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,

Petitioners,

v.

JANET BERGERON,

Respondents.
_____/

PETITIONERS' REPLY BRIEF

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POINT I: THE FOURTH DISTRICT OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

Respondent disputes that the fourth district's decision in Acquadro v. Bergeron, 778 So. 2d 1034 (Fla. 4th DCA 2001), conflicts with the line of cases from other districts holding that tortious statements made in another state and directed toward Florida via the telephone are not "committed within this state" as required for personal jurisdiction pursuant to section 48.193(1)(b), Florida Statutes. See Thompson v. Doe, 596 So. 2d 1178, 1180 (Fla. 5th DCA 1992) ("false statements made via telephone from another state to a person in Florida [do] not constitute the commission of a tortious act in Florida"), approved, 620 So. 2d 1004 (Fla. 1993); McLean Financial Corp. v. Winslow Loudermilk Corp., 509 So. 2d 1373, 1374 (Fla. 5th DCA 1987) (same); Texas Guaranteed Student Loan Corp. v. Ward, 696 So. 2d 930, 932 (Fla. 2d DCA 1997) (claims of defamation and other torts arising from debt collection letters and telephone calls into Florida did not satisfy 48.193(1)(b)); Intercontinental Corp. v. Orlando Regional Medical Center, Inc., 586 So. 2d 1191, 1195 (Fla. 5th DCA 1991) (court did not reach question of whether the tort of tortious interference was adequately alleged because communicating with a person in Florida does not constitute commission of a tortious act in this state).

Respondent maintains that Acquadro is in accord with a separate line of cases from the fourth district where tortious statements into Florida via telephone were found to be "committed within this state" and were thus sufficient for jurisdiction under section 48.193(1)(b). See Achievers Unlimited, Inc. v. Nutri Herb, Inc., 710 So. 2d 716 (Fla. 4th DCA 1998); Carida v. Holy Cross Hosp., Inc., 424 So. 2d 849 (Fla. 4th DCA 1982), overruled in part, Doe v. Thompson, 620 So. 2d 1004 (Fla. 1993); Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994) (citing Carida)); see also Deans v. Johns, 789 So. 2d 1072, 1076 (Fla. 1st DCA 2001) (citing Silver, Carida).

Respondent argues that these two lines of cases do not conflict because the fourth district cases -- unlike the first line of cases -- concerned defamatory statements, where the tort is not complete until publication of the false statement. Respondent argues that the torts in the fourth district cases were not complete until the defamatory statements were published via telephone in Florida and were thus "committed within" in this state. (Ans. Br. at 25-29). This argument, however, does not fully reconcile the conflict in view of Texas Guaranteed.

Even if this Court were to find that *defamatory* statements via telephone into Florida are sufficient for jurisdiction, while other types of tortious statements are not sufficient, the Acquadro decision would still be in error. The Acquadro

decision found personal jurisdiction over *both* defendants even though only *one* of them had allegedly defamed plaintiff. See Acquadro, 778 So. 2d at 1035 ("Plaintiffs' complaint alleges . . . that one of the appellants defamed plaintiff").

Accordingly, pursuant to the Acquadro decision, allegedly tortious statements made via telephone into Florida resulting in claims for false arrest or malicious prosecution are sufficient for jurisdiction under section 48.193(1)(b); the tortious statements need not include defamation. This is not consistent with Achievers Unlimited; Carida; and Silver; and is in direct conflict with Thompson; McLean Financial; Texas Guaranteed; and Intercontinental Corp.

Furthermore, the Acquadro decision held that respondent was not required to refute petitioners' affidavits even though it acknowledged that the affidavits "denied making the statements which were the basis of the tort claims." 778 So. 2d at 1035. This is in direct conflict with a long line of cases holding that where the allegations of a complaint are contested by affidavit or similar sworn proof, the burden returns to the plaintiff to refute the evidence submitted by the defendant, also by affidavit or similar sworn proof. See, e.g., Belz Investco v. Groupo Immobiliano Cababie, S.A., 721 So. 2d 787, 789 (Fla. 3d DCA 1998) (citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989); Washington Capital

Corp. v. Milandco, Ltd., Inc., 695 So. 2d 838, 841 (Fla. 4th DCA 1997)).

