IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA
FIFTH DISTRICT

SKYDIVE SPACE CENTER, INC.
AND CRISTOPHER PARENTE,

Appellant(s),

v.

Case No.: 5D18-0537
Lower Case No.: 05 2016 CA 013866

HENRI POHJOLAINEN,
DAVID STROBEL AND
TANDEM SOLUTIONS, INC.
D/B/A WINGS TANDEM

Appellee(s).
_____/

REPLY BRIEF OF APPELLANTS

AN APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA
The Honorable Charles Roberts

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STATUTES AND RULES

I. SUMMARY JUDGMENT WAS PREMATURE BECAUSE RELEVANT DISCOVERY WAS OUTSTANDING AND ONGOING INCLUDING EXPERT FORENSIC EXAMINATION OF THE LAPTOP OWNED BY ONE OF POHJOLAINEN'S COMPANIES, A MOTION TO COMPEL POHJOLAINEN TO PRODUCE DOCUMENTS AND MOTIONS TO AMEND. THE TRIAL COURT TACITCY ADMITS ITS DECISION WAS PREMATURE AS IT AFFECTS AMENDMENT AND COMPLICATES ONGOING DISCOVERY.

Pohjolainen ignores the trial court's own admission that its decision was premature and does not directly address the trial court's own concerns about having entered a premature Summary Judgment in his Answer Brief. (See Appellant's Initial Brief at page 19 through 23.) In fact, Pohjolainen does not address in his Answer Brief the trial court's concerns that it may have entered a Summary Judgment prematurely and that amending the Complaint on issues of agency is now a problem. Instead, Pohjolainen argues the Appellants should just rejoin Pohjolainen as a Defendant once they obtain discovery that he lied to the court. The problem with that argument is that discovery that relates to Henri Pohjolainen cannot be conducted as he is no longer a party. Even as a nonparty, Pohjolainen would object stating the court has already declared that he has no liability as a matter of law. Pohjolainen doesn't address why entry of Summary Judgment was proper before Skydive was ever able to examine the first computer of one of Pohjolainen's companies, the laptop used by his Wings Project Manager, David Strobel to edit and/or transmit the illegal recording, or before Skydive's

Motion to Compel Discovery directed to him was heard. There is no dispute that Defendant, Strobel did not own that laptop nor could Strobel permit inspection of a computer he didn't own. In fact, it was Pohjolainen who filed a motion on this as it related to the company's laptop computer and set the hearing four months after he filed the motion. (See Dok. 113, 124, R 851-852.)

II. POHJOLAINEN ARGUES ON APPEAL THAT SKYDIVE WAS "INTENDING TO THWART" THE SUMMARY JUDGMENT AND TRIES TO ANALOGIZE CASES NOT ON POINT.

Pohjolainen does not argue that pending examination of the laptop or an undecided Motion to Compel Production of Documents from him was either irrelevant or frivolous.

Appellee Pohjolainen has seized on some language in case law in his Answer Brief that if discovery commences at the time a Motion for Summary Judgment is pending that discovery should not be considered if it is intended to thwart the Summary Judgment as premature. So, what does "thwart" the Summary Judgment mean? It must mean discovery that is not reasonably calculated to lead to the discovery of admissible evidence to the issues and subject matter of the case.

Fla. R. Civ. P. 1.280(1) states:

> In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any

> books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. **It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added).**

So therefore, "thwart" is more likely to mean conducting nonsensical, irrelevant discovery solely to avoid entry of a summary judgment. It is highly doubtful that a court would consider forensic examination of a laptop computer owned by Pohjolainen or his companies or having a motion to compel heard on electronic discovery he didn't produce, which Pohjolainen did not seek a protective order, as a frivolous attempt to "thwart" the entry of a summary judgment. Pohjolainen does not dispute that the Appellants did not have the laptop for forensic examination or that a Motion to Compel Discovery directed to him was still pending.

This case is complex in that a forensic expert is involved and computers need to be examined with other digital data. Forensic experts are expensive and their use must be judicious. Discovery is often described as peeling away layers of an onion.

