IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D15-2938

CHRISTIAN RAUTENBERG

Appellant,

v.

THOMAS FALZ

Appellee.

ON APPEAL TO THE SECOND DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

APPELLANT CHRISTIAN RAUTENBERG'S INITIAL BRIEF

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STATEMENT OF JURISDICTION

This is an appeal of the trial court's order denying Christian Rautenberg's ("Mr. Rautenberg") Amended Motion to Dismiss based on lack of personal jurisdiction under section 48.193, Florida Statutes (the "Long-arm statute"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i). *See, e.g., Hitt v. Homes & Land Brokers, Inc.*, 993 So. 2d 1162, 1165 (Fla. 2d DCA 2008) (holding that "jurisdiction of the person" for purposes of Rule 9.130(a)(3)(C)(i) "refers to service of process or to the applicability of the long arm statute to nonresidents.") (quoting *Warren v. Southeastern Leisure Sys., Inc.*, 522 So. 2d 979, 980 (Fla. 1st DCA 1988)). Venue is proper in this Court pursuant to section 35.03, Florida Statutes.

The order denying Mr. Rautenberg's Amended Motion to Dismiss was rendered on May 27, 2015. (A.3). The Notice of Appeal was timely filed on June 24, 2015. (A.1-2). Accordingly, jurisdiction lies in this Honorable Court. FL. R. APP. P. 9.130(b).

INTRODUCTION

This case is before this Court for a second time. Thomas Falz ("Mr. Falz") sued Sybac Solar AG, Co. ("Sybac") and Mr. Rautenberg for defamation and tortious interference. Sybac is a German company with its principal place of business in Germany. Mr. Rautenberg is a German citizen and former Sybac employee.

Before Mr. Falz served Mr. Rautenberg, Sybac moved to dismiss the Complaint on forum non conveniens grounds. The trial court denied Sybac's motion and Sybac appealed. This Court reversed because it could not determine whether the trial court analyzed the factors outlined in *Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1990). *Sybac Solar AG, Co. v. Falz*, 2015 WL 1088480 (Fla. 2d DCA 2015) (A.8-11).

While Sybac's appeal was pending, Mr. Falz served Mr. Rautenberg in Germany. Mr. Rautenberg moved to dismiss the Complaint for lack of personal jurisdiction. The trial court denied his motion in a written order following a non-evidentiary hearing. That denial is the subject of Mr. Rautenberg's appeal.

In a separate order, the trial court denied Sybac's motion to dismiss on forum non conveniens grounds for a second time. Sybac is appealing that

order in case number 2D15-2939. The appeals are traveling together, pursuant to this Court's July 8, 2015 order.

STATEMENT OF THE CASE AND FACTS

A. DECEMBER 20, 2013, ACCORDING TO THE COMPLAINT

According to the Complaint, on December 20, 2013, Mr. Rautenberg told Mr. Falz's "employer" that Mr. Falz had stolen money, that he was a defendant in a Florida lawsuit involving fraud, and that he would receive prison time as a result of his swindling. (A.13 at ¶9-12). The Complaint specifically identifies American Vulkan Corporation as Mr. Falz's employer. *Id.* at ¶7. Mr. Falz alleges that Mr. Rautenberg published his comments to Mr. Falz's employer, and Mr. Falz identifies Winter Garden, Florida as American Vulkan Corporation's location. *Id*.

Nowhere in the Complaint, however, does Mr. Falz allege where Mr. Rautenberg and Mr. Falz's employer were when Mr. Rautenberg published the purportedly defamatory statements. The representative of American Vulkan to whom the comments were directed is also unidentified. The word Germany is not mentioned once in the Complaint. There is no reference to the Long-arm statute in the Complaint.

B. DECEMBER 20, 2013, ACCORDING TO MR. FALZ'S TESTIMONY DURING PROCEEDINGS ON SYBAC'S MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS

Mr. Falz served Sybac long before he served Mr. Rautenberg. Sybac moved to dismiss Mr. Falz's Complaint on, *inter alia*, forum non conveniens grounds. Before Mr. Falz served Mr. Rautenberg in Germany, the trial court held a hearing on Sybac's motion to dismiss. At the hearing, Mr. Falz explained what happened on December 20, 2013. Mr. Falz's version of the story from the hearing bears little resemblance to the story presented in the Complaint.

At the hearing, Mr. Falz acknowledged that Mr. Rautenberg is a German citizen who lives in Germany, and that Sybac is a German corporation with its principal place of business in Germany. (A.29, 39). More importantly, Mr. Falz revealed that Mr. Rautenberg did not publish the purportedly defamatory statements to American Vulkan Corporation in Florida. Rather, Mr. Rautenberg published the statements orally during a meeting on December 20, 2013, in Herne, Germany. *Id*. at 36. Mr. Falz testified that he was actually at the meeting in Germany when Mr. Rautenberg published his comments. Mr. Falz attended the meeting in his stead as President of American Vulkan Corporation. *Id*. at 54. No one else

from American Vulkan Corporation attended the meeting.

Two Germans named Sebastian and Bernd Hackforth were at the meeting with Mr. Rautenberg and Mr. Falz. *Id*. at 53-54. The Hackforths own Hackforth Holding, a German holding company. *Id*. Hackforth Holding owns a German entity called Vulkan Group. Vulkan Group owns American Vulkan Corporation as a subsidiary. *Id*.

Mr. Falz was clear, however, that his "employer is American Vulkan" and that his employment contract was an "American contract with American Vulkan." *Id*. at 56, 58. Mr. Falz was also clear that his contract with American Vulkan did not change as a result of the meeting, and that he remains President of American Vulkan. *Id*. at 59. Finally, Mr. Falz testified that the Hackforths conduct all their business in Germany and never visit American Vulkan in Florida because "they don't like to fly." *Id*. at 59-60.