POINT II: THE DISTRICT COURT DID NOT ERR IN FINDING THAT PETITIONERS' AFFIDAVITS CONTESTED THE ALLEGATIONS OF THE COMPLAINT

Perhaps realizing the insufficiency of any sworn evidence to support her allegations against the Acquadros, respondent asserts that the fourth district erred in finding that the Acquadros' affidavits had denied making "the statements which were the basis of the tort claims." Acquadro, 778 So. 2d at 1035. Respondent argues that the burden never returned to Bergeron because the Acquadros' affidavits did not sufficiently contest the essential jurisdictional facts alleged in complaint. (Ans. at pp. 29-35). However, this argument is unavailing.

First, respondent argues that jurisdiction is proper because Dr. Acquadro allegedly "brought a lawsuit against Ms. Bergeron in the court below over matters related to this action." (Ans. Br. at 31). However, Dr. Acquadro did not bring the referenced lawsuit, and did not appear in the lawsuit in his individual capacity; he was substituted in for Edward Acquadro in a representative capacity. (App. 7, p.6, lines 17-21). Moreover, this argument is irrelevant since jurisdiction was based solely on alleged tortious acts pursuant to section 48.193(1)(b). The referenced civil action has no connection to respondent's count for malicious prosecution, which was based solely on Bergeron's

criminal prosecution for abuse of an elderly person. (App. 1, pp. 8-9).

The Acquadros' affidavits contested the essential jurisdictional facts by contesting the factual basis for every count alleged in the amended complaint. With respect to the false arrest/false imprisonment[1] and malicious prosecution counts, the amended complaint alleged that Bonnie Towing representatives had spoken by telephone with defendants prior to Bergeron's arrest, (App. 1, p.4, ¶17); that the Acquadros had offered Bonnie Towing representatives "money or other benefits to procure" Bergeron's arrest, (App. 1, p.4, ¶16); that Bonnie Towing representatives had put the police in contact with the Acquadros prior to Bergeron's arrest, (App. 1, p.4, ¶17); and that the Acquadros had intentionally lied to the police in an effort to convince them to proceed with arresting and prosecuting Bergeron. (App. 1, p.4, ¶17).

The Acquadros' sworn affidavits squarely contested these allegations. The Acquadros stated that they did not speak with and were not even acquainted with representatives of co-defendant, Bonnie Towing & Recovery ("Bonnie Towing") prior to Bergeron's arrest. (App. 4, p.6, ¶15; App. 5, p.2, ¶4). They did not offer money or other benefits to procure Bergeron's arrest. (App. 4, p.6, ¶15; App. 5, p.2, ¶4). In fact, they knew nothing of Bergeron's arrest until after it had occurred. (App. 4, p.6, ¶15; App. 5, p.2, ¶4).

In addition, the Acquadros stated under oath that they did not lie to the police to convince them

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[1] Although the amended complaint set forth separate counts for false arrest and false imprisonment, "[I]n Florida, the tort of false imprisonment is identical to the tort of false arrest." Card v. Miami-Dade County Florida, 147 F. Supp. 2d 1334, 1347 (S.D. Fla. 2001).

to arrest and prosecute Bergeron. (App. 4, p.7, ¶16; App. 5, p.2, ¶5). They did not make false statements regarding Bergeron's abuse toward Eddie Acquadro. (App. 4, p.7, ¶16; App. 5, p.2, ¶5). They did not provide false or malicious information to the police and prosecutors. (App. 4, p.7, ¶16; App. 5, p.2, ¶5). Furthermore, any information provided to the police and prosecutors after Bergeron was arrested at Bonnie Towing

[2] would have been absolutely privileged. See Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992); Stucchio v. Tincher, 726 So. 2d 372 (Fla. 5th DCA 1999).

