IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-389
LOWER TRIBUNAL CASE NO. 5D98-1944

BERNARD WENDT,

Petitioner,

v.

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

Respondents.

_____/

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S INITIAL BRIEF

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INTRODUCTION

On September 25, 2000, this Court accepted jurisdiction to review the decision of the District Court of Appeal of Florida, Fifth District, entitled Horowitz v. Lakse, 751 So.

2d 82 (Fla. 5th DCA 1999). Petitioner, Bernard Wendt ("Wendt"), submits that the Fifth District decision expressly and directly conflicts with decisions of other district courts of appeal on the same point of This matter was before the Fifth District on appeal from a non-final order. Consequently, the record in the Fifth District contains only those parts of the record from the lower tribunal which were appended to the briefs of the appellant and appellee. The Fifth District advises that it does not forward the briefs and appendices to the supreme court. For the court's convenience, some footnotes herein denote appended excerpts selected from the evidence of record.

STATEMENT OF THE CASE AND FACTS

Beginning in 1993, K.D. Trinh, Inc. ("Trinh"), a Canadian corporation, held itself out as a firm specializing in short term transactions involving the purchase and quick sale of food products. Capital for that operation was derived from short term, high interest loans made almost exclusively to Trinh by Florida residents through independent agents who brokered the

loans from Florida.[1] Notes and certificates for the loans were issued by Trinh and sent to the Florida lenders and were for a nine-month period at varying high rates of interest.[2]

Initially, Alexander Legault ("Legault") was president of Trinh.[3] At that time, Loren ("Ray") Reynolds ("Reynolds") was a salaried Trinh employee in charge of raising capital in Florida and enlisting independent agents who were residents of Florida.[4] Reynolds was a Florida resident, domiciled in Florida, and worked for Trinh from Florida.[5] George Hermann and his company, H & R Financial Services, Inc., (collectively "Hermann") and Bernard Wendt ("Wendt") were among the independent resident Florida agents.[6]

Marvin Horowitz, a Michigan lawyer and resident, together with his Michigan law firm, Horowitz-Gudeman, P.C. (collectively "Horowitz"), were retained by Trinh in 1993 as an independent contractor to provide advice with respect to

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[1] **Petitioner's Appendix Tab 8, pages 56-58; Tab 11.**

[2] Petitioner's Appendix Tab 7, W-9, W-10, W-48, W-49; Tab 9, page 81.

[3] Petitioner's Appendix Tab 7, W-1, W-5; Tab 8, page 49.

[4] Petitioner's Appendix Tab 8, pages 53, 68.

[5] Petitioner's Appendix Tab 7, W-8; Tab 8, pages 57-58, 70-71; Tab 9, pages 315-316.

[6] Petitioner's Appendix Tab 8, pages 68, 75.

federal and state securities laws applicable to the loans and related

advertisements that Trinh either published or intended to publish in the United States.[7] Horowitz was aware that Trinh's agents were brokering the loans through public seminar presentations to residents of Florida.[8]

In the beginning, Horowitz conferred with Legault. In April 1994, Alphonse Demots (the person who first contacted Horowitz on behalf of Trinh) and Reynolds ousted Legault from effective authority and from the corporate offices. From that time on, Legault remained as a figure head, and Reynolds assumed the role of chief executive officer.[9] Later in 1994, Trinh was acquired by Reynold's Florida corporation, Strong Financial Services, Inc. ("Strong").[10] As early as July and August 1994, Horowitz began communicating with and advising Reynolds.[11] Reynolds instructed Horowitz, and Horowitz acknowledged, that "Reynolds was Strong Financial Services." Reynolds was president of Strong, lived in Florida, and managed the corporation and directed its activities from his

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[7] Petitioner's Appendix Tab 2; Tab 3; Tab 6; Tab 7, W-5.

[8] Petitioner's Appendix Tab 9, page 64-65.

[9] Petitioner's Appendix Tab 8, pages 70, 82.

[10] Petitioner's Appendix Tab 8, pages 70-71; Tab 9, page 255.

[11] Petitioner's Appendix Tab 10, Horowitz Invoices No. 10560 and No. 10616.

office in Daytona Beach, Florida.[12] Reynolds reviewed Horowitz' statements for services rendered; payment to Horowitz was made only upon Reynold's approval.[13]

Horowitz revised and drafted the notes and certificates used by Trinh for the loans from Florida residents to fit Trinh's purposes, allegedly to conform to federal and Florida securities laws.[14] Horowitz advised Trinh, Florida residents and the State of Florida that the notes and certificates were not securities and that the Trinh agents were not required to be licensed securities brokers with the state of Florida to legally offer the loans evidenced by those instruments.[15] He further advised that, even if the notes and certificates were deemed to be securities, they were exempt from registration under Section 517.051(8), Florida Statutes or Section 517.061(11), Florida Statutes.[16]

On June 13, 1994, Lynn Chang ("Chang"), an investigator

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[12] Petitioner's Appendix Tab 8, pages 57-58, 70-71.

