SUPREME COURT OF KENTUCKY
NO. 2005-SC-00861

LINDA KERN CUMMINGS — APPELLANT

V. **BRIEF OF APPELLEE, R. ANDREW BOOSE, AS TRUSTEE**

JOHN BROOKS PITMAN, EXECUTOR OF THE ESTATE OF BETTY KERN MILLER; R. ANDREW BOOSE, INDIVIDUALLY AND AS TRUSTEE; THE GUIDE DOG FOUNDATION FOR THE BLIND, INC.; AND STEVEN KERN SHAW — APPELLEES

APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 2004-CA-001185-MR

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 5.03, the undersigned hereby certifies that a true and accurate copy of this Brief was served by United States mail, first class, postage pre-paid, on this 28th day of September, 2006, on the following: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Darren W. Peckler, Boyle Circuit Court Judge, 321 West Main Street, Danville, Kentucky 40422; Charles W. Curry, Esq., 109 North Mill Street, Lexington, Kentucky 40507; Ephraim W. Helton, Esq., 237 West Main Street, Danville, Kentucky 40423-0137; Charles R. Hembree, Esq., 200 West Vine Street, Suite 810, Lexington, Kentucky 40507-1620; Kevin L. Nesbitt, 102 South Fourth Street, P. O. Box 287, Danville, Kentucky 40423; George M. McClure, Esq., P. O. Box 214, Danville, Kentucky 40423-0214; and to Mark S. Kosak, Esq., 610 Broad Hollow Road, Suite 306, Melville, New York 11747. The undersigned further certifies that he has not removed the record in this matter from any clerk's office.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee desires oral argument and believes oral argument would aid the Court in deciding the issues presented because this case presents unique factual and legal questions.

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COUNTERSTATEMENT OF THE CASE

On July 10, 2003, Boyle Circuit Judge Darren W. Peckler granted Defendant R. Andrew Boose, as Trustee's, Motion for Partial Summary Judgment and ruled that the Court lacked personal jurisdiction over the Defendant R. Andrew Boose (hereinafter "Boose") in his capacity as Trustee of the Trust Agreement made by Betty Kern Miller (hereinafter "Miller"), as Grantor. (R. Vol. 3, at 365; Order Dated July 8, 2003, at 1, attached hereto in Appendix as A-1.) The trial court held:

> [T]here is a distinction between R. Andrew Boose in his individual capacity as an attorney, or as an individual, who met with and advised his client, Mrs. Miller, prior to the execution of the subject codicil and trust, and R. Andrew Boose acting as a trustee of the trust which was not funded until after Mrs. Miller's death.

(*Id.*).

The trial court thereby found that Boose, in his capacity as Trustee of the Miller Trust, lacked minimum contacts with the Commonwealth of Kentucky to allow the court to exercise personal jurisdiction over him as Trustee. Moreover, the trial court held that in making this determination, any contacts Boose may have had with Kentucky in his individual capacity as Miller's lawyer prior to the execution of the Codicil and Trust Agreement do not establish minimum contacts with Kentucky in his capacity as Trustee. (*Id.* at 1-2). The trial court did not rule on the issue of subject matter jurisdiction which Boose had also raised in his motion for summary judgment. (*Id.*)

On October 7, 2005, the Kentucky Court of Appeals affirmed the ruling by the Boyle Circuit Court granting Boose's Motion for Partial Summary Judgment. In an opinion written by Justice Taylor, with Justices Guidugli and Huddleston concurring, the appellate court focused not only on the distinction drawn by the Boyle Circuit Court between Boose, as Trustee of the Trust,

and Boose, individually as an attorney, but the Court also appropriately relied upon KRS § 454.210, Kentucky's long-arm statute, and the three-part test for personal jurisdiction as set forth in *Friction Materials Co. v. Stinson*, 833 S.W.2d 388, 390 (Ky. App. 1992) in affirming the trial court's ruling.

In rendering its opinion, the Court of Appeals asked the question of whether Boose, as Trustee of the Trust, "purposely availed" himself of the privilege of acting in Kentucky or causing a consequence here. The Court of Appeals concluded that Boose, as Trustee, did not purposely avail himself of the privilege of acting in Kentucky such to subject him to jurisdiction in Kentucky courts:

> The only activity in Kentucky that Boose engaged in as trustee was signing the trust document. Boose's duties as trustee did not begin until the trust was funded upon Miller's death in 1996. Boose rendered his services as trustee from New York, maintained bank accounts in New York, and generated fees as trustee in New York; fees that were paid based upon a New York statute. With the exception of signing the trust document, all of Boose's activities as trustee occurred in New York.
>
> Based upon the foregoing, we cannot conclude that Boose, as trustee for the trust, purposely availed himself of the privilege of acting in this Commonwealth or caused a consequence here.

(Court of Appeals Opinion, at 6-7, attached hereto in Appendix as A-2.)

The Court of Appeals properly recognized (1) a distinction between Boose, in his capacity as Trustee of the Miller Trust, and Boose, in his individual capacity as an attorney for Miller and the Miller Estate and (2) that Boose, in his capacity as Trustee, did not have sufficient minimum contacts to justify the Boyle Circuit Court exercising jurisdiction over him. More importantly, in rendering its opinion, the Court of Appeals also recognized the futility of Plaintiff's goal of establishing personal jurisdiction over Boose as Trustee – even if Boose had sufficient contacts with Kentucky such that the trial court could exercise personal jurisdiction

over him as Trustee of the Miller Trust, Kentucky does not have the jurisdiction over the Miller Trust, a New York trust, in order to provide Plaintiff the relief she seeks. As the Court of Appeals stated:

> We also note that the trust is not a party to this litigation nor could a Kentucky court have obtained personal jurisdiction over the trust. The fact that Boose is properly before the court in Kentucky for his actions as an attorney does not constitute a legal basis to obtain judgment over him or over the trust itself. Any challenge to the trust or the actions of Boose as trustee must be made in New York. Thus, we believe the circuit court properly determined that it lacked jurisdiction over Boose as trustee and properly dismissed Boose, in his capacity as trustee from this case.

(*Id.* at 7.)

The question before this Court is whether the appellate court was correct in affirming the trial court's partial summary judgment finding, as a matter of law, that Boose, as Trustee, did not have minimum contacts with Kentucky under KRS § 454.210 so that the Boyle Circuit Court did not have personal jurisdiction over Boose, as Trustee. The following factual and legal discussion establishes that the appellate court reached the correct legal conclusion so that partial summary judgment should be affirmed.

I. BOOSE HAD NO CONTACT WITH KENTUCKY PRIOR TO HIS REPRESENTATION OF MILLER AS HER PERSONAL ATTORNEY.

The undisputed facts are as follows. Boose is an attorney who works in New York, New York. (R. Vol. 2, at 171-175; Affidavit of R. Andrew Boose ("First Boose Affid."), attached to Brief in Support of Motion for Partial Summary Judgment by Defendant R. Andrew Boose in His Capacity as Trustee, at ¶ 2, attached hereto in Appendix as A-3.) Boose does not have an office or place of business in Kentucky. (*Id.*, at ¶ 4.) He does not work through agents who maintain an office or place of business here. (*Id.*) Prior to his service as counsel for Miller, Boose had never taken any action in Kentucky.

Betty Kern Miller was the only child of Jerome Kern, a noted songwriter whose credits include the music to Showboat and songs such as "Smoke Gets in Your Eyes." (*Id.*, at ¶ 10(a).) Jerome Kern owned over 800 copyrights and royalties producing contracts. (*Id.*)

After marrying a gentleman from Kentucky, Miller moved to Danville, Kentucky in the late 1970s or early 1980s. At that time, another attorney in New York City, Harriet Pilpel, assisted Miller with the specialized work required to administer such a large body of intellectual property rights and the royalties associated with licensing those musicals and songs to theater groups who perform these favorites every year, as well as to record, film, and television companies. (R. Vol. 2, at 172; First Boose Affid., at ¶ 10(a).)

Mrs. Pilpel passed away in 1991. Thereafter, Miller contacted Boose about representing her. (*Id.*, at ¶ 10(b).) Although Boose had known Miller since the 1970s and had assisted Pilpel in representing Miller while he was with the same firm as Pilpel, the Defendant notes that it was Miller who initiated the contact with Boose in 1991. (*Id.*, at ¶ 10(b).) There is no evidence that Boose solicited her legal work, or any other work at that time, or at any other time, despite Plaintiff's insinuations to the contrary. (*Id.*, at ¶ 10(b), 10(c).)

