IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC01-896
L.T. NO.: 4D00-2011

MARTIN ACQUADRO, M.D., and
ROSE ACQUADRO,

Appellants,

v.

JANET BERGERON,

Appellee.
_____/

JURISDICTIONAL BRIEF (AMENDED)

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STATEMENT OF THE FACTS

Appellee Janet Bergeron, plaintiff below, brought suit against non-resident appellant defendants, Martin Acquadro, M.D., and his mother, Rose Acquadro (collectively, the "Acquadros"), alleging defamation, false arrest and malicious prosecution. Bergeron's complaint alleged that the Acquadros, while in Massachusetts, engaged in telephone conversations with persons in Florida, in which Rose Acquadro allegedly defamed Bergeron and both appellants allegedly made statements which were the basis of Bergeron's claims for false arrest and malicious prosecution. Personal jurisdiction was alleged under section 48.193(1)(b), Florida Statutes (1999), which subjects a non-resident who commits a tortious act within Florida to the jurisdiction of the Florida courts.[1]

The Acquadros moved to dismiss for lack of personal jurisdiction. In support of their motion, the Acquadros filed affidavits in which they denied making the statements which were

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[1] Section 48.193, Florida Statutes provides:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> * * *
>
> b) Committing a tortious act within this state.

the basis of the tort claims. Bergeron did not file any affidavit to refute the proof in the Acquadros' affidavits.[2]

The fourth district acknowledged that the Acquadros' affidavits had denied the allegedly tortious statements. Nevertheless, the district court affirmed the trial court's denial of appellants' motion to dismiss. The court held:

> Because the defendants' affidavits did not deny that the telephone communication, which was the basis of personal jurisdiction, had occurred, the trial court correctly denied the motion to dismiss.

By holding that the telephone communication itself was the "basis of personal jurisdiction," the court effectively held that a telephone call is not merely a conduit through which a tortious act may be directed toward Florida, but is in and of itself sufficient for personal jurisdiction over a nonresident. As set forth below, this holding expressly and directly conflicts with decisions of other district courts of appeal as well as decisions of this same district court on the same question of law.

[2] The fourth district's reference in its opinion to "conflicting affidavits" might lead to the mistaken impression that Bergeron actually filed an affidavit in this case. No such affidavit was ever filed.

SUMMARY OF ARGUMENT

The fourth district acknowledged that the Acquadros' affidavits had contested Bergeron's allegations of tortious conduct. Accordingly, the court should have recognized that the burden had returned to Bergeron to refute the proof in the Acquadros' affidavits - a burden that Bergeron never met.

The court, however, did not find that the burden had returned to Bergeron because the Acquadros' affidavits -- while denying any tortious conduct -- did not also deny that defendants had conversed with persons in Florida. Thus, according to the district court's opinion, a telephone call is not merely a conduit through which a tortious act may be directed toward Florida, but is in and of itself sufficient for personal jurisdiction over a nonresident.

The fourth district's decision conflicts with previous holdings of the same court, which heretofore required a telephone call into Florida *to be tortious* before subjecting the caller to the jurisdiction of this state. Furthermore, there is a conflict in the districts as to whether even a tortious telephone call into Florida would constitute a tortious act "within this state" so as to subject the caller to jurisdiction pursuant to section 48.193(1)(b).

ARGUMENT

1. The Fourth District's Decision Conflicts with Previous Holdings of the Same Court, Which Heretofore Required A Telephone Call Into Florida *To Be Tortious* Before Subjecting the Caller To the Jurisdiction Of this State

The specific procedures to be followed by litigants and the trial court where, as here, the issue of personal jurisdiction has been raised, have been established by this Court in Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989). See Washington Capital Corp. v. Milandco, Ltd., Inc., 695 So. 2d 838, 841 (Fla. 4th DCA 1997). As set forth in Venetian Salami, "[d]etermining the propriety of a plaintiff's exercise of long-arm jurisdiction in Florida is a two-step inquiry." Washington Capital, 695 So. at 840.

"The initial inquiry is whether the plaintiff has established sufficient jurisdictional facts to subject the defendant to Florida's long-arm jurisdiction." Id. "Only after the plaintiff satisfies this burden must the second step of the Venetian Salami inquiry be addressed--i.e., whether the defendant possesses sufficient minimum contacts to satisfy constitutional due process requirements." Id. at 840-41.

