

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC00-389
LOWER TRIBUNAL CASE NO. 5D98-1944

BERNARD WENDT,

Petitioner,

vs.

MARVIN HOROWITZ &
HOROWITZ & GUDEMAN, P.C.,

Respondents.
_____ /

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL, FIFTH DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

By: Dale T. Golden
Florida Bar No. 094080

Michael J. McGirney
Florida Bar No. 856797

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
100 North Tampa Street
Suite 3550
Tampa, Florida 33602
(813)472-7800
(813)472-7811 (facsimile)
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENTS	
<u>I. THE APPELLATE COURT CORRECTLY HELD THAT RESPONDENT ARE NOT SUBJECT TO PERSONAL JURISDICTION UNDER §48.193(1)(a), AS RESPONDENT WERE NOT CONDUCTING, ENGAGING IN OR CARRYING ON A BUSINESS OR BUSINESS VENTURE IN FLORIDA.</u>	4
<u>II. THE APPELLATE COURT CORRECTLY HELD THAT RESPONDENT IS NOT SUBJECT TO JURISDICTION UNDER §48.193(1)(b), AS THE ALLEGED TORTS OCCURRED OUTSIDE THE STATE OF FLORIDA.</u>	9
<u>III. HOROWITZ IS NOT SUBJECT TO PERSONAL JURISDICTION FOR ACTIONS TAKEN SOLELY AS AGENT FOR K.D. TRINH.</u>	14
<u>IV. PETITIONER'S ASSERTION THAT THE DISTRICT COURT ERRED BY SUBSTITUTING IT OWN JUDGMENT FOR THAT OF THE TRIAL COURT IS UNSUPPORTED BY THE EVIDENCE.</u>	20
CONCLUSION.....	22
CERTIFICATE OF SERVICE.....	23
CERTIFICATE OF COMPLIANCE.....	23

TABLE OF CITATIONS

STATE COURT CASES

<u>Andrew H. Boros, P.A. v. Carter</u> , 537 So.2d 1134 (Fla. 3 rd DCA 1989).....	15
<u>Bank of Wessington v. Winters Gov. Sec.</u> , 361 So.2d 757 (Fla. 4 th DCA 1978).....	4
<u>Brennan v. Ruffner</u> , 640 So.2d 143 (Fla. 4 th DCA 1994).....	7
<u>Dinsmore v. Martin Blumenthal Assoc. Inc.</u> , 314 So.2d 561 (Fla. 1975).....	7
<u>Doe v. Thompson</u> , 620 So.2d 1004 (Fla. 1993).....	16
<u>Economic Research Analyst, Inc. v. Brennan</u> , 232 So.2d 219 (Fla. 4 th DCA 1970).....	18
<u>Ellis v. State</u> , 622 So. 991 (Fla. 1993).....	10
<u>Excel Handbag Co., Inc. v. Edison Bros. Stores, Inc.</u> , 428 So.2d 348 (Fla. 3 rd DCA 1983).....	15
<u>The Florida Bar v. Nesmith</u> , 642 So.2d 1357 (Fla. 1994).....	7
<u>Forsythe v. Longboat Key Beach Erosion Control Dist.</u> , 604 So.2d 452 (Fla. 1992).....	9
<u>Georgia Insurers Insol. Pool v. Brewer</u> , 602 So.2d 1264 (Fla. 1992).....	15
<u>Horowitz v. Laske</u> , 751 So.2d 82 (Fla. 5 th DCA 1999).....	8
<u>Kennedy v. Reed</u> , 533 So.2d 1200 (Fla. 2 nd DCA 1988).....	15
<u>King v. Young</u> , 107 So.2d 751 (Fla. 2 nd DCA 1958).....	18
<u>Maryland Casualty Co. v. Hartford Accident and Indemnity Co.</u> , 264 So.2d 842 (Fla. 1 st DCA 1972).....	5
<u>McClellan Financial Corp. v. Winslow Loudermilk Corp.</u> , 509 So.2d 1373 (Fla. 5 th DCA 1987).....	13