[13] Petitioner's Appendix Tab 10, Horowitz Invoice No. 11128.

[14] Petitioner's Appendix Tab 8, pages 51-52; Tab 9, pages 327-328.

[15] Petitioner's Appendix Tab 4, pages 11-15; Tab 5, page 206; Tab 8, pages 42-57, 69-78; Tab 9, pages 56, 155-158.

[16] Petitioner's Appendix Tab 7, W-70, W-71.

with the Office of Comptroller, Department of Banking and Finance for the State of Florida ("State of Florida") wrote Hermann concerning "certain investments which may be 'securities' under Section, 517.021, Florida Statutes," inquiring whether there was a reliance on an exemption or if registration plans were anticipated.[17] Hermann "almost had a panic." He contacted Reynolds who told him to contact Legault.[18] Legault sent a copy of the Chang letter to Horowitz under a cover sheet marked "URGENT!!!" [19] and subsequently instructed Horowitz to handle the State of Florida investigation for Trinh and Hermann.[20] Horowitz called Hermann in Florida and assured him that he would take care of the investigation. Hermann was not represented by other counsel in the matter.[21]

Horowitz always knew that the notes and certificates were to be marketed in Florida to Florida residents by Trinh's resident Florida agents and that Trinh and its agents

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[17] Petitioner's Appendix Tab 6, W-47.

[18] Petitioner's Appendix Tab 5, page 248.

[19] Petitioner's Appendix Tab 7, W-46, W-47.

[20] Petitioner's Appendix Tab 7, W-59, W-60; Tab 8, pages 75-78, 83.

[21] Petitioner's Appendix Tab 4, pages 25-28, 30-31.

specifically required advice concerning the legality of those notes and certificates in Florida. One of the major concerns expressed directly to Horowitz by resident Florida agents was whether those agents must be licensed with the state of Florida in order to legally offer the certificates.[22]

Horowitz was involved in two separate investigations by the State of Florida for Trinh and specifically on behalf of Hermann.[23] Horowitz conferred with Hall and took directions from Reynolds concerning the second investigation by the State of Florida for Hermann and Trinh.[24]

While Horowitz rendered his advice from Michigan, he was well aware that his advice would be relied on in Florida by the resident Florida agents and lenders. The advice he rendered with respect to the certificates and related matters, the independent agents agreements, and the investigations by the State of Florida was purposely directed at resident

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[22] Petitioner's Appendix Tab 7, W-8, W-57, W-63; Tab 4, pages 11-15; Tab 5, page 206; Tab 8, page 74, 121-129.

[23] Petitioner's Appendix Tab 7, W-59, W-63, W-43, W-74, W-60; Tab 8, pages 90-96, 100; Tab 9, pages 241-282, Tab 10.

[24] Petitioner's Appendix Tab 9, pages 241-277; Tab 7, W-75, W-87-W-94, W-95, W-96, W-97, W-99-W-101, W-102, W-103, W-104, W-106, W-107, W-109, W-110, W-111-W-116, W-118-119, W-121-W-122, W-124, W-125, W-126-W-127.

Florida agents and residents.[25] Furthermore, Horowitz knew that his legal advice and his representations to the State of Florida during its investigations would impact resident Florida agents and lenders.[26]

To enable Horowitz to respond to the State of Florida's request for a list of Florida lenders, Horowitz was provided with a list of over 100 lenders which showed the amounts of each loan. Many of the loans were under $25,000, the threshold for exemption from registration as a security.[27] When he forwarded the list on to the State of Florida, the loan amounts for each lender were redacted.[28] Horowitz informed the State of Florida that if the notes and certificates were deemed to be securities, they were exempt from registration under Section 517.051(8) and Section 517.061(11), Florida Statutes.[29] Those exemptions required that the loans could not be offered to more than 35 lenders

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[25] Petitioner's Appendix Tab 9, pages 222-228, 273; Tab 8, pages 49, 59, 68-71, 75-76, 81-83, 95.

[26] Petitioner's Appendix Tab 9, pages 71, 158, 256-258.

[27] Petitioner's Appendix Tab 6, W-123; Tab 9, pages 247-248, 250-252.

