

IN THE COUNTY COURT OF THE  
TWENTIETH JUDICIAL CIRCUIT IN AND  
FOR LEE COUNTY, FLORIDA

CASE NO. 2018-SC-001768

David Edward Howe,

Plaintiff,

v.

Enterprise Holdings, Inc.,

Defendant.

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**DEFENDANT'S MOTION TO QUASH TRIAL WITNESS SUBPOENA OR,  
IN THE ALTERNATIVE, FOR ENTRY OF PROTECTIVE ORDER**

Defendant, ENTERPRISE HOLDINGS, INC., (hereinafter "Enterprise"), by and through the undersigned counsel, and pursuant to Rules 1.410 and 1.280, of the Florida Civil Procedure and Florida Statute § 48.194, hereby files its Motion to Quash Plaintiff's trial witness subpoena or, in the alternative, for Entry of a Protective Order in favor of Pamela M. Nicholson, and states:

**BACKGROUND**

1. This dispute arises out of a rental car agreement, wherein Plaintiff, DAVID HOWE, wrongfully accused Enterprise of conspiring against him to manufacture and then attempt to collect on previously nonexistent damages to a vehicle he rented from National Car Rental. Mr. Howe rented a vehicle from

Enterprise Leasing Company of Florida, LLC ("Enterprise Florida"). The rental period commenced on October 28, 2016, at the Miami International Airport, and ended on October 29, 2016, at Ft. Myers International Airport.<sup>1</sup>

2. On or about August 15, 2018, Plaintiff mailed a Lee County Subpoena to the St. Louis, Missouri Sherriff's Office. The subpoena commanded the Chief Executive Officer of Enterprise, PAMELA M. NICHOLSON, to appear and testify at trial on August 22, 2018. A copy of the subpoena is attached as "**Exhibit A**" hereto.

3. On or about August 17, 2018, just five days before trial, the St. Louis Sherriff's Office then left a copy of that subpoena at the front desk of the corporate headquarters of Enterprise, located at 600 Corporate Park Drive, St. Louis, MO 63105. At no time was a copy of the subpoena ever left at Ms. Nicholson's Missouri residence or personally delivered to her by a designated officer with the St. Louis Sheriff's office.<sup>2</sup> The subpoena also did not include requisite travel and appearance fees.

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<sup>1</sup> On December 14, 2016, Enterprise Florida informed Plaintiff that it would not seek to recover from him any of the costs associated with the damage and repair of the subject vehicle. Further, at no time did Enterprise ever charge Mr. Howe or collect any payment from him with regards to the same vehicle repairs. Consequently, Mr. Howe has also not incurred any actual damages that could form the basis of any of his supposed theories of liability in this case.

<sup>2</sup> Ms. Nicholson's primary residence is in the state of Missouri and she does not conduct regular business, outside of her representative capacity with Enterprise, in the state of Florida.

4. Ms. Nicholson has not been named individually as a Defendant in this action and was never a party to Plaintiff's rental transaction with Enterprise Florida. Further, there are no allegations in Plaintiff's Statement of Claim, or any other evidence whatsoever, which suggests that Ms. Nicholson directed or oversaw any alleged "tortious activity" against Plaintiff or any other resident of the state of Florida.

5. Plaintiff's subpoena directing Ms. Nicholson to appear at trial is untimely, overly burdensome and deficient in both its form and service. Further, Ms. Nicholson cannot be compelled to testify in this matter because she resides outside of the jurisdiction of this Court, she has not been named as a Defendant or identified as someone who oversaw or directed any alleged "tortious activity" directed at the state of Florida in this matter, she does not possess any knowledge with regards to the issues that are central to this case and Plaintiff cannot demonstrate a single compelling reason for having the chief executive officer of Enterprise Florida travel to the state of Florida to take part in the trial of this cause.

6. Therefore, this Court should grant Defendant's Motion and Quash Plaintiff's subpoena directing Ms. Nicholson to appear at trial or, in the alternative, enter a Protective Order and excuse Ms. Nicholson from having to appear in person and

prohibit Plaintiff from making any further efforts to secure Ms. Nicholson's presence at trial.

MEMORANDUM OF LAW

**I. Ms. Nicholson Cannot be Compelled to Appear in her Individual or Executive Capacities**

Plaintiff cannot compel Ms. Nicholson to testify at trial in her individual or executive capacities because the Court has no jurisdiction over her.

