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## *PREVIEW; Groo v. Mont. Eleventh Jud. Dist. Ct.: New Frontiers in Social Media and Specific Personal Jurisdiction*

Rachel Parker

Alexander Blewett III School of Law at the University of Montana, [rachel1.parker@umconnect.umt.edu](mailto:rachel1.parker@umconnect.umt.edu)

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**PREVIEW; Groo v. Montana Eleventh Judicial District Court: *New Frontiers in Social Media and Specific Personal Jurisdiction***

**Rachel Parker\***

The Montana Supreme Court will hear oral argument in *Groo v. Montana Eleventh Judicial District Court* on Friday, March 31, at 10:00 a.m. in the George Dennison Theatre at the University of Montana, Missoula, Montana. David B. Cotner and Brian T. Geer are expected to appear on behalf of defendant-petitioner Melissa Groo. Kris A. McLean, Tyson A. McLean, and Jordan A. Pallesi are expected to appear on behalf of plaintiffs Triple D Game Farm, Inc., Lorney “Jay” Deist, and Kimberly Deist.

## I. INTRODUCTION

The issue in this proceeding is whether certain social media activity can provide a basis for the exercise of specific personal jurisdiction.<sup>1</sup> This is an issue of first impression in Montana that is likely to have swift and wide-reaching impacts as courts seek to define the relationship between social media activity and personal jurisdiction in an increasingly digitized world.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Factual Background*<sup>2</sup>

Melissa Groo, a New York citizen and resident, is a self-employed photographer and describes herself as an expert and leader in the field of ethical wildlife photography.<sup>3</sup> In August 2020, Groo was contacted via Facebook Messenger by Heather Keepers, a former employee of Triple D Game Farm, Inc., regarding their “common enemy,” Triple D.<sup>4</sup>

Triple D, also known as Triple D Wildlife, is a business in Kalispell, Flathead County, Montana, that offers guests the opportunity to “observe trained wildlife in their natural environment and capture their beauty with the lens or brush.”<sup>5</sup> Keepers was employed as an animal trainer at the facility from 2011–2020.<sup>6</sup> After relocating to Kentucky,<sup>7</sup> Keepers was contacted by a group leader and Triple D client who asked

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\* J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2024.

<sup>1</sup> Order for Supplementary Briefing, *Groo v. Mont. Eleventh Jud. Dist. Ct.*, <https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/3/331/url/OP+22-0587+Briefing/Scheduling+---+Order.pdf> (Mont. Dec. 22, 2022) (No. OP 22-0587).

<sup>2</sup> The following factual background is based on the district court’s order denying Groo’s motion to dismiss. Because this case has not reached the discovery stage of litigation, and because the legal question will be reviewed *de novo*, the Supreme Court will likely look instead towards the parties’ pleadings and briefs in assembling the facts.

<sup>3</sup> Order Re: Defendant Groo’s Motion to Dismiss at 2, *Triple D Game Farm, Inc. v. Keepers* (Mont. 11th Jud. Dist. Jul. 22, 2022) (No. DV-22-087(A)) [hereinafter District Court Order].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1 (quoting Complaint ¶ 11).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Petition of Writ of Supervisory Control at 5, *Groo v. Mont. Eleventh Jud. Dist. Ct.*, <https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/8/336/url/OP+22-0587+Writ+---+Supervisory+Control+---+Petition.pdf> (Mont. Oct. 13, 2022) (No. OP-22-0587).

if she had “left for a guy.”<sup>8</sup> She responded with allegations of poor animal welfare, and that contact suggested she reach out to Groo.<sup>9</sup>

Keepers and Groo subsequently exchanged a number of Facebook messages.<sup>10</sup> Keepers’ initial message shared that she had “ENDLESS information and evidence and knowledge of evidence of many things. Illegal, unethical, and just absolutely morally wrong and dishonest.”<sup>11</sup> She expressed a desire to save the animals, who were “now just sitting and rotting,” from owner Jay Deist by permanently shuttering his operation, and inquired as to Groo’s interest in assisting.<sup>12</sup> Groo responded affirmatively and stated that she “would love to get [Keepers’] help on taking [Deist] down.”<sup>13</sup> Groo later offered links regarding the potential breach of Keepers’ non-disclosure agreement.<sup>14</sup>