[28] Petitioner's Appendix Tab 6, W-124; Tab 9, pages 265-270.

[29] Petitioner's Appendix Tab 7, W-70, W-71.

and that the loans be over $25,000. Horowitz knew that the resident Florida agents were facing civil and possible criminal charges with respect to the State of Florida investigations.[30] Bernard Wendt ("Wendt"), an independent resident Florida agent of Trinh relied upon Horowitz' advice and representation in Florida.

The underlying action began when Edward and Ruth Laske sued Wendt alleging that Wendt was not licensed to sell securities and that he had sold unregistered securities. Wendt asserted a third-party complaint against Horowitz alleging that Horowitz committed tortious acts in Florida which resulted in injury in Florida. Horowitz moved to dismiss for lack of personal jurisdiction, submitted his affidavit in support of that motion, and argued the motion before the trial court. Wendt was then allowed to submit his evidence. The trial court found jurisdiction pursuant to section 48.193, Florida Statutes and Horowitz appealed.

In its opinion of December 17, 1999, the Fifth District reversed the decision of the trial court, ruling that Section 48.193(1)(b), Florida Statutes, was not applicable because Horowitz committed his negligent acts in Michigan. "The 'tortious acts' alleged here . . . were not committed in the

[30] Petitioner's Appendix Tab 9, pages 177, 256-260.

state of Florida as required by the plain language of the statute." [31] (emphasis in original).

The Fifth District concluded that there was no personal jurisdiction even though Florida residents were injured in Florida by the tortious conduct of Horowitz from outside the state and even though Horowitz' activities were purposefully directed at Florida residents and the State of Florida. Furthermore, the court considered the evidence and concluded that Horowitz' contacts were "brief and insubstantial" and "[T]hese transcripts and records reveal that Horowitz did have some scant contact with parties and entities within the state of Florida during 1994 and 1995 ..... These materials also indicated that Horowitz prepared certain loan documents for K.D. Trinh which K.D. Trinh then used in Florida." [32] (emphasis added). The court went on to comment with respect to the alleged acts of Horowitz that "[i]f committed at all, these acts were committed in Michigan." The Fifth District relied on its holding in Thompson v. Doe, 596 So. 2d 1178, 1180-1181 (Fla. 5th DCA 1992), aff'd on other grounds, 620 So. 2d 1004 (Fla. 1993) to support its conclusion: "[O]ccurrence of injury in Florida standing alone is insufficient to establish

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[31] Petitioner's Appendix Tab 1, page 7.

[32] Petitioner's Appendix Tab 1, page 7.

jurisdiction under section 48.193(1)(b) . . . part of a defendant's tortious conduct must occur in this state." Id. at 1180.

Wendt filed a motion for direct conflict certification. On January 21, 2000, Wendt's motion for direct conflict certification was denied. This Court accepted discretionary jurisdiction of Wendt's request for review of the Fifth District's decision.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District in this action should be reversed. The Fifth District ruled that the trial court lacked personal jurisdiction under section 48.193(1)(b), Florida Statutes, because Horowitz' acts were committed from Michigan and not as a result of his personal physical presence in Florida. The Fifth District's interpretation directly conflicts with decisions of other district courts of appeal and the United States District Court of Appeal for the Eleventh Circuit on the same point of law. The Fifth District relied on its ruling in Thompson v. Doe, 596 So. 2d 1178, 1180-1181 (Fla. 5th DCA 1992), aff'd on other grounds, 620 So. 2d 1004 (Fla. 1993) in making its decision. However, Thompson v. Doe provides little support, and is easily distinguishable.

Decisions of other district courts of appeal on this same

point of law have followed the well-established position that an out-of-state tortious act which causes injury in Florida is sufficient for personal jurisdiction under section 48.193(1)(b), Florida Statutes. Koch v. Kimball, 710 So. 2d 5, 7 (Fla. 2d DCA 1998); accord Silver v. Levinson, 648 So. 2d 240, 241-242 (Fla. 4th DCA 1994); Allerton v. State Dept. of Ins., 635 So. 2d 36, 40 (Fla. 1st DCA 1994); Lee B. Stern & Co. v. Green, 398 So. 2d 918, 919 (Fla. 3d DCA 1981). In some cases, a single act causing injury in Florida by a nonresident has been considered sufficient to obtain jurisdiction. 8911 Normandy Beach, Inc. v. Thomas C. Kearns, 739 So. 2d 156 (Fla. 3d DCA 1999)(citing Law Offices of Evan I. Fetterman v. Inter-Tel, Inc., 480 So. 2d 1382, 1386 (Fla. 4th DCA 1985)).