After the hearing, Mr. Falz did not attempt to amend his Complaint to reconcile its allegations with his testimony. And even though Mr. Falz's testimony established that Mr. Rautenberg was a German citizen living in Germany, and that he published his purportedly tortious comments in Germany, not Florida, Mr. Falz never sought to amend his Complaint to explain how Florida's Long-arm statute conferred jurisdiction over Mr.

Rautenberg.

C. MR. RAUTENBERG'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Mr. Rautenberg's first argument in his Amended Motion to Dismiss was that the Complaint should be dismissed because it "is completely void of any allegations that would subject RAUTENBERG to Florida's long-arm jurisdictional statute." (A.120 at ¶ 8). Mr. Rautenberg argued that the only jurisdictional allegations were directed to Sybac, and were "insufficient to bring RAUTENBERG within the reach of Florida's long-arm statute even though the Complaint alleges him to be a corporate agent of Sybac." *Id*. at ¶ 9.

Notwithstanding the Complaint's lack of jurisdictional allegations regarding Mr. Rautenberg, he provided an affidavit "for the sake of completeness" to establish he had no personal contacts with Florida that would give rise to jurisdiction under the Long-arm statute. *Id*. at ¶ 11. He averred that he was a German citizen and had lived in Germany his entire life. (A.126 at ¶3). Mr. Rautenberg explained that his dealings with Florida were sporadic, and purely a product of his role as an authorized agent for Sybac. (A.127 at ¶12-14).

For example, Mr. Rautenberg noted that he visited Florida once, during a ten-day business trip on behalf of Sybac in February of 2011. *Id*. at ¶ 14. He acknowledged sending emails and making phone calls to Florida on behalf of Sybac, but none of that communication related to the tortious acts alleged in the Complaint. *Id*. at ¶ 8-12. Most importantly, he was pellucid that he had no personal contact with Florida whatsoever. *Id*. at ¶ 13-26. As a result, Mr. Rautenberg argued in his Amended Motion to Dismiss that "general jurisdiction does not exist to sue RAUTENBERG in Florida" under the Long-arm statute. (A.122 at ¶ 13).

Likewise, Mr. Rautenberg maintained that he had committed no act which would subject him to specific jurisdiction under the Long-arm statute. (A.123-124). Mr. Rautenberg acknowledged that specific jurisdiction over a foreign defendant can arise if the defendant commits a tortious act in Florida, but swore that he had committed no such act, and definitely not in Florida. *Id*. In support, he averred what Mr. Falz already knew: "I have never committed any tortious act in Florida. Specifically, I never published a defamatory statement about Falz to Falz's employer, American Vulkan in Winter Haven, Florida, as alleged in the complaint." (A.128 at ¶ 20).

D. MR. FALZ'S RESPONSE TO MR. RAUTENBERG'S MOTION TO DISMISS

Mr. Falz did not respond to the argument that the Complaint should be dismissed because it failed to plead sufficient jurisdictional facts against Mr. Rautenberg personally. And although Mr. Falz had not amended his Complaint, in a section of his response titled "Summary of Relevant Plead Facts," he admitted that the statements purportedly uttered by Mr. Rautenberg on December 20, 2013, were published in Germany, not Florida. (A.146 at ¶ 3).

In his supporting affidavit (A.155-160), Mr. Falz did not rebut Mr. Rautenberg's claim that he has never had personal contact with Florida. Mr. Falz's affidavit speaks only to Sybac's contacts with Florida. Mr. Rautenberg is discussed sparingly, and exclusively in terms of his status as an agent or employee of Sybac. Mr. Falz does not refute, anywhere in his affidavit, Mr. Rautenberg's claims that he never committed a tortious act in Florida and never published defamatory statements to Mr. Falz's employer in Florida.

Mr. Falz also does not allege anywhere in his response or supporting affidavit that Mr. Rautenberg is the alter ego of Sybac, or any other fact suggesting that Sybac and Mr. Rautenberg are one in the same, such that

Sybac's activities in Florida would be imputed to Mr. Rautenberg personally. Also absent from Mr. Falz's response is a request for leave to amend his Complaint to allege sufficient jurisdictional facts in the event the trial court granted Mr. Rautenberg's motion to dismiss.

Paragraphs 17 and 18 of Mr. Falz's affidavit contain the only allegations pertinent to personal jurisdiction regarding Mr. Rautenberg. In paragraph 17, Mr. Falz claimed: "Rautenberg's statements and actions as alleged in the complaint…were intentionally calculated to cause Affiant injury in Florida in Affiant's capacity as president of American Vulkan Corporation." (A.159). In addition, Mr. Falz stated in paragraph 18 that he "suffered and continues to suffer damages in Florida as a result of the false statements made by Rautenberg." *Id*.

E. THE NON-EVIDENTIARY HEARING ON MR. RAUTENBERG'S MOTION TO DISMISS

The trial court entertained argument on Mr. Rautenberg's Motion to Dismiss on March 17, 2015. Mr. Rautenberg argued that at the very least, Mr. Falz's Complaint must be dismissed because it contained no jurisdictional allegations whatsoever directed to Mr. Rautenberg individually. (A.167-168). Rather, argued counsel for Mr. Rautenberg, the only jurisdictional allegations in the Complaint involved Sybac and Mr.

Rautenberg's work as "an agent and an employee of Sybac, which is irrelevant" for purposes of determining whether the trial court had personal jurisdiction over Mr. Rautenberg. (A.168).

