence. Klock’s performance was the physical modification of a motorcycle. His obligations were not complete until he delivered the final, customized motorcycle to Bowyer in North Carolina. It was the finished motorcycle that counted, and the furnishing of parts and labor was but a means to that end.¹

And, even if this agreement were susceptible to being called a “services contract,” it lacks the factual touchstones that justified assertion of jurisdiction in cases cited by Klock. In *Daktronics*, the out-of-state defendant was a consultant supplying services to the in-state corporation over a period of three years, during which the consultant would work to channel business to South Dakota for the

¹ Klock scrambles to explain away the holding of *Lakeside Bridge & Steele Co. v. Mountain State Const. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979), by seeking to impose the label “services contract” on this agreement and emphasizing the presence of the motorcycle within the forum. The “services” vs. “goods” distinction is a misnomer here, but just as importantly, Klock’s discussion misses the fundamental tenet that *Lakeside* embodies – all other things being equal, performance by the plaintiff in the forum is not a basis for asserting jurisdiction over the defendant. Vicarious personal jurisdiction is a bankrupt concept that Klock asks this Court to endorse.

benefit of the in-state corporation. The contract in question was discussed and executed by the consultant while she was physically in South Dakota. Similarly, in *Alaska Telecom v. Schafer*, 888 P.2d 1296 (Alaska 1995), the out-of-state defendant was a consultant who negotiated a contract with an in-state corporation, executed the contract while in Alaska, and performed consulting work within the forum.

Here, Bowyer's performance took place outside the forum, based on an agreement initially conceived in Arizona. To the extent that Klock performed "services," the ultimate goal was directed out-of-state with the delivery of the finished motorcycle to Bowyer. Regardless, whether Klock provided services or delivered a finished good is of small consequence. No matter what label applies, the emphasis is misplaced because the subject of discussion is Klock's performance, not Bowyer's.

The more important question is this: How can Klock's performance in the forum serve as a basis of jurisdiction over Bowyer? Klock does not address this question, much less answer it. Past precedent from this Court and the U.S. Supreme Court demonstrates that the answer is a clear, resounding *no*. The in-state plaintiff's contacts or actions cannot be a proxy by which to bootstrap jurisdiction over an out-of-state defendant.

This past term, the United States Supreme Court re-affirmed why this is necessarily the case in *Walden v. Fiore*, 134 S.Ct. 1115 (2014). The Court repeatedly emphasized a basic principle for measuring whether sufficient minimum contacts exist: "[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum state." *Id.* at 1126. Klock points out that *Walden* was an intentional

tort case, implying that the above-quoted language has no relevance to this breach-of-contract action. Not so. The rejection of vicarious jurisdiction is not based on the nature of the cause of action, but inheres in the basic analysis of whether “minimum contacts” exist to establish specific jurisdiction.

It is well-established that a plaintiff’s performance in the forum is not sufficient to justify assertion over the out-of-state defendant. *See, e.g., Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir.1982) (plaintiff’s unilateral performance of contract in forum state insufficient). Further, a connection that exists by virtue of a contract with the in-state plaintiff is not a connection between the out-of-state defendant and the forum, which is the factor that matters for purposes of evaluating minimum contacts. *See Aaron Ferer & Sons Co. v. Atlas Scrp Iron & Metal Co.*, 558 F.2d 450, 455 n.6 (8th Cir. 1977) (“It is a defendant’s contacts with the forum state that are of interest in determining if in personam jurisdiction exists, not its contacts with a resident.”)

An extended quotation from the *Walden* opinion drives these two principles home:

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.

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., supra*, at 291–292. 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”). We have thus rejected a plaintiff’s argument that a Florida court could exercise personal jurisdiction over a trustee in Delaware based solely on the contacts of the trust’s settlor, who was domiciled in Florida and had executed powers of appointment there. *Hanson v. Denckla*, 357 U.S. 235, 253–254 (1958). We have likewise held that Oklahoma courts could not exercise personal jurisdiction over an automobile distributor that supplies New York, New Jersey, and Connecticut dealers based only on an automobile purchaser’s act of driving it on Oklahoma highways. *World-Wide Volkswagen Corp., supra*, at 298. 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*, 444 U.S. at 332.

One would struggle to find a more definitive repudiation of Klock’s theory of vicarious jurisdiction than the above-quoted language from Justice Thomas, who delivered the unanimous opinion for the Court.

Accordingly, the attempt to argue that Bowyer had a substantial connection to South Dakota based on work Klock performed here fails on its own terms. If jurisdiction exists, it must be based on Bowyer’s activities, not those of Klock or a third party.

