SUPREME COURT OF FLORIDA

NO. 65,921

THE GRAPHIC PRESS, INC.,

V.

BEDFORD COMPUTER CORPORATION

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

INITIAL BRIEF ON BEHALF OF BEDFORD COMPUTER CORPORATION

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STATEMENT OF THE CASE

The Graphic Press, Inc., a Florida corporation ("Graphic") commenced an in personam action for damages for an alleged breach of contract against Bedford Computer Corporation, a New Hampshire corporation ("Bedford"), in a Florida state court. Graphic constructively served process upon Bedford by publication, pursuant to Chapter 49 of the Florida Statutes. There was no personal service of process under Florida's long arm statute. Bedford did not appear in the Florida action, and Graphic obtained a default judgment against Bedford. Thereafter, Graphic commenced litigation against Bedford in the United States District Court for the District of New Hampshire, seeking enforcement of the Florida default judgment. Both Graphic and Bedford filed motions for summary judgment, and the federal district court granted Graphic's motion and entered judgment against Bedford. Bedford filed a motion to alter or amend the judgment, and the District Court denied Bedford's motion. Bedford thereafter filed a notice of appeal, to the United States Court of Appeals for the First Circuit, and motions for stay of execution and to approve the form of the supercedeas bond filed by Bedford. The supercedeas bond was approved, and execution of judgment has been stayed pending Bedford's appeal.

On September 21, 1984, the United States Court of Appeals, on its own initiative, certified the following questions to the Florida Supreme Court, pursuant to Rule 9.150 of the Florida Rules of Appellate Procedure:

> (1) Can a Florida court obtain jurisdiction in personam over a non-resident corporation through constructive service of process under Fla. Stat. §49.011, notice having

been given not only by publication within Florida but also by certified mail addressed to defendant's correct out-of-state address (and actually received there by defendant)?

(2) If the answer to question (1) is in the negative, and assuming notice of the kind mentioned in that question is provided, would a Florida court obtain jurisdiction in personam over a non-resident corporation under some theory of Florida law other than is provided by Fla. Stat. §§49.011 et seq.?

The Court of Appeals did not designate either party as the "moving party", within the meaning of Florida Rule of Appellate Procedure 9.150(d).

As the appellant before the United States Court of Appeals, Bedford has, in accordance with the advice of the Florida Supreme Court Clerk's Office, assumed the role of "moving party" for the purpose of submitting the initial brief in this proceeding. For the sake of simplicity, Bedford will be referred to as "appellant", and Graphic as "appellee", in this brief.

I.

A FLORIDA COURT CANNOT OBTAIN IN PERSONAM JURISDICTION OVER A NON-RESIDENT CORPORATION THROUGH CONSTRUCTIVE SERVICE OF PROCESS BY PUBLICATION UNDER §49.011, FLORIDA STATUTES.

A virtually unbroken line of authority stands for the proposition that service of publication, pursuant to Chapter 49 of the Florida Statutes, can lead only to the exercise of in rem or quasi in rem jurisdiction by a Florida court.

Section 49.011 of the Florida Statutes sets forth the only categories of cases in which service by publication may be employed. Most of those categories are immediately recognizable as embracing cases in which rights to and interests in real or personal property located within Florida are to be adjudicated, i.e., proceedings historically described as in rem or quasi in rem. Category (5), relied on by the plaintiff in this case, is, stylistically, an exception; it comprises actions "[f]or the construction of any . . . contract . . . and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder." 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. Yet every reported Florida decision known to counsel in which this point has arisen, save one, has yielded a contrary interpretation: even under §49.011(5), service by publication can confer only in rem or quasi in rem jurisdiction upon a Florida court. Cases directly so holding, in the context of contract disputes, are Gaskill v. May Brothers, Inc., 372 So.2d 98 (Fla. 2d DCA 1979); Shannon v. Great Southern Equipment Company, 326 So.2d 19 (Fla. 2d DCA 1976); Ressler v. Sena, 307 So.2d 457 (Fla. 4th DCA 1975); and Clark v. Realty Investment

Center, Inc., 252 So.2d 589 (Fla. 3d DCA 1971); see also Robinson v. Loyola Foundation, Inc., 236 So.2d 154, 161 (Fla. 1st DCA 1970); Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965).