In her brief, Plaintiff spends a considerable amount of time attempting to draw inferences from letters sent by Boose's law firm, Kay Collyer & Boose, and Weil, Gotshal & Manges to Miller for the purpose of implying that Boose solicited legal work from Miller. However, the documents and pleadings in the record, including the letters referenced by Plaintiff, do not support Plaintiff's inferences. *See* (R. Vol. 3, at 328-345; Reply Memorandum in Support of Motion for Partial Summary Judgment by Defendant R. Andrew Boose in his Capacity as Trustee, at 1-3); (R. Vol. 3, at 341-342; Affidavit of R. Andrew Boose ("Second Boose Affid.") attached to Reply Memorandum in Support of Motion for Partial Summary Judgment by

Defendant R. Andrew Boose in his Capacity as Trustee, attached to Appendix as A-4).[1] The record reflects that there is no question that Miller sought out Boose to act as her counsel.[2] Moreover, Boose's individual contact with Miller as her attorney prior to his acts in the capacity of a Trustee has no bearing on the issue of the Court's personal jurisdiction over Boose in his capacity as Trustee of the Miller Trust.

II. BOOSE PERFORMED SERVICES DURING MILLER'S LIFETIME ONLY IN HIS INDIVIDUAL ROLE AS HER ATTORNEY.

In 1991, Boose, in his individual capacity as an attorney, traveled to Kentucky at Miller's request to meet with her and to discuss her request that Boose represent her. (R. Vol. 2, at 173; First Boose Affid., at ¶ 10(b).) He traveled again to Danville in April 1995, when Miller signed the Codicil and Trust Agreement that are at issue in the present case. (*Id.*, ¶ 10(f).) A comprehensive understanding of Boose's actions in 1994 and 1995 in his individual capacity as an attorney is necessary to show the absence of minimum contacts sufficient to support a Kentucky court's exercise of personal jurisdiction over Boose in his capacity as Trustee.

In 1994, Miller solicited Boose's advice about how her estate plan should handle the administration of the copyrights and royalties after her death. (*Id.*, at ¶ 10(c).) Based on his experience in this area, Boose indicated that he had seen other clients establish a trust so that a trustee or trustees could administer the copyrights and royalties for the benefit of family

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[1] A careful review of the April 25, 1991 letter from Jeremy Nussbaum to Miller reveals that Nussbaum was responding on Boose's behalf, while he was away from the office, to Miller's request for representation. (Appellant Appendix Exhibit No. 4). The letter in no way indicates that there was a solicitation, especially considering that Boose was not even present when Miller first contacted him. Furthermore, a careful review of the April 29, 1991 letter from Robert G. Sugarman of Weil Gotshal & Manges to Miller merely shows that Weil, Gotshal & Magnes had agreed to continue representing Miller on "pending matters" through their conclusion. (Appellant Appendix Exhibit No. 5). The Weil firm's representation was limited and once again, does not lead to the conclusion that Boose solicited Miller's legal work. The April 30, 1991 letter from Mitchell Salem of Weil Gotshal & Manges to Miller is further evidence of Weil Gotshal & Manges representation of Miller through the conclusion of "pending matters." (Appellant Appendix Exhibit No. 6).

[2] Plaintiff claims that these facts are one-sided because Miller is not alive to provide her testimony which would presumably be contrary to Boose's testimony. (Plaintiff's Brief, at 6). Plaintiff has no evidence to support this contention that Miller, if alive, would contradict Boose's testimony.

members. (*Id.*) Miller then asked Boose to prepare the necessary documents to carry out this plan. (*Id.*) In the present case, those family members are Miller's daughter, the Plaintiff/Appellant, Linda Kern Cummings (by Miller's marriage to Jack Cummings), and Miller's son, Defendant/Appellee Steven Kern Shaw (by Miller's marriage to Artie Shaw).

Boose had another partner in his law firm prepare the Miller Trust Agreement and a Codicil that would distribute the copyrights and royalties to the Miller Trust upon Miller's death. (*Id.*, at ¶ 10(d).) Plaintiff suggests that Boose may have prepared the Codicil and Trust himself. (Plaintiff's Brief, at 7). Once again, the undisputed facts in the record do not support Plaintiff's contention. *See* (R. Vol. 2 at 135-179 (with exhibits), 135-150 (without exhibits); Brief in Support of Motion for Summary Judgment by Defendant R. Andrew Boose in his Capacity as Trustee, at 4); (R. Vol. 2, at 173; First Boose Affid., at ¶ 10(b)).

Furthermore, those facts are immaterial because Boose's individual contact with Miller in Kentucky as her attorney, prior to his acts in the capacity of a Trustee, has no bearing on the issue of the Court's personal jurisdiction over Boose in his capacity as Trustee of the Miller Trust. Regardless, there is no dispute that both the Codicil and Trust were prepared in New York. (R. Vol. 2, at 173; First Boose Affid., at ¶ 10(d).)

Although the Miller Trust Agreement and the Codicil involved the transfer of copyrights, which are governed exclusively by federal law, Boose recognized that the law of wills and trusts varies from state to state. Accordingly, in keeping with the accepted practice among estate planning attorneys, Boose forwarded the Miller Trust Agreement and the Codicil to a Danville, Kentucky lawyer, William Barnett, for review. (*Id.*, at ¶ 10(e).)

On April 27, 1995, Boose and Barnett discussed the documents by telephone. (*Id.*) On April 28, 1995, Boose came in person to Barnett's office to discuss the documents. (*Id.*, at ¶

10(f).) After Barnett determined that the documents conformed to Kentucky law, Boose drove to Miller's house in Boyle County for the execution of the documents. (*Id.*)

In the presence of witnesses, Boose oversaw Miller's execution of the Miller Trust Agreement and the Codicil. (*Id.*) Boose also signed the Miller Trust Agreement as Co-Trustee. At Miller's request, Boose returned to his office with the originals of those documents. Boose later obtained the originals of Miller's Will and prior Codicil. (*Id.*, at ¶ 10(h).)

Significantly, in all the previously described conduct, Boose was acting exclusively in his individual capacity as counsel for his client Miller. Arguably, he only acted in his capacity as Co-Trustee for the very brief time that he signed the Miller Trust Agreement. Of course, Boose could have signed the Trust Agreement anywhere. The location of where Boose signed the Trust Agreement had no impact upon his service as the Trustee, which duties did not arise until after Miller's death.

III. BOOSE'S ACTIONS AS TRUSTEE HAVE OCCURRED IN NEW YORK AND NOT KENTUCKY.

While the Plaintiff spends considerable time talking about Boose's conduct as attorney for Miller, the relevant analysis is his conduct as Trustee once the Trust became effective after Miller's death. It is beyond dispute that Boose took no action as Trustee until Miller died on April 5, 1996. The Miller Trust was not funded until her death (by the Codicil dated April 28, 1995).[3] (*Id.*, at ¶ 10(i).) Thus, Boose could not have taken any action as Trustee in Kentucky because the Miller Trust had no assets. Since April 5, 1996, Boose has handled the

[3] Plaintiff claims that the Miller Trust was an inter vivos trust, fully operational upon its creation and that the lower courts incorrectly treated the Trust as a testamentary trust. (Plaintiff's Brief, at 8). Although Miller was to deposit a *de minimus* sum of money in the Trust at the time of its creation, or $10.00, no such funds were deposited so the Trust did not have any practical operational effect until Miller's death. At that point, the Codicil was activated and poured over the literary property into the Trust, proceeds from which were to be distributed to the Plaintiff and her brother as beneficiaries. Since there were no actual funds to manage in the Trust until the Codicil went into effect, Boose did not begin acting as a Trustee until the Codicil poured the literary property into the Trust after Miller's death.

administration of the Miller Trust from his office in New York City and places other than the Commonwealth of Kentucky. (*Id.*, at ¶¶ 4, 10(j).)

Plaintiff's allegations are that Boose, as Trustee, has improperly hired himself and his law firm to perform legal services for the Trust. Any decisions by Boose, as Trustee, to hire himself and his law firm as counsel for the Trust, and to pay his law firm for legal services, has occurred in New York and not in Kentucky. Moreover, the Trust specifically provides that the Trustee can hire professionals, including a law firm with which a trustee may be affiliated.[4] (R. Vol. 1 at 29, Complaint Exhibit, Miller Trust, at paragraph 5.)

Plaintiff also makes numerous references to Boose's alleged scheme to become "sole" Trustee of the Trust. (Plaintiff's Brief, at 9). Plaintiff fails to mention that the Trust Agreement provides for the appointment of a co-trustee. See (R. Vol. 1, at 29; Complaint Exhibit, Miller Trust, at Art. 6, para. A). A co-trustee has yet to be appointed because no one would be interested in an appointment that would immediately result in designating that person as a defendant in a lawsuit.

In Count IV of the Complaint, the Plaintiff specifically seeks relief that due to Boose's alleged breach of fiduciary duty as a trustee, the Trust should be interpreted and reformed for the benefit of the Plaintiff, including, but not limited to, compelling Boose to submit to the jurisdiction of the Boyle Circuit Court for any and all matters regarding the administration of the

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[4] Courts have held that a trustee is entitled to compensation for his additional or technical work, including acting as attorney for the trust. *Norris v. Bishop*, 207 Ky. 621, 623, 269 S.W. 751 (1925) (co-trustee permitted to charge legal fees for legal services provided to trust). It is also well established that a settlor may sanction a self-employment contract by a trustee under the provisions of the instrument. *In Re Thompson Estate*, 328 P.2d 1 (Cal. 1958).

