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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 79,799

JANE DOE (alias),

Petitioner,

-vs-

JERE WILLIAM THOMPSON,

Respondent.

PETITIONER'S BRIEF

BOEHM, BROWN, RIGDON,
SEACREST & FISCHER, P.A.

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STATEMENT OF THE FACTS

This is an appeal from the appellate court's decision quashing an order denying Respondent's (THOMPSON), motion to dismiss for lack of jurisdiction over the person. The Appellee (DOE) sued Thompson as President of Southland. On or about March 17, 1987, JANE DOE, was battered and assaulted while working the graveyard shift at a Southland convenience store located in Volusia County, Florida. (Slip op. at 1-2).

As alleged in the complaint, prior to the evening of this attack, Southland's stores experienced an escalating increase in incidents of violence. (Slip op. at p. 2). However, THOMPSON, as President and Chief Executive Officer of Southland Corporation consciously and deliberately permitted the existence of a policy at 7-Eleven by keeping its stores open late at night with only one clerk on duty. He further failed to take any other reasonable security measures to make this store safe. Due to this failure the complaint alleged that he breached his duty to DOE to provide a safe workplace.

THOMPSON filed his affidavit, claiming he has taken no personal actions whatsoever in the State of Florida. (Slip op. at 4). The trial court denied THOMPSON'S motion to dismiss for lack of jurisdiction. The Fifth District reversed the trial court, and certified conflict with two other appellate court decisions.

STATEMENT OF THE CASE

Petitioner's Amended Complaint was served on or about October 23, 1990. 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.

Respondent's motion sought to quash service of process and to dismiss him, claiming the Court lacked in personam jurisdiction over him. An affidavit in support of the motion was filed on or about October 25, 1990.

A hearing on Respondent's Motion to Dismiss was held on March 6, 1991. The trial court denied both Respondent's Motion to Quash Service of Process and Motion to Dismiss. The order reflecting the Court's ruling was rendered on June 14, 1991, and Respondent filed a Notice of Appeal on July 12, 1991. On April 3, 1992, the Fifth District rendered an opinion reversing the trial court, and certifying conflict. This Honorable Court accepted jurisdiction and this appeal follows.

SUMMARY OF THE ARGUMENT

The Fifth District has mistakenly focused on THOMPSON'S personal acts in holding that the circuit court has no jurisdiction. Petitioner maintains that it is THOMPSON'S activities and duties as president and CEO that give rise to jurisdiction, and the breach of those duties is actionable. In order to establish the commission of a tort for purposes of the long-arm statute, physical presence in the State is not necessary. What is required is that the place of injury be within Florida. International Harvester Company v. Mann, 460 So.2d 580, 581 (Fla. 1st DCA 1984).

Therefore, personal jurisdiction over THOMPSON squarely fits within the "committing a tortious act within this State" provision of the long-arm statute.

In addition, personal jurisdiction over THOMPSON does not violate the due process requirements enunciated in International Shoe Company v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945). "The commission of a tort within Florida by a non-resident is a sufficient "minimum contact" with Florida to justify personal jurisdiction in light of the federal constitution." International Harvester, 460 So.2d at 582, (citing Godfrey v. Neumann, 373 So.2d 920 (Fla. 1979)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT A PERSON MUST BE PHYSICALLY PRESENT IN THE STATE OF FLORIDA IN ORDER TO HAVE "COMMITTED A TORTIOUS ACT" AND SATISFY SECTION 48.193(1)(B) OF THE FLORIDA STATUTES (1987).

A. THOMPSON IS INDIVIDUALLY LIABLE FOR ACTS DONE IN HIS CORPORATE CAPACITY AS PRESIDENT

DOE'S cause of action against THOMPSON is based on Section 440.11(1) of the Florida Statutes (1987), which provides, in pertinent part, "The same immunities from liability enjoyed by an employers shall extend to each employee of the employer acting in furtherance of the employer's business....Such fellow-employee immunities shall not be applicable to an employee, who acts with respect to a fellow employee with....gross negligence...."