Groo then made multiple public Facebook posts about Deist, including calling him a “deeply cruel” man who “caused unspeakable suffering for so many animals” and sharing an article entitled “Photography game farm Triple D Wildlife cited 6 times for keeping animals in squalor,”<sup>15</sup> which she asked people to share.<sup>16</sup> In August 2021, she sent a Facebook message to photography group leaders, some of whom were located in Montana, and encouraged them to cancel future workshops at Triple D.<sup>17</sup> She also allegedly contacted or tagged photographers and others, some of whom were located in Montana, encouraging them not to support Triple D.<sup>18</sup> Groo disputes the allegations of tagging Montana residents with the exception of a comment including 11 tagged individuals, calling the rest of the record “only speculative allegations without evidentiary support.”<sup>19</sup>

Groo has never been associated with any Montana business, had a registered agent in Montana, or owned property or other assets in the state.<sup>20</sup> She “has never received mail, opened a bank account, paid taxes, initiated litigation, or maintained a phone [line] in Montana.”<sup>21</sup> She has visited the state four times since 2018<sup>22</sup> and has never visited Triple D.<sup>23</sup>

### B. Procedural Posture

On January 25, 2022, Plaintiffs Triple D Game Farm, Inc. and its owners, Jay and Kimberly Deist, brought a civil action against Melissa Groo, Heather Keepers, Justine Glasman, Jeanette Tartaglino, John Does 1–4, and Corporations A–D in Flathead County District Court, alleging

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<sup>8</sup> District Court Order, *supra* note 3, at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2–4.

<sup>11</sup> *Id.* at 3 (quoting Response, Exhibit A).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> District Court Order, *supra* note 3, at 4 (citing Response, Exhibit I).

<sup>15</sup> *Id.* at 5 (citing Response, Exhibit C); see *Photography game farm Triple D Wildlife cited six times for keeping animals in squalor*, ROADSIDE ZOO NEWS (Aug. 6, 2021), <https://perma.cc/29LR-WFJP>.

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Petitioner’s Reply Brief at 3, *Groo v. Mont. Eleventh Jud. Dist. Ct.*, <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=422532> (Mont. March 7, 2023) (No. OP-22-0587).

<sup>20</sup> *Id.* at 2.

<sup>21</sup> District Court Order, *supra* note 3, at 2.

<sup>22</sup> *Id.*

<sup>23</sup> Petition of Writ of Supervisory Control, *supra* note 7, at 5 (citation omitted).

tortious interference with contractual relations and tortious interference with prospective economic advantage claims against Groo.<sup>24</sup>

On April 18, 2022, Groo filed a Motion to Dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.<sup>25</sup> After hearing oral argument on the motion in June,<sup>26</sup> the district court denied the Motion, finding that the exercise of specific personal jurisdiction was appropriate<sup>27</sup> and that Triple D had alleged sufficient facts to support its tortious interference claims.<sup>28</sup> Groo filed an Answer on August 5, 2022, and the case proceeded to scheduling.

On October 13, 2022, Groo filed a Petition of Writ of Supervisory Control in the Montana Supreme Court challenging the applicability of specific personal jurisdiction.<sup>29</sup> The Court subsequently ordered a summary response<sup>30</sup> and supplementary briefing.<sup>31</sup> The district court proceedings are stayed pending the outcome of the petition.<sup>32</sup>

### C. District Court's Order and Reasoning

In accepting the exercise of specific personal jurisdiction, the district court used the framework outlined in *Ford Motor Co. v. Montana Eighth Judicial District Court*:<sup>33</sup>

A Montana court's exercise of specific personal jurisdiction depends on whether the defendant's suit-related conduct created a substantial connection with Montana. Accordingly, exercising specific personal jurisdiction over a defendant is only appropriate when both the defendant and the underlying controversy are appropriately affiliated with Montana.<sup>34</sup>

To determine whether a non-resident defendant is subject to specific personal jurisdiction, the court applies a two-step test. First, there must be a basis for personal jurisdiction under Montana's long-arm statute.<sup>35</sup> Second, the exercise of personal jurisdiction must comport with "the

<sup>24</sup> District Court Order, *supra* note 3, at 5.

