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

REPLY BRIEF ON BEHALF OF BEDFORD COMPUTER CORPORATION

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INTRODUCTORY STATEMENT

In its initial brief to this Court ("Bedford's Initial Brief"), Bedford Computer Corporation ("Bedford") presented three arguments: (1) A virtually unbroken line of Florida court decisions has held that service of process by publication can lead only to in rem or quasi in rem jurisdiction over nonresidents; (2) The plain language of §49.021, Fla. Stat. (1983) and the constitutional environment in which it was enacted demonstrate that unavailability of personal service is a prerequisite to service thereunder; and (3) Florida law provides that actual notice of litigation does not support the exercise of in personam jurisdiction.

In its initial brief to this Court ("Graphic's Initial Brief"), The Graphic Press, Inc. ("Graphic") argued: (1) Because §48.193, Fla. Stat. (1983) provides that Bedford could have been personally served, service of process by publication supported in personam jurisdiction; (2) Day-Tona Seabreeze v. Thunderbird Operating Corp., 207 So.2d 59 (Fla. 1st DCA 1968) is better authority than the overwhelming line of precedential authority cited by Bedford; and (3) Because Bedford had notice of the action commenced by Graphic and could have challenged jurisdiction pursuant to Fla. R. Civ. P. 1.140(b), Bedford became subject to the in personam jurisdiction of the Florida court.

In this reply brief, Bedford will demonstrate why Graphic's arguments should fail.

I.

The plain language of §49.021, Fla. Stat. (1983) provides that service of process by publication is available only if "personal service of process cannot be had," but does not specify that in personam as opposed to in rem or quasi in rem jurisdiction is effected thereby.

Graphic's Initial Brief at 4 suggests that Florida statutes specifically provide for service of process by publication in cases such as this one. However, the clear, plain and unequivocal statutory language of §49.021, Fla. Stat. (1983) provides as follows:

> 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....

§49.021, Fla. Stat. (1983) (emphasis added). This language clearly makes the unavailability of personal service of process a prerequisite to service of process by publication. This has consistently been the understanding of the Florida courts which have considered this statute. E.g., Burton v. Burton, 448 So.2d 1229 (Fla. 2d DCA 1984).

Since, as argued in Graphic's Initial Brief at 4-6, Bedford could have been personally served pursuant to §48.193, Fla. Stat. (1983), the statutory prerequisite to service of process by publication under §49.021, Fla. Stat. (1983) was not satisfied. Graphic's attempted service was therefore void.

Even if Graphic could demonstrate that the availability of personal service of process did not bar service under §49.021, Fla. Stat. (1983), Graphic would still need to show that in personam as opposed to in rem or quasi in rem jurisdiction was

effected by service pursuant to §49.021, Fla. Stat. (1983). Although Chapter 49, Fla. Stat. is silent on this issue, it should be noted that Risman v. Whittaker, 326 So.2d 213 (Fla. 4th DCA 1976), cited in Graphic's Initial Brief at 4, in fact stands for the principle that a plaintiff electing service of process by publication elects in rem or quasi in rem jurisdiction rather than in personam jurisdiction. Id. at 214-15. Cf. Palmer v. Palmer, 353 So.2d 1271 (Fla. 1st DCA 1981) (plaintiff could have utilized §48.193 and §48.194, Fla. Stat. to effect in personam jurisdiction, but utilized constructive service and effected only in rem jurisdiction.) If Graphic chooses to adopt the Risman rationale in support of a plaintiff's right to elect between personal service and service by publication, Graphic should likewise adopt the Risman rationale with respect to the limited jurisdictional consequences of any such election.

In summary, because Bedford could have been personally served pursuant to §48.193 and §48.194, Fla. Stat. (1983), service by publication was not available under §49.021, Fla. Stat. (1983). Furthermore, although Chapter 49, Fla. Stat. is silent as to the type of jurisdiction effected by service thereunder, examination of Florida cases interpreting Chapter 49, Fla. Stat. discloses that only in rem or quasi in rem jurisdiction may be effected by service by publiction.

II.

