

IN THE  
SUPREME COURT OF FLORIDA

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Case No. \_\_\_\_\_  
Lower Tribunal No.: 2D 02-2892

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KEVIN O'HALLORAN, as Trustee  
for Keller Financial Services of Florida,  
Inc., and KELLER FINANCIAL  
SERVICES, INC.,

Petitioners,

vs.

ERNIE PASSEOS, INC., d/b/a  
LIBERTY HARLEY DAVIDSON,

Respondents.

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On Appeal from the Second District Court of Appeal

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**PETITIONERS' BRIEF ON JURISDICTION**

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## **QUESTION PRESENTED**

This case presents the Court with a question as to which the Court has recently noted "confusion" among the district courts of appeal and as to which the decision of the Second District Court of Appeal (the "Second DCA") expressly and directly conflicts with decisions of the First and Third District Courts of Appeal:

WHETHER THE COMMISSION OF A TORT CAUSING INJURY IN FLORIDA IS SUFFICIENT TO SATISFY LONG-ARM JURISDICTION UNDER SECTION 48.193(1)(b) OF FLORIDA STATUTES.

Appellants Kevin O'Halloran, as Trustee for Keller Financial Services of Florida, Inc., and Keller Financial Services, Inc. (collectively "KFS") respectfully request that the Court exercise its jurisdiction under Rule 9.130(a)(2)(A)(iv) of Florida Statutes in order to resolve this important conflict.

## **STATEMENT OF THE CASE AND FACTS**

On or about May 27, 2000, KFS filed its Complaint in the Circuit Court for the Sixth Circuit (the "Trial Court"), alleging one count of conversion against Appellee Ernie Passeos, Inc. d/b/a Liberty Harley Davidson ("Liberty") and another count of conversion against Don Bender. (R.1-18). KFS is a Florida corporation engaged in the financial services business. (R.3, ¶ 7). Liberty is an Ohio corporation engaged in the retail sale of motorcycles. (R.3, ¶ 8). Bender was the general manager of Bennett Motorcycles, Inc., a now-defunct corporation that previously did business in Florida as a motorcycle retailer. (R.3-4, ¶¶ 9-10).

On or about November 23, 1996, KFS and Bennett entered into a

“Wholesale Security Agreement” (“Floorplan Agreement”), pursuant to which Bennett pledged its inventory held for sale as collateral for a loan. (R.4, ¶ 12). After KFS had duly perfected its security interest in Bennett’s inventory, Bennett defaulted on the Floorplan Agreement in September of 1997. (R.4, ¶¶ 13-14).

On or about February 13, 1998, Liberty made a bulk, commercial purchase of ten (10) motorcycles from Bennett. (R.4-5, ¶ 15). Liberty’s counsel described the transaction at the March 6, 2002 hearing on Liberty’s motion to dismiss:

And so what happens is four years ago my client is down here [in Florida] on vacation and sees these motorcycles and buys ten of them. Now, how does he do that? In the affidavit that is before this Court, he goes back up to Ohio, he makes contact with Mr. Bender or somebody from Bennett, and says, “I would like to buy some of your motorcycles.”

They make a deal and he buys ten motorcycles. He pays for them in full to Bennett, or Mr. Bender, and he gets delivery of the motorcycles.

(R.31, ll. 13-23).

Mr. Passeos further described the transaction in his affidavit:

Although Liberty purchased the motorcycles described in the complaint, it did so as a result of a purchase made through the office of Liberty located in the State of Ohio; the motorcycles were shipped by Bennett Motorcycles, Inc. and delivered to Liberty in Ohio; Liberty purchased 10 motorcycles from Bennett Motorcycles. . . .

(R.59-60, ¶ 14).

Bennett did not remit the proceeds of the sale to KFS, as required by the Floorplan Agreement. (R.5, ¶ 16). Moreover, Liberty has since sold some or all of the motorcycles, and has refused to remit the proceeds of those sales, or to return the motorcycles themselves, to KFS despite demand. (R.6, ¶¶ 20-21).

On February 6, 2002, Liberty moved to dismiss KFS's Complaint for lack of

personal jurisdiction. (R.19-22). On June 12, 2002, the Trial Court denied Liberty's motion. (R.86). On July 10, 2002, Liberty appealed the decision to the Second DCA. (R.87). The Second DCA reversed the Trial Court's finding that the Trial Court had personal jurisdiction over Liberty. (Order pp. 2, 5). In so ruling, the Second DCA solely addressed the applicability of Florida's long-arm statute, finding that Liberty's conduct was not sufficient to satisfy section 48.193(1)(b) of Florida Statutes. (Order p. 5). The Court expressly reasoned:

The mere fact that an injury to a Florida resident may have resulted is insufficient to establish jurisdiction in the Florida courts.

On October 7, 2003, the Second DCA denied KFS's motions seeking rehearing en banc and certification to this Court. KFS timely filed its Notice to Invoke Discretionary Jurisdiction on November 6, 2003.