<u>Philips v. Orange Co. Inc.</u> , 522 So.2d 64 (Fla.2 nd 1988).....	13
<u>Schnetzler v. Cross</u> , 688 So.2d 445 (Fla.1 st DCA 1997), Rev. dis'd 695 So.2d 699 (Fla. 1997).....	19
<u>Shaw v. Shaw</u> , 334 So.2d 13 (Fla. 1976).....	20
<u>Stoll v. Noel</u> , 694 So.2d 701 (Fla. 1997).....	18
<u>Suroor v. First Investment Corp.</u> , 700 So.2d 139 (Fla. 5 th DCA 1997).....	17
<u>Texas Guaranty Student Loan Corp. v. Ward</u> , 696 So.2d 930 (Fla. 2 nd DCA 1997).....	13
<u>Thomas Jefferson University v. Romer</u> , 710 So.2d 67 (Fla. 4 th DCA 1998).....	11
<u>Unruh v. State</u> , 669 So.2d 242 (Fla. 1996).....	9
<u>Venetian Salami Co. v. Parthenais</u> , 554 So.2d 499 (Fla. 1989).....	10
<u>Windels, Marx, Davies & Ives v. Solitron Devices, Inc.</u> , 510 So.2d 1177 (Fla. 4 th DCA 1987).....	7

FEDERAL COURT CASES

<u>Bangor Punta Operations, Inc. v. Universal Marine</u> , 543 F.3d 1107 (5 th Cir. 1976).....	13
<u>Robinson v. Giarmarco & Bill, P.C.</u> , 74 F.3d 253 (11 th Cir. 1996).....	12
<u>Sun Bank, N.A. v. E.F. Hutton Co.</u> , 926 F.2d 1030 (11 th Cir. 1991).....	13

INTRODUCTION

This brief is submitted on behalf of Respondent, Appellants below, Marvin Horowitz and Horowitz & Gudeman, P.C. (hereinafter collectively referred to as "Horowitz"). The parties will be referred to either by proper name, or as Petitioner or Respondent. Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

Petitioner appeals the decision of the Fifth District Court of Appeal that reversed the trial court's order determining that it had personal jurisdiction over Respondent. The District Court never reached the issue of whether Horowitz had sufficient minimum contacts with Florida to subject him to its jurisdiction, finding that Petitioner failed to meet his burden of establishing jurisdiction under the Florida long arm statute, §48.193.

Edward and Ruth Laske, individually and on behalf of similarly situated individuals, filed a class action complaint against Bernard Wendt in the Fifth Judicial Circuit, Lake County, Florida. In their complaint, they allege that Wendt played an active role as a broker and promoter for the sale of K.D. Trinh promissory notes, which notes turned out to be

worthless. Generally, it is alleged in the complaint that the sale of K.D. Trinh notes violated security laws.

Wendt sued K.D. Trinh Investments, Inc. ("K.D. Trinh"), Strong Financial Services, Inc. ("Strong Financial"), and Thomas Peter Hall ("Hall"), in addition to Horowitz. The first amended third-party complaint specifically alleges that K.D. Trinh is a Canadian corporation and that Horowitz, a Michigan attorney, was K.D. Trinh's attorney.

Wendt's initial third party complaint was dismissed with leave to amend because it failed to contain allegations which supported long arm jurisdiction over Horowitz. In the first amended third-party complaint, Wendt alleged generally that Horowitz "engaged in a business in the State of Florida, that being the practice of law,"; that Horowitz committed a tortious act in Florida; and that Horowitz "caused personal injury to persons within the State of Florida arising out of acts or omissions by him outside the State of Florida." These allegations generally correspond with Florida Statute, §§48.193(1)(a)(b) and (f)(1).

In response, Horowitz filed an affidavit which established that he had never been a resident of Florida; had never practiced law or been licensed to practice law in Florida; had never maintained an office, agent, address or telephone listing in Florida; had never solicited business from any Florida resident, either personally, via the U.S. Mail or the telephone, or through representatives or by general advertisement. In addition, Horowitz has never owned any assets in Florida and his only business contacts with any party or entity in the State of Florida have been on behalf of a client.