Notwithstanding the lack of jurisdictional allegations in the Complaint, counsel for Mr. Rautenberg urged the trial court to dismiss Mr. Falz's Complaint with prejudice based on the affidavits. (A.164, 182, 192). Counsel noted Mr. Rautenberg's sworn statement that he had no personal contact with Florida and had never committed any tortious act in Florida. (A.177-178). As a result, Mr. Rautenberg maintained that "even though it's not alleged," if "the only long-arm basis is committing a tort in Florida," it was "sufficiently negated by his sworn testimony." *Id*.

Counsel for Mr. Rautenberg then discussed each paragraph of Mr. Falz's responsive affidavit and argued the allegations in the affidavit failed to rebut Mr. Rautenberg's claim that he had no personal contact with Florida, because each allegation involved Sybac's contacts with Florida, or Mr. Rautenberg's contacts with Florida acting as an agent for Sybac. *Id*. at 178-180. Thus, Mr. Rautenberg's counsel argued the Complaint should be dismissed with prejudice "because both sides have had the opportunity to provide these affidavits" and Mr. Rautenberg's sworn denial of any personal

contact with Florida remains unrebutted. *Id*. at 182.

Counsel for Mr. Falz responded. He argued the trial court had general jurisdiction because Mr. Rautenberg did not refute Mr. Falz's claim that "Sybac Solar has substantial and not isolated activity within Florida. And he also has not disputed that Christian Rautenberg was acting as an agent for Sybac Solar." (A.182). In addition, counsel for Mr. Falz argued that even though Mr. Rautenberg was acting in his corporate capacity, he was subject to *in personam* jurisdiction because he directed "intentional and purposeful conduct at the parties in the state of Florida." (A.183). As with his written opposition to Mr. Rautenberg's motion to dismiss, Mr. Falz's argument during the hearing did not include a request for leave to amend in the event the trial court found Mr. Falz's jurisdictional allegations wanting.

Counsel for Mr. Rautenberg replied. He agreed that as a general rule, a corporate agent is not protected by his corporate status for an intentional tort, but "only to the extent that conduct was the basis being asserted for jurisdiction in Florida." (A.190). And because Mr. Falz did not dispute that the only tortious acts alleged against Mr. Rautenberg that would give rise to specific jurisdiction occurred in Germany, counsel argued that any non-tortious act Mr. Rautenberg performed in Florida on Sybac's behalf could

not "be piled on as a jurisdictional fact." (A.190). The trial court reserved ruling at the end of the hearing. *Id*. at 193.

F. THE TRIAL COURT'S ORDER DENYING MR. RAUTENBERG'S MOTION TO DISMISS

The trial court ruled that "Plaintiff's Complaint has alleged sufficient jurisdiction [sic] facts to subject Defendant Rautenberg to Florida jurisdiction." (A.5). The order also states: "The Plaintiff has alleged sufficient jurisdictional facts to subject Defendant Rautenberg to long-arm (general) jurisdiction under section 48.193(2)," but the order does not mention or cite the jurisdictional facts the trial court deemed sufficiently pled by Mr. Falz in his Complaint. (A.5).

The trial court found that it had general jurisdiction over Mr. Rautenberg. The order states that "[g]eneral jurisdiction does not require that the plaintiff's cause of action arise out of the nonresident defendant's contacts with the forum state." *Id*. at 4. Rather, "[a] defendant may be subject to the exercise of general jurisdiction if they [sic] are found to have maintained 'continuous and systematic contacts' with the forum state so that the defendants [sic] can properly be considered to be 'present in the forum.'" *Id*.

The trial court found Mr. Rautenberg maintained continuous and

systematic contacts with Florida and explained its finding as follows:

> According to the complete record, Defendant Rautenberg: is the founder of [Sybac]; is acting as an agent of [Sybac]; is in [sic] involved in another case in Polk County, [Sybac] v. 6th Street Solar Energy Park of Gainesville, LLC (6th Street), Case No. 2012-CA-6844; traveled to Florida for ten days to meet with the Plaintiff's father and other individuals; Plaintiff is a member of 6th Street; [Sybac] is the parent company of Florida company Sybac Solar, LLC; [Sybac] and Defendant Rautenberg provided the funding for 6th Street; [Sybac] continues to sell their [sic] products and services in Florida as evidenced by brochures and Verified Complaint in the 6th Street case. The dispute involving the 6th Street case is the basis of the published accusations by Defendant Rautenberg as Sybac's agent.

Id. The court concluded its general jurisdiction analysis by finding that "the exercise of general jurisdiction over Defendant Rautenberg comports with constitutional notions of due process." *Id*. The trial court did not explain its rationale for this finding.

The trial court also found that it had specific jurisdiction over Mr. Rautenberg. The order does not reference any of the subsections of (1)(a) of the Long-arm statute, however. The order states that "[s]o long as a commercial actor's efforts are purposefully directed toward residents of another State," personal jurisdiction arises even in the "absence of physical contacts" with the State. *Id*. at 5. The trial court cites *Allerton v. State Dep't of Ins.*, 635 So. 2d 36, 39 (Fla. 1st DCA 1994), for the proposition

that specific jurisdiction lies in Florida where a defendant's "actions were intentional and purposeful, and designed to have an effect in Florida." *Id*. Finally, the trial court found that under *Calder v. Jones*, 465 U.S. 783 (1984), the "complete record including the Complaint and Plaintiff's affidavit establish defendant has sufficient minimum contacts with the forum state such that the defendant has purposefully availed itself [sic] of the privilege of doing business in Florida or that the defendant would anticipate being haled into Florida's courts."

