

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2017-P-1446

Worcester, ss.

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Caroline Roch, Appellant

V.

David J. Mollica and Donna Z. Mollica, Appellees

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On Appeal From Worcester Superior Court

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Appellant's Brief for Caroline Roch

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Date: 12/15/2017

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None

**STATEMENT OF ISSUES**

The single issue raised by this appeal is whether, in a transitory action, jurisdiction of a Massachusetts Superior Court over defendants in a civil action is achieved by in-hand service of a summons and complaint upon such defendants while the defendants are physically present in Massachusetts.

**STATEMENT OF THE CASE**

On April 11, 2017, Plaintiff-Appellant, a resident of New Jersey, filed her civil action complaint against the Defendants-Appellees, residents of New Hampshire, in Worcester Superior Court. R.A. Page 6.

The Complaint alleged that the Defendants-Appellees caused personal injury to the Plaintiff-Appellant on March 9, 2015, while the parties were in Florida. R.A. Page 6.

Shortly after the complaint was filed, on the very same day, April 11, 2017, Deputy Sheriff Kevin Derry, from the Worcester County Sheriff's Office, effected and certified to making in-hand service of copies of the complaint and summons upon both Defendants-Appellees while they were physically

present in the city of Worcester. R.A. Page 13 and R.A. Page 15.

On May 17, 2017, pursuant to Superior Court Rule 9A, the Defendants-Appellees filed with the Superior Court their "Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction," along with the appropriate Rule 9A documents, which included the plaintiff's opposition to said motion. R.A. Page 17 (Motion) and R.A. Page 41 (Opposition).

After a hearing held on August 3, 2017, the Superior Court allowed the "Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction." R.A. Page 60.

On August 28, 2017, the Plaintiff filed her "Motion for Reconsideration of Defendant's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction."

On September 7, 2017, the Superior Court denied Plaintiff's Motion for Reconsideration without a hearing. R.A. Page 63.

On August 28, 2017, the Plaintiff filed her Notice of Appeal with the Superior Court. R.A. Page 72.

**STATEMENT OF THE FACTS**

The relevant facts are that service of the summons and complaint was timely made upon both Defendants/Appellees while they were physically in Massachusetts. R.A. Page 13 and R.A. Page 15.

**SUMMARY OF THE ARGUMENT**

Jurisdiction of a Massachusetts Superior Court over defendants in a civil action is achieved by in-hand service of a summons and complaint upon such defendants while the defendants are physically present in Massachusetts.

**ARGUMENT**

The Superior Court has personal jurisdiction over defendants David and Donna Mollica as a result of in-hand service having been made upon them while they were physically present in Massachusetts.

When confronted with a motion to dismiss under Mass. R. Civ. P. 12(b)(2), the plaintiff bears the burden of establishing facts sufficient to show that

the court may exercise personal jurisdiction over the defendant. Droukas v. Divers Training Academy, Inc., 375 Mass. 148, 151 (1978). The court views these jurisdictional facts in the light most favorable to the plaintiff. Cepeda v. Kass, 62 Mass. App. Ct. 732, 738 (2004).

It was not disputed that the Defendants-Appellees were served in-hand with the summons and copy of the subject complaint on or about April 11, 2017, while they were physically present in Massachusetts.

As a result of such in-hand service within Massachusetts, this case does not involve any question at all about "long arm" jurisdiction.

This is a transitory action in which jurisdiction is based solely upon the Defendants-Appellees having been served while physically present in the Commonwealth.

In Pinson v. Potter, 298 Mass. 109 (1936) the Supreme Judicial Court ruled that in-hand service within the Commonwealth was sufficient to establish personal jurisdiction in a transitory action in which

- A. the plaintiff lived outside of  
Massachusetts (Texas)
- B. the defendant lived outside of  
Massachusetts (Connecticut) and
- C. the alleged tort occurred outside of  
Massachusetts (Connecticut).

This case is exactly like the Pinson case, to wit:

- A. the plaintiff lives outside of  
Massachusetts (New Jersey)
- B. the defendants live outside of  
Massachusetts (New Hampshire) and
- C. the alleged tort occurred outside of  
Massachusetts (Florida).

Not only does the common law allow for personal jurisdiction in a case such as this when in-hand service has been made, so also does M.G.L.c. 223, §1 clearly contemplate a lawsuit in Massachusetts between an out of state plaintiff and an out of state defendant when it states: "If neither party lives in the commonwealth, the action may be brought in any county."



"The short of the matter is that jurisdiction based on physical presence alone [within the forum state] constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" Burnham v. Sup. Ct. of Ca., County of Marin, 495 U.S. 604 (1990) at 619. (Emphasis added.)

"Where, ... as in the present case, a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it [the jurisdictional principle] is 'no longer justified.' ... [W]e reaffirm today our time-honored approach ... . [A] doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard." Id., at 622.