Appellant argues about delays of when motions were filed by Skydive then heard. First, there was never a Motion to Compel the Plaintiffs' to do anything filed by either Defendant. Second, (Dok. 113) reflects Pohjolainen's Motion for

Court Determination regarding the laptop was filed on July 27, 2017 but not heard until November 1, 2017 (Dok. 124). Pohjolainen's Motion for Summary Judgment was filed on October 21, 2017 (Dok. 125) but not heard until January 10, 2018 (R 1668-1670). The reality is the Court dockets are full, courts are understaffed, hearing time is at a premium and there are three lawyers in this Viera case, two in Volusia County and one in Pinellas County, Florida. There is no document or indication that the Plaintiffs were stalling or prohibiting any hearing or any discovery in this case. The trial court did not have that opinion. Also, piggy backing hearing time is discouraged by our trial courts.

III. IN THIS CASE, THE TRIAL COURT, LIKE THE TRIAL COURT IN *ARGUELLES*, MADE NO FINDING THAT PENDING DISCOVERY WAS IRRELEVANT. IN FACT, THE TRIAL COURT WAS AWARE OF ITS RELEVANCY AND EXPRESSED ITS CONCERNS.

Just as this Court found in *Arguelles v. City of Orlando*, 855 So.2d 1202 (Fla. 5th DCA 2003) the trial court here made no findings that pending discovery would be irrelevant to the Summary Judgment. See *Aguelles* at 1203 fn.1. In *Aguelles*, the case was set for trial. Two weeks after the trial weeks were announced a single deposition was noticed. This Honorable Court found "Entry of Summary Judgment in this case was premature because discovery had not been completed." *Id. at 1203*. In Pohjolainen's case, this case was not on a trial docket

as discovery continued and no party noticed the case at issue for purposes of trial docketing because discovery was not and is not completed[1].

In *A & B Pipe & Supply Co. v. Turnberry Towers Corp.*, 500 So.2d 261 (Fla. 3rd DCA 1986), the 3rd DCA considered a case where Summary Judgment was entered but a Motion to Compel Discovery was not ruled upon in the record and adopted the same position the Circuit Court had in the case of *Cullen v. Big Daddy's Lounges, Inc.*, 364 So.2d 839 (Fla. 3rd DCA 1978) and found:

> In *Cullen v. Big Daddy's Lounges, Inc., 364 So.2d 839 (Fla. 3d DCA 1978),* we relied upon *Commercial Bank* in reversing summary judgment for defendant, entered prior to plaintiffs' completion of their *discovery* and where the court had not yet ruled upon plaintiffs' motion to compel. *See also Danna v. Bay Steel Corp., 445 So.2d 704 (Fla. 4th DCA 1984)*; *Moore v. Freeman, 396 So.2d 276 (Fla. 3d DCA 1981)*; *Lovelace v. Sobrino, 280 So.2d 514 (Fla. 3d DCA 1973)*.
>
> The record in the instant case similarly discloses that the judgment appealed from was entered prematurely. We therefore have not considered the other points raised in this appeal. The final summary judgment is reversed [**3] and the cause is remanded for further proceedings, which may include further motions for summary judgment after discovery is completed.
>
> Reversed and remanded.

[1] Relevant discovery in this case is in a holding pattern pending the outcome of this appeal.

Although our trial court initially thought it would fashion a remedy for Skydive in paragraph 4 of its order, all the forensic discovery to be conducted after examination of the laptop that would relate to Pohjolainen, individually, and other discovery could not be conducted as the court has already made a finding Pohjolainen had no liability as a matter of law. Therefore, Plaintiffs/Appellants' discovery efforts would easily be "thwarted".