THOMPSON'S liability in this case is derived from his status as President of Southland Corporation. The complaint alleges that THOMPSON violated his duty to DOE to provide a safe workplace, in his capacity as president. Thus, THOMPSON, as president, failed to act to protect DOE. Prior to Sullivan v. Streeter, 509 So.2d 268 (Fla. 1987), there was no liability to fellow employees on the part of corporate officers for acts done in their discharge of the job duties. A supervisor was held liable only for acts committed "beyond the scope of the nondelegable duty of the employer to provide his employees with a safe place to work." Chorak v. Naughton, 409 So.2d 35, 38 (Fla. 2d DCA 1981). See also, Streeter, 509 So.2d, n.5 at 271.

In Sullivan, this Honorable Court did away with the affirmative act doctrine and held that the gross negligence in the discharge of one's job duties could give rise to liability. In

Sullivan, the president of a bank was sued. The bank had experienced a robbery, and the president refused to hire additional security despite the fact that the robber had threatened the plaintiff's decedent. The robber returned and killed the decedent, and a lawsuit was filed against the president for gross negligence.

The Fourth District reversed the trial court order dismissing the complaint, and this Honorable Court affirmed the Fourth District's opinion. This Court abolished the affirmative act doctrine and held "Nowhere does section 440.11(1) impose upon injured employees a requirement to show that the fellow employee has committed some affirmative act going beyond the scope of the employer's nondelegable duty to provide a safe place to work." Sullivan, 509 So.2d at 271. This Court held that the statute did not contain any exceptions to it and that a president is as much a supervisor/employee as anyone in the corporate hierarchy. Further, in the age of corporate responsibility, it is imperative that a president, officer or director be responsible for their grossly negligent acts which were done in the discharge of their corporate duties. See Streeter v. Sullivan, 485 So.2d 893 (Fla. 4th DCA 1986). Thus, THOMPSON is individually liable for acts done in his corporate capacity.

B. JURISDICTION UNDER SECTION 48.193

The Fifth District has held in its opinion that section 48.193(1) and (f) were inapplicable since THOMPSON was not personally engaged in any of the activities enumerated in the statute (Slip Op at p.4). The court then went on and discussed the

issue of whether subsection (b) of the statute applies to this case.

Subsection (b) provides that jurisdiction over a nonresident is proper when they commit "a tortious act within this state." The Fifth District stated that this subsection requires "that part of a defendant's tortious conduct must occur in the state." (Slip Op at p.4). Petitioner asserts that the decision improperly interprets the statute.

In order to analyze the correctness of the district court decision in the case below, the language of Section 48.193 should be addressed initially. The language of the statute merely states that there is jurisdiction over a person who commits a tortious act within this state. §48.193(1)(b). The constitutionality of the statute has long been settled. Venetian Salami v. Parthenais, 554 So.2d 499 (Fla. 1986); Godfrey v. Neumann, 373 So.2d 920 (Fla. 1979).

At issue is the meaning that should be accorded to the phrase "committing a tortious act within this state." Keeping in mind that the tortious act in this case is the breach of THOMPSON'S duty to provide a safe workplace, Petitioner submits that the Fifth District has accorded to narrow an interpretation of the statute in this case.

The Fifth District's decision would require that a nonresident be present in the State of Florida at the time of the commission of the tort. Indeed, it would be difficult, under the Fifth District's analysis to envision a situation where a defendant could commit a tortious act and not be present in the State of Florida.

Thus, in the Fifth District's point of view, the physical location of the defendant at the time when they injured a Florida plaintiff would be crucial. This is anachronistic.

In the instant case, THOMPSON had a duty to provide a safe workplace for DOE. One of those workplaces was located in New Smyrna Beach, Florida, and the duty runs to that location. The breach of that duty created an unreasonably dangerous condition in a New Smyrna Beach 7-Eleven Store. Thus, even under the Fifth District's analysis, THOMPSON committed a tortious act in the state. At any rate, the Fifth District's holding is flawed, and this Court should adopt the view represented by other districts holding that the place of injury is dispositive of whether a tortious act was committed.