<sup>25</sup> *Id.* at 1, 5.

<sup>26</sup> *Id.* at 1.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> Petition of Writ of Supervisory Control, *supra* note 7.

<sup>30</sup> Order, *Groo v. Mont. Eleventh Jud. Dist. Ct.*,

<https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/2/330/url/OP+22-0587+Writ++Supervisory+Control+++Petition.pdf> (Mont. Oct. 13, 2022) (No. OP 22-0587).

<sup>31</sup> Order, *supra* note 1.

<sup>32</sup> Order, *Groo v. Mont. Eleventh Jud. Dist. Ct.*,

<https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/1/329/url/OP+22-0587+Grant+++Order.pdf> (Mont. Jan. 24, 2023) (No. OP 22-0587).

<sup>33</sup> 443 P.3d 407 (Mont. 2019), *aff'd*, 141 S.Ct. 1017 (2021).

<sup>34</sup> District Court Order, *supra* note 3, at 6 (quoting *Ford Motor Co.*, 443 P.3d at 412).

<sup>35</sup> *Id.* Mont. R. Civ. P. 4(b)(1) provides that:

[A]ny person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts: (A) the transaction of any business within Montana; (B) the commission of any act resulting in accrual within Montana of a tort action; (C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana; (D) contracting to insure any person, property, or risk located within Montana at the time of contracting; (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person; (F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or (G) acting as personal representative of any estate within Montana.

traditional notions of fair play and substantial justice embodied in the due process clause.”<sup>36</sup>

The court accepted the plaintiffs’ argument that personal jurisdiction applied under Montana Rule of Civil Procedure 4(b)(1)(B), which extends jurisdiction for “the commission of any act resulting in accrual within Montana of a tort action,” with minimal analysis, stating that “Triple D has made a ‘sufficient showing’ the [sic] Groo’s social media campaign resulted in the accrual within Montana of Triple D’s claims against her, and Montana’s long-arm statute applies.”<sup>37</sup>

The court next addressed the issue of due process. This analysis considers whether the defendant “purposely availed [themselves] of conducting activities in Montana, thereby invoking Montana’s laws,” whether the claim “arises out of or relates to the defendant’s forum-related activities,” and whether “the exercise of personal jurisdiction is reasonable.”<sup>38</sup> The court found that Groo had purposely availed herself because she “took voluntary action to have an effect in Montana” when she targeted Triple D with her social media campaign.<sup>39</sup> Likewise, the court found that the specific targeting of a Montana audience regarding a Montana business with the intent to impact that business created the requisite forum nexus. The court satisfied *Ford Motor Co.*’s nexus requirement by using a stream of commerce theory as “persuasive context” to find that “it was reasonably foreseeable to Groo her campaign would reach Montana and have an impact in Montana—and was in fact specifically designed to do so.”<sup>40</sup> Finally, the court found that Groo failed to overcome the rebuttable presumption that the exercise of jurisdiction was reasonable—technology could “blunt any burden,” New York’s sovereignty was not threatened, Montana had an interest in adjudicating the dispute, and Montana provided the most efficient relief of the controversy, especially considering that the other defendants likely could not litigate in New York.<sup>41</sup>

### III. SUMMARY OF THE ARGUMENTS

#### A. *Petitioner’s Arguments*

Groo argues that the district court erred in finding that the requirements for personal jurisdiction were satisfied. First, she argues that because the torts arose outside Montana, they cannot provide a basis for jurisdiction under Mont. R. Civ. P. 4(b)(1)(B).<sup>42</sup> Second, she argues that because her social media activity targeted the national and international wildlife photography community rather than Montana or a Montana audience, the exercise of specific personal jurisdiction would violate her due process rights.<sup>43</sup>

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<sup>36</sup> District Court Order, *supra* note 3, at 6 (citing *Ford Motor Co.*, 443 P.3d at 412).

