

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

FOURTH DISTRICT COURT OF APPEALS CASE NO.: 4D08-3836
TRIAL COURT CASE NO.: CACE 07-9966 CA 14

OCEAN WORLD, S.A.,
A Foreign Corporation,

Petitioner/Plaintiff,

vs.

DIANA REISS, PH.D.,

Respondent/Defendant.

**RESPONDENT DIANA REISS PH.D.'S ANSWER BRIEF ON
JURISDICTION**

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Kelly R. Melchiondo
Julie L. Fishman
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130
Tel: 305/789-3200
Fax: 305/789-3395

ATTORNEYS FOR RESPONDENT/DEFENDANT DIANA REISS, PH.D.

TABLE OF CONTENTS

	PAGE
<u>INTRODUCTION</u>	1
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	3
<u>ARGUMENT</u>	4
I. STANDARD OF REVIEW	4
II. THE APPELLATE COURT’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT’S RULINGS, OR THOSE OF ANY OTHER DISTRICT, AND INSTEAD SQUARELY APPLIES RELEVANT CASE LAW	5
A. The Appellate Court Correctly Applied <i>Wendt v.</i> <i>Horowitz</i> and <i>Acquadro v. Bergeron</i> to Determine That No Tort Occurred or Could Have Occurred <i>Within Florida</i> Based on the Allegations of the Second Amended Complaint	6
B. The Appellate Court Properly Based Its Determination on the Facts Alleged in the Complaint and Did Not Utilize Evidence Not Before the Trial Court	7
C. Reiss’ Affidavit Was Sufficient Under <i>Wendt</i> and	

<i>Acquadro</i>	8
-----------------------	---

D. The Appellate Court Did Not Announce a New Substantive Standard for Tortious Interference, or for Any Tort, Involving a Nonresident	9
--	---

<u>CONCLUSION</u>	10
--------------------------------	----

<u>CERTIFICATE OF SERVICE</u>	11
--	----

<u>CERTIFICATE OF COMPLIANCE</u>	12
---	----

TABLE OF AUTHORITIES

STATE CASE LAW

PAGE(S)

<i>Achievers Unlimited, Inc. v. Nutri Herb, Inc.</i> , 710 So. 2d 716 (Fla. 4th DCA 1998)	4
<i>Acquadro v. Bergeron</i> , 851 So. 2d 655 (Fla. 2003)	6, 8
<i>Connolly v. Sebeco</i> , 89 So. 2d 482 (Fla. 1956)	7, 8
<i>Hunt v. Cornerstone Golf, Inc.</i> , 949 So. 2d 228 (Fla. 4th DCA 2007)	4
<i>Nielsen v. City of Sarasota</i> , 117 So. 2d 731 (Fla. 1960)	5
<i>Reaves v. State</i> , 485 So. 2d 829 (Fla. 1986)	5, 8
<i>Rivera v. Torfino Enterprises, Inc.</i> , 914 So. 2d 1087 (Fla. 4th DCA 2005)	5
<i>Silver v. Levinson</i> , 648 So. 2d 240 (Fla. 4th DCA 1994)	5
<i>Venetian Salami Co. v. Parthenais</i> , 554 So. 2d 499 (Fla. 1989)	7, 8, 10

<i>Wallace v. Dean</i> , 3 So. 3d 1035 (Fla. 2009)	5
<i>Wendt v. Horowitz</i> , 822 So. 2d 1252 (Fla. 2002)	6, 7, 8

FLORIDA CONSTITUTION

Fla. Const., Art. V., §3(b)(3)	4
--------------------------------------	---

RULES OF APPELLATE PROCEDURE

Fla. R. App. P. 9.030	3
Fla. R. App. P. 9.030(a)(2)(A)(iv)	4
Fla. R. App. P. 9.331	4

INTRODUCTION

There are no grounds for conflict jurisdiction. The decision of the Fourth District Court of Appeal at issue, finding no personal jurisdiction over nonresident Diana Reiss, Ph.D. (“Reiss”), on grounds that (1) Florida’s long-arm statute was not satisfied because the complaint did not allege commission of a tortious act within Florida and (2) requisite minimum contacts to satisfy due process requirements were not established (“Decision,” OW A-1, p. 1.) [1], comports with and in fact relies upon decisions of this Court and the rules of law stated therein. Petitioner/ Plaintiff Ocean World, S.A. (“Ocean World”), advances a “kitchen sink” argument, asserting the Decision conflicts with eight decisions of this Court and other district courts of appeal, as well as additional decisions of the same (Fourth) district court of appeal and one federal court. But in every respect, Ocean World misapprehends and misconstrues the Decision and applicable caselaw. In addition, Ocean World improperly disregards the applicable standard of review. Reiss respectfully submits that this Court should decline to accept jurisdiction to review the case.

