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IN THE SUPREME COURT OF FLORIDA

JANE DOE (alias),

Petitioner,

vs. Case No.: 79,799

JERE WILLIAM THOMPSON,

Respondent.

_______________________________/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT
CASE NO.: 91-01574

ANSWER BRIEF OF RESPONDENT,
JERE WILLIAM THOMPSON

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TABLE OF CONTENTS

	ITEM	PAGE No.
1.	Table of Authorities	iii
2.	Statement of the Facts	1
3.	Statement of the Case	5
4.	Summary of the Argument	7
5.	Argument	
	The District Court was correct in finding that the Trial Court had no personal jurisdiction over Respondent, Jere William Thompson, pursuant to §48.193(1)(b), Fla. Stat....................	9
6.	Conclusion	23
7.	Certificate of Service	24
8.	Appendix	

(A-1) Plaintiff's Amended Complaint

(A-2) Deposition transcript of Jere William Thompson taken April 13, 1990

(A-3) Affidavit of Jere William Thompson

(A-4) Transcript of Hearing of March 6, 1991

(A-5) Motion to Quash Process of Service, Motion to Abate for Lack of Personal Jurisdiction, and Motion to Dismiss for Failure to State a Cause of Action

(A-6) Order dated June 14, 1991

CASES

Bamford v. Hobbs, 569 F. Supp. 160 (S.D. Texas 1983) . . . 20

Bangor v. Punta Operations v. Universal Marine Co., 543 F.2d 1107 (5th Cir. 1976) 12

Bloom v. A.H. Pond & Co., Inc., 519 F. Supp. 1162 (S.D. Fla. 1981) 15, 16, 17

Bulova Watch Company, Inc. v. K. Hattori & Company, Ltd., 508 F. Supp. 1322 (E.D. New York 1981) 19

Caride v. Holy Cross Hospital, Inc., 424 So. 2d 849 (Fla. 4th DCA 1982) 6, 13

Columbia Briargate Company v. First National Bank, 713 F.2d 1052 (4th Cir. 1983) 20, 21

Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980) 21, 22

Excel Handbag Company v. Edison Brothers Stores, 428 So. 2d 348 (Fla. 3rd DCA 1983) 16, 17

Georgia Insurers Insolvency Pool v. Brewer, 17 FLW S370 (Fla. 1992) 14, 16, 18

Hanson v. Denckla, 357 U.S. 235, 78 Sup. Ct. 1228 (1958) . 18

Hurletron Whittier, Inc. v. Barda, 402 N.E.2d 840 (Ill. 1st Dist. 1980) 20

International Harvester Co. v. Mann, 460 So. 2d 580 (Fla. 1st DCA 1984) 5, 12

International Shoe Company v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945) 7, 17, 20

Jack Pickard Dodge, Inc. v. Yarbrough, 352 So. 2d 130 (Fla. 1st DCA 1977) 11

Kennedy v. Reed, 533 So. 2d 1200 (Fla. 2nd DCA 1988) . . 11, 12, 15

Lee B. Stern & Co., Ltd. v. Green, 398 So. 2d 918 (Fla. 3rd DCA 1981) 11, 12

Leheigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87 (2nd Cir. 1975) 20

Life Laboratories, Inc. v. Valdez, 387 So. 2d 1009 (3rd DCA 1980) 18

Merkel Associates, Inc. v. Bellofram Corp. 437 F. Supp. 612 (W.D. New York 1977) 19

Phillips v. Orange Company, Inc., 522 So. 2d 64 (Fla. 2nd DCA 1988) 11

Pipkin v. Wisconsin, 526 So. 2d 1001 (Fla. 3rd DCA 1988) . 13

Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1985) 12

State Security Insur. Co. v. Frank B. Holland Co., Inc., 530 F. Supp. 94 (N.D. Illinois 1981) 19

Turner v. Lawton, 473 So. 2d 303 (Fla. 2nd DCA 1985) . . 15, 17

Unger v. Publisher Entry Service, Inc., 513 So.2d 674 (Fla. 5th DCA 1987) 10

Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989) 10, 17, 18

Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974) . 20

Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969) . 20

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 26, 100 Sup. Ct. 559, 62 L. Ed. 2d 490 (1980) 17

