

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 09-1039

Petition from Fourth District Court of Appeals Case Number: 4D08-4374

Trial Court Case Number CACE 07-9966001

OCEAN WORLD, S.A.,

Petitioner,

v.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF
NEW YORK D/B/A COLUMBIA UNIVERSITY,

Respondent.

Petitioner's Brief on Jurisdiction

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PREFACE

The Fourth District Court in *Trustees of Columbia University in City of New York v. Ocean World, S.A.*, 12 So.3d 788 (Fla. 4th DCA 2009), reversed the trial court's denial of Defendant's Motion to Dismiss (for want of jurisdiction). Pursuant to Rules 9.030(a)(2)(A) and 9.120 of the Florida Rules of Appellate Procedure, the Petitioner requests that Court exercise jurisdiction (or at least defer exercise of jurisdiction and order filing of briefs on the merits) because the Fourth District Court of Appeal's decision expressly and directly conflict with decisions of this Court, former decisions of Fourth District Court of Appeals and other decisions of District Courts of Appeal.

The Petitioner, Ocean World, S.A. will be referred to as "Ocean World" and Respondent THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK D/B/A COLUMBIA UNIVERSITY will be to as "Columbia."

References to Ocean World's Appendix will be indicated by the letter OW A (Ocean World Appendix), followed by the page number on which the material is found (e.g., OWA- 109 or OWA- 146-190).

STATEMENT OF THE CASE AND FACTS

Ocean World invokes this Court's jurisdiction for this petition for review requesting this Court exercise jurisdiction pursuant to Fla. Const., Art. V, §3(b)(3) to resolve the express and direct conflict caused by the Fourth District Court of Appeal's decision – which conflicts with decisions of this Court, former decisions of Fourth District Court of Appeals and other decisions of District Courts of Appeal. The decision is attached as OW A-1.

Ocean World¹ filed a complaint in 2007 against Columbia and several defendants for Columbia's employee's/agent's tortious interference of Ocean World's contracts and business relationships with the Taiji Whale Museum, Dr. Michael Briggs, Dr. Douglas Hammond and the Dominican Republic. The Second Amended Complaint alleges that the tort(s) arose from communications of Columbia's agent Reiss that were specifically directed into the State of Florida in the form of telephonic, electronic, and written communications into Florida.

¹ Ocean World's adventure park is a state-of-the-art facility that features the largest man-made dolphin habitat in the world (one of several dolphin pools holds 12,000,000 gallons of sea water), which permit one-on-one with dolphins, "swim with" programs, and other interactive opportunities for people to approach dolphins and learn about them. Additional daily interactive events feature seal lions, sharks, stingrays, exotic tropical birds, and tigers.

In April of 2006, Ocean World entered into negotiations to buy Twelve (12) dolphins from the Taiji Whale Museum in Japan. Examples of facilities which have included dolphins (the marine mammals) as part of their offering to visitors are the Miami Seaquarium and Orlando's Sea World.

Columbia moved to dismiss the Second Amended Complaint, arguing that Florida lacks personal jurisdiction over it. Ocean World responded that Columbia's multiple Affidavits never denied the actual jurisdictional allegations in the complaint. Columbia also attached Reiss' Affidavit. Reiss' Affidavit:

Reiss moved to dismiss the Second Amended Complaint, arguing that Florida did not have personal jurisdiction over her, an individual who was not a resident of Florida. Ocean World explained that that Reiss' Affidavit:

- 1) Never denied traveling to Florida.
- 2) Never denied sending and receiving electronic mails into and out of Florida.
- 3) Never denied telephoning into Florida.
- 4) Never denied sending written communications into Florida.
- 5) Never denied that her communications into Florida were related to the subject of the litigation.
- 6) Never denied her tortious interference.

In an affidavit in support of her motion, she admitted that her contacts with Florida had nearly all been for "business-related purposes," related to her work as a self-described research scientist and "scientific advisor" to various zoological societies.

The trial court limited discovery to facts relating to jurisdiction. After extensive briefing by the parties and a hearing, the trial court denied the

Defendant's Motion to Dismiss. Reiss appealed the decision and the Court in *Trustees of Columbia University in City of New York v. Ocean World, S.A.*, 12 So.3d 788 (Fla. 4th DCA 2009) reversed and remanded the decision of the trial court.²

SUMMARY OF THE ARGUMENT

The decision in *Trustees of Columbia University in City of New York v. Ocean World, S.A.*, 12 So.3d 788 (Fla. 4th DCA 2009) conflicts with *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) and *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002) and *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989) when the Court held that the defendant is not required to provide a rebutting affidavit (thereby changing the analysis/burden in determining jurisdiction).