<sup>37</sup> *Id.* at 7.

<sup>38</sup> *Id.* (quoting *Ford Motor Co.*, 443 P.3d at 413).

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Petition of Writ of Supervisory Control, *supra* note 7, at 9.

<sup>43</sup> Petitioner’s Opening Brief at 11, *Groo v. Mont. Eleventh Jud. Dist. Ct.*, <https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/3/331/url/OP+22-0587+Appellant%27s+Opening+---+Brief.pdf> (Mont. Jan. 20, 2023) (No. OP 22-0587).

### 1. Long-Arm Statute

Groo argues that it was inappropriate to rely on the nexus analysis of *Ford Motor Co.*, a negligence products liability case, in the context of intentional torts.<sup>44</sup> Rather, relevant precedent on intentional torts provides that some act giving rise to the claims must have occurred in Montana.<sup>45</sup> Groo points out that extending personal jurisdiction for out-of-state social media conduct when the same conduct on a non-social media platform would not provide jurisdiction would create a separate standard based exclusively on the medium of communication.<sup>46</sup>

Groo cites to *Blessing v. Chandrasekhar*<sup>47</sup> and *Freeplay Music, Inc. v. Cox Radio, Inc.*<sup>48</sup> as cases where analogous long-arm statutes did not extend jurisdiction over a non-resident defendant whose internet-based acts occurred outside of the forum state.<sup>49</sup>

In *Blessing*, the New Jersey- and California-based defendants tweeted a photo of Kentucky residents at a D.C. rally with disparaging statements soliciting information about them.<sup>50</sup> The Sixth Circuit found that Kentucky's long-arm statute, which extends jurisdiction over a defendant who causes "tortious injury by an act or omission in this Commonwealth,"<sup>51</sup> did not apply because the defendants had not committed an act *in* Kentucky, despite consequences occurring inside the forum.<sup>52</sup>

*Freeplay* dealt with New York's jurisdiction over an out-of-state corporate defendant who broadcasted the plaintiff's compositions and recordings on websites that were accessible in New York.<sup>53</sup> New York's long-arm statute applies, *inter alia*, when a defendant "commits a tortious act within the state."<sup>54</sup> The court found that infringement occurred where the website was created or maintained, rather than viewed, and declined to extend jurisdiction.<sup>55</sup>

### 2. Due Process

Groo next argues that because neither Montana nor its residents were the specific target audience of her social media posts, exercising personal jurisdiction would violate her due process rights.<sup>56</sup>

The first general principle for analysis is the defendant's liberty interest, which "constrains a State's authority to bind a nonresident defendant to a judgment of its courts."<sup>57</sup> Because personal jurisdiction submits a defendant to the "coercive power of a State,"<sup>58</sup> even in a civil

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<sup>44</sup> *Id.* at 13.

<sup>45</sup> *Id.* (citing *Milky Whey, Inc. v. Dairy Partners, LLC*, 342 P.3d 13, 18 (Mont. 2015); *Bi-Lo Foods, Inc. v. Alpine Bank*, 955 P.2d 154 (Mont. 1998); *Tackett v. Duncan*, 334 P.3d 920, 929 (Mont. 2014)).

<sup>46</sup> *Id.* at 13–14.

<sup>47</sup> 988 F.3d 889 (6th Cir. 2021).

<sup>48</sup> No. 04 Civ. 5238GEL, 2005 WL 1500896 (S.D.N.Y. June 23, 2005).

<sup>49</sup> Petitioner's Opening Brief, *supra* note 43, at 15–17.

<sup>50</sup> *Id.* at 15–16 (citing *Blessing*, 988 F.3d at 901).

