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IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA

Case No. 6D23-4292
L.T. Case No. 43-2023-CA-001147

MICHAEL JAYSON LIPSEY

Appellant,

v.

SCOTT FRANCIS, derivatively on behalf of PARKWAY PROPERTY INVESTMENTS, LLC, and JAMES HEISTAND

Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida

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I. Appellee's Complaint Is Not Legally Sufficient to Meet His Burden of Proof.

Appellant disputed personal jurisdiction by filing a declaration contesting the jurisdictional allegations in the complaint. [App'x at 0083-85]. Thus, under *Venetian Salami*, the burden shifted to Appellee to "prove by affidavit the basis upon which jurisdiction may be obtained." *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Appellee did not meet this burden.

Instead, Appellee and the lower tribunal simply relied upon the allegations of the complaint as established or undisputed facts. [App'x 0091-93; 0119-21]. However, Appellee's Complaint was verified only "to the best of [Appellee's] knowledge and belief." [App'x 0036]. Such an affirmation by Appellee is insufficient to transform *allegations* into *evidence* because the verification was not based on personal knowledge. *Estes v. Rodin*, 259 So. 3d 183, 199 (Fla. 3d DCA 2018); *see also* Initial Brief at 7-9.

In the Answer brief, Appellee **does not refute** that the complaint does not constitute legally sufficient evidence, as required by *Venetian Salami*. *See* Ans. Br., at 9-11. Instead, Appellee argues that Appellant's declaration

is legally insufficient, so the burden of proof never shifted back to Appellee.[1] However, Appellant's declaration is legally sufficient on its face. Appellant is only required to refute Appellee's jurisdictional allegations. Appellant has done so by swearing under oath, *inter alia*, that: "[s]ince 2018, I have resided in Colorado;" "I do not have a personal bank account in Florida;" "I do not have a personal designated business office in Florida;" "I do not directly own real property in Florida;" and "I have not committed any tortious acts within Florida." [App'x 0083-84]. These sworn statements—especially compared to Appellee's insufficiently verified (i.e., unsworn) complaint—are enough to shift the burden back to Appellee.

In *Frantin v. MVS Media Group, LLC*, -- So. 3d --, No. 3D23-716, 2023 WL 7563632, at *1 (Fla. 3d DCA Nov. 15, 2023), the plaintiff sued both a company and its president, Mr. Frantin. Frantin filed a motion to dismiss and affidavit, which was opposed by a declaration of plaintiff's counsel of record. *Id.* In finding Frantin's affidavit legally sufficient to shift the burden back to the plaintiff, the Third District Court of Appeal explained:

[1] To the extent this Court finds that Appellant's declaration was insufficient to shift the burden back to Appellee under *Venetian Salami*, the allegations of the complaint do not adequately plead the existence of jurisdiction under the long-arm statute in the first place, as argued in Appellant's Initial Brief. *See* Initial Br. at 9. Thus, this Court should find that the burden never shifted to Appellant at all.

> Frantin filed an affidavit contesting the jurisdictional allegations in the complaint. Specifically, Frantin averred he resides in New York and he does not conduct any business, own any real property and has not committed any tortious act within Florida. We find Frantin's affidavit was legally sufficient to have shifted the burden to [the plaintiff] 'to prove by affidavit the basis upon which jurisdiction may be obtained.'

Frantin, 2023 WL 7563632, at *1 (quoting *Venetian Salami*, 554 So. 2d at 502) (reversing and remanding for dismissal of the complaint).

The Third DCA further explained that the declaration of the plaintiff's counsel of record was legally insufficient because it was not based upon personal knowledge. *Id.* at *2. Moreover, the plaintiff offered no other competent sworn proof to meet the *Venetian Salami* burden. *Id.* The court made clear that "[w]here a plaintiff fails to refute [a defendant's sworn] allegations by providing legally sufficient sworn proof as to the basis for jurisdiction, the trial court must grant the defendant's motion to dismiss." *Id.* In the instant case, Appellee provided no legally sufficient sworn proof as to the basis for jurisdiction, and Appellant's motion to dismiss should have been granted.

