

IN THE SUPREME COURT OF FLORIDA  
CASE NO: SC 09-1042

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4<sup>th</sup> DCA Case No: 4D08-3836  
Trial Court Case No: CACE 07-9966001

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OCEAN WORLD, S.A.,

Petitioner,

v.

DIANA REISS, PH.D.,

Respondent.

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Petitioner's Brief on Jurisdiction

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Date: August 27, 2009

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## **PREFACE**

This is a proceeding for discretionary review of the Fourth District Court of Appeal's decision, filed pursuant to Rule 9.030(a)(2)(A) and Rule 9.120 of Florida Rules of Appellate Procedure. Defendant/Appellant/Respondent, Diana Reiss, appealed a non-final order (via 9.130) denying her motion to dismiss Plaintiff/Appellee/Petitioner, Ocean World, S.A.'s, Second Amended Complaint for lack of personal jurisdiction. The Fourth District Court of Appeal reversed and remanded the decision.

This Petition on Jurisdiction requests this Court exercise jurisdiction (or defer exercise of jurisdiction and order filing of briefs on the merits) on the grounds the Fourth District Court of Appeal's decision creates conflict with decisions of this Court, former decisions of Fourth District Court of Appeals and other decisions of District Courts of Appeal.

Petitioner, Ocean World, S.A., is Appellee below and will be referred to as "Ocean World." Respondent, Diana Reiss, is Appellant below and will be referred to as "Reiss." References to Ocean World's Appendix will be indicated by the letters OW A (Ocean World Appendix), followed by the page number on which the material is found (e.g., OW A- 109).

## **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 World<sup>1</sup> filed a complaint in 2007 against Reiss and several defendants for tortious interference of contracts and business relationships with the Taiji Whale Museum, Dr. Michael Briggs, Dr. Douglas Hammond and the Dominican Republic arising from communications of Reiss into the State of Florida in the form of hundreds of electronic, telephonic and written communications into Florida giving rise to the causes of action (Counts 5, 6, and 7). The Complaint alleged Reiss acted as an apparent agent of Columbia University (Count 8). As the Complaint states, Reiss' intentional tortious

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<sup>1</sup> Ocean World operates an adventure park in the Dominican Republic. Ocean World Adventure Park opened in March, 2004; this state-of-the-art facility 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, other interactive opportunities to approach and learn about dolphins. Ocean World attracts residents of Florida and elsewhere in the United States. Plus 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 long included dolphins (the marine mammals) as part of their offering to visitors are the Miami Seaquarium and Orlando's Sea World.

activities caused interference with the contracts and business relationships, and prevention of their performance occurred in Florida.

Reiss moved to dismiss the Second Amended Complaint, arguing Florida did not have personal jurisdiction over her, an individual who was not a resident of Florida. Ocean World responded 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, Reiss admitted, *inter alia*, 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.

Very limited discovery (only related to jurisdiction) was permitted. The trial court denied the motion. Reiss appealed to the Fourth District Court, which reversed and remanded the trial court's decision. *Reiss v. Ocean World, S.A.*, 11 So.3d 404 (Fla. 4<sup>th</sup> DCA 2009). The Court's holding:



- 1) looked outside the four corners of the Complaint and looked to evidence not before the trial court;
- 2) held Ocean World could not possibly assert a cause of action in tort; and
- 3) overlooked the Reiss' failure to provide the required rebuttal affidavit (failed to require Reiss to meet its burden of providing an Affidavit to rebut the well-pled Complaint of Ocean World.)

Ocean's World's Motion for Rehearing, Rehearing *en banc* and/or for Certification was denied. Ocean World petitions this Court through this Brief on Jurisdiction, alleging the decision of the Fourth District Court expressly and directly conflicts with the decisions of this Court and other Appellate Courts. Ocean World requests this Court grant jurisdiction and/or otherwise direct that Briefs on Jurisdiction be filed.<sup>2</sup>

### **SUMMARY OF THE ARGUMENT**

The Appellate Court's decision in *Reiss v. Ocean World, S.A.*, 11 So.3d 404 (Fla. 4<sup>th</sup> DCA 2009), expressly and directly conflicts with this Court's rulings in *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002), *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) and *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989) (among other cases), by:

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<sup>2</sup> It should be noted that a companion case involving the same litigants and the same constitutional issues is 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. Dept. of Transportation*, \_\_\_ So.2d \_\_\_, 2002 WL 31373490 (Fla. 1st DCA 2002).