Fla. Stat. Chapter 934.02(5) defines person as:

> (5) "Person" means any employee or agent of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, **and any individual, partnership, association, joint stock company, trust, or corporation. (emphasis added).**

The court recognized this dilemma when it considered Plaintiff's Motion to Amend the Complaint, considered the Law of Agency and reflected on its Summary Judgment Order and stated: (R 1819-1860 at R 1830-1831, R 1834, R 1837-1839):

THE COURT: Based on the Court's prior ruling, which I did pull up so I'm going to have to rely on you to remind me, did I grant a motion for partial summary judgment against Mr. P individually? **MR. HANNA:** Yes. **THE COURT:** Okay. Now, with that in mind, could not Mr. P bind a principal if he's an agent, servant, or employee? In other words, he would have no liability because I've already ruled on that. But it would not seem to me at first blush --and that's

why I'm asking because I want to hear from you -- it would seem to me that he could still bind a principal if he is an agent, servant, or employee.**…MR. HANNA:** In the course of entering summary judgment in Henri P's favor, your conclusion of law No. 2 was that Mr. P's testimony establishes that he did not engage in any act that would constitute a violation of the statute. There is no record evidence or reasonable inference drawn from record evidence that Mr. P engaged in any act that would violate the statute. The problem I had with the general allegations is the Court had found he didn't do it. The allegations say he did do it. And agent or individual, he either did the acts or he didn't do the acts. If the Court has found he didn't do the acts, which is a matter of agency law -- could bind the principal -- but if he didn't do the acts to begin with, it shouldn't be alleged against -- there's no basis for alleging that he did the acts.**…THE COURT:** Mr. Morello, what is your position? What do you want to do at this point? If I made a finding that Mr. P hasn't engaged in an act that would constitute a violation of F.S. 943.03(1), what do? You want to do? **MR. MORELLO:** Well, let me tell you the practical, what we had to do practically. We had to appeal that order because the 30-day time period is coming up, like, now. So we filed a notice of appeal. But that was because discovery's outstanding and we wanted Henri P back in individually.

At the Summary Judgment hearing for Pohjolainen the Court was informed of the following as it related to dismissing Pohjolainen from the case and discovery

that was pending if Pohjolainen would execute an affidavit which Pohjolainen refused to do: (R 1743-1786 at R 1760-1764):

MR. MORELLO: Good afternoon, your Honor. **THE COURT:** Good afternoon, sir. **MR. MORELLO:** Your Honor, the Defendant knows what our position is because we filed a detailed response and we delivered a copy to your J.A. I don't know if you got the upload or not. But it's premature. And here's why. If there was any lack of cooperation between three lawyers in this case, the Court would be the first one to know that discovery was being sandbagged or somebody's dragging their feet. But no one's noticed the case for trial yet. And the reason that is is because we've got three lawyers and three schedules and experts to deal with. I can't even get my hands on Mr. Strobel's laptop until probably after Ms. Schultz's objections are heard which she doesn't even have to raise them until the 18th of January. Then we have to have them heard. We want to start with one laptop first to see if that gives us the answer. Then we'll go to Mr. Pohjolainen's own computer. So there are no deadlines in place with a pretrial order. So prior to setting the motion to compel Mr. Pohjolainen to produce E-mails you would think if he wants exonerated he could give us E-mails between himself, Strobel and Mr. Giuseppe Crot (phonetic), the Italian we've yet to depose from Italy. We have to wait until he gets back because he was part of the three in communications. The operative word here that's sticking them on 1(a) and 1(b) of

[Fla. Stat. 934.03] which I would voluntarily dismiss if I knew is the word procure. We know he didn't do the recording; Mr. Pohjolainen. He wasn't in the room. The question is did he procure it. We've given you evidence of motive because they brought thousands of dollars of his containers and they were complaining about their safety and their design. So he had the motive to have someone get the recording. But right now we can't even get to the first laptop let alone Mr. Pohjolainen's computer. And we've got a motion to compel some basic E-mails of which his lawyer said were so voluminous. But when we submitted the motion to the Court we showed with deposition testimony there weren't that many E-mails. Then you would think if he was totally guilt free and wanted out they would take the deposition of who they claimed did the recording, Mike Dokes (phonetic), to just simply say: "Did Henri procure you to take the depo to take the recording?" He was being set for deposition by Ms. Schultz and Mr. Hanna and he drops off – they drop the deposition. So the person that could exonerate him and say: "No. They didn't – he—they didn't procure me to do it." He hasn't been deposed. So we have discovery that we're moving forward on. We have forensic experts to deal with. It's just premature. He can have his day for summary judgment. He won't even need that day, Judge, because I'll voluntarily dismiss the claims we don't have evidence on. He won't need the day for summary judgment. But he'll have his day when discovery is completed. I've given the Court a ton of case law