The Restatement of Law, Trusts, § 170 (p. 440) states: "By the terms of the trust, the trustee may be permitted to sell trust property to himself individually ... or otherwise to deal with the trust property on his own account." The rule is expressed in 2 Scott on Trusts, § 170.9 (p. 1213), as follows: "By the terms of the trust, the trustee may be permitted to do what in the absence of such a provision in the trust agreement would be a violation of his duty of loyalty." Any type of public policy against such a situation is deemed to be overridden where there is a specific direction in the governing instrument.

Trust, to apply Kentucky law to the Trust, and require the Trustee to make periodic and accurate accountings to the beneficiaries and restoring the Trustee to the prudent man fiduciary standard. (*See* R. Vol. 1 at 6, Complaint, Count IV.)

It is significant that the Plaintiff has sought relief from the trial court to compel Boose, as Trustee, to submit to the jurisdiction of the Boyle Circuit Court. Seeking such equitable relief from the trial court proves that even the Plaintiff knows that Boose, in his role as Trustee, is not subject to the jurisdiction of the Boyle Circuit Court.

In addition, Plaintiff is seeking equitable relief against Boose in his capacity as Trustee, wherein Plaintiff is asking the trial court to reform the Trust and require Boose, as the Trustee, to undertake different roles and duties. The Plaintiff is also asking the Boyle Circuit Court to apply Kentucky law and not New York law. Since Plaintiff's cause of action seeks that type of equitable relief against Boose, as Trustee, the Court must look to Boose's conduct as Trustee, all of which occurred in New York, for purposes of this jurisdictional analysis.

Boose has performed his services as Trustee in New York. All bank accounts for the Miller Trust are in New York. Intangible assets of the Trust are managed in New York and not Kentucky. (R. Vol. 2, at 171-175; Boose First Affid.) The trust is not registered in New York because there is no requirement to do so. The trust is governed by New York law.

In his capacity as Trustee, Boose has conducted the activities of a prudent trustee in New York such as sending letters and checks, as well as periodic reports of the financial receipts and expenses, including legal fees and commissions, and the transactions and other activities of the Trust, to the beneficiaries from New York. Boose, as trustee, has also acted as an intermediary between the Executor, Brooks Pitman, and the Trust in New York. (R. Vol. 2 at 188, Boose, as

Trustee's, Answer to the Plaintiff's Interrogatory No. 7.) Plaintiff has simply been unable to point out any conduct that Boose, as Trustee, has undertaken in Kentucky.

It is not disputed by Boose that he, as an individual, and his law firm have served in a limited capacity as attorneys for the Miller Estate at the request of the Executor, Brooks Pitman. Boose did not serve as primary counsel for the estate. Instead, Charles Hembree has acted as counsel for the estate. Executor Pitman hired Boose, and his law firm, to provide legal advice to the Estate on copyright matters and estate tax issues relating to valuation of the literary properties.

It is obvious that the crux of the Plaintiff's objections to the Trust Agreement is that Boose is the Trustee, and as Trustee, he receives a fee. The Plaintiff also objects to the fact the Trust Agreement allows Boose, as Trustee, to hire himself, and his law firm, to provide legal services to the trust. Not only was such an arrangement the intent of the settlor, Miller, but the law allows for a settlor to provide that the Trustee may hire himself, or his law firm, to provide legal services to the Trust. *See* p. 8 herein.

Moreover, the record establishes the significant amounts the Plaintiff, Cummings, and her brother Shaw have received as beneficiaries of the Trust in comparison to the amounts Boose has earned in trustee fees and attorneys' fees. The record reflects that from 1997 to April 2002, Boose, as Trustee, received from the Estate a total of $3,142,123.76 in literary property royalties earned during that time period which he passed on to the beneficiaries.[5] (R. Vol. 2 at 190, Defendant Boose, in his capacity as Trustee, Answers to Plaintiff's Interrogatory No. 11.)

[5] In addition, in 1998 Boose received from the Estate and distributed to the beneficiaries $1,150,000 of royalties which the Estate had previously received and had held until 1998, and he received and distributed between 1997 and April 2002 $1,921,131 in ASCAP royalties received directly from ASCAP. Thus, as of April 30, 2002, the beneficiaries had received literary property royalty distributions of approximately $6,213,254.76.

During that same time period, 1997-April 2002, Boose, as trustee, received $55,881 in trustee fees. Those trustee fees, which were between $10,071 to $11,850 per year, are calculated pursuant to Section 2309 of the New York Surrogate Court Procedures Act. (*Id.* at 192, Answer to Plaintiff's Interrogatory No. 14.)

During the same period, Boose, as Trustee, also had the need to hire attorneys to provide legal services to the Estate. Legal work for the Trust has involved the overall management of the literary properties, negotiation of contracts, analysis of royalty receipts, negotiation of sale of Jerome Kern papers, renegotiation of agreements based upon copyright termination and reversion rights, and tax matters related to income, tax returns and tax reporting to beneficiaries.

During the time period of April 1996 to August 2002, the record establishes that the Miller Trust paid $199,170.00 in legal fees and costs to Boose's law firm(s) for providing legal services to the Trust. (*Id.* at 262, Boose, in his Individual Capacity, Answer to Plaintiff's Interrogatory No. 15.) Thus, for the relevant time period, Boose's statutory trustee fees and his law firm's fees for services rendered were approximately 4% of the amount of proceeds distributed to the two beneficiaries as described in footnote 5 on page 10 herein.

Furthermore, Plaintiff misconstrues the distributions by Executor, Brooks Pitman, of substantial funds from the Miller estate's accounts in Kentucky to the Trust. (*See* Plaintiff's Brief, at 14.) Because of this litigation, Pitman, the Executor of the Estate, who is also a Defendant in the litigation, has not considered it advisable to settle the estate and distribute out the literary property to the Trust as provided in the Codicil to the Will. For example, if the Court decided the Trust should be declared void, the Trustee could be criticized or potentially be held liable for distributing the copyrights to the Trust while the litigation was pending.

Therefore, technically, the Estate still owns legal title to the copyrights. As such, Boose and Pitman have not been able to notify royalty payors to change the payee from the Estate to the Trust. Accordingly, all monies except monies from ASCAP come in payable to the Estate, either directly to the Estate from the payors, or from the payors to Boose, which he forwards on to the Executor. Then, from time to time, the Executor pays the royalties to the Trust, which are then deposited in the Trust bank account in New York. This avoids monies being held up while this case goes on. However, this procedure of sending monies first to the Estate and then to the Trust causes delay in paying out monies to the beneficiaries which would not occur if the Plaintiff had not filed this lawsuit.

ASCAP money is treated differently because when ASCAP learned that Miller had named the Trust as her successor, and since Miller was a former member of ASCAP, ASCAP insisted on paying the money directly to the Trust. Thus, Boose receives money directly from ASCAP payable to the Trust and deposits those funds into the Trust account in New York.

When Boose receives monies from the Estate, he pays out 100% of them immediately to the beneficiaries. The funds that he receives from ASCAP are used to pay the fees and expenses of the Trust. Boose distributes the remainder of the ASCAP monies to the beneficiaries on a quarterly basis, along with a report of the activities of the Trust and of the receipts and expenses that occurred during each quarter.

IV. PLAINTIFF HAS REMEDIES AGAINST BOOSE AS AN INDIVIDUAL ATTORNEY.

Plaintiff cites favorably to the Court of Appeals description of her allegations against Boose:

> Cummings alleged that Miller suffered from diminished capacity and that Boose exercised undue influence over Miller causing her to execute a codicil "transferring all her right, title and interest to literary works, including management thereof, to this Trust in which [Boose] was to have sole authority." Cummings further alleged that Boose engaged in the unauthorized practice of law and that his actions constituted a conflict of interest.

(Plaintiff's Brief, at 8). Plaintiff's allegations of diminished capacity, undue influence, conflict of interest, and unauthorized practice of law all arise out of Boose's individual actions as counsel for Miller in preparation and execution of the Codicil and Trust documents. To the extent that Plaintiff complains "the net effect of [the lower courts' ruling] was to leave in doubt the extent and duration of Boose's liability, if any, to Mrs. Cummings," Plaintiff is incorrect.

