IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-896

MARTIN ACQUADRO and ROSE ACQUADRO,

Petitioners,

vs.

JANET BERGERON,

Respondent.

ON DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

ANSWER BRIEF OF RESPONDENT, JANET BERGERON

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NOTE ON CITATIONS TO THE RECORD

In this Answer Brief, the Respondent adheres to the Petitioners' convention of citing to the "Appellants' Appendix" (as filed in the District Court of Appeal) as "App. _ _," where the underline contains the index tab number of a document in the Appellants' Appendix, followed by a page and/or paragraph reference within said document, or a reference to an exhibit attached to the document.

The pages in the Appellee's Appendix were consecutively numbered for ease of reference. The Appellee's Appendix (as filed in the District Court of Appeal) will be cited in this Answer Brief as "AA-__," with a page number in place of the underline.

STATEMENT OF THE CASE AND FACTS

In their Statement of the Facts, the Petitioners (Martin Acquadro and Rose Acquadro, the defendants in the trial court and appellants in the fourth district) have given a distorted view of the facts, and have failed to set forth the record evidence in support of the order on appeal.

This Court has elected to review a decision of the Fourth District Court of Appeal affirming an order of the trial court which denied the Petitioners' motion to dismiss for lack of personal jurisdiction. *Acquadro v. Bergeron*, 778 So. 2d 1034 (Fla. 4th DCA 2001). Unfortunately, the fourth district's decision explicitly makes reference only to "telephone calls" as the basis for personal jurisdiction. As will be demonstrated by the following factual recital, telephone calls formed only a few of the facts underlying the allegation that the Acquadros committed torts in Florida and were therefore subject to long-arm jurisdiction in Florida.

The Respondent Janet Bergeron lived in Boca Raton for eight or nine years with Eddie Acquadro, the uncle of Petitioner Martin Acquadro and the brother-in-law of Petitioner Rose Acquadro. They held themselves out as husband and wife. App. 1, p. 2; App. 4, Exhibit G, ¶¶ 4-5; App. 7, pps. 43-45. The Petitioner Rose Acquadro came to believe that she owned the house where Eddie Acquadro and Ms. Bergeron

lived together. App. 7, pps. 43-44, 64. Because of this belief, the plaintiff contends below, Rose Acquadro and the other Petitioner, her son Martin Acquadro, set out to oust Ms. Bergeron from Eddie Acquadro's life – not caring whether they destroyed her life in the process (e.g., App. 1, Exhibits A-C) – for fear that he might convey or devise some interest in the property to her. *E.g.*, App. 7, pps. 14, 67, 83.

All parties agree that Ms. Bergeron was arrested on September 17, 1997, and charged with battery on Eddie Acquadro. The Complaint alleges that the battery was "a complete fabrication" of four employees of Bonnie Towing & Recovery, Inc. ("Bonnie Towing"), a defendant below (and nominally a Respondent in this Court). App. 1, p. 2. In her testimony below, Ms. Bergeron squarely refuted the allegation that she battered Eddie Acquadro. App. 7, pps. 56-58.

In support of counts for false arrest, false imprisonment, malicious prosecution and intentional infliction of emotional distress, the Complaint alleges that the Acquadros spoke by telephone from Massachusetts with the Bonnie Towing employees "before, during, and after Ms. Bergeron's arrest. The Acquadros offered them money or other benefits to procure Ms. Bergeron's arrest." App. 1, p. 4. The Complaint continues:

17. The BONNIE TOWING representatives put the police in contact by telephone with MARTIN ACQUADRO and ROSE ACQUADRO, who intentionally lied to the police in an effort to convince them to proceed with the arrest and prosecution of Ms. Bergeron. MARTIN ACQUADRO and ROSE ACQUADRO told the police that Ms. Bergeron was regularly abusive to Edward W. Acquadro, and committed criminal neglect of Edward W. Acquadro. They knew these statements to be false at the time they made them, or they made these statements with reckless indifference to their truth [or] falsity.

18. MARTIN ACQUADRO and ROSE ACQUADRO took extraordinary steps to aggressively push for Ms. Bergeron to be prosecuted. They provided false, malicious and incriminating information to the police and prosecutors to encourage Ms. Bergeron's prosecution. They hired private investigators to follow her around and take pictures of her, and provided information to the authorities to support a claim that she was continuing to seek out Edward W. Acquadro, as if she were a threat to him.

19. The Acquadros hired attorneys to pressure the State Attorney's Office to prosecute Ms. Bergeron. The Acquadros' attorneys attended hearings and depositions to observe, feed information to the State Attorney's Office, and otherwise exert pressure in favor of Ms. Bergeron's continued prosecution.

20. The Acquadros hired JAMES R. BONNIE to accompany Edward W. Acquadro on a flight to Massachusetts while Ms. Bergeron was still in jail. Meanwhile, their attorneys provided the criminal court with false information to cause the judge to enter an order that Ms. Bergeron not come in contact with Edward W. Acquadro, and not return to the home they had shared for eight years.

21. As a direct result of the false statements made by the individual defendants to the police and prosecutors, Ms. Bergeron was arrested on felony charges; incarcerated in the Palm Beach County Jail for 13 days; and prosecuted.

App. 1, at 4-5. Although the Petitioners' Brief purports to inform this Court, as a matter of fact, that the Acquadros'

affidavits "contested the essential jurisdictional facts" alleged in the Complaint (Petitioners' Brief at 2-3), there is no basis in fact for that statement. The affidavits filed below (App. 3, 4 and 5) did not refute many of the "essential jurisdictional facts" alleged in the Complaint.[1]

Martin Acquadro's affidavit states, "I did not speak with ... representatives of Bonnie Towing ... prior to [Ms.] Bergeron's arrest. ... In fact, I knew nothing of [Ms.] Bergeron's arrest until after it had occurred." App. 4, ¶ 15. Rose Acquadro's affidavit contains identical conclusory statements. App 5, ¶ 4. But the record shows these statements are arguments, not facts; and are addressed only to the periphery of the Acquadros' tortious conduct, not to the core.

The Acquadros were in Massachusetts when Ms. Bergeron was arrested. They did not know exactly what time she was arrested (a fact which itself is subject to legal argument). They admit they were on the phone to the Boca Raton police on the day of the arrest. App. 5, ¶ 3; App. 4, ¶ 8.

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[1]. Vast portions of Martin Acquadro's affidavit are entirely hearsay, not based on personal knowledge, and submit documents that the affiant is not competent to authenticate. *See* App. 4, ¶ 4, attaching Exhibit A, ¶ 5, attaching Exhibit B, ¶ 9, attaching Exhibit D, and ¶ 10, attaching Exhibit E. The trial court may have elected, properly, to disregard these passages and exhibits.

The testimony at the evidentiary hearing left considerable doubt as to the exact time Ms. Bergeron was actually arrested. App. 7, pps. 47-50, 59-61. Ms. Bergeron was read her Miranda rights and taken into custody at the scene of the alleged crime. App. 7, pps. 58-59. She was questioned there, and then taken to the Boca Raton police station. App. 7, pps. 58-59.

Rose Acquadro was on the phone to the police before they and Ms. Bergeron left the Bonnie Towing garage to go to the Boca Raton police station. App. 7, pps. 49-50. There is no evidence in the record to prove what time the police decided they had probable cause, and arrested Ms. Bergeron. While Ms. Bergeron was there at the police station, Rose Acquadro called the police, and tried to talk them into somehow prohibiting Ms. Bergeron from returning to her own home. App. 7, pps. 50, 59-60. In her affidavit, Rose Acquadro never denies this.