The Eleventh Circuit has also consistently ruled that jurisdiction under section 48.193(1)(b) "was not limited to a situation where an act in Florida caused an injury in Florida but also ... reached the situation where a foreign tortious act caused injury in Florida." Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033 (11th Cir. 1991)(citing Bangor Punta Operations, Inc. v. Universal Marine Co., 543 F.2d 1107, 1109 (5th Cir. 1976). Accordingly, the decision of the Fifth District expressly and directly conflicts with those of other district courts of appeal and that of the Eleventh Circuit on

the same issue.

The contrary factual allegations contained in Horowitz' affidavit and Wendt's evidence cannot be reconciled. In such circumstances, this Court recognized the need for evidentiary hearings and set forth those guidelines in Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989). Contrary to the instruction of Venetian Salami and its progeny, the Fifth District made its decision prior to an evidentiary hearing.

Instead of remanding this case to the trial court for an evidentiary hearing on evidence submitted by both Horowitz and Wendt which was not harmonious, the Fifth District erred by weighing facts which were disputed and by substituting its own opinion for that of the trial court. This Court has clearly ruled that weighing and reevaluating the evidence when reviewing the record de novo is not the prerogative of an appellate court. Shaw v. Shaw, 334 So. 2d 13, 14 (Fla. 1976). Thus, the decision of the Fifth District in this action should be reversed.

ARGUMENT

I. FLORIDA LAW DOES NOT REQUIRE THE PHYSICAL PRESENCE OF A NONRESIDENT TO OBTAIN PERSONAL JURISDICTION WHEN THE ACTS OF THE NONRESIDENT OUTSIDE FLORIDA CAUSE INJURY INSIDE FLORIDA.

The ruling of the Fifth District in this case -- that there is no personal jurisdiction over Horowitz under 48.193(1)(b), Florida Statutes, because his acts occurred in Michigan -- expressly and directly conflicts with the decisions of other district courts of appeal regarding the scope of personal jurisdiction under section 48.193(1)(b).

As a basis for its decision in this case, the Fifth District relied upon Thompson v. Doe, 596 So. 2d 1178-1180-1181 (Fla. 5th DCA 1992), aff'd on other grounds 620 So. 2d 1004 (Fla. 1993). That reliance is misplaced as the facts of the instant case are distinguishable. Thompson v. Doe involved injuries in Florida which were caused by the alleged omissions of an out-of-state corporate president, acting in a corporate capacity. The Fifth District ruled that long-arm jurisdiction did not exist over a nonresident corporate officer whose alleged negligent actions were not alleged to have been taken outside his duties as the company's president.

Unlike Thompson, Horowitz states that he was an independent

contractor of Trinh and not a corporate employee, corporate officer nor director. He was practicing law in Florida, a business venture, from which he and his firm benefitted pecuniary gain. That practice of law involved affirmative acts and services purposefully directed at Florida residents and a state of Florida regulatory agency of securities. Horowitz knew that his advice and representations would be relied upon by and would impact Florida resident lenders, resident Florida agents, and the State of Florida investigations. His practice of law related to advice regarding Florida securities laws, the drafting of the Independent Agents Agreement in express consideration that it would be construed by Florida law, the redrafting and revising of Trinh certificates for compliance with Florida securities laws, and interaction with the State of Florida in two separate securities' investigations.

The lower court opined that it had personal jurisdiction over Horowitz, because his business venture in Florida, the practice of law, was sufficient to satisfy the requirements of Florida's long arm statute.

> Any person...who personally...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:

> (a)...conducting, engaging in, or carrying on a business or business venture in this state...

§ 48.193, Fla. Stat. (1995).

Engaging in a "business venture" under the statute does not require engaging in a business or making a profit. State ex. rel. Weber et ux. Register, 67 So. 2d 619, 620 (Fla. 1953); A.B.L. Realty v. Cohl, 384 So. 2d 1351, 1354 (Fla. 4th DCA 1972)(fewer activities required to show business venture than business under long arm statute); Maryland Casualty v. Hartford Accident and Indemnity, 264 So. 2d 842, 844 (Fla. 1st DCA 1972)(business venture not restricted to commercial transactions for profit). To be engaged in a business venture, it is not necessary to have local offices, local agents, or a lease. Bank of Wessington v. Winters Gov. Sec., 361 So. 2d 757,760 (Fla. 4th DCA 1978).