STATEMENT OF THE CASE AND FACTS

Ocean World seeks discretionary review of the Decision instructing the trial

¹ Citations to OW A-1 refer to Ocean World’s Appendix to Petitioner’s Brief on Jurisdiction, the Decision of the District Court of Appeal of the State of Florida, Fourth District, at issue.

court to dismiss the second amended complaint (hereafter sometimes “complaint”) as to Reiss for lack of personal jurisdiction. OW A-1, p. 4. Ocean World first filed suit in 2007. It subsequently amended its complaint twice, filing the second amended complaint on April 29, 2008. Reiss has defended against Ocean World’s claims for two years, despite the Fourth District Court’s recent determination that the Florida courts lack personal jurisdiction over her.

This case arises out of the Dominican Republic government’s denial of Ocean World’s permit application for the importation of twelve dolphins captured by local fishermen in Taiji, Japan, for delivery to Ocean World’s marine amusement park in the Dominican Republic (“D.R.”). *See* OW A-1, p. 1. Ocean World entered into a contract for the purchase of the dolphins. Ocean World also entered into a contract with the Taiji Whale Museum with the stated purpose of cooperating in a “friendly exchange to study and conserve [dolphins].” *Id.*

When the D.R. denied Ocean World a permit to import the dolphins, Ocean World filed suit against Reiss, a renowned marine mammal scientist, and others, alleging counts for intentional interference with Ocean World’s contract to purchase the dolphins, its contract with the Taiji Whale Museum, and its business relationship with the D.R. OW A-1, pp. 1-2. Ocean World brought suit against Reiss based on alleged involvement with activist organizations opposing capture and slaughter of

dolphins. *See id.*, p. 1. The complaint alleged that Reiss engaged in telephonic and electronic communications “with people in Florida to plan, coordinate, and block the exportation of the dolphins to the [D.R.]” OW A-1, p. 1. Exhibits to the complaint included eight email messages from Reiss to co-defendant Richard O’Barry, a Florida resident, and one email to another co-defendant. *Id.*, p. 2.

Reiss moved to dismiss based on lack of personal jurisdiction, and, with her attorney, filed affidavits in support of the motion. OW A-1, p. 2. After a hearing, the trial court denied the motion, and Reiss appealed to the Fourth District Court of Appeal (“Fourth District”). The Fourth District reversed and remanded with instructions to dismiss the second amended complaint as to Reiss. OW A-1, p. 2. The Fourth District also denied Ocean World’s Motion for Rehearing, Rehearing *en banc* and/or for Certification. Ocean World now petitions this Court to exercise discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Pursuant to Fla. R. App. P. 9.030, Ocean World has not alleged any credible grounds warranting discretionary jurisdiction of this Court. The Decision does not expressly or directly conflict with any decision of this Court or any other district court of appeal, but rather, is based upon and follows precedent of this Court. Ocean World’s arguments are not supported by and are contradicted by the Decision itself.

Ocean World completely misconstrues the ruling and analysis of the Fourth District. First, the Decision did not improperly “look outside the four corners of the Complaint” or consider evidence not before the trial court. Second, the Decision made no determination as to whether Ocean World could assert a cause of action in tort, but merely (as the proper inquiry for personal jurisdiction) whether the facts alleged in the complaint established commission of a tortious act *within Florida*. Third, the Decision shows Reiss provided the appropriate affidavit.

ARGUMENT

I. STANDARD OF REVIEW.

This Court “[m]ay review any decision of a district court of appeal that...expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Fla. Const., Art. V., §3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv). This rule terminated supreme court jurisdiction over “purely intradistrict conflicts.” Committee Notes to 1980 Amendment; *see also* Fla. R. App. P. 9.331. [2]

² Ocean World’s arguments based on purported conflict with decisions of the Fourth District Court of Appeal, even if they had any merit, which they do not, are irrelevant. In any event, the Decision is consistent with intradistrict authority cited by Ocean World. *Hunt v. Cornerstone Golf, Inc.*, 949 So. 2d 228, 230 (Fla. 4th DCA 2007) (for personal jurisdiction “determinative issue...is...whether the tort, as alleged, occurred in Florida.”); *Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So. 2d 716, 719 (Fla. 4th DCA 1998) (nonresident had sufficient minimum contacts to comport with due

As this Court explained long ago in *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960) (reaffirmed following the 1980 amendments to article V of the Florida Constitution), there are two principle circumstances that support jurisdiction to review district court decisions based upon alleged express-and-direct conflict:

- (1) the announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or
- (2) the application of a rule of law to produce a different result in a case that involves “substantially similar controlling facts as a prior case....”