Against that legal backdrop, the trial court explained its ruling that it had specific jurisdiction over Mr. Rautenberg:

> In the case at bar, Defendant Rautenberg purposely directed his actions towards Florida as evidenced in the complete record as follows: The Complaint states in part that false accusations set forth herein were directed at Falz, individually and in his capacity as President of American Vulkan Corporation, located in Winter Haven, Polk County, Florida; traveled to Florida for ten days to meet with the Plaintiff's father and other individuals; active in 6th Street litigation as the founder and agent of Sybac; sells products and services in Florida; funds provided from his corporation to 6th Street. Defendant Rautenberg's affidavit admits he traveled to Florida for ten days to meet with [Mr. Falz's father] to discuss business between [Sybac] and Sybac Solar LLC which provided the funding for the 6th Street project which holds title for the project. Here, Defendant Rautenberg (agent/founder) has availed himself of the privilege of doing business in Florida and allegedly has committed acts with an effect in Florida. Defendant Rautenberg as the founder of Sybac markets and sells his goods and services. Thus, he receives an economic benefit from selling

> in Florida and the United States. Also, these contacts are not random as they clearly provide that Defendant Rautenberg has purposefully availed himself of the privilege of the laws of Florida as his company has filed suit as a Plaintiff in Polk County, Florida. Defendant Rautenberg could have reasonably anticipated being haled into court in Florida due to the fact that his actions were intentional and purposeful, and designed to have an effect in Florida.

Id. at 6.

SUMMARY OF THE ARGUMENT

The trial court erred in finding it had general and specific jurisdiction over Mr. Rautenberg. Although Mr. Falz failed to adequately allege jurisdictional facts in his Complaint, this Court should not give Mr. Falz an opportunity to do so on remand. The parties filed jurisdictional affidavits and the trial court found it had specific and general jurisdiction over Mr. Rautenberg based on undisputed facts.

The trial court erred in finding it had specific jurisdiction over Mr. Rautenberg. It is undisputed that Mr. Rautenberg did not commit a tortious act in Florida. That Mr. Falz claimed he suffered damages in Florida for acts committed by Mr. Rautenberg in Germany is insufficient to confer specific personal jurisdiction, even if the acts were intentional.

The trial court's ruling that it had general jurisdiction over Mr. Rautenberg was also erroneous. The trial court found it had general

jurisdiction over Mr. Rautenberg based on his sporadic activity in Florida, all of which was exclusively on behalf of Sybac. Because Mr. Falz never pled or proved a veil piercing or alter ego theory, the trial court erred by imputing Sybac's Florida conduct to Mr. Rautenberg personally. This Court should reverse with instructions that Mr. Falz's action against Mr. Rautenberg be dismissed with prejudice.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THIS COURT SHOULD REVERSE AND REMAND FOR ENTRY OF AN ORDER DISMISSING MR. FALZ'S COMPLAINT WITH PREJUDICE BECAUSE THE TRIAL COURT DOES NOT HAVE PERSONAL JURISDICTION OVER MR. RAUTENBERG.

A. Standard of Review

This court's standard of review on orders finding personal jurisdiction over a nonresident defendant is de novo. *Scharwzberg v. Knoblach*, 98 So. 3d 173, 180 (Fla. 2d DCA 2012). In addition, Florida's long arm statute must be strictly construed. *Id*.

B. Argument

The Long-arm statute provides, in pertinent part, as follows:

> (1)(a) A 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 any of the following acts:
>
> 2. Committing a tortious act within this state
>
> (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

FLA. STAT. § 48.193 (2013).

It is well-established that determining the propriety of a plaintiff's attempt to exercise long-arm jurisdiction over a foreign defendant is a two-step inquiry. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). The first inquiry is whether the plaintiff has alleged sufficient jurisdictional facts to subject the defendant to long-arm jurisdiction under section 48.193, Florida Statutes. *Id*. at 502. If the plaintiff has done so, the next question is whether the defendant possesses sufficient minimum contacts with Florida to satisfy constitutional due process requirements. *Id*. at 500.

1. <u>Mr. Falz Fails Step One of the *Venetian Salami* Analysis - his Complaint Lacks Sufficient Factual Allegations to Subject Mr. Rautenberg to Long-arm Jurisdiction.</u>

It is the plaintiff's burden to plead jurisdiction. *Jaffe & Hough, P.C. v. Baine*, 29 So. 3d 456, 458 (Fla. 2d DCA 2010). There are two ways to

satisfy this burden. "The plaintiff may allege the language of section 48.193, Florida Statutes, without supporting facts or may set forth specific facts showing that the defendant's actions are encompassed by section 48.193." *Id*. at 459.

Mr. Falz's Complaint does not track the language of the Long-arm statute. Consequently, the question is whether the Complaint contains sufficient factual allegations to show that Mr. Rautenberg's actions fall within the purview of the statute. The answer is clearly no.

Mr. Falz sued Mr. Rautenberg for defamation and tortious interference. The Complaint contains no factual allegations directed to Mr. Rautenberg in his capacity as an individual that bear on general jurisdiction. Instead, Mr. Falz endeavored to plead just enough to allow for an inference that Mr. Rautenberg committed tortious acts in Florida, which would give rise to specific jurisdiction under subsection (1)(a)2 of the Long-arm statute. His effort is unavailing.

In Florida, the tort of defamation is committed in the place where it is published. *Casita, L.P. v. Maplewood Equity Partners L.P.*, 960 So. 2d 854, 857 (Fla. 3d DCA 2007). And "[a] telephonic, electronic, or written communication is deemed 'published' in Florida, subjecting the publisher to

long-arm jurisdiction under section 48.193(1)(b)[1] of the Florida Statutes if the communication was made into this state by a person outside the state, even if that person has no other contacts with the state." *Id*. Put simply, if Mr. Rautenberg's comments were heard or read by a human who was physically present in Florida, the comments were published in Florida. If the comments were not heard or read in Florida, they were not published in Florida.