## SUMMARY OF ARGUMENT

This case presents the Court with the following question as to which the Court has recently noted "confusion" among the district courts of appeal:

WHETHER THE COMMISSION OF A TORT CAUSING INJURY IN FLORIDA IS SUFFICIENT TO SATISFY LONG-ARM JURISDICTION UNDER SECTION 48.193(1)(b) OF FLORIDA STATUTES.

KFS respectfully requests that the Court exercise its jurisdiction under Rule 9.130(a)(2)(A)(iv) over this matter in order to resolve this important conflict.

The Second DCA expressly answered the above-quoted question in the negative in this case, stating:

The mere fact that an injury to a Florida resident may have resulted is insufficient to establish personal jurisdiction.

(Order p. 5) (citing Tex. Guaranteed Student Loan Corp. v. Ward, 696 So. 2d 930, 932 (Fla. 2d DCA 1997)). The Second DCA's decision expressly and directly conflicts with: Dean v. Johns, 789 So. 2d 1072 (Fla. 1st DCA 2001); Walter Lorenz Surgical, Inc. v. Teague, 721 So.2d 358 (Fla. 1st DCA 1998); Allerton v. Department of Ins., 635 So.2d 36 (Fla. 1st DCA 1994); International Harvester Co. v. Mann, 460 So.2d 580 (Fla. 1st DCA 1984); Wood v. Wall, 666 So.2d 984 (Fla. 3d DCA 1996); and Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3rd DCA 1981), each of which states that the commission of a tort causing injury in Florida is sufficient to satisfy long-arm jurisdiction.

Further, this Court has recently noted "confusion" among the appellate courts on this very issue:

We do not decide the broader issue of whether injury alone satisfies the

requirement of section 48.193(1)(b), as that issue is not the basis for this Court's jurisdiction. However, we note that the federal courts that have addressed this issue, although acknowledging the confusion among Florida's district courts, have adopted a broad construction of section 48.193(1)(b), holding that the commission of torts out of state that cause an injury to an in-state resident satisfies Florida's long-arm statute. See, e.g., Posner v. Essex Ins. Co., 178 F.3d 1209, 1216-17 (11th Cir.1999); Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 257 (11th Cir.1996); Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033-34 (11th Cir.1991); Bangor Punta Operations, Inc. v. Universal Marine Co., 543 F.2d 1107, 1109 (5th Cir.1976); Rebozo v. Washington Post Co., 515 F.2d 1208, 1211-12 (5th Cir.1975); Hollingsworth v. Iwerks Entm't, Inc., 947 F.Supp. 473, 478 (M.D.Fla.1996); Interfase Mktg., Inc. v. Pioneer Techs. Group, Inc., 774 F.Supp. 1355, 1357 (M.D.Fla.1991).

KFS respectfully requests that the Court exercise its jurisdiction under Rule 9.030(a)(2)(A)(iv) in order to resolve this important conflict.

#### **STANDARD OF REVIEW**

The Court has discretion under Rule 9.130(a)(2)(A)(iv) to accept jurisdiction over a decision of a district court of appeal that expressly and directly conflicts with that of another district court of appeal.

## ARGUMENT

The decision of the Second DCA squarely provides this Court with an opportunity to resolve the conflict among the jurisdictions on whether the commission of a tort causing injury in Florida is sufficient to establish long-arm jurisdiction. The Complaint plainly alleges that KFS is a Florida corporation, which acted as manager and administrator for a number of related businesses, all of which were located in Florida cities. (R.1-3, ¶¶ 2, 6-7). The clear inference is that any financial harm that KFS suffered was suffered in Florida, and Liberty has offered no evidence to contradict that proposition. Moreover, the Second DCA's statement that "[t]he mere fact that an injury to a Florida resident may have resulted is insufficient to establish personal jurisdiction" strongly suggests that that Court found, at a minimum, that the injury in this case occurred in Florida.<sup>1</sup>

The conflict between the Second DCA, on the one hand, and the First and Third District Courts of Appeal, on the other, could not be plainer. The positions of the respective courts are juxtaposed. Cf. Dean v. Johns, 789 So. 2d 1072, 1076 (Fla. 1st DCA 2001) ("The trial court should decide first, whether [the defendant] has engaged in acts or omissions that injured [the plaintiff] in Florida, and second, whether [the plaintiff] stated a cause of action in tort arising in substantial part from such acts or omissions."); Walter Lorenz Surgical, Inc. v. Teague, 721 So.2d 358, 360 (Fla. 1st DCA 1998) (same); Allerton v. Department of Ins., 635 So.2d 36, 39 (Fla. 1st DCA 1994) ("[W]e do not believe that the supreme court intended in Doe

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<sup>1</sup>Nothing in this Brief should be construed as an admission that the only contact with Florida in this case was the infliction of injury in Florida.

to deprive a Florida plaintiff, injured by the intentional misconduct of a nonresident corporate employee expressly aimed at him, of the right to obtain personal jurisdiction over that employee in a Florida court."); International Harvester Co. v. Mann, 460 So.2d 580, 581 (Fla. 1st DCA 1984) ("It is well-established that the commission of a tort for purposes of establishing long-arm jurisdiction does not require physical entry into the state, but merely requires that the place of injury be within Florida."); Wood v. Wall, 666 So.2d 984, 986 (Fla. 3d DCA 1996) (citing favorably the above-quoted language from Mann); Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3rd DCA 1981) ("More importantly, the affidavits are inadequate to defeat jurisdiction in light of case law holding that the place of injury is the location of the tortious act for purposes of long-arm jurisdiction under Florida's statute."). In fact, in opposing KFS's Motion to Certify Conflict, Liberty did not argue, and could not have argued, that a conflict did not exist; rather, Liberty strictly argued, without factual support, that the injury in this case did not occur in Florida.

