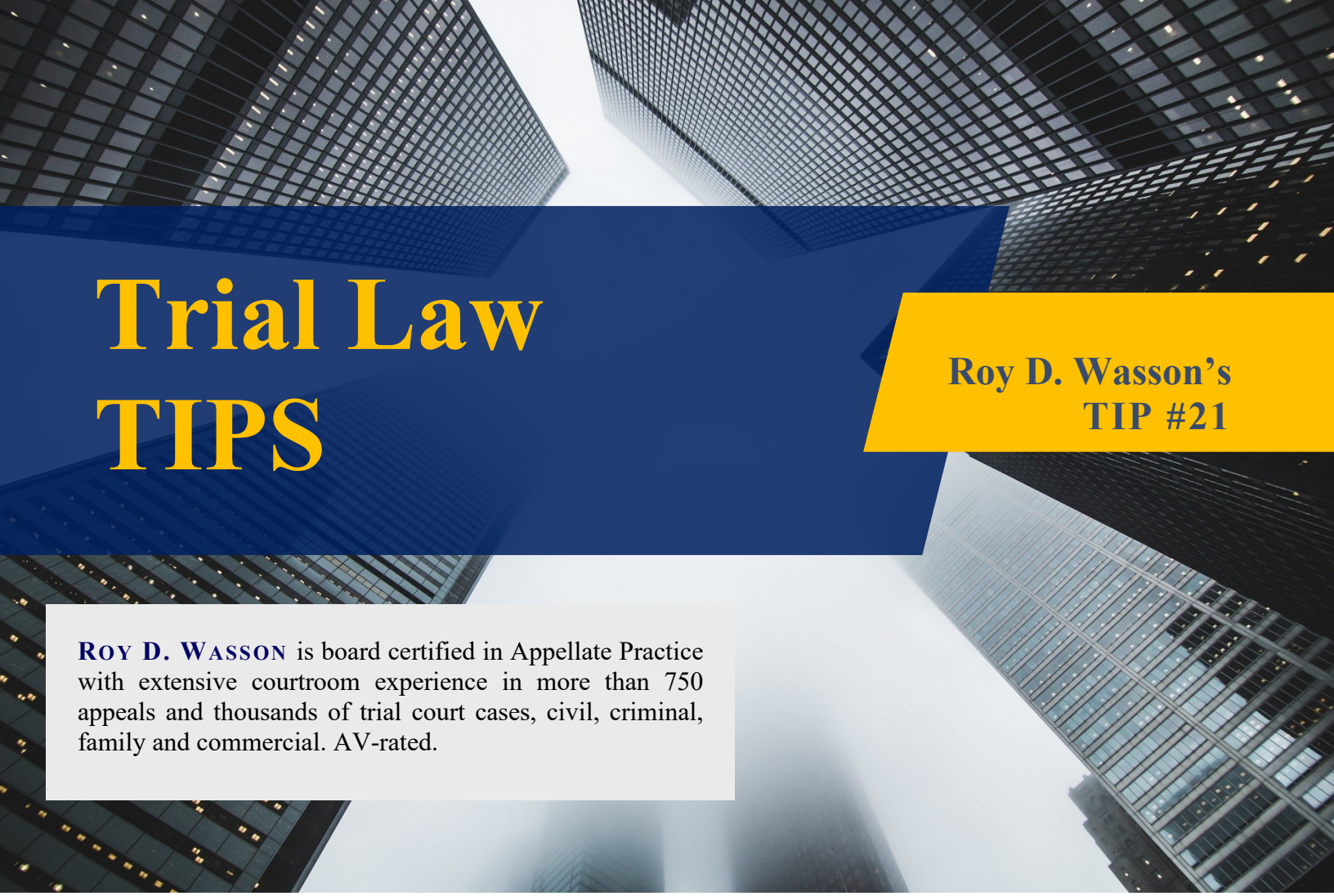

Trial Law TIPS

Roy D. Wasson's TIP #21

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

The Meat of Establishing Jurisdiction Under *Venetian Salami*—Discovery and Affidavits Are Needed—and That's No Baloney

Introduction

Although most of your caseload may be against defendants who are citizens and residents of Florida, or against companies which plainly are doing business in Florida and without any question are subject to the personal jurisdiction of Florida's courts, other cases may require you to go to war on the jurisdictional issue. Product liability cases against foreign manufacturers, commercial tort and contract cases, and other litigation involving out-of-state defendants often require you to litigate the issue of the court's power to adjudicate a controversy over the foreign party. For those of you who have not yet engaged in the pre-trial battle of personal jurisdiction, this is a primer on the subject. For the battle-scarred veteran of such fights, this will serve as a refresher of the basics.