<sup>51</sup> Ky. Rev. Stat. Ann. § 454.210(2)(a)(3) (West 2019).

<sup>52</sup> Petitioner's Opening Brief, *supra* note 43, at 15–16 (citing *Blessing*, 988 F.3d at 901, 903).

<sup>53</sup> *Id.* at 16 (citing *Freeplay*, 2005 WL 1500896 at \*1–2).

<sup>54</sup> N.Y. C.P.L.R. Law § 302(a)(2) (Consol. 1995); *Freeplay*, 2005 WL 1500896 at \*7.

<sup>55</sup> *Freeplay*, 2005 WL 1500896 at \*7.

<sup>56</sup> Petitioner's Opening Brief, *supra* note 43, at 18.

<sup>57</sup> *Id.* at 19 (quoting *Walden v. Fiore*, 571 U.S. 277, 283 (2014)).

<sup>58</sup> *Id.* at 20 (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty.*, 137 S.Ct. 1773, 1780 (2017)).

matter, “only the defendant’s contacts with the forum state can be a basis for jurisdiction, not the plaintiff’s, other parties, or third parties.”<sup>59</sup>

Groo also asserts that allowing technology to broaden the limitations on jurisdiction would offend the principle of interstate federalism.<sup>60</sup> Subjecting a defendant to the jurisdiction of every state where internet-based information is accessible would eviscerate geographical limitations on a state’s judicial power.<sup>61</sup>

Groo then tracks the development of specific personal jurisdiction from *Pennoyer v. Neff*<sup>62</sup> through *Calder v. Jones*,<sup>63</sup> *Walden v. Fiore*,<sup>64</sup> and beyond in light of past technological updates.<sup>65</sup> While acknowledging that courts must continually revisit the appropriate test, she argues that the defendant’s liberty interest, interstate federalism, and a distinctive consideration of only the defendant’s contacts underlie the development of the law.<sup>66</sup> This historical analysis largely divides internet cases into either a post-*Calder*-pre-*Walden* or post-*Walden* era. *Calder* and its progeny opened a narrow door to extend jurisdiction when tortious actions are expressly aimed at a given forum; however, this still requires “more than a finding that the harm caused by the defendant’s intentional tort is primarily felt within the forum.”<sup>67</sup> This has been found to deny jurisdiction in internet cases where the defendant is posting to some sort of general audience, for example, a Minnesota defendant posting on a public blog about an Alabama academic,<sup>68</sup> or an Iowa citizen posting accusations about a New York moving company.<sup>69</sup>

Although it did not overrule *Calder*, *Walden* limited the importance of the injury’s location in favor of emphasizing the defendant’s contacts with the forum state.<sup>70</sup> Post-*Walden* cases like *Axiom Foods, Inc. v. Acerchem International, Inc.*<sup>71</sup> clarified that “*Calder* cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.”<sup>72</sup> Therefore, because Groo’s public posting was targeted towards a general audience of wildlife photographers, and her private messages with Keepers could not be aimed at a forum or forum residents by nature of their inherent privacy, existing case law does not support extending specific personal jurisdiction.<sup>73</sup>

Finally, Groo argues that extending jurisdiction is not reasonable because it would favor the plaintiffs’ convenience over her own.<sup>74</sup>

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<sup>59</sup> *Id.* (citing *Walden*, 571 U.S. at 285).

<sup>60</sup> *Id.* at 21–23.

<sup>61</sup> *Id.* at 23 (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

<sup>62</sup> 95 U.S. 714 (1878), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>63</sup> 465 U.S. 783 (1984).

<sup>64</sup> 571 U.S. 277 (2014).

<sup>65</sup> Petitioner’s Opening Brief, *supra* note 43, at 24–40.

<sup>66</sup> *Id.* at 24.

<sup>67</sup> *Id.* at 27–28 (quoting *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998)).

<sup>68</sup> *Id.* at 29 (citing *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002)).

