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 REPLY BRIEF

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I. MR. FALZ DID NOT ALLEGE THAT MR. RAUTENBERG PUBLISHED THE STATEMENTS IN FLORIDA BECAUSE MR. FALZ KNEW MR. RAUTENBERG DID NOT PUBLISH THE STATEMENTS IN FLORIDA AND THIS COURT SHOULD DECLINE MR. FALZ'S INVITATION TO INFER A FACT HE CANNOT ALLEGE IN GOOD FAITH.

In his Answer Brief, Mr. Falz claims he "alleged specific facts demonstrating that Rautenberg committed the tortious acts constituting defamation and tortious interference within the state of Florida." (AB at 10). That is incorrect. As argued in the Initial Brief, "the tort of defamation is committed in the place where it is published." (IB at 18) (quoting *Casita, L.P. v. Maplewood Equity Partners L.P.*, 960 So. 2d 854, 857 (Fla. 3d DCA 2007)). And because the comments underlying the defamation claim are the basis for Mr. Falz's tortious interference claim, the analysis is the same. (IB at 19) (citing *PK Computers, Inc. v. Indep. Travel Agencies of Am., Inc.*, 656 So. 2d 254, 255 (Fla. 4th DCA 1995). Mr. Falz failed to allege where Mr. Rautenberg was when he purportedly uttered the defamatory statements. Mr. Falz failed to allege where the unnamed representative of American Vulkan Corporation was when he or she heard the comments. Mr. Falz's failure to allege the location of publication is dispositive.

Mr. Falz does not dispute that he failed to allege where the comments were published. Instead, he argues the trial court correctly found that his Complaint sufficiently alleged that Mr. Rautenberg committed a tortious act in Florida because the trial court was required to "draw all reasonable inferences in favor of the pleader." (AB at 11). In other words, Mr. Falz contends he sufficiently pled jurisdictional facts because, from the story alleged in the Complaint, this Court can "reasonably infer" that Mr. Rautenberg published his comments in Florida.

This is a particularly hollow argument. Mr. Falz's testimony during the hearing on Sybac's forum non conveniens motion establishes that Mr. Rautenberg is a German citizen living in Germany and that he published the purportedly defamatory comments in Germany, not Florida. As a result, Mr. Falz could never, in good faith, allege that Mr. Rautenberg published his comments in Florida. Yet, incredibly, he invites this Court to infer precisely that. This Court should decline the invitation.

II. MR. FALZ'S ARGUMENT THAT SUBJECTING MR. RAUTENBERG TO FLORIDA JURISDICTION COMPORTS WITH DUE PROCESS IS BASED ON A MISUNDERSTANDING OF *CALDER V. JONES*.

Mr. Falz maintains that the record establishes Mr. Rautenberg has sufficient minimum contacts with Florida to satisfy the due process inquiry. (AB at 11-14). In support, Mr. Falz relies on the United States Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), because it is "directly on point with the instant case." (AB at 12). It is not.

In *Calder*, the defendants were employees of a Florida newspaper *that published an allegedly libelous article in California*. As Justice Thomas explained in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the *Calder* court's holding that jurisdiction over the defendants was appropriate in California was due, in large part, to the fact that the defendants committed a tort in California.

> The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of

> libel, the defendants' intentional tort actually occurred *in* California. In this way, the "effects" caused by the defendants' article—*i.e.*, the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California,* not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

Walden, 134 S. Ct. at 1123-24. (emphasis in original).

In this case, Mr. Falz testified unequivocally during the hearing on Sybac's forum non conveniens motion that Mr. Rautenberg published the comments in Germany, not Florida. As a result, Mr. Falz could not, and cannot, claim that Mr. Rautenberg committed the torts alleged in the Complaint in Florida. As a result, *Calder* is not helpful for Mr. Falz.

More importantly, *Calder* can no longer be applied without taking *Walden* into account. While the *Walden* court may not have overturned *Calder*, it narrowed the scope of its holding by clarifying that specific jurisdiction over a defendant is not proper where the only basis for jurisdiction is that the plaintiff felt the effects of the defendant's actions in the Plaintiff's chosen forum. *See, e.g., Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) ("[A]fter *Walden* [,] there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum.' Any decision that implies

otherwise can no longer be considered authoritative.") (internal citations omitted); *see also Maxitrate Tratamento Termico E Controles v. Super Systems, Inc.*, —— F. App'x ——, 2015 WL 3407370 at 3 (6th Cir. May 28, 2015) ("*Walden* forecloses [any] theory of personal jurisdiction" based on the argument that jurisdiction is proper where a plaintiff felt the effects of a defendant's actions).