The Fifth District reversed the lower court, holding that §48.193(1)(a) did not confer jurisdiction over Horowitz as his activities for a Canadian client were performed in Michigan and did not amount to a course of business activity in Florida. The district court further determined that §48.193(1)(b) was not applicable as the tortious acts that Petitioner complained of were not committed in Florida. Petitioner seeks review of the Fifth District's decision claiming that it is in conflict with decisions of the other district courts of appeal.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly ruled that Respondent is not subject to personal jurisdiction, as he was not operating a business in Florida, committed no tortious act within the State of Florida and all actions taken by Respondent were as agent for K.D. Trinh.

THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENT ARE
NOT SUBJECT TO PERSONAL JURISDICTION UNDER
§48.193(1)(a), AS RESPONDENT WERE NOT CONDUCTING,
ENGAGING IN OR CARRYING ON A BUSINESS OR BUSINESS
VENTURE IN FLORIDA.

Florida Statute, §48.193(1)(a), provides for long arm jurisdiction over a non-resident "operating, conducting, engaging in, or carrying on a business or business venture in this State or having an office or agency in the State."¹

In his Initial Brief, Petitioner takes the position that Respondent was engaged in the practice of law in Florida by offering advice to his Canadian client regarding aspects of Florida law.² This argument ignores the plain language of the statute, which clearly requires that the conduct of business occur "in this state."³

The cases cited by Petitioner in support of his position, actually undermine that position. Those cases are clearly distinct from the instant factual situation, as the non-resident defendants had express contractual relationships with Florida residents.

Maryland Casualty Co. v. Hartford Accident and Indemnity Co., 264 So.2d 842 (Fla. 1st DCA 1972), involved the issue of whether non-resident administrators of a non-resident decedent's will could be sued in Florida. The decedent, a Virginia resident, was injured when struck by a car in Daytona Beach. Since the administrators stepped into the shoes of the deceased, the court analyzed whether or not the deceased would

¹It is undisputed that the Respondent has neither an office nor an agent in Florida.

²While the Petitioner has outlined his argument as only involving the question of whether physical presence is necessary in Florida to provide jurisdiction under §48.193(1)(b), he nonetheless addresses the "business venture" provision of §48.193(1)(a), as well.

³ "Long arm statutes are to be strictly construed." See, Bank of Wessington, *infra*.

have been subject to personal jurisdiction. *Id.* at 842-843. In finding that the deceased, and therefore the administrators, could be sued in Florida, the court relied on the contractual relationship between the deceased and the Florida hospital where he was treated for the injuries that ultimately resulted in his demise:

Jones had contracted with the hospital for services, thereby implying that such services were to be paid for...Jones' actions with regard to the hospital constituted a form of business within this State, where services were substituted for pecuniary gain.

Id. at 844.

Unlike the situation in Maryland Casualty Co., where the non-resident defendant had a business relationship with a Florida entity, no such relationship existed between Respondent and any Florida residents with regard to the instant litigation. Respondent entered into no agreements with Florida parties which required the performance of services in exchange for payment. As such, Maryland Casualty Co., provides no support for Petitioner's position.

Likewise, Bank of Wessington v. Winters Gov. Sec., 361 So.2d 757 (Fla. 4th DCA 1978), does not assist the Petitioner. In Bank of Wessington, the non-resident defendant corporation "engaged in approximately ten separate oral transactions" with the Florida entity over the course of a two month period. *Id.* The court found jurisdiction under § 48.193(1)(a) over the corporation, but declined to similarly find jurisdiction over the bank's agent who allegedly negotiated the deals. *Id.* at 760.

Petitioner argues in his Brief that Respondent did, in fact, represent a Florida resident, i.e. Loren Reynolds ("Reynolds") or perhaps, George Hermann ("Hermann")⁴. This supposition is based on the allegation that Reynolds eventually became the "contact person" at K.D. Trinh and that Horowitz "began taking directions from Reynolds and advising him."⁵ While Reynolds may have been a Florida resident, the Petitioner's argument overlooks the undisputed fact that Horowitz never represented Reynolds nor any

⁴The district court rejected the latter assertion as it is undermined by Wendt's own allegations in the first amended third-party claim that Hall represented Hermann and did not address the former allegation as it was not specifically raised at the district court level.