The *Columbia* decision also expressly and directly conflicts with decisions such as *Woods v. Nova Companies Belize Ltd.*, 739 So. 2d 617 (Fla. 4th DCA 1999) (*see also Calder v. Jones*, 465 U.S. 783, 788-89, 104 S.Ct. 1482, 1486-87 (U.S. 1984))³ when the Court held that it is proper (when looking to the

² There is a companion case involving the same litigants and the same constitutional issues are already pending before this Court. *See Café Erotica/We Dare to Bare, etc. v. Florida Department of Transportation*, Case No.: SC02-2515. *See also Café Erotica / We Dare to Bare, etc. v. Department of Transportation*, So.2d ___, 2002 WL 31373490 (Fla. 1st DCA 2002)

³ The *Trustees of Columbia* opinion cites to the opinion in *Reiss v. Ocean World, S.A.*, 11 So.3d 404 (Fla. 4th DCA 2009). The Petitioner here has also filed a Petition requesting jurisdiction in that case (alleging that the decision in *Reiss*

significance of Defendant's contacts with the State) to consider just one year of contacts that a nonresident defendant may have had with Florida.

ARGUMENT

I. THE *REISS* DECISION – BY NOT REQUIRING THE DEFENDANT TO PROVIDE A REBUTTING AFFIDAVIT – CHANGES THE ANALYSIS/BURDEN IN DETERMINING JURISDICTION AND THEREBY EXPRESSLY AND DIRECTLY CONFLICTS WITH *WENDT V. HOROWITZ*, 822 SO.2D 1252 (FLA. 2002) AND *AQUADRO V. BERGERON*, 851 SO.2D 665 (FLA. 2003)

By overlooking Columbia's failure to sufficiently rebut the Second Amended Complaint by filing an affidavit supported in fact which controverts the jurisdictional issues raised in the Seconded Amended Complaint, the Fourth District Court's decision expressly and directly conflicts with cases such as *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) and *Wendt v. Horowitz*, 822 So.2d 1252, 1253 (Fla. 2002), which requires a party opposing the claim of personal jurisdiction to file its own affidavits to rebut the evidence supplied by the Plaintiff. *See, e.g., Acquadro*, 851 So.2d at 672 (finding Defendant's affidavit insufficient to shift the burden back to the Plaintiff by reiterating that "a defendant must file an affidavit containing allegations, which if taken as true, show that the defendant's conduct does not make him or her amenable to service")

conflicts with decisions of this Court and other appellate courts). Thus, it may be appropriate to consider the arguments in that Petition in determining whether jurisdiction should be accepted in this case.

Ocean World properly alleged sufficient facts to support the invocation of jurisdiction over Columbia. The Fourth District Court, however, failed to accept the uncontroverted facts that would have required a finding that there were sufficient allegations to support jurisdiction over Columbia, including (with no rebutting affidavit from Defendant) that:

- 1) Ocean World was a foreign corporation doing business in Broward County, Florida;
- 2) Columbia was doing business in Broward County, Florida through the interactive internet class rooms, alumni association, and the interactive website on the internet providing education to students in Florida.
- 3) Columbia has Florida business interests which commenced, organized, funded, and continue to facilitate both local and global activities to interfere with the Plaintiff's Florida office and Plaintiff's business, as a whole;
- 4) Columbia knowingly conducts business with forum state residents via its interactive website;
- 5) Columbia's website and interactive courses have continuously and systematically been directed by Columbia to Florida residents for the very purpose of receiving financial benefits from Florida.
- 6) Columbia never filed any affidavit or other evidence that showed that Columbia did *not* target Florida (to contradict the allegations of the second amended complaint and the accompanying specific evidence produced in support).

The *Columbia* decision expressly and directly conflicts with *Venetian Salami v. Parthenais*, 554 So.2d 499 (Fla. 1989), *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) and/or *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002), and it would be

appropriate for this Court to accept jurisdiction and/or otherwise permit the filing of Briefs on the merits of this case.

II. THE FOURTH DISTRICT COURT’S DECISION IN *TRUSTEES OF COLUMBIA* – WHERE IT FOUND THAT IT WAS SUFFICIENT TO LOOK AT ONLY ONE YEAR OF CONTACTS THAT DEFENDANT MAY HAVE HAD WITH THE FORUM STATE – EXPRESSLY AND DIRECTLY CONFLICTS WITH *WOODS V. NOVA COMPANIES BELIZE LTD.*, 739 SO. 2D 617 (FLA. 4TH DCA 1999)

The Fourth District Court’s decision in *Columbia* – in the Court’s analysis of whether the nonresident defendant’s conduct could be deemed to be “systematic and continuous” such that the exercise of personal jurisdiction over that Defendant may be proper - found it was sufficient to assess only one year of contacts that Defendant may have had with the forum state. This decision expressly and directly conflicts with cases such as *Woods v. Nova Companies Belize Ltd.*, 739 So. 2d 617 (Fla. 4th DCA 1999) and numerous other cases that state that “contacts are commonly assessed over a period of years prior to the plaintiff’s filing of the complaint.” *Id.* at 621, quoting *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996) (it was error to just look at one year of contacts, as “the phrase ‘continuous and systematic’ necessarily requires that courts evaluate the defendant's contact with the forum state over time.”).⁴

⁴ The Court explained that “[t]he minimum contacts inquiry is fact-intensive” and “courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances-up to and including the date the suit was filed-to assess whether they satisfy the ‘continuous and systematic’ standard.” *Id.*

The Petitioner therefore requests this Court accept jurisdiction and/or otherwise permit the filing of Briefs on the merits of this case.