II. Appellee Conflates Sections 48.193(1)(a)(1) and 48.193(1)(a)(2) of the Long-Arm Statute.

In trying to establish personal jurisdiction under section 48.193(1)(a)(1) (operating, conducting, engaging in, or carrying on a business venture in this state), Appellee conflates it with section 48.193(1)(a)(2) (committing a tortious act within Florida). Specifically, Appellee's complaint and arguments

center around allegations that Appellant committed tortious acts *in his capacity as Parkway's CEO*, but then Appellant makes an unsupported logical leap that Appellant was therefore acting in his *individual* capacity.

Both the complaint, and the trial court's order, confirm that Appellant conducted business in the state of Florida only in his **official** capacity as CEO of Parkway, not in his **personal** capacity. The trial court found personal jurisdiction based on Appellant's acts "as CEO." [App'x 0121]. As argued in Appellee's brief, Appellant "traveled to Florida seven (7) times [as Parkway's CEO], supported [Parkway's] operations in Florida, and communicated with Parkway's departments and employees in Florida." Ans. Br. at 15. Every single act Appellee cites as a basis for personal jurisdiction would necessarily have had to be done by Appellant in his official capacity. Even Appellee's argument that "Appellant abused his authority **as an officer of Parkway** for his own benefit" establishes that Appellant's actions were all performed in his official capacity. *See* Ans. Br., at 16 (emphasis added).

In arguing that the above allegations somehow allow the trial court to exert personal jurisdiction over Appellant under § 48.193(1)(a)(1), Appellee conflates the requirements of subsection (1)(a)(1) with subsection (1)(a)(2) by arguing that the allegations that Appellant committed tortious acts (outside of Florida, no less, which is plainly insufficient to establish jurisdiction under

this section as discussed in section IV, *infra*) somehow transform official acts done in Appellant's representative capacity as CEO of Parkway into acts done in his individual or personal capacity.

Moreover, Appellee misconstrues *Suroor*, *Yarger*, and *Excel Handbag* by arguing that inclusion of a mere conclusory allegation that a corporate officer "served his personal interests" is sufficient to establish personal jurisdiction over the officer. *See* Ans. Br. at 17-18. It is not. *See Suroor v. First Inv. Corp.*, 700 So. 2d 139, 141 (Fla. 5th DCA 1997) (plaintiff was required to allege activities "apart from his role as an agent of" the company before a court could exercise personal jurisdiction); *Yarger v. Convergence Aviation Ltd.*, 310 So. 3d 1276, 1281 (Fla. 5th DCA 2021) (no personal jurisdiction because the corporate officer's "ties to Florida were related to his role as an agent for" the corporation); *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 428 So. 2d 348, 350 (Fla. 3d DCA 1983) (a defendant must "transact business on their own account in the state, as opposed to engaging in business as representatives of the corporation.").

Furthermore, Appellee did not to respond to Appellant's argument that the trial court erred in exerting personal jurisdiction under section 48.193(1)(a)(1) despite failing to meet the connexity requirement. *See* Initial Br. at 16-17. Such connexity only exists "where the cause of action arises

from [a] person's business activities in Florida." *Schwartzberg v. Knobloch*, 98 So. 3d 173, 177 (Fla. 2d DCA 2012). The trial court cited allegations of Appellant's "travels" and "regular email, text, or telephone communications with Parkway's personnel in Florida" as a basis for exercising jurisdiction under section 48.193(1)(a)(1). However, the court never found (and Appellee has yet to argue) that any of Appellee's claims **arose out of** such "travels" and "communications." And "[e]lectronic communications from out-of-state offices into Florida do not establish conducting business in Florida." *Stonepeak Partners, LP v. Tall Tower Cap., LLC*, 231 So. 3d 584, 556 (Fla. 2d DCA 2017).