Horowitz was engaged in a business venture in Florida -- the practice of law. "In determining whether a particular act constitutes the practice of law, our primary goal is the protection of the public." Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978). The practice of law includes advising others as to their legal rights and the preparation of legal documents. State v. Sperry, 140 So. 2d 587, 591 (Fla. 1962). Horowitz gave legal advice to Florida residents both in Canada and while they were in Florida by telephone

calls, some of which were personally placed by him.[33] Horowitz made certain critical

[33] Petitioner's Appendix Tab 4, pages 11-15; Tab 5, page 206, 250-251; Tab 8, pages 49; Tab 9, pages 241, 257-260, 262-264.

representations when he appeared by telephone and letter on numerous occasions before the State of Florida on behalf of Hermann, a Florida resident acting as one of Trinh's resident Florida agents and Trinh.[34] Although Horowitz represented Hermann and Trinh before an administrative agency rather than a court, his conduct is still an appearance in the practice of law. Id. It does not matter whether he was compensated directly by Hermann. His acts were in the furtherance of his law practice and representation. Compensation is not an element of practicing law. Florida Bar v. Smania, 701 So. 2d 835, 836 (Fla. 1997).

The making of changes in legal forms to fit specific factual needs of others is the practice of law. In re The Florida Bar, 355 So. 2d 766, 769 (Fla. 1978). Horowitz redrafted the Trinh certificates and the Independent Agents Agreement with the expectation that they would be used and relied upon in Florida.[35]

Giving advice on Florida law with the intent that it be used is the practice of law. Florida Bar v. American Legal & Bus. Forms, 274 So. 2d 225, 227 (Fla. 1973). Horowitz gave

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[34] Petitioner's Appendix Tab 9, pages 240-282.

[35] Petitioner's Appendix Tab 7, W-42; Tab 8, pages 68-71; Tab 9, pages 123-133.

his legal opinion to resident Florida agents, to Florida resident

Reynolds who was acting CEO of Trinh and then president of Strong, and to Florida resident lenders. He advised that the Trinh certificates were not securities and that the Trinh agents were not required to be licensed securities brokers with the state of Florida to legally market the loans evidenced by the notes and certificates. During the second investigation by the State of Florida, he further advised that the agents should continue seeking loans for Trinh -- "go ahead, it's business as usual."[36] Horowitz intended and knew that his advice and opinions would be relied and acted upon.[37]

The practice of law constitutes a business venture sufficient to give Florida courts jurisdiction under Section 48.193, Florida Statutes. See Rogers & Wells v. Winston, 662 So. 2d 1303, 1304 (Fla. 4th DCA 1995)(holding New York law firm was engaged in a business venture in Florida by performing legal services in Florida probate proceeding, even though virtually all services performed on behalf of the estate were performed in New York); accord In re Estate of Vernon, 609 So. 2d 128, 130 (Fla. 4th DCA 1992)(holding court has jurisdiction over out-of-state partners in law firm

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[36] Petitioner's Appendix Tab 4, pages 21, 22, 24; Tab 5 page 250-255.

[37] Petitioner's Appendix Tab 7, W-61; Tab 8, pages 75-76; Tab 9, pages 221-224.

appearing in Florida proceeding).

Since Florida courts have found personal jurisdiction over out-of-state law firms, the argument that there is no jurisdiction over Horowitz because he was merely representing the interests of others and that he derived no pecuniary gain is ludicrous. His representation was in the furtherance of his law firm and its reputation and he derived pecuniary gain, although as stated above, pecuniary gain is not an element of practicing law. The very nature of a law practice is to represent clients and act on their behalf. As Horowitz was neither corporate counsel nor a corporate employee, officer or director for Trinh or Strong, he cannot gain immunity from the court's jurisdiction on the basis of a corporate shield.

In a case involving similar circumstances, the Eleventh Circuit responded to a defendant's reliance on Thompson v. Doe and its progeny for the proposition that "an allegedly negligent act committed outside the state resulting in injury in Florida is insufficient to confer personal jurisdiction over a nonresident defendant." Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996)(citing Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994). In construing Florida law as it believed the Florida Supreme Court would, the Eleventh

Circuit stated that "[t]he cases cited by defendants do not indicate

such a trend,[38] nor is it the holding of Doe. Silver, 648 So. 2d at 242 ("Doe only addressed the 'corporate shield' doctrine . . . ") Robinson at 257.