There is no dispute that Boose has submitted to jurisdiction for the Boyle Circuit Court in his individual capacity as counsel for Miller. Plaintiff therefore may proceed on the merits against Boose in that capacity. To the extent that Plaintiff can prove her allegations against Boose for undue influence, then the Codicil, and therefore the Miller Trust, would be considered invalid and Boose would no longer be trustee.[6]

But to the extent the Plaintiff seeks to use these allegations to have the Boyle Circuit Court reform the Trust and, for example, remove Boose as trustee, that relief is not obtainable

[6] A testamentary instrument, such as a will or codicil, may be set aside if allegations of undue influence or diminished capacity are proven. *See, e.g., Copley v. Craft*, 312 S.W.2d 899 (Ky. 1958) (undue influence) and *Bye v. Mattingly*, 975 S.W.2d 451 (Ky. 1998) (diminished capacity). Thus, to the extent that Plaintiff can prove either of her claims, the Codicil, which funds the Trust, and the Trust, which was created at the same time as the Codicil, would be set aside, leaving no Trust to be managed by Boose. This would provide Plaintiff the appropriate relief she seeks. Furthermore, to the extent the Plaintiff seeks relief against Boose for an alleged conflict of interest by creating a Codicil and Trust document that affords him the opportunity to act as Trustee and receive legal fees, which Boose denies is improper, the Plaintiff could seek to recover damages against Boose for his actions as an attorney.

regardless of the outcome of this Court's determination of personal jurisdiction. The trial court has no subject matter jurisdiction over the Miller Trust, which is a foreign trust. Under Kentucky statutory law, Kentucky courts may not exercise subject matter jurisdiction over a foreign trust like the Miller Trust except under specific conditions which are not present in this case.

Regardless, the merits of this lawsuit are not the subject of this appeal. The only question before this court is the question of jurisdiction. The actions of Boose individually as an attorney are separate from the actions of Boose as Trustee in managing the Miller Trust, a New York trust. The trial court and appellate court correctly recognized this distinction and in doing so, recognized that Boose, as Trustee, did not have the requisite minimum contacts with Kentucky for the Boyle Circuit Court to exercise jurisdiction over him as Trustee. Thus, the trial court's granting of partial summary judgment, and the appellate court's affirmance of that judgment, should be affirmed.

ARGUMENT

A. THE LOWER COURTS CORRECTLY CONCLUDED THE BOYLE CIRCUIT COURT LACKS PERSONAL JURISDICTION OVER BOOSE IN HIS CAPACITY AS TRUSTEE.

The decision to exercise personal jurisdiction is a question of law based on the due process clause of the Constitution. *Tobin v. Astra Pharmacy Products, Inc.*, 993 F.2d 528, 542 (6th Cir. 1993). As a question of law, the Court reviews *de novo* the trial court's determination as to personal jurisdiction. *Id.*

"Because summary judgments involve no fact finding, [an appellate court] reviews [summary judgment] de novo." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Pursuant to a *de novo* review, the appellate court owes no deference to the conclusions of the

trial court, but must "ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto as a matter of law." *Id.*

Pursuant to this *de novo* standard, this Court should likewise find that Boose, as Trustee, is clearly entitled to summary judgment for lack of personal jurisdiction, as a matter of law. The Plaintiff has the burden of establishing personal jurisdiction over Boose, as trustee. *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). While Boose has submitted to jurisdiction before the Boyle Circuit Court in his individual capacity for his conduct as an attorney in overseeing the execution of documents, he did not consent to jurisdiction in his capacity as Trustee because his actions, as Trustee, did not occur until after Miller's death and his actions, as Trustee, occurred in New York and not Kentucky.

Careful attention must be paid to the distinction between the claims being made against Boose acting in those two distinct capacities. The lower courts were correct in concluding that Boose's role as Trustee was distinct from his role as an individual, or as an attorney. As such, this Court should conclude that Boose, as trustee, does not have the requisite minimum contacts to enable a Kentucky court to exercise personal jurisdiction over him as Trustee.

Boose is not a resident of Kentucky. As such, the Commonwealth of Kentucky may only exercise personal jurisdiction over him as permitted by the parameters set forth in Kentucky's Long-Arm Statute, KRS § 454.210. Kentucky's Long-Arm Statute provides, in pertinent part, that when jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him. KRS § 454.210(b).

Kentucky courts have established a three-part test to determine minimum contacts questions under the Long-Arm Statute. *Wilson v. Case*, 85 S.W.3d 589, 593 (Ky. 2002). In the instant appeal, the Court of Appeals, in applying KRS § 454.210, focused on these factors in

affirming the trial court's opinion. (Opinion of Court of Appeals, at 6.) The relevant factors are as follows:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the activities of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

Tennessee Farmers Mutual Ins. Co. v. Harris, 833 S.W.2d 850, 851-52 (Ky. App. 1992) (*quoting Pierce v. Serafin, M.D.*, 787 S.W.2d 705, 706 (Ky. App. 1990)). *See also Friction Materials Co. v. Stinson*, 833 S.W.2d 388, 390 (Ky. App. 1992). This Court has held that, "Each of these three criteria represents a separate requirement, and jurisdiction will lie only where all three are satisfied." *Wilson* at 593 (emphasis added).

There can be no doubt that Boose, as Trustee, has not had sufficient minimum contacts with the Commonwealth of Kentucky to warrant the exercise of personal jurisdiction over him in his capacity as Trustee. The Long-Arm Statute requires the trial court to specifically look at the Defendant's contacts with Kentucky that give rise to the specific claim alleged by the Plaintiff. *See* KRS § 454.210(2)(b) (2004); *Tennessee Farmers Mutual Ins. Co. v. Harris*, 833 S.W.2d 850, 851-52 (Ky. App. 1992) (emphasis added).

For the purposes of this appeal, Plaintiff is complaining about Boose's conduct as Trustee and his administration of the Miller Trust. *See* (R. Vol. 1, at 5; Complaint, at ¶ 23); (R. Vol. 2, at 224-243; Reply to Defendant Boose's Memorandum and Memorandum in Support of

Plaintiff's Motion to Compel, at 3-4).[7] In making these complaints, Plaintiff seeks reformation of the Trust, a relief that cannot be obtained in Kentucky courts pursuant to KRS § 386.685 (2004). (See Section D herein.) Thus, the Court must consider Boose's contacts with Kentucky in relation to those specific claims against him as Trustee.

It is undisputed that the only activity Boose undertook in Kentucky, in his capacity as Trustee, was signing the Miller Trust Agreement as co-trustee. That action, which would have taken no more than a few seconds and which could have been done anywhere, is legally insignificant and cannot subject Boose, as Trustee, to the jurisdiction of this Court for the purpose of addressing Plaintiff's complaints regarding the administration of the Miller Trust. (*See* Sections B.2 and B.3 herein.)

Moreover, the activity complained of must take place in Kentucky to satisfy the minimum contacts test. The Plaintiff is not complaining about Boose's signature on a document. The Plaintiff is complaining about the content of that document (which allows Boose, as Trustee, to hire himself and his firm as counsel for the Trust) and how the Trust has been administered since Miller's death. (Boose, a trustee, has hired himself and his law firm to provide legal services to the trust). (*Id.*) All of that conduct has occurred in New York and not Kentucky.

A number of other courts have addressed the issue of whether a forum state had personal jurisdiction over an out-of-state trustee and have concluded that such personal jurisdiction did not exist based upon the limited contacts the trustee had with the forum state. Notably, the Supreme Court case of *Hanson v. Denckla*, 357 U.S. 235; 78 S.Ct. 1228; 2 L.Ed.2d 1283 (1958),

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[7] As previously mentioned, Plaintiff's claims for undue influence, diminished capacity, conflict of interest, and the unauthorized practice of law as they relate to Boose's preparation and execution of the Codicil and Trust documents are claims against Boose in his individual capacity and not the subject of this appeal. Instead, those claims may be adjudicated by the Boyle Circuit Court as Boose has already submitted to the trial court's jurisdiction individually in his capacity as an attorney.

dealt with the issue of whether a Florida trial court had personal jurisdiction over a trustee located in Delaware.

In *Hanson*, a settlor established a trust in Delaware, naming a Delaware trustee to administer it. *Hanson* at 238. The settlor then moved to Florida where she continued to receive payments from the trust. After her death, certain legatees of the settlor sued the trustee in Florida to declare a provision of the trust invalid and thereby maximize their interests. *Hanson* at 238.

The United State Supreme Court held that the Florida court lacked personal jurisdiction over the Delaware trustees because the non-resident trustees did nothing to purposefully avail themselves of the benefits of doing business in Florida other than to continue sending trust payments and related documents to the settlor in Florida. *Hanson* at 253-254. The Court in *Hanson* emphasized that the claim must be linked to the trustees having purposefully availed themselves of the benefits of doing business in the forum state for personal jurisdiction to exist over the trustees. *Id.* at 357 U.S. 253, 78 S.Ct. at 140, 2 L.Ed.2d at 1298.

The same conclusion was also reached by the Rhode Island Supreme Court in case of *Laura Love Rose et al. v. First Star Bank*, 819 A.2d 1247 (R.I. 2003). In *Rose*, the plaintiffs, who were Rhode Island residents and who were beneficiaries of an Ohio trust, sued the Ohio trustee in Rhode Island. The Rhode Island state supreme court found the Rhode Island trial court did not have personal jurisdiction over the Ohio trustee. *Id.* at 1256.