Ms. Bergeron testified that she was never told she was "arrested," but she was first handcuffed at 10:05 p.m., when she was transported from the Boca Raton police station to the county jail. App. 7, p. 50. For all the record shows, the police decision-making process might not have been completed until then. This was well after Rose Acquadro called the police station to lobby them (which she does not deny she did;

she only argues that she did not "lie" when she lobbied the police).

Even if the Acquadros' affidavits are "true" (in spite of their lack of personal knowledge) in arguing that their phone calls went to the police after Ms. Bergeron was arrested, and so these phone calls do not support the "false arrest" count of the Complaint, the same phone calls nonetheless support the malicious prosecution count of the Complaint.

Martin Acquadro's affidavit, for instance, confirms his telephone conversations with the Boca Raton police in connection with the arrest and prosecution of Ms. Bergeron. App. 4, ¶ 9. In claiming to "refute" the allegations of the Complaint, Martin Acquadro's affidavit states, "I never lied to the police to convince them to arrest and prosecute Bergeron." App. 4, ¶ 16. The key to reconciling this sentence with the allegations of the Complaint is the use of the word "lied." He is saying only that his statements were not lies. The Martin Acquadro affidavit does not deny the "essential jurisdictional fact" that he spoke to the police, or that, as the Complaint alleges, he "told the police that Ms. Bergeron was regularly abusive to Edward W. Acquadro, and committed criminal neglect of Edward W. Acquadro." App. 1, ¶ 17. Ditto for the identically worded affidavit of Rose Acquadro. App.

5, ¶ 5.

Martin Acquadro admits that he had been on the telephone to Florida before the arrest and heard that "Eddie was being abused and exploited by [Ms.] Bergeron," App. 4, ¶ 7, and he does not deny repeating this hearsay to the police, as the Complaint alleges. The Complaint alleges that the Acquadros "knew these statements to be false at the time they made them, *or they made these statements with reckless indifference to their truth [or] falsity.*" App. 1, ¶ 17 (emphasis supplied).

The affidavits not only do not refute the latter allegation, they affirmatively support it. When Martin Acquadro's affidavit states that he "never lied to the police," he cannot claim to have personal knowledge of the truth or falsity of his statements to the police that Ms. Bergeron "regularly" abused and neglected Eddie Acquadro. Assuming he has revealed his best sources in his affidavit, he relied on extremely vague, unclear hearsay knowledge of Ms. Bergeron's "regular" abuse and neglect. App. 4, ¶ 7. His evidence is so dubious that he clearly acted with reckless indifference to truth or falsity when he told the police that Ms. Bergeron "regularly" abused Eddie.

With reference to Martin Acquadro's statements to the police, his affidavit states, "I did not make false statements

regarding Bergeron's abuse toward my uncle." App. 4, ¶ 16. Again, he is not denying that, in lobbying the police to charge and prosecute Ms. Bergeron, he told them she abused Eddie Acquadro. And he does not and cannot claim to have personal knowledge of whether she did in fact abuse him, so he cannot know whether the substance of what he told the police about Ms. Bergeron was true. He provides no denial that his statements were made with reckless indifference to their truth or falsity, and gives no ultimate facts to support a conclusion that his statements were not made with reckless indifference to their truth or falsity. In order to discuss this subject, he would have to admit he made the statements.

Neither Martin Acquadro nor Rose Acquadro denies knowing that the Bonnie Towing statements to the police were lies. Tellingly, in fact, the affidavits make not a single reference to what the Bonnie Towing representatives told them, or what the Acquadros told the police. They certainly never discuss their many conversations with their hired Bonnie Towing work crew after the arrest.

Janet Bergeron spent 13 days in jail. App. 7, p. 62. Meanwhile, her home was ransacked, and her belongings stolen. App. 7, pps. 40-43, 51-52, 62-63, 65.

After she was released from jail, Ms. Bergeron, now

joined by her sister, Jacqueline Branz, and their father, returned to Ms. Bergeron's home to find James R. Bonnie had been given a "power of attorney" to dispose of all of the property not only of Eddie Acquadro, but also of Ms. Bergeron. App. 7, pps. 41-43. Ms. Branz testified that he told her he "could do whatever he wanted to, to us or the house or anything," App. 7, p. 43, and that the Acquadros paid him for "liquidating all of Janet's possessions, Janet and Eddie's possession[s]." App. 7, p. 51. James R. Bonnie and his father, Jack Bonnie, kept referring to the "durable power of attorney" coming from "the Acquadros," not distinguishing between Martin or Rose. App. 7, p. 42.

The Complaint alleges that James R. Bonnie and the Acquadros committed civil theft by disposing of Ms. Bergeron's property:

> 60. This is an action against JAMES R. BONNIE, ROSE ACQUADRO and MARTIN ACQUADRO for civil theft.
>
> 61. Beginning during the 13 days while Ms. Bergeron remained in jail, and continuing thereafter, the defendants, JAMES R. BONNIE, MARTIN ACQUADRO, and ROSE ACQUADRO conspired to steal her cash and personal property from the home she had shared with Edward W. Acquadro for eight years.
>
> 62. JAMES R. BONNIE and ROSE ACQUADRO personally converted Ms. Bergeron's cash and personal property to their own possession. MARTIN ACQUADRO further participated by directing the operation, and by cloaking JAMES R. BONNIE and/or ROSE ACQUADRO in the indicia that they acted lawfully under a power of attorney from Edward W. Acquadro to dispose of Ms. Bergeron's property.

> 63. JAMES R. BONNIE, ROSE ACQUADRO and MARTIN ACQUADRO thus committed theft of Ms. Bergeron's property in violation of Florida Statutes section 812.014.

App. 1, at 12. In response to this, both Acquadros' affidavits contain the identical conclusory statement: "I did not steal, convert, or commit theft of Bergeron's property, and I did not conspire to steal, convert, or commit theft of Bergeron's property." App. 4, ¶ 18 (Martin); App. 5, ¶ 6 (Rose). Nowhere do they deny that they gave James R. Bonnie a "durable power of attorney," as is alleged, and as the record shows.

Nowhere in her affidavit did Rose Acquadro deny that she personally came to Palm Beach County to supervise James R. Bonnie as he cleaned out Eddie Acquadro's house, or that she presided over the discarding or selling of property from the house; and nowhere does Martin Acquadro deny directing this operation. The theory of the Complaint below is that the Acquadros committed civil theft and conspiracy to commit civil theft by giving James R. Bonnie his "durable power of attorney" and marching orders to clean all belongings out of the home shared by Janet Bergeron and Eddie Acquadro.

Bonnie and his co-conspirators committed theft of some

property by throwing it away.[2] They "liquidated" other property by selling it. App. 7, p. 51. Part of Bonnie's pay was that he could keep any money he acquired from selling Ms. Bergeron's property. App. 7, p. 51. The Complaint calls it a "theft" of Ms. Bergeron's property that James R. Bonnie and Rose Acquadro discarded or sold her property, and, when the Acquadros deny that the committed "theft," they are in reality making the legal argument that their conduct was not a "theft."

In other words, they do not deny the ultimate facts, but demand that the trier of fact accept their legal opinion of their conduct. Indeed, implicitly, the Acquadros admit their complicity in the underling activities, App. 4, at 4-5 n.1, saying they hired hands to clean up "garbage."