- 1) making its determination on a motion to dismiss by looking outside the four corners of the Complaint and utilizing evidence not before the trial court;
- 2) holding as a matter of law and fact that Ocean World could not possibly assert a cause of action in tort; and
- 3) in ruling for Reiss without properly requiring Reiss to meet her burden of providing an Affidavit that actually directly rebuts the well-pled Complaint allegations of Ocean World.

### **ARGUMENT**

**I. The Reiss Summary Determination That No Tort Occurred Or Could Possibly Be Stated Is Expressly And Directly In Conflict With This Court's Holding In *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002) and *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) (that provide that an Appellate Court is not to engage in deciding whether a tort exists, particularly where there has not been a full evidentiary hearing or trial on the issues)**

The Fourth District Court of Appeals reversed the denial of the motion to dismiss (on jurisdiction) “[b]ecause the facts pled in the complaint do not constitute the commission of a tortious act within Florida or otherwise establish the requisite minimum contacts with the state.” *Id.* at 1.

The *Reiss* Opinion thus specifically and summarily decided no tort could have occurred in this case.<sup>3</sup> This kind of unfair summary

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<sup>3</sup> As a matter of law and fact, that determination is erroneous and contrary to decisions of other courts. First, the Fourth District Court could not possibly have ruled on ALL the facts, since by law, there has yet to be discovery completed in that regard. The trial court followed *Gleneagle Ship Management v Leondakos*, 602 So.2d 1282 (Fla. 1992) which limits discovery when jurisdiction is challenged in an action to jurisdictional

determination expressly and directly conflicts with the decisions of *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002), where this Court explained it is not appropriate for the appellate court to decide whether a tort occurred. *Id.* at 1258 (“[t]he Fourth District did not decide whether the defendant had committed the torts alleged, because that would have required a full-blown trial, not the limited evidentiary hearing contemplated by *Venetian Salami Co.*”). *See also Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003).

**II. The Reiss Decision - Which Allows A Court On A Motion To Dismiss To Consider Evidence Outside The Four Corners Of The Complaint And To Consider Evidence That Was Not Before the Trial Court - Expressly And Directly Conflicts With The Decisions of This Court**

The Fourth District Court of Appeals’ decision also relied upon facts outside the four corners of the Second Amended Complaint, attachments and

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issues. Second, there are other causes of action that could be stated against Reiss, including such torts as for defamation. *See, e.g., Casita, L.P. v. Maplewood Equity Partners L.P.*, 960 So.2d 854 (Fla. 3<sup>rd</sup> DCA 2007) (A telephonic, electronic, or written communication is deemed published in Florida, subjecting the non-resident publisher to long-arm jurisdiction under section of long-arm statute pertaining to commission of tortious act within the state, if the communication was made into this state by a publisher outside the state, even if that publisher has no other contacts with the state); *Silver v. Levinson*, 648 So.2d 240 (Fla. 4th DCA 1994) (mailing of defamatory letter into Florida); *Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So.2d 716 (Fla. 4th DCA 1998) (defamatory statements over telephone to Florida residents by nonresident); *Acquadro v. Bergeron*, 778 So.2d 1034 (Fla. 4th DCA 2001) (telephone conversations made into Florida), *approved*, 851 So.2d 665 (Fla. 2003). It is directly contrary to law to allow the Fourth District Court to extinguish all causes of action against Defendant based on the limited discovery (that is not even completed) related just to jurisdiction.

affidavit which were not considered by the trial court. OW A-1 (The Court presumes no other evidence could exist in support of Ocean World's position.) The Court's approach is in direct and express conflict with decisions of this Court and other Appellate Courts. *Connolly v. Sebeco*, 89 So.2d 482 (Fla. 1956).<sup>4</sup>

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

**III. 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 Reiss' failure to sufficiently rebut the second amended complaint by filing an affidavit supported in fact which controverts jurisdictional issues raised in the second amended complaint, the Fourth District Court's decision expressly and directly conflicts with cases such as

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<sup>4</sup> See also *Chatham Mfg., Corp. v. Cates*, 969 So.2d 515 (Fla. 1<sup>st</sup> DCA 2007) (Dismissal of complaint error where court relied upon matters raised in motion to dismiss, but not contained within four corners of complaint); *East Naples Water Systems, Inc. v. Board of County Commissioners of Collier County*, 457 So.2d 1057, 1059 (Fla. 2d DCA 1984) ("While it is possible that [an] appellant will not prevail on the merits of [a] complaint, the merits have not yet been addressed and cannot be addressed on [a] motion to dismiss which [is] before the trial court. On a motion to dismiss, the trial court looks to the four corners of the complaint; consideration of matters not disclosed by the complaint or by a prior pleading is reversible error"). *Rivera v. Torfino Enterprises, Inc.*, 914 So.2d 1087 (Fla. 4<sup>th</sup> DCA 2005); *Wheeler v. Powers*, 972 So.2d 285 (Fla. 5<sup>th</sup> DCA 2008).

*Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003) and *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002), which require a party opposing the claim of personal jurisdiction to file its own affidavits to rebut evidence supplied by Plaintiff. *Acquadro*, 851 So.2d at 672 (“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.” (finding Defendant’s affidavit insufficient to shift the burden back to Plaintiff).

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

**IV. The *Reiss* Decision Expressly and Directly Conflicts With the Decisions of This Court and other Appellate Courts by Now Requiring That No Cause Of Action In Tort (Or For Tortious Interference May Lie) Involving A Nonresident Unless The Contract Contemplates Payment Or Performance In Florida And “Mentions” Florida Somewhere In The Contracts**

The Fourth District Court in *Reiss* held no tort of tortious interference could possibly be alleged because the contracts did not mention Florida and did not state payment or performance was to occur in Florida:

The second amended complaint did not allege nor could it have alleged--based on the facts of this case - that the tortious interference occurred within Florida. This is fatal to Ocean World’s claim. *Nothing in the contracts contemplated payment or performance in Florida, nor is Florida mentioned anywhere in the contracts. Any tortious interference with the contracts and business relationships occurred in the Dominican Republic or, alternatively, in Japan, the countries in which the contracts were to be performed.*

*Reiss*, 11 So.3d at 407. [emphasis added].

Contrary to the decision, there is no requirement Florida be mentioned in a contract in order for personal jurisdiction to be possible in Florida over a nonresident. Equally true, there is no case law requiring the contract to state the performance or payment had to occur in Florida in order for personal jurisdiction to be possible in Florida over a nonresident. Tortious interference is deemed to have occurred where the acts constituting interference by the tortfeasor occurred; not where the contract was to be performed or paid by the original contracting parties. *Hunt v. Cornerstone Golf, Inc.*, 949 So. 2d 228, 230 (Fla. 4th DCA 2007)(“The determinative issue for this court is not whether [the plaintiff] has proven tortious interference actually occurred, but rather whether the tort, as alleged, occurred in Florida.”).<sup>5</sup>

The *Reiss* decision, however, quite specifically provides there is no personal jurisdiction even if the tests set forth in this Court’s decision in *Venetian Salami* are satisfied, unless the contract provides that performance or payment will occur in Florida (and Florida is mentioned in the contract).

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<sup>5</sup> See also *ABL-USA Enterprises, Inc. v. Hawk Aviation, Ltd.*, 15 F. Supp. 2d 1297, 1300-01 (S.D. Fla. 1998) (the interference was alleged to have been accomplished by telephone calls from Nesterenko in France to Hawk in Florida: “While the Court agrees that mere phone calls are generally not enough to confer long-arm jurisdiction, in this case, the alleged tort was accomplished by virtue of those phone calls to Florida.”)

The application of the *Venetian Salami* test has been successfully applied in numerous cases, and nowhere in any of the cases are the Fourth District Court of Appeal's new conditions found. The determination of personal jurisdiction - as many decisions of this Court and other appellate court decisions demonstrate - is based upon an evaluation of the allegations of each Complaint and evidence offered in support of claims of personal jurisdiction. They turn on specific actions occurring giving rise to the tort. They do not summarily turn on particular "buzz" words that may or may not be found in a particular contract, and does not require contractual language showing performance and payment to occur in Florida ever dispositive. *Hunt & Porter v Wilson, Walch, Fortner, Robinson & Besse, M.D.*, 384 So.2d 190 (Fla. 2<sup>nd</sup> DCA 1980)(one of many cases finding the existence of the tort of tortious interference without regard to where performance would occur) Ocean World 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 & LOCICERO PL, Post Office Box 2602, Tampa, Florida 33601-2602 on behalf of LEVINE SULLIVAN KOCH & SHULZ, LLP, 1050 Seventeenth St., N.W., Suite 800, Washington, D.C.. 20036, Gary W. Kovacs, Esq, Proskauer Rose, LLP, 2255 Glades Road, Suite #340 West, Boca Raton, Florida 33431, by U.S. Mail this 27<sup>th</sup> day of August, 2009.

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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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