The settlor, Mrs. Rose, originally created the trust in Ohio. She then moved to Rhode Island. The trustee periodically sent trust-related statements, checks and other documents to the settlor, and the two minor beneficiaries in Rhode Island. *Id.* at 1249.

In interpreting the Rhode Island long-arm statute, which is analogous to the Kentucky long-arm statute because it allows long-arm jurisdiction to the fullest extent as permitted by due

process, the Rhode Island court found that the Ohio trustee's contacts with Rhode Island, which were simply communications with and distribution of the money to the settlor and beneficiaries who lived there, were insufficient to establish minimum contacts. The Court emphasized there must be some act by which the defendant purposefully availed himself to the privilege of conducting activities with the forum state and thus invoked the benefits and protection of laws. *Id.* at 1255, *citing Hanson*, 357 U.S. at 253, 78 S.Ct. at 1239-40, 2 L.Ed.2d at 1298. The court found that by sending trust statements, mailing trust-related checks and making occasional trust-related telephone calls to the trust beneficiaries who resided in Rhode Island, the bank did not thereby purposely avail itself to the privilege of doing business there. *Id.*

In addition, the Montana Supreme Court in *Matter of Estate of Ducey*, 787 P.2d 749 (Mont. 1990), concluded that Montana's exercise of personal jurisdiction over a non-resident trustee would exceed the limits of due process. In *Ducey*, a Nevada resident created a trust in Nevada and later relocated to Montana where she died. The Estate filed a petition in the Montana District Court seeking to transfer the trust assets from Nevada to the Estate and opposing the appointment of a Nevada bank as trustee. The Montana Supreme Court found that the several bits of trust administration that may have occurred in Montana did not amount to solicitation of business in Montana, so that personal jurisdiction over the out of state trustee did not exist. 787 P.2d at 752.

The case at bar is also quite similar to two cases involving professionals, a physician and a dentist, who performed their professional services in Ohio for Kentucky residents, but who had only incidental contact with Kentucky. *Kennedy v. Ziesmann, M.D.*, 526 F. Supp. 1328 (E.D. Ky. 1981); *Jackson v. Wileman, D.D.S.*, 468 F. Supp. 822 (W.D. Ky. 1979). In both of those cases, the court found Kentucky did not have personal jurisdiction over those non-residents.

In *Kennedy*, the Plaintiff traveled to Ohio for several appointments with Dr. Ziesmann, including a tubal ligation and post-operative care. 526 F. Supp. at 1329. When a later procedure performed by another physician in Ohio resulted in bleeding, she called Dr. Ziesmann, who returned her call and then called her local pharmacy "in Florence, Kentucky, to prescribe methegrine tablets for treatment of the plaintiff's bleeding." *Id.* at 1330.

On these facts, the *Kennedy* Court held that Dr. Ziesmann was not subject to the jurisdiction of the Kentucky courts, finding "the cause of action against Dr. Ziesmann did not arise from activities in Kentucky merely because he treated a Kentucky resident in Ohio who then returned to Kentucky." *Id.* at 1331. The Court went on to hold that Dr. Ziesmann's telephone calls and his listings in the yellow page directories in Florence, Kentucky were "only incidental" and that those contacts did not "satisfy the 'purposefully availing' element of the tripartite test discussed above." *Id.* Before reaching these conclusions, the *Kennedy* Court noted that "Dr. Ziesmann is not on staff at any hospital in Kentucky," that he "maintains no banking or checking accounts" here, and that he "does [not] own any personal or real property in the State of Kentucky." *Id.* at 1329.

In *Jackson*, the Plaintiff was a resident of Ashland, Kentucky, who traveled to Ironton, Ohio for the fitting of a dental prosthesis by the Defendant. 468 F. Supp. at 823. The Court rejected the Plaintiff's argument that the injury occurred in Kentucky, but focused on the location where the Defendant provided the professional services, as follows:

> Defendant does not regularly do or solicit business in Kentucky. In fact, he does no business nor does he solicit any business in Kentucky. He does not derive substantial revenue in goods used or consumed or services rendered in Kentucky. Further, it cannot be found that the alleged tortious injury occurred in Kentucky. Assuming arguendo that the injury did occur in Kentucky, it did not arise out of defendant's doing or soliciting business in

> Kentucky, nor did it arise out of a persistent course of conduct or the derivation of substantial revenue within Kentucky.

Id.

The case before this Court is similar to that before the United States District Courts in both *Kennedy* and *Jackson*. Because those federal courts applied Kentucky state law in reaching their decisions, those cases are persuasive authority for this Court. *See generally Friction Materials Co., Inc. v. Stinson*, 833 S.W.2d, 388, 390 (Ky. App. 1992) (citing federal authority as source for three-part test).

Both *Kennedy* and *Jackson* involved a professional, such as Boose in his capacity as Trustee. In their analysis, the Courts looked at the location where the services were provided. Here, Boose did not begin serving as Trustee until the Miller Trust was funded at Miller's death in April 1996. At that time, Boose was in the state of New York. As Trustee, he maintains bank accounts in New York – not Kentucky. Boose's trustee's fees from the Miller Trust have been earned in New York and are based on a New York statute. Finally, Boose neither maintains an office in Kentucky nor does he solicit business as a Trustee here in Kentucky. Everything Boose does in his capacity as Trustee is and has been done in New York.

The actions taken by Boose prior to the Trust becoming effective were not in his capacity as Trustee. Instead, he took those actions as Miller's attorney.[8] Accordingly, the trial court and appellate court's decisions were correct because those rulings were based on KRS § 454.210 and Kentucky's tripartite test that Boose, as Trustee, did not have the requisite minimum contacts

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[8] Plaintiff claims that because Miller died testate in Kentucky and the will was probated in Kentucky, it is appropriate for the Boyle Circuit Court to exercise personal jurisdiction over Boose as a Trustee. (Plaintiff's Brief, at 11-13). The probate of the will and codicil are not actions taken by Boose. Neither is his appointment as Trustee. These are all actions that resulted from his acts as an attorney, not as a Trustee, in having the Codicil and Trust drafted at Miller's direction and request. Only actions taken by Boose, as Trustee, are relevant for purposes of the jurisdictional analysis. *See* KRS § 454.210.

with Kentucky to justify the exercise of personal jurisdiction over Boose in his capacity as Trustee.

B. APPLICATION OF THE THREE PART TEST.

1. Boose did not purposefully avail himself of the privilege of acting in Kentucky or causing a consequence in Kentucky.

The lack of personal jurisdiction over Boose as Trustee is supported by application of the three-part test. In *Kennedy, supra*, the Court specifically noted that the out-of-state doctor's contacts did not satisfy the first prong of that test – that "the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state." *Tennessee Farmers Mutual Ins. Co.*, 833 S.W.2d at 851. Boose, as Trustee, has never significantly acted in Kentucky and thus cannot be said to have "purposefully avail[ed] himself of the privilege" of doing so.

In *Bernita Perkins-Richardson v. Winters Insurance Agency, Inc. and Amco Insurance Company*, 2005 U.S. Dist. LEXIS 29826 (E.D. Ky.), Federal Judge Danny Reeves, interpreting the Kentucky Long-Arm Statute, held that out of state insurance companies who collected a premium for a vehicle registered and garaged in Kentucky did not amount to the defendants "purposely availing themselves to the privilege of acting in Kentucky." *Id.* at *8. The Court made this finding, despite the fact one of the defendants was licensed to do business in Kentucky, because the action did not arise from those activities. *Id.* at *7.

The "purposeful availment" prong of this analysis is satisfied when the defendant's contacts with the forum state are such that "he should reasonably anticipate being hauled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475; 85 L.Ed.2d 518, 105 S.Ct. 2174 (1985) (quotation omitted). The defendant's contacts must be more than "random," "fortuitous," or "attenuated." *Id.*

In the instant case, the Court of Appeals specifically focused on this element of the three part test and correctly concluded that Boose, as Trustee, did not purposefully avail himself of the privilege of acting in Kentucky. The appellate court recognized that the only activity Boose conducted in Kentucky, as Trustee of the Miller Trust, was signing the Trust document. (Opinion of Court of Appeals, at 6.) Of course, Boose could have signed the Trust Agreement in any state.

With the exception of the signing of this document, all of Boose's activities as Trustee occurred in New York:

> Boose rendered his services as trustee from New York, maintained bank accounts in New York, and generated fees as trustee in New York; fees that were paid based on a New York statute. With the exception of the signing of the trust document, all of Boose's activities as trustee occurred in New York.

Id. at 7.