III. THE TRUSTEES OF COLUMBIA DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH CASES SUCH AS *RENAISSANCE HEALTH PUB., LLC V. RESVERATROL PARTNERS, LLC*, 982 SO.2D 739 (FLA. 4TH DCA 2008), WHICH HAVE FOUND JURISDICTION BY UTILIZING THE “EFFECTS” TEST FIRST SET FORTH IN *CALDER V. JONES*, 465 U.S. 783, 788-89, 104 S.CT. 1482, 1486-87 (U.S. 1984).⁵

The Fourth District Court in *Silver v. Levinson*, 648 So.2d 240 (Fla. 4th DCA 1994) involved an action by a former husband against his former wife's out-of-state attorney, alleging that attorney purposefully mailed allegedly defamatory letter to state which was received in state by several individual recipients. The Defendant filed a Motion to Dismiss for want of personal jurisdiction.

In explaining why the contacts were sufficient to support personal jurisdiction over the nonresident attorney, the Court utilized the “effects” test first

at 569-70. *See also Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 409-11, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (examining contacts over a seven-year-period, up to the time the lawsuit was filed). *Accord Wilson v. Belin*, 20 F.3d 644, 650-51 (5th Cir. 1994) (examining defendant's contacts with forum state over five-year period in assessing minimum contacts for general jurisdiction purposes), *cert. denied*, 513 U.S. 930, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372, 376 (5th Cir. 1987) (analyzing defendant's contacts with forum state over five-year period in general jurisdiction case); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329, 1330-31 (9th Cir. 1984) (examining defendant's contacts over three-year period in connection with general jurisdiction inquiry).

⁵ This Court can look to the Petitioner’s Motion for Rehearing and Rehearing en banc and/or for Certification to see and extensive discussion of *Calder* and the many other cases citing to it.

enunciated in *Calder*. 465 U.S. at 789-90, 104 S.Ct. at 1487 (Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California, explaining because the intentional tort “expressly aimed at” California and because “the defendants knew that the brunt of their statements would be felt in California, they must have anticipated being haled into court in California to answer for their actions.”) *See also Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So.2d 739 (Fla. 4th DCA 2008) (citing to *Calder*).

If the Court in *Trustees of Columbia* were required to have utilized this test, it would have been required to find sufficient facts to support jurisdiction over Columbia. Thus, the decision in *Trustees of Columbia* expressly and directly conflicts with cases such as *Levinson*.⁶

The Petitioner therefore requests this Court accept jurisdiction and/or otherwise permit the filing of Briefs on the merits of this case.

IV. THE FOURTH DISTRICT COURT’S OPINION IN *TRUSTEES OF COLUMBIA* – TO THE EXTENT IT RELIES UPON THE HOLDING IN *REISS V. OCEAN WORLD, S.A.*, 11 SO.3D 404 (FLA.

⁶ *Accord Waterproof Gear, Inc. v. Leisure Pro, Ltd.*, Slip Copy, 2009 WL 1066249 (M.D. Fla. 2009). *Foreign Imported Prod. and Pub., Inc. v. Grupo Ind. Hotelero, S.A.*, 2008 WL 4724495 (S.D.Fl. Oct. 24, 2008) applied a modified version of the oft-cited case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 119 (W.D.Pa. 1997) (which refined the *Calder* test and held that an interactive website which allows a defendant to enter into contracts to sell products to Florida residents, and which “involve[s] the knowing and repeated transmission of computer files over the internet,” may support a finding of personal jurisdiction; utilizing a “website-plus” analysis).

4TH DCA 2009) – EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

As set forth in the Petition on Jurisdiction recently filed in the case of *Reiss v. Ocean World, S.A.*, 11 So.3d 404 (Fla. 4th DCA 2009), the *Columbia* decision (which relies upon that holding) is expressly and directly in conflict with *Venetian Salami v. Parthenais*, 554 So.2d 499 (Fla. 1989), *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002) and *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003).

The Petitioner therefore requests this Court accept jurisdiction and/or otherwise permit the filing of Briefs on the merits of this case.

CONCLUSION

Based on the arguments, evidence and authorities provided, the Petitioner respectfully requests this Court to accept jurisdiction and/or otherwise permit the filing of Briefs on the merits of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been submitted electronically pursuant to the Florida Supreme Court Rules, and forwarded to Howard D. Finkelstein, Esq., Finkelstein & Krinsk, LLP, The Kroll Center, 301 W. Broadway, Suite 1250, San Diego, California 92101-3579, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A, 150 West Flagler Street, Suite #2200, Miami, Florida 33130, THOMAS &

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CERTIFICATE OF COMPLIANCE

I certify that the typeface used in the foregoing brief is 14-point Times New
Roman, in compliance with Florida Rule of Appellate Procedure 9.210(2)(a).

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