So wrote the late Justice Scalia in a case deeming that the state does indeed have jurisdiction over a nonresident in a lawsuit unrelated to his activities, or complete lack of activities, within the state if he is personally served with process while

temporarily in that state. The United States Supreme Court specifically held that such a result is in accord with constitutional due process requirements. Once jurisdiction is achieved with in-hand service upon the defendant while the defendant is physically within the state, minimal contacts with the state is no longer an appropriate subject for discussion.

"The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum state, without more, has been, and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment." *Id.*, at 628 (Justice White, concurring).

In Burnham, the United States Supreme Court unanimously ruled that a state has proper personal jurisdiction over a defendant when jurisdiction is based solely and exclusively on in-hand personal service of a summons and complaint on the defendant within the state.

The Court here is advised of the case of Pulte Computer Corp. v. Debus, 1990 Mass. App. Div. 211, in

which the Burnham decision on jurisdiction was followed to the letter even in spite of a claim by the defendant that the forum was not convenient. In Pulte, as in the previously cited Pinson case,

- A. the plaintiff was from outside of Massachusetts (just as in this case);
- B. the defendant lived outside of Massachusetts and (just as in this case);  
and
- C. the alleged wrongdoing occurred outside of Massachusetts (just as in this case).

The Pulte court held that in-hand service of a summons and complaint upon the defendant (a German resident) while the defendant was briefly in Massachusetts (at a trade show) established jurisdiction over the defendant no matter how transiently he was in the Commonwealth and no matter that the action complained of occurred outside of Massachusetts.

"The law of Massachusetts has always been, so it appears, that when a defendant is 'in the state, however transiently, and the summons is actually served upon him

there, the jurisdiction of the court is complete, as to the person of the defendant.' Peabody v. Hamilton, 106 Mass. 217, 220-221 (1870), and cases there cited. The principle continues to be given effect, though it may be now too settled to call for articulation. Klavan v. Klavan, 405 Mass. 1105, 544 N.E.2d. 863 (1989) (rescript). We are, of course, guided by the settled law." Pulte, *supra*, at 212.

Later, in Tracy v. Wanck, 2001 Mass. App. Div. 20, the Court again relied on the Burnham decision. That court's opinion notes that the defendant in that case (as did the Defendants in this case, thus far) based his entire argument against jurisdiction on principles of law arising out of the assertion of long-arm jurisdiction even though service in that case had been made in person while the defendant was temporarily in Massachusetts. The Court responded to the defendant's "assertion that he must have minimum contacts with Massachusetts in order for our courts to exercise full, in personam, jurisdiction over him

despite having been served with process in hand in this state" by declaring that the assertion "is without merit." *Id.*, at 22.

The Tracy court, as in the Pulte case, rejected any assertion by the defendant about long arm jurisdictional requirements such as minimum contacts with Massachusetts.

"Therefore, this appeal turns on the question as to whether the district court obtained full in-personam jurisdiction over the defendant by virtue of the fact that he was served with a summons and complaint within the Commonwealth. We answer this question in the affirmative. Personal service in the jurisdiction has been the ancient and historic basis for the exercise of jurisdiction, and it remains so in Massachusetts."

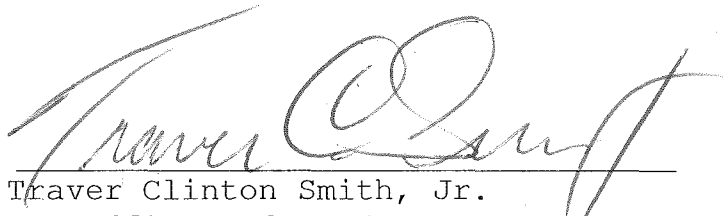
Tracy, *supra*, at 21.

#### CONCLUSION

In the case at bar, the Defendants' Motion to Dismiss Plaintiff's Complaint was and is without merit for the reasons stated herein. The Superior Court

Order allowing the motion to dismiss should be REVERSED by this court and the case should be remanded to the Superior Court. The United States Constitution and the case law and statutes of Massachusetts require such a result.

Respectfully submitted,



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ADDENDUM

A. M.G.L.c. 223, §1.....1

B. Superior Court Clerk's Notice and Judgment on  
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M.G.L.c. 223


§1 Transitory Actions; General Provisions.

A transitory action shall, except as otherwise provided, if any one of the parties thereto lives in the commonwealth, be brought in the county where one of them lives or has his usual place of business; provided, however, that if the instrument of the crime is a forged check, credit card, or other negotiable instrument, intending on its face to be presented for payment at another place in another county and the value of the money, goods or services involved is in excess of one hundred dollars, the action may be brought in the county where the instrument was presented or at the place where the instrument was presented for payment, if such place of payment is located in the commonwealth; and provided, further, that except in actions upon negotiable instruments if the plaintiff is an assignee of the cause of action, it shall be brought only in a county where it might have been brought by the assignor thereof. If neither party lives in the commonwealth, the action may be brought in any county. If an action is dismissed because the defendant has raised timely objection to




venue, the defendant shall be allowed double costs.