STATUTES

§48.193(1), Fla. Stat. -- 9-11

STATEMENT OF THE FACTS

This appeal arises out of an action filed by JANE DOE (alias) against WILLIAM DANIEL COVEY, JERE WILLIAM THOMPSON, DON MILLER and JOHN DOE as District Manager[1]. In her Amended Complaint, served October 23, 1990, Petitioner alleges that she was employed as a clerk at a 7-Eleven convenience store, owned and operated by The Southland Corporation in New Smyrna Beach, Volusia County, Florida. (A1-p.1).[2] On March 17, 1987, while Petitioner was working at the store, the Defendant, WILLIAM DANIEL COVEY, allegedly entered the store and sexually assaulted the Petitioner, causing her injuries. (A1-p.1).

In order to avoid the statutory immunity granted employers and fellow employees by Chapter 440, Fla. Stat., Petitioner made separate claims of "gross negligence" against certain officers of her employer, The Southland Corporation. Count II of the Petitioner's Complaint is such a claim against the Respondent, JERE WILLIAM THOMPSON, who was the President and Chief Executive Officer of The Southland Corporation at the time of the alleged incident. (A1-p.2; A2-p.4).

The basis of Petitioner's claim is that THOMPSON allegedly

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[1] The Defendant, John Doe, was dismissed by agreement of the parties. (A4-p.4).

[2] At the time this brief is being filed, the record had not yet been transmitted to the Court. Since the proceeding below arose out of an appeal of a non-final order pursuant to Rule 9.130(a)(3)(c), Fla. Rules of Appellate Procedure, an appendix was submitted to the Fifth District Court of Appeal. To maintain consistency, Respondent is filing an identical appendix with its brief, and references to the record will be by Appendix exhibit number, followed by the page number of the exhibit. For example, "(A1-p. 1)" refers to Appendix exhibit one, at page one.

knew that The Southland Corporation's robbery prevention policies were ineffective, and that other measures would "greatly diminish" incidents of violence and robberies. (A1-p.3). Further, Petitioner alleges that THOMPSON knew or should have known that keeping the store open late at night and allegedly providing inadequate security would pose a danger to Petitioner. (A1-p.3). Despite this, Petitioner alleges that THOMPSON "consciously and deliberately" adopted a policy of "...keeping stores open at night with one clerk and further failed to take any other reasonable security measures to make the store reasonably safe." (A1-p.3-4).

The jurisdictional allegations are contained in Paragraph 10 of the Petitioner's Amended Complaint. In that paragraph, Petitioner alleges that THOMPSON was:

> "...operating, conducting, engaging in, or carrying on a business venture in the State of Florida having an office or agency in this state, and further, committed in [sic] tortious act within this state by acts more fully alleged below, and caused injury to persons within this state arising out of an act or omission by THOMPSON outside the state and at the time of said injury, THOMPSON was engaged in solicitation or service activities within this state."

(A1-p.2-3).

These allegations were, however, refuted by both the affidavit and deposition of the Respondent, which were filed with the Trial Court. (A2, A3). The uncontroverted testimony contained in both the affidavit and deposition reveal that Respondent, JERE WILLIAM THOMPSON, is a citizen and resident of Dallas, Texas, where he has been living for the past twenty years. (A3-p.1). THOMPSON has never maintained a personal residence in the state of Florida nor

has he ever maintained an office for business purposes in this state. (A3-p.1-2).

THOMPSON has never been in the specific 7-Eleven convenience store at which the Petitioner worked at the time of the subject incident. (A3-p.3). Further, THOMPSON does not personally operate, conduct, engage in or carry on a business or business venture in the state of Florida. (A3-p.3). THOMPSON does not own or possess any real property in the state of Florida, nor has he engaged in any solicitation or service activities within the state. (A3-p.3).

At the time of Thompson's affidavit and deposition he indicated that he had been President of The Southland Corporation, and its Chief Executive Officer since May of 1986. (A3-p.2). The Southland Corporation itself is incorporated in the state of Texas, and its corporate headquarters and principal place of business are in the state of Texas. (A3-p.2).