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The lead case on the subject of what must be pleaded and proven to establish personal jurisdiction over a foreign defendant is *Venetian Salami Co. v. Parthenais* 554 So. 2d 499 (Fla. 1989). That decision from the Supreme Court of Florida established that the jurisdictional inquiry is a two-step process, and the decision established the basic procedure for resolving those two inquiries. Hundreds of cases cited since *Venetian Salami* have refined and shaped the contours of those procedures.

The first step in the jurisdictional inquiry is to satisfy the pleading requirement. "First, the complaint must allege sufficient facts to bring the action within the ambit of one of the various jurisdictional criteria contained in Florida's long-arm statute found in Section 48.193, Florida Statutes." *Law Offices of Sybil Shainwald v. Barro*, 817 So. 2d 873, 875 (Fla. 5th DCA 2002). However, simply establishing factually that the defendant falls within the long-arm statute is itself insufficient to support the exercise of jurisdiction over a recalcitrant party.

It is a popular misconception among Florida lawyers that the Florida long-arm statute on its face satisfies the constitutional "minimum contacts" analysis of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Supreme Court in *Venetian Salami* expressly rejected the argument that merely satisfying one of the statutory bases for jurisdiction would simultaneously comport with the "traditional notions of fair play and substantial justice" which are the underpinnings of *International Shoe*'s "minimum contacts" requirement.

In a case decided ten years before *Venetian Salami,* the Second District held: "under a given factual situation, even though a nonresident may appear to fall within the wording of a long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state." *Osborn v. University Society, Inc.*, 378 So. 2d 3873, 874 (Fla. 2d DCA 1979). In approving the *Osborn* analysis, the Supreme Court in *Venetian Salami* stated: "the mere proof of any of one of these several circumstances enumerated in Section 48.193 as the basis for obtaining jurisdiction of nonresidents ***does not*** automatically satisfy the due process

requirement of minimum contacts." *Venetian Salami, supra*, at 502 (emphasis added).

Pleading Requirements

In order to obtain "long-arm" jurisdiction over a non-resident defendant and to establish a basis for extra-territorial service of process (or service on a statutory agent of a non-resident), it is necessary to sufficiently plead facts which would support such jurisdiction and service. Sometimes you don't know much more about the defendant's contacts with Florida than the fact that a product bearing the defendant's trademark which was purchased from a store in Florida malfunctioned and caused the injury.

The statute which is used most commonly to support the exercise of long-arm jurisdiction over a non-resident is § 48.193, Fla. Stat. The plaintiff has the initial burden to plead in the complaint the statutory basis for service under the long-arm statute. *Venetian Salami, supra*, at 502. In the event that you are unaware of the specifics of the defendant's contacts with Florida when you first draft the complaint, you may find it comforting to learn that you are not required to plead specific facts which fall under the provisions of the long-arm statute. "The plaintiff may satisfy this initial burden either by alleging the ***language of the statute without pleading supporting facts***, or by alleging specific facts that indicate that the defendant's actions fit within one of these sections of Florida's long-arm statute. . . ." *Becker v. Hooshmand*, 2003 Fla. App. LEXIS 3147, 28 Fla. L. Weekly D693 (Fla. 4th DCA March 12, 2003)(emphasis added)[1].

If the complaint fails to contain either allegations of specific facts which would support personal jurisdiction over a non-resident or fails to track the language of § 48.193 or another long-arm statute, the defendant may move to dismiss without any supporting affidavit or other evidence strictly on the insufficiency of the pleading. However, if the complaint pleads such facts or tracks the statutory language, the defendant is held to a higher burden than simply challenging the sufficiency of the plaintiff's pleading.

[1]The full text of the statute is printed at the end of this article.

Necessity of Affidavit by Defendant

Assuming that you have properly pled a jurisdictional basis against a non-resident defendant, a defendant must make an evidentiary showing of the inaccuracy of your jurisdictional allegations. "Affidavits are generally necessary to support these challenges because the motion, by itself, only raises the legal sufficiency of the pleadings which is not an issue in these proceedings." *Law Offices of Sybil Shainwald v. Barro* 817 So. 2d 873, 876 (Fla. 5th DCA 2002). Should the defendant fail to file an affidavit or other admissible evidence refuting your jurisdictional allegations, no amount of persuasive argument by defense counsel should be accepted by the trial judge on the factual dispute of the defendant's connections to Florida.[2]

Further, if the defendant does not file the affidavit by the time of the hearing on its motion to dismiss, a ruling by the judge denying that motion will render it too late for the defendant to belatedly file such an affidavit. *See Becker, supra*, at *6 (affirming trial court's refusal to consider defendant's affidavit submitted ten days after the trial court denied the motion to dismiss). If, however, the defense timely files an affidavit which factually contests your jurisdictional allegations, you may not rest on the pleadings yourself.