<sup>69</sup> *Id.* at 30 (citing *Best Van Lines, Inc. v. Walker*, No. 03 Civ. 6585(GEL), 2004 WL 964009 (S.D.N.Y. May 5, 2004), *aff’d*, 490 F.3d 239 (2d Cir. 2007)).

<sup>70</sup> *Id.* at 33.

<sup>71</sup> 874 F.3d 1064 (9th Cir. 2017).

<sup>72</sup> Petitioner’s Opening Brief, *supra* note 43, at 35 (quoting *Axiom Foods, Inc.*, 874 F.3d at 1070).

<sup>73</sup> *Id.* at 40–41.

<sup>74</sup> *Id.* at 41–42.

### B. Plaintiffs' Arguments

Triple D supplements the district court's statement of facts with the assertion that Groo had financial motivation to eliminate Triple D as a competitor in the wildlife photography business. Because Groo leads private group photography tours abroad for the "wealthy and elite," she had business reasons to eliminate a more approachable venue that offers the same sorts of photographs.<sup>75</sup> Triple D then argues that specific personal jurisdiction is proper: the torts accrued in Montana, minimum contacts are sufficient under either a "purposeful direction" or "purposeful availment" standard, and extending jurisdiction is reasonable.

First, Triple D argues that Groo's alleged tortious actions did in fact accrue in Montana.<sup>76</sup> Triple D distinguishes Groo's facts from those in *Milky Whey*, *Tackett*, and *Bi-Lo Foods*—in those cases, the plaintiff created the defendant's contacts with the state, usually by reaching out *from* Montana, whereas Groo reached *into* Montana when she targeted a Montana business and certain Montana clients to pressure them to take action in Montana.<sup>77</sup> *Ford Motor Co.* also successfully distinguished itself from these cases on a factual basis.<sup>78</sup> Triple D argues that the harm accrued in Montana not only as an incidence of the plaintiffs' location, but primarily because Groo took calculated actions to reach into the state.<sup>79</sup>

Next, Triple D suggests a *Calder*-based "purposeful direction" test as the most appropriate means of determining whether Groo purposely availed herself of Montana's laws.<sup>80</sup> The Ninth Circuit's test "requires a showing that the defendant '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'"<sup>81</sup> The Seventh Circuit utilizes a similar test.<sup>82</sup> While Montana has not expressly adopted this test, and in fact seems to distinguish purposeful direction from purposeful availment, Triple D argues that they are functionally the same and that Groo's actions survive either standard.<sup>83</sup>

Triple D relies primarily on *Majumdar v. Fair*<sup>84</sup> to support the contention that virtual presence is best analyzed under the purposeful direction test and is not significantly constrained by *Walden*. The *Majumdar* court analyzed derogatory Facebook activity made by a nonresident defendant to find that "tagging" residents was sufficient to show direction into the forum. It analogized tagging to a letter or email and found that the sufficiency of the contacts was further strengthened because the contents were intended to incite action in the forum state.<sup>85</sup>

Under this test, Groo's tagging and other social media activity combined with her clear intent to impact a Montana business provide

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<sup>75</sup> Plaintiffs' Response Brief at 7–8, *Groo v. Mont. Eleventh Jud. Dist. Ct.*, <https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/4/332/url/OP+22-0587+Appellee%27s+Response+++Brief.pdf> (Mont. Feb. 21, 2023) (No. OP 22-0587).

<sup>76</sup> *Id.* at 13–17.

<sup>77</sup> *Id.* at 16.

<sup>78</sup> *Id.* at 14–15 (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407, 413 n.1 (Mont. 2019)).

<sup>79</sup> *Id.* at 17.

<sup>80</sup> *Id.* at 19.

<sup>81</sup> Plaintiffs' Response Brief, *supra* note 75, at 19 (quoting *Will Co., Ltd. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022)).

<sup>82</sup> *Id.* at 20 (quoting *Majumdar v. Fair*, 567 F. Supp. 3d 901, 908 (N.D. Ill. 2021)).

