

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 OF FLORIDA, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT AND CITATIONS OF AUTHORITY 1

 I. THE DECISION OF THE FIFTH DISTRICT SHOULD BE
 REVERSED BECAUSE HOROWITZ WAS ENGAGED IN A
 BUSINESS OR BUSINESS VENTURE IN FLORIDA AND
 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

 . 1

 II. II. A CONSTRUCTION OF SECTION 48.193(1)(b)
 WHICH REQUIRES NO PHYSICAL PRESENCE WITHIN THE
 STATE DOES NOT RENDER SECTION 48.193(1)(f)
 SUPERFLUOUS.. . . .

 . . .13

CONCLUSION 15

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE. 15

TABLE OF CITATIONS

Federal Cases

Bangor Punta Operations, Inc. v. Universal Marine Co.,
543 F.2d 1107, 1109 (5th Cir. 1976)..... 3

Posner v. Essex Ins., 178 F.3d 1209 (11th Cir. 1999).... 3

Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253
(11th Cir. 1996)..... 3

Sun Bank, N.A. v. E.F. Hutton & Co.,
926 F.2d 1030, 1033 (11th Cir. 1991)..... 3

State Cases

8911 Normandy Beach, Inc. v. Thomas C. Kearns,
739 So. 2d 156 (Fla. 3d DCA 1999)..... 2,
10

Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.,
511 So. 2d 992 (Fla. 1987)..... 13,
14

Allerton v. State Dept. of Ins.,
635 So. 2d 36, 40 (Fla. 1st DCA 1994)..... 2,
10

<u>Bank of Wessington v. Winters Gov. Sec.,</u>	
361 So. 2d 757, 760 (Fla. 4th DCA 1978).....	
3	
<u>Carida v. Holy Cross Hospital, Inc.</u>	
424 So. 2d 849, 851 (Fla. 4th DCA 1982).....	
9	
<u>Computech International v. Milam Commerce Park, Ltd.,</u>	
753 So. 2d 1219 (Fla. 1999).....	
14	
<u>Dinsmore v. Martin Blumenthal Assoc., Inc.,</u>	
314 So. 2d 561 (Fla. 1975).....	
6, 7	
<u>Execu-Tech Bus. Sys. v. New Oji Paper Co.,</u>	
752 So. 2d 582 (Fla. 2000).....	1,
10	
<u>Computech International v. Milam Commerce Park, Ltd.,</u>	
753 So. 2d 1219 (Fla. 1999).....	
14	
<u>Koch v. Kimball</u> , 710 So. 2d 5, 7 (Fla. 2d DCA 1998).....	2,
10	
<u>Law Offices of Evan I. Fetterman v. Inter-Tel, Inc.,</u>	
480 So. 2d 1382, 1386 (Fla. 4th DCA 1985).....	
2	
<u>Lee B. Stern & Co. v. Green,</u>	
398 So. 2d 918, 919 (Fla. 3d DCA 1981).....	
2	
<u>Lipsig v. Ramlawi</u> , 760 So. 2d 170, 186 (Fla. 3d DCA 2000)	
11	

Maryland Casualty v. Hartford Accident and Indemnity,
264 So. 2d 842, 844 (Fla. 1st DCA 1972).....
3

McLean Financial Corp. v. Winslow Loudermilk Corp.,
509 So. 2d 1373 (Fla. 5th DCA 1987).....
8

Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999)..... 14,
15

National Sur. Corp. v. Windham, 74 So. 2d 549 (Fla. 1954)
11

Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994) . 2, 9,
10

Stoll v. Noel, 694 So. 2d 701 (Fla. 1997)..... 11,
13

Thomas Jefferson University v. Romer,
710 So. 2d 67 (Fla. 4th DCA 1998).....9, 10,
13

Venetian Salami Co. v. Parthenais,
554 So. 2d 499 (Fla. 1989).....
7

Wood v. Wall, 666 So. 2d 984 (Fla. 3d DCA 1996).....
2, 10

Florida Statutes

§ 48.193, Fla. Stat.....1, 2, 8, 9, 10, 13, 14,
15

Other Authorities

Restatement (Second) of Agency, § 14 N.....