Because the comments underlying the defamation claim are the basis for Mr. Falz's tortious interference claim, the analysis is the same[2]. *See, e.g. PK Computers, Inc. v. Indep. Travel Agencies of Am., Inc.*, 656 So. 2d 254, 255 (Fla. 4th DCA 1995) (dismissing complaint because plaintiff did not sufficiently allege that defamation and tortious interference occurred in Florida: "Nor is the complaint legally sufficient to demonstrate long arm jurisdiction under subsection (b), because it fails to allege that the tortious acts that form the basis for Counts II, IV and VI were committed within the

[1] Prior to 2013, the subdivision of the Long-arm statute providing for jurisdiction for "[c]ommitting a tortious act within this state" was 48.193(1)(b). Following the Long-arm statute's amendment in 2013, that provision is now contained in 48.193(1)(a)2.

[2] Mr. Falz acknowledged as much in his response to Mr. Rautenberg's Amended Motion to Dismiss when he referred to the defamatory statements underlying both claims as "the same jurisdictional generating event." (A.152-153).

state. Each of these tort claims (fraud, tortious interference and slander) stems from the alleged communication of oral statements or misstatements by the appellant. The complaint does not state either that the statements were made in the state or that they were directed at listeners who were located in the state.").

According to the Complaint, Mr. Rautenberg published the defamatory comments to Mr. Falz's "employer" on December 20, 2013. Mr. Falz specifically identifies American Vulkan Corporation, located in Winter Garden, Florida, as his "employer." Collectively, these allegations seem to suggest that Mr. Rautenberg published the comments to American Vulkan Corporation while Mr. Rautenberg was in Florida, or that he otherwise directed the comments to American Vulkan Corporation in Florida.

Of course, Mr. Falz knew when he filed his Complaint that Mr. Rautenberg did not commit any of the alleged tortious acts in Florida. He knew Mr. Rautenberg was a German citizen and full-time resident. Mr. Falz was aware that Mr. Rautenberg made the statements identified in the Complaint during a meeting in Germany because Mr. Falz was present at the meeting. Mr. Falz knew that Mr. Rautenberg did not publish his statements to any representative of American Vulkan Corporation, other than Mr. Falz

himself. And he knew Mr. Rautenberg did not publish the statements to anyone in Florida.

Rather than acknowledging these inconvenient truths and dealing with them head-on, Mr. Falz resorted to pleading factual allegations that are specious at best, and at worst, wholly disingenuous. But regardless of how this Court views the allegations in the Complaint, it is what is missing that ultimately carries the day. Mr. Falz needed to allege where the publication took place. He did not. That ends the inquiry.

To wit, Mr. Falz never actually specifies where Mr. Rautenberg was when he published the comments, whether the comments were uttered or written, or where the unnamed representative of American Vulkan Corporation was when he or she heard the comments. The absence of these important details means Mr. Falz failed to allege that Mr. Rautenberg published his comments in Florida. The failure to allege that Mr. Rautenberg published his comments in Florida is dispositive, because Mr. Falz's suggestion that Mr. Rautenberg committed the torts in Florida was the only plausible basis for personal jurisdiction over Mr. Rautenberg pled in the Complaint. The trial court should have dismissed the Complaint under step one of the *Venetian Salami* analysis.

But it did not. It turned to step two, assessed the parties' affidavits, ruled it had general and specific jurisdiction over Mr. Rautenberg, and explained its ruling in a detailed order. As a result, this Court should not remand to give Mr. Falz an opportunity to rework his Complaint. It should reverse with instructions that the case be dismissed with prejudice because, as explained below, the affidavits can be harmonized, and they establish that the trial court has neither specific, nor general, jurisdiction over Mr. Rautenberg.

2. <u>Minimum Contacts – the Affidavits Establish that the Trial Court had neither Specific Jurisdiction nor General Jurisdiction over Mr. Rautenberg.</u>

"Florida courts may exercise personal jurisdiction of a nonresident defendant only if there are sufficient minimum contacts between the defendant and the state such that maintaining the action in Florida does not offend traditional notions of fair play and substantial justice." *Wiggins v. Tigrent, Inc.*, 147 So. 3d 76, 85 (2d DCA 2014) (citing *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)).

"Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state."

Wiggins, 147 So. 3d at 85 (quoting *Bird v. Parsons*, 289 F. 3d 865, 873 (6th Cir. 2002)). If a plaintiff establishes general jurisdiction under section 48.193(2), "the due process requirement of minimum contacts is fulfilled." *Schwartzberg*, 98 So. 3d at 178.

If a plaintiff asserts that a defendant is subject to specific jurisdiction for committing one of the acts enumerated in section 48.193(1)(a), however, "the plaintiff must still establish that the nonresident defendant has sufficient minimum contacts with the State of Florida to satisfy due process of law." *Schwartzberg*, 98 So. 3d at 177 (citing *Int'l Shoe*, 326 U.S. at 316, 66 S. Ct. 154); *see also Wendt v. Horowitz*, 822 So.2d 1252, 1257 (Fla.2002) ("[W]e distinguish the question of whether communications into Florida can constitute 'committing a tortious act' for the purposes of Florida's long-arm statute from the question of whether those acts may satisfy the minimum contacts required to comply with the constitutional prong of *Venetian Salami*.").

Specific Jurisdiction

In his affidavit, Mr. Rautenberg stated: "I have never committed any tortious act in Florida. Specifically, I never published a defamatory statement about Falz to Falz's employer, American Vulkan in Winter Haven,

Florida, as alleged in the complaint." *Id*. at ¶ 20. Mr. Falz did not refute those claims in his counter-affidavit. That should end the specific jurisdiction inquiry.