Respondent maintains that Dr. Acquadro's own affidavit supports and does not deny the allegation that he repeated "hearsay" statements to the police. (Ans. Br. at 6.). Respondent argues that Dr. Acquadro knew that these "hearsay" statements were false at the time that he made them or that such statements were made with reckless indifference as to their truth or falsity. (Ans. Br. at 6.). The referenced statements in Dr. Acquadro's affidavit are as follows:

> In early September, prior to September 17, 1997, I received a telephone call from Jan Kaufman, a social worker from Boca Raton Community Hospital, who was concerned about Eddie's well being and safety. Subsequently, I received a telephone call from Roxy Thompson,

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[2] Respondent speculates that Bergeron may not have been arrested until "well after Rose Acquadro called the police station to lobby them." (Ans. Br. at 5). However, the affidavits show that Bergeron was arrested before the Acquadros knew anything about it. (App. 4, p.6, ¶15; App. 5, p.2, ¶4). This is supported by the probable cause affidavit, which shows that Bergeron was arrested at Bonnie Towing after the officer interviewed the Bonnie Towing witnesses:

> ON ARRIVAL, I MET WITH COMPLAINANTS/WITNESSES CATHY BONNIE, JAMES BONNIE, ROY WOOD, AND PAUL WILLIAMS. ALL ARE EMPLOYEES OF BONNIE TOWING . . . AFTER TALKING TO THE WITNESSES, VICTIM ACQUADRO, AND DEFENDANT BERGERON, IT WAS DETERMINED THROUGH MY INVESTIGATION THAT THERE WAS SUFFICIENT PROBABLE CAUSE TO ARREST JANET BERGERON FOR BATTERY ON A PERSON 65 YEARS OF AGE OR OLDER. BERGERON WAS TRANSPORTED TO BRPD, PROCESSED, AND LATER TRANSFERRED TO PALM BEACH COUNTY JAIL.

(App. 4, Exh. A (Probable Cause Affidavit)).

> a social worker from Prudential. She was concerned that Eddie was being abused and exploited by Bergeron.

(App. 4, p.2, ¶7). Even if Dr. Acquadro's statements to the police were somehow not privileged, revealing this information to the police after being advised that Bergeron had been arrested for abusing his uncle could hardly serve to support a claim for malicious prosecution.

Respondent's claim that jurisdiction is proper based on her allegations of false arrest/false imprisonment and malicious prosecution also fails because, as respondent acknowledges, there was probable cause for Bergeron's arrest for battery upon Eddie Acquadro. (App. 7, p.78, lines 19-22) (Appellee's Ans. Br. in district court proceeding, pp. 2-3). Pursuant to section 901.15(a), Florida Statutes, a law enforcement officer is authorized to arrest a person without a warrant when there is probable cause to believe that the person has committed any battery upon another person. Thus, Bergeron's arrest at Bonnie Towing for battery upon Eddie Acquadro was authorized by section 901.15(a). "[A]n arrest pursuant to lawful authority . . . cannot be false." Jackson v. Navarro, 665 So. 2d 340, 340 (Fla. 4th DCA 1995). Similarly, an action for malicious prosecution requires that there was no probable cause for the underlying judicial proceeding. Jackson, 665 So. 2d at 341-42. Therefore, personal jurisdiction cannot lie on respondent's claims of false arrest/false imprisonment and malicious prosecution.

The fourth district decision addressed respondent's claims for false arrest, malicious prosecution, and defamation, but not her claim for civil theft. Similarly, the trial court indicated its disagreement that jurisdiction could be based on respondent's allegations of civil theft:

RESPONDENT'S ATTORNEY: Civil theft. Paragraph 61. . . .

> Paragraph 62 . . . Paragraph 63, thus committed civil theft in violation of the statute.
>
> THE COURT: All right . . . Specifically, I am not sure I agree with, frankly, Mr. Rivas on some of those paragraphs he cited. But [paragraphs] 16, 17, [alleging false arrest/malicious prosecution] that sounds like that could be a tort, if doing it by telephone is enough.

(App. 7, pp. 24-25) (emphasis supplied).

Nevertheless, respondent argues that personal jurisdiction could have been based on her allegations of civil theft. However, her allegations of civil theft were squarely rebutted by the Acquadros' affidavits.