that says entry of summary judgment at this stage is clearly reversible error. So I can't – I can't just say: "Here. I'm gonna voluntarily dismiss those claims" and then find digital evidence that he did procure the recordings. **THE COURT:** All right. **MR. MORELLO:** We have other depositions. **THE COURT: why not get Mr. Pohjolainen out of this case and then if any of the discovery shows that he should be in it go ahead and file refile against him? An amended complaint. MR. MORELLO: What a brilliant idea. And I proposed it to Mr. Hanna this morning. I said: "Just give me an affidavit. Just give me an affidavit." He said: "You got the deposition testimony." I said: "I gotta worry about malpractice. Give me an affidavit that says that and I'll let him out. I'll just dismiss without prejudice." So I came up with the same solution. But they said: "No.No." So something's not right, Judge. (emphasis added).** **THE COURT:** Okay. **MR. MORELLO:** Because I'm willing to let them out with some – give me an affidavit on his part. I'll we'll leave him out of the case. Not like everything's being focused on Mr. Pohjolainen. But we'll let him out of the case and then if something pops up that shows that he procured it we bring him back in. So I've offered that solution. He rejected it. He wanted it had to have the hearing for summary judgment. **THE COURT:** All right. Thank you very much.

…

The escape hatch the trial court tried to fashion for Skydive is paragraph 4 of its Order Granting Summary Judgment (R 1695-1699) allows summary judgment to be set aside if evidence is found Pohjolainen lied in his deposition. The major problem with that is that all discovery which pertains to Pohjolainen after summary judgment was entered will be met with a Motion for a Protection Order as he is no longer a party or, if a nonparty, the court has already declared he has no liability as a matter of law and such discovery would be argued by Pohjolainen as harassment, burdensome, irrelevant or not discoverable.

It does not appear to be a credible legal argument of Pohjolainen to assert that because no depositions were pending, summary judgment was not premature. Apparently, Mr. Pohjolainen interprets the line of cases cited in Appellant's Initial Brief as being restricted only to discovery depositions that have not been completed. The point of those cases is to recognize that summary judgment is improvident and improper when there is relevant discovery pending, not simply a discovery deposition.

For example, in *DeSimone v. Burger King Corp.*, 568 So.2d 987, Lexis 8126*, *2 (Fla. 3rd DCA 1990) there was discovery document production pending, portions of a safety manual and the court reversed the Summary Judgment as premature even though portions had already been produced:

> The plaintiffs in a personal injury suit sought

production of the defendant's safety manual. Defendant claimed the request was overbroad and irrelevant. The court issued an agreed order on the plaintiffs' motion to compel production. According to the order, defendant's counsel was to permit inspection of the manual. During this inspection, plaintiffs' counsel was to tag the pages for which he sought copies. Defendant was ordered to either produce the requested pages or notify the plaintiffs that it considered the pages trade secrets, in which case the plaintiffs could move to have the pages turned over to the trial judge for in camera inspection. Thus, the trial judge could decide plaintiffs' right to use the pages.

Plaintiffs' counsel viewed the manual and tagged the pages he deemed necessary for the preparation of his case. Defendant's counsel assured him the **[*2]** pages would be forthcoming unless the defendant considered them trade secrets, in which case plaintiffs would be notified so that they could move for an in camera inspection. Instead of following the court's order, the defendant withheld the documents and failed to notify the plaintiffs of its decision not to release the pages. Defendant then moved for summary judgment.