THOMPSON is not a controlling shareholder of The Southland Corporation. (A2-p.12). As past President and Chief Executive Officer, THOMPSON was responsible for overseeing the sales and profits of The Southland Corporation. He was <u>not</u> responsible for any loss prevention programs, (A2-p.14), nor did he make, approve, or disapprove any decisions with regard to the implementation of loss prevention programs. (A2-p.15).

In March of 1987, there were approximately twenty-five to thirty divisions within The Southland Corporation, broken down by region. (A2-p.16). The manager of each division was responsible

for final decisions with regard to loss prevention programs for each division. It was the division manager who had the authority to hire two clerks to work at night, (A2-p.17), and that decision was not subject to approval by anyone above the division manager level. (A2-p.17). Similarly, the responsibility to ensure that loss prevention measures were effective rested with the division manager. (A2-p.27). Fundamentally, the division manager, not THOMPSON, had the "ultimate responsibility" for deciding whether two clerks would be put in The Southland Corporation stores as a measure of security. (A2-p.29). This was also true of the decision whether to use cameras, alarms, or other loss prevention measures in the store. (A2-pp.29-30, 34).

STATEMENT OF THE CASE

Petitioner's Amended Complaint was served on or about October 23, 1990. (A1). Subsequently, Respondent filed a Motion to Quash Process and Service of Process, Motion to Abate for Lack of Personal Jurisdiction and Motion to Dismiss for Failure to State a Cause of Action. (A5).

Insofar as it is pertinent to this appeal, said motion sought to quash service of process upon the Respondent and to dismiss him since the Court lacked in personam jurisdiction over him. An affidavit in support of this motion to dismiss was filed in October of 1989. (A3). The Plaintiff was subsequently afforded the opportunity to depose Respondent on April 13, 1990. A copy of that deposition was filed with the Court on April 26, 1990. (A2).

A hearing on Respondent's Motion to Dismiss was held on March 6, 1991. At that time, the trial court denied the motion to quash service of process and denied Respondent's motion to dismiss. (A4). The Order reflecting the Court's ruling was rendered on June 14, 1991, (A6). Respondent's Notice of Appeal to the District Court of Appeal, Fifth District, from this non-final order was timely filed on July 12, 1991.

On April 3, 1992, the Fifth District Court of Appeal filed its decision, reversing the Trial Court's denial of Respondent's Motion to Quash Service of Process and his Motion to Abate for lack of personal jurisdiction, with directions to enter an order granting these motions. In its opinion, the court certified conflict with <u>International Harvester Co. v. Mann</u>, 460 So.2d 580 (Fla. 1st DCA

1984) and Caride v. Holy Cross Hospital, Inc., 424 So.2d 849 (Fla. 4th DCA 1982). Petitioner timely filed its Notice To Invoke this Court's Discretionary Jurisdiction on May 1, 1992.

SUMMARY OF THE ARGUMENT

The trial court's attempted exercise of personal jurisdiction over Respondent, JERE WILLIAM THOMPSON, was improper, and the Fifth District Court of Appeals was correct in reversing the trial court's decision. Section 48.193(1)(b), Fla. Stat., requires that there be proof the defendant committed a "tortious act" within this state. Petitioner failed to meet her burden of proving that such an act occurred, as the uncontroverted evidence demonstrated that THOMPSON committed no acts, tortious or otherwise, within this state.

The alleged acts of THOMPSON's employer, The Southland Corporation, cannot be attributed to THOMPSON individually, in order to satisfy this in personam jurisdictional requirement. Additionally, any acts taken by THOMPSON not only took place outside this state, but were performed by him as President and Chief Executive Officer of The Southland Corporation and not in his individual capacity. Actions taken by a corporate officer in his corporate capacity cannot serve as the basis for the exercise of personal jurisdiction.