<sup>83</sup> *Id.* at 20–21.

<sup>84</sup> 567 F. Supp. 3d 901 (N.D. Ill. 2021).

<sup>85</sup> Plaintiffs' Response Brief, *supra* note 75, at 24–26 (quoting *Majumdar*, 567 F. Supp. 3d at 911, 913–14).

sufficient minimum contacts to comport with due process.<sup>86</sup> Triple D argues that the same activities amount to purposeful availment because Groo took voluntary actions designed to have an effect in Montana, surviving either standard.<sup>87</sup> Again, for the same reasons, the claims arise out of Groo’s forum-related activities.<sup>88</sup>

Finally, Triple D argues that extending jurisdiction is reasonable, emphasizing efficient resolution and fairness towards the plaintiffs, because Groo reached into Montana, it is fair that she should return to litigate.<sup>89</sup>

#### IV. ANALYSIS

This proceeding, as an issue of first impression in Montana, has the potential to newly define specific personal jurisdiction in the context of social media. The question is whether the Court will treat social media as a limited, fact-dependent set of circumstances subject to its own rule or whether they will take this opportunity to adjust or clarify specific personal jurisdiction more broadly, either specific to Montana’s long-arm statute or the due process considerations refined by *Ford Motor Co.* This analysis highlights three of many plausible options: the Court could definitively create a brand new test for social media contacts under which Groo could be subject to personal jurisdiction for her intent to create action in Montana; the Court could clarify and apply *Ford Motor Co.*, under which Groo would likely not be subject to personal jurisdiction for the nature and extent of her contacts in Montana, or the Court could decide the issue under Mont. R. Civ. P. 4(b) and hold to the precedent of cases like *Tackett*, *Milky Whey*, and *Bi-Lo Foods*, under which Groo would likely not be subject to personal jurisdiction based on her location and the public nature of her postings.

Ongoing developments in the area of digital jurisdiction suggest that the creation of a new test is a possible, though perhaps extreme, outcome. Groo’s cited social media precedent in *Blessing*, *Freeplay*, and *Torre v. Kardooni*<sup>90</sup> is perhaps less immediately compelling than the more factually analogous *Majumdar*, which analyzed Facebook tagging of forum residents. *Majumdar* has since been followed by *Lord v. Smith*,<sup>91</sup> signaling a solidifying rule of law under the Seventh Circuit’s “purposeful direction” test. In *Lord*, the defendant, a North Carolina resident who had never had any contact with Illinois, began posting statements about a fellow popular gamer via Twitter, email, and direct message.<sup>92</sup> Some of the posts provided Lord’s home address and encouraged Smith’s followers to threaten Lord with violence.<sup>93</sup> As in *Majumdar*, the court applied the “purposeful direction” test—mostly *Calder*, filtered through *Walden*’s defendant-focused contacts—to find that *because Smith’s posts were designed to*

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<sup>86</sup> *Id.* at 27.

<sup>87</sup> *Id.* at 33.

<sup>88</sup> *Id.* at 33–34.

<sup>89</sup> *Id.* at 35–37.

<sup>90</sup> No 22-4693 (SDW) (MAH), 2022 WL 17813069 (D.N.J. Nov. 29, 2022). In this case, used by Groo to support the contention that general public postings could not be found to confer specific personal jurisdiction, a nonresident defendant made defamatory online statements about a New Jersey resident; the court found that the defendant’s postings did not involve New Jersey. (Petitioner’s Opening Brief, *supra* note 41, at 36–37).

<sup>91</sup> No. 22 C 2689, 2022 WL 17668707 (N.D. Ill. Dec. 14, 2022)

<sup>92</sup> *Id.* at \*1–2.

<sup>93</sup> *Id.* at \*2.

create action in the forum, he had purposefully directed his behavior at the forum.<sup>94</sup>

Combined with *Majumdar*, a clearer filtering test develops that fits cleanly when retrofitted onto other social media cases like *Blessing* and *Torre*: social media behavior, whether public or private, is not sufficient on its own to extend specific personal jurisdiction, unless and until the behavior is clearly intended to result in tortious action in a specific geographic location.