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DECISION OF THE FIFTH DISTRICT SHOULD BE REVERSED BECAUSE HOROWITZ WAS ENGAGED IN A BUSINESS OR BUSINESS VENTURE IN FLORIDA AND 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 Fifth District ruled that, absent his having been physically present in Florida, Florida courts could not exercise personal jurisdiction over Horowitz under Section 48.193, Florida Statutes. That decision expressly and directly conflicts with decisions of other district courts of appeal, and with the decision of this Court in Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000), regarding the scope of personal jurisdiction under Section 48.193, Florida Statutes, and should therefore, be reversed.

Horowitz argues that the decision of the Fifth District is correct because it reconciles the nature of his wrongful acts and omissions committed as a nonresident from outside the state with the plain language of the statute. However, this Court accepted jurisdiction over this issue in the context of a direct conflict of the district court's decision with decisions of other districts. Those decisions have consistently required no physical presence by a nonresident in order for Florida courts to exercise personal jurisdiction for acts or omissions committed outside the state resulting in

injury in Florida.

The focus of this appeal is whether physical presence is required under section 48.193(1)(b). However, Wendt has always maintained that other sections of the statute, additionally pled in the first amended third-party complaint, are supportive of his jurisdictional claim.

Horowitz argues primarily that he did not engage in business or a business venture in Florida, and that he is immune from liability because he was a corporate agent. Wendt will respond to each argument in turn. Regarding the first argument, Horowitz alleges that: (1) cases cited by Wendt are not supportive of his position, (2) he had no express relationships with any Florida resident, (3) he did not represent Hermann because Hermann was represented by Hall, and (4) he was not practicing law in Florida as he maintained no offices in Florida and was not paid directly by Hermann.

(1) Horowitz is apparently confused. He states that "the cases cited by Wendt defeat his own position."¹ Such a statement ignores the crux of this appeal and the cases from other districts that conflict with the decision of the Fifth

¹ See, Respondent's Brief On The Merits at pg. 4.

District in this case.² Wendt submitted for the court's consideration: Bank of Wessington v. Winters Gov. Sec., 361 So. 2d 757 (Fla. 4th DCA 1978) and Maryland Casualty Co. v. Hartford Accident and Indemnity Co., 264 So. 2d 842, 844 (Fla. 1st DCA 1972). Bank of Wessington confirms that Florida law does not require local offices, local agents, or a lease as determination of a business venture. Horowitz cannot stand on the absence of those trappings as proof that he did not engage in a business venture in Florida. Maryland Casualty simply holds that engaging in a "business venture" is not restricted to one engaging in commercial transactions for profit. Horowitz reasons that because he received no money directly from Hermann, his representation did not constitute engaging in a business venture of the practice of law. Such reasoning would mean that if a lawyer did not accept payment (profit) or

² See, 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)); Koch v. Kimball, 710 So. 2d 5, 7 (Fla. 2d DCA 1998); Wood v. Wall 666 So. 2d 984 (Fla. 3d DCA 1996); Silver v. Levinson, 648 So. 2d 240, 241-42 (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); Posner v. Essex Ins., 178 F.3d 1209 (11th Cir. 1999); Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996); 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)).

payment made directly from another for services rendered, those services need not be diligently conducted with a duty of zealous advocacy.

Wendt does not suggest that Bank of Wessington or Maryland Casualty is factually similar to this case. They simply illuminate the criteria for a business venture.

(2) Horowitz engaged in the practice of law in Florida and did in fact represent Florida residents. Despite Horowitz' denial that he had express contractual relationships, he had an oral agreement with Hermann whereby he assured Hermann and Eisenmann that he would take care of the first investigation with the State of Florida in the Summer of 1994.³ Horowitz directly advised a group of resident Florida agents and prospective agents of the viability of Trinh, the legality of the Trinh notes, and that they did not have to be licensed as brokers with the state of Florida. Horowitz made telephone calls to Reynolds in Florida, expressly advising Reynolds when Reynolds was a Florida resident agent of Trinh before Strong bought Trinh. He also made telephone calls advising Reynolds when Reynolds was owner

³ See, Petitioner's Initial Brief Appendix Tab 4, pages 25-18, 30-31; Tab 5, pages 254, 255.

and chief executive of Strong, a Florida corporation.⁴ Therefore, Horowitz had business relationships in Florida. Questions of fact concerning those relationships should appropriately be addressed in an evidentiary hearing by the trial court.