Further, as this Court noted in Wendt, the Eleventh Circuit Court of Appeals (the "Eleventh Circuit") and the federal district courts in Florida have noted the absence of state court guidance on the issue presented in this case. As the Eleventh Circuit explained in Posner v. Essex Ins. Co., 178 F.3d 1209 (11th Cir.1999):

As explained in detail in Thomas Jefferson Univ. v. Romer, 710 So.2d 67, 70 (Fla. 4th Dist.Ct.App.1998) (Farmer, J., concurring and dissenting), the courts are deeply divided on the issue of whether a tortious act committed outside the state resulting in injury inside the state subjects the actor to jurisdiction in Florida under subsection (1)(b).

Several of the Florida district courts of appeal have concluded that (1)(b) does not extend jurisdiction to the out-of-state defendant under these circumstances. See, e.g., Texas Guaranteed Student Loan Corp. v. Ward, 696 So.2d 930, 932 (Fla.2d Dist.Ct.App.1997) ("The occurrence of injury alone in Florida does not satisfy section 48.193(1)(b)"); McLean Fin. Corp. v. Winslow Loudermilk Corp., 509 So.2d 1373, 1374 (Fla. 5th Dist.Ct.App.1987) (no jurisdiction under (1)(b) where alleged tortious act was "making of fraudulent representations in Virginia, by telephone"); Jack Pickard Dodge, Inc. v. Yarbrough, 352 So.2d 130, 134 (Fla. 1st Dist.Ct.App.1977) (no (1)(b) jurisdiction where injury occurred in Florida but alleged tortious act was servicing, outside state, of vehicle that caused injury). Other decisions of the Florida district courts of appeal, however, have reached the opposite conclusion. See, e.g., Wood v. Wall, 666 So.2d 984, 986 (Fla.3d Dist.Ct.App.1996) (allegations of intentional tortious acts by defendants in their states of residence calculated to cause injury in Florida sufficient to create jurisdiction under (1)(b)); Allerton v. State Dep't of Ins., 635 So.2d 36, 40 (Fla. 1st Dist.Ct.App.1994) (jurisdiction proper under (1)(b) where Florida plaintiff "injured by the intentional misconduct of a nonresident corporate employee expressly aimed at him").

Id. at 1216-17.

Given the lack of state court guidance on this critical state law issue, the Eleventh Circuit has repeatedly been left to predict the manner in which this Court would rule on the issue if confronted with it. See, e.g., Wammock v. Celotex Corp., 835 F.2d 818, 820 (11th Cir.1988) (in the absence of controlling state court precedent, federal court must predict how state supreme court would rule on issue). The Eleventh Circuit has emphatically taken a position juxtaposed to that of the Second DCA in this case, predicting that this Court would find that the alleged commission of an out-of-state tort causing injury in Florida is sufficient for long-arm jurisdiction. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 257 (11th Cir.1996) (holding that subsection (1)(b) extends jurisdiction over defendant whom plaintiff alleged caused injury in Florida through negligent drafting and review of

will, which occurred out of state); Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033-34 (11th Cir.1991) (applying former Fifth Circuit interpretation that personal jurisdiction existed under section 48.193(1)(b) where defendant's tortious act outside of the state caused injury in Florida); see also Bangor Punta Operations, Inc. v. Universal Marine Co., 543 F.2d 1107, 1109 (5th Cir.1976); Rebozo v. Washington Post Co., 515 F.2d 1208, 1212-13 (5th Cir.1975).

In light of this lack of state court guidance, this Court should accept jurisdiction over this case under Rule 9.030(a)(2)(A)(iv) and resolve the conflict as to whether the commission of a tort causing injury in Florida is sufficient for long-arm jurisdiction.

**CONCLUSION**

KFS respectfully requests that the Court exercise its jurisdiction under Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure to resolve the conflict among the district courts of appeal on the issue of whether the commission of a tort causing injury in Florida is sufficient for long-arm jurisdiction.

**CERTIFICATE OF SERVICE**

I CERTIFY that a true and correct copy of this Jurisdictional Brief was provided by mail to Peter M. Feaman, Esquire, Buckingham, Doolittle & Burroughs, L.L.P., 2500 North Military Trail, Suite 480, Boca Raton, Florida 33431 on this \_\_\_\_ day of November, 2003.

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Attorney

**CERTIFICATE OF TYPEFACE AND FONT SIZE**

This Jurisdictional Brief was written entirely in Times New Roman 14-point font, in accordance with Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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Attorney