The Illinois cases become even more persuasive sources if the Court were to expressly adopt the Ninth Circuit’s “purposeful direction” test, as plaintiffs urge. Montana courts seem to make some distinction between purposeful direction and purposeful availment, although it is unclear exactly what that distinction might be; one recent federal court ruling suggests that purposeful availment, as the “more general” of the two, is applicable for products liability, implying the corollary that “purposeful direction” is applicable for non-products liability cases.<sup>95</sup> The Court may also take this opportunity to clarify whether this is merely a linguistic difference or whether there is some substantive legal distinction between the two.

If the Court creates a new test reliant on the factual minutiae of Groo’s social media behavior, such as the quantity of her specific tagging and the locations of the tag-ees, it is likely that the case would return to the district court for limited jurisdictional discovery. Groo’s briefing contests a number of the allegations regarding her specific behavior, and it would be critical to resolve these disputes before proceeding with either the case or a subsequent appeal.

The second option is that the Court will focus on the sufficiency of minimum contacts in the vein of *Ford Motor Co.* While the district court satisfied *Ford Motor Co.*’s nexus requirement—that the claims need to have some connection to the defendant’s forum state activities, though not necessarily causal—by applying the “not directly on point”<sup>96</sup> stream of commerce theory, it seems unlikely that the Court would accept the novel use of this theory here. Rather, a more straightforward reading of *Ford Motor Co.* suggests that the Court (or the district court, after limited jurisdictional discovery) would assess Groo’s contacts with the state to find that Triple D’s claims do not have the requisite nexus.

The remaining option is that the Court will decline to extend jurisdiction in reliance on Groo’s cited precedence of *Tackett, Milky Whey*, and *Bi-Lo Foods* or similar cases that address a tort’s accrual in Montana under the long-arm statute. These cases clearly state that a tort does not accrue in Montana when all of the acts were committed in another forum, even when the injury is experienced in the forum state.<sup>97</sup> Though Triple D suggests that these cases could still be distinguished on the basis of reaching in or reaching out of Montana, this distinction, without more, would leave strange gaps for torts committed within contractual relationships, insurance companies, and others for whom reaching in or out is not necessarily evident or relevant to the relationship. Applying this precedent, the Court could find that because Groo was in New York when

<sup>94</sup> *Id.* at \*5–6.

<sup>95</sup> DeWitt v. Best Buy Stores, L.P., No. CV-22-75-H-BMM, 2022 WL 17340258 at \*2–3 (D. Mont. Nov. 30, 2022).

<sup>96</sup> District Court Order, *supra* note 3, at 8.

<sup>97</sup> See, e.g., *Milky Whey, Inc. v. Dairy Partners, LLC*, 342 P.3d 13, 18 (Mont. 2015); *Bi-Lo Foods v. Alpine Bank*, 955 P.2d 154, 159 (Mont. 1998).

she was posting, no part of the alleged tort accrued in Montana. Though it would efficiently dispose of this case, it leaves unanswered the current problem with social media torts: until some sort of special rule is created, a social media user is either subject to jurisdiction almost everywhere or almost nowhere.

As a final note, it seems unlikely that the reasonableness of extending jurisdiction will have a dispositive impact in the Court's decision, as there are so many other dispositive points preceding that question. The Court seems eager to develop the relevant law, and deciding this issue based on well-established factors of reasonableness seems unlikely given the pressing questions of Montana law and due process, although it remains a possibility, especially if the Court decides they prefer not to trailblaze this issue.

## V. CONCLUSION

The question of specific personal jurisdiction and social media usage is not a straightforward one, nor are its answers. Given the lack of binding precedent, oral argument may prove particularly central to the decision. By hearing this Petition, regardless of its outcome, the Montana Supreme Court has positioned itself at the forefront of this legal issue and has the potential to return a highly consequential decision of national importance.