IN THE SUPREME COURT OF FLORIDA

NO. 65,921

THE GRAPHIC PRESS, INC.,

Appellee,

V.

BEDFORD COMPUTER CORPORATION,

Appellant

ON CERTIFIED QUESTIONS FROM
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF ON BEHALF OF THE GRAPHIC PRESS, INC.

WHITMAN, WOLFE, GROSS,
SCHAFFEL & KRAMER, P.A.
10651 N. Kendall Drive
Suite 200
Miami, FL 33176
(305) 279-7000

BY IRVING J. WHITMAN and
DOUGLAS M. KRAMER

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STATEMENT OF THE CASE AND OF THE FACTS

Appellant, Bedford Computer Corporation ("Bedford"), has included in its brief a statement of the case and of the facts which we respectfully submit is incomplete and, therefore, somewhat misleading. Accordingly, Appellee, The Graphic Press, Inc. ("Graphic"), offers the following statement, the bulk of which comes from the Certification of the United States Court of Appeals for the First Circuit.

Graphic, a Florida corporation, brought an action for breach of contract against Bedford in the Seventeenth Judicial Circuit of Broward County, Florida, on November 24, 1982. Bedford is a New Hampshire corporation engaged in the sale of computers and related items. In November 1980, the parties executed a written contract by which Graphic agreed to purchase computer equipment from Bedford. The delivery, installation, user training and final testing were to be performed by Bedford at Graphic's place of business in the State of Florida. Difficulties arose regarding equipment and Graphic requested permission to return it to Bedford. Bedford agreed to de-install, remove and repurchase the equipment. Bedford allegedly breached the agreement and Graphic brought suit in Florida for damages.

Because Graphic determined that Bedford was not qualified to do business in Florida and had no agent in Florida upon whom process could be served, Graphic undertook to make service upon

it by publication. Jurisdiction over Bedford was acquired in Florida by publication and certified mail as provided in Chapter 49 of the Florida Statutes.

The actual steps taken by Graphic to protect its rights under Chapter 49 are set forth in the Affidavit of Irving Whitman dated November 5, 1983, and do not appear to be in dispute. Specifically, publication was made in the Broward Review and Business Record, a newspaper published in the county where the court is located, once a week for four consecutive weeks. Copies of the complaint and of the publication were sent by both regular mail and certified mail, return receipt requested, to Bedford at its correct business address in New Hampshire.

In addition to furnishing notice through publication and regular and certified mailings, counsel for Graphic exchanged correspondence with Bedford's New Hamphsire counsel in an effort to resolve the parties' differences. After negotiations failed, counsel for Graphic notified counsel for Bedford of its intention to proceed with the lawsuit in Florida and to seek a default judgment if no answer to the complaint was forthcoming. When Bedford failed to respond to the complaint, a motion for default was filed, Bedford was notified and final judgment was entered against Bedford on May 16, 1983.

Thereafter, on October 4, 1983, Graphic filed an action in the United States District Court for the District of New Hampshire seeking to enforce its Florida judgment. Bedford answered the

federal complaint by collaterally attacking the Florida judgment on the basis that the Florida court lacked in personam jurisdiction. It was not asserted, however, that Bedford was not fully apprised, in fact, of the pending Florida action against it.

Since there was no dispute as to the material facts, both parties moved for summary judgment. By its order dated February 14, 1984, the District Court ruled in favor of Graphic, finding that the process used by Graphic in Florida was proper, that Bedford's objections to the Florida action failed in "their interpretation and application of the Florida law effecting service of process on foreign corporations" and that Graphic's judgment was therefore entitled to full faith and credit.

Bedford then filed a notice of appeal to the United States Court of Appeals for the First Circuit. The Court of Appeals, on its own initiative, filed its Certification to this Court.