In examining the question of whether a nonresident's physical presence is required for jurisdiction, the court in Silver inquired whether the acts of the nonresident were too random, fortuitous or attenuated for the nonresident to anticipate being haled into court for doing business in Florida. In its own opinion in this case, the Fifth District used three paragraphs to summarize Horowitz' activities which took place over two and one half years, including its description of Horowitz' appearance with the State of Florida for just the second securities investigation alone:

> These contacts consisted of a series of brief phone calls as to this inquiry, primarily to Marsha Perkins, a financial investigator in the Office of the

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[38] The court was referring to the following cases: Robinson v. Giarmarco & Bill, P.C. defendants cited Silver v. Levinson 648 So. 2d 240, 242 (Fla. 4th DCA 1994), Allerton v. State Dept. of Ins., 635 So. 2d 36, 39 Fla. 1st DCA 1994), Pipkin v. Wiggins, 526 So. 2d 1002, 1003 (Fla. 3d DCA 1988), and Carida v. Holy Cross Hospital, Inc. , 424 So. 2d 849,851 (Fla. 4th DCA 1982), but the Eleventh Circuit stated that these cases do not hold that an allegedly negligent act committed outside the state resulting in injury in Florida is insufficient to confer personal jurisdiction over a nonresident.

> Comptroller for the state. Horowitz made one phone call to Wendt regarding this second inquiry in March 1995. Also, Horowitz reviewed a subpoena Wendt received from the state during this second inquiry.[39]

In its opinion, the Fifth District quoted what another court described as a basis for personal jurisdiction in Florida:

> "[W]ere this an action involving a suit arising out of legal services performed for a client within the State of Florida, the performance of such services might subject the defendants to the jurisdiction of the Florida courts. Hill, 762 F.Supp. at 935."

The Fifth District went on to say, "[R]egrettably for Wendt, however, that is not the case here." Unfortunately, the Fifth District, in examining the evidence appended to appellant Horowitz' brief, overlooked Horowitz' own testimony that after Legault was removed from power and office, he began taking directions from Reynolds and advising him, that Reynolds was in Florida and "was Strong Financial Services." Without question, Horowitz was performing services for a client within the State of Florida. Furthermore, one of the Directors of Strong lives in Volusia County, Florida.[40]

Coupled with Horowitz' other conduct in the first investigation by the State of Florida and other legal services

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[39] Petitioner's Appendix Tab 1, page 5.

[40] Petitioner's Appendix Tab 9, page 273.

which were directly aimed at the application of Florida law and Florida residents, no stretch of the imagination could consider these acts random, fortuitous or attenuated. Horowitz knew that his acts would impact Florida residents. He knew that his representations and contentions to the State of Florida would impact not only the resident Florida agents, but also those who loaned money to Trinh under the notes and certificates he drafted. When Horowitz sent the list of lenders to the state's investigator with the loan amounts redacted, he knew or should have known that such an omission was material to the State of Florida investigations, because he advised that he was relying on exemptions from securities registration which essentially required fewer than 35 lenders or loans less than $25,000.[41] In describing his contacts with the State of Florida investigators, Horowitz stated that "[T]his would turn out to be the first of a series of discussions in order to resolve the problem."[42]

In Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 1486-87 (1984), the Supreme Court addressed the tortious conduct of Florida defendants that caused injuries in California and

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[41] Petitioner's Appendix Tab 7, W-70, W-71; Tab 9, pages 117, 248.

[42] Petitioner's Appendix Tab 9, page 158.

found personal jurisdiction because the conduct was expressly aimed at California and "[b]ecause the defendants knew that the brunt of their statements would be felt in California, they must have anticipated being haled into court in California to answer for their actions." Id.

Burger King v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2182 (1985), as cited by Silver, most succinctly summarizes the argument against a nonresident's attempt to avoid jurisdiction for tortious acts in the state by claiming an absence of physical presence:

> Having made our world more accessible through mail, phone and faxes:
>
> > [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within the State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Silver at 243.

With the exception of the Fifth District, all district courts of appeal have similar rulings. Compare Koch v. Kimball, 710 So. 2d 5, 7 (Fla. 2d DCA 1998)("[I]n order for the commission of a tort to establish long arm jurisdiction, there need not be physical entry into the state; it is enough

if the place of injury is within Florida."); Allerton v. State Dept. of Ins., 635 So. 2d 36, 40 (Fla. 1st DCA 1994)(recognizing limitation of Int'l. Harvester but reaffirming that commission of tort in Florida for purposes of long arm jurisdiction merely required that the place of injury be within Florida); Int'l Harvester v. Mann, 460 So. 2d 580 (Fla. 1st DCA 1994)("[C]ommission 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.")(emphasis in original). Lee B. Stern & Co. v. Green, 398 So. 2d 918, 919 (Fla. 3d DCA 1981)("[T]he place of injury is the location of the tortious act for purposes of long-arm jurisdiction under [section b of] Florida's statute.")(emphasis in original) with Thompson v. Doe, 596 So. 2d 1178, 1180-81 (Fla. 5th DCA 1992)("occurrence of injury in Florida standing alone is insufficient to establish jurisdiction under section 48.193(1)(b)...part of a defendant's tortious conduct must occur in this state."), aff'd on other grounds, 620 So. 2d 1004 (Fla. 1993).