We reverse on the state of the record, as it was premature for the trial court to award the defendant summary judgment when the plaintiffs, through no fault of their own, had not completed discovery. *Societe Euro-Suisse v. Citizens & Southern Int'l Bank, 394 So.2d 533 (Fla. 3d DCA 1981)*; *Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla. 3d DCA 1975)*. We do not pass on the merits of the plaintiffs' complaint. The matter is returned to the trial court for further proceedings, which may include subsequent motions for summary

> judgment when discovery is completed.
>
> Reversed and remanded, with directions. *Id. at 8126 Lexis *2.*

In *Spradley v. Stick*, 622 So.2d 610, 613 (Fla. 1st DCA 1993) the court reversed a Summary Judgment when interrogatories were objected to but not ruled upon prior to Summary Judgment. The 1st DCA found:

> The questions propounded for Doctors Santana and Taylor represented a reasonable means of discovery necessary to the establishment of appellant's cause of action. The entry of summary judgment absent enforcement of such discovery constituted an abuse of discretion. The general rule is that *HN3* courts will be reluctant to grant a motion for summary judgment before the parties have had an opportunity to conduct discovery. *A & B Pipe and Supply Co. v. Turnberry Towers Corp., 500 So. 2d 261 (Fla. 3d DCA 1986)*; [**8] *Derosa v. Shands Teaching Hospital and Clinic, Inc., 468 So. 2d 415 (Fla. 1st DCA 1985)*; *Cullen v. Big Daddy's Lounges, Inc., 364 So. 2d 839 (Fla. 3d DCA 1978)*. In the present case, because appellant, a prisoner, encountered difficulty in getting answers to his questions, judicial enforcement of discovery was necessary, but lacking.

Pohjolainen does not dispute that examination of the laptop owned by one of Pohjolainen's companies was relevant and that Plaintiff could not conduct that examination until the court approved it after further delays by Strobel's counsel or that a Motion to Compel Pohjolainen was not heard prior to Summary Judgment.

Pohjolainen simply adopts the position there was no deposition pending and no court order he violated. Other than that, Pohjolainen's position in responding to this line of cases and the facts of his case is simply- so what?

On the purpose of Summary Judgment Judge Evander of This Honorable Court in *Wilmington Trust v. Moon*, 238 So.3d 425, 427 (Fla. 5th DCA 2018) wrote:

> **Because summary judgment is not a substitute for trial, when a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove its cause of action; rather, the court's function is solely to determine whether the record conclusively shows that the moving party has established that the plaintiff could never prove its case. (emphasis added).** *Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC, 75 So. 3d 865, 869 (Fla. 2d DCA 2011)* (holding defendant in mortgage foreclosure action was not entitled to summary judgment because original note and mortgage were not "in evidence"; "burden was on [defendant] to prove that [plaintiff] *could never* prove its case—not that it *had not* already done so").

Judge Evander's analysis is consistent with our Supreme Court when considering entry of a Summary Judgment and how it deprives a litigant of their Constitutional rights. In *Holl v. Talcott*, 191 So.2d 40, 48 (Fla. 1966) our Supreme Court, on rehearing, stated:

> The requirement that the absence of triable issues be shown conclusively is not new. In effect we have so held in every case in which the point has been discussed. Recently, in *Harvey Building, Inc. v. Haley, Fla.1965, 175 So.2d 780*, we held that "all doubts regarding the existence of an issue are resolved against the movant * *." Requiring that all doubts be removed is the same as requiring that the showing must be conclusive. This conclusive showing is justified because the summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial.

Looking at the circumstantial evidence obtained thus far in the case against Pohjolainen set forth in Appellant's Initial Brief, it is more probable than not that the Plaintiffs will be able to prove their case against Pohjolainen once discovery is completed. The entry of Summary Judgment in this case was premature and the trial court shared those same concerns.

CONCLUSION

Appellants respectfully request this Honorable Court to reverse the summary judgment in favor of Mr. Pohjolainen and send this case back to the trial court as this summary judgment was premature in light of the facts of this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via email delivery to Bruce A. Hanna, Esq., Wright & Casey, P.A., 340 N. Causeway, New Smyrna Beach, FL 32169, at BHanna@SurfCoastLaw.com, Megan@SurfCoastLaw.com, and Joelle Schultz, Esq., Law Office of Joelle Schultz, PLLC, 13555 Automobile Blvd., Ste. 300, Clearwater, FL 33762, at Joelle@JoelleSchultzLaw.com, Robyn@JoelleShultzLaw.com by email this 23rd day of October, 2018.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel certifies that this brief is typewritten using 14 point Times New Roman font and complies with Rule 9.210(a)(2), Fla. R. App. P.

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