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FILED
SID J. WHITE
JUL 27 1992
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 REPLY BRIEF

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

By: _____
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INTRODUCTION

THOMPSON argues that the Fifth District's opinion should be affirmed as THOMPSON did not personally commit a tortious act within the state, and that he cannot be held liable for his acts as an agent of the corporation. The defendant further seeks to avoid the jurisdiction of Florida courts in the second part of his argument, regarding the constitutionality of asserting jurisdiction over his person.

I. THOMPSON IS PERSONALLY SUED FOR HIS ACTS TAKEN AS PRESIDENT OF SOUTHLAND CORPORATION

As he did in the courts below, THOMPSON seeks to avoid the application of the long arm statute by arguing that he did not personally commit any of the acts enumerated in the statute. THOMPSON argues that because this cause of action is predicated on the corporate acts of Southland in failing to provide a safe workplace, there can be no jurisdiction over THOMPSON. Thus, according to THOMPSON, he cannot be sued in Florida. (Resp. Brief at pp. 16-17).

THOMPSON's analysis is incorrect and reflects a misunderstanding of petitioner's cause of action, which is based on Sullivan v. Streeter, 509 So.2d 268 (Fla. 1987).

A . THOMPSON'S ARGUMENT RESTS ON THE BASIS OF THE REJECTED "AFFIRMATIVE ACT" DOCTRINE

Although THOMPSON dismisses Petitioner's first section of her brief as irrelevant to the issues on this appeal, petitioner

respectfully disagrees because of this very misconception. THOMPSON argues that this tort could only have been committed by the corporation. (Resp. Brief at p. 17).

THOMPSON's argument that this is a "corporate tort" as opposed to one committed by individuals is based upon the "affirmative act" doctrine which was rejected by this Court in 1987 in Streeter. In reviewing petitioner's cause of action, it is clear that the complaint is grounded upon THOMPSON's duty as the Chief Executive Officer and President of Southland Corporation to provide a safe workplace for his employee, JANE DOE. It was not THOMPSON's personal participation in the horrifying event which took place at the store, but his responsibility for providing a safe store which gives rise to his liability.

Prior to Streeter, a corporate officer must have committed some affirmative act going beyond the scope of the employer's nondelegable duty to provide a safe workplace in order to be held liable to a fellow employee. See Kaplan v. Tenth Judicial Circuit 495 So.2d 231 (Fla. 3d DCA 1986). This was known as the "affirmative act doctrine".

The "affirmative act doctrine", as pointed out by this Court in the Sullivan case, had its roots in Florida's workers compensation scheme. At common law, it was well settled that servants mutually owed to each other the duty of exercising ordinary care in the performance of their service, and were liable for their failure in that respect which resulted in injury to a fellow servant. Frantz v. McBee Company, 77 so.2d 796 (Fla. 1955). This was altered by the adoption of the workers compensation acts.

See Streeter.

However, under the 1987 version of the Workers Compensation Act, first the District Court, and then this Honorable Court, in Streeter, determined that the "affirmative act" doctrine no longer applied and supervisors and corporate officers could be liable for their breach of the duty to provide a safe workplace for their fellow employees. The Fourth District cogently noted that the ruling would make supervisors responsible for their acts regarding safety in the workplace, "Today's headlines of Love Canal, Three Mile Island, Bhopal, and similar catastrophic incidents bespeak the necessity for individual, as well as corporate, responsibility." Sullivan v. Streeter, 485 So.2d 893, 895 (Fla. 4th DCA 1986).

In the Streeter case, the corporate employer was sued precisely because he violated his duty to provide a safe workplace by failing to hire additional security guards when needed. Thus, THOMPSON has misconceived the basis of liability when he implies that the failure to provide adequate security can only be committed by a corporation. The case law has clearly held otherwise. Thus, Streeter and its progeny indicates that contrary to THOMPSON's assertion that he could not be subject to jurisdiction because only a corporation can commit the tort alleged by petitioner, supervisors and corporate officers are liable for failing to properly discharge their corporate duties in providing a safe workplace.

B. THE FIDUCIARY SHIELD DOCTRINE DOES NOT APPLY

THOMPSON has argued that the long arm statute does not apply

where an officer engages in "no activities in the forum state on his own behalf." (Resp. Brief at p. 19). This argument invokes what is known as the "fiduciary shield" doctrine. Bulova Watch Company, Inc. v. K. Hattori & Company, Ltd., 508 F. Supp. 1322 (E.O. NY. 1981). The respondent misconstrues the fiduciary shield doctrine. Initially, the fiduciary shield doctrine is not a constitutional doctrine. A thorough discussion of that point occurred in a case cited by respondent as one of the most "well reasoned decisions in this area", Columbia Briargate Company v. First National Bank, 713 F.2d 1052 (4th Cir. 1983). In fact, the Columbia decision rejected the application of the doctrine, under the facts of that case.