Id.; *Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009).

The alleged conflict must be express and direct, i.e., it must “appear within the four corners of the majority decision.” *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). The record cannot be used to establish conflict jurisdiction. Thus, the only facts relevant to this Court’s jurisdiction are those contained within the decision itself.

Id.

process where he “committed an intentional act directly aimed at Florida and made accusations targeted at a corporation that has its principal place of business in Florida...[and] had additional contacts with the state); *Silver v. Levinson*, 648 So. 2d 240, 242-244 (Fla. 4th DCA 1994) (allegations of nonresident’s intentional tort “aimed directly at Florida and resulting in injuries to a Florida resident” subjected defendant to Florida’s long-arm statute and satisfied due process); *Rivera v. Torfino Enterprises, Inc.*, 914 So. 2d 1087, 1090 (Fla. 4th DCA 2005) (going outside four corners of complaint impermissible on motion to dismiss).

II. THE APPELLATE COURT’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT’S RULINGS, OR THOSE OF ANY OTHER DISTRICT, AND INSTEAD SQUARELY APPLIES RELEVANT CASE LAW.

A. The Appellate Court Correctly Applied *Wendt v. Horowitz* and *Acquadro v. Bergeron* to Determine That No Tort Occurred or Could Have Occurred Within Florida Based on the Allegations of the Second Amended Complaint.

Ocean World misapprehends and ignores the pertinent language of the Decision, which found no personal jurisdiction over Reiss “[b]ecause the **facts plead in the complaint** do not constitute the commission of a tortious act **within Florida** or otherwise establish the requisite minimum contacts with the state.” OW A-1, p. 1 (emphasis added). Ocean World inexplicably argues from this language that the Decision “summarily decided no tort could have occurred in this case.” OW Brief (OW Br.), p. 5. Ocean World closes its eyes to the actual determination: that no tort, based on the allegations, occurred *within Florida*. The Fourth District itself italicized the word “within” to emphasis its holding. OW A-1, p. 3.

The Fourth District applied the rule of law announced in prior decisions of this Court cited by Ocean World. *Wendt v. Horowitz*, 822 So. 2d 1252, 1257 (Fla. 2002) (“a [Florida] court can exercise personal jurisdiction, *inter alia*, whenever a foreign [defendant] commits a ‘tortious act’ on Florida soil.”); *see also Acquadro v. Bergeron*, 851 So. 2d 655, 669-670 (Fla. 2003) (discussing *Wendt* and requirement under Florida long-arm statute that a tortious act be committed within Florida).

Ocean World further argues, without citation to authority, that the Fourth District Court “could not possibly have ruled on ALL the facts” because discovery had not been completed in that regard. OW Br, p. 5, n.3. But the Decision clearly provides that the court ruled on “the facts plead in the complaint.” OW A-1, p. 1. This is the proper standard for review of a motion to dismiss. *Connolly v. Sebeco*, 89 So. 2d 482, 484 (Fla. 1956) (motion to dismiss to be decided on “sufficiency of facts *alleged*.”). Even Ocean World acknowledges this rule and specifically argues that the Fourth District is required to consider “evidence” within “the four corners of the complaint.” OW Br., pp. 6-7. [3]

B. The Appellate Court Properly Based Its Determination on the Facts Alleged in the Complaint and Did Not Utilize Evidence Not Before the Trial Court.

Ocean World’s argument that the Decision “relied upon facts outside the four corners of the [complaint], attachments and affidavit” because the court “presumes no

³ Based on the same reasoning, Ocean World’s argument that the complaint should not be dismissed as to Reiss, because other causes of action including defamation, could be stated, must fail. Ocean World cites no authority, let alone any that purportedly directly and expressly conflicts with the Decision, that a motion to dismiss cannot be granted if another cause of action *could* be pleaded. This Court does not decide any issue that is not the basis for the Court’s jurisdiction. *Wendt*, 822 So. 2d at 1253. Thus, this is not a proper consideration here. Reiss does note, however, that the Fourth District determined that exercise of jurisdiction over Reiss would not comport with due process because sufficient minimum contacts do not exist. OW A-1, pp. 1, 3. Changing the theory of the tort alleged does not eliminate this requirement. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) (satisfaction of Florida’s long-arm statute and due process required for personal jurisdiction over nonresident.);