(3) Horowitz suggests that he cannot be considered to have represented Hermann, because Hermann was represented by Florida counsel, Thomas P. Hall. The record shows that in 1994, Hall represented Hermann only in the capacity of corporate attorney in negotiating terms of Hermann's contract with Trinh and not with respect to the first investigation by the State of Florida in the summer of 1994.⁵ However, Horowitz did collaborate with Hall concerning various defenses in the second investigation by the State of Florida in early 1995.⁶ Contrary to Horowitz' statement that there is no credible evidence that he advised and represented Hermann, Hermann and Eisenmann have both testified that they relied upon Horowitz representing them in the matter as they did not have funds at

⁴ See, Petitioner's Initial Brief Appendix Tab 12, pages 57-58, 66, 71, 123-129; Tab 13, pages 157-158; Petitioner's Initial Brief, Appendix Tab 9, pages 256-257.

⁵ See, Petitioner's Initial Brief Appendix Tab 13, pages 207-208.

⁶ See, Petitioner's Initial Brief Appendix Tab 9, pages 256-257.

that time to hire an attorney for that type of representation.⁷ A party may be represented by more than one lawyer. Moreover, Horowitz' statement that the district court only needed to rely on Wendt's own allegations in the amended third-party complaint that Hermann was represented by Hall is wrong. Wendt submitted credible and competent evidence to refute Horowitz' affidavit on that point. Regardless, the third-party complaint was filed prior to depositions of Legault, Horowitz, Hermann and Eisenmann, and other discovery of record on appeal; that record shows the extent of Horowitz' involvement with Florida residents. The allegations in Wendt's complaint do not erase Horowitz' representation of Hermann which is evidenced by sworn testimony; nor can Horowitz find support in the fact that the district court either overlooked that competent testimony or weighed it in error.

(4) Horowitz misinterprets Dinsmore v. Martin Blumenthal Assoc., Inc., 314 So. 2d 561 (Fla. 1975). Dinsmore does not hold that a lawyer's activities for one client be collectively examined in terms of their relationship to the lawyer's total practice. Instead, the activities related to a particular

⁷ See, Petitioner's Initial Brief Appendix Tab 4, pages 25-28, 30-31.

client must be scrutinized as a collective unit, in and of itself, not in comparison to the lawyer's entire practice. Unless a lawyer were an in-house counsel or only had a few clients, it is highly unlikely that his efforts with respect to any one client would amount to more than a small percentage of his practice.

Horowitz states that since he did not receive payment directly from Hermann, he was not practicing law in Florida. It is noteworthy that in an earlier pleading, Horowitz does not disavow that his efforts were for personal pecuniary gain. "[O]f course they were, but the point of the fact remains that Horowitz' activities on behalf of Trinh were a minute portion of his Michigan-based law practice" ⁸ Horowitz now attempts to mask the fact that he received personal pecuniary gain as an independent contractor with the argument that the percentage of time he spent on the representation in question was not proportionately sufficient to the rest of his practice to constitute a collective showing of doing business in Florida.

Again, Horowitz misinterprets Dinsmore.

Horowitz' own description of his involvement with the Department of Banking and Finance as "a series of

⁸ See, Petitioner's Reply Brief Appendix, Tab 1.

discussions," his invoices, and correspondence demonstrate the depth of his involvement with Florida.⁹ However, he attempts to minimize his involvement merely as "some correspondence and some telephone conversations."¹⁰ He then quotes the district court's opinion which quantitatively weighs Horowitz' contacts in Florida despite the fact that the district court had disclaimed the necessity to address that prong of the jurisdictional test.¹¹ Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989) provides a two-prong test for jurisdiction. When affidavits and evidence cannot reconcile disputed allegations, the trial court must hold an evidentiary hearing to determine the facts. It is not within the scope of an appellate court's discretion to weigh the evidence or substitute its opinion for that of a trial court.

The trial court in this case made no findings of fact, and the district court erred in substituting its judgment or analysis of whether there were sufficient pleadings or evidence to satisfy the long arm jurisdictional requirements

⁹ See, Petitioner's Reply Brief Appendix, Tab 2; Petitioner's Initial Brief Appendix Tab 10; Appellee' Answer Brief to Fifth District Court of Appeals, Appendix Tab 4.

¹⁰ See, Respondents' Brief On The Merits, page 8.

¹¹ See, Petitioner's Initial Brief Appendix Tab 1, page 8.

by weighing and quantifying Horowitz' contacts as "scant" and "brief and insubstantial." ¹²

Horowitz seeks support in the Fifth District's opinion in McLean Financial Corp. v. Winslow Loudermilk Corp., 509 So. 2d 1373, 1374 (Fla. 5th DCA 1987) for his position that a telephone call placed by a nonresident defendant in another state does not constitute an act "committed in the State of Florida as required by section 48.193(1)(b). While the opinion is supportive of the Fifth District's opinion here, it too conflicts.