Under the Fifth's analysis, if two (2) persons are standing next to each other, one in Florida and one in Georgia, and the Georgia resident negligently fires a gun and strikes the Florida resident, the Floridian cannot obtain jurisdiction over the Georgia resident since there was no tortious act committed in Florida. Thus, the Fifth District's holding subjects Florida residents to injuries that cannot be redressed in Florida courts. Further, the other view represents a bright line test that can be easily applied. This is opposed to the fifth District's holding, which requires a determination in the context of time and space of where a "tortious act" occurred.

The more reasonable interpretation of the statute is provided by the alternate line of cases. International Harvester Company v. Mann, 460 So.2d 580 (Fla. 1st DCA 1984). In Mann, the District

Court stated, "it is well-established that the commission of a tort for purposes of establishing long-arm jurisdiction does not require physical entry into the state, but merely requires that the place of injury be within Florida." Id. at 581 (Emphasis Court's) (citing Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3d DCA 1981); Bangor Punta Operations, Inc. v. Universal Marine Co., 543 F. 2d 1107 (5th Cir. 1976); Rebozo v. Washington Post Co., 515 F. 2d 1208 (5th Cir. 1975)).

Further, in Pipkin v. Wiggins, 526 So.2d 1002 (Fla. 3d DCA 1988), the appellate court stated "where a tortious act is committed within this state it is not necessary to show that the Defendant was physically present in the State of Florida. Id. at 1003. See also Biernath v. First National Bank and Trust of Beverly, New Jersey, 530 So.2d 505 (Fla. 3d DCA 1988).

The Fifth District Court's decision is inconsistent with the scope of the Sullivan decision. For example, it ignores today's realities where corporations cross state and national lines on a regular basis. Under the Fifth District's decision, a president of a multi-national corporation may only sued in his home state. In other words, the same decision would have affected the same employees in the same way in every state, although the president is subject to jurisdiction only in his home state. Thus, Petitioner submits the Fifth District erred in its decision.

II. THE TRIAL COURT'S ORDER DOES NOT VIOLATE THOMPSON'S CONSTITUTIONAL RIGHTS.

The Fifth District's opinion goes on to state that if jurisdiction was proper under §48.193(b), that a substantial issue

of the statutes' constitutionality would be raised. A tort committed in this state allows Florida to constitutionally assert its long arm jurisdiction, the Fifth District's concerns to the contrary, notwithstanding.

The District Court completely ignored this Court's recent holding in Venetian Salami v. Parthenais, 554 So.2d 499 (Fla. 1989) where this Court held that "implicit within several of the enumerated circumstances are sufficient facts which are proven, without more, would suffice to meet requirements of International Shoe." Id. at 502. At a bare minimum, the resolution of the question of due process involves a factual analysis in the circumstance of each individual case. Venetian Salami, at 500.

It is submitted by the Petitioner that the facts in the instant case clearly would not offend due process by in allowing the court to assert jurisdiction over THOMPSON. First, THOMPSON is the President and Director of Southland Corporation, which owns and operates thousands of convenience stores in the State of Florida. THOMPSON is being sued for his breach of the duty to keep those stores safe for his employees. Under the circumstances, THOMPSON should reasonably anticipate the being haled into court here, when his failure to act causes injury to an employee in Florida. This is, in essence, the bedrock, analysis of due process. World-Wide Volkswagon Corporation v. Woodson 44 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

The Fifth District's opinion on the merits of the due process claim are simply not properly analyzed and are out of step with current constitutional thinking. It reflects an anachronistic

approach to jurisdiction which has long since been rejected by the United States Supreme Court and by this Honorable Court.

CONCLUSION

The Fifth District erred in not affirming the trial court's order denying defendant's motion to dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 5th day of June, 1992 to HARRY ANDERSON, ESQUIRE, P.O. Box 2867, Orlando, FL 32802 and WILLIAM DANIEL COVEY, 110897, Annex G-27, Tomoka Correctional Institute, 3950 Tiger Bay Road, Daytona Beach, FL 32115.