Necessity of Affidavit or Other Evidence from Plaintiff

Once the defendant has filed a motion to dismiss based upon lack of personal jurisdiction, and supported that motion with evidence refuting your jurisdictional allegations, "[t]he burden then shifts to the plaintiff to prove by affidavit or other sworn statement that jurisdiction is proper." *Northwestern Aircraft Corp. v. Stewart*, 2003 Fla. App. LEXIS 3784 at *6, 28 Fla. L. Weekly D782 (Fla. 5th DCA March 21, 2003). Thus, you must find someone with personal knowledge concerning the defendant's contacts with Florida which you have plead to support jurisdiction over that defendant. Sometimes you can have the luck of locating disgruntled ex-employees who can attest to a corporation's activities in Florida. Other times, especially in commercial cases, your client has personal knowledge concerning the defendant's presence in Florida. But what about in the ordinary product case in which the

only contact with Florida your client has personal knowledge is that the fact that one of the defendant's products ended-up in this state? Never fear, the answer is near.

Jurisdictional Discovery—The Meat of the Issue

As soon as you receive a motion to dismiss filed by a non-resident defendant which raises a challenge to personal jurisdiction, you need to send out interrogatories and a request for production seeking detailed information about the defendant company's contacts with Florida. In some cases, you may want to send out this discovery along with the service of the initial process itself, where you can anticipate a tough battle on the jurisdictional issue.

It has been more than ten years since the Supreme Court of Florida expressly recognized the permissibility of conducting limited discovery while the jurisdictional issue is being litigated, but defendants still make efforts to fight such discovery, arguing to trial judges that they should not have to submit to depositions and other forms of discovery until jurisdiction is resolved. That argument was rejected by the Supreme Court in *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992). In that case, the Supreme Court "adopt[ed] the federal courts' policy of allowing discovery on questions of jurisdiction because limited discovery in such instances will provide the trial court with additional information on which to base its decision regarding jurisdiction." *Id.* at 1284. The Supreme Court accepted the approach of the Fifth Circuit in *Gleneagle*, and overruled the Third District's contrary decision, agreeing "that to require a plaintiff to rely solely on a defendant's affidavits regarding jurisdiction would give the defendant who fails to comply with discovery, an unfair advantage in the proceedings." *Id.*

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[2] *See generally*, e.g. *Trial Law "Tip" of the Week—No. 2: Don't Tell the Judge What Happened Outside the Courtroom (He or She Is Not Supposed to Believe You); Blimpy Venture, Inc. v. Palms Plaza Partners, Ltd.,* 636 So. 838, 840 (Fla. 4th DCA 1994)(unsworn representations of counsel and argument in motion insufficient to establish factual matters).

You often will have to attend hearings on motions to compel to force the defendant to fully respond to such discovery. And you should use creativity to obtain the jurisdictional information in admissible form, such as using requests for admissions to authenticate advertising published in Florida and other discovery techniques which will provide you with admissible evidence. Those who are reading TIP who already well-experienced in this area should have some great forms for jurisdictional discovery. This is an invitation any list mates who have such discovery to post sets for others to download for future use.

Limited Evidentiary Hearing

Even when both parties submit opposing affidavits on the jurisdictional issue, very often those affidavits can be harmonized because one of them will be much more specific than that other. "If the affidavits can be harmonized, the trial court can make a decision based upon facts that are essentially undisputed." *Northwestern Aircraft Capital Corp.*, *supra*, at *6.

What happens, though, in the situation where the defendant files an affidavit which specifically contests in a detailed fashion each of the factual allegations of the complaint, and all you can do is to present a counter-affidavit which conflicts with the defendant's affidavit? "If the affidavits are in direct conflict and cannot be reconciled, then ***the trial court must hold a limited evidentiary hearing*** to determine jurisdiction." *Law Offices of Sybil Shainwald, supra*, at 875(emphasis added).

You should think about conducting jurisdictional discovery even in those circumstances in which you have a strong affidavit, in case the trial court holds that your affidavits are in direct conflict and requires an evidentiary hearing. If all you have to go on is the testimony of your client or other affiant which will add nothing to the affidavit, you may lose the evidentiary hearing. Therefore, you should be prepared to establish the facts you learned in your jurisdictional discovery. And don't just wave documents around under the judge's nose at the hearing. Put exhibit stickers on them and move them into evidence. Your appellate lawyer will thank you later.