The plain language of §48.193, Fla. Stat. (1983) provides for personal service only and does not extend the jurisdictional effect of service of process by publication under §49.011 et seq., Fla. Stat. (1983).

Graphic's Initial Brief at 5 appears to argue that since §48.193, Fla. Stat. (1983) provides that personal service of process upon persons outside Florida who are described in the statute and served in the manner provided has the same effect as personal service of process within Florida, service of process by publication pursuant to §§49.011 et seq., Fla. Stat. (1983) was extended to effect in personam jurisdiction.* Such reasoning by Graphic is contradicted by two subsections of §48.193, Fla. Stat. (1983).

The first subsection of §48.193 contradicting Graphic's reasoning is §48.193(2), Fla. Stat. (1983), which reads as follows:

> (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.

§48.193(2), Fla. Stat. (1983) (emphasis added). This language clearly provides that one utilizing §48.193, Fla. Stat. (1983) must personally serve process as provided in §48.194, Fla. Stat.

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*Graphic's Initial Brief at 5 erroneously cites Tingler v. City of Tampa, 400 So.2d 146 (Fla. 2d DCA 1981) for the principle that §48.193, Fla. Stat. (1983) extended jurisdiction of the Florida courts to the fullest extent consistent with due process of law. The Tingler decision has nothing to do with service of process. In any event, the principal erroneously attributed to Tingler is inapplicable in this case, as is discussed infra.

(1983). See Underwood v. University of Ky., 390 So.2d 433 (Fla. 3d DCA 1980); Tucker v. Dianne Elec., Inc., 389 So.2d 683 (Fla. 5th DCA 1980); A.B.L. Realty Corp. v. Cohl, 384 So.2d 1351 (Fla. 4th DCA 1980); Bradford White Corp. v. Aetna Ins. Co., 372 So.2d 994 (Fla. 3d DCA 1979); P.S.R. Assocs. v. Artcraft-Heath, 364 So.2d 855 (Fla. 2d DCA 1978); Palmer v. Palmer, 353 So.2d 1271 (Fla. 1st DCA 1978). Since Graphic did not personally serve Bedford in the manner provided in §48.194, Fla. Stat. (1983), §48.193, Fla. Stat. (1983) does not support Graphic's argument that in personam jurisdiction was effected.*

The second subsection of §48.193 contradicting Graphic's reasoning is §48.193(4), Fla. Stat. (1983), which reads as follows:

> (4) Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereinafter provided by law.

§48.193(4), Fla. Stat. (1983). This language clearly indicates that §48.193 did not affect service of process by publication pursuant to §§49.011 et seq., Fla. Stat. (1983), which has historically yielded only in rem or quasi in rem jurisdiction. See, e.g., Ake v. Chancey, 152 Fla. 677, 13 So.2d 6 (Fla. 1943).

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*§48.193 Fla. Stat. (1983) does support Bedford's argument that the statutory prerequisite to constructive service of process by publication (that personal service of process not be available) was not satisfied, as is discussed supra at 2 and in Bedford's Initial Brief at 10-14.

III.

Florida case law supports the proposition that constructive service of process pursuant to §§49.011 et seq., Fla. Stat. (1983) is inappropriate for in personam actions against nonresidents.

Bedford's Initial Brief cites an overwhelming line of authority for the principle that service by publication pursuant to Chapter 49, Fla. Stat. (1983) can yield only in rem or quasi in rem jurisdiction and may not be used against nonresidents in actions ex contractu for damages due to alleged breach of contract. Graphic, attempts to divert attention from the foregoing by reference to Day-Tona Seabreeze v. Thunderbird Operating Corp., 207 S.2d 59 (Fla. 1st DCA 1968), and by unpersuasive attempts to distinguish several cases cited by Bedford. It is remarkable that Graphic would place such emphasis upon Day-Tona, which determined application of a predecessor statute to a resident of Florida, when there are so many cases dealing directly with Chapter 49, Fla. Stat. (1983) and nonresidents. Bedford respectfully submits that this is best explained by the fact that none of the cases which have dealt directly with Chapter 49, Fla. Stat. (1983) have ever held that a Florida court acquired in personam jurisdiction over a nonresident served by publication. However, Bedford has already addressed and distinguished Day-Tona at length in Bedford's Initial Brief at 5-9*, so this section will focus instead on

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*Bedford's Initial Brief at 5-9 clearly distinguishes Day-Tona from the case at hand. The assertion in Graphic's Initial Brief at 9 that Bedford acknowledges that the Day-Tona case is nearly identical to the present case is absolutely inaccurate.