In Martin Acquadro's affidavit, he does not deny complicity in sending Rose Acquadro to Palm Beach County as part of a conspiracy, or deny "cloaking JAMES R. BONNIE and/or ROSE ACQUADRO in the indicia that they acted lawfully under a

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[2]. See App. 4, Exhibit G thereto. Within Exhibit G, there is a stack of letters between Edwards & Angell and Ms. Bergeron's then-lawyer fighting over Ms. Bergeron's attempts to gain access to her former home to retrieve her things. In one of the Edwards & Angell letters, dated December 11, 1997, the Acquadros' attorney writes that "the computer that your client previously claimed had been stolen was located under a pile of rubbish in Mr. Acquadro's trashed residence."

power of attorney from Edward W. Acquadro to dispose of Ms. Bergeron's property." He implicitly admits to his participation in all these events, but demands that the trial court accept his conclusion that his conduct was lawful, not "theft" or "conversion."

Jacqueline Branz asked James R. Bonnie how much he was being paid "to do this and why are you doing this," and he replied, "nothing *yet*." App. 7, p. 46 (emphasis supplied). She testified that she later learned from "all the depositions that were taken" that the Acquadros paid Jack Bonnie $5,500. App. 7, p. 50. Martin Acquadro later claimed to have spent $31,450.35 of his own money on Eddie Acquadro's house ***while Eddie was still alive*** "in order to make the residence habitable and presentable for sale." AA-38. After Eddie died, Martin sought and received reimbursement of this amount from Eddie's estate. AA-38, 55.

On whether the Acquadros gave money to the Bonnies, Martin Acquadro's affidavit states only, "I did not offer money or other benefits to procure Bergeron's arrest." App. 4, ¶ 15. (Rose Acquadro's identical sentence is at App. 5, ¶ 4.) The Complaint alleges that the Acquadros gave money and other benefits to the Bonnies, and the Acquadros do not deny this, instead denying only that they gave the money and other

benefits *to procure Bergeron's arrest*. The allegations and evidence equally support the inference that the money and other benefits provided by the Acquadros to the Bonnie Towing defendants was part of a package of rewards and inducements to get them to ruin Bergeron's life (e.g., App. 1, Exhibits A-C), not merely payment for the specific services that the Acquadros nominally paid the Bonnie Towing representatives to perform. Again, in this instance, their affidavits contain an argument as to the ultimate inference to be drawn rather than a denial of the pertinent fact.

The Complaint alleges, for instance, that the Acquadros hired James R. Bonnie "to accompany Edward W. Acquadro on a flight to Massachusetts while Ms. Bergeron was still in jail," App. 1, ¶ 20, and Martin Acquadro does not deny this, in fact saying only that the Acquadros "arranged for Eddie to fly to Massachusetts" on the "evening" of Ms. Bergeron's arrest, not addressing the allegation that James R. Bonnie was paid to accompany Eddie to Massachusetts. App. 4, ¶ 8. This trip was one of the "other benefits" referred to in the Complaint, where it alleges that the "Acquadros offered them [the Bonnie Towing representatives] money *or other benefits* to procure Ms. Bergeron's arrest." App. 1, p. 4.

In October of 1997, Martin Acquadro engaged Edwards &

Angell "to represent my uncle's interests." App. 4, ¶ 9. In this capacity, while the civil theft was still under way, the Acquadros' attorneys and Ms. Bergeron's attorneys engaged in extensive litigation and letter-writing over the Acquadros' desire to prohibit Ms. Bergeron from entering upon the property to retrieve her belongings. App. 4, Exhibit G (letters attached as exhibits to the exhibit). The Acquadros' attorneys aggressively denied that the Acquadros or their agents, the Bonnie Towing thugs, were responsible for the disappearance of any of Ms. Bergeron's things, and suggested that Ms. Bergeron had trashed her own home and stolen her own things. *Id.*

The attorneys also communicated with the State Attorney's Office in connection with the criminal prosecution of Janet Bergeron. App. 4, second page of Composite Exhibit B. *See also* App. 7, p. 68. The Acquadro affidavits do not deny the allegation, made in support of the malicious prosecution claim, that they "hired attorneys to pressure the State Attorney's Office to prosecute Ms. Bergeron." App. 1, ¶ 19. The Acquadros do not deny the allegation that their "attorneys attended hearings and depositions to observe, feed information to the State Attorney's Office, and otherwise exert pressure in favor of Ms. Bergeron's continued prosecution." App. 1, ¶

19.

While the Complaint says the Acquadros "provided false, malicious and incriminating information to the police and prosecutors to encourage Ms. Bergeron's prosecution," App. 1, ¶ 18, their non-responsive affidavits assert only that they did not give the "criminal court" any "false information," App. 4, ¶ 17, which means only they gave information to their lawyers, not "police and prosecutors," who gave it to the State Attorney, not "the court," and that it was, in their view, "true" information, not "false" information.

Elsewhere, Martin Acquadro's affidavit says that his "attorneys did not provide the criminal court with false information to support the Order of No Contact and Order Directing New Residence. In fact, these orders had already been entered by the time that legal counsel was retained to represent my uncle's interests in Acquadro I." App. 4, ¶ 17. True enough, these orders were entered on September 17 and 18, App. 4, Exhibits C and D, possibly before the Acquadros hired Edwards & Angell, but this paragraph misses the point. The record shows that the Acquadros themselves, not their attorneys, provided the information to the court and/or state attorney to secure an order from the court that Ms. Bergeron not return to her home. App. 4, Exhibit G, ¶¶ 28-33.

The affidavit never denies the allegation of the Complaint that the Acquadros, through their attorneys, subsequently "hired private investigators to follow her around and take pictures of her, and provided information to the authorities to support a claim that she was continuing to seek out Edward W. Acquadro, as if she were a threat to him." App. 1, ¶ 18. *See also* App. 7, p. 68. Nor does it deny that the Acquadros' attorneys subsequently secured and/or "fed" information to the State Attorney's Office based upon which the Assistant State Attorney moved to hold Ms. Bergeron in contempt for attempting to return to her former home, App. 4, ¶ 10 and Exhibit E,[3] and to otherwise continue pursuing the prosecution of Ms. Bergeron. Never do they say a word to deny that the prosecution continued, as a result of their activities, long after it would have been nolle-prossed.

The Martin Acquadro affidavit implies that he, through his lawyers and investigators, provoked the Assistant State Attorney's motion to hold Ms. Bergeron in contempt. He says he learned from the Boca Raton police that Ms. Bergeron and her father were still going to Ms. Bergeron's home in October

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[3]. Martin Acquadro filed his civil complaint against Ms. Bergeron on October 24, 1997, so Edwards & Angell must have been hired before that date; and the motion for Ms. Bergeron to be held in contempt for returning to her home was filed on October 28, 1997.

of 1997; in the next paragraph he says he hired Edwards & Angell; and in the next sentence, he says that the Assistant State Attorney filed a motion alleging that "[p]olice records and witness observations indicate that the defendant continues to utilize the victim's residence along with other individuals including her father." App. 4, ¶¶ 9-10 (with reference to the second of the two paragraphs numbered 9). The close chronology implies, but avoids saying, the truth, as alleged, that Edwards & Angell helped generate these "police records and witness observations" through the private investigator, and provided the information to the Assistant State Attorney.

The Acquadros' attorneys appeared at hearings before Judges Harold Cohen and Catherine Brunson in their litigation over Ms. Bergeron's motion to be allowed to return to the property for long enough to retrieve her belongings. App. 7, pps. 9-12. During all this time, the Complaint alleges, the theft and destruction of her personal property was ongoing as part of the "clean-up" of the house. Ultimately, Ms. Bergeron recovered practically none of her personal property. App. 7, p. 65.