Similar holdings, in the context of dissolution proceedings--in which service by publication is authorized by §49.011(4), Fla. Stat. (1983)--are Gelkop v. Gelkop, 384 So.2d 195 (Fla. 3d DCA 1980); Palmer v. Palmer, 353 So.2d 1271 (Fla. 1st DCA 1978); Lahr v. Lahr, 337 So.2d 837 (Fla. 2d DCA 1976); and Rich v. Rich, 214 So.2d 777 (Fla. 4th DCA 1968). To the same effect is Hyman v. Canter, 389 So.2d 322 (Fla. 3d DCA 1980). See also, in the context of tort cases clearly not covered by §49.011, the consistent holdings and language in Huguenor v. Huguenor, 420 So.2d 344 (Fla. 5th DCA 1982); and Drake v. Scharlau, 353 So.2d 961 (Fla. 2d DCA 1978).

Even Risman v. Whittaker, 326 So.2d 213 (Fla. 4th DCA 1976), inexplicably cited by the federal district court in support of its decision in this case, is fully consistent with and supports the interpretation of §49.011 reached in all of the decisions cited above. Risman upheld the right of a Florida plaintiff to constructively serve process upon a non-resident defendant, whose address is known, in a mortgage foreclosure action, even though personal service upon the defendant was possible. In holding that the plaintiff could choose between personal and constructive service (a point with which we take issue, infra), however, the court explicitly recognized that the plaintiff would be choosing, as well, between in personam and in rem jurisdiction over the defendant:

> Where such personal service was unavailable the alternative open to plaintiffs was to obtain service of process by publication. In so doing such plaintiffs achieved only in rem jurisdiction.
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> * * *

> And, . . . we are at a loss to understand why the non-resident defendants here are protesting when the use of the Long Arm Statute would result in their greater exposure via in personem [sic] jurisdiction, instead of in rem. . . .

Id. at 214-15.

Standing apparently alone against this otherwise unbroken line of authority is the ruling of the First District Court of Appeal in Day-Tona Seabreeze, Inc. v. Thunderbird Operating Corp., 207 So.2d 59 (Fla. 1st DCA 1968), the only case cited by the appellee in its favor on this issue in its brief before the First Circuit Court of Appeals, at 8, and the only case so cited by that Court. The court in Day-Tona upheld the right of one Florida corporation to serve process upon another Florida corporation by publication, in an action (apparently in personam) for breach of a lease, where the defendant had no office, officers, or resident agents in Florida.

Does this single holding mean that all of the other cases cited herein incorrectly held or stated that service by publication under Chapter 49 of the Florida Statutes cannot confer in personam jurisdiction upon a Florida court? We respectfully submit that it does not.

The court in Day-Tona appears to have been guided by its belief that the Florida Legislature, in enacting the 1941 statute now codified as Chapter 49 of the Florida Statutes, meant to preserve the essence of one of its many predecessor statutes, "Chapter 11829, Acts of 1927, which governed service of process on corporations, required them to designate a place and agent for receiving service of process, and subjected those failing to comply to process by publication," even though "that part of Chapter 11829 relating to constructive service on corporations" was

repealed in 1941. 207 So.2d at 60. Even if this highly questionable view of the law were correct, it arguably has no bearing upon a non-resident corporate defendant (i.e., a foreign corporation) which is not and has never been required by Florida law to designate an agent to receive process in Florida.

There are, moreover, additional problems facing one who would cite the Day-Tona case, as appellee has done, as authority for the broad proposition that service by publication can lead to in personam jurisdiction in a contract case in Florida. First, the court cited no cases in support of its apparent assumption that the predecessor statute, Chapter 11829, could be utilized to confer in personam jurisdiction. Second, the court referred to none of the older Florida Supreme Court cases, cited infra, that appear to state, as a general proposition of law, that constructive service cannot lead to in personam jurisdiction; thus, the court gave no indication that it was knowingly ruling in contradiction of that general principle. Third, the Day-Tona case has apparently never been cited, much less relied upon, in any subsequent reported decision by a Florida appellate court. Fourth, the same panel of appellate judges that decided the Day-Tona case revealed just two years later, in Robinson v. Loyola Foundation, Inc., 236 So.2d 154 (Fla. 1st DCA 1970), at 161, that they were well aware of

> the established law of this state . . . that a personal judgment based upon constructive service on a non-resident who does not appear was not valid either in Florida or elsewhere. It was established that a judgment rendered on such constructive service against a non-resident was effectual only as a judgment in rem, acting on such property as such

defendant may have within the jurisdiction of the court.*

It may not be irrelevant, finally, that service by publication in Day-Tona, prior to the adoption in 1973 of Florida's general long-arm statute, §§48.193 and 194, Fla. Stat. (1983), was apparently the only way in which process could be served on the defendant, none of whose officers or agents could be found and served within Florida. §48.194 allows, of course, personal service of process outside of Florida upon a defendant who has allegedly breached a contract under circumstances such as those in Day-Tona.