Obviously, Boose's only contact with Kentucky as trustee, that of signing the trust agreement in Kentucky, is a random or fortuitous act at best. It could not be concluded that Boose, as he signed the Trust Agreement in Kentucky, or as he acted as trustee in New York, could reasonably anticipate that he could be hauled into court in Kentucky for his actions as the trustee. Based on these facts, this Court should conclude that Boose did not purposefully avail himself of the privilege of acting or causing consequence in Kentucky. Without being able to prove this element, the Plaintiff's claim of personal jurisdiction over Boose as Trustee must fail. *See Wilson, supra.*

2. **The Plaintiff's cause of action does not arise from Boose's activities in Kentucky.**

The trial court's lack of jurisdiction over Boose, in his capacity as Trustee, is also supported by the second element of the test – that "the cause of action must arise from the Defendant's activities there," *i.e.*, in the forum state. *Id.* As the *Kennedy* and *Jackson* opinions establish, the focus must be on where the Defendant acted, not on where the Plaintiff claims to have suffered an injury.[9]

The Plaintiff's claims against Boose, as Trustee, do not arise from the activities of Boose, as Trustee, in Kentucky since he performed no such activities in Kentucky. Instead, the activities of Boose as Trustee, about which Plaintiff complains, have all occurred outside of Kentucky. For example, the fact that Boose, as Trustee, has hired himself and his law firm to provide legal services to the trust occurred in New York. The appellate court recognized this distinction in the second element of the test when it focused specifically on Boose's activities as Trustee.

Kentucky courts have applied this same reasoning in other decisions. The *Tennessee Farmers Mutual Ins. Co., supra*, case turned on a motor vehicle accident involving Tennessee residents on both sides of the collision. The accident happened in Bell County, Kentucky. After obtaining a judgment against the party at fault, the injured parties filed an Amended Complaint against their Tennessee-based insurance carrier in Bell County. *Id.* at 850-851.

The insurance carrier defended based on the Kentucky court's lack of personal jurisdiction. When the insureds countered that the carrier had investigated the accident in

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[9] Plaintiff claims that Boose's actions have caused financial consequences in Kentucky that support asserting jurisdiction over him. (Plaintiff's Brief, at 24). This argument is wrong for several reasons. First, the focus of the jurisdictional analysis must be on the actions of the out of state defendant, Boose, and not on the injuries alleged by the Plaintiff herein. *See Kennedy, supra*, and *Jackson, supra*. Second, all the actions that Boose took to cause this alleged "financial consequence" were actions taken by him as an attorney in handling the execution of the Codicil and Trust documents when he had those documents drafted and provided Miller legal advice. These actions are immaterial to the question of whether the trial court has jurisdiction over Boose in his capacity as Trustee.

Kentucky and thus had sufficient contacts with Kentucky, the Court in *Tennessee Farmers* held that "the only contact appellant had with Kentucky concerning appellees' loss occurred after the accident when appellant's adjuster came to Kentucky" to investigate the claim. *Id.* at 852 (emphasis added).

Similarly, the United States District Court for the Western District of Kentucky has held that "[i]t is obvious that" a party's presence in Kentucky for "negotiations with representatives of [another party] may not serve as a basis for personal jurisdiction in [an] action" brought by another party to a separate transaction. *Info-Med, Inc. v. National Healthcare, Inc.*, 669 F. Supp. 793, 796 (W.D. Ky. 1987). *See also Auto Channel, Inc. v. Speedvision Network, LLC*, 995 F.Supp. 761, 765 (W.D. Ky. 1997) (noting the inability to demonstrate "a sufficient causal link between [Plaintiffs'] claims and Defendants' alleged contacts with the state" and requiring that "Plaintiffs must show that their injuries 'arose out of' these activities").

Moreover, in *Papa John's International, Inc. v. Entertainment Marketing & Communications International, Ltd.*, 381 F.Supp.2d 638 (W.D. Ky. 2005), Judge Heyburn ruled that simply because an out of state company had engaged in negotiations and contractual relations with Papa John's did not create personal jurisdiction over the out of state company. The only connection to Kentucky was that Papa John's had its headquarters in Kentucky, but not that the claims arose from the Defendant's conduct in Kentucky. *Id.* at 642-643.

All of the preceding cases establish that the court must focus on the Defendant's precise activity of which the Plaintiff complains when evaluating whether personal jurisdiction attaches to the Defendant. In Plaintiff's cause of action seeking reformation of the Miller Trust, the Plaintiff complains about Boose's conduct as Trustee in the administration of the Miller Trust, a function accomplished completely outside of Kentucky's borders.

The only related act within Kentucky was Boose's signing the Miller Trust Agreement. That contact is insufficient as a basis for personal jurisdiction over him. Had he met Miller in Cincinnati to sign the instrument, would the courts of Ohio have jurisdiction over him? Of course, the answer is no, as is the answer to the question whether this Court has jurisdiction over Boose in his capacity as Trustee for simply signing the Trust Agreement in Kentucky.

Moreover, the case law establishes that Boose's execution of the trust document in Kentucky does not establish jurisdiction. Such a "one-time, one-day" visit is not enough to meet the requirements for personal jurisdiction. *See Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002). In *Wilson*, this Court held there was no personal jurisdiction over an out-of-state Defendant where there was a one-time, one-day visit to Kentucky to deliver a buyer's check for an airplane and to fly the airplane out of Kentucky and deliver it to the buyer in Maryland. *Id.* at 595-595. This "specific business transaction" did not mean that the Defendant had "purposefully availed himself of the protections of Kentucky law." *Id.* at 594.

Based on *Wilson, supra*, Boose's signing the trust document in Kentucky, which did not take effect until after the Trust was funded, does not establish that the Plaintiff's claim arises out of Boose's conduct in Kentucky.

3. Kentucky does not have an interest in resolving this dispute concerning the Trustee's conduct.

Finally, Plaintiff argues that Kentucky's exercise of jurisdiction over Boose as Trustee of the Miller Trust is reasonable because Kentucky has an interest in resolving the dispute. (Plaintiff's Brief, at 26). But Plaintiff's explanation of Kentucky's "interest" in this matter relates specifically to Kentucky's interest in adjudicating the claims of undue influence and diminished capacity that Plaintiff has made against Boose individually as an attorney in preparing and executing the Codicil and Trust documents. Boose, as an individual, recognizes

that Kentucky has an interest in adjudicating those claims and thus, he has already submitted to the jurisdiction of the Boyle Circuit Court in that respect.

However, Kentucky does not have an interest in adjudicating the claims against Boose as Trustee when the Trust itself does not even fall within Kentucky's jurisdiction. The Trust is a New York Trust subject to New York laws. *See* KRS § 386.675. All the conduct Plaintiff addresses about Boose as trustee has occurred in New York. Any relief wherein Plaintiff seeks to reform the Trust and remove Boose as Trustee as part of this reformation must come from the New York courts and not Kentucky courts.

The only action in Kentucky by Boose, as Trustee, was signing the trust document. That contact to Kentucky, however, is not substantial enough for it to make the exercise of personal jurisdiction over Boose reasonable.

Now that Miller is deceased, the only connection to Kentucky is the fact the Plaintiff lives in Kentucky and receives her checks in Kentucky. However, Plaintiff's argument that Boose's correspondence with the beneficiaries, or the sending or receiving of funds from Executor Brooks Pitman, is a sufficient contact to give rise to personal jurisdiction must also fail.

The law is clear that mere correspondence with Kentucky residents is not the kind of minimum contacts necessary to establish personal jurisdiction. *See, e.g., Franklin Roofing, Inc. v. Eagle Roofing & Sheet Metal, Inc.*, 61 S.W.3d 239 (Ky. App. 2001) (holding that conducting contract negotiations by telephone, mail and fax from outside Kentucky was not sufficient minimum contacts); *Bowen v. Eastside Jersey Dairy*, 521 S.W.2d 822 (Ky. App. 1975)

(concluding that letters written by out-of-state Defendant did not give rise to personal jurisdiction).[10]

If mailing letters and checks to the beneficiaries or Brooks Pitman created personal jurisdiction, then the result would be that Boose, as Trustee, would be subject to personal jurisdiction wherever the beneficiaries may move. For example, the other beneficiary Steven Shaw now resides in Tennessee and receives checks and correspondence from Boose in Tennessee. Does that mean Tennessee now has jurisdiction over Boose as trustee under the Due Process clause?

Obviously, the constraints of the due process minimum contacts analysis does not allow for such an absurd holding. Mailing a check to a beneficiary who is rightfully entitled to the proceeds is not purposefully availing one's self to the jurisdiction of the state where that beneficiary happens to reside. Accordingly, the trial court and appellate court did not err in granting partial summary judgment.

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[10] Plaintiff cites to *Wright v. Sullivan Payne Co.*, 839 S.W.2d 250 (Ky. 1992) and its discussion of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) as support for her argument that correspondence to and from the forum state is sufficient minimum contact to assert jurisdiction over Boose. (Plaintiff's Brief, at 29). This Court in *Wright* discussed *Burger King* in the context of a position taken by a party that this Court rejected. *Wright*, 839 S.W.2d at 255 ("The rationale of Burger King does not extend in personam jurisdiction solely by virtue of the liquidation act."). *Wright* involved the question of whether the regulation scheme under KRS § 304-33.040(5) gives rise to jurisdiction over a foreign state corporation absent minimum contacts within the state. That statute is not at issue in this case so that *Wright* is not persuasive.