Eddie Acquadro was flown to Massachusetts while Ms. Bergeron was still in jail. App. 4, ¶ 8. He lived in "an assisted-living center" until he died on August 27, 1988,

Petitioners' Brief at 5, AA-24, App. 5, ¶ 3, in Pennsylvania. AA-32. Martin Acquadro secured a durable power of attorney from him on October 4, 1997. App. 4, ¶ 8, AA-20-22. It was this document that empowered Martin Acquadro to exercise virtually unlimited control over the Boca Raton home Ms. Bergeron had lived in for eight years, AA-21, and to confer upon James R. Bonnie yet another power of attorney to "liquidate" Ms. Bergeron's belongings.

Armed with his power of attorney, Martin Acquadro brought a lawsuit for damages against Janet Bergeron in the Circuit Court of the 15th Judicial Circuit. App. 4, ¶¶ 9, 11-12; AA-6-28. In his affidavit, he testifies that, "acting on Eddie's behalf pursuant to a valid durable power of attorney, I engaged the law firm of Edwards & Angell to represent my uncle's interests." App. 4, ¶ 9. He admits that on October 24, 1997, he filed[4] "a three-count civil complaint ... against

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[4]. Actually, he says, "On October 24, 1997, a three-count civil complaint was filed against Bergeron," as if the complaint filed itself. His affidavit tries so hard to avoid acknowledging personal responsibility for his actions in Florida, he even uses curiously contorted language to pretend it was Ms. Bergeron's own fault that he continued litigating against her (and even filed an Amended Complaint for damages), saying: "The lawsuit could not be dismissed in its entirety because [Ms.] Bergeron had filed a counterclaim for unjust enrichment," App. 4, ¶ 12, and, after she filed a voluntary dismissal of her action, "I responded by immediately dismissing the action in its entirety on August 25, 1998," App. 4, ¶ 13, as if he could not have dismissed *his own*

[Ms.] Bergeron and Robert Bergeron [her father] alleging: (1) unlawful entry and detention [sic]; (II) trespass; and (III) declaratory judgment." App. 4, ¶ 11. He later filed an Amended Complaint seeking compensatory and punitive damages against Ms. Bergeron and her father. AA-9-10.

The Complaint was originally brought in the name of Eddie Acquadro, AA-15-17, but was stricken as a sham when the evidence proved that Eddie Acquadro was not competent to sue, or did not in fact sue. AA-15-19. Ms. Bergeron alleged that the lawsuit against her was brought in Eddie's name as a result of "undue influence," or that, while his capacity was diminished, his family brought the suit "without his consent." App. 4, Exhibit G, ¶ 9. Eventually, Martin Acquadro was forced to admit that it was he who brought the lawsuit (he was the "proper party" all along, AA-16) against Ms. Bergeron, not Eddie (though he continued to claim to sue Ms. Bergeron for Eddie's "benefit").

After Eddie Acquadro's death, Martin Acquadro, as the named personal representative and a beneficiary under the will, served as personal representative of Eddie Acquadro's

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lawsuit in its "entirety" at any time. Then he has the nerve to say that Ms. Bergeron was "[n]ot content with costing Eddie and his estate tens of thousands of dollars in attorney's fees in Acquadro I," as if, in fact, she had ever forced Martin Acquadro to spend a nickel on the lawsuit he brought.

estate. App. 4, ¶ 14; AA-26-27, 32. Ms. Bergeron filed a claim against the estate. App. 4, ¶ 14; AA-44. Martin Acquadro's affidavit states, "Bergeron's statement of claim [in the probate court] was eventually struck by the Honorable Judge John J. Hoy ... " App. 4, ¶ 14. This wording leads the reader to the impression that Judge Hoy ruled against Ms. Bergeron's claim, but in fact, the record reflects that Judge Hoy entered an order agreed upon by the parties, App. 4, Exhibit F, AA-52-53, and the record does not reflect the terms upon which the parties agreed to the order. Martin Acquadro continued to administer his uncle's estate until more than nine months after the instant lawsuit was filed against him. AA-57.

In the instant case, after the Acquadros filed their motion to dismiss for lack of personal jurisdiction, Ms. Bergeron's counsel scheduled an evidentiary hearing. App. 6. The plaintiff did not file any affidavits in opposition to the Acquadros' motion, contending, as she did, that the motion was facially insufficient. App. 7, pps. 33-35. While making the argument that the Acquadros' affidavits were facially insufficient, the plaintiff nonetheless also introduced some evidence to refute some of the statements made by the Acquadros in their affidavits. App. 4, pps. 37-66. The

testimony about Rose Acquadro's libel of Ms. Bergeron is particularly noteworthy:

> ***Ms. Branz's testimony:*** It was 9:19 at night. And the phone rang, and I was in the kitchen and Janet was in a bedroom, and we both picked up. And this person was screaming on the phone, get out of my house, get out of my house. She repeated that several times.
>
> And I said, we are in Janet and Eddie's house, who is this? She said, this is Rose Acquadro. You are in my house. Get out of my house. And then James Bonnie and Rose Acquadro started to dialog. And a number of things were said.
>
> James Bonnie repeatedly called Janet a retard. Rose Acquadro said that Janet has AIDS. And I said, Rose, if Janet has AIDS, then that would mean that Eddie has AIDS too. And she said, they never had sex. And I said, well, of course they did; they lived together as husband and wife.

App. 7, pps. 43-44.

> ***Ms. Bergeron's testimony:*** I was traumatized ... I picked it up, but I couldn't say anything after I heard her voice.
>
> Q. What did you hear her say?
>
> A. That I had AIDS, get out of the house.
>
> Q. Who else was on the phone?
>
> A. James Bonnie. ... He told me that I was retarded.

App. 7, pps. 63-64.

In the trial court, the defendants never objected to the plaintiff's election not to file any counter-affidavits in opposition to the defendants' motion to dismiss the action for lack of personal jurisdiction over them. Neither did they make the argument in the Fourth District Court of Appeal that

this election had any substantive effect on the case.

SUMMARY OF THE ARGUMENT

The Petitioners have never identified any case that *Acquadro* is in conflict with. Therefore, the instant petition for review should be dismissed.

There is no merit to the Petitioners' contention that the fourth district's decision is in conflict because it holds that a phone call, standing alone, absent a tort, is adequate to support personal jurisdiction in Florida. The fourth district did not so hold, but, if this Court is concerned that others might discover the Petitioners' strained interpretation of the fourth district's decision and be misled by it, this Court should affirm the fourth district but disclaim the potential erroneous interpretation.

Regardless of the fourth district's decision, the order of the trial court should be affirmed because the Acquadros failed to cross the first threshold of the *Venetian Salami* test. Their affidavits failed to refute the allegations of the Complaint that they both committed the torts of false arrest, false imprisonment, malicious prosecution, and civil theft, and that Rose Acquadro committed slander.

The Acquadros' affidavits do not squarely meet and deny the allegations of the Complaint, and as to many of the

allegations of the Complaint the affidavits make no reference. The affidavits mostly state legal conclusions instead of refuting the allegations of the Complaint. There is no support in the law for the Acquadros' notion that their submission of legal conclusions will suffice to establish that they did not commit the torts specifically alleged.

To the extent that the affidavits actually might have been interpreted to deny that the Acquadros committed the specifically alleged torts, there is ample evidence in the record to refute the affidavits.

Finally, with respect to the count of the Complaint alleging defamation by Rose Acquadro, the evidence proves she intentionally, maliciously communicated a false and defamatory statement into Florida, to victimize a Florida resident. The controlling case law entitles her victim to hale her into court in Florida, and requires her to defend this suit.

ARGUMENT

STANDARD OF REVIEW

The standard of review of a trial court's decision whether to grant a motion to dismiss an action for lack of personal jurisdiction is whether the trial court's decision is supported by competent substantial evidence. *E.g., Fasco Controls Corp. v. Goble*, 688 So. 2d 1029, 1031 (Fla. 5th DCA

1997).

