IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC01-896

MARTIN ACQUADRO and
ROSE ACQUADRO,

L.T. Case No. 4D00-2011

Petitioners,

v.

JANET BERGERON,

Respondent.

ORIGINAL

RESPONDENT'S JURISDICTIONAL BRIEF

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RESPONDENT'S STATEMENT OF THE FACTS

It is inappropriate for the Petitioners to base their arguments on a "Statement of the Facts" that sets forth certain of the facts stated in the decision below, as it does, and omits others, as it does, and adds some "facts" that are not within the decision below, as it does. This Court looks within the "four corners" of the decision below to decide whether to exercise jurisdiction. *See, e.g., Reaves v. State,* 485 So. 2d 829, 830 (Fla. 1986). Therefore, the only facts relevant to these jurisdictional briefs are found within the text of