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/kca

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

JERE WILLIAM THOMPSON,

Appellant,

v.

CASE NO. 91-1574

JANE DOE (alias),

Appellee.

_____/

Opinion filed April 3, 1992

Non-Final Appeal from the Circuit Court
for Volusia County,
John W. Watson, III, Judge.

Harry K. Anderson of Anderson &
Associates, Orlando, for Appellant.

Francis J. Carroll, Jr. and Michelle
Morris-Jenkins of Boehm, Brown, Rigdon,
Seacrest & Fischer, P.A., Daytona Beach,
for Appellee.

DIAMANTIS, J.

Appellant Jere William Thompson appeals from an order denying his motion to quash process and service of process and motion to abate for lack of personal jurisdiction in a negligence action brought by appellee Jane Doe. We reverse.

On or about March 17, 1987 appellee was employed as a clerk at a 7-11 convenience store in Volusia County, Florida, which was owned and operated by the Southland Corporation. On that date, while appellee was working alone in the evening hours, appellee was sexually assaulted and battered. Appellee

filed suit seeking damages against her alleged assailant and various officials of Southland Corporation including Thompson for gross negligence in failing to take adequate security measures to make the store reasonably safe.

In her complaint appellee alleged that Thompson, as president and director of Southland Corporation, was operating, conducting, engaging in, or carrying on a business venture in Florida having an office or agency in this state and caused injury to persons within this state by an act or omission outside of the state while engaged in solicitation or service activities within the state. Appellee alleged that Thompson knew or should have known that his policy of keeping the store open during late night hours, staffing the store with only one clerk, and other inadequate security measures posed a serious danger to appellee to whom Thompson owed a duty of providing a safe workplace.

Thompson filed a motion to quash process and service of process and a motion to abate for lack of personal jurisdiction. Thompson asserted that the amended complaint failed to allege a basis for invoking long-arm jurisdiction over him pursuant to section 48.193 of the Florida Statutes (1987), and that under Florida law, jurisdiction does not lie over an individual because of acts performed in his capacity as a representative of a corporation unless the individual transacts business on his own account within the state. In support of these motions, Thompson filed an affidavit stating that he is a 20 year resident of Texas, that he has never maintained a residence in Florida during the period in question, that he is president and chief executive officer of the Southland Corporation headquartered in Dallas, Texas, that his office is in Dallas, Texas, and that he has never maintained a business office in Florida during the period in question. Thompson further stated that he has

not personally conducted business in Florida, has not personally committed a tort in Florida, and has not personally engaged in any solicitation or service activities within Florida.

This court has held that two inquiries must be made in determining whether long-arm jurisdiction is appropriate in a given case: (1) whether the complaint alleges sufficient jurisdictional facts to bring the action within the statute and, (2) if so, whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements. Unger v. Publisher Entry Service, Inc., 513 So.2d 674, 675 (Fla. 5th DCA 1987) rev. denied, 520 So.2d 586 (Fla. 1988). Florida's long-arm statute, section 48.193 of the Florida Statutes (1987) states, in pertinent part:

> 48.193 Acts subjecting person to jurisdiction of courts of state.--
>
> (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 and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
>
> (b) Committing a tortious act within this state.
>
> * * *
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or
>
> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

Appellee relies primarily upon section 48.193(1)(b) to uphold the trial court's ruling in this matter.[1] We recognize that whether jurisdiction lies under section 48.193(1)(b) is not clearly settled. This court has held that the occurrence of injury in Florida standing alone is insufficient to establish jurisdiction under section 48.193(1)(b) and that part of a defendant's tortious conduct must occur in this state. McLean Financial Corporation v. Winslow Loudermilk Corporation, 509 So.2d 1373, 1374 (Fla. 5th DCA 1987)(false statements made via telephone from another state to a person in Florida does not constitute the commission of a tortious act in Florida); Freedom Savings & Loan Association v. Ormandy & Associates, Inc., 479 So.2d 316, 317 (Fla. 5th DCA 1985)(in an action for tortious interference with contract where the only tortious act was the revocation of a letter of credit in Pennsylvania, no part of the tortious act was committed in Florida and Florida court was without jurisdiction). See also Fitz v. Samuel Friedland Family Enterprises, Inc., 523 So.2d 1284, 1285 (Fla. 4th DCA) rev. denied, 531 So.2d 1354 (Fla. 1988); Phillips v. Orange Co., Inc., 522 So.2d 64, 66 (Fla. 2d DCA 1988); Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130, 134 (Fla. 1st DCA 1977).