The Petitioners contend that the standard of review is de novo. In support of this contention, they cite *Execu-Tech Business Systems, Inc. v. New Oji Paper Co., Ltd.*, 752 So. 2d 582 (Fla. 2000). But that case states only that a trial court's ruling "*on a question of law* is subject to de novo review." *Id*. at 584 (emphasis supplied). Having said that, the Petitioners then proceed to argue only about certain legal questions, based on the Petitioners' highly debatable interpretation of the fourth district's decision.

If this court agrees that the fourth district made an incorrect statement of law, then the Petitioners are correct that the statement of law, seen in isolation, is reviewed de novo and commented upon as such. However, if this Court finds the fourth district's reasoning incorrect, or concludes that its choice of words might mislead some readers, this Court will ultimately have to decide, based on a review of the record, whether the right result was reached. Unlike *Execu-Tech Business Systems, Inc.*, the issues in this case are fact intensive. The appropriate standard of review is that this Court must decide whether the trial court's order denying the Petitioners' motion to dismiss is supported by competent substantial evidence, and, if so, whether the fourth district

correctly affirmed.

I. REVIEW SHOULD BE DISMISSED OR DISCHARGED FOR LACK OF A CONFLICT OF DECISIONS.

In order to establish conflict jurisdiction, Art. V. § 3(b)(3), Fla. Const., a party must show that a district court decision "expressly and directly conflicts" with a decision of another district court or of this Court. The Petitioners in this case have never identified the case or cases that *Acquadro* is in conflict with. The petition for review of this case should be dismissed for the reasons set forth more fully in the Respondent's Jurisdictional Brief.

The parties in this proceeding do not even know what issue this Court has granted review based upon. This Court only addresses the issues that formed the basis for the grant of conflict jurisdiction. *See Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1094 n.11 (Fla. 2000). In this case, however, the entire case is thrown up for re-argument because of the Petitioners' failure to identify a conflict issue.

In their Jurisdictional Brief and in the Petitioners' Brief On the Merits, the Petitioners keep arguing about the best-known, controlling cases on personal jurisdiction, *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989)

and *Washington Capital Corp. v. Milandco, Ltd., Inc.*, 659 So. 2d 838 (Fla. 4th DCA 1997), as if the fourth district has announced its disagreement with them. But *Acquadro* is not in conflict with *Venetian Salami Co.* or *Washington Capital Corp.* The fourth district has again cited and followed those cases in August, five months after rendering *Acquadro* decision. *See Shoppers Online, Inc. v. E-Pawn, Inc.*, 792 So. 2d 615 (Fla. 4th DCA 2001). The fourth district is not in a state of apostasy when it comes to this state's personal jurisdiction jurisprudence.

Therefore, review should be dismissed, or the grant of review discharged.

II. THERE IS NO MERIT TO THE PETITIONERS' CONTENTION THAT THE FOURTH DISTRICT HELD THAT A PHONE CALL INTO FLORIDA FORMS THE BASIS FOR PERSONAL JURISDICTION EVEN IN THE ABSENCE OF ANY TORT.

This subsection of this brief is dedicated to the Petitioners' argument that the fourth district's decision:

> held that it was not sufficient to deny the tortious statements allegedly made by telephone to Florida; in order to contest jurisdiction, the Acquadros were required to deny the fact of the telephone communication itself. By holding that the telephone communication was the "basis of personal jurisdiction," the court essentially held that a telephone call is not merely a conduit through which a tortious act may be directed to Florida, but is *in and of itself sufficient* for personal jurisdiction over a nonresident.

Petitioners' Brief at 9 (emphasis in original). The fourth district's decision said no such thing. The fourth district held that the phone calls unquestionably took place, and they were the "basis of personal jurisdiction" to the extent they were tortious; but the trial court's "limited evidentiary hearing" was not the time or place to decide the ultimate issue of liability.

Rose Acquadro's affidavit, for instance, did not even deny that she got on the phone to James Bonnie, Jacquie Branz and Janet Bergeron and said Ms. Bergeron "has AIDS," as alleged and proven below. She merely said she "did not make defamatory statements about Bergeron." For all a finder of fact can discern from this affidavit, she is merely making a legal argument that her statement was not actionable for some defensive reason *besides* a contention that she did not make the statement she is alleged to have made. To cite another example, she never denied that she was personally present in Palm Beach County committing the alleged civil theft. She merely denies that she committed theft, which, again, is a legal argument as to her liability.

If this Court chooses to concur with the Petitioners that the fourth district's decision might be interpreted to mean a phone call into Florida, in the absence of a tort, can be

sufficient for personal jurisdiction, then this Court should merely write an opinion affirming the fourth district, but warning that this Court disapproves the fourth district's decision to the extent it might be interpreted in the strained manner the Petitioners have chosen to interpret it.

In any event, the fourth district's decision should be affirmed.

III. THERE IS NO MERIT TO THE PETITIONERS' CONTENTION THAT THERE IS A "SPLIT IN THE DISTRICTS" AS TO WHETHER A TORTIOUS TELEPHONE CALL INTO FLORIDA FORMS AN ADEQUATE BASIS FOR PERSONAL JURISDICTION.

The Petitioners contend that there is a "split in the districts as to whether even a *tortious* phone call into Florida is sufficient for personal jurisdiction." Petitioners' Brief at 13 (emphasis in original). To the contrary, there is no such "split." On this point, the Petitioners get two distinct lines of cases mixed up.

In *Silver v. Levinson*, 648 So. 2d 240 (Fla. 4th DCA 1994), the fourth district held that "plaintiff's complaint containing a cause of action for an intentional tort of libel aimed directly at Florida and resulting in injuries to a Florida resident subjected defendant to the reach of our long arm statute." *Id*. at 242. *See also Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So. 2d 716, 718-719 (Fla. 4th DCA

1998) (same); *Carida v. Holy Cross Hosp., Inc.*, 424 So. 2d 849, 849 (Fla. 4th DCA 1982) (same). Each of these cases also holds that constitutional due process requirements are necessarily always met when an out-of-state defendant intentionally projects a libel into Florida.

The Petitioners attempt to establish conflict by confusing this rule of law with a distinct line of cases in which a tort was committed entirely outside of this state, but some resulting injury was felt by a party in this state. For instance, in *Thompson v. Doe*, 596 So. 2d 1178 (Fla. 5th DCA 1992), *aff'd*, *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993), the defendant was in Texas when he committed negligence. There was no question about whether he committed a tortious act in Florida; he did not. *Thompson*, 596 So. 2d at 1181 (referring to Thompson's "foreign tortious act causing injury in Florida"). The fifth district said: "This court has held that the occurrence of injury in Florida standing alone is insufficient to establish jurisdiction under section 48.193(1)(b) and that part of a defendant's tortious conduct must occur in this state." *Thompson*, 596 So. 2d at 1180.

This case is not in conflict with *Thompson*. In this case, the fourth district's decision was based on the rule of law that "the tort of libel is not completed until the

statements are published," *Silver*, 648 So. 2d at 242, and so the "final element of the tort" is not satisfied until the defamatory statements are published. *Id*. "Until that time, no tort had been 'committed'," *Silver*, 648 So. 2d at 242. If the statement is made in Florida "via telephone," then the tort was committed "in Florida within the meaning of Florida's long-arm statute." *Achievers Unlimited, Inc.*, 710 So. 2d at 718.