The Eleventh Circuit acknowledges the conflict between the district courts, but adheres to a broader interpretation of Section 48.193(1)(b). Posner v. Essex Ins., 178 F.3d 1209, 1216-17 (11th Cir. 1999)(expressly continuing to interpret

subsection (1)(b) to apply to defendants' committing tortious acts outside the state that cause injury in Florida).

While Horowitz' duty of care might be determined in Michigan, the injury occurred in Florida. In Department of Corrections v. McGhee, 653 So. 2d 1091, 1092 (Fla. 5th DCA 1995), Florida prisoners escaped due to the alleged negligence of the Florida Department of Corrections. The Florida prisoners caused injury in Mississippi, and plaintiffs sued the Department of Corrections in Florida. The court held that Florida's standard for the duty of care owed to third parties applied, even though the injury occurred in Mississippi and Mississippi law might apply to other aspects of the case. "[T]he local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, *with respect to the particular issue,* some other state has a more significant relationship..." McGhee at 1092 (citing Restatement (Second) of Conflict of Laws § 146 (1971). (emphasis added by the court).

Horowitz was asked to construe Florida law for the benefit of Trinh, its resident Florida agents, and Florida lenders. Horowitz made direct legal representations and assurances to Florida residents who he knew would rely upon those representations. He placed telephone calls directly to

Hermann's office in Florida and affirmatively advised Hermann and John Eisenmann ("Eisenmann") that the certificates were legal and did not require registration under Florida or federal law, and that even though there had been one investigation by the State of Florida and a second investigation was ongoing, they should continue with "business as usual" and that he would take care of the investigation by the State of Florida. Both men testified that because of Horowitz' assurances that he had checked out Trinh and that he would take care of everything with the state, they believed that he represented them in the investigations and they were not represented at the time by other counsel in the matter.[43] Horowitz directly advised others who he knew to be Florida residents and agents who he knew were looking to him on the question of the legality of the Trinh certificates in Florida. Horowitz appeared before the State of Florida by a series of telephone calls and letters, making representations concerning his position on the legality of the notes and certificates and on exemptions from registration as securities which he contended applied to those notes and certificates.

Because Horowitz breached his duty of care to Florida residents who relied upon his representation and advice, his

[43] Petitioner's Appendix Tab 4, pages 25-28, 30-31.

out-of-state actions caused injury in Florida. The last element of that tortious conduct, the damages resulting from that breach of duty, occurred in Florida. But for Horowitz' wrongful acts and omissions, Wendt and others would not have believed in nor acted in reliance upon the viability and legality of the Trinh certificates and operation. Because of Horowitz' wrongful acts and omissions, Wendt has been involved in federal and state class actions and an administrative action which resulted in the revocation of his professional license by the State of Florida Insurance Commission. He has faced criminal charges, and his reputation and standing in the community has been ruined.

Wendt's damages, including extensive legal costs, are the direct result of the wrongful acts of Horowitz. Florida's wrongful act doctrine allows for recovery of those damages incurred in litigation with third parties:

> Where the wrongful act of the defendant has involved the claimant in litigation with others, and has placed the claimant in such relation with others as makes it necessary to incur expenses to protect its interests, such costs and expenses, including reasonable attorney's fees upon appropriate proof, may be recovered as an element of damages.

City of Tallahassee v. Blankenship & Lee, 736 So. 2d 29, 30 (Fla. 1st DCA 1999)(quoting Northamerican Van Lines, Inc. v. Roper, 429 So. 2d 750, 752 (Fla. 1st DCA 1983); State Farm

Fire & Cas. Co. v. Pritcher, 546 So. 2d 1060, 1061 (Fla. 3d DCA 1989).

In accordance with the rulings of other district courts of appeal and those of the Eleventh Circuit on this same point of law, the physical presence of Horowitz in Florida was not required in order for the courts to have personal jurisdiction over him for tortious acts committed by him outside of Florida which caused injury in Florida. Thus, the decision of the Fifth District should be reversed as it directly conflicts with decisions of other district courts of appeal on the same point of law.