III. Appellee Did Not Allege or Establish That Appellant Committed a Tortious Act Within Florida.

Although the trial court did not rule on personal jurisdiction under Florida Statutes section 48.193(1)(a)(2), Appellee urges that this Court can affirm the trial court's finding of personal jurisdiction on this basis. However, as fully briefed in the motion to dismiss, Appellee did not properly allege and certainly has not established that Appellant committed a tort within this state, as required by the plain language of the long-arm statute. *See* [App'x 0070-75]. The long-arm statute provides that Florida courts may exert personal jurisdiction over a defendant who personally (or through an agent) engages in "a tortious act **within the State**." § 48.193(1)(a)(2), Fla. Stat. (emphasis added).

In interpreting this statute, this Court must adhere to a "supremacy-of-text principle," as mandated by the Florida Supreme Court. *Advisory Opinion to the Governor Re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020). The "supremacy-of-text principle" requires that the words of a governing text are of paramount concern and the statute's plain and ordinary meaning must control. *McGregor v. Fowler White Burnett, P.A.*, 332 So. 3d 481, 486 (Fla. 4th DCA 2021). Additionally, the long-arm statute must be strictly construed in favor of the non-resident defendant. *Rollet v. de Bizemont*, 159 So. 3d 351, 355 (Fla. 3d DCA 2015) (citations omitted); *see also Olson v. Robbie*, 141 So. 3d 636, 640 (Fla. 4th DCA 2014); *Cosmopolitan Health Spa, Inc. v. Health Indus., Inc.*, 362 So. 2d 367, 368 (Fla. 4th DCA 1978).

The plain language of the statute requires that a defendant commit a tort "within" Florida. *Casita, L.P. v. Maplewood Equity Partners L.P.*, 960 So. 2d 854, 857 (Fla. 3d DCA 2007). Indeed, "[a] complaint is not legally sufficient to allege personal jurisdiction based on tortious acts when the complaint fails to allege that the acts were committed within Florida." *Rautenberg v. Falz*, 193 So. 3d 924, 930 (Fla. 2d DCA 2016). In other words, the plain language of section 48.193(1)(a)(2) limits jurisdiction to "[c]omitting a tortious act *within* this state," not directed at this state. *Thomas Jefferson Univ. v.*

Romer, 710 So. 2d 67, 71 (Fla. 4th DCA 1998) (Farmer, J., concurring) ("[I]t 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.").

The complaint in the instant case does not allege a single *tortious* act or omission of Lipsey that occurred while he was *physically* present within Florida. Instead, the complaint alleges that Lipsey visited Florida to fulfill his duties as CEO, including meeting with potential candidates and conducting site visits. [App'x at 0007 (Compl. at ¶ 7)]. *None* of the causes of action in the complaint, however, arise out of these alleged contacts with Florida. *See Camp Illahee Invs., Inc. v. Blackman*, 870 So. 2d 80, 85 (Fla. 2d DCA 2003) ("By its terms, section 48.193(1) requires connexity between the defendant's activities and the cause of action."); *LaFreniere v. Craig-Myers*, 264 So. 3d 232, 238 (Fla. 1st DCA 2018) ("Although these allegations plainly assert that [defendant, a corporate officer] visited Florida throughout a span of nine years, none of the allegations suggest that she committed a tort while in the forum state.").

Instead, the only causes of action against Appellant asserted in the complaint are for inspection of corporate records, breach of fiduciary duties and corporate waste relating to the purported devaluing of Appellee's membership interest, the payment of certain compensation packages, and allegedly interfering with Appellee's performance of his job functions. *See* [App'x 0029-35 (Compl., at ¶¶ 120-123, 134-139, 148-151; 153-158)]. But there are no allegations whatsoever that any of these claims arise out of tortious acts of Appellant while he was physically present within Florida. Appellee alleges that Appellant's only actions within the state were to "fulfill his duties as CEO"—for example, by "visit[ing] Parkway's Florida offices in Jacksonville and Orlando," "conduct[ing] site visits at Parkway projects in Miami, Orlando and Tampa, Florida," and "me[eting] with a potential candidate for hire for development deals in central Florida." [App'x at 0007]. None of these alleged in-state actions are tortious.