With respect to the first step of the inquiry, a "[p]laintiff bears the initial burden of pleading the basis for service under the long-arm statute." Id. at 841. "If the allegations of the complaint are sufficient to establish

Florida's long-arm jurisdiction, the burden shifts to the defendant to contest jurisdiction by a legally sufficient affidavit or other similar sworn proof contesting the essential jurisdictional facts." Washington Capital, 695 So. 2d at 841 (emphasis supplied). "The burden then returns to the plaintiff who must, by affidavit or other sworn statement, refute the proof in the defendant's affidavit." Id. "The failure of a plaintiff to refute the allegations of the defendant's affidavit requires that a motion to dismiss be granted, provided that the defendant's affidavit properly contested the basis for long-arm jurisdiction by legally sufficient facts." Id.

Here, the district court implicitly found that appellants had not met their burden to contest jurisdiction by a legally sufficient affidavit and thus that the burden had not returned to Bergeron to refute the proof in the Acquadros' affidavits. The court held:

> Defendants filed affidavits in support of their motion to dismiss for lack of personal jurisdiction, in which they denied making the statements which were the basis of the tort claims, but did not deny their involvement in the telephone conversations with persons in Florida.
>
> Defendants argue that plaintiffs' failure to refute their affidavits denying the tortious conduct required the trial court to grant their motion to dismiss for lack of personal jurisdiction. We disagree. . . . Because the defendants' affidavits did not deny that the telephone communication, which was the basis of personal jurisdiction, had occurred, the trial court correctly denied the motion to dismiss.

(Emphasis supplied).

In other words, appellants' affidavits denying the alleged tortious conduct were not legally sufficient to shift the burden back to Bergeron because the affidavits did not also deny that defendants had conversed with persons in Florida. Thus, according to the district court's opinion, a telephone call is not merely a conduit through which a tortious act may be directed toward Florida, but is in and of itself sufficient for personal jurisdiction over a nonresident. This expansive finding of jurisdiction -- which has no basis in section 48.193 -- expressly and directly conflicts with existing case law from the fourth district, which heretofore required a telephone call into Florida *to be tortious* before subjecting the caller to the jurisdiction of this State. See, e.g., Achievers Unlimited, Inc. v. Nutri Herb, Inc., 710 So. 2d 716 (Fla. 4th DCA 1998) ("[m]aking a *defamatory statement* to a listener in Florida, *even via telephone*, constitutes the commission of a tort in Florida within the meaning of Florida's long-arm statute"); Carida v. Holy Cross Hosp., Inc., 424 So. 2d 849 (Fla. 4th DCA 1982) (jurisdiction found based on *defamation* by virtue of phone calls into the State), overruled on other grounds, Doe v. Thompson, 620 So.2d 1004 (Fla. 1993); Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994) (*slanderous statements* during telephone call placed to Florida number subjected nonresident caller to jurisdiction).

2. There is a Conflict in the Districts as to Whether Even a Tortious Telephone Call Into Florida Would Constitute a Tortious Act *Within This State* So As To Subject the Caller To Jurisdiction Pursuant to Section 48.193(1)(b).

There is a conflict in the districts as to whether even tortious statements made via telephone from another state to a person in Florida constitutes the commission of a tortious act within Florida. Thus, even if appellants' affidavits had not disputed the tortious conduct alleged in their telephone calls to Florida, there would still be express and direct conflict with existing case law from other district courts of appeal.

In Thompson v. Doe, 596 So.2d 1178 (Fla. 5th DCA 1992), approved, 620 So. 2d 1004 (Fla. 1993), the fifth district reiterated its prior holding that "false statements made via telephone from another state to a person in Florida does not constitute the commission of a tortious act in Florida." Id. at 1180 (citing McLean Financial Corporation v. Winslow Loudermilk Corporation, 509 So. 2d 1373, 1374 (Fla. 5th DCA 1987)) (emphasis supplied). The fifth district reasoned that "the occurrence of injury in Florida standing alone is insufficient to establish jurisdiction under section 48.193(1)(b) and . . . part of a defendant's tortious conduct must occur in this state." Id.

Accordingly, in Horowitz v. Laske, 751 So. 2d 82 (Fla. 5th DCA 1999), the fifth district held that "[b]rief phone calls and

letters initiated in Michigan" responding to the state of Florida with regard to the sale of unregistered securities were "not committed in the state of Florida as required by the plain language of" section 48.193(b). Id. at 85-86. "Rather, if committed at all, these acts were committed in Michigan." Id. at 86. See also Intercontinental Corp. v. Orlando Regional Medical Center, Inc., 586 So. 2d 1191, 1195 (Fla. 5th DCA 1991) ("we are convinced the mere act of communicating with the promisee in Florida . . . does not constitute commission of a tortious act in this state").