Even assuming for arguments sake there was a valid statutory basis for personal jurisdiction, the exercise of personal jurisdiction herein would violate the due process requirements delineated by International Shoe Company v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945), and its progeny. The plaintiff must prove that the defendant, individually, had sufficient minimum contacts with the forum state

such that the defendant "should reasonably anticipate being haled into court there." The undisputed testimony of Respondent demonstrates that he personally had no contacts with this state, and committed no acts within this state.

The Fifth District's reversal of the trial court's denial of Respondent's Motion to Quash Service of Process and Motion to Abate for Lack of Personal Jurisdiction was therefore proper, and should be affirmed.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE TRIAL COURT HAD NO PERSONAL JURISDICTION OVER RESPONDENT, JERE WILLIAM THOMPSON, PURSUANT TO §48.193(1)(b), Fla. Stat.

Petitioner's claim that the Court has personal jurisdiction over the Respondent, JERE WILLIAM THOMPSON, is premised upon the provisions of §48.193, Fla. Stat. This statute, commonly known as Florida's long-arm statute, provides a number of avenues for the exercise of jurisdiction over a non-resident defendant.[3]

While unclear from the Complaint, it appears that the sole basis[4] relied upon by Petitioner for the exercise of jurisdiction over Respondent, THOMPSON, is subsection 48.193(1)(b), Fla. Stat., which provides that:

> "(1) Any person, whether or 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 himself...to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
> ...
> (b) Committing a tortious act within this state.

In order to determine whether in personam jurisdiction over Respondent is appropriate under this subsection, two inquiries must

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[3] While interesting, Petitioner's discussion of the basis for her cause of action against Respondent under Section 440.11(1), Fla. Statutes, is irrelevant to the issue of personal jurisdiction and does not need to be addressed by this Court.

[4] Any other basis for the exercise of jurisdiction is not only refuted by the undisputed testimony of Respondent, through his affidavit as well as the deposition filed with the Court, but was abandoned by Petitioner at the time of the hearing on Respondent's Motion to Dismiss. (A4-p.18). Additionally, the District Court specifically ruled that Sections 48.193(1)(a) and Section 48.193(1)(f) were inapplicable, and the Petitioner has not challenged that ruling here.

be made. First, it must be determined whether the facts, as proven from the affidavits and depositions filed with the Court, bring the action within the ambit of §48.193(1)(b), Fla. Stat. If it does, a second inquiry must be made to determine whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements. Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989) (quoting Unger v. Publisher Entry Service, Inc., 513 So.2d 674, 675 (Fla. 5th DCA 1987)).

Statutory Requirements

Fundamentally, for jurisdiction to exist under subsection 48.193(1)(b), Fla. Stat., the Petitioner must establish[5] that JERE WILLIAM THOMPSON "personally or through an agent" committed a tortious act within this state.[6] Petitioner has identified no agent of THOMPSON who committed a tortious act within this state. She must therefore prove that THOMPSON himself "personally" committed a tortious act within this state.

While the evidence indisputably shows that THOMPSON performed no acts within this state, tortious or otherwise, Petitioner contends that no proof to the contrary is necessary; rather, Petitioner claims that the occurrence of an injury to her in this

[5] Where, as here, the allegations in the Complaint have been refuted by affidavit, the burden is on the Plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989)

[6] Petitioner asserts that "the language of the statute merely states that there is jurisdiction over a person who commits a tortious act within the state." (Petitioner's Brief p.8). Petitioner conveniently omits the language of the statute which requires that all of the enumerated acts under Section 48.193(1) be performed by the Defendant "personally or through an agent."

state is sufficient to establish that Respondent "personally" committed a tortious act within this state. This is an incorrect interpretation of the law.

In Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130 (Fla. 1st DCA 1977), the court rejected just such a contention. The Court there noted that "...the clear wording of §48.193(1)(b), Fla. Stat. -- the commission of a 'tortious act within this state' -- requires a different result...The fact the injury occurred in Florida is crucial to a determination of when the cause of action accrued, but the occurrence of the injury alone in the forum state does not satisfy the statutory test." Id. at 134. In other words, the Defendant must have committed some "affirmative wrongful act" within the forum state to obtain personal jurisdiction under this provision. Id.