For instance, in *Two Worlds United v. Zylstra*, 46 So. 3d 1175 (Fla. 2d DCA 2010), Two Worlds, a Florida not-for-profit corporation, sued Zylstra, a California resident, in Florida. *Id*. at 1176. Two Worlds alleged that Zylstra owned and operated a website where Zylstra posted defamatory comments about Two Worlds. *Id*. Like Mr. Falz, Two Worlds sued for defamation and tortious interference, alleging Zylstra was subject to specific jurisdiction for committing intentional torts in Florida. *Id*. at 1177.

Zylstra moved to dismiss for lack of personal jurisdiction. In his affidavit, Zylstra denied personally owning the website, but admitted to being the sole stockholder of the California corporation that did. *Id*. Zylstra also denied posting the comments or otherwise committing any tortious act against Two Worlds. *Id*. at 1177-1178.

Two Worlds filed a counter-affidavit, alleging that the license of the California corporation was suspended, but provided "no evidence regarding what 'suspended' legally means in the context of California law or that the corporation was dissolved." *Id*. at 1178. The *Zylstra* court held that Two

Worlds failed to establish specific personal jurisdiction over Zylstra: "The corporate shield doctrine applies here to shield Zylstra from being haled into court based on personal jurisdiction because he denied committing the alleged negligent *and intentional acts* and Two Worlds did not rebut Zylstra's affidavit." *Id*. (emphasis added).

The same result should obtain here. Like Zylstra, Mr. Rautenberg averred in his affidavit that he did not publish the defamatory remarks alleged in Mr. Falz's Complaint, or commit any other tortious act in Florida. Mr. Falz's failure to contest those claims in his counter-affidavit should be dispositive.

However, in his counter-affidavit, Mr. Falz claimed: "Rautenberg's statements and actions as alleged in the complaint…were intentionally calculated to cause Affiant injury in Florida in Affiant's capacity as president of American Vulkan Corporation." (A.159). In addition, Mr. Falz stated that he "suffered and continues to suffer damages in Florida as a result of the false statements made by Rautenberg." Mr. Falz will likely argue, as he did below (A.149), that these two unpled and conclusory statements, made for the first time in his counter-affidavit, give rise to specific personal jurisdiction over Mr. Rautenberg. They do not. The Third District Court of

Appeal's decision in *Casita, L.P. v. Maplewood Equity Partners L.P.* is directly on point.

In *Casita*, the plaintiff sued for defamation and tortious interference. The plaintiff alleged the defendant "knowingly, willfully, and maliciously embarked on an aggressive campaign to destroy" the plaintiff's "reputation and business" by "publishing false and disparaging written and oral statements" that caused the plaintiff injury. *Casita*, 960 So. 2d at 856. Although the plaintiff alleged the defamatory statements were published in Florida, the Third District Court of Appeal held that the plaintiff's "effort to assert jurisdiction over the [defendant] under section 48.193(1)(b) fails" because, just like Mr. Falz, the plaintiff was "unable to offer any proof that the [defendant] published the injurious statements within Florida."

Undeterred, the plaintiff in *Casita* advanced the same argument Mr. Falz adopted in this case - that pursuant to a number of decisions from Florida's appellate courts, including *Allerton v. State Dep't of Ins.*, 635 So. 2d 36 (Fla. 1st DCA 1994)[3], tortious activity committed outside Florida can still give rise to personal jurisdiction under section 48.193(1)(b), as long as

[3] Mr. Falz relied heavily on *Allerton* in his response to the motion to dismiss. (A.148-149). So did the trial court when it ruled against Mr. Rautenberg. (A.5).

the defendant "intended to cause injury" in Florida. The plaintiff in *Casita* argued that under Florida law: "targeted and intentional tortious acts aimed at Florida [are sufficient to] establish the requisite minimum contacts **and** comport with the requirements of due process of law under Fla. Stat. 48.193(1)(b)." *Id*. (emphasis in original).

The Third District Court of Appeal disagreed:

> In this non-final appeal from an order denying a motion to dismiss for lack of personal jurisdiction, we answer a question unresolved in *Wendt v. Horowitz*, 822 So. 2d 1252, 1253 n. 2 (Fla.2002), whether injury alone to a Florida plaintiff caused by a tortious act committed outside the state is sufficient to invoke the jurisdiction of the courts of this state under Section 48.193(1)(b) of the Florida long-arm statute. Joining the majority of our sister courts of appeal to the north, *see Consol. Energy Inc. v. Strumor*, 920 So. 2d 829 (Fla. 4th DCA 2006), *Homeway Furniture Co. of Mount Airy, Inc. v. Horne*, 822 So. 2d 533 (Fla. 2d DCA 2002), *Thompson v. Doe*, 596 So. 2d 1178, 1179 (Fla. 5th DCA 1992) *decision approved by Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993), we today conclude that it is not.

Casita, 960 So. 2d at 855-856.

To support its conclusion, the *Casita* court explained that the plaintiff's interpretation of *Allerton* and the similar cases it cited in support of its argument was flawed. According to the *Casita* court, those cases do not stand for the proposition that specific personal jurisdiction can arise merely because a plaintiff sustains damages in Florida from tortious activity

committed out of state: "We are not so sanguine about [the plaintiff's] reading of the facts of these cases. Carefully considered, it appears to us in each case that part of the alleged tortious conduct occurred in Florida." *Id*. at 857.