Mr. Falz's only argument for Florida jurisdiction over Mr. Rautenberg is that he felt the effects of Mr. Rautenberg's statements in Florida. Even under *Calder*, that argument is questionable. After *Walden*, it is a non-starter. Mr. Falz protests that "Appellant's reliance on *Walden* makes the misguided factual assumption that none of Rautenberg's tortious acts took place in Florida." (AB at 21). Mr. Falz does not explain why Mr. Rautenberg's claim that none of the tortious acts alleged in the Complaint occurred in Florida is "misguided." Mr. Falz testified very clearly that the tortious acts alleged in the Complaint occurred in Germany, not Florida. Mr. Falz is unable to point to anything in the record that suggests otherwise, because nothing in the record suggests otherwise.

Mr. Falz also argues that this case is distinguishable from *Walden* because "more than just the injury is alleged to have occurred in Florida."

(AB 21). Mr. Falz claims that "[a]s evidenced by Falz's Affidavit and its attachments, Rautenberg's tortious conduct was well orchestrated, committed for the benefit of Sybac, and carried out for the sole purpose of having an effect on Falz in Florida." *Id.* Mr. Falz does not specify what parts of his Affidavit or its attachments substantiate this claim.

In any event, this argument amounts to nothing. Mr. Falz's claim that Mr. Rautenberg's tortious conduct was well-orchestrated is nonsensical. Whether tortious conduct is well-orchestrated or poorly-orchestrated has no bearing on the jurisdictional inquiry. The only tortious conduct alleged by Mr. Falz stems from a single act - Mr. Rautenberg's utterance of statements during a meeting in Germany on December 20, 2013. Mr. Falz's attempt to recast the alleged tortious conduct as some sort of overarching scheme perpetrated by Mr. Rautenberg, whether well-orchestrated or not, has no support in the record. Likewise, the claim that Mr. Rautenberg committed this "well-orchestrated" tort "for the benefit of Sybac" is also unhelpful for Mr. Falz. If anything, it supports Mr. Rautenberg's argument that Sybac's contacts should not have been imputed to Mr. Rautenberg personally.

Thus, Mr. Falz's attempt to distinguish this case from *Walden* is reduced to his claim that Mr. Rautenberg's tortious conduct was "carried out

for the sole purpose of having an effect on Falz in Florida." This is precisely the jurisdictional allegation the *Walden* court held was insufficient to satisfy the minimum contacts part of the due process inquiry. (*See* IB at 33-35). *Walden* makes clear that Mr. Falz's reading of *Calder* is flawed. *Walden* controls this case and compels reversal because Mr. Rautenberg does not have sufficient personal contacts with Florida to satisfy due process.

III. MR. FALZ'S ARGUMENT THAT MR. RAUTENBERG'S AFFIDAVIT CONTAINED MERE LEGAL CONCLUSIONS AND THUS DID NOT SHIFT THE BURDEN BACK TO MR. FALZ FAILS BECAUSE MR. RAUTENBERG SUFFICIENTLY REBUTTED THE ONLY JURISDICTIONAL ALLEGATIONS IN THE COMPLAINT.

In his Complaint, Mr. Falz did not specify where the publication of Mr. Rautenberg's purportedly defamatory statements occurred. But he did insinuate, even though he knew it was not true, that on December 20, 2013, Mr. Rautenberg published the comments to Mr. Falz's employer, American Vulkan Corporation, in Winter Garden, Florida. (A.12).

Thus, the only plausible basis for Long-arm jurisdiction over Mr. Rautenberg based on the allegations in the Complaint is that Mr. Rautenberg committed a tortious act in Florida. Because the tortious act underlying both counts in the Complaint is defamation, specific jurisdiction over Mr. Rautenberg would only be proper if he published the comments to someone

at American Vulkan Corporation in Florida on December 20, 2013, as the Complaint suggests. If Mr. Rautenberg did not publish the comments to someone in Florida, there would be no basis for *in personam* jurisdiction. Therefore, to shift the burden back to Mr. Falz, all Mr. Rautenberg needed to do in his affidavit was swear that he did not publish the comments to anyone at American Vulkan Corporation, as alleged in the Complaint.