Appellee argues, generally, that "a defendant's physical presence is not required" and "[t]he plaintiff need only show that the defendant's contact within the State resulted in . . . a tortious act." Ans. Br., at 12-13. While Appellee is correct that there is a limited exception to the physical presence requirement, it does not apply to the claims here. "Examining the cases where this rule is applied, we discover that in virtually all of them, the finding

that personal jurisdiction exists against a nonresident defendant who commits a tort outside of Florida involves some sort of communication directed into Florida for the purpose of fraud, slander, or other intentional tort." *Wiggins v. Tigrent, Inc.*, 147 So. 3d 76, 86 (Fla. 2d DCA 2014); *see also Reiss v. Ocean World, S.A.*, 11 So. 3d 404, 406-07 (Fla. 4th DCA 2009) (emphasis added) (finding that electronic communications into Florida did not give rise to a cause of action and did not satisfy long-arm statute, explaining that Florida courts "have held that the communication into Florida ***must be tortious in and of itself***."); *Becker v. Hooshmand*, 841 So. 2d 561, 562-63 (Fla. 4th DCA 2003) (cataloguing cases where physical presence was not required, ***all*** of which involved tortious communications into the state).

In other words, the exception to physical presence is only applied to communication-based causes of action, such as fraud, defamation, and slander, where the communications directed into Florida are tortious *in and of themselves* and give rise to the claim. There are no allegations that any particular communication of Appellant into Florida was tortious in and of itself nor are there any claims for such communication-based torts. The allegations instead include:

- "Lipsey has used his position and contacts with Florida to communicate regularly with Heistand in Florida to effectuate their plan to oust

Francis, devalue his member interest, and devalue Parkway." [App'x 0007 (Comp. at ¶ 6)];

- "Upon information and belief, Lipsey also communicated with Heistand through email, text, or telephone to effectuate the changes in management, and implement their plan to oust Francis in violation of Florida law as outlined in this complaint." [*Id.* at ¶ 8]; and

- "Lipsey has been in constant communication with human resources, information technology, legal, marketing and accounting departments located in Orlando and Jacksonville, Florida." [*Id.* at ¶ 8].

But these are all insufficient to satisfy the standard for committing a tort within Florida. The alleged communications with Heistand or other employees of Parkway are not tortious in and of themselves. The torts at issue in this case are not based upon such communications but rather Appellant's purported violations of his fiduciary duties as a corporate officer. Again, the causes of action in question do not *arise from* any communications directed into Florida that are tortious in and of themselves. Thus, Appellee has failed to sufficiently allege any acts or omissions on the part of Appellant that would satisfy section 48.193(1)(a)(2).

Appellee urges jurisdiction based on allegations that Appellant caused harm to Francis in Florida. Ans. Br. at 12, 14. However, out-of-state acts that cause injury, harm, and/or damages to a Florida resident do not satisfy the long-arm statute. *See ProAmpac Holdings, Inc. v. RCBA Nutraceuticals, LLC*, 388 So. 3d 41, 47 (Fla. 5th DCA 2022) ("[B]ecause the conduct

allegedly giving rise to the tort occurred outside of Florida, RCBA's alleged injury suffered in Florida is insufficient to establish long-arm jurisdiction."). "The wording of section 48.193(1)[(a)(2)] links jurisdiction to the 'arising' of a cause of action from a defendant's commission of tortious acts in Florida. This language necessarily focuses analysis not on where a plaintiff ultimately felt damages, but where a defendant's tortious conduct occurred." *Metnick & Levy, P.A. v. Seuling*, 123 So. 3d 639, 645 (Fla. 4th DCA 2013). "If the Legislature intended for [committing a tortious act in Florida] to encompass all tortious acts which were complete outside Florida but ultimately have consequences here only because a Florida resident suffers damages, we believe it would be incumbent on the Legislature to make that statutory purpose clear in the plainest of language." *Korman v. Kent*, 821 So. 2d 408, 410-11 (Fla. 4th DCA 2002); *see also Kaminsky v. Hecht*, 272 So. 3d 786, 788 (Fla. 4th DCA 2019) (collecting cases from all district courts and concluding "a majority of the district courts, including this court, have held that 'mere injury in Florida resulting from a tort committed elsewhere is insufficient to support personal jurisdiction over a nonresident defendant.'"). In short, even if Appellant's out-of-state acts caused harm to Parkway or Appellee as Florida residents, this is insufficient to satisfy the long-arm statute.