⁵ See, Petitioner's Initial Brief at p. 3.

Florida resident, personally. (See, Brennan v. Ruffner, 640 So.2d 143 (Fla. 4th DCA 1994) (attorney who represent a corporation does not represent the individual shareholders), see also, The Florida Bar v. Nesmith, 642 So.2d 1357 (Fla. 1994) (corporation not owner was client).

In fact, it is undisputed that Respondent solicited no business in Florida, received no payments from any Florida residents, and had no agents, offices, or addresses in Florida.

In Dinsmore v. Martin Blumenthal Assoc. Inc., 314 so.2d 561 (Fla. 1975), this Court ruled that in order to bring a non-resident under the purview of the "business venture" provision of the long arm statute, "the activities of the person sought to be served...must be considered collectively and show a general course of business activity in the State for pecuniary gain." Id. at 564.

A case that provides a good illustration of what is required under § 48.193(1)(a) is Windels, Marx, Davies & Ives v. Solitron Devices, Inc., 510 So.2d 1177 (Fla. 4th DCA 1987). In that case, a New York law firm represented a Florida client in a New York lawsuit. The client eventually sued the law firm in Florida for malpractice. The non-resident defendants moved to abate for lack of personal jurisdiction. The appellate court, in affirming the trial court's finding of jurisdiction, relied on, inter alia, the fact that the non-resident firm was paid ten thousand dollars per month by the client, performed work in Florida on numerous occasions, negotiated a loan in Florida and received all retainer payments from Florida. Id. at 1177-1178. This constituted a "record of substantial activity in Florida over a period of several years by the out of state law firm." Id. at 1178.

In the instant case, Horowitz merely directed some correspondence and engaged in some telephone conversations with Florida residents during the State's investigation of his client. Based upon these facts, the appellate court correctly ruled:

Brief phone calls and letters initiated in Michigan and performed wholly in Michigan, and the preparation of loan documents, all done on behalf of a Canadian client doing business in Florida, does not amount to a general course of business activity in Florida by Horowitz. Compare, Foster, Pepper & Riviera, 611 So.2d at 582-583 (Fla. 1st DCA 1992) (holding that securities counsel's single act of preparing a private placement memorandum in Seattle which was used in Florida does not, without more, show a general course of business activity in Florida for pecuniary benefit.)

Horowitz v. Laske, 751 So.2d 82, 85 (Fla. 5th DCA 1999).

Since Respondent's limited contacts with Florida provide no support for Petitioner's assertion that the district court erred in finding that Respondent were not subject to personal jurisdiction under § 48.193(1)(a), that portion of the district court's decision must be affirmed.

ISSUE NO. 2

**THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENT IS NOT
SUBJECT TO JURISDICTION UNDER §48.193(1)(b), AS THE
ALLEGED TORTS OCCURRED OUTSIDE THE STATE OF FLORIDA.**

Under § 48.193(1)(b), any person "committing a tortious act within the state", is subject to service of process.⁶ By contrast, § 48.193(1)(f) allows for the exercise of long arm jurisdiction over a person who causes injury to a person or property within the State "arising out of an act or omission by the defendant outside of the state..."

Judges should not construe statutes to render specific provisions superfluous or redundant. See, Unruh v. State, 669 So.2d 242, 245 (Fla. 1996). "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related provision in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992). Long arm statutes are to be strictly construed. See, Bank of Wessington, 361 So.2 at 759. This Court has held that statutes should not be interpreted in a manner that would deem the legislative action useless. See, Ellis v. State, 622 So.2d 991 (Fla. 1993). The responsibility of the court when construing a statute is to give the statutory words their plain and ordinary meaning. See, Silva v. Southwest Fla. Blood Bank, 601 So.2d 1184 (Fla. 1992).

⁶Of course, even if a court finds that § 48.193 has been satisfied, the court must still determine whether or not the non-resident defendant has sufficient "minimum contacts" to satisfy due process requirements. See, Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989).