It can hardly be concluded, then, contrary to appellee's assertion in its brief before the First Circuit, that Day-Tona, a case upholding constructive service upon a Florida corporation on the basis of a repealed statute, "is nearly identical to the present matter and is dispositive of the jurisdictional issues raised by defendant." Brief of Appellee, at 9.

Appellee has, in that same brief, at pages 9-14, unpersuasively attempted to distinguish several of the cases cited above from this case, with the hope of discrediting the clear statements in those opinions to the effect that service by publication under Chapter 49 cannot lead to in personam jurisdiction. Appellee has made no suggestion, however, as to why the Florida courts have so consistently made that statement if it is not in fact the law of the state.

We contend that the interpretation of Chapter 49 so repeatedly adopted by the courts of Florida is the correct one, and that its adoption was far from fortuitous or casual. Indeed, this interpretation of Chapter 49

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* Despite the court's use of the past tense, it is clear from the opinion that the court did not regard the law governing this issue as having changed.

appears to have been reached with federal constitutional considerations in mind. Thus, in Newton v. Bryan, 142 Fla. 14, 194 So. 282 (Fla. 1940), a case involving constructive service by publication under one of the predecessor statutes to Chapter 49, Justice Chapman stated for this Court:

> It is now established that a personal judgment on constructive service on a non-resident who does not appear is contrary to due process of law, and is not valid either in the state where rendered or elsewhere. . . . This rule controls and is applicable to all kinds of constructive or substituted service by publication or personal service out of the jurisdiction in which the judgment is rendered. A judgment rendered on such service against a non-resident is effectual only as a judgment in rem, acting on such property as he may have within the jurisdiction. See . . . Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. . . .

194 So. at 284-85 (emphasis added). This court appears to have believed, then, as it reasonably should have in 1940, that, as Pennoyer taught, 95 U.S. at 727, in personam jurisdiction could result only from personal service of process within the forum state (or upon service outside the state upon a temporarily absent Florida citizen);* it followed that constructive service by publication on a non-resident could only support the exercise of in rem or quasi in rem jurisdiction. This was five years prior to the articulation of the "minimum contacts" test, in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945),

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* Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

and just one year prior to the enactment by the Florida legislature of what is now Chapter 49 in 1941.

There is no reason to believe that the Florida legislature intended to depart from the view expressed in Newton v. Bryan; indeed, in 1943 this Court observed, in the case of Ake v. Chancey, 152 Fla. 677, 13 So.2d 6 (Fla. 1943), involving "a common law action to collect an attorney's fee":

> We find nothing in the 1941 Constructive Service Statute to show that it was intended to be employed to bring a defendant into court for the mere purpose of collecting a personal claim and the cases relied on by appellee do not show that constructive service can be substituted for personal service in such cases. The courts generally held that suits to collect personal claims cannot afford a basis for constructive service.

13 So.2d at 9.

While the federal constitutional underpinning of this understanding of Chapter 49 has been partly eroded since the early 1940's,* the early and consistent reading of legislative intent remains accurate: constructive service by publication pursuant to Chapter 49 will not support an assertion of in personam jurisdiction by a Florida court.

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* See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), suggesting that, "in the case of persons missing or unknown," service by publication could lead to in personam jurisdiction.

II.

SERVICE BY PUBLICATION UNDER §49.021, FLORIDA STATUTES, IS AVAILABLE ONLY WHEN PERSONAL SERVICE OF PROCESS "CANNOT BE HAD."

§49.021, Fla. Stat. (1983), explicitly states: "Where personal service of process cannot be had, service of process by publication may be had upon any party,. . . ." The words of the statute could hardly be clearer. Service by publication is available only when the defendant cannot be served personally.

This has consistently been the understanding of the Florida courts in interpreting this statute. Burton v. Burton, 448 So.2d 1229 (Fla. 2d DCA 1984); Shefer v. Shefer, 440 So.2d 1319 (Fla. 3d DCA 1983). In Taylor v. Lopez, 358 So.2d 69, 70 (Fla. 3d DCA 1978), the court held service by publication invalid, stating:

> It seems elemental that service of process by publication may be had only if personal service of process cannot be had. Resort to constructive service by publication is predicated on "necessity". . . .

See also H. Trawick, Florida Practice and Procedure §8-17 (1983), at 118 ("the fundamental basis for service by publication is necessity").