Horowitz' efforts were directed toward Florida from the outset; he knew that the impact of the notes and agents' agreements that he drafted would be felt by Florida lenders and agents. He knew that the State of Florida would rely upon representations he made in response to its inquiries. Horowitz told the Florida regulatory agency that if it determined that the Trinh notes were securities requiring registration, then his position was that they were exempt because, inter alia, they were for amounts less than \$25,000.¹³ Yet, when Horowitz furnished the State of Florida with the

¹²

See, Petitioner's Initial Brief Appendix Tab 1, page 5.

¹³ See, Petitioner's Initial Brief Appendix Tab 7, W-70, W-71.

requested list of over one hundred lenders, their loan amounts were redacted. Horowitz must have known that the loan amounts were material to the exemptions on which he had advised the State of Florida he was relying. Such an omission was expressly aimed at and severely impacted Floridians and cannot be overlooked.

The facts in Silver are strikingly similar to those in this case. As opined in Thomas Jefferson University v. Romer, 710 So. 2d 67 (Fla. 4th DCA 1998) (Farmer, J., concurring):

There is no conflict in the decisions of [the Fourth District]. Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994), does not involve tortious conduct wholly outside Florida; the publication in Florida of a defamatory falsehood is obviously the commission of a tortious act in this state. So too with Carida v. Holy Cross Hospital, 424 So. 2d 849 (Fla. 4th DCA 1982), (publication of oral defamatory statements in Florida held commission of tortious act in Florida).

Id. at 70 n.3. (emphasis added). Here, Horowitz mailed letters and information to the Department of Banking and Finance in response to its investigations, intending that the Department should act upon that information. Just as in Silver, when the information containing material omissions was mailed to the Department of Banking and Finance and relied upon by the Department, a tortious act was committed within this state. Similarly, Horowitz is liable for damages caused

by his intentional material omission "within Florida," even under the narrowest reading of the scope of section 48.193(1)(b) -- "committing an act in Florida that ultimately proves to be a tort." Id. at 71.

Horowitz' attempt to show a greater division in the district courts on the issue of the requirement of physical presence than actually exists fails, as certain critical facts are overlooked. As then observed in Thomas Jefferson University, the First and Third district cases did not require physical presence for jurisdiction under 48.193(1)(b). See, Wood v. Wall, 666 So. 2d 984 (Fla. 3d DCA 1996); Allerton v. State Dept. of Ins., 635 So. 2d 36 (Fla. 1st DCA 1994). Since that time, the Second District joined those ranks. See, Koch v. Kimball, 710 So. 2d 5 (Fla. 2d DCA 1998). Thus, all districts, except the Fifth, have upheld jurisdiction under 48.193(1)(b) without the requirement of physical presence. Although in the context of a conspiracy, this Court has also upheld jurisdiction under 48.193(1)(b) without the requirement of physical presence. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000).

Horowitz' second main argument concerns the issue of agency. He was an independent contractor, not a corporate

employee, director, agent, or officer, but he states that the distinction is meaningless to this Court's analysis. This distinction is critical to the question of immunity provided to a corporate agent. Contrary to Horowitz' claims, the district court did not distinguish Horowitz as a corporate agent rather than an independent contractor.

Horowitz turns to the analysis of the Restatement (Second) of Agency § 14N (1957) found in Stoll v. Noel, 694 So. 2d 701 (Fla. 1997). However, his analysis of Stoll is incomplete. A thorough examination reveals that the question of agency in Stoll "turns on the degree of control retained or exercised by" the principal; "[T]he right to control depends on the terms of the employment contract." Id. at 703 (quoting National Sur. Corp. v. Windham, 74 So. 2d 549, 550 (Fla. 1954)).

As independent contractors, lawyers may also be agents, but only if the principal controls "their physical conduct in the performance of services" and they are "subject to his control." Lipsig v. Ramlawi, 760 So. 2d 170, 186 (Fla. 3d DCA 2000) (citing the Restatement (Second) of Agency § 14N cmt. a (1958)).