II. THE DISTRICT COURT ERRED BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE TRIAL COURT AFTER WEIGHING THE EVIDENCE RATHER THAN REMANDING THE MATTER TO THE TRIAL COURT FOR AN EVIDENTIARY HEARING.

This Court outlined procedural instructions for challenging personal jurisdiction in Venetian Salami Co. v. Parthenais. A party questioning the legal sufficiency of a pleading's allegations concerning jurisdiction or the contention of minimum contacts may file a motion to dismiss with supporting affidavits. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. Id at 502. Venetian Salami addressed the dilemma of what should be done when the relevant facts set forth in the respective affidavits are in direct

conflict, making it impossible for a court to fairly make a decision based upon facts which are essentially undisputed. This Court ruled, "[T]herefore, we hold that in cases such as this, the trial court will have to hold a limited evidentiary hearing in order to determine jurisdiction." Id. at 503.

In its decision in this case, the Fifth District surmised that the parties agreed that resolution of the jurisdictional question centered on whether Horowitz engaged in a business venture under section 48.193(1)(a), or committed a tortious act within the state of Florida pursuant to section 48.193(1)(b). The court then stated that it would apply the facts to each provision in turn. In doing so, it summarized Horowitz' acts and concluded that "[B]ecause Wendt has not met his burden and established jurisdiction under Florida's long arm statute,"-- the basis of that decision being that Horowitz was not physically present in Florida, -- "[w]e do not reach the second inquiry as to whether 'sufficient minimum contacts' have been demonstrated to alleviate due process concerns."

The Fifth District correctly recounted the procedural history in its decision, but weighed the evidence proffered by Wendt by describing Horowitz' contacts as "scant" and "brief and insubstantial." The Fifth District stated:

> 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.[44]

The evidence submitted by Wendt was voluminous. However, a careful examination of Wendt's argument concerning Horowitz' representation of Hermann's interests and that of Trinh in the State of Florida investigation reveals that the supporting affidavits of Hermann and Eisenmann on that point clearly show that: (1) Horowitz placed a call to Hermann's Florida office and spoke on a telephone speaker to both men; and (2) he assured them that he would take care of the problem with the State of Florida. Eisenmann's deposition concisely states that neither he nor Hermann had the resources at that time to hire another lawyer, nor did they have other counsel and were relying on Horowitz' promise to take care of the matter and believed that he represented them in the matter.

By weighing the evidence and substituting its own opinion, the Fifth District circumvented Wendt's opportunity to argue his allegations as Horowitz had done after he submitted his evidence. This court has declared that the proper procedure is a remand to the trial court for an evidentiary hearing. Evidentiary findings and conclusions of the trier of fact,

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[44] Petitioner's Appendix Tab 1, page 5n.1.

where supported by legally sufficient evidence, should not lightly be set aside by those possessing the power of review. The Florida Bar v. Abramson, 199 So. 2d 457 (Fla. 1967). It is not the function of an appellate court to substitute its judgment for that of the trial court through reevaluation of testimony and evidence, but, rather, the test is whether the judgment of the trial court is supported by competent evidence. Shaw v. Shaw, 334 So. 2d 13, 14 (Fla. 1976). Subject to the appellate court's right to reject inherently incredible and improbable testimony or evidence, it is not the prerogative of an appellate court, upon de novo review of the record, to substitute its judgment for that of the trial court. Id. at 14. The Fifth District weighed the substantiality of the evidence rather than judging whether it was legally competent. Wendt submitted an extensive record of competent evidence consisting of sworn testimony in depositions, affidavits and documents. Much of the evidence proffered by Wendt was corroborated by Horowitz' own deposition, despite the allegations in his affidavit to the contrary.

A trial court's factual and legal determinations are endowed with the presumption of correctness, and it is not the prerogative of the appellate court, upon de novo consideration

of the record to substitute its judgment for that of the trial court. Brandenburg Inv. Corp. v. Farrell Realty, Inc., 463 So. 2d 558 (Fla. 2d DCA 1985). Therefore, the opinion issued by the Fifth District as a substitution for that of the trial court after weighing the evidence prior to an evidentiary hearing was made in error.

Conclusion

Every district court, except the Fifth, has ruled that physical presence of a nonresident in Florida is not a prerequisite for personal jurisdiction when the nonresident's acts and omissions cause injury in Florida. Because that is the better law and because the Fifth District weighed and reevaluated the evidence and substituted its own judgment for that of the trial court without an evidentiary hearing on the, the decision below should be reversed.

Respectfully submitted,

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