This holding was subsequently adopted by both the Third District Court of Appeal in Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3rd DCA 1981) (finding an affirmative wrongful act taking place within the state of Florida, therefore jurisdiction appropriate), as well as the Second District Court of Appeal in Phillips v. Orange Company, Inc., 522 So.2d 64 (Fla. 2nd DCA 1988) and Kennedy v. Reed, 533 So.2d 1200 (Fla. 2nd DCA 1988).

The facts in Phillips closely parallel those in this case. In Phillips, the plaintiff alleged jurisdiction was established under §48.193(1)(b), Fla. Stat., in a suit by a corporation against its out-of-state directors and officers because of their improper approval and execution of a severance contract for the

corporation's president. The plaintiff argued that jurisdiction was established because the alleged tortious conduct of the appellants caused the corporation financial injury in Florida. The court disagreed:

> "Although the fact that an injury occurs in Florida is crucial to a determination of when a cause of action accrued, the occurrence of the injury alone in the forum state does not satisfy the statutory test of §48.193(1)(b)."

Id. at 66.

Since no part of the Defendant's alleged tortious conduct occurred in Florida, jurisdiction under §48.193(1)(b), Fla. Stat., was not established. As the court in Reed also noted, "the complaint alleges damages in Florida, but this alone does not confer jurisdiction." 533 So.2d at 1202.

The court's statement in International Harvester Co. v. Mann, 460 So.2d 580, 581 (Fla. 1st DCA 1984) that "...the commission of a tort for purposes of establishing long-arm jurisdiction... merely requires that the place of injury be within Florida" completely ignores the clear statutory wording to the contrary.[7] Moreover, such a statement was completely unnecessary to the court's decision, which specifically found that the defendant did indeed

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[7] It is worth noting that none of the three decisions cited by the Mann court actually stand for this proposition. In Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3rd DCA 1981), the court specifically found that the Plaintiff had established the alleged commission of a tortious act within the State of Florida, including the removal of and encumbering of assets within the state. The court there specifically noted that it, along with the decisions in Bangor v. Punta Operations v. Universal Marine Co., 543 F.2d 1107 (5th Cir. 1976) and Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1985) all found that the defendants "committed wrongful acts within the forum." Id. at 919.

commit a tortious act within the state.

In that case, the defendant corporate directors were Georgia residents and the Plaintiff alleged they had liquidated the assets of a Delaware corporation, Mann International, whose sole place of business was in Jackson County, Florida, by transferring those Florida assets to another corporation, International Harvester, at a price substantially below market value. While the defendant's actions originated elsewhere, the court concluded the actions "culminated" within the state of Florida, where the improper transfer of the corporation's Florida assets allegedly occurred, as well as the loss of value in the Florida corporation as an ongoing Florida business concern. Id. at 581.

Similarly, in Caride v. Holy Cross Hospital, 424 So.2d 849, (Fla. 4th DCA 1982), while there was no "physical entry" in the state, the court found there was tortious conduct within the state, since the allegedly libelous telephone calls by the defendant to the persons in the state were "...a tort committed by sending false statements into the state." In fact, the Caride court dealt only with the constitutional ramifications of subjecting the defendant to jurisdiction, and never held that the only requirement by statute was that the injury or damages occur within the state. To that extent, there is no conflict between its decision and the Fifth District's decision herein.

While the defendant may not have to be physically present in the state, some act must take place in this state. For example, in Pipkin v. Wisconsin, 526 So.2d 1001 (Fla. 3rd DCA 1988), the court

found the defendant engaged in acts of soliciting within the state, even though he was never physically present here. As this Court recently noted, "obligations arising from incidents occurring in another state alone do not result in personal jurisdiction." Georgia Insurers Insolvency Pool v. Brewer, 17 FLW S370, 371 (Fla. 1992).

Contrary to Petitioner's assertion, the Fifth District's decision below did not hold that "the physical location of the defendant at the time when they injured a Florida plaintiff would be crucial." (Petitioner's Brief, p.9). Rather, the court held only that some "...part of a defendant's tortious conduct must occur in this state." (Slip Opinion, p.4). This is in accordance with the clear language of the statute.