That is where the rubber meets the road in this case. It is undisputed that the tortious acts alleged in the Complaint did not occur in Florida. This Court should follow the lead of the *Casita* court. The facts that matter are on all fours. The plaintiff in *Casita* alleged the same causes of action as Mr. Falz. Mr. Falz's jurisdictional argument is the same one advanced by the plaintiff in *Casita*. The question presented in this case is the same question the *Casita* court resolved: does injury alone to a Florida plaintiff caused by defamatory statements made outside Florida, and not otherwise communicated to someone physically present in Florida, invoke the jurisdiction of Florida courts under section 48.193(1)(a)2? For the reasons explained by the *Casita* court, this Court should answer the question in the negative.

This Court's decision in *Homeway Furniture Co. of Mount Airy, Inc. v. Horne*, 822 So. 2d 533 (Fla. 2d DCA 2002), is also instructive. *Mount Airy* did not involve a cause of action for defamation, but the facts

underlying the *Mount Airy* plaintiff's Complaint are closely analogous. In *Mount Airy*, the "tortious acts" alleged in the plaintiff's Complaint "involved the defendants making false reports of crimes to law enforcement officials in North Carolina." *Mount Airy*, 822 So. 2d at 538. The plaintiff argued for *in personam* jurisdiction over the defendant because "although the defendants were located in North Carolina and their acts occurred in that state, they engaged in intentional torts directed at [the plaintiff], who they realized was a resident of the state of Florida." *Id*. at 537. This is Mr. Falz's argument and the crux of the trial court's ruling that it had specific jurisdiction over Mr. Falz. (A.6).

As it did in *Mount Airy*, this Court should reject it. Like Mr. Falz, the *Mount Airy* defendants "did not personally commit [the tortious] acts in Florida, either through their physical presence or through communications into this state." *Id*. at 538. The *Mount Airy* court noted that "[t]his court has previously followed the general rule that, even in the context of intentional torts, the existence of an injury in Florida, standing alone, is insufficient to establish jurisdiction pursuant to section 48.193(1)(b) when all of the defendant's tortious conduct occurred outside the state." *Id*. at 539. The *Mount Airy* court identified two exceptions to the general rule, neither of

which applied in that case, and neither of which apply here. *Id*. The principles outlined in *Mount Airy* should guide the resolution of this case.

There are two final reasons this Court should hold that the allegations in Mr. Falz's affidavit do not give rise to specific jurisdiction under section 48.193(1)(a)2. Both arguments are based on the plain language of section 48.193(1)(a)2. Both arguments come from Judge Farmer's well-penned concurrence in *Thomas Jefferson Univ. v. Romer*, 710 So. 2d 67, 68 (Fla. 4th DCA 2002) (Farmer, J., concurring and dissenting).

First, the notion that specific *in personam* jurisdiction arises simply because a plaintiff suffers injury in Florida from a tort committed outside the state is belied by the plain language of section 48.193(1)(a)2. According to Judge Farmer:

> The legislature did not say "commission of a tort" in this state, but instead made jurisdiction depend on the "commission of a tortious act" here. If the legislature had used "commission of a tort," there might be some theoretical basis to separate the elements of a tort - among which is damages - and reason that the tort is committed where the last element occurs. But because the statutory locution is "commission of a tortious act," it is plain that the focus of this provision is on the act itself, not its character as a tort. In short, wherever the damage element in a given case might occur, it is the commission by the defendant of the act itself—setting into motion the various elements that combine to make a tort—that is the critical test for jurisdictional purposes. The legislature has therefore said quite clearly that for jurisdiction under (1)(b) the act or omission of the defendant must have occurred within Florida.

Id. at 71.

Judge Farmer is right. Florida's Long arm statute must be strictly construed. *Scharwzberg,* 98 So. 3d at 180. Under section 48.193(1)(a)2, it is the "tortious act" that must be committed in Florida to give rise to personal jurisdiction. In this case, the only tortious acts alleged in the Complaint are Mr. Rautenberg's comments, which he purportedly made in Germany, and were not communicated into Florida. Mr. Falz's claim in his affidavit that he suffered injury from those tortious acts in Florida should not be part of the inquiry.

Second, whether a tortious act is committed intentionally, negligently, or otherwise, should be meaningless in evaluating personal jurisdiction under section 48.193(1)(a)2. According to Judge Farmer, the legislature did not distinguish intentional torts from non-intentional torts in section 48.193(1)(a)2, so neither should courts.

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

Id. at 71. (internal citations omitted). Thus, Mr. Falz's claim in his affidavit that "Mr. Rautenberg's statements and actions as alleged in the complaint…were intentionally calculated to cause [him] injury in Florida" should not change the analysis under section 48.193(1)(a)2. *See also Acquadro v. Bergeron*, 851 So. 2d 665, 671 (Fla. 2003) ("Section 48.193 does not, as petitioners argue, distinguish among the universe of possible torts. Instead, the statute provides that any person who commits a tortious act in this state submits himself or herself to the personal jurisdiction of the courts of this state.").

In sum, Mr. Rautenberg averred in his affidavit that he did not commit a tortious act in Florida, or direct his allegedly defamatory statements into Florida. Mr. Falz did not contest those claims in his counter-affidavit. Mr. Falz's effort to create a new jurisdictional hook via his claim in his affidavit that Mr. Rautenberg's statements were "intentionally calculated" to cause injury in Florida is unavailing. There is no other basis in the record for specific jurisdiction over Mr. Rautenberg pursuant to Florida's Long-arm statute.

Even if there was, Mr. Falz still cannot establish specific jurisdiction because the record establishes that Mr. Rautenberg does not have sufficient

minimum contacts with Florida to satisfy the due process analysis. The United States Supreme Court's recent decision in *Walden v. Fiore*, 134. S. Ct. 1115 (2014) is controlling. The decision also casts serious doubt on whether *Allerton* and its ilk are still good law.