Graphic's futile attempts to distinguish some of the cases cited in Bedford's Initial Brief.

Graphic's Initial Brief at 9-10 alleges that judgment was set aside in Gaskill v. May Brothers, Inc., 372 So.2d 98 (Fla. 2d DCA 1978), because the defendant did not have sufficient contacts with Florida. In fact, plaintiff in Gaskill had attempted but not perfected personal service pursuant to §48.194, Fla. Stat., although constructive service pursuant to Chapter 49, Fla. Stat. had been perfected. In dictum, the Gaskill court stated that because plaintiff's complaint did not allege circumstances described in §48.193, Fla. Stat., there would have been no in personam jurisdiction even if personal service had been perfected. However, Gaskill held that the complaint likewise failed to describe the type of action for which service of process by publication may be employed because Chapter 49, Fla. Stat. did not encompass simple actions ex contractu. Thus, while defendant may or may not have had contacts with Florida, that was not the basis for the decision. Gaskill stands for the principle that service by publication may not be used to effect in personam jurisdiction in actions for breach of contract, such as Graphic's action against Bedford.

Graphic's Initial Brief at 10-11 states that Shannon v. Great Southern Equipment Co., 326 So.2d 19 (Fla. 2d DCA 1976) does not place restrictions upon use of service by publication because it was based upon plaintiff's failure to satisfy Florida pleading requirements. However, Shannon clearly states that the reason judgment against the garnishee defendant Shannon was

improper was that the default judgment against Shelfer (defendant in the original action) was entered without jurisdiction.

> As noted, the original action against Shelfer sounded in personam. If such an action is to be prosecuted against one on whom personal service cannot be effected it must be brought "quasi in rem" and directed against property... belonging to the defendant found in this state.

Id. at 20. Because plaintiff in the original action utilized service of process by publication, the only jurisdictional possibilities in the original action were in rem or quasi in rem. The plaintiff's failure to properly plead an in rem action was fatal to the original action. Since Graphic attempted service by publication, just as did plaintiff in the original action against Shelfer described in Shannon, Graphic's failure to properly plead an in rem action was likewise fatal.

Contrary to the assertion in Graphic's Initial Brief at 11, the opinion in Ressler v. Sena, 307 So.2d 457 (Fla. 4th DCA 1975) clearly sets forth the basis upon which it rests. The court stated:

> We have examined the tenant's complaint with care.... It alleges no in rem jurisdiction. It is simply an action ex contractu--a suit for damages based on breach of contract. This being true, the service attempted under F.S. 49.011, Laws of 1973, was void.

Id. at 458. Obviously, the foregoing again stands for the principle that service by publication may not be used in actions, such as Graphic's, for damages based on breach of contract.

In Clark v. Realty Investment Center, Inc., 252 So.2d 589 (Fla. 3d DCA 1971), the court noted that the plaintiff brokers brought an action ex contractu for recovery of a commission pursuant to a written agreement. Service was

attempted by publication under §§49.011 et seq., Fla. Stat. The opinion does not directly so state, but it appears that the written agreement was entered into or was to be performed in Florida. Nevertheless, the court stated:

> As for the service attempted on the non-residents in this case, under §49.011 Fla. Stat. F.S.A., we hold, for the reasons stated above, that the complaint did not present a basis for service by publication on the non-resident appellants.

Clark at 590. Therefore, the basis for the decision seems to again be that an action for damages based on an alleged breach of a written contract cannot present a basis for service by publication on a nonresident, because service by publication pursuant to §§49.011, et seq. Fla. Stat. may only be used to effect in rem or quasi in rem jurisdiction.