Again, this understanding of the availability of service by publication predates the adoption of the present statutory scheme and is constitutionally based. Thus, in McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (Fla. 1926), this Court concluded

> that in suits of this nature, where personal service cannot be effected after the exercise of reasonable diligence and an honest and conscientious effort to do so, appropriate to the circumstances, a reasonable method of imparting notice by publication . . . is due

> process of law, provided the requirements of the statute be strictly followed. . . . Pennoyer v. Neff. . . .

108 So. at 833. Accord, Balian v. Wekiwa Ranch, 97 Fla. 180, 122 So. 559, 563 (Fla. 1929); Reybine v. Kruse, 128 Fla. 278, 174 So. 720 (Fla. 1937).

Indeed, the detailed requirements of the sworn statement required by §49.031 are explainable only in terms of this rule of necessity. Why else do §§49.041, 49.051, 49.061, and 49.071, Fla. Stat. (1983), require statements that the plaintiff wishing to serve process by publication has made "diligent search and inquiry" to discover the name and location of the defendant to be so served? Why else must the plaintiff swear under oath, under §49.051, that all corporate agents are either unknown, absent from the state, cannot be found within the state, have unknown "whereabouts," or conceal themselves "so that process cannot be served upon them so as to bind the said corporation"? (It must be recalled that the ability of a Florida plaintiff to personally serve process upon a defendant outside of Florida was generally unavailable prior to the enactment of §48.194, Fla. Stat. (1983), in 1973). As one court has stated,

> With reference to the diligent search and inquiry requirement of the statute to determine the defendant's place of residence, the test is whether the complainant reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstance to acquire the information necessary to enable him to effect personal service on the defendant.

Canzoniero v. Canzoniero, 305 So.2d 801, 803 (Fla. 4th DCA 1975)(emphasis added); see also Wiggins v. Portmay Corp., 432 So.2d 802, 804 (Fla. 1st DCA 1983); Kooman, Constructive Service in Florida, 9 U. Fla. L. Rev. 1, 8 (1956). (Even Day-Tona Seabreeze, Inc. v. Thunderbird Operating Corp., 207 So.2d 59 (Fla. 1st DCA 1968), relied on by appellee, gives evidence

of adherence to this interpretation. Observing that personal service upon the defendant could not be effected in that case, the court immediately concluded, "Therefore, plaintiff is entitled to use constructive service. . . ." Id. at 60-61 (emphasis added).)

Risman v. Whitaker, 326 So.2d 213 (Fla. 4th DCA 1976), is to the contrary. The court in Risman upheld constructive service upon a non-resident defendant, despite the fact that the defendant could have been served personally outside of Florida pursuant to §48.194. The court was aware of McDaniel v. McElvy, supra, and other decisions adhering to the rule of necessity as a condition to the use of constructive service, but distinguished those cases on the ground that they had been decided prior to the enactment of Florida's general long-arm statute, §§48.193 and 194, in 1973. Apparently because the statute providing for constructive service was enacted in 1941, at a time when personal service outside of Florida was not authorized by any statute, the court concluded that "the reference to personal service [in §49.021] means service upon defendants within the State of Florida under Fla. Stat. §48.031 (1973)." Id. at 215. No authority was cited for this proposition, and Risman has apparently not been cited in any subsequent reported decision by a Florida appellate court.

We respectfully contend that Risman was wrongly decided. There is simply no persuasive reason to distinguish between personal service within Florida and personal service outside of Florida for the purpose of interpreting §49.021. Service by publication--even when accompanied by the mailing of notice to the defendant, pursuant to §49.12, Fla. Stat. (1983)(and note that the statute does not require the use of certified mail)--is less likely to provide effective notice to a defendant than

personal service, regardless of where personal service is effected; thus, service by publication should always be a last resort, utilized only when necessary. Considering that §§49.021, 48.193(2), and 48.194 all refer to "personal service", an interpretation of §49.021 which includes out-of-state personal service within the meaning of "personal service" is the more natural interpretation as well as the one best serving the policy underlying the statute. At least one court has given evidence of having adopted this interpretation of §49.021. Shefer v. Shefer, 440 So.2d 1319 (Fla. 3d DCA 1983). There is no reason to think the Florida legislature intended otherwise.

Indeed, we suggest that to interpret §49.021 as the court did in Risman might well be violative of the Due Process Clause of the Fourteenth Amendment. As the United States Supreme Court held in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), due process requires

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . . The notice must be of such nature as reasonably to convey the required information. . . . [P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

339 U.S. at 306.

At least one Florida court has observed: "Constructive service is constitutionally predicated upon a finding that personal service could not be effected." Bradbery v. Frank L. Savage, Inc., 190 So.2d 183, 186 (Fla. 4th DCA 1966). Even when supplemented by the use of ordinary mail, as §49.12 requires, constructive service is a highly questionable predicate,

constitutionally, for the assertion of in personam jurisdiction.