The "plain meaning" of §48.193(1)(b) compels this Court to affirm the district court's decision. In holding that §48.193(1)(b) did not give the trial court jurisdiction over Horowitz, the appellate court stated:

The "tortious act" alleged here, negligently responding to the state of Florida regarding the sale of K.D. Trinh's unregistered securities and negligently drafting loan documents for use by K.D. Trinh, a Canadian corporation, for use in its Florida business activities, were not committed in the state of Florida as required by the plain language of the statute... Rather, if committed at all, these acts were committed in Michigan.

See, Horowitz, 751 So.2d at 86 (emphasis in original).

There is no consensus amongst Florida appellate courts that have interpreted § 48.193(1)(b). Some courts have drawn distinctions between intentional and negligent torts holding that the former subject a non-resident to long arm jurisdiction. Others have held that only one element of the alleged tort, e.g. damages, need occur in Florida for jurisdiction to arise, while others have held that the plain meaning of the statute clearly sets forth the only situation where jurisdiction will lie, i.e. where the tort itself is committed in Florida.

In a well-reasoned concurrence in Thomas Jefferson University v. Romer, 710 So.2d 67 (Fla. 4th DCA 1998), Judge Farmer commented on each of these analyses:

The statute does not distinguish between intentional torts and negligence. It simply refers to a "tortious act." To draw the distinction of intentional torts, it is necessary to add words to the statute. Judges are not free to add to statutory text, especially where the existing language suggests some uncertainty as to the precise legislative intent...

Moreover, the legislature did not say "commission of a tort" in this state, but instead made jurisdiction depend on the commission of a "tortious act" here. If the legislature had used "commission of a tort," there might be some theoretical basis to separate the elements of a tort—among which is damages—and reason that the tort is committed where the last element occurs. But because the statutory locution is "commission of a tortious act," it is plain that the

focus of this provision is on the act itself, not its character as a tort. In short, wherever the act itself—setting into motion the various elements that combine to make a tort—that is the critical test for jurisdictional purposes. The legislature has therefore said quite clearly that for jurisdiction under (1)(b) the act or omission of the defendant must have occurred with Florida.

Moreover, the text of the statute outside of (1)(b) confirms this reading. Subdivision (1)(f) explicitly addresses the circumstances where acts committed outside of Florida ultimately cause injury within the state. If (1)(b) were also deemed to cover the circumstance where acts committed outside Florida cause injury here, then one of two possible interpretations of these two provisions must be true: (A) one of the two subdivisions is superfluous, or (B) the two subdivisions are redundant. But judges should not construe statutes to render specific provisions superfluous or redundant... We are required to assume rather that the legislature had something different in mind in each provision. Reading (1)(b) to be limited to what it so clearly says—committing an act in Florida that ultimately proves to be a tort—is the logical reading. That would leave the entirety of subdivision (1)(f) to apply to all assertions of jurisdiction over acts outside of Florida that ultimately cause injury to someone within the state.

Id. at 71 (citations omitted).

In his brief, Petitioner relies on Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir.1996). However, that case provides no assistance to Petitioner for two (2) reasons.

Initially unlike the instant case, Giarmarco involved a non-resident attorney who represented and was being sued by a Florida client. Respondent does not argue that a non-resident attorney representing a Florida client would not be subject to personal jurisdiction. Instead, Respondent argues that since he has never represented a Florida client, no personal jurisdiction exists.

In addition, the Giarmarco court was constrained to follow its own precedent in Sun Bank, N.A. v. E.F. Hutton Co., 926 F.2d 1030 (11th Cir.

1991). In Sun Bank, the court stated that the scope of §(1)(b) "remains unclear"; however since the court had previously determined, in Bangor Punta Operations, Inc. v. Universal Marine, 543 F.3d 1107 (5th Cir. 1976), that §(1)(b) applied where the tortious conduct occurred outside of Florida, it was constrained by that decision. See, Sun Bank, 925 F.2d at 1033-34.