ARGUMENT

A FLORIDA COURT CAN OBTAIN JURISDICTION IN PERSONAM OVER A NON-RESIDENT CORPORATION, WHICH HAS MINIMUM CONTACTS WITH THE STATE OF FLORIDA, THROUGH CONSTRUCTIVE SERVICE OF PROCESS UNDER FLA. STAT. SECTION 49.011, WHERE NOTICE HAS BEEN GIVEN NOT ONLY BY PUBLICATION WITHIN FLORIDA, BUT ALSO BY CERTIFIED MAIL ADDRESSED TO DEFENDANT'S CORRECT OUT-OF-STATE ADDRESS, AND DEFENDANT RECEIVES ACTUAL NOTICE OF SUIT AND IGNORES IT.

In its brief, Bedford attempts to convince this Court that the manner by which the Broward County Circuit Court acquired jurisdiction over defendant was not in accordance with Florida law. To support its position, Bedford quotes dictum from numerous Florida cases which, when taken out of context, ostensibly furnish some comfort. Bedford conveniently disregards the actual language of the Florida statutes providing for service of process on non-resident defendants. It is submitted that the reason for this is clear: the Florida statutes specifically provide for service by publication in cases such as this one. Their language is clear, plain and unequivocal.

Chapters 48 and 49 of the Florida Statutes contain the general "long-arm" jurisdiction provisions of our state's laws. These statutes provide alternative methods of obtaining jurisdiction over the person of non-resident defendants. Risman v. Whittaker, 326 So. 2d 213 (Fla. 4th DCA 1976).

Section 48.193(1), Florida Statutes, authorizes Florida courts to exercise jurisdiction over out-of-state residents

having sufficient contacts with the state. It states:

> Any person, whether of not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the juris-diction of the courts of this state of any action arising from the doing of any of the following:
>
> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.
>
> (2) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.
>
> (3) Only causes of action arising from acts or omissions enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section, unless the defendant in his pleadings demands affirmative relief on other causes of action, in which event the plaintiff may assert any cause against the defendant, regardless of its basis, by amended pleadings pursuant to the rules of civil procedure.

This statute has been held to extend jurisdiction of the Florida courts to the fullest extent consistent with due process of law. Tingler v. City of Tampa, 400 So. 2d 146 (Fla. 2d DCA 1981).

The first manner of exercising jurisdiction is furnished by Section 48.193(2), Florida Statutes. That section provides:

> Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state . . . The service shall have the same effect as if it had been personally served within this state.

The second manner of effectuating service of process on out-of-state defendants is provided by 49.021. This method has been described as service by publication.

> Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:
>
> (2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown, and whether dissolved existing, including corporations or other legal entities not known to be dissolved or existing . . .;
>
> (3) Any group, firm, entity or persons who operate or do business, or have operated or done business in this state, under a name or title which includes the words "corporation," "company," "incorporated," "inc." or any combination thereof, or under a name or title which indicates, tends to indicate or leads one to think that the same may be a corporation or other legal entity.

Under Florida law, service of process by publication is not available in all types of actions. Section 49.011 specifies those actions in which such service is permissible:

> Service of process by publication may be made in any court on any person mentioned in s. 49.021 in any action or proceeding:

> (5) For the construction of any will, deed, contract or other written instruments and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder;
>
> . . .
>
> (11) Wherein personal service of process or notice is not required by the statutes or constitution of this state or by the constitution of the United States.

In order to make use of service by publication under Section 49.011, the statutory scheme compels a plaintiff employing this mechanism to execute an affidavit of diligent search and inquiry. Section 49.031 and Section 49.051, Florida Statutes. Under the statutory scheme, defendant may receive a copy of the notice through the mail.

In short, the applicable Florida Statutes clearly authorize Florida courts to exercise in personam jurisdiction over non-resident defendants via the procedure employed in the instant case. In its brief, Bedford does not dispute this point. To the contrary, Bedford states: "On its face, then, and taken in isolation, Section 49.011(5) might appear to provide for service by publication in an in personam proceeding seeking damages for breach of contract." Brief of Appellant at 3.