The Columbia case recognized that the doctrine is based upon equitable principles and is not a principle of constitutional interpretation, as suggested by THOMPSON. (Resp. Brief at pp. 20-21). In fact, the Columbia court refused to exercise the doctrine in its case, holding that the fiduciary shield doctrine is ultimately a matter of statutory interpretation. Therefore, petitioner disagrees with respondent's argument that there would be no jurisdiction over individual officers who commit tortious acts, as that is a matter of statutory interpretation of §48.193.

The cases cited are distinguishable from this case. In this case, JERE WILLIAM THOMPSON is the president not just a high level employee of the corporation. All the cited cases involved persons who were not chief executive officers. Thus, it would be more equitable for THOMPSON to appear in Florida to defend his company's policies.

The case of Escude Cruz v. Ortho Pharmaceutical Corp. 619 F.2d 902 (1st Cir. 1980) which THOMPSON characterizes as "very similar" is distinguishable. In Cruz, suit was actually brought against the officers of a Puerto Rican corporation's non-resident parent corporation. Thus, Cruz found a lack of causal relationship between the officer's activities and plaintiff's cause of action. This is not the case here, as THOMPSON, by virtue of his status, owed a direct duty to JANE DOE to provide her a safe workplace. The existence of this duty has never been controverted by THOMPSON.

II. THOMPSON DID COMMIT A TORTIOUS ACT WITHIN THE STATE OF FLORIDA

Lastly, respondent argues that there is no evidence of his involvement in the store's security decisions. This is, of course, an argument on liability.

The respondent successfully sought in the court below, a protective order abating all discovery, except on jurisdiction, pending resolution of the jurisdictional issue. (A-1). The petitioner thus, was handicapped by being barred from developing facts on liability.

Nonetheless, there is evidence that THOMPSON violated his duty to provide a safe workplace, both directly and through the acts of his agents. As respondent gratuitously pointed out, §48.193 applies to torts committed by individuals and their agents. Respondent has admitted that he supervises all employees, thus, any actions committed by employees under his supervision would be his responsibility.

For example, THOMPSON admitted that employees under his

supervision decided to resist the Gainesville ordinance requiring two (2) clerks to be on duty (T.31 - Refers to THOMPSON's deposition found in Respondent's appendix). The Fifth District's opinion, does not state that THOMPSON did not commit a tortious act. Rather, the Fifth's opinion was predicated on their conception that the long arm statute had no application for acts committed by THOMPSON in Texas which resulted in injury in Florida. Respondent did not move for rehearing on that point, nor did he ask for clarification of the court's ruling. THOMPSON's attempt to argue that he did not commit the tort alleged by the petitioner comes too late in the day. In any event, petitioner should be given an opportunity for full discovery of the liability facts.

III. THE APPLICATION OF THE STATUTE IS NOT UNCONSTITUTIONAL UNDER THESE CIRCUMSTANCES

The central issue in this appeal is whether THOMPSON by failing to act and failing to mandate security measures as alleged in petitioner's complaint committed a tortious act in the state of Florida, as described in §48.193(b). There is little guidance given in determining the meaning of the words "tortious act". The Fifth District has decided that some affirmative act on the part of the defendant must have occurred in the state of Florida in order to give rise to jurisdiction. The other districts have disagreed, holding that the place of injury need only occur in Florida in order for a tortious act to have occurred. See Sun Bank, N.A. v. E.F. Hutton and Company, 926 F.2d 1030 (11th Cir. 1991).

Respondent belittles petitioner's suggestion that the Fifth's formula will prove unworkable and fraught with problems. However,

petitioner again points out that it is difficult to determine when a tortious act would occur in the state of Florida under the Fifth District's holding without the defendant being present. The petitioner urges this Honorable Court to adopt the rule found in the opposing line of cases cited in the opinion.

Respondents state briefly that the statute as applied would be unconstitutional. (Resp. Brief at p. 7). The Fifth District did not go that far, holding only in dicta, that a rule allowing the assertion of jurisdiction where a foreign tortious act causes injury in Florida "would raise a substantial" issue. (Slip. Op. at p. 5). The panel did not hold that the trial court's assertion of jurisdiction was unconstitutional, as implied by respondent. (Resp. Brief at p. 18). On the contrary, there is no constitutional impediment to THOMPSON being haled into court in Florida.

