

## Litigating in Florida: Updates and Recent Decisions

[www.bergersingerman.com](http://www.bergersingerman.com)

June 2010

### Florida Supreme Court Holds Passive Website of Non-Resident Can Constitute Tortious Act in State of Florida

On June 17, 2010, the Florida Supreme Court held that a non-resident defendant commits a tortious act of defamation in the State of Florida for purposes of the long-arm statute if the non-resident makes the defamatory statements about a Florida resident by posting those statements on a website, provided the statements are accessible in Florida and accessed in Florida, *Internet Solutions Corporation v. Marshall*, No. SC09-272. In this decision, the Florida Supreme Court responded to a certified question by the Eleventh Circuit Court of Appeals on the applicability of the Florida long-arm statute, Section 48.193(1).

Tabatha Marshall, a resident of Washington State maintains a non-commercial passive website on which she posted allegedly defamatory comments about a Nevada corporation with its principal place of business in Florida. The corporation brought suit in the Middle District of Florida and asserted jurisdiction under Florida Statutes Section 48.193(1)(b) which provides a basis for long arm jurisdiction for torts committed in this state, even if the tortfeasor is not in Florida.

In this case, the District Court dismissed the case finding that

although the tort of defamation had been committed by the publication of the defamatory statements (satisfying the first prong of the required analysis in determining jurisdiction, i.e., notions of fair play and substantial justice), dismissal was required because the website on which the statements were located was passive and there was no specific effort to transmit the information into Florida. The District Court concluded that the due process (or second prong) of the jurisdictional analysis was not satisfied because there were insufficient minimum contacts between the publisher of the materials, who loaded the information onto a computer in Washington, and the State of Florida.

The Eleventh Circuit agreed a tort had been committed but determined that Florida law was unsettled as to whether the passive publication of materials on a computer which could be, and in this case was, accessed by Florida residents constituted a tort committed in Florida. The Eleventh Circuit certified the question to the Florida Supreme Court. See *Internet Solutions Corp. v. Marshall*, 557 F.2d 1293, 1297 (11th Cir. 2009).

In a remarkable opinion, the Florida Supreme Court demonstrates that intellectualism, analysis and nuance are not dead. The court decided half of the jurisdictional question. The Court decided that posting defamatory information on a website

anywhere which is accessed by a Florida resident constitutes a tort in Florida. There is no requirement that the person posting the information has any intention of directing the information to Florida or attempts to target Florida residents. There is no requirement of any overt act or effort to transmit the information into Florida. The tort is completed when the defamatory information is published, which occurs when a Florida resident sees the information in Florida. It does not matter that the information was seen in Florida because a Florida resident was actively looking for it.

Therefore under Florida law the tort of defamation subjecting a tortfeasor to the statutory long arm jurisdiction of Fla. Stat. 48.193(1)(b) is committed in Florida if defamatory material is read (published) in Florida irrespective of where the information is loaded or stored and irrespective of any intent by the author to have the information directed into Florida. This satisfies the first prong of the long arm analysis. Under Florida law a tort has been committed in Florida.

Importantly, the Florida Supreme Court did not address the second prong of the jurisdictional analysis, i.e., the due process minimum contacts analysis. That issue was not part of the certified question from the Eleventh Circuit. However, the Court's holding as to the first prong is significant for every non-resident person or business with an active or passive website that may be alleged

to defame a Florida resident.

## Meeting Your Burden on Summary Judgement in Mortgage Foreclosure Cases

Recently, the Fourth District Court of Appeal in *Riggs v. Aurora Loan Services, LLC*, 35 Fla. L. Weekly D879a (Fla. 4th DCA 2010), held that it was error to grant summary judgment in favor of a purported mortgagee when the mortgagee failed to conclusively establish with record evidence that it was the lawful owner and holder of the note at issue.