A plain reading and application of our statutory law should generally resolve the inquiry. Where words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent of the legislature. Citizens of the State of Florida v. Public Service Commission, 435 So. 2d 784 (Fla. 1983). Courts are obliged to interpret and construe

statutes according to precise language adopted by the legislature. Florida Gulf Health Systems Agency, Inc. v. The Commission on Ethics, 354 So. 2d 932 (Fla. 2d DCA 1978).

A close examination of Florida appellate decisions concerning these statutes reveals that they are not basically inconsistent with the meaning of the statutory language, notwithstanding Bedford's protestations to the contrary.

A starting point in examining Florida law regarding service by publication is Day-Tona Seabreeze v. Thunderbird Operating Corp., 207 So. 2d 59 (Fla. 1st DCA 1968). Day-Tona, a motel owner, leased a hotel to Thunderbird, a Florida corporation. Day-Tona alleged breach of the lease and instituted suit in Florida for damages. Personal service could not be completed, however, because all of defendant's principals and agents resided in the State of New York. Personal jurisdiction was therefore acquired by publication service under Chapter 48 of the Florida Statutes, the predecessor to present Chapter 49. As in the present case, the defendant asserted that publication service could not be used for an in personam action. The District Court of Appeal rejected this assertion and held that personal service was in fact properly acquired. The court stated:

> As previously noted, Chapter 48 was intended to establish one uniform procedure for service by publication. It is broad scope. It applies in all types of actions where personal service cannot be had except in those where personal service of process or notice is required by the Statutes or the Constitution. It is specifically applicable against domestic corporations."

The Day-Tona case is nearly identical to the present case, and Bedford acknowledges as much. The court in that case approved the use of publication service to acquire personal jurisdiction against a corporate defendant in a contract action similar to the instant matter. The Day-Tona court thus appears to have considered and rejected arguments virtually identical to those asserted by Bedford.

Against the language of the statute and the Day-Tona case, defendant cites Gaskill v. May Brothers, Inc., 372 So. 2d 98 (Fla. 2d DCA 1979). This was a collection case in which a Florida creditor sued an Illinois debtor upon theories of account stated and open account. Plaintiff's Florida action was instituted by publication service and a default judgment was acquired against defendant. While the court did in fact set aside the judgment, its reason for doing so was because the defendant did not have sufficient contacts with the State of Florida to justify an action against it regardless of the type of service employed. In its opinion, the court cited the language of Section 48.193 and specifically stated as follows:

> The complaint makes no reference to the cause of action having arisen out of any of the circumstances described in the statute . . . Therefore, even if the deputy had been able to effect personal service upon appellant in Illinois, there would have been no in personam jurisdiction over her with respect to this complaint."

Unlike the defendant in Gaskill, Bedford agreed to perform substantial activities in the State of Florida. These activities

are alleged in Graphic's complaint and have never been in dispute. The Gaskill opinion thus has no bearing upon the present matter and does not in any way limit the use of publication service against defendants who are otherwise subject to the jurisdiction of the courts of Florida.

The remaining cases cited by defendant are distinguishable from the present matter on one of several grounds. In each of these cases, the court disapproved publication service either because the defendant had insufficient contacts with Florida, because the subject matter of the action did not fall into any of the categories specified in Section 49.011, Florida Statutes, or because the plaintiff's pleadings were not in conformity with Florida law. A good example is Shannon v. Great Southern Equipment Co., 326 So. 2d 19 (Fla. 2d DCA 1976). Plaintiff in that case sued to collect the balance due under an equipment lease for work and labor performed for defendant, Shelfer. The opinion does not specify whether Shelfer was a resident of Florida or whether the contracts were to be performed in Florida. The only area considered by the court was the attempt by plaintiff to base jurisdiction upon garnishment of a debt owed to Shelfer by the co-defendant, Shannon. Plaintiff attempted to effect this garnishment by publication service against Shelfer and completed actual service against Shannon, the garnishee. The court held that such service was insufficient and based its opinion principally upon the fact that the procedure was not

followed under Florida law to effect the garnishment as a basis for quasi in rem jurisdiction. The court stated:

> [I]t is essential that the complaint expressly provide that the action is directed against the property per se, not the defendant, and that the property so proceeded against be specifically described. That was not done here and the omission is a fatal due process defect.