B. Klock’s act of transporting the motorcycle into and out of the forum does not create a “substantial connection” between Bowyer and the forum.

Bowyer was not physically present in the forum, but – as Klock repeatedly trumpets – Bowyer allowed his motorcycle to come into the forum, not once, but twice. The reason for this is simple: the work on the motorcycle wasn’t complete when Klock first took the motorcycle from South Dakota to Florida to be used in the promotional activities and then delivered it to Bowyer in North Carolina. When it was complete, Klock delivered it a second time to North Carolina.

The presence of the motorcycle in the forum is the too-slender reed on which Judge Smith made his determination and on which Klock tries to defend it. This Court has never held that the temporary presence of personal property in the forum is sufficient for asserting jurisdiction over an out-of-state property owner who has no other substantial connections to the forum. It should not do so now.

It is axiomatic that “mere ownership of property in the forum state” is insufficient to establish minimum contacts. *See Shaffer v. Heitner*, 433 U.S. 186 (1977). Here, the question does not turn on ownership of real property, but on the temporary presence of personal property owned by an out-of-state defendant that was brought into and out of the forum state by the in-state plaintiff as part of their agreement.

The undisputed facts show that Bowyer purchased the motorcycle in Minnesota in January 2009. He re-took possession of it in North Carolina in April 2010. At all times in which the motorcycle entered or exited South Dakota, it was in Klock’s custody and control. Klock has never suggested that transporting the motorcycle was not part of what he agreed to do, nor has he ever denied that he or his agents were responsible for its safe-keeping for every moment of its time here.

In his briefing, Klock argues that the movement of a motorcycle distinguishes this case from *Marschke v. Wratishaw*, in which the out-of-state defendant “had no physical contact with South Dakota before, during or after the period relevant to the sale of” the vehicle at issue. 2007 SD 125, ¶ 22, 743 N.W.2d 402, 410. Yet *Marschke* stands for the idea that a seller of a good that is bound for South Dakota has not

availed himself of jurisdiction here. *Marschke* teaches us that the entry of personal property – in that case, a vehicle – into the forum was not sufficient grounds to assert jurisdiction over the out-of-state defendant who was alleged to have breached a contract. Here, the focus on motorcycle is but another iteration of the specious claim that a plaintiff's actions in the forum suffice to bootstrap jurisdiction over an out-of-state defendant.

The paucity of support for Klock's position is most evident in the three-sentence argument he musters in support of the proposition that the suit arises from activities that Bowyer directed at the forum. *See Appellee's Responsive Brief*, at 17. Klock suggests that the "contract was negotiated in part in South Dakota and performed almost completely in South Dakota." *Id.* The record does not bear out these startling claims. First, there is a material distinction between text or phone communications with an in-state party and actions directed at the forum. *See supra Aaron Ferer & Sons Co.*, 558 F.2d at 455 n.6. And, as has been well-established, the alleged texts, emails, and communications (even if deemed "negotiations" for a deal that was already in place) are not sufficient to establish "minimum contacts."

Second, to say that the contract "was performed almost completely in South Dakota" is inaccurate on its own terms. The contract was performed (by Bowyer) at NASCAR events outside of South Dakota, and Klock's "performance" was not consummated until he delivered the customized motorcycle to Bowyer's residence in North Carolina.

That Klock's work took place in South Dakota as opposed to, say, Iowa, Nebraska, or Ottawa was irrelevant to Bowyer. It had no bearing on what Bowyer either expected to put into the agreement or what he expected to get out of the agreement. Indeed, from Bowyer's perspective, any connection that the motorcycle has to South Dakota is nothing more than adventitious happenstance. The hows and wherefores of Klock's performance were not Bowyer's concern, so long as the motorcycle was customized as intended and delivered to him at his residence.

Based on the foregoing, it cannot be said that Bowyer "purposefully availed himself" of the forum or that the exercise of jurisdiction by a South Dakota court comports with due process. The undisputed evidence reveals that Bowyer had no reasonable expectation that he might be haled into South Dakota. The contacts, if any, that Bowyer had with the forum were negligible, at best, and do not rise to the level of "minimum contacts" that due process requires. Plaintiff did not meet its burden, and the Circuit Court erred as a matter of law in concluding otherwise.

CONCLUSION

The Order denying Bowyer's Motion to Dismiss should be reversed and remanded with instructions to dismiss the Complaint for lack of personal jurisdiction.

Date: July 24, 2014.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of being heard on these issues at oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 2,469 words.

/s/ Alex M. Hagen

Alex M. Hagen

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing *Appellant's Reply Brief* was sent by e-mail for electronic filing to:

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