We recognize that some Florida courts have held that the commission of a tort for purposes of establishing long-arm jurisdiction under section

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[1] Section 48.193(1)(a) is inapplicable because Thompson's uncontroverted affidavit establishes that Thompson was not personally operating, conducting, engaging in, or carrying on a business or business venture in this state and that he did not have an office or agency in this state. Section 48.193(1)(f) is similarly inapplicable because Thompson's affidavit establishes that he, personally, was neither engaged in solicitation or service activities within this state, nor were any products, materials, or things processed, serviced, or manufactured by Thompson used or consumed within this state in the ordinary course of commerce, trade or use.

48.193(1)(b) does not require physical entry into or tortious conduct within this state, but only requires that injury or damages occur within Florida. International Harvester Company v. Mann, 460 So.2d 580, 581-582 (Fla. 1st DCA 1984).[2] See also Carida v. Holy Cross Hospital, Inc., 424 So.2d 849 (Fla. 4th DCA 1982). We certify conflict with these cases.

Further, we would point out that application of the contrary authority which holds that a foreign tortious act causing injury in Florida gives rise to jurisdiction under section 48.193(1)(b) would raise a substantial issue of whether Florida could constitutionally exercise jurisdiction over Thompson. This constitutional issue requires a two-prong analysis: first, has Thompson established sufficient "minimum contacts" with Florida to allow Florida to assert jurisdiction over him and, second, would the assertion of such jurisdiction offend "traditional notions of fair play and substantial justice". Sun Bank, N.A. v. E. F. Hutton & Company, Inc., 926 F.2d 1030, 1034-1035 (11th Cir. 1991),[3] *citing* Burger King Corporation v.

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[2] The trial court apparently relied on the case of International Harvester Company v. Mann, 460 So.2d 580 (Fla. 1st DCA 1984) in reaching its decision. However, we note that neither party in the trial court or in this court cited our cases of McLean Financial Corporation v. Winslow Loudermilk Corporation, 509 So.2d 1373 (Fla. 5th DCA 1987) and Freedom Savings & Loan Association v. Ormandy & Associates, Inc., 479 So.2d 316 (Fla. 5th DCA 1985).

[3] In Sun Bank, N.A. v. E.F. Hutton & Company, Inc., 926 F.2d 1030 (11th Cir. 1991), the court held that Florida could not constitutionally exercise jurisdiction over a New York E.F. Hutton vice-president who made misrepresentations in two telephone calls between New York and Florida concerning the creditworthiness of a client which resulted in financial injury or loss to the bank in Florida. Of interest, the court recognized the conflict in Florida law concerning whether there was jurisdiction over a foreign defendant who commits a foreign tortious act causing injury in Florida. Because of prior fifth circuit precedent, the eleventh circuit concluded Florida law allowed jurisdiction to be exercised but found that such exercise of jurisdiction violated both minimum contacts and traditional notions of fair play and substantial justice.

Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). See also International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). However, because we hold that the trial court is without jurisdiction pursuant to section 48.193(1)(b) we need not reach the issue of whether Florida may constitutionally exercise jurisdiction over Thompson.

Accordingly, we reverse the order of the trial court and remand this cause with instructions to vacate the order denying Thompson's motion to quash process and service of process and denying his motion to abate for lack of personal jurisdiction, and to enter an order granting Thompson's motions.

REVERSED and REMANDED.

GOSHORN, C.J. AND COWART, J., concur.