Contrary to the assertions of Bedford, the Shannon decision does not place any restrictions upon use of publication service in actions such as the present matter. Rather, it is based upon the fact that the plaintiff failed to satisfy Florida pleadings requirements to properly effect its garnishment against co-defendant. Shannon thus has no bearing upon the present case.

The next case cited by Bedford is Ressler v. Sena, 307 So. 2d 457 (Fla. 4th DCA 1975). Graphic finds it difficult to properly respond to the defendant's citation of this case because the opinion is extremely short and does not clearly set forth the basis upon which it rests. It appears that the court did in fact hold publication service improper in an action by a tenant against an out-of-state landlord under the terms of a lease. The opinion does not specify, however, whether the property was located in Florida and does not set forth the specific procedure by which the tenant attempted to effect such publication service. The opinion seems to be based in substantial part upon the tenant's pleadings deficiencies, as well as the fact that no appellate brief was filed on his behalf. In light of the above,

as well as the clear statutory language and case law authority to the contrary, Graphic submits that the Ressler opinion does not sustain Bedford's position.

Bedford further cites the case of Clark v. Realty Investment Center, Inc., 252 So. 2d 589 (Fla. 3d DCA 1971). Clark involved a suit by real estate brokers seeking payment of a commission alleged to be due under a listing agreement for the sale of corporate stock. In addition to suing the corporate defendants, the broker sued the shareholders individually and attempted publication service upon two shareholders who resided out of the State of Florida. The court held that publication service against these non-residents was improper because "they had no office or place of business in Florida and had no interest other than through ownership of stock in the corporation." The Clark case is thus completely distinguishable from the present matter. Clark is based upon the fact that defendants' contacts with the State of Florida consisted solely of stock ownership. Aside from the extremely limited nature of this connection, such stock ownership is not included in Section 49.011 as being a basis for the allowance of publication service. The Court noted in passing that an alternate procedure may have existed under other sections of the Florida statutes for other types of service but found that such procedures were not followed in the case.

Bedford also cites a number of divorce cases in which a Florida plaintiff attempted to serve a non-resident spouse by

publication. Gelkop v. Gelkop, 384 So. 2d 195 (Fla. 3d DCA 1980); Palmer v. Palmer, 353 So. 2d 1271 (Fla. 4th DCA 1978); Rich v. Rich, 214 So. 2d 777 (Fla. 4th DCA 1968). In each of these cases, the court held that publication service was sufficient to confer jurisdiction to terminate the marital bonds but could not be used as a basis to award alimony, child support or property distribution. Bedford goes on to argue that these holdings impose a limitation upon the use of publication service in non-domestic cases such as the present one.

Bedford's argument disregards the basic nature of "divisible divorce". Williams v. North Carolina, 317 U.S. 287, 297-298, (1942); 325 U.S. 226 (1945). It further ignores the fact that Section 49.011(6) provides for publication service only with regard to proceedings "for dissolution or annulment of marriage" and not for proceedings to fix awards of alimony, child support or property distribution. As reviewed in Palmer v. Palmer, supra, Section 48.193(e) allows for long-arm jurisdiction to make such monetary awards only in a limited set of circumstances:

> 1. Any person, whether not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person . . . to the jurisdiction of the courts of this state:
>
> . . .
>
> (e) With respect to proceedings for alimony, child support or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of defendants, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commence-

> ment of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

Under both the Williams decision and Section 49.011(6), divorce is considered in the nature of an in rem proceeding. Thus, in order to acquire a divorce, a plaintiff need not acquire personal jurisdiction against a non-resident spouse. A divorce decree may, therefore, be made by publication service even though the non-resident spouse maintains absolutely no contacts with the State of Florida. The same is not true, however, with regard to claims against the non-resident spouse for alimony, child support or property distribution.