The Petitioners have not cited any case in conflict with this rule of law. The *Thompson* issue underlies the other cases cited in the Petitioners' Jurisdictional Brief as being in conflict with this case. They are all about activities committed outside of Florida, causing injury in Florida. *See Horowitz v. Laske*, 751 So. 2d 82, 86 (Fla. 5th DCA 1999) ("The 'tortious acts' alleged here ... were not committed *in the state of Florida* as required by the plain language of the statute," section 48.193(1)(b)) (emphasis in original); *Texas Guaranteed Student Loan Corp. v. Ward*, 696 So. 2d 930, 932 (Fla. 2d DCA 1997) ("The complaint ... fails to allege that any of the tortious conduct occurred in Florida. The occurrence of injury alone in Florida does not satisfy section 48.193(1)(b) ... To establish personal jurisdiction, part of the defendant's tortious conduct must occur in Florida.");

Intercontinental Corp. v. Orlando Regional Medical Center, Inc., 586 So. 2d 1191, 1195 (Fla. 5th DCA 1991) ("Without deciding whether appellee has adequately alleged the tort of tortious interference at all, we are convinced the mere act of communicating with the *promisee* in Florida, in an effort to convince the promisee not to insist on contractual rights, does not constitute the commission of a tortious act in this state") (emphasis in original); *McLean Financial Corp. v. Winslow Loudermilk Corp.*, 509 So. 2d 1373, 1374 (Fla. 5th DCA 1987) (making a false statement over the phone does not constitute commission of a tort in Florida).

The fifth district's decision in *Thompson* certified conflict with *Carida*, saying, "We recognize that some Florida courts have held that the commission of a tort for purposes of establishing long-arm jurisdiction under section 48.193(1)(b) does not require physical entry into or tortious conduct in this state, but only requires that injury or damages occur within Florida," and, with a "see also" introduction, identified *Carida* as one of those cases. *Thompson*, 596 So. 2d at 1181.

Thompson thus misstated the holding in *Carida* and wrongly certified *Carida* as being in conflict. *Carida* was a case in which libel was committed via telephone calls into Florida,

and so the libel was committed in Florida. Since then, many cases have cited *Carida*, correctly recognizing that it stands for the proposition that a libel transmitted into Florida on the telephone constitutes the commission of a tort in Florida. *E.g.*, *Acquadro*, 778 So. 2d at 1035; *Silver*, 648 So. 2d at 242. In *Doe*, this Court "disapprove[d]" *Carida*, but only to the extent *Carida* was "in conflict with this opinion," which is not at all.

In sum, there is no conflict between the fourth district's decision in this case and any other case. Therefore, review should be dismissed or discharged.

IV. THE TRIAL COURT CORRECTLY FOUND PERSONAL JURISDICTION OVER THE DEFENDANTS BECAUSE THE DEFENDANTS' AFFIDAVITS FAILED TO REFUTE THE JURISDICTIONAL FACTS ALLEGED IN THE COMPLAINT.

The Acquadros' argument that the fourth district was required to reverse the trial court depends entirely upon their contention that they filed legally sufficient affidavits contesting the essential jurisdictional facts alleged in the Complaint. This argument is without merit, as a matter of fact. The Acquadros' affidavits were insufficient to shift the burden to Ms. Bergeron because the unrefuted allegations of the Complaint are sufficient to satisfy both due process considerations and long arm jurisdiction.

The analysis of personal jurisdiction in Florida starts with *Venetian Salami Co.* and *Washington Capital Corp.*

> If the allegations of the complaint are sufficient to establish Florida's long-arm jurisdiction, the burden shifts to the defendant to contest jurisdiction by a *legally sufficient* affidavit or other similar sworn proof contesting the essential jurisdictional facts. ... The burden then returns to the plaintiff who must, *by affidavit or other sworn statement*, refute the proof in the defendant's affidavit. ... The failure of a plaintiff to refute the allegations of the defendant's affidavit requires that a motion to dismiss be granted, *provided that the defendant's affidavit properly contested the basis for long-arm jurisdiction by legally sufficient facts.*

Washington Capital Corp., 659 So. 2d at 841 (emphasis supplied). In this case, the Acquadros' affidavits did not properly contest the basis for long-arm jurisdiction by legally sufficient facts, or show a failure of minimum contacts. Therefore, the Acquadros failed to shift the burden back to Ms. Bergeron to prove either that they committed a tort in Palm Beach County or that they possess sufficient minimum contacts to satisfy constitutional due process requirements.

The Acquadro affidavits are a thin gruel of conclusory statements, avoiding more of the factual allegations of the Complaint than they address. The first paragraph of each of the Acquadro affidavits contains an identical statement that

each affiant has “personal knowledge as to all of the facts contained herein,” App. 4, ¶ 1 (Martin), App. 4, ¶ 1 (Rose), but it is obvious in one paragraph after another that that statement is not true as a matter of law.

The issues in this case are fact-intensive. Therefore, this brief’s Statement of the Facts, rebutting the Statement of the Facts of the Petitioners’ Brief, serves to support this section of the argument by pointing out, line after line, how the affidavits are insufficient to fully deny any of the torts alleged in the Complaint.

The affidavits themselves support the exercise of personal jurisdiction. Martin Acquadro demonstrates that he brought a lawsuit against Ms. Bergeron in the court below over matters related to this action. His attorney, in argument on this motion below, said this case “is really just an improper continuation of an action that was already voluntarily dismissed by both parties sometime ago,” App. 7, p. 3, referring to the lawsuit Martin brought against Ms. Bergeron.

If this action is a “continuation” of the action Martin brought against Ms. Bergeron, surely the court has personal jurisdiction over him. Moreover, with regard to the civil theft of Ms. Bergeron’s property, the Acquadros’ counsel argued below that Ms. Bergeron “could have asserted that as a

counterclaim" in the lawsuit Martin Acquadro brought against Ms. Bergeron. Thus, the Acquadros argued not only that the factual matters were so inseparable as to be a potential permissive counterclaim, but also that there would have been personal jurisdiction over Rose Acquadro, had Ms. Bergeron brought this action as a counterclaim in Martin Acquadro's suit against her.

In the context of the personal jurisdiction analysis below, every allegation of the Complaint that was not specifically denied in the Acquadros' affidavits had to be taken as true. As the fourth district said in ***Bohemian Savings & Loan Ass'n v. Nagelbush***, 535 So. 2d 357 (Fla. 4th DCA 1988):

> Because appellant failed to rebut all of the legally sufficient jurisdictional allegations in appellee's complaint, those not rebutted must be taken as true. Therefore, jurisdictional grounds were stated and the trial court properly denied appellant's motion to dismiss for lack of personal jurisdiction under the long-arm statute.

Id. at 358. This rule is well settled. *See Tallmadge v. Mortgage Finance Group, Inc.*, 625 So. 2d 1313 (Fla. 4th DCA 1993) ("the unrefuted portion of [p]laintiff's allegations demonstrate sufficient minimum Florida contact to support jurisdiction"); *John Ownbey Co., Inc. v. Bike Athletic Co.*, 488 So. 2d 618, 619 (Fla. 1st DCA 1986) (holding that "the

burden never shifted to Bike [the plaintiff] to support these allegations of its complaint with evidence," referring to allegations not specifically denied by the defendant, and therefore "the motion to dismiss was properly denied for failure to overcome the legal sufficiency of allegations of the complaint"); *Lee B. Stern & Co., Ltd. v. Green*, 398 So. 2d 918, 919 (Fla. 3d DCA 1981) (although defendants "generally" denied contacts, and the allegations of the complaint, nonetheless they "did not overcome the legal sufficiency of the complaint since they failed to address specific allegations that certain of the subject assets were unlawfully removed from Florida or were encumbered within the state by the defendants"); *Elmex Corp. v. Atlantic Federal Savings and Loan Ass'n of Fort Lauderdale*, 325 So. 2d 58, 62 (Fla. 4th DCA 1976) ("[f]or the purposes of withstanding a motion to dismiss a plaintiff is [n]ot required to [p]rove a jurisdictional fact [n]ot at issue").