IV. Appellee Has Not Alleged or Established General Jurisdiction Because Appellant Has Not Engaged in "Substantial and Not Isolated" Activity in Florida in His Personal Capacity.

Appellee failed to allege sufficient facts or establish general personal jurisdiction over Appellant in his personal capacity under section 48.193(2). As set forth in the Initial Brief, general personal jurisdiction over a corporate officer in his *personal capacity* can only arise from the officer's contacts with the state in his *personal capacity*. Initial Brief at 17-20. *See Wiggins v. Tigrent, Inc.*, 147 So. 3d 76, 85 (Fla. 2d DCA 2014); *Carter v. Estate of Rambo*, 925 So. 2d 353, 354 (Fla. 5th DCA 2006); *Biloki v. Majestic Greeting Card Co.*, 33 So. 3d 815, 821 (Fla 4th DCA 2010). Appellee never refutes the law on this issue. Instead, Appellee merely cites Appellant's various actions in his capacity as CEO of Parkway as grounds for jurisdiction. Specifically, Appellee references only that Appellant "oversaw and directed Parkway's Florida operations; made major decisions for the Florida-based company; regularly communicated with the company's Florida departments; routinely visited Florida; and communicated with Heistand in Florida through email, text, or telephone." Ans. Br., at 19-20. All such actions were done in Appellant's

capacity as CEO of Parkway and cannot form the basis of general personal jurisdiction over Appellant in his *personal* capacity.[2]

V. Appellee Misapplies the Corporate Shield Doctrine and Fails To Supply Any Evidence In Opposition To Applying The Doctrine.

As Appellee concedes, "[t]he corporate shield doctrine is designed to protect non-residents from being haled into Florida to defend an action filed against him personally in a forum with which his only relevant contacts are acts performed totally outside the forum state and not for his own benefit but for the exclusive benefit of his employer." Ans. Br., at 20-21 (internal quotation omitted). In this case, Appellee only alleges that Appellant engaged in conduct in Appellant's official capacity as CEO of Parkway, which falls squarely within the protection of the corporate shield doctrine.

Nonetheless, Appellee cites *Allerton v. State Department of Insurance*, 635 So. 2d 36 (Fla. 1st DCA 1994), for the proposition that the mere allegation of an intentional tort "aimed at" a Florida plaintiff renders the corporate shield automatically inapplicable. *See* Ans. Br., at 21. Appellee's argument is

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[2] Appellee relies upon *Hatfield v. AutoNation, Inc.*, 915 So. 2d 1236 (Fla. 4th DCA 2005). *See* Ans. Br., at 19. That case appears to be alone against the weight of authority, which requires a corporate officer to have *personal* contacts with Florida (*see* Initial Brief at 17-20) and requires such contacts to be "continuous," "systematic," "extensive," and "pervasive." *See, e.g.*, *Trustees of Columbia Univ. in City of New York v. Ocean World, S.A.*, 12 So. 3d 788, 794 (Fla. 4th DCA 2009).

unavailing in light of more recent case law. For example, in *Rensin*, the First District Court of Appeal found that, "[i]n each of these cases where jurisdiction was found [despite the corporate shield doctrine], the plaintiff **produced evidence** of the specific conduct on the part of the corporate officer that constituted fraud or an intentional tort. In each case, the nonresident corporate officer **personally** and intentionally engaged in the tortious conduct." *Rensin v. Att'y Gen.*, 18 So. 3d 572, 575-76 (Fla. 1st DCA 2009) (emphasis added). Here, Appellee only relies upon unsupported allegations, not evidence. Also, Appellee only references Appellant's actions as CEO of Parkway, not any action in Appellant's personal capacity. Such unsupported allegations that Appellant engaged in acts in only his **official** capacity as CEO of Parkway are insufficient to defeat the corporate shield doctrine.