When viewed against this background, the reasoning behind all of the divorce cases cited by Bedford is obvious. Each of the cases turns on the fact that the non-resident defendant did not maintain his domicile in Florida and did not otherwise qualify for extention of personal jurisdiction under Section 48.193(e).

The process used in the present case, however, is not so limited. Bedford's contacts with Florida were substantial and have never been in serious dispute. The fact that defendant agreed to perform a contract in Florida and later breached the agreement is unquestionably a sufficient basis for the extention of jurisdiction under Section 48.193. The plain language of the Florida Statutes makes equally clear a plaintiff's right to seek "enforcement of any legal or equitable right, title, claim or

interest thereunder" by publication service under Section 49.011(5). In light of this fact, the extension of jurisdiction over Bedford was completely in accordance with Florida law, as well as all requirements of due process.

The thrust of Bedford's argument appears to be that a judgment which is obtained in violation of due process or without jurisdiction is not entitled to full faith and credit. Graphic has no basic disagreement with these principles, and might be in an untenable position were the Florida court to have acted in violation of Bedford's due process or without jurisdiction. Bedford, however, misses the point. All of the steps taken by Graphic to acquire jurisdiction in Florida were strictly in conformity with Florida law. And the exercise of jurisdiction by the Broward Circuit Court did not violate Bedford's due process.

With respect to Bedford's assertion that its due process was denied, it overlooks two critical features of this case. First, Bedford had sufficient minimum contacts with the State of Florida to satisfy due process notions of fair play. Second, Bedford received actual notice of the pending Florida lawsuit and had an opportunity to defend -- which opportunity included the right to raise, among other things, the issues of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process. See Rule 1.140(b), Florida Rules of Civil Procedure. Bedford does not seriously dispute either point.

There appears to be no question that Bedford's activities

and contacts with Florida were substantial enough to satisfy the "minimum contacts" test of International Shoe Co. v. State of Washington, 326 U.S. 310 (1946). It also does not seem contested that Bedford's activities in Florida were substantial enough to subject it to jurisdiction under Chapters 48 and 49 of the Florida Statutes. The contracts and correspondence between the parties show that Bedford was to perform a substantial part of the contract in Florida, including installation, testing, user-training and de-installation.

In this respect, jurisdiction over Bedford has not violated basic notions of justice and fair dealing. Graphic is a resident of the State of Florida. Bedford contracted with Graphic for a profit motive and agreed to perform substantial activities in Florida under the contract. Bedford chose to avail itself of the marketplace in Florida and subjected itself to the jurisdiction of this state's courts.

When the subject transaction proved unsatisfactory, Bedford chose to breach its agreement and caused Graphic to suffer substantial monetary loss. Graphic made every effort to resolve the differences between the parties and continued these efforts even after it had initiated suit in Florida. Bedford, on the other hand, has done everything possible to frustrate these efforts and to evade the process issued against it.

In conformity with the publication, Beford received actual notice of the pending Florida lawsuit against it. It was

afforded a reasonable and fair opportunity to be heard on all issues it might choose to bring to the court's attention. Each of the matters would, of course, be considered prior to any determination of Bedford's rights. Prudently, fundamental requirements of due process have been satisfied by reasonable notice and a reasonable opportunity to be heard. See Florida Public Service Commission v. AAA Enterprises, Inc., 387 So. 2d 940 (Fla. 1980).

Bedford cites the case of Napoleon B. Broward Drainage District v. Certain Lands Upon Which Taxes Were Due, 33 So. 2d 716, 160 Fla. 120 (Fla. 1948), and others, for the general proposition that "The fact that the defendant had actual knowledge of the attempted service cannot be relied upon to justify the failure of the plaintiff to strictly observe and substantially comply with a statute authorizing service by publication." The problem with Bedford's reliance upon this principle, however, is that Graphic complied with the requisites of the controlling publication statute prior to the Florida court's obtaining personal jurisdiction over the defendant. The cases are simply inapposite.