The Bangor Punta decision was rendered prior to the Fifth District Court of Appeal's decision in McClellan Financial Corp. v. Winslow Loudermilk Corp., 509 So.2d 1373 (Fla. 5th DCA 1987). In McClellan, the court held that misrepresentations allegedly made via telephone by the non-resident defendants in Virginia were not "committed in the State of Florida as required by Section 48.193(1)(b)." Id. at 1374.

In addition, Bangor Punta was decided prior to the Second District Court of Appeals decision in Phillips v. Orange Co., Inc., 522 So.2d 64 (Fla. 2nd DCA 1988). In Phillips, the court strictly construed §(1)(b) finding that that the tortious act had to have been committed in Florida. That decision was affirmed in Texas Guaranty Student Loan Corp. v. Ward, 696 So.2d 930 (Fla. 2nd DCA 1997). As such, the Eleventh Circuit decisions were apparently based more upon the doctrine of stare decisis, than an analysis of §48.193(1)(b).

To follow the logic forwarded by the Petitioner would not only render a portion of the long arm statute meaningless, it could lead to bizarre results. For example, if a Georgia resident was involved in an automobile accident with a Florida resident in Georgia, but the injury to the Florida resident did not manifest itself until the Florida resident returned to Florida, the Petitioner's reading of § 48.193(1)(b) would likely give the Florida court

long arm jurisdiction over the Georgia resident.⁷ Surely, this was not the intent of the Florida legislature in enacting §48.193.

Since the "plain meaning" of the statute requires that the tort be committed in Florida and it is undisputed that Horowitz never entered Florida, no personal jurisdiction lies under §48.193(1)(b).

ISSUE NO. 3

**HOROWITZ IS NOT SUBJECT TO PERSONAL JURISDICTION FOR
ACTIONS TAKEN SOLELY AS AGENT FOR K.D. TRINH.**

While clearly K.D. Trinh is subject to personal jurisdiction in Florida as it sought pecuniary gain by soliciting business in Florida, Horowitz neither solicited business on his own behalf or performed any acts as anything other than agent of K.D. Trinh, his client. As such, no personal jurisdiction lies.

It is well-established in Florida that an attorney acts as an agent for his client. See e.g., Andrew H. Boros, P.A. v. Carter, 537 So.2d 1134 (Fla. 3rd DCA 1989). Furthermore, jurisdiction over the principal (K.D. Trinh) does not confer jurisdiction over the agent (Horowitz). See, Georgia Insurers Insol. Pool v. Brewer, 602 So.2d 1264, 1267 n.6 (Fla. 1992); Kennedy v. Reed, 533 So.2d 1200 (Fla. 2nd DCA 1988).

Where an attorney's contacts with Florida are solely in his capacity as attorney for his client, the attorney--like a corporate officer, shareholder, or other agent of a corporation --is not personally conducting business in the State of Florida. See, e.g., Excel Handbag, Co., Inc. v. Edison Brothers Stores, Inc., 428 So.2d 348 (Fla. 3rd DCA 1983). In that case, Excel Handbag sued Edison Brothers Stores, Inc., as well as Julian Edison, the President of

⁷Of course, the non-resident would still be entitled to assert a due process/minimum contacts defense.

the Company; Eric Newman, the Vice President and General Counsel of Edison Brothers; and Herbert Robinson, Edison Brothers' outside counsel, who practiced law in the State of New York. Id. at 349.⁸

Said the Court in Excel:

While a corporation itself may be subject to jurisdiction when it transacts business through its agents operating in the forum state, unless those agents transact business on their own account in the State, as opposed to engaging in business as representatives of the corporation, they are not engaged in business so as to be individually subject to the State's long arm statute.

Id. at 350.

In Doe v. Thompson, 620 So.2d 1004 (Fla. 1993), this Court held that personal jurisdiction did not exist over a non-resident defendant (Thompson) who was the president of a foreign corporation (the corporate owner of 7-11 Convenience Stores) which indisputably did business in Florida, on the basis that Florida's long arm jurisdiction statute requires that one must personally (or through an agent) do one of the enumerated acts under the statute in order to bring oneself within the purview of the statute. As this Court noted:

While Southland Corporation, which operated business in Florida, could be haled into court because of its minimum contacts, its chief executive officer is not by virtue of his position subject to personal jurisdiction. Thompson's allegedly negligent actions are not alleged to have taken outside his duties as Southland's president and chief executive officer; rather, Doe alleges that he was acting within the scope of his employment.