(Emphasis added.)

<p align="center"><b>CLERK'S NOTICE</b></p>	<p>DOCKET NUMBER <b>1785CV00592</b></p>	<p><b>Trial Court of Massachusetts The Superior Court</b></p> 
<p>CASE NAME: Caroline Roch vs. David J Mollica et al</p>		<p>Dennis P. McManus, Clerk of Courts</p>
<p>TO: Traver Clinton Smith, Jr., Esq. Law Offices of Jeffrey S. Glassman, LLC 1 International Place Boston, MA 02110</p>		<p>COURT NAME &amp; ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608</p>
<p align="center">You are hereby notified that on 08/03/2017 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion to dismiss (#6.0): ALLOWED After hearing this motion is ALLOWED. For the reasons stated in Defendants' Memorandum. This is essentially the same action that was dismissed in Docket No. 1685CV926A. Personal service on the Defendants does not confer jurisdiction on the court.</p> <p>Notices Mailed 8/8/17</p>		
<p>DATE ISSUED <b>08/08/2017</b></p>	<p>ASSOCIATE JUSTICE/ ASSISTANT CLERK <b>Hon. James G Reardon, Jr.</b></p>	<p>SESSION PHONE# <b>(508)831-2350</b></p>



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<b>CLERK'S NOTICE</b>	DOCKET NUMBER <b>1785CV00592</b>	<b>Trial Court of Massachusetts The Superior Court</b> 
CASE NAME: Caroline Roch vs. David J Mollica et al		Dennis P. McManus, Clerk of Courts
TO: Traver Clinton Smith, Jr., Esq. Law Offices of Jeffrey S. Glassman, LLC 1 International Place Boston, MA 02110		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608
<p>You are hereby notified that on the following entry was made on the above referenced docket:</p>		
DATE ISSUED <b>08/08/2017</b>	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE# <b>(508)831-2350</b>

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<b>JUDGMENT ON MOTION TO DISMISS</b>		<b>Trial Court of Massachusetts The Superior Court</b> 
DOCKET NUMBER	<b>1785CV00592</b>	Dennis P. McManus, Clerk of Courts
CASE NAME	Caroline Roch vs. David J Mollica et al	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Mollica, David J. Mollica, Donna Z.		
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Roch, Caroline		
<p>This action came on before the Court, Hon. James G Reardon, Jr., presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),</p> <p>It is <b>ORDERED AND ADJUDGED:</b></p> <p>that the complaint be and hereby is dismissed due to lack of personal jurisdiction.</p>		
DATE JUDGMENT ENTERED	CLERK OF COURTS/ASST. CLERK	
08/08/2017	X 	

Date/Time Printed: 08-08-2017 11:30:14

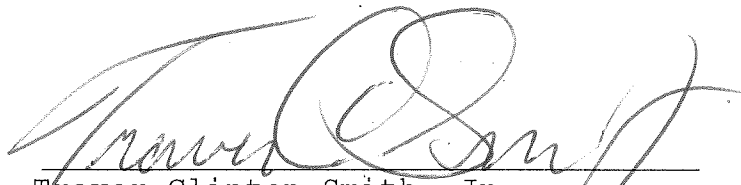
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CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

- Rule 16(a)(6) (pertinent findings or memorandum of decision);
- Rule 16(e) (references to the record);
- Rule 16(f) (reproduction of statutes, rules, regulations);
- Rule 16(h) (length of briefs);
- Rule 18 (appendix to the briefs); and
- Rule 20 (typesize, margins, and form of briefs and appendices).



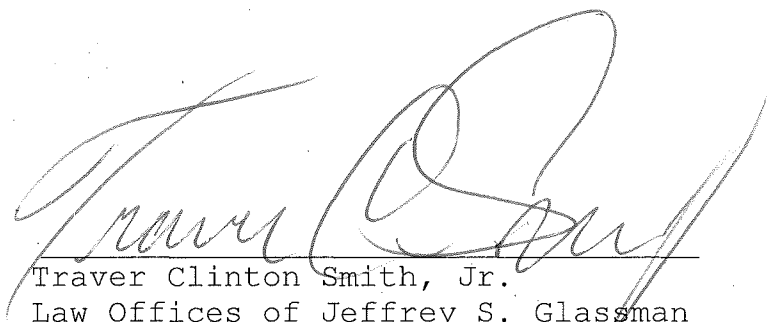
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Date: 12/15/2017

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on December 15, 2017, I have made service of this Brief and Appendix upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System on:

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