Moreover, the Court in *Burger King* extended personal jurisdiction over an out of state defendant based on a franchise agreement that contained a choice of law provision that provided that all disputes be adjudicated in Florida. It was the out of state defendant's deliberate decision to enter into this franchise agreement, and the notice he was provided that disputes would be adjudicated in the forum state of Florida, that resulted in the Court asserting jurisdiction over him. *Burger King*, 471 U.S. 547 ("As Judge Johnson argued in his dissent below, 'Rudzewicz' "purposefully availed himself of the benefits and protections of Florida's laws" by entering into contracts expressly providing that those laws would govern franchise disputes.") That is not the situation herein. In fact, the Trust Agreement contains an express provision that it shall be governed by the laws of New York, which is further evidence that New York, rather than Kentucky, has jurisdiction over the Trust and Boose as Trustee. (R. Vol. 1, at 29; Complaint Exhibit, Miller Trust, at Art. 9).

C. THE AUTHORITY RELIED UPON BY THE PLAINTIFF DOES NOT SUPPORT PLAINTIFF'S ARGUMENT THAT THERE IS A DISTINCTION BETWEEN BOOSE AS TRUSTEE AND BOOSE AS AN ATTORNEY.

The material facts clearly show that Boose, as Trustee, does not have the necessary contacts to give rise to personal jurisdiction in Kentucky. Plaintiff argues there is no law that supports making the distinction of Boose in his capacity as a Trustee. (Plaintiff's Brief, at 8.) To the extent Plaintiff cites to treatises, Kentucky statutory and case law, and rules of procedure to support her conclusion that no such distinction exists, the Plaintiff misses the point.

What Plaintiff's argument ignores is the authority of the Kentucky Long-Arm Statute which explicitly states, "When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him." KRS 454.210(b) (2004) (emphasis added). The test set forth by the courts also focuses on this language and requires "the cause of action must arise from the Defendant's activities [in the forum state]." *Tennessee Farmers Mutual Ins. Co.*, *supra*, 833 S.W.2d at 851-52 (emphasis added). The law clearly requires a correlation between the Plaintiff's cause of action and the Defendant's activities that subject him to jurisdiction.

Simple logic dictates that the cause of action against Boose, as Trustee, for his conduct in that capacity cannot arise from his activities in other roles in which he is acting in his individual capacity as an attorney. Instead, the focus must be limited to his contacts with Kentucky while serving as Trustee. Thus, there is a basis to make a distinction between Boose as trustee and Boose as an individual attorney.

Moreover, the Plaintiff's focus on Boose's acts as an individual and the personal attorney for Miller misses the fact that summary judgment is appropriate where "there is no genuine issue of any material fact." CR 56.03 (emphasis added). The Plaintiff is asking the Court to focus on

immaterial facts (Boose's activities as an individual), which have no bearing on the analysis under the Long-Arm statute of whether Boose, as a Trustee, lacks minimum contacts with Kentucky.

The only material facts are that the Miller Trust was not funded until Miller's death. Therefore, Boose did not serve as Trustee during her lifetime. After her death, Boose served as Trustee from his office in New York.

Furthermore, the authority the Plaintiff relies on to support her argument that no distinction exists between Boose in his two capacities is not persuasive. In fact, this authority supports the distinction being made by Boose.

Plaintiff cites to KRS § 386.730(2) (2004), *Cook v. Holland*, 575 S.W.2d 468 (Ky. App. 1978), and *Anderson v. Columbia Finance & Trust Co.*, Ky., 20 Ky. L. Rptr. 1790, 50 S.W. 40 (Ky. 1899) for the proposition that there is no distinction between a trustee in his fiduciary capacity and a trustee individually. That statute and cases actually support the exact opposite conclusion.

KRS § 386.730 differentiates between a person acting as an individual and a trustee acting in his fiduciary capacity. According to KRS § 386.730:

> (1) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in contract.
>
> (2) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.
>
> (3) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of

> trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

KRS § 386.730 (emphasis added). The statute clearly contemplates two separate capacities for a person who serves as trustee: a "personal" capacity and a "fiduciary" capacity.[11]

Moreover, Plaintiff relies heavily on *Cook v. Holland*, 575 S.W.2d 468 (Ky. App. 1978), a case which addresses KRS § 386.730, for the proposition that there is no distinction between a person acting in his or her individual capacity and a person acting as trustee. Not only does *Cook* fail to address personal jurisdiction at all, but Plaintiff cites *Cook* out of context.

In *Cook*, the question was whether an individual could sue a trustee in his fiduciary capacity, or satisfy the judgment from the assets of the trust. *Cook* involved a personal injury claim arising out of a collision between two trucks. One of the drivers was employed as a farm manager by the trustee, who had been designated as executor and trustee of the estate of the original owner of the farm after the original owner's death. The questions before the appellate court were (1) the extent to which other persons associated with the estate are liable for the negligence of the employee of the farm and (2) whether the claim against the trustee individually is barred by the statute of limitations. *Cook*, 575 S.W.2d at 471.

The *Cook* court first addressed whether an individual could sue a trustee in his fiduciary capacity and therefore satisfy the judgment from the assets of the trust.[12] According to the Court, the orthodox common law rule is that an action at law cannot be maintained for a tort against the

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[11] Plaintiff argues that she is alleging individual fault against Boose pursuant to KRS § 386.730 and *Bryan v. Security Trust Co.*, 296 Ky. 95, 176 S.W.2d 104 (1943). (Plaintiff's Brief, at 16-17). But once again, this allegation arises from Boose's actions as Trustee in allegedly failing to administer the Trust according to his fiduciary duties. Pursuant to KRS § 254.210, before the Boyle Circuit Court can decide the merits of this allegation, it first must have jurisdiction over Boose as Trustee based on the specific conduct that gives rise to this claim.

[12] The *Cook* court addressed this issue in the context of respondeat superior, which is not an issue in this case. All allegations are against Boose as Trustee or Boose individually, as an attorney. There are no allegations against any person acting as his agent.

trustee in his fiduciary capacity. *Id.* at 474. This is the dicta relied upon by Plaintiff in arguing that no distinction exists between a person acting individually and as trustee. (Plaintiff's Brief, at 19). But the Plaintiff fails to focus on the fact that the *Cook* Court takes issue with the reasoning behind this old rule of law.

First, the Court focused on the fact that this is a rule applied only by the courts of law and not by courts of equity. According to the Court in *Cook*, "So long as a distinction was made between actions at law and suits in equity, there was a theoretical basis for refusing to permit direct actions against a trustee in his fiduciary capacity for tort liability." *Id.* at 474. In other words, a plaintiff could not recover from trust assets at law because he or she was required to sue the trustee individually. Although this would result in an inequitable result if the trustee was not personally liable, this could be rectified in a court of equity, where the trustee could be indemnified by the trust assets.[13]

Plaintiff is seeking equitable relief in the form of reformation of the trust. Thus, if courts of law and courts of equity were not merged under the current civil rules, a court of equity would clearly recognize the distinction between the trustee as an individual and in his fiduciary capacity. But the distinction between law and equity no longer exists. *See* Ky. R. of Civ. P. 2. Thus, the *Cook* court determined that the theoretical basis behind this separate treatment in law and equity is no longer valid. *Cook*, 575 S.W.2d at 474.

The *Cook* court further recognized that even without the merger of law and equity, the reasoning behind this split is illogical and should be invalid. At law, the plaintiff can recover a judgment against the trustee as an individual, thus refusing to recognize the trustee in his

[13] The whole purpose of this equitable rule is to recognize that the trustee should not be held liable for a tort that was committed during the administration of the trust, for which he has no personal responsibility.

fiduciary capacity. But then in equity, the court immediately recognizes that the existence of a trust, or the trustee in his fiduciary capacity, by allowing the trustee to pay the judgment via trust assets and funds. *Id.* Thus, based on this reasoning, the Court in *Cook* concluded there is "no theoretical objection to the maintenance of a tort action against a trustee in his fiduciary capacity."[14] *Id.*

The Court in *Cook* further noted that § 7-306 of the Uniform Probate Code (codified in 1976 as KRS § 386.730) "authorize[s] direct actions against a personal representative or trustee in his fiduciary capacity for torts committed in the course of administration of the trust," thus recognizing the distinct capacities between a person acting individually and in a fiduciary capacity as trustee. *Id.* at 475.

Plaintiff further relies on *Cook* out of context when she cites *Cook* for the proposition that an "'executor and trustee' is the same person as [an] individual." (Plaintiff's Brief, at 18). This quote comes from a section of the opinion dealing with the second issue of whether the statute of limitations bars the plaintiffs from amending their complaint to name the trustee "individually" as opposed to "executor and trustee." *Cook* at 477.