Id. at 1006.

The Fifth District Court of Appeal reaffirmed this principle in Suroor v. First Investment Corp., 700 So.2d 139 (Fla. 5th DCA 1997). Although the specific statute that was addressed in Suroor was §48-181(1), which relates to service of process on non-residents engaging in business in the State, the operative language of that statute is virtually identical to the operative language of the long arm statute in question. In

⁸ Although it is not explicitly stated, it is implicit that Robinson was not a corporate employee, because Newman was referred to as Vice President and General Counsel, whereas Robinson was referred to as an attorney, and separate mention was made of the state in which he practiced.

that case it was alleged that Sheikh Suroor was the sole shareholder of a corporation, Peccany, and that he visited Orange County, Florida to inspect and evaluate land which he owned there; that he made payments from his personal funds to suppliers of services who were improving the property; that he communicated directly with representatives of the plaintiff while in Florida, and that he contracted to have services performed in Florida. *Id.* at 141. Nevertheless, the court held that these allegations did not establish that Sheikh Suroor operated, conducted, engaged in or carried on a business or business venture in Florida:

At most, these allegations establish that Sheikh Suroor acted in furtherance of Peccany's interest in accordance with his role as an agent of the corporation. In order to establish that Sheikh Suroor had subjected himself to personal jurisdiction in Florida, FIC was required to allege facts establishing that Sheikh Suroor had engaged in business activities, apart from this role as an agent of Peccany, and had begun serving his own personal interests.

Id. (citing Excel Handbag Co., *supra*).

Wendt argues that Doe v. Thompson is not applicable here because Horowitz was not an employee of Trinh, but rather an independent contractor. While it is certainly true that Horowitz was an independent contractor not an employee, that distinction is meaningless to this Court's analysis. Whether he was independent contractor or employee, Horowitz was at all times acting as an agent for his principal, K.D. Trinh.

The term "agent" can apply to both an employee and an independent contractor. In an agency relationship, the principal delegates to an agent the "management of some business to be transacted in his name or on his account," as well as the discretionary authority to carry out that business. See, Economic Research Analyst, Inc. v. Brennan, 232 So.2d 219 (Fla. 4th DCA 1970); King v. Young, 107 So.2d 751 (Fla. 2d DCA 1958).

This Court has recognized that a physician can be an independent contractor and an agent of the state and therefore, be entitled to the statutory immunity from suit provided to agents of the state. See, Stoll v.

Noel, 694 So.2d 701 (Fla. 1997). In doing so, this Court relied upon the Restatement (2d) of Agency, Section 14N (1957), the comment to which notes that:

Most of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies, are independent contractors...However, they fall within the category of agents.

In Schnetzler v. Cross, 688 So.2d 445 (Fla. 1st DCA 1997), rev. dis'd, 695 So.2d 699 (Fla. 1997), the court held that Doe v. Thompson applies to employee professionals such as physicians, and that there is no exception to the corporate shield doctrine for employed professionals:

Our reading of Thompson finds no exception to the corporate shield doctrine for physicians or any other employees engaged in so called 'professional services,' e.g. lawyers, engineers, accountants, etc.

Schnetzler, supra at 447(emphasis added).

The only distinction between this case and Schnetzler is that, as noted above, Horowitz was an independent contractor hired by K.D. Trinh rather than an employee of K.D. Trinh. Nevertheless, all of his activities with respect to the subject matter of this litigation were performed at the request of and on behalf of K.D. Trinh, and he was compensated for those services by K.D. Trinh. In other words, he was not performing acts in Florida "personally" or for his own benefit. Rather, he was performing acts solely on behalf of his Canadian client. Thus, this case is distinguishable from those cases in which an attorney was hired by a Florida resident and was therefore performing acts on behalf of a Florida Client. See, e.g., Robinson v. Giarmarco, supra; Rogers & Wells v. Winston, supra; and In Re: Estate of Vernon, supra.