The Complaint alleges that both of the Acquadros "told the police that Ms. Bergeron was regularly abusive to Edward W. Acquadro, and committed criminal neglect of Edward W. Acquadro," and they do not deny that. Therefore, that allegation is taken as true, as is the allegation that they "took extraordinary steps to aggressively push for Ms.

Bergeron to be prosecuted."

The Complaint alleges that both of the Acquadros "hired private investigators to follow her [Ms. Bergeron] around and take pictures of her, and provided information to the authorities to support a claim that she was continuing to seek out Edward W. Acquadro, as if she were a threat to him." The Acquadros did not deny those allegations, so they are accepted as true.

Martin Acquadro affirmatively admits he hired Edwards & Angell to file the civil suit against Ms. Bergeron, and does not deny that his law firm was also hired to pressure the State Attorney's Office to prosecute Ms. Bergeron. The Complaint alleges that Rose Acquadro also hired Edwards & Angell for this purpose, and she does not deny it. Together, they do not deny that their attorneys attended hearings and depositions to observe, feed information to the State Attorney's Office, and otherwise exert pressure in favor of Ms. Bergeron's continued prosecution.

The Acquadros do not deny that they hired James R. Bonnie to accompany Eddie Acquadro on a flight to Massachusetts while Ms. Bergeron was still in jail. The Complaint alleges that Martin later cloaked James R. Bonnie and/or Rose Acquadro "in the indicia that they acted lawfully under a power of attorney

from Edward W. Acquadro to dispose of Ms. Bergeron's property." In his affidavit, he does not deny that. The Complaint alleges that this act was his role in the civil theft. Martin Acquadro denies he committed theft, but only in the most general and conclusory terms, not in terms sufficient to refute the specific facts alleged in the Complaint.

Of course Martin Acquadro does not admit that his conduct constituted theft or conspiracy, but that is a legal argument, or an argument as to the ultimate inference a jury might draw, not a fact. "In most cases, the affidavits can be harmonized, and the court will be in a position to make a decision based upon facts which are essentially undisputed." *Venetian Salami* at 502-503. So it is here.

Rose Acquadro's affidavit does not deny that she was personally on the property in Palm Beach County participating in certain activities, which the Complaint labels "civil theft." She merely says she did not commit "theft." Even in denying that she has sufficient minimum contacts with Florida to support personal jurisdiction, she does not give a hint to how often she actually visits Florida. If she addressed the issue, she would have to say that she was in Florida, performing some of the very acts the Complaint alleges were tortious.

Therefore, the order on appeal should be affirmed.

V. THE EVIDENCE IN THE RECORD SUPPORTED THE TRIAL COURT'S FINDING THAT IT HAD PERSONAL JURISDICTION OVER THE ACQUADROS.

In the *Venetian Salami* analysis, if a court concludes the defendant's affidavits are sufficient to deny the allegations of the Complaint, then the Court must determine whether all the evidence in the record supports a finding of a lack of long-arm jurisdiction or minimum contacts. Even in this stage, unrefuted allegations of the complaint are taken as true. In this case, when the evidence is added to the unrefuted portions of the Complaint, it is even more clear that the trial court's order finding personal jurisdiction over the Acquadros was correct, and the fourth district was correct to affirm.

By their argument, the Acquadros, in substance, are asking this Court to rule that they did not commit any torts in Florida, just because they say they did not. But the record contains irrefutable proof that the Acquadros were involved in the factual matters that the plaintiff said were tortious. The Acquadros merely deny liability.

Under the rule of law the Acquadros are promoting, if a defendant files an affidavit that says, "I did not commit a tort," the plaintiff would have to prove the defendant's

liability in an evidentiary hearing in order to establish personal jurisdiction, and then prove it again before a jury. Under the Acquadros' rule, an out-of-state driver who clearly was involved in a traffic accident in Florida could submit an affidavit denying that he was not negligent, and this would require the plaintiff to prove, at a limited hearing on personal jurisdiction, he was negligent in order to establish the trial court's personal jurisdiction over him.

That is why the plaintiff below conducted no discovery on personal jurisdiction. It seemed absurd to think that the defendants could submit a motion that shows, on its face, their extensive involvement in the factual matters alleged in the Complaint, and in the same motion establish a lack of personal jurisdiction by denying liability. In *Offer v. Lady Alice Corp.*, 671 So. 2d 191 (Fla. 4th DCA 1996), the fourth district said:

> The facts alleged here could constitute tortious conduct. ... And, the tortious conduct did occur in Florida. ... Finally, Jepson's activities in Florida were sufficient to satisfy the minimum contact requirement of due process.

Id. at 192 (citations omitted). Although *Offer* is short on factual analysis, the quoted passages seem to be saying that the disputed issue, as in this case, was the ultimate inference of liability. In this case, as in *Offer*, the

conduct that "could constitute" a tort clearly took place in Palm Beach County. *See also Offer v. Arison*, 671 So. 2d 193 (Fla. 4th DCA 1996) (same holding, noting that as "Judge Stone stated in his original dissent, '[f]rom the evidence and claims in this record, it is premature to draw ultimate inferences or conclusions of fact to preclude the plaintiff from proceeding against Appellee' Jepson").

In this case, as the fourth district held, it is premature to draw the ultimate inference as to whether the Acquadros committed any of the torts alleged. In this case, as in *Saudi Arabian Airlines Corp. v. Dunn*, 395 So. 2d 1295, 1296 (Fla. 1st DCA 1981), there "are many factual issues involved, as well as conflicting reasonable inferences to be drawn therefrom." Here, as in *Saudi Arabian Airlines*, the Court should conclude that "the trier of fact will ultimately determine" whether any or all of the alleged torts were committed. *Id*. The Court cannot conclude, on this record, that no tort was committed.

The evidence in the record shows that Ms. Bergeron lived with Eddie Acquadro for most of the 1990s. She was arrested and accused of battery on him, but she maintains, and it is not an issue in this appeal, that she can prove at trial that the alleged battery was a complete fabrication.

The evidence shows that the Acquadros spoke with the police that day. The evidence shows that the Acquadros do not really know whether they spoke with the police before or after Ms. Bergeron was arrested, or whether Ms. Bergeron might have been released or charged with a lesser crime had they not spoken with the police. The Acquadros reveal nothing of what they said to the police, except that, in keeping with human nature, they do not perceive themselves to have lied.

The Complaint's allegation that they "told the police that Ms. Bergeron was regularly abusive to Edward W. Acquadro, and committed criminal neglect of Edward W. Acquadro," must be accepted as fact. There is nothing in the record to refute the allegation that these statements were made with reckless indifference to their truth or falsity.

Subsequently, the Acquadros involved themselves personally in pushing for the prosecution to go forward, and later hired attorneys to continue this effort. They hired private investigators to follow Ms. Bergeron around and take pictures of her, and provided that information to the authorities to provoke the state to file a motion for Ms. Bergeron to be held in contempt for returning to her home.

Martin Acquadro's own affidavit confirms the allegations of the Complaint that he fought a legal battle to keep Ms.

Bergeron out of the house. The evidence shows that the Acquadros had regular dealings with James R. Bonnie, beginning on the day of Ms. Bergeron's arrest, and hired him to fly Eddie to Massachusetts. There is nothing to contradict the allegations and evidence that Martin Acquadro gave James R. Bonnie a power of attorney and had him, aided by Rose Acquadro, clean out Eddie's home, apparently trashing Ms. Bergeron's things. The evidence further proves that Ms. Bergeron, subsequent to her arrest, never had an opportunity to retrieve her personal property, and never got it back. Martin and Rose Acquadro deny that this was theft, but their denial is merely a statement of their legal defense.