If no part of the defendant's conduct occurred within the state, a Florida plaintiff is not foreclosed from obtaining jurisdiction over a non-resident. Indeed, the statutory scheme clearly spells out the requirements for obtaining jurisdiction when there is a tortious act within the state and when there is not. Section 48.193(1)(f) outlines the requirements for jurisdiction where the injury occurs within the state by an act or omission occurring outside the state. Thus, Petitioner's cry that the District Court's ruling "subjects Florida residents to injuries that can not be addressed in Florida courts" is, to that extent, false. On the other hand, both the statute and the Federal Constitution recognize that some injuries to Florida residents can not and should not properly be redressed by a Florida court. See,

Georgia Insurers Insolvency Pool v. Brewer, supra at S372. A defendant who has no contact with this state should not be required to defend a lawsuit in this state merely because the Plaintiff happens to reside here.

Nor can Petitioner premise jurisdiction upon the acts of THOMPSON's employer, The Southland Corporation. Certainly, The Southland Corporation does business within this state, since it owns and operates various convenience stores within this state. This however, does not establish jurisdiction over THOMPSON simply because he was the President of that corporation. As noted by the Kennedy court, "...jurisdiction will not lie over an individual because of acts performed in his capacity as agent for another." 533 So.2d at 1202 (Fla. 2nd DCA 1988);[8] see also Turner v. Lawton, 473 So.2d 303 (Fla. 2nd DCA 1985), and Bloom v. A.H. Pond & Co., Inc., 519 F.Supp. 1162 (S.D. Fla. 1981). As the Court in Bloom stated:

> "While the corporation itself may be properly amenable to service when it transacts business through agents operating in the forum state, unless the agents transact business on their own account and not on behalf of the corporation, the agents are not engaged in business so as to sustain an application of the long-arm statute to them as individuals. (citations omitted) If the law were otherwise, any corporate employee could be forced to defend a suit in the Florida courts, regardless of what the individual did with respect to his employer's business, so long as his employer engaged in business in this state."

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[8] This holding was recently approved by this Court in Georgia Insurers Insolvency Pool v. Brewer, supra at note 6, when it cited the Kennedy decision for the proposition that "Jurisdiction over the principal (Allied) however does not confer jurisdiction over the agent."

Id. at 1170-71.

In the instant case, Petitioner's Complaint makes clear that JERE WILLIAM THOMPSON is being sued for acts which he performed "in the course and scope of his employment" as President and Director of The Southland Corporation. (A1-¶9, p.2). Petitioner's claim is based upon THOMPSON's alleged actions as a corporate officer of The Southland Corporation and not in his individual capacity. Therefore, THOMPSON is not subject to the personal jurisdiction of the Court, as he did not personally engage in business within this state so as to be individually subject to the state's long-arm statute. Excel Handbag Company v. Edison Brothers Stores, 428 So.2d 348 (Fla. 3rd DCA 1983).

Moreover, the alleged "tortious acts" committed by the Respondent, THOMPSON, are that as President, he knew or should have known that "Southland's robbery prevention policies were ineffective" and his failure to institute other security measures proximately caused the Petitioner's injuries. In this case, as in Bloom and Excel, the alleged tortious acts giving rise to the litigation could only be committed by the corporation and not by the directors as individuals. THOMPSON himself could only act through his corporate office to "improperly" or "negligently" implement safety measures at 7-Eleven convenience stores.[9] Personal jurisdiction can not be predicated on a tort allegedly

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[9] Of course, the evidence before the trial court conclusively established that THOMPSON did not commit any such "tortious acts", even in his corporate capacity, as he had no involvement in decisions regarding security measures implemented at the store where the Appellee was injured. (A2-pp.14-17; 27-30).

committed in this state, "...where the tort is one which could have been committed only by the corporation." Excel Handbag Company, supra at 350; Bloom v. A. H. Pond Co., Inc., supra at n. 8; see, also, Turner v. Lawton, 473 So.2d 303 (Fla. 2nd DCA 1985).