Once a defendant like Bedford is properly served with notice of a lawsuit, it has a relatively simple and inexpensive vehicle by which to challange matters such as jurisdiction over the person, insufficiency of process and insufficiency of service of process. Bedford seems to acknowledge the availability of such a

procedure pursuant to Rule 1.140(b), Florida Rules of Civil Procedure, and its arguments against application of such a procedure in this case are at best sophistry and at worst confusing. The fact is, Florida courts are not "willing to overlook defects in the manner in which process" is served, so long as a proper challange is made to that manner.

In the event that Bedford was concerned about acceding to the jurisdiction of the court by making an appearance, that concern would have been quickly allayed. Numerous appellate decisions of this state have recognized that a challenge to jurisdiction over one's person does not constitute submission to the jurisdiction of the court. See, for example, Sternberg v. Sternberg, 139 Fla. 219, 190 So. 486 (1939); Huffman v. Heagy, 122 So. 2d 335 (Fla. 3d DCA 1960); see also Public Gas Co. v. Weatherhead Co., 409 So. 2d 1026 (Fla. 1982); First Wisconsin National Bank of Milwaukee v. Donian, 343 So. 2d 943 (Fla. 2d DCA 1977), cert. den., 355 So. 2d 513 (Fla. 1978).

Bedford is a sophisticated litigant and has had the advice of counsel in each and every step in these proceedings. It was fully aware of the Florida action against it, but nevertheless made the affirmative decision to ignore the action and let a default judgment be taken against it. Bedford has now gone one step further and has required Graphic to pursue its remedies through the Federal District Court of New Hampshire, the United States Court of Appeals for the First Circuit, and this Honorable

Court.

In effect, Bedford has put the parties to substantial time and expense to adjudicate its contentions which, if meritorious, could have been resolved by the orderly and relatively inexpensive device of a motion to dismiss. This total disregard of established procedure should not be rewarded. Compare Craven v. J.M. Fields, Inc., 226 So. 2d 407 (Fla. 4th DCA 1969), in which the court held:

> If the original service or the return is so defective as to amount to no notice, the judgment must be deemed void. However, if the service or return is irregular but actually gives the defendant notice of the action or proceeding, a judgment based thereon has been held not to be void but merely voidable . . .
>
> The initial return in the instant case was irregular but the service was sufficient to put the defendant on notice of a proceeding instituted against it. However, the defendant saw fit to simply ignore the process, sit idly by, let default be entered against it, a jury trial initiated and final judgment entered pursuant to that jury verdict without making any effort to use the defenses available to it by Rule 1.140(b), Fla. RCP, 20 F.S.A.[2]. A party (complaining of an irregular service or return is required to move diligently to effectuate those remedies available to him by our rules of civil procedure lest he suffer the consequences.

In summary, a Florida court may acquire jurisdiction over a non-resident defendant if the service of process statutes are closely followed and the defendant has requisite minimum contacts with the state. Where the process employed furnishes the defendant with actual notice of the action, it must properly react or incur the consequences.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the questions certified by the United States Court of Appeals for the First Circuit should be answered in the affirmative.

Respectfully submitted,

WHITMAN, WOLFE, GROSS,
SCHAFFEL & KRAMER, P.A.
Attorneys for Appellee -
The Graphic Press, Inc.
10651 N. Kendall Drive, Suite 200
Miami, FL 33176
(305) 279-7000

BY: _____
IRVING J. WHITMAN

BY: _____
DOUGLAS M. KRAMER

I hereby certify that one copy of this brief has been furnished to each of the attorneys for the Bedford Computer Corporation, Marc Rohr and Roger Jay Sharp, by depositing the same in the U.S. Mails, postage prepaid and addressed to him, this 19th day of November, 1984.

IRVING J. WHITMAN

DOUGLAS M. KRAMER