Neither Gaskill, Shannon, Ressler nor Clark includes any discussion about whether there were sufficient contacts with Florida to satisfy due process notions of fair play in the exercise of in personam jurisdiction. If a determination regarding sufficient contacts had been important to such decisions, surely one of the four cases would have discussed the issue.

With respect to the cases cited in Bedford's Initial Brief holding that service by publication can confer only in rem or quasi in rem jurisdiction in the context of dissolution proceedings, Graphic's Initial Brief at 14 makes the sweeping statement that "[e]ach 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 an extention [sic] of personal

jurisdiction under Section 48.193[(1)](e)."* However, the opinion in Palmer v. Palmer, 353 So.2d 1271 (Fla. 1st DCA 1978) clearly recites that the defendant husband was a resident of Florida. He was clearly subject to the jurisdiction of the courts of Florida pursuant to §48.193(1)(e), Fla. Stat., and plaintiff argued that although her defendant husband had been served by publication, the foregoing statutory provision gave the court in personam jurisdiction. The court stated:

> "In this case the wife had two alternatives available, personal service under Sections 48.193 and 48.194 or service by publication under Section 49.021, Florida Statutes (1975). She had the option to select the method of service. She selected service by publication. In so doing, the court obtained in rem jurisdiction. If she had selected the other alternative available, the court would have obtained in personam jurisdiction."

Palmer at 1272**. Thus, the Palmer court expressly rejected the argument. now raised by Graphic, that personal jurisdiction was extended by §48.193 to apply to matters wherein process was served by publication.

In summary, no known Florida appellate case has ever held that in personam jurisdiction over a nonresident defendant could be effected through service by publication pursuant to Chapter 49, Fla. Stat., although many have held to the contrary.

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*As discussed supra at 4-5, §48.193(4), Fla. Stat. plainly establishes that there is in fact no "extention [sic] of personal jurisdiction" under §48.193, Fla. Stat. if service is made in any manner other than pursuant to §48.194, Fla. Stat.

**Bedford respectfully submits that there was no option to elect between the two methods of service of process, but agrees that only in rem jurisdiction can be obtained by service by publication.

IV.

Actual notice of the Florida litigation commenced by Graphic did not subject Bedford to the in personam jurisdiction of the Florida court where process was not served in accordance with Florida statutes or case law, and Bedford had no duty to appear even to avail itself of Fla. R. Civ. P. 1.140(b).

Graphic raises no challenge to the following statement included in Bedford's Initial Brief at 15: "There is no general statutory provision authorizing service by mail, certified or otherwise, in Florida." Furthermore, except to allege that they are inapposite because Graphic supposedly complied with Florida's statutes, Graphic makes no effort to rebut the cases cited in Bedford's Initial Brief at 15-16 in support of the principles that (i) notwithstanding actual notice, no jurisdiction can be obtained without strict compliance with Florida's constructive service of process statutes and (2) those statutes must be strictly construed against a plaintiff who seeks to obtain service of process thereunder. Moreover, Graphic apparently agrees with the holdings in Colson v. Thunderbird Bldg. Materials, 589 S.W.2d 836 (Tex. Civ. App. 7th Dist. 1979) (default judgment not entitled to full faith and credit if winner of default did not satisfy requirements of state service of process statute which it utilized) and In re Biederman Estate, 161 So.2d 538 (Fla. 2d DCA 1964) (judgment purporting to bind defendant over whom court has not acquired in personam jurisdiction is void within and without state in which rendered)

cited in Bedford's Brief to First Circuit at 3-4.* In fact, Graphic almost admits that its position is untenable if the service attempted was insufficient to effect in personam jurisdiction.**

In spite of the above, Graphic's Initial Brief at 17-19 argues that Bedford had notice of the litigation and could easily have challenged jurisdiction pursuant to Fla. R. Civ. P. 1.140(b), that Bedford compelled Graphic to pursue its remedy through the District Court, the Court of Appeals and now this Honorable Court, and, citing Craven v. J.M. Fields, Inc., 226 So.2d 407 (Fla. 4th DCA 1969), that Bedford should "incur the consequences." This argument fails for the following reasons.