In this case, Horowitz had no employment contract, simply a retainer letter wherein he dictated the terms of

representation, making it explicitly clear that he was under no authority nor control of Trinh in connection with his "review of the Diverting brochure and advertisements." The retainer letter provides:

My representation ... will be limited to certain securities matters ... I must have accessibility to Mr. Demots and you ... Therefore I will expect full cooperation from each of you during the pendency of my representation ... I am under no obligation to undertake representation with respect to any future matters but may exercise my discretion to do [sic] decline such representation should K.D. Trinh request such services ..
.. "14

Later, without an additional retainer agreement, he represented Hermann and responded to the State of Florida investigations.

Horowitz describes agency as "management of some business to be transacted" in the principal's name "as well as discretionary authority to carry out that business."¹⁵ However, he did not manage either Trinh's or Strong's business. He was not under their control, as reflected by his retainer letter. His role was strictly one of rendering advice and appearing before an agency of the State of Florida in response to its inquiries. Trinh did not dictate Horowitz'

¹⁴ See, Petitioner's Initial Brief Appendix Tab 6, W-5.

¹⁵ See, Respondents' Brief On The Merits, page 18.

position regarding the legality of the notes nor his response to the State of Florida. Horowitz advised that the notes were not securities requiring registration and he drafted the language of the notes for compliance with Florida's securities laws. When the State of Florida asked Hermann for information about the investors and any exemption from securities registration which was being claimed, it was Horowitz, of his own volition, who omitted the amounts of the loans which would have indicated to the State that securities laws had been violated. No evidence shows that this act or omission was dictated or controlled by Trinh or Strong. Thus, as an independent contractor, Horowitz was not also an agent, and he cannot be protected from liability by some corporate shield.

Assuming for argument's sake that Horowitz could be considered a corporate agent. As an officer of the court, Horowitz' conduct is, nevertheless, controlled by the rules of professional conduct. Action against public policy cannot be shielded under the guise of corporate agency. Horowitz performed services for the promotion of his own law practice and acted independently, not as a corporate employee. Any question of fact as to the nature of his agency should be addressed in an evidentiary hearing before the trial court for a determination of whether Horowitz was controlled by Hermann,

Trinh and/or Strong.

II. A CONSTRUCTION OF SECTION 48.193(1)(b) WHICH REQUIRES NO PHYSICAL PRESENCE WITHIN THE STATE DOES NOT RENDER SECTION 48.193(1)(f) SUPERFLUOUS.

The district court recognized that Wendt made allegations by virtue of sections 48.193(1)(a), 48.193(1)(b), and 48.193(1)(f). However, considering the constraints imposed by Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So. 2d 992 (Fla. 1987), Wendt's primary argument did not focus on subsection (1)(f). Lest it be thought that Wendt has abandoned any allegations, he responds to Horowitz' reference of the Thomas Jefferson University analysis of section 48.193(1)(f).

Horowitz suggests that if section 48.193(1)(b) does not require physical presence, then it is superfluous when considered with section 48.193 as a whole. However, an analysis of section 48.193(1)(f) considered in light of this Court's ruling in Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999),¹⁶ would align the jurisdictional issue before this Court with the current law regarding the scope of the economic loss rule and would create harmony within section 48.193. Subsections (1)(f) and (1)(g) afford jurisdiction over one

¹⁶ See also, Computech International v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999).

causing damages in Florida resulting from out-of-state acts. If financial damages in Florida resulting from out-of-state acts are not solely to physical property to which it is asserted that only subsection (1)(f) applies, or do not arise out of a breach of contract, then suits for damages to intangible property such as trademarks, business reputation and good will, and otherwise viable causes of action such as securities fraud, tortious interference, slander, etc. would be denied access to the courts. Surely, such a result was not intended by the legislature.

Section 48.193(1)(f) does not limit the word "property" to physical property; the term "service activities" is not defined. Although subsection (1)(f) includes products and materials, etc., solicitation and service activities can also apply to professional services, including the practice of law. Albeit, Aetna was decided within the context of products liability and the interests of an insurance carrier, the scope of the law should not exclude other appropriate factual scenarios.

Moransais and its progeny curb the unintended expansion of the economic loss rule beyond its principled origins which would bar certain otherwise legitimate causes of action. Accordingly, construing section 48.193(1)(f)(1) to apply to

financial damages, not limited solely to physical property, effectively harmonizes the subsections of section 48.193.

CONCLUSION

For the reasons herein and in Petitioner's Initial Brief, the decision of the Fifth District should be reversed and this case remanded for further proceedings.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Dale A. Golden, Steven P. Seymoe, Harry W. Lawrence, and Terry A. Smiljanich by mail, on December 4, 2000.

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