In *Walden*, plaintiffs brought a tort action against the defendant Drug Enforcement Administration agent in their home state of Nevada after the agent seized their funds in Atlanta. *Id*. at 1119–1120. The Supreme Court held that Nevada lacked personal jurisdiction over the agent, despite his knowledge that plaintiffs were Nevada residents, because none of his activities took place in Nevada. *Id*. at 1124. "[The agent's] actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections." *Id*. at 1125.

Like Mr. Falz and the trial court's order, the respondents in *Walden* relied on *Calder* to "emphasize that they suffered the 'injury' caused by petitioner's allegedly tortious conduct (*i.e.* the delayed return of their gambling funds) while they were residing in the forum." *Id*. The Supreme Court found that emphasis "misplaced." *Id*. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the

defendant's conduct connects him to the forum in a meaningful way." *Id*. The *Walden* court also explicitly held that "[t]hese same principles apply when intentional torts are involved." *Id*.

In so holding, the Supreme Court emphasized that "for a State to exercise jurisdiction consistent with due process, the defendant's *suit-related* conduct must create a substantial connection with the forum State." *Id*. at 1121. (emphasis added). The trial court in this case ruled it had specific jurisdiction over Mr. Rautenberg for a variety of reasons, but none of them has to do with the tortious acts alleged in this lawsuit. The trial court focused on Mr. Rautenberg's Florida connections through his work for Sybac and Mr. Rautenberg's role in a separate lawsuit maintained by Sybac in Florida. (A.6). This is not "suit-related" conduct.

The trial court's specific jurisdiction analysis was also flawed because it focused too heavily on Mr. Falz's contacts with Florida, rather than Mr. Rautenberg's. According to the Supreme Court, "however significant the plaintiff's contacts with forum may be, those contacts cannot be decisive in determining whether the defendant's due process rights are violated." *Id*. at 1122. That Mr. Falz happened to be a Floridian, president of a Florida company, or otherwise connected to Florida, is not relevant to the due

process analysis regarding Mr. Rautenberg.

In sum, the Supreme Court's rejection of the "injury only" theory as a basis for specific jurisdiction, even where intentional torts are involved, seems to sound the death knell for *Allerton* and similar cases. Either way, *Walden* controls this case. The trial court erred in finding Mr. Rautenberg has minimum contacts with Florida. He does not. This Court should reverse with instructions that Mr. Falz's Complaint be dismissed with prejudice.

3. General Jurisdiction

Thankfully, the general jurisdiction analysis in this case is even easier. The problem with the trial court's general jurisdiction ruling is that for no apparent reason, it imputed Sybac's conduct in Florida to Mr. Rautenberg. That was error.

Florida law is clear that, generally, "the actions of a corporation cannot be imputed to its shareholders for purposes of establishing long arm personal jurisdiction over the shareholder." *Suroor v. First Inv. Corp.*, 700 So. 2d 139, 141 (Fla. 5th DCA 1997). In *Suroor*, the court found that imputation of corporate acts to an individual defendant shareholder was inappropriate despite the plaintiff's explicit allegation that the defendant was the "beneficial owner" of the corporation. *Id*. This rule arises from the

"basic tenet of American corporate law ... that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

Despite this general rule, "[a] nonresident shareholder of a corporation doing business in Florida may be subject to long-arm jurisdiction under an alter ego theory ...." *Aldea Commc'ns, Inc. v. Gardner*, 725 So. 2d 456, 457 (Fla. 2d DCA 1999). But to properly allege the "alter ego" theory, a plaintiff must allege "both that the resident corporation was a mere instrumentality of its shareholders, and that the corporation was used for improper conduct." *Bellairs v. Mohrmann*, 716 So. 2d 320, 323 (Fla. 2d DCA 1998). Mr. Falz never alleged or attempted to prove a veil piercing or alter ego theory. Consequently, the trial court's attribution of Sybac's conduct in Florida to Mr. Rautenberg personally was error.

Mr. Rautenberg averred in his affidavit that his only conduct in Florida was sporadic and performed exclusively on Sybac's behalf. (A.126-129). Mr. Falz's counter-affidavit in no way refutes Mr. Rautenberg's claims. In fact, Mr. Falz specifically avers that "[a]t all times relevant to the Complaint, Rautenberg was acting as an agent and/or employee of [Sybac]." (A.158). That disposes of the general jurisdiction question. *See, e.g.,*

Wiggins, 147 So. 2d at 85 (holding that while a general jurisdictional analysis may apply to a corporate defendant, it did not apply to its managing member, because nothing in the record refuted his affidavit, which established he was not personally operating, conducting, engaging in, or carrying on a business venture in Florida).

CONCLUSION

The trial court has neither specific nor general jurisdiction over Mr. Rautenberg. This Court should reverse with instructions that Mr. Falz's action against Mr. Rautenberg be dismissed with prejudice.

DATED this 27th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 27, 2015, the following was filed through the Florida e-Portal and a true and correct copy of the foregoing has been furnished via e-mail to: Benjamin W. Hardin, Esquire, and Daniel A. Fox, Esquire [service@hardinpalaw.com], at HARDIN & ASSOCIATES, P.A., P.O. Box 3604, Lakeland, Florida 33802; Alan Bookman, Esquire, [abb@esclaw.com], P. Michael Patterson, Esquire, [pmp@esclaw.com], Cecily M. Welsh, Esquire, [cmw@esclaw.com], at EMMANUEL SHEPPARD & CONDON, 30 South Spring Street, Pensacola, Florida 32502.

/s/ Michael M. Brownlee
Michael M. Brownlee, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire