NOTE, ALTHOUGH A RECENT DECISION OF THE FOURTH DISTRICT COURT OF APPEAL RECONFIRMS THE EXISTENCE OF AN EXCEPTION TO THE "INTRA-CORPORATE CONSPIRACY DOCTRINE," THE EXCEPTION IS QUITE LIMITED

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In *Mancinelli et. al. v. Davis et. al*., 42 Fla. L. Weekly D7842 (April 5, 2017), the Fourth District Court of Appeal reconfirmed the existence of an exception to the "intra-corporate conspiracy doctrine," a doctrine used to insulate company agents (officers, directors, partners, members or employees) from claims that they conspired with their company to harm the plaintiff. The doctrine, which is the natural implication of agency principles, provides that an agent cannot conspire with his principal, as the agent acts **for** a principal such that the conduct of the agent is deemed the conduct of the principal. Conceptually, there is only a single actor in the agent/principal context, and a conspiracy requires more than one actor. The doctrine is often thought to be absolute. As *Mancinelli* makes clear, it is not; there is an exception. A close examination of the exception, however, shows it to be rather limited.

In *Mancinelli*, the plaintiff alleged that Davis, the CEO of Broadbandone, LLC d/b/a Host.net ("Host"), had conspired with Host and Host's outside counsel to breach a contract which obligated Host to provide various computer network and related services to the plaintiff. The complaint alleged that the breach was staged for the purpose of requiring the plaintiff to enter into a new and financially more favorable contract for Host, which would also financially benefit Davis personally. The trial court dismissed the conspiracy count, ruling that the "intra-corporate conspiracy doctrine" precluded the viability of a conspiracy claim against a company and its agents.

Although the Fourth District Court of Appeal affirmed the dismissal, its opinion reconfirmed that the doctrine is not absolute; there is an important exception. Where the agent has "a personal stake … separate and distinct from the [principal's] interest," that is, where the agent has acted to advance his "personal interests, wholly and separately from the [principal's]," a conspiracy can be made out. At first thought, the exception might appear to swallow the rule, as there are any number of personal advantages an agent might have to pursue matters also in his principal's interest, and it might seem easy to allege some personal interest. A deeper look shows this initial thought unavailing.

As the Fourth District opinion in *Mancinelli* itself makes clear, the exception requires that the "'personal stake' … be more than just personal animosity on the part of the agent." The personal interest must be "wholly and separately [distinct] from the" principal's interests. Thus, as was alleged in *Mancinelli*, even increased

compensation or the financial benefit the agent may receive when his company benefits is not enough to implicate the exception. *See also, Microsoft Corporation v. Big Boy Distributors, LLC,* 589 F. Supp.2d 1308 (S.D.Fla. 2008) (the personal financial stake of Microsoft's investigators who threatened to imprison a witness was insufficient to trigger the exception). This, too, however, does not fully reveal the limit of the exception. The real question is when does an agent act solely for himself, that is, solely to further his own interests and not that of his principal Case law delineating when an employee (an agent) is acting within the scope of his employment and, therefore, fostering his employer's (the principal's) interest sufficiently to have vicarious liability befall the employer points to just how separately distinct the agent's actions must be to be considered just his own, sheds light on this question; it is the mirror image to the real issue as it were.

In *Hennegan v. Department of Highway Safety and Motor Vehicles*, 467 So.2d 748 (Fla. 1st DCA 1985), a case where a minor had been sexually assaulted by a trooper who had stopped her on a pretext that she was under suspicion for theft, the Court reversed a summary judgment the trial court had entered for the Department of Highway Safety and Motor Vehicles stating that "conduct may be within the scope of employment, even if unauthorized, if it is of the same general nature as that authorized or is incidental to the conduct authorized" and then finding that "[i]t cannot be said, as a matter of law, that the acts alleged were or were not done in furtherance of [the trooper's] duties to apprehend a shoplifting suspect." The Court found the trooper's rather outrageous conduct here something a finder of fact could still say was within the scope of his employment.

In the same vein was *McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996). In *McGhee*, the Florida Supreme Court was asked to determine whether a beating rendered by a Deputy Sherriff after an arrest was within the Deputy's scope of employment such that the waiver of sovereign immunity applied. The trial court had granted summary judgment to the County, ruling that the alleged beating was beyond or outside the Deputy's duties and, therefore, outside the scope of his employment; the District Court of Appeal had affirmed. After approvingly discussing the *Hennegan* decision and saying that "[t]he officer's misconduct [in *Hennegan*], though illegal, clearly was accomplished through an abuse of power lawfully vested in the officer, not an unlawful usurpation of power the officer did not possess," the Supreme Court ruled in *McGhee* that the Deputy "clearly had the lawful authority to restrain arrestees, detain them, or even respond with force inappropriate situations. His office gave him that authority. . . . The fact that [he] may have intentionally abused his office does not in itself" render his actions outside the scope of his employment. Summary judgement was reversed.

Non-public entity cases are in accord. In *Valeo v. East Coast Furniture Co*., 95 So.3d 921 (Fla. 4th DCA 2012), the Court reversed a summary judgment granted the employer in a circumstance where its truck driver employee, after getting into an accident, physically attacked the other driver by swinging a padlock. The Court stated that "if the employee committed the battery 'during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer,' then … vicarious liability" could be imposed on the employer.

In *Trabulsy v. Publix Super Market, Inc*., 138 So.3d 553 (Fla. 5th DCA 2014), another battery case, this stemming from an altercation over a shopping cart which the patron had left unattended in the store for a few minutes, the Court overturned a summary judgment granted to Publix stating that "'[c]onduct is within the scope of employment if it occurs substantially within authorized time and space limits, and is activated at least in part by a purpose to serve the master."

More recent is *Goodman v. Rose Realty West, Inc*., 193 So.3d 86 (Fla. 4th DCA 2016), a case where the seller of a home used his own realty company as his broker. In *Goodman*, the Seller Disclosure Worksheet provided the buyer failed to disclose multiple defects to the property which were "not readily observable and not known to the buyer." Although clearly primarily benefitting the seller, because his realty company also benefitted, the Court found that the failure to disclose was within the scope of the agency relationship.

As these cases indicate, finding that an agent was acting outside the scope of his employment, that is, acting for a separate and distinct purpose from his principal, as is required for the exception to the "intra-corporate conspiracy doctrine" to apply, is a tall order. The exception reconfirmed by *Mancinelli* is not likely to be available in very many cases.

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