It is clear that the United States Supreme Court has in recent years developed a flexible case by case approach to due process in regards to long arm jurisdiction. Burger King Corporation v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L.E. 2d 528 (1985). In Burger King, the Supreme Court held that a defendant may not avoid jurisdiction, simply by not physically entering a state, "[W]e have consistently rejected the notion that an absence of physical contacts can defeat jurisdiction there." Burger King, 471 U.S. at 476, 105 S. Ct. at 2184.

The Supreme Court has held that in a commercial context, the issue of due process and minimum contacts is whether the defendant has purposely directed his activities to the residents of the forum

state. One example given by the Court of this concept is where the defendant has created continuing obligations between himself and the forum's residents. Id. The petitioner has alleged that THOMPSON owed her the duty to provide a safe workplace in her store in New Smyrna Beach, Florida. The existence of this duty has never been challenged at any stage in these proceedings, and, indeed, has been recognized by this Honorable Court in Streeter. Thus, the respondent has established an obligation to petitioner that was breached when he allowed petitioner to work under the conditions alleged in the complaint.

When there are minimum contacts established, the defendant must argue that to assert jurisdiction would violate fair play and substantial justice. The Supreme Court has looked at several factors in evaluating this question; the burden on the defendant, the forum state's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. Burger King, 471 U.S. at 477; 105 S. Ct. at 2184.

Although the respondent argues that it would be unfair to subject THOMPSON to the jurisdiction of Florida, he does not discuss any of those factors enumerated above. On the other hand, the Supreme Court has noted that in modern business relations, the inconvenience of a party in litigating out of his home state is minimized. Further, the Court has recognized, "A state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state

actors." 417 U.S. at 473, 105 S. Ct. at 2182. In fact, THOMPSON testified that he made decisions as president dealing with Southland's Florida operations. (T.43).

However simplistic and appealing the Fifth District's concerns might be, it can no longer apply in a modern world of business, as recognized by the Supreme Court.

CONCLUSION

The petitioner prays that this Honorable Court reverse the Fifth District's holding and remand this case for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 24th day of July, 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

APPENDIX

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SMALBEIN, JOHNSON, ROSIER, BUSSEY, ROONEY & EBBETS, P. A.

20 NOV 1989

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IN THE CIRCUIT COURT FOR VOLUSIA COUNTY, FLORIDA.

CASE #89-0655-CA-01

JANE DOE (ALIAS),

Plaintiff,

vs.

WILLIAM DANIEL COVEY, etc., et al.,

Defendants.

ORDER GRANTING PARTIAL ABATEMENT AND DEFERRING RULING ON MOTION TO QUASH

THIS CAUSE came on for hearing pursuant to notice on October 31, 1989, on the below disposed of motions. Present at said hearing were Francis J. Carroll, Jr., Esq. representing Plaintiff and Harry Anderson, Esq., representing Defendants, JERE WILLIAM THOMPSON and RICHARD DOLE. The Court having heard argument of counsel and being duly advised in the premises, it is accordingly,

ORDERED AND ADJUDGED as follows:

1. The motions of Defendant, JERE WILLIAM THOMPSON and RICHARD DOLE, to quash Plaintiff's Request for Admissions served upon them August 8, 1989, and to abate this action in regard to said requested admissions is **GRANTED** to the extent that discovery in this action is abated with the exception of discovery directed to jurisdiction. Said Defendants shall not be required to respond to said requested admissions until subsequent Order of this Court.

2. Ruling is deferred on the motions of Defendant, JERE WILLIAM THOMPSON and RICHARD DOLE, to quash process and attempted service of process, to abate this action for lack of personal jurisdiction, and to dismiss the Complaint for failure to state a cause of action. Discovery in this action is abated with the exception of discovery directed to the issue of jurisdiction until the Court rules upon said Defendants' Motions to Dismiss and Motion to Quash.

3. Plaintiff's ore tenus motion to conduct depositions by telephone is **GRANTED**.

4. A hearing herein on the pending motions shall not be rescheduled to be heard any sooner than forty-five (45) days after the date of this hearing.

5. The Court notes that it has advised counsel appearing at this hearing of the fact that the Honorable John W. Watson, III, presided over the criminal trial of Defendant, WILLIAM DANIEL COVEY, arising as the result of the incident which is the subject matter hereof. Counsel are to advise the Court whether they, or their clients, have any objection to this action continuing to be assigned to the Honorable John W. Watson, III.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida; this 13 day of November, 1989.

/s/ JOHN W. WATSON, III
CIRCUIT JUDGE

Copies to:

Harry Anderson, Esq.
Francis J. Carroll, Jr., Esq.
William Daniel Covey