The second district has also held that the occurrence of injury in Florida is insufficient to establish jurisdiction under section 48.193(1)(b). Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033-34 (11th Cir.1991) (citing Phillips v. Orange Co., 522 So. 2d 64 (Fla. 2d DCA 1988). But see Koch v. Kimball, 710 So. 2d 5 (Fla. 2d DCA 1998) ("in 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").

The Eleventh Circuit has recognized that Florida courts "are deeply divided on the issue of whether a tortious act committed outside the state resulting in injury inside the state subjects the actor to jurisdiction in Florida under subsection (1)(b)." Posner v. Essex Ins. Co., Ltd., 178 F.3d 1209, 1216

(11th Cir. 1999) (citing Thomas Jefferson Univ. v. Romer, 710 So. 2d 67, 70 (Fla. 4th DCA 1998) (Farmer, J., concurring and dissenting)).

> Several of the Florida district courts of appeal have concluded that (1)(b) does not extend jurisdiction to the out-of-state defendant under these circumstances. See, e.g., Texas Guaranteed Student Loan Corp. v. Ward, 696 So. 2d 930, 932 (Fla. 2d Dist. Ct. App. 1997) ("The occurrence of injury alone in Florida does not satisfy section 48.193(1)(b)"); McLean Fin. Corp. v. Winslow Loudermilk Corp., 509 So. 2d 1373, 1374 (Fla. 5th Dist.Ct.App.1987) (no jurisdiction under (1)(b) where alleged tortious act was "making of fraudulent representations in Virginia, by telephone"); Jack Pickard Dodge, Inc. v. Yarbrough, 352 So. 2d 130, 134 (Fla. 1st Dist. Ct. App. 1977) (no (1)(b) jurisdiction where injury occurred in Florida but alleged tortious act was servicing, outside state, of vehicle that caused injury). Other decisions of the Florida district courts of appeal, however, have reached the opposite conclusion. See, e.g., Wood v. Wall, 666 So. 2d 984, 986 (Fla. 3d Dist. Ct. App. 1996) (allegations of intentional tortious acts by defendants in their states of residence calculated to cause injury in Florida sufficient to create jurisdiction under (1)(b)); Allerton v. State Dep't of Ins., 635 So. 2d 36, 40 (Fla. 1st Dist. Ct. App. 1994) (jurisdiction proper under (1)(b) where Florida plaintiff "injured by the intentional misconduct of a nonresident corporate employee expressly aimed at him").

CONCLUSION

By their affidavits, appellants contested the essential jurisdictional facts which were the basis of Bergeron's tort claims. The district court found that the burden did not return to Bergeron to refute the proof in appellants' affidavits because the out-of-state appellants did not also dispute that they had had telephone conversations with persons in Florida. As set forth above, this holding expressly and directly conflicts with other decisions of the fourth district as well as with decisions of other district courts of appeal. Accordingly, appellants respectfully request that this Court exercise its discretionary jurisdiction to review this matter.

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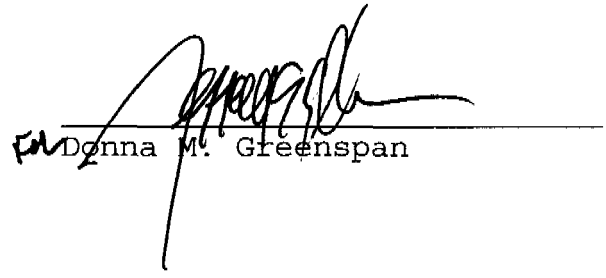
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Robert Rivas, Esq.,** Rivas & Rivas, 311 S. Calhoun Street, #206X, Tallahassee, FL 32301, and **Jeffrey W. Johnson, Esq.**, Johnson, Leiter & Belsky, 506 S.E. 8th Street, Fort Lauderdale, FL 33316 by U.S. Mail this 15th day of May, 2001.



Donna M. Greenspan

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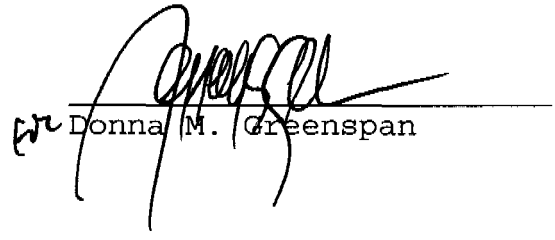
I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210(a)(2), 9.100(1).



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