The Court's analysis of this issue turns on C.R. 15.03, or whether there was "a change of parties" such that the additional standards of subsection (2) of CR 15.03 were met. *Cook*, 575 S.W.2d at 477. This analysis has nothing to do with personal jurisdiction or KRS § 454.210 and focuses exclusively on a civil rule that has no bearing herein.

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[14] The *Cook* court ultimately determined the issue of whether the trustee can be sued in his fiduciary capacity need not be decided because any error was harmless – the personal judgment had already been recovered against the Trustee and the Trustee already had a judgment entitling him to indemnity from the trust. *Id.* at 475.

Finally, Plaintiff cites to *Anderson v. Columbia Finance and Trust Co.*, 20 Ky. L. Rptr. 1790, 50 S.W. 40 (1899) as additional authority that no such distinction exists between a person acting individually and in a fiduciary capacity as Trustee. But once again, this authority establishes otherwise.

In *Anderson*, a trustee had filed a suit against a borrower to recover a balance on a note. *Id.* at 40. After that matter was resolved in favor of the borrower, the borrower then sued the trustee for malicious prosecution. *Id.* at 40. The trustee argued that no recovery could be had against it because it had originally filed suit in its capacity as trustee and therefore it was only liable as trustee and not as an individual. However, the Court found that one who abuses the process of the Court is personally liable for the consequences of their acts and it is immaterial whether the abuse was brought in its own name or the name of a trustee or another. *Id.* at 40.

Thus, because there was an intentional and malicious act, the Court found the defendant trust company could be held individually liable. *Id.* at 40. However, the holding in *Anderson* clearly inferred there are times when a trustee would not be individually liable for its acts on behalf of a trust, but that a malicious act was certainly not one of them. Thus, *Anderson* is clearly in accord with KRS § 386.730 and *Cook v. Holland, supra*, which distinguishes between an individual whose actions are personal and an individual acting in a fiduciary capacity as trustee.

Plaintiff's argument about whether the common law creates a distinction between a trustee acting as an individual and as a fiduciary misses the point (although there is clearly support for this argument in KRS § 386.730 and the *Cook* and *Anderson* cases). For purposes of a personal jurisdiction inquiry, the distinction has always been fundamentally important. Only those actions of Boose <u>as Trustee</u> of the Trust should be considered.

D. REGARDLESS OF WHETHER THE TRIAL COURT HAD PERSONAL JURISDICTION OVER BOOSE, KENTUCKY COURTS LACK SUBJECT MATTER JURISDICTION OVER THE MILLER TRUST.

Irrespective of the trial court's ruling on personal jurisdiction, the fact remains that the Boyle Circuit Court lacks subject matter over this foreign trust and over Boose, as its Trustee. It is well-established that subject matter jurisdiction is an issue that is always ripe and can be ruled upon at any point during the proceedings. *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001) ("Defects in subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived.") This includes raising the issue of subject matter jurisdiction for the first time on appeal. *See Karahalios v. Karahalios*, 848 S.W.2d 457, 460 (Ky. App. 1993).[15]

Accordingly, even if this Court believes that the trial court had personal jurisdiction over Boose as Trustee, the trial court does not have subject matter jurisdiction over this foreign trust. Thus, this Court should dismiss any claims against the Miller Trust and Boose as Trustee for lack of subject matter jurisdiction as well.

Plaintiff contends she needs the Boyle Circuit Court to have jurisdiction over Boose as Trustee because she wants to ask the trial court to reform the trust. Presumably, part of that reformation would seek to have Boose removed as trustee and to have a new trustee appointed. It is clear by Count IV of Plaintiff's Complaint she is seeking a court order to reform the foreign trust.

KRS § 386.675 provides the basic rule governing a court's jurisdiction over judicial proceedings relating to trusts, in part, as follows:

> (1) Judicial proceedings may be initiated by interested persons concerning the internal affairs of trusts. Proceedings which may

[15] This is not the first time that the issue of subject matter jurisdiction has been raised. The issue of subject matter jurisdiction has been raised by Boose at both the trial court and appellate court level, although neither court directly addressed the issue.

> be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts.
>
> ****
>
> (2) The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law.

KRS § 386.675 (2004). Moreover, for foreign trusts, KRS § 386.685 also applies:

> The court will not, over the objection of a party, entertain proceedings under KRS § 386.675 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.

KRS § 386.685 (2004).

Because the Miller Trust has "its principal place of administration in another state," namely New York, it is a foreign trust governed by KRS § 386.685. As to the first requirement, there is no question that litigation in New York's courts could bind all of the parties to this litigation. Either the Surrogate's Court or the Supreme Court (the New York civil trial court)

would have jurisdiction over questions related to the administration of the Miller Trust. *See* N.Y. Surr. Ct. Proc. Act § 1509.[16]

In addition to this grant of subject matter jurisdiction, the New York court would have "personal jurisdiction over any person as to any matter within the subject matter jurisdiction of the court." N.Y. Surr. Ct. Proc. Act § 211.[17] Regarding the specific allegation of and relief sought by the Plaintiff in the case at bar, either the Surrogate's Court or the supreme court would have jurisdiction "[o]n the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust." N.Y. Est. Powers & Trusts Law § 7-2.6(2).[18]

Thus, KRS § 386.685 deprives this Court of subject matter jurisdiction over the instant action "unless...the interests of justice otherwise would seriously be impaired." KRS § 386.685(2). In the case at bar, the "interests of justice" will not be impaired, as a matter of law,

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[16] N.Y. Surr. Ct. Proc. Act § 1509 provides:

> Except as to the extent inconsistent with other provisions of this act, the surrogate having jurisdiction over a lifetime trust shall have such power over the lifetime trust and its trustee as a justice of the supreme court having jurisdiction over the trust would have.

[17] N.Y. Surr. Ct. Proc. Act § 211 states:

> The court may exercise personal jurisdiction over any person as to any matter within the subject matter jurisdiction of the court, if, on analogous facts in an action in the supreme court, such person would be subject to the personal jurisdiction of that court.

[18] N.Y. Est. Powers & Trusts Law § 7-2.6(2) provides:

> (a) Subject to the relevant provisions of the civil practice laws and rules, the supreme court has power:
>
> (1) On the application of a trustee, to accept his resignation and to discharge him on such terms as it deems proper.
>
> (2) On the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust, who is insolvent or whose insolvency is imminent or apprehended or who for any reason is a person unsuitable to execute the trust.
>
> (3) In case of the resignation or removal of a trustee, to appoint a successor trustee and, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section does not apply to a trust arising or resulting by implication of law, nor where other provisions are made by law for the resignation, suspension or removal of a trustee or the appointment of a successor trustee.

if Kentucky jurisdiction is not exercised over the dispute regarding the administration of the trust.

In this case, the witnesses regarding the trust administration will be in New York. The Trustee's office is in that state, and the professionals who advise him regarding the Miller Trust's banking and investments are in that state. No assets are physically located in Kentucky so there is no need for a "view," and there is no need to exercise *in rem* jurisdiction over the assets.

Rather, the trust property includes music copyrights and royalties. By its own terms, the Miller Trust is governed by New York law. Given the unusual nature of those assets and the concentration of artists in and near New York City, any expert testimony about administering a trust consisting primarily of those kind of assets will most likely come from attorneys and others in or near New York City. Finally, the courts of New York are, of course, in the best position to address questions of that state's law.

The Plaintiff has received substantial proceeds as a beneficiary of the Miller Trust so that she could afford to pursue such a lawsuit in New York.[19] There is nothing preventing the Plaintiff from bringing this cause of action in New York and seeking the relief that she is seeking in this action. Enforcing the statutory requirement that the Plaintiff contest this foreign trust in New York would not impair the interests of justice. Accordingly, the "interests of justice" do not require a Kentucky court to exercise jurisdiction over the administration of the Miller Trust.

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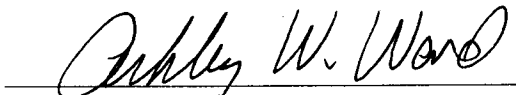
[19] The Plaintiff has received one-half of approximately $6,213,154 in proceeds from the Trust from 1997-2002. *See* footnote 5 on page 10 herein and (R. Vol. 3, at 328-345: Boose's Reply Memorandum in Support of Motion for Partial Summary Judgment); (R. Vol. 2, at 262; Defendant Boose, In His Capacity as Trustee, Answers to Plaintiff's Interrogatory No. 11.) It clearly would not be cost-prohibitive for Plaintiff to contest this Trust in New York.

CONCLUSION

Based on the foregoing, the appellate court did not err in upholding the trial court decision granting Boose's motion for partial summary judgment. The appellate court's opinion should be affirmed.

In the alternative, because the subject trust is a foreign trust pursuant to KRS § 386.685 and the interests of justice do not dictate that Kentucky assert jurisdiction over the trust, even if this Court finds that personal jurisdiction existed, any cause of action against the Miller Trust and Boose as Trustee of the Miller Trust should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,



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