other evidence could exist” is without merit and nonsensical. OW Br., pp. 6-7, citing OW A-1, p. 1. The Decision states no such presumption and cannot be considered in this Court’s jurisdictional analysis. *Reaves*, 485 So. 2d at 830 (allegations of conflict must be based on facts contained on the face of the decision). Nor would it be relevant. The Decision is properly based on the “facts pled in the complaint.” OW A-1, p. 1; *Connolly*, 89 So. 2d at 484 (Fla. 1956) (motion to dismiss to be decided on “sufficiency of facts *alleged*...”); *see also Wendt*, 822 So. 2d at 1260 (because the threshold question of personal jurisdiction turns on “whether a tort is committed in Florida, the court necessarily must review the allegations of the complaint to determine if a cause of action is stated.”). In addition, it was proper for the court to consider the affidavits of Reiss and her counsel. OW A-1, p. 2; *Venetian Salami*, 554 So. 2d at 502-503.

C. Reiss’ Affidavit Was Sufficient Under *Wendt* and *Acquadro*.

The purpose of affidavits in a personal jurisdiction inquiry is “to contest the allegations of the complaint or to raise a contention of minimum contacts.” *Acquadro*, 851 So. 2d at 668; *see also Wendt*, 822 So. 2d at 1256-1257 (affidavit refuted allegations). Ocean World does not point to any allegation in the complaint or “evidence” that Reiss did not rebut by affidavit. OW Br., pp. 7-8. The Fourth District

set forth pertinent averments from the Reiss affidavit (OW A-1, p. 2) and determined, *inter alia*, that Reiss lacked requisite minimum contacts with Florida (OW A-1, pp. 1, 3-4). Accordingly, the second purpose of the affidavit, as set forth in *Acquadro*, was satisfied. The Decision does not announce a rule of law that conflicts with a rule previously announced by this Court or another district court or apply a rule of law to produce a different result than a case with substantially similar controlling facts.

D. The Appellate Court Did Not Announce a New Substantive Standard for Tortious Interference, or for Any Tort, Involving a Nonresident.

Ocean World's selective and distorted reading of the Decision provides no basis for conflict jurisdiction. The Decision states, in support of the determination that "based on the facts of this case" the second amended complaint "did not allege nor could it have alleged...that the tortious interference occurred *within* Florida," that nothing in the contracts "contemplated payment or performance in Florida, nor is Florida mentioned anywhere in the contacts." OW A-1, p. 3. The Fourth District did not thereby announce a new substantive standard for any tort, but instead limited its discussion to the threshold personal jurisdiction analysis. The court observed, by way of example, the dearth of any connection with Florida that would satisfy the connexity requirement of Florida's long-arm statute. *Id.* ("for jurisdiction to attach under [the long-arm statute], a defendant's 'actions must directly cause injury or damage within the state.'"). It was not possible to cause injury within Florida where the contracts had

no connection to the state whatsoever so that any purported breach of performance or payment could not have occurred in Florida.

The Decision contains no announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court, and instead follows and applies the rule requiring a two-step analysis jurisdictional analysis set forth in *Venetian Salami*, 554 So. 2d at 502.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Court deny jurisdiction.

Dated: September 21, 2009

Respectfully submitted,

**STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.**

Museum Tower, Suite 2200

150 West Flagler Street

Miami, FL 33130

Telephone: 305/789-3200

Facsimile: 305-789-3395

By: _____

Kelly R. Melchiondo

Fla. Bar No. 0582603

kmelchiondo@stearnsweaver.com

Julie L. Fishman

Fla. Bar No. 17293

jfishman@stearnsweaver.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished via U.S. Mail and electronic mail on September 21, 2009 to Alexander Penalta, Esq. and Colleen M. Stiger, Esq., PENALTA & STIGER, P.A., 595 South Federal Highway, Suite 600, Boca Raton, FL 33432, Deanna K. Shullman, Esq., THOMAS & LOCICERO PL, 100 W. Kennedy Blvd., Suite 500, Tampa, FL 33602, and Gary W. Kovacs, Esq., PROSKAUER ROSE, LLP, 2255 Glades Road, Suite 340 West, Boca Raton, FL 33431, and the original and five copies of the brief, were filed with the Florida Supreme Court, by Federal Express and electronic transmission, this 21st day of September, 2009.

Kelly R. Melchiondo

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that this Answer Brief on Jurisdiction is typed in 14 point (proportionally spaced) Times New Roman in accordance with the Florida Rules of Appellate Procedure 9.210(a)(2).

Kelly R. Melchiondo