A Florida court cannot exercise general personal jurisdiction over an out of state Corporation's non-resident chief executive officer where there are no facts alleged to bring the witness within the purview of Florida's long-arm statute. See *Olson v. Robbie*, 141 So. 3d 636 (Fla. 4th DCA 2014) (citing *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993) ("while a corporation, which operates businesses in Florida (it is expressly denied that Enterprise operates businesses in Florida), could be hauled into court because of its minimum contacts, its chief executive officer is not by virtue of his position subject to personal jurisdiction"); *Carter v. Estate of Rambo*, 925 So. 2d 353, 356 (Fla. 5th DCA 2006) (recognizing that "any activity in one's capacity as corporate officer or director is exempted from consideration in support of the exercise of long-arm jurisdiction over said officer or director")); see also *Packaging Corp. of America v. DeRycke*, 49 So. 3d (Fla. 2d DCA

2010) (citing *Washington v. State*, 973 So. 2d 611, 613 (Fla. 3d DCA 2008) ("PCA could not compel Mr. Sumwalt to testify at trial. It has 'no method to compel an out-of state witness to testify in a civil proceeding'").

Furthermore, the mere proof of any one of the several circumstances enumerated in Fla. Stat. § 48.193 as the basis for obtaining jurisdiction over non-residents does not automatically satisfy the due process requirement of minimum contacts. See *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989).

In the instant case, Plaintiff has not named Ms. Nicholson as a defendant or alleged in any pleading that Ms. Nicholson was a primary participant in any intentional tortious contacts expressly aimed at the state of Florida. Additionally, there are no facts in in the record which could support such an outlandish proposition. Without an element of "intentional conduct calculated to cause injury to a plaintiff in the form state," there is no basis to compel Ms. Nicholson's attendance at trial. *Allerton v. State, Department of Insurance*, 635 So. 2d 36 (Fla. 1st DCA 1994); *Doe*, 620 So. 2d at 1006 (under the corporate shield doctrine "acts of a corporate employee performed in his corporate employee do not form the basis for jurisdiction over the corporate employee in his individual capacity") (citing *Estabrook v. Wetmore*, 129 N.H. 520, 529 A. 2d 956 (1987)); see also *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1074 (Fla. 5th

DCA 2008) ("it has long been the law in Florida that in order to proceed against an individual using a FDUTPA violation theory an aggrieved party must allege that the individual was a direct participant in the improper dealings").

Moreover, even if Ms. Nicholson could be compelled to appear at trial in this matter, Florida law would still not permit Plaintiff to select Defendant's corporate representative who shall testify on behalf of the corporation either. See *Sybac Solar, GmbH v. 6th St. Solar Energy Park of Gainesville, LLC*, 217 So. 2d 1068 (Fla. 2d DCA 2017); *Racetrac Petroleum, Inc. v. Sewell*, 150 So. 3d 1247, 1252 (Fla. 3d DCA 2014); *Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V.*, 705 So. 2d 112, 113 (Fla. 3d DCA 1998).

Enterprise has no reason (or obligation) to select the CEO of the parent company of the Enterprise Florida to speak to the circumstances of Plaintiff's south Florida rental experience and dispute, nor can the Plaintiff demonstrate any reason why the attendance of Ms. Nicholson is necessary at trial given the uncomplicated nature of Plaintiff's apparent and claims.<sup>3</sup>

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<sup>3</sup> Some state and federal courts have also held that "department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 950 (Fla. 1st DCA 2015) (discussing the adoption of the "apex doctrine" in other courts). Although Florida courts have not expressly adopted the apex doctrine in the corporate context, in favor of the protections already granted by Rule 1.280, it still worth noting that Plaintiff has not made a good faith effort to obtain discovery through less intrusive methods, demonstrated that there

Accordingly, Plaintiff cannot demonstrate a necessity, reason, or legal basis to compel Ms. Nicholson to travel to the state of Florida to appear at trial.

**II. Ms. Nicholson was not Served With Plaintiff's Subpoena in Accordance with the Essential Requirements of Florida Law**

Plaintiff's substituted service of the witness subpoena on another employee at Enterprise Holdings, Inc. was legally insufficient pursuant to sections 48.031(1)(a) and (3) and 48.194, Florida Statutes. Accordingly, she cannot be compelled to appear at trial.

Section 48.031(1)(a), Florida Statutes, provides in pertinent part that:

(1)(a) Service of original process is made by delivering copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.

. . . .

(3) The service of process of witness subpoenas, whether in criminal or civil actions, is to be made as provided in subsection (1).

*Id.* Section 48.194 also provides that:

(1) Except as otherwise provided herein, service of process on persons outside of this state shall be made in the same manner as service within this state by any

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is a reasonable indication that Ms. Nicholson's testimony is calculated to lead to the discovery of admissible evidence, or that there is no less intrusive way of discovery in this matter. See *Citigroup v. Holtsberg*, 915 So. 2d 1265 (Fla. 4th DCA 2005).

officer authorized to serve process in the state where the person is served. No order of court is required.

*Id.*; see also *Aero Costa Rica v. Dispatch Services, Inc.*, 710 So. 2d 218 (Fla. 3d DCA 1998) (statutes which govern substituted service of process are to be strictly construed and also, they must be strictly complied with) (citing *Hauser v. Schiff*, 341 So. 2d 531 (Fla. 3d DCA 1977); *Stoeffler v. Castagliola*, 629 So. 2d 196 (Fla. 2d DCA 1993)).

Plaintiff's failure to abide by the carefully set out rules for effectuating service of a trial witness subpoena upon Ms. Nicholson cannot be cured. The substitute service on an employee of the corporation where Ms. Nicholson is employed does not satisfy the strict requirements for obtaining personal service on Ms. Nicholson pursuant to section 48.031. See *Aero*, 710 So. 2d at 219. Accordingly, Ms. Nicholson cannot be compelled to travel to the state of Florida to testify at trial in this matter.

**III. The Subpoena Should be Quashed, or in the Alternative, a Protective Order Should be Entered, Because it is Untimely, Unreasonable and Overly Burdensome**

Plaintiff's untimely and improper subpoena directed to Ms. Nicholson must be quashed or, in the alternative, a protective order must be entered relieving Ms. Nicholson of any obligation or duty to appear at trial in this matter.



Florida Rule of Civil Procedure 1.410(c) provides in pertinent part that a party may move to quash a subpoena if it is unreasonable or oppressive. Rule 1.410(2) also provides that a person may be required to attend an examination only in the county wherein the person resides or is employed or transact business in person or at such other convenient place as may be fixed by an order of court. Finally, Florida Rule of Civil Procedure 1.280(c) provides that a court should enter an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense that justice requires.

In the instant case, and for all the reasons previously stated herein, Ms. Nicholson should have no obligation or duty to respond to Plaintiff's subpoena where the issuance of the subpoena (without the requisite appearance and mileage fees) and the improper attempt at service was undertaken less than five (5) days before trial, Ms. Nicholson does not reside in the state of Florida, and there is no evidence or allegation in the record that Ms. Nicholson has any knowledge of the facts and circumstances underlying this case or that Ms. Nicholson oversaw or directed any "tortious act" against the Plaintiff or any other resident of the state of Florida.

#### **CONCLUSION**

Accordingly, Plaintiff cannot overcome the high burden required to substantiate the subject subpoena and to bring Ms.

Nicholson within the jurisdiction of Florida's long-arm statute and the Court's jurisdiction in this matter. Therefore, the Court should quash Plaintiff's trial witness subpoena or, in the alternative, enter a protective order relieving Ms. Nicholson of any duty or obligation to appear at trial on August 22, 2018.

WHEREFORE, Defendant, ENTERPRISE HOLDINGS, INC. d/b/a National Car Rental, respectfully requests the Court grant Defendant's Motion to Quash Plaintiff's trial witness subpoena or, in the alternative, for Entry of a Protective Order in favor of Pamela M. Nicholson, and for all other relief the Court deems fair and equitable.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the ECF system. I further certify that a true and correct copy hereof has been furnished via email to: David Edward Howe, 2121 Collier Ave. Unit #501 Fort Myers, FL 33901 (deh@davidhowe.com).

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**"EXHIBIT A"**



**IN THE CIRCUIT/COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN  
AND FOR LEE COUNTY, FLORIDA  
CIVIL ACTION**

*Certificate of Service*

**The above undersigned hereby certifies that, on August 15, 2018, a copy of the foregoing PLAINTIFF DAVID EDWARD HOWE'S SUBPOENA TO APPEAR AND TESTIFY AT A HEARING OR TRIAL IN A CIVIL ACTION was electronically sent for service via email to Defendant Enterprise Holdings, Inc., at the email addresses provided on record with the Lee Clerk AND to St. Louis Sheriff's Office, 100 S Central Ave, Clayton, MO 63105 (via FedEx)**

"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Brooke Dean, Operations Division Director, whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."