In this case, no suggestion has been made by the appellee that the appellant could not have been served in New Hampshire pursuant to §48.194. Therefore, a vital prerequisite to the use of constructive service has not been satisfied.

III.

THE FACT THAT THE DEFENDANT ACTUALLY RECEIVED NOTICE OF THE ACTION BY CERTIFIED MAIL DOES NOT SUPPORT THE EXERCISE OF IN PERSONAM JURISDICTION OVER DEFENDANT BY A FLORIDA COURT.

There is no general statutory provision authorizing service by mail, certified or otherwise, in Florida.

For service in this case to have been valid and effective, then, it could only be by dint of a ruling to the effect that actual notice renders service of process effective, notwithstanding the clear failure of the plaintiff to comply with statutory requirements. This is not the law in Florida. This Court held, in Napoleon B. Broward Drainage District v. Certain Lands Upon Which Taxes Were Due, 33 So.2d 716, 160 Fla. 120 (Fla. 1948):

> It is established law that when substituted or constructive service is substituted in place of or for personal service a strict and substantial compliance with the provisions of said statute must be shown in order to support the judgment or decree based on such substituted or constructive service. . . . The inquiry must be as to whether the requisites of the controlling statute have been complied with. . . . 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.

33 So.2d at 718 (Emphasis added). Accord, Panter v. Werbel-Roth Securities, Inc., 406 So.2d 1267 (Fla. 4th DCA 1981); see also Conway v. Spence, 119 So.2d 426 (Fla. 3d DCA 1960); Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 529, 72 L.Ed. 446 (1928); Armco, Inc. v. Penrod-Stauffer Building Systems, Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

A plaintiff cannot be permitted to effectively rewrite the laws governing service of process; the rules set forth by the legislature were meant to be followed. As more than one Florida court has noted:

> It is a fundamental principle of law that the constructive service statute is strictly construed against a plaintiff who seeks to obtain service of process under it.

Wiggins v. Portmay Corp., 432 So.2d 802, 804 (Fla. 1st DCA 1983); accord, Tibbetts v. Olson, 91 Fla. 824, 108 So. 679, 685 (Fla. 1926); Huguenor v. Huguenor, 420 So.2d 344 (Fla. 5th DCA 1982).

The procedural rule permitting a defendant to move to dismiss a complaint (or to quash service of process) on the grounds of "insufficiency of process" or "insufficiency of service of process", Fla. R. Civ. P. 1.140(b), moreover, would make little sense if actual notice of a lawsuit were sufficient to deprive a defendant of the right to object to improper service, since only a defendant who has notice of the action is in a position to make such a motion. Indeed, the ability of such a defendant to so move has been recognized in cases exactly like this one. Clark v. Realty Investment Center, Inc., 252 So.2d 589 (Fla. 3d DCA 1971); Robinson v. Loyola Foundation, Inc., 236 So.2d 154, 161 (Fla. 1st DCA 1970).

If anything, the courts should be even less willing to overlook defects in the manner in which process was served when a default judgment has been entered. See Restatement of Judgments, 2d, §3 at 52-53 (1982). A non-resident defendant is entitled to rely upon a plaintiff's failure to comply with statutory and case law governing service of process in determining whether it is obligated to defend itself in a distant forum.

CONCLUSION

The overwhelming weight of authority in Florida is to the effect that constructive service of process by publication (1) cannot support the exercise of in personam jurisdiction by a Florida court, and (2) cannot be utilized as a method of service of process unless personal service of process upon the defendant is impossible. For both of these reasons, the use of constructive service in this case was impermissible under Chapter 49 of the Florida Statutes, and the default judgment entered against appellant is void as a matter of Florida (and very possibly federal constitutional) law. No other provision of Florida law pertaining to service of process was relied upon by appellee in support of the notice provided in this case, nor could any be.

The questions posed by the United States Court of Appeals for the First Circuit should be answered in the negative.

Respectfully submitted,

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I hereby certify that one copy of this brief has been furnished to each of the attorneys for The Graphic Press, Inc., Jay M. Niederman and Irving J. Whitman, by depositing the same in the U. S. Mails, postage prepaid and addressed to him, this 23d day of October, 1984.

Marc Rohr

Marc Rohr