That is exactly what he did. 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." (A.128). By swearing that he did not publish the defamatory statements alleged in the Complaint to anyone with American Vulkan Corporation in Winter Haven, Mr. Rautenberg refuted the only plausible basis for jurisdiction contained in the Complaint. As Mr. Falz put it aptly in his Answer Brief, "[t]he inquiry here is simply whether the tort as alleged occurred in Florida, and not whether the alleged tort actually occurred." (AB at 15).

Mr. Falz contends that Mr. Rautenberg's affidavit was insufficient to shift the burden because it contained legal conclusions, as opposed to facts. This argument flounders because any lack of specific factual allegations in

Mr. Rautenberg's affidavit is a product of the lack of specific jurisdictional allegations in Mr. Falz's Complaint. Mr. Falz never alleged where Mr. Rautenberg was when he defamed Mr. Falz. Mr. Falz does not identify the American Vulkan Corporation representative who fielded the comments. Rather than specifying whether the comments were made orally or in writing, Mr. Falz used the term "publish" repeatedly in his Complaint. Yet on appeal, Mr. Falz bemoans Mr. Rautenberg's use of the term "publish" in his affidavit, characterizing it as a mere legal conclusion that is insufficient to refute Mr. Falz's jurisdictional allegations. (AB at 16-17).

The problem for Mr. Falz is that Complaint contains no jurisdictional facts other than the disingenuous insinuation that Mr. Rautenberg published the comments to someone at American Vulkan Corporation in Winter Haven, Florida. Mr. Rautenberg refuted that allegation in his affidavit. That is all he could do. That is all he was required to do.

IV. MR. FALZ'S ARGUMENT THAT THE TRIAL COURT CORRECTLY FOUND IT HAD GENERAL JURISDICTION OVER MR. RAUTENBERG IS MERITLESS.

In his "Summary of the Argument," Mr. Falz admits that the trial court's general jurisdiction finding "may have been somewhat tenuous based on Rautenberg's claims that most of his contacts with Florida were non-

tortious acts committed as a corporate agent of Sybac in furtherance of Sybac business." (AB at 8). Yet in his argument section, Mr. Falz fails to explain how this Court can affirm the trial court's imputation of Sybac's contacts with Florida to Mr. Rautenberg personally.

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.

V. ALLOWING MR. FALZ LEAVE TO AMEND HIS COMPLAINT WOULD BE FUTILE BECAUSE THE RECORD ESTABLISHES THAT THERE IS NO BASIS FOR PERSONAL JURISDICTION OVER MR. RAUTENBERG.

Mr. Falz argues that he should be allowed to amend because it "is clear that any defect as to personal jurisdiction found with Falz's Complaint can be cured by amendment, which would allow this matter to proceed to a determination on the merits." Unsurprisingly, Mr. Falz does not explain how, based on anything in the record, a Florida court could ever have personal jurisdiction over Mr. Rautenberg. That is because, by Mr. Falz's own account, the allegedly tortious act that is the impetus for his Complaint

occurred in Germany, not Florida, and was committed by a German who has no personal contacts whatsoever with this State.

Mr. Falz was aware of these pesky facts when he filed suit. He had the burden to properly plead jurisdiction. Mr. Falz failed to carry his burden because he could not, and cannot, allege facts in good faith that would give rise to personal jurisdiction over Mr. Rautenberg.

Enough is enough. Mr. Falz filed a Complaint that is arguably a sham pleading. Now he urges this Court to infer, from the amalgam of untruths and half-truths pled in the Complaint, that Mr. Rautenberg published the alleged comments in Florida, even though he knows that is not true. Mr. Falz hedges his argument that this Court should uphold the trial court's ruling by requesting a redo. He does not deserve one. More importantly, it would serve no purpose. The record establishes conclusively that Mr. Rautenberg cannot be subject to Florida jurisdiction for the tortious act alleged in the Complaint.

CONCLUSION

This Court should reverse with instructions that Mr. Falz's action against Mr. Rautenberg be dismissed with prejudice.

DATED this 27th day of August, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 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 Reply 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