In the Amended Complaint, Bergeron alleged that the Acquadros conspired with James Bonnie to steal her property. (App. 1, ¶61). The Acquadros contested this allegation in their affidavits: "I did not steal, convert, or commit theft of Bergeron's property, and I did not conspire to steal, convert, or commit theft of Bergeron's property." (App. 4, p.7, ¶18; App. 5, p.2, ¶6). Bergeron also alleged that Dr. Acquadro "further participated by directing the operation, and by cloaking JAMES R. BONNIE and/or ROSE ACQUADRO in the indicia that they acted lawfully under a power of attorney from Edward W. Acquadro to dispose of Bergeron's property." (App. 1, ¶62).

The Amended Complaint does not explain how this alleged power of attorney is supposed to be part of the alleged conspiracy and, in fact, this is the only time that this alleged power of attorney is even mentioned in the entire Amended Complaint. (App. 1). Nevertheless, to the extent that this alleged power of attorney could somehow be connected to a conspiracy to commit theft, the Acquadros' affidavits contested that allegation: "I did not conspire to steal, convert, or commit theft of Bergeron's property." (App. 4, p.7, ¶18; App. 5, p.2, ¶6). Furthermore, Dr. Acquadro's affidavit explains that Eddie gave <u>him</u> the power of attorney, not James Bonnie or Rose Acquadro. (App. 4, ¶9).

Respondent argues that in order to shift the burden to her on the civil theft claim, Rose Acquadro was required to deny in her affidavit that she personally came to Palm Beach County to supervise James R. Bonnie as he cleaned out Eddie Acquadro's house. (Ans. Br. at 9). However, it was never alleged in the amended complaint that Rose Acquadro personally came to Palm Beach County to supervise James R. Bonnie, (App. 1), and thus no requirement for her to contest such personal appearance in her affidavit. Furthermore, the affidavit did contest that Rose had stolen or conspired to steal any of Bergeron's property, and the burden thus returned to Bergeron to offer proof of any such theft.

Moreover, respondent herself disputes any notion that her claim of personal jurisdiction over Rose

Acquadro was based on personal appearance in the state rather than some alleged conspiracy over the telephone: "The theory of the Complaint below is that the Acquadros committed civil theft and conspiracy to commit civil theft by giving James R. Bonnie his 'durable power of attorney' and marching orders to clean all belongings out of the home shared by Janet Bergeron and Eddie Acquadro." (Ans. Br. at 9-10).

In her answer brief, respondent does not distinguish between the allegations of her complaint and the later testimony at the hearing on petitioners' motion to dismiss for lack of jurisdiction. It is, of course, critical to keep this sequence clear in order to appropriately evaluate the shifting burden of proof under the Venetian Salami analysis. For example, on page 10, in arguing that the affidavits did not sufficiently contest the allegations in the amended complaint such that the burden returned to Bergeron, respondent cites to "App. 7, p.51," which actually refers to testimony from the hearing, not the allegations of the amended complaint. On page 5 of the answer brief, respondent actually argues that Rose Acquadro's affidavit was required to deny later testimony during the hearing to which objections were twice raised and sustained by the trial court. (App. 7, pp. 50, 59-60).

POINT III: THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE BURDEN HAD SHIFTED TO BERGERON TO SHOW THE BASIS ON WHICH JURISDICTION WAS OBTAINED AND IN FAILING TO FIND THAT BERGERON HAD NOT MET THIS BURDEN; THE COURT FURTHER ERRED IN FAILING TO FIND THAT THE SECOND STEP OF THE "VENETIAN SALAMI" INQUIRY WAS NOT SATISFIED

On May 27, 1999, defendants filed their motion to dismiss for lack of jurisdiction, along with their supporting affidavits. (App. 3-5). The hearing, which was noticed by plaintiff and not ordered by the trial court, (App. 6), was not held until a full year later, on May 23, 2000. (App. 7). As respondent concedes, during that entire year, "the plaintiff

below conducted no discovery on personal jurisdiction." (Ans. Br. at 36). Plaintiff also "did not file any affidavits in opposition to the Acquadros'" motion to dismiss. (Ans. Br. at 18).

In her answer brief, respondent argues that defendants never addressed in the trial court her failure to file any affidavits. (Ans. Br. at 19-20). In fact, defendants argued: "There have not been any affidavits or any other evidence contrary [to defendants' affidavits] offered at this time." (App. 7, p.26, lines 21-23). Plaintiff then offered live testimony in lieu of affidavits in opposition to the Acquadros' affidavits. (App. 7, pp. 37-66).

Petitioners are not objecting to the fact that live testimony was offered in lieu of affidavits. See, e.g., Viking Acoustical Corp. v. Monco Sales Corp., 767 So. 2d 632, 634 (Fla. 5th DCA 2000) ("[w]here the defendant has filed one or more affidavits supporting a meritorious challenge, the plaintiff is required to rebut the affidavits with opposing affidavits, testimony or documents") (emphasis supplied). What petitioners are arguing, as they did in both the trial court and the appellate court, is that this live testimony in lieu of affidavits did not "refute the proof in the defendant's affidavit." Washington Capital, 695 So. at 841. Furthermore, if this live testimony could somehow be viewed as refuting the

Acquadros' affidavits, then a second hearing should have been ordered by the trial court to conduct the limited evidentiary hearing contemplated by Venetian Salami.

As set forth in respondent's initial brief on the merits, p.8, there was only one vague reference to Dr. Acquadro during plaintiff's entire live testimony. Thus, plaintiff's testimony did not refute Dr. Acquadro's affidavit wherein he contested the amended complaint's allegations of false arrest and malicious prosecution.

[3] Furthermore, as set forth in Point I above, even allegedly false statements made via telephone into Florida leading to claims for false arrest and malicious prosecution are not sufficient for personal jurisdiction under section 48.193(1)(b), and Dr. Acquadro was not alleged to have defamed Bergeron.

With respect to the telephone call in which Rose Acquadro allegedly defamed Bergeron by saying that she has AIDs, respondent argues:

> There is no evidence in the record as to where Rose Acquadro was located when the call was made. For all the record shows, she may have been in James Bonnie's office, talking on a speaker phone. She does not deny being in Palm Beach County, neither during the phone call nor at any other time.

(Ans. Br. at 41). However, this argument is directly contradicted by plaintiff's own representations to the trial court.

THE COURT: . . . It says, On or about August 2nd, Rose Acquadro made a statement that

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[3] In fact, plaintiff's testimony actually supports the Acquadros' affidavits:

> THE COURT: Prior to Janet's arrest, were you present or did you know of any phone calls that Martin or Rose Acquadro made to the police?
> THE WITNESS: No, I wasn't present.

(App. 7, 51).

Miss Bergeron has AIDS.

My question is do you allege somewhere where this took place?

PLAINTIFF'S COUNSEL: Gee, Your Honor, it's not specifically in here that it was on the telephone from Massachusetts to Florida.

(App. 7, p. 23, lines 13-23).

As set forth in Point I above, there is a split in the districts as to whether allegations of defamatory statements directed toward Florida via telephone are sufficient for personal jurisdiction. Even if this Court should hold with the fourth district view, jurisdiction over Rose Acquadro is not appropriate because the second step of the Venetian Salami inquiry was not satisfied. Viewed from the perspective of Rose Acquadro, as it must, the single alleged defamatory telephone call was such a random or attenuated act that it cannot fairly be said that Rose Acquadro should reasonably anticipate being haled into court here. See Silver, 648 So. 2d at 243. This view is supported by Rose Acquadro's sworn affidavit. During the entire year between the affidavit and the hearing on defendant's motion to dismiss, plaintiff never conducted any discovery in an attempt to prove that Rose Acquadro had sufficient minimum contacts with the state to satisfy the second step of the Venetian Salami inquiry.

CONCLUSION

The district court decision should be quashed and the case should be remanded with instructions to enter an order dismissing Dr. Acquadro and Rose Acquadro from the underlying action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **Robert Rivas, Esq.,** Rivas & Rivas, 311 S. Calhoun Street, #206X, Tallahassee, FL 32301, and **Jeffrey W. Johnson, Esq.,** Hinshaw & Culbertson, South Trust Bank Plaza, One E. Broward Blvd., Suite 1010, Ft. Lauderdale, FL 33301, this 14th day of January, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font standards required by Florida Rule of Appellate Procedure 9.210(a)(2).

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