In *Riggs*, a mortgagee sued to foreclose a mortgage alleging that it was the owner and holder of the underlying promissory note. The promissory note reflected an “endorsement in blank” which the Fourth DCA described as “a stamp with a blank line where the name of the assignee could be filled in above a pre-printed line.” Although the trial court entered summary judgment in favor of the mortgagee, the Fourth DCA reversed on the grounds that the mortgagee’s status as the owner and holder of the note had not

been conclusively established in the record.

Specifically, the Fourth DCA held that the “endorsement in blank,” being unsigned and unauthenticated, created a genuine issue of material fact as to whether the mortgagee was the lawful owner and holder of the note and/or mortgage. Without record evidence by way of supporting affidavit or deposition testimony, there was no evidence in the record to establish that the mortgagee validly owned or held the note. There was no evidence of an assignment, no proof of purchase of the debt, or any other evidence effecting a transfer.

*Riggs* demonstrates the need of the moving party in meeting its burden on summary judgment to demonstrate the absence of any disputed issues of fact, even in mortgage foreclosure cases.

\*On June 16, 2010, the Fourth District Court of Appeal withdrew its original opinion. *Riggs v. Aurora Loan Services, LLC*, 2010 WL 2382584 (Fla. 4th DCA 2010) now stands for the proposition that an “endorsement in bank”

satisfies a purported mortgagee’s obligation to meet its burden on summary judgment because the blank endorsement makes the promissory note “payable to the bearer” and allowed the promissory note to be “negotiated by transfer of possession alone.” The Court relied on sections 673.2011(1) and 673.3011(1), Florida Statutes in reaching this conclusion. Accordingly, because the mortgagor did not dispute the authenticity of his signature on the promissory note itself, and because the promissory note was an original document and self-authenticating, the Fourth District Court of Appeal held that the purported mortgagee satisfied its summary judgment burden and the judgment of foreclosure was properly entered. ■

---

*\*Courtesy of Berger Singerman’s Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

*The information in this newsletter is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. Berger Singerman is not responsible for any loss or damage occasioned to any person in connection with acting on or refraining from action as a result of any material in this publication.*

*The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.*

---

### Berger Singerman’s Dispute Resolution Team

Berger Singerman’s Dispute Resolution Team has earned its reputation for successfully and efficiently handling complex commercial litigation matters. Our Team members are committed to delivering appropriately aggressive litigation and creative dispute resolution. The Dispute Resolution Team’s leadership, depth and work ethic allow us to respond quickly in emergency situations and deliver desired results.

Mitchell W. Berger	MBerger@bergersingerman.com	Melanie A. Hines	MHines@bergersingerman.com
Anthony J. Carriuolo	ACarriuolo@bergersingerman.com	Sharon Kegerreis	SKegerreis@bergersingerman.com
Samuel C. Cozzo	SCozzo@bergersingerman.com	Charles H. Lichtman	CLichtman@bergersingerman.com
James C. Cunningham, Jr.	JCunningham@bergersingerman.com	Etan Mark	EMark@bergersingerman.com
Andrew M. Hinkes	AHinkes@bergersingerman.com	Stefanie C. Moon	SMoon@bergersingerman.com
James D. Gassenheimer	JGassenheimer@bergersingerman.com	Kelly A. O’Keefe	KOKeefe@bergersingerman.com
David L. Gay	DGay@bergersingerman.com	Monica Rossbach	MRossbach@bergersingerman.com
Gavin C. Gaukroger	GGaukroger@bergersingerman.com	Leonard K. Samuels	LSamuels@bergersingerman.com
Fred O. Goldberg	FGoldberg@bergersingerman.com	Frank Scruggs	FScruggs@bergersingerman.com
Rita Goldberg	RGoldberg@bergersingerman.com	Daniel H. Thompson	DThompson@bergersingerman.com
Gregory A. Haile	GHaile@bergersingerman.com	Michel O. Weisz	MWeisz@bergersingerman.com
René D. Harrod	RHarrod@bergersingerman.com	Jeffrey S. Wertman	JWertman@bergersingerman.com