Since it is undisputed that Horowitz undertook no action in Florida for personal pecuniary gain, but was instead, acting solely as agent for K.D. Trinh, Horowitz is not subject to personal jurisdiction in Florida.

ISSUE NO. 4

**PETITIONER'S ASSERTION THAT THE DISTRICT COURT ERRED BY
SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE TRIAL
COURT IS UNSUPPORTED BY THE EVIDENCE.**

In his Brief, Petitioner argues that the Fifth District Court of Appeal wrongfully "weighed the evidence proffered by Wendt."⁹ However, this assertion is undermined by case law cited by the Petitioner. In Shaw v. Shaw, 334 So.2d 13 (Fla. 1976), this Court held that an appellate court is constrained by the requirement that it merely determine whether the trial court's ruling is supported by competent evidence. This Court further held that an appellate court had the right to reject incredible or improbable testimony. Id. at 14.

In its opinion, the Fifth District Court of Appeal obviously found that there was no credible evidence to support Wendt's vague assertion that Horowitz represented a Florida resident, presumably Hermann (although Petitioner now argues that Horowitz represented Reynolds). Petitioner argues that this determination by the appellate court involved a weighing of "the substantiality of the evidence rather than judging whether it was legally competent."¹⁰ What the Petitioner has failed to do is offer any evidence to support this conclusory statement.

In fact, the district court needed only to rely on Wendt's own assertions in reaching its conclusion. In the Amended Third-Party Complaint, Wendt specifically alleged that Hermann was represented by Hall:

34. ...Hall advised Hermann that the loans being made to K.D. Trinh did not violate federal or Florida law.

⁹ See, Petitioner's Initial Brief at p.26-27.

¹⁰ See, Petitioner's Initial Brief at p. 28.

35. Hall knew or should have know that Hermann was relying on Hall's legal advice...¹¹

As such, the district court was completely correct in holding:

Contrary to the allegations in the Third-Party First Amended Complaint, there is little, if any, evidence to support the contention that Horowitz represented any Florida resident. If this vague reference was to Hermann, the evidence indicates that Hermann had his own attorney in Florida.

Horowitz, 751 So.2d at 85 FN.1.

Since it is clear that there was no credible evidence to support Wendt's vague assertion that Horowitz represented a Florida resident, the district court correctly determined that the trial court erred in failing to dismiss the first amended third-party complaint.

IV. CONCLUSION

Since there is no evidence that Respondent engaged in business in Florida, committed a tortious act within the state, or acted in any capacity other than as agent for K.D. Trinh, nor did the Fifth District Court of Appeal exceed its bounds in reviewing the trial court's order, the Fifth District Court of Appeal's decision must be affirmed.

Respectfully submitted by,

Dale T. Golden
Fla. Bar No. 094080

MARSHALL, DENNEHEY, WARNER,

COLEMAN & GOGGIN

¹¹ See, Respondent's Appendix Tab 1, p. 7.

100 N. Tampa St., Suite 3550

Tampa, FL 33602

Phone: (813) 472-7800

Fax: (813) 472-7811

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to:
Steven P. Seymoe, Esquire Harry W. Lawrence, Esquire

P.O. Box 391 P.O. Box 2809
Tallahassee, FL 32302 Orlando, FL 32802
Attorney for Edward Laske, Attorney for K.D. Trinh,
et al. Investment, Inc.

Terry A. Smiljanich, Esquire Robert Austin, Esquire
One Urban Center, Suite 147 P.O. Drawer 490200
4830 W. Kennedy Blvd. Leesburg, FL 34749-0200
Tampa, FL 33609 Attorney for Bernard Wendt
Attorney for Thomas Peter Hall

by mail, on this 10th day of November, 2000.

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
100 N. Tampa St., Suite 3550
Tampa, FL 33602
Phone: (813) 472-7800
Fax: (813) 472-7811

By: _____

DALE T. GOLDEN
Florida Bar No.: 094080

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this brief complies with the font requirements (Courier New 12) of Rule 9.210, Florida Rules of Appellate Procedure.

DALE T. GOLDEN