Moreover, all of Appellee's allegations are mere conclusions and conjecture. For example, Appellee asserts that Appellant's conduct was not in the best interests of Parkway and was guided by Appellant's self-interest. Ans. Br. at 22. But Appellee never alleged any facts beyond Appellant increasing his compensation (which, in reality, Appellant was not empowered to do but was something only the members of Parkway had authority to do) and withholding material information from Appellee. Appellee concludes that these two acts necessarily equate to the commission of an intentional tort.

Ans. Br. at 22. Even if Appellee had proffered sufficient evidence to establish that these allegations were true (which he did not), it is not clear how such conduct rises to the level of intentional misconduct as opposed to the official acts of a CEO that would likely fall under the business judgment rule.

VI. Due Process Considerations Do Not Support Exercising Personal Jurisdiction Over Appellant.

"To support an exercise of specific personal jurisdiction, the defendant's contacts with the forum state must directly relate to the challenged conduct or transaction." *Southern Wall Products, Inc. v. Bolin*, 251 So. 3d 935, 940 (Fla. 4th DCA 2018) (citations omitted). In other words, a defendant's contacts must **both** (1) directly give rise to the plaintiff's causes of action, **and** (2) occur within the state.

Here, Appellee cannot identify any of Appellant's in-state contacts that meet both requirements. Appellant's only alleged contacts within the state do not give rise to plaintiff's claims. [App'x at 0006-07]. Furthermore, each of these alleged contacts occurred in Appellant's capacity as CEO of Parkway, not in his personal capacity. Because of these deficiencies, Appellant could not possibly expect to be haled into court in Florida in his personal capacity.

Appellee provided no argument to the alternative. Instead, Appellee states that merely because Appellee made the conclusory allegation that Appellant "committed an intentional tort in Florida against a Florida resident,

both the statutory predicate and due process are satisfied. *See* Ans. Br., at 23-24. However, as explained in detail above, Appellee has not alleged that Appellant committed an intentional tort in his personal capacity. *See* Section IV, *supra*. Thus, Appellant could not reasonably anticipate being haled into a Florida court in his personal capacity.

Furthermore, *Calder v. Jones*, 465 U.S. 783 (1984) does not help Appellee's position. Appellee cites *Calder* for the proposition that a person's "status as an employee 'does not somehow insulate [him] from jurisdiction." Ans. Br. at 24. However, *Calder* involves intentional libelous communication—which is tortious in and of itself. *Calder*, 465 U.S. at 789-90. As explained in detail above, there is no allegation that Appellant made communications that are tortious in and of themselves such that Appellant's actions may be transformed from his official capacity into his personal capacity. *See* Section IV, *supra*.

VII. Appellee Should Not Be Granted Another Opportunity To Amend.

To the extent this Court finds the jurisdictional allegations lacking, Appellee seeks leave to file an amended complaint. But Appellee is on his third iteration of the complaint,[3] and he has only made allegations "to the best of

[3] *See* Ans. Br., at 25 n.6 (admitting that Appellee has already amended his complaint twice).

[Appellee's] knowledge and belief." [App'x at 0036]. Appellee has provided no explanation for why another amendment will cure the current defects. *See Price v. Morgan*, 436 So. 2d 1116, 1122 (Fla. 5th DCA 1983) (affirming denial of leave to amend because "when asked how he would amend further if given the opportunity, plaintiff's counsel could not demonstrate what further amendment would be made").

CONCLUSION

For all the above-stated reasons, this Court should reverse the trial court's ruling, and order the trial court to grant Appellant's motion to dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts e-Filing Portal and is being served, on August 23, 2024, on all counsel of record listed on the below Service List via e-mail generated by the Florida Courts e-Filing Portal and to Pro Se Appellants via U.S. Certified, Return-Receipt Mail.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in Arial 14-point font, the word count is 4,000 words or less, and this document complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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