Establishing the Substance of the Long-arm Contacts

This short article makes no effort to address the topic of what evidence you must introduce to satisfy any of the statutory bases for long-arm jurisdiction. For example, if you do have to engage in an evidentiary hearing to establish personal jurisdiction, you need to think about what facts you will need to present to establish that "the defendant was engaged in solicitation or service activities within the state," or otherwise fell within the provisions of § 48.193, Fla. Stat. A good start at learning the sorts of things that will and will not satisfy the substantive requirements of the long-arm statute are addressed in the Supreme Court's decision in *Wendt v. Horowitz,* 822 So. 2d 1252 (Fla. 2002). You trial lawyers know how to establish facts before the trier-out-of-fact, so I will leave that area to you.

The Problem of (Optional) Immediate Appealability

When you win the defendant's motion to dismiss based upon lack of personal jurisdiction, the defense can take an immediate interlocutory (that's a fancy word for "nonfinal") appeal pursuant to Fla. R. App. P. 9.130 (a)(3)(C)(i). That is not the problem, but may be blessing in disguise. If the defendant appeals immediately, you will be able to obtain the appellate court's ruling on the jurisdictional issue before you go through a long and expensive trial of a complex product liability action or other, equally costly litigation.

The problem is if the defendant chooses to defer the appeal until the end of the case and after you have won a big judgment in your favor. Rule 9.130(g) expressly provides that the availability of an immediate appeal for the limited class of orders described therein "shall not preclude initial review of a non-final order on appeal from the final order in the cause." Ninety-nine times out of one hundred a defendant who loses a motion to dismiss based on jurisdictional grounds will take an immediate appeal (in large part because defense counsel can bill for it). Occasionally the issue will not be appealed immediately, but will be held in reserve for the defense to use if it loses the trial.

If no immediate appeal is taken, don't forget about the issue. You should consider continuing to establish record evidence of the

defendant's contacts with Florida during pre-trial proceedings and even at the trial itself, because such evidence can be used in the final appeal, if the jurisdictional issue is raised then.

In *Parrish v. AmSouth Bank, N.A.*, 657 So. 2d 1189 (Fla. 4th DCA 1995), the defendant filed a motion to dismiss alleging that the complaint failed to sufficiently plead personal jurisdiction, which motion was denied by the trial court. Rather than appealing immediately, the defendant waited until after trial and raised the jurisdictional issue on a final appeal.

The court in *Parrish* agreed that the complaint was insufficient to support personal jurisdiction but affirmed the judgment in favor of the plaintiff nonetheless, "find[ing] the denial of that motion has, in light of subsequent events, become harmless error." *Id*. at 1190. In a decision which you should keep in your research file for future reference, the Fourth District in *Parrish* held as follows: "While we agree that the motion to dismiss should have been granted, we conclude that the error is harmless. ***Proof at trial established that she was doing business in this state*** so as to subject her to jurisdiction . . . ." *Id.* (emphasis added).

Some would argue that the issue on appeal should have been whether the jurisdiction over the defendant had been established at the time of the motion to dismiss, and that the appellate court should have looked at a "snapshot" of the record frozen in time as of that ruling, rather than allowing events at trial to render the error harmless. Whatever your personal philosophy, the decision is there for you to use in your favor, should the "problem" arise of the defendant not appealing immediately.

In closing on the subject of appeals from trial courts' rulings on such motions, don't forget to have a court reporter in attendance at the limited evidentiary hearing which must be conducted where the affidavits are in direct conflict. If you present witnesses to testify to the defendant's connections with Florida and minimum contacts, but there is no record of that testimony, it will be next to impossible to reverse the dismissal of your case if the court should accept the defendant's position instead of yours. It is hard enough to reverse factual determination by trial court even when there is a full record.

Conclusion

Remember that pleading the statutory basis for long-arm jurisdiction will not be enough in a case where jurisdiction is hotly disputed. The defendant will have to file an affidavit to overcome your jurisdictional allegations, but you will need to file your own affidavit to establish "minimum contacts" and keep the case alive. The possibility of an evidentiary hearing to resolve conflicts in the affidavits is itself a good enough reason to conduct jurisdictional discovery, whether or not you believe that the opposing affidavits can be harmonized in your favor. Make a record to support the trial judge on appeal, and good luck in hauling the recalcitrant foreign tortfeasor before the tribunals we know we can trust to do justice: here in Florida.

Keep Tryin!

Roy

The long-arm statute reads as follows:

> § 48.193. **Acts subjecting person to jurisdiction of courts of state**
>
> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(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.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.