In light of the evidence, the trial court did not err in denying the Acquadros' motion to dismiss the Complaint for lack of personal jurisdiction over the Acquadros, and therefore the fourth district's decision should be affirmed.

VI. STANDING ALONE, ROSE ACQUADRO'S DEFAMATION OF JANET BERGERON IS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION OVER HER.

Rose Acquadro argues that she is not subject to personal jurisdiction in Florida as a consequence of her defamation in Florida of a Florida resident. There is no merit to this contention. Irrespective of any other issue in this case, her defamation of Janet Bergeron, standing alone, subjects her to

in personam jurisdiction in this state.

Rose Acquadro states in her affidavit, "I did not make defamatory statements about Bergeron." App. 5, ¶ 6. Arrayed against that is the testimony of Ms. Branz and Ms. Bergeron, live, in court, and subject to cross examination, irrefutably proving she said Ms. Bergeron "has AIDS." In view of the evidence, Rose Acquadro's statement that she "did not make defamatory statements" about Ms. Bergeron would justify the trial court to cast an extremely skeptical eye on the rest of the legal conclusions stated in Rose Acquadro's affidavit.

The Petitioners' Brief does not even attempt to argue that Rose Acquadro's affidavit could be believed over the live testimony. Rose Acquadro's statements (published to third persons Branz and Bonnie) were defamatory *per se* inasmuch as they impute to Ms. Bergeron "a presently existing venereal or other loathsome and communicable disease." *Wolfson v. Kirk*, 273 So. 2d 774 (Fla. 4th DCA 1973). There is no argument but that the Complaint sets forth a cause of action for libel, and that the libelous statements were published in Florida.

As discussed in section III, above, this case is controlled by *Silver*, *Achievers Unlimited, Inc.*, and *Carida*. There is no merit to the Petitioners' Brief's arguments to the contrary.

Rose Acquadro argues that the "alleged defamatory telephone call was initiated not by Rose Acquadro in Massachusetts, but by James Bonnie in Florida." Petitioners' Brief at 20. As a matter of fact, there is nothing in the record to support this statement. There is no evidence in the record as to where Rose Acquadro was located when the call was made. For all the record shows, she may have been in James Bonnie's office, talking on a speaker phone. She does not deny being in Palm Beach County, neither during the phone call nor at any other time.

The caller ID in Ms. Bergeron's home reflected that the call originated from James Bonnie's office in Boca Raton, Petitioners' Brief at 20, n.2, but, for all the record shows, even if Rose Acquadro was not in his office, she might have originated the call to James Bonnie, who then conferenced Ms. Bergeron in. Rose Acquadro might also have called James Bonnie and asked him to set up the conference call. She does not deny being involved in the call, or state who made it. If Rose Acquadro had wanted to be candid about the phone call in her affidavit, she could have, but instead she chose to be coy and misleading and now asks the Court to assume facts in her defense in the absence of proof.

More fundamentally, the Petitioners' Brief's argument

that it makes any difference who "initiated" the call to the Acquadro-Bergeron home is wholly lacking in support. The analysis set forth in *Silver* does not suggest that there is an "exception" to the rule of *Silver* if the defendant did not "initiate" the phone call. What matters is whether Rose Acquadro intentionally initiated the libel, which she did, by intentionally speaking it, intending that its effect be felt in Florida. The exception suggested by the Acquadros in this case is inconsistent with *Silver's* reasoning. *Silver* found long arm jurisdiction over the defendant because "the place of the publication of the defamatory statement caused by the libel is a relevant inquiry for the purpose of applying Florida's long arm statute." *Silver*, 648 So. 2d 242. *Silver* also focused on whether the sending of the defamation into Florida was intentional.

The Petitioners' Brief next argues that Rose Acquadro prevails under the "second step of the *Venetian Salami* inquiry," to wit: That her libel of Ms. Bergeron "was such a random or attenuated act that it cannot fairly be said that Rose Acquadro should reasonably anticipate being haled into court here. *See Silver*, 648 So. 2d at 243." The fallacy in this contention is twofold. First, *Silver* has already established that when, as here, one person's libel of a person

in Florida is “intentional and purposeful, designed to have an effect in South Florida,” this state’s courts will assert personal jurisdiction. *Silver* at 244. In other words, the legal issue has already been decided against Rose Acquadro in *Silver*, and the distinction she is making — as to which phone number appeared on the caller ID — is a distinction without a difference.

Secondly, the Petitioners’ Brief has wholly manufactured, with no support in the law, the idea that somehow the burden has shifted to the plaintiff below to prove that Rose Acquadro has sufficient minimum contacts with the State of Florida to satisfy constitutional due process requirements. Her affidavit does not contain any facts to support such a conclusion.

Rose Acquadro’s position seems to be that if her affidavit shifted the burden to the plaintiff to prove that she committed a tort, the burden automatically remains with the plaintiff to prove whether she had constitutionally sufficient minimum contacts. This view is mistaken. If she wishes to contest the constitutional sufficiency of her minimum contacts, she must, in her affidavit, *separately* give proof of a lack of such contacts in order to shift the burden to Ms. Bergeron to prove that she does have sufficient

contacts. *See, e.g., Venetian Salami* at 502 ("A defendant wishing to contest the allegations of the complaint concerning jurisdiction *or to raise a contention of minimum contacts* must file affidavits in support of his position.") (emphasis supplied).

The only reference to the issue of minimum contacts in Rose Acquadro's affidavit is in the last paragraph, where she testifies under oath: "My conduct has not been such that I should reasonably anticipate being haled into court in Florida. Maintenance of this suit would offend traditional notions of fair play and substantial justice." App. 5, ¶ 8. Such a statement of legal conclusions is facially insufficient.

To the contrary, in order to shift the burden to Ms. Bergeron to prove that Rose Acquadro did have sufficient minimum contacts to satisfy "traditional notions of fair play and substantial justice," she had to state, in her affidavit, how often she comes to Florida; what business she does in Florida; what communications she has with Florida; what she owns in Florida; and other such jurisdictional facts. She submitted no such facts to shift the burden to Ms. Bergeron to prove her minimum contacts.

Indeed, she did not deny the allegations of the Complaint

that she hired private investigators to follow Ms. Bergeron around; that she hired attorneys to monitor the prosecution of Ms. Bergeron; that she had her attorneys attend hearings and depositions on her behalf, and feed information to the prosecutors; and that she was personally present with James R. Bonnie in Palm Beach County to help dispose of Ms. Bergeron's property. Under Florida law in this context, these allegations, because they are not denied, are to be taken as true. *See Bohemian Savings & Loan* at 358; *John Ownbey Co.* at 619; *Lee B. Stern & Co.* at 919.

Therefore, the fourth district correctly affirmed the trial court's order finding personal jurisdiction over Rose Acquadro.

CONCLUSION

For the foregoing reasons, this Court should dismiss or discharge review of this case. Alternatively, the fourth district's decision to affirm the trial court's order denying the Acquadros' motion to dismiss for lack of personal jurisdiction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Answer Brief was served by U.S. Mail on December 24, 2001 on Donna M. Greenspan, Edwards & Angell, LLP, 1 N. Clematis St., West Palm Beach, FL 33401; and Jeffrey W. Johnson, Johnson, Leiter & Belsky, P.A., 506 S.E. 8th St., Fort Lauderdale, FL 33316.

Robert Rivas

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is printed in 12-point Courier New typeface.

Robert Rivas