Due Process Requirements

The exercise of jurisdiction over the Respondent, THOMPSON, in this case is not only improper under the clear wording of §48.193(1)(b), Fla. Stat., it is also inconsistent with the constitutional due process requirements enunciated by International Shoe Co. v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945) and its progeny. In order to subject the defendant to an in personam judgment when he is not present within the forum state, due process requires that the defendant have certain "minimum contacts" with the forum such that the maintenance of the suit does not offend traditional notions of "fair play" and "substantial justice". As noted by the U.S. Supreme Court in Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 26, 100 Sup. Ct. 559, 62 L.Ed.2d 490 (1980), the test is whether the defendant's conduct in connection with the forum state is "such that he should reasonably anticipate being hailed into court there."

Clearly, fulfilling the requirements of §48.193, Fla. Stat., in and of itself, does not mean that due process has been afforded the Defendant. As noted recently by this Court in Venetian Salami Company v. Parthenais, 554 So.2d 499, 500 (Fla. 1989):

> "By enacting §48.193, the legislature has determined the requisite basis for obtaining jurisdiction over non-resident defendants as far as Florida is concerned. It has not specifically addressed whether the federal

> constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts."

The District Court therefore followed the principle that such a determination is dependent on the facts, and analyzed those facts presented, finding that they fell far short of that required by due process. The District Court below did not, as Petitioner suggests, ignore this Court's holding in Venetian Salami Company. On the contrary it explicitly followed the principle that "the mere proof of any one of the several circumstances enumerated in §48.193 as the basis for obtaining jurisdiction of non-residents does not automatically satisfy the due process requirement of minimum contacts." Id. at 502.[10]

In order to "satisfy the jurisdictional nexus over a non-resident defendant by a long-arm statute and satisfy the minimum contact concept", Petitioner must show that THOMPSON "purposefully avail(ed) himself of the privilege of acting in the forum state." Life Laboratories, Inc. v. Valdez, 387 So.2d 1009, 1010 (3rd DCA 1980). As stated by the court in Hanson v. Denckla, 357 U.S. 235, 253; 78 Sup. Ct. 1228, 1239-40 (1958):

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that role will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law."

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[10] This principle was implicitly reaffirmed by this Court in Georgia Insurers Insolvency Pool v. Brewer, supra.

In a similar decision, the court in Bulova Watch Company, Inc. v. K. Hattori & Company, Ltd., 508 F.Supp. 1322 (E.D. New York 1981), addressed the issue of whether or not a corporate officer or employee can be subject to the personal jurisdiction of the forum state where the officer or employee engaged in no activities in the forum state on his own behalf. In that case, the plaintiff charged the defendants with unfair competition, disparagement and with engaging in a conspiracy to raid the plaintiff's marketing staff in order to appropriate plaintiff's trade secrets. The plaintiff was a New York corporation, and brought suit in New York. The defendant was a Japanese corporation whose wholly owned subsidiary, Seiko, was a New York corporation. Individual defendants included the plaintiff's regional manager, who had done no personal business in New York, and had no personal contacts with the state; the regional sales manager of the plaintiff, located in Chicago, who later moved to Texas, but never lived in nor had any personal contacts of any sort with New York and whose sole contact with the state had been to attend meetings on behalf of the plaintiff or the defendant; and others who similarly had no personal contact with the state. The court there noted:

> "Where the corporate agent engages in corporate business for the sole benefit of the corporation, it is difficult to see how the exercise of jurisdiction over one who has conducted no activities on his own behalf 'comports with fair play and substantial justice.'"

Id. at 1348 (citing Merkel Associates, Inc. v. Bellofram Corp., 437 F.Supp. 612, 618 (W.D. New York 1977)).

The court in State Security Insur. Co. v. Frank B. Holland Co., Inc., 530 F.Supp. 94 (N.D. Illinois 1981) agreed. See also

Hurletron Whittier, Inc. v. Barda, 402 N.E.2d 840 (Ill. 1st Dist. 1980); Leheigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 92-93 (2nd Cir. 1975); Weller v. Cromwell Oil Co., 504 F.2d 927, 929 (6th Cir. 1974); Wilshire Oil Co. v. Riffe, 409 F.2d 1277, 1280-82 (10th Cir. 1969).