First, the controlling law set forth in Bedford's Initial Brief at 15-16, provides that actual notice of the litigation commenced by Graphic was insufficient to subject Bedford to in personam jurisdiction.

Secondly, this Court should expressly reject Graphic's assertions that Bedford is responsible for Graphic's attempt to enforce its invalid judgment through the District Court, the Court of Appeals, and this Court. Graphic was informed very early in the proceedings that the Florida court had no

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*Graphic's Brief to First Circuit at 15 states: "Plaintiff has no basic disagreement with these cases [cited in Bedford's Brief to First Circuit at 3-4] or the principles for which they are cited."

**"The thrust of Bedford's argument appears to be that a judgment which is obtained... 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... without jurisdiction." Graphic's Initial Brief at 15.

jurisdiction to enter an in personam judgment against Bedford.* Graphic could have admitted that its service was improper at any time, and could have initiated litigation by personal service pursuant to §48.193 and §48.194 Fla. Stat. (1983), in order to subject Bedford to in personam jurisdiction of the Florida court for a trial on the merits. By following the appropriate statutory requirements and court rules, Graphic also could have subjected Bedford to in personam jurisdiction in a United States District Court in Florida or New Hampshire or in a New Hampshire superior court.

One must ask why Graphic chose not to properly commence a new action for a trial on the merits. This is most readily explained by the fact that Graphic had obtained a default judgment for the full alleged purchase price of the equipment which was the subject of the original Florida action, even though Graphic had retained the equipment. Undoubtedly, Graphic realized that to submit to a trial on the merits would have resulted in a judgment reduced at least by the value of the equipment retained by Graphic. Graphic should not be rewarded for putting the parties to substantial time and expense for the purposes of avoiding a trial on the merits and preserving an

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*The record below establishes that at least as of the date Bedford filed its answer in the District Court, Graphic knew that Bedford challenged the jurisdiction of the Florida court. In fact, Graphic was aware of Bedford's position even before initiating the District Court action.

unjust enrichment, nor should it be allowed to shift the responsibility for the proceedings which have resulted from its efforts to collect an invalid default judgment.

Thirdly, Craven v. J.M. Fields, Inc., 226 So.2d 407 (Fla. 4th DCA 1969), had nothing to do with whether in personam jurisdiction is obtained over a nonresident through notice by publication and certified mail. In Craven, personal service of process was properly made on the defendant corporation's manager in Florida, but the sheriff's return failed to establish the absence of corporate directors before service was made upon the defendant's manager. The issue before the court was whether an insufficient sheriff's return renders a final judgment void and subject to attack by motion to vacate filed more than one year after judgment. However, in this case, it is the service rather than the return which was improper, and less than one year passed from entry of judgment until Bedford's challenge in the District Court. Therefore, Craven is not controlling or even relevant authority.

Furthermore, Craven makes it clear that if the judgment had been void, then it would have been vacated even though defendant had not utilized Fla. R. Civ. P. 1.140(b). In Florida, a personal judgment based on constructive service of process is void. E.g., Newton v. Bryan, 142 Fla. 14, 194 So. 282 (Fla. 1940); Robinson v. Loyola Foundation, Inc., 236 So.2d 154 (Fla. 1st DCA 1970); In re Biederman Estate, 161 So.2d 538 (Fla. 2d DCA 1964) cert. den. 168 So.2d 146 (Fla. 1965). Thus, even if Craven were relevant, Bedford should incur no consequences from Graphic's void judgment.

CONCLUSION

The plain language of Florida's statutes and the overwhelming weight of other authority provide that constructive service by publication may not be used if personal service is available and will not in any event support in personam jurisdiction over a nonresident. Graphic's arguments fail to sustain its contrary position. Furthermore, Graphic has not demonstrated that actual notice of Graphic's litigation subjected Bedford to the in personam jurisdiction of the Florida court where that notice was effected by constructive service by publication.

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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December 10, 1984

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