In the instant case, it is impossible to believe that "fair play and substantial justice" can be afforded to the Respondent by subjecting him to the jurisdiction of the Florida courts. THOMPSON engaged in no activities within this state. His only purported contact with this state was his employment as President and Chief Executive Officer of a corporation which happens to do business within this state. This is not the type of "minimum contacts" contemplated by the court in International Shoe as sufficient to comport with due process considerations. In order to establish jurisdiction over THOMPSON, the Petitioner must show that he took some "purposeful and affirmative" action on his own behalf, and not as a corporate officer. See Bamford v. Hobbs, 569 F.Supp. 160, 168 (S.D. Texas 1983). This the Petitioner has completely failed to do, and the testimony of the Respondent conclusively establishes to the contrary.

One of the most well-reasoned decisions in this area is the recent Federal Court of Appeals decision of Columbia Briargate Company v. First National Bank, 713 F.2d 1052 (4th Cir. 1983). After a thorough analysis of the history and basis for the exercise of jurisdiction over nonresident corporate officers, the court announced the following rule to be used to determine whether the

exercise of such jurisdiction comports with due process:

> "...when a non-resident corporate agent is sued for a tort committed by him in his corporate capacity in the forum state in which service is made upon him without the forum under the applicable state long-arm statute...he is properly subject to the jurisdiction of the forum court, provided the long-arm statute of the forum state is coextensive with the full reach of due process. On the other hand, if the claim against the corporate agent rests on nothing more than that he is an officer or employee of the non-resident corporation and if any connection he had with the commission of the tort occurred without the forum state, we agree that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally by reason of service under the long-arm statute of the forum state.

Id. at 1064-65.

One of the cases heavily relied upon by the court in Columbia Brairgate involves facts very similar to those presented here. In Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980) the Plaintiff brought suit in Puerto Rico against corporate officers who resided in New Jersey. While the corporation was admittedly subject to personal jurisdiction in Puerto Rico, the court found that the affidavits of the individual defendants conclusively established that none of the directors and officers "personally participated" in any acts causing the plaintiff's injury. In order to constitutionally exercise jurisdiction over a corporate officer, the court found that there must be "...some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to plaintiff's injury." 619 F.2d at 907.

The court rejected the argument that allegations that a corporate officer "knew or should have known" of the dangers

inherent in the type of work performed by the plaintiff, but failed to warn and take measures necessary to avoid those dangers, were sufficient to show such participation. The court remarked "these conclusory allegations are insufficient to show personal participation on the part of (the corporate officer) in any conduct that harmed the plaintiff." Id. at 908.

Under the undisputed facts as developed in this case, THOMPSON committed no tortious acts within this state. Based upon the unrefuted affidavit, as well as the deposition taken of him by the Petitioner, THOMPSON was not responsible for any of the decisions regarding security measures taken at the subject 7-Eleven store located in Volusia County, Florida. Where, as here, the corporate officer has absolutely no contact with the forum state, it is constitutionally impermissible to exercise personal jurisdiction over him. As such, service of process over the Respondent, JERE WILLIAM THOMPSON, should be quashed, and this action dismissed.

CONCLUSION

The exercise of personal jurisdiction over Respondent, JERE WILLIAM THOMPSON, is improper. Not only is it inconsistent with the statutory requirements of §48.193(1)(b), Fla. Stat., it violates the federal constitutional requirement of due process. The Fifth District Court of Appeal's decision reversing the trial court's order denying the Respondent's Motion to Quash Service of Process and Motion to Dismiss for Lack of Personal Jurisdiction should be affirmed in all respects.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and authentic copy of the foregoing has been furnished by regular U.S. Mail to William Daniel Covey, 110897, Annex G-27, Tomoka Correctional Institute, 3950 Tiger Bay Road, Daytona Beach, Florida 32115; and to Francis J. Carroll, Jr., Esquire, 435 South Ridgewood Avenue, Suite 200, Post Office Box 6511, Daytona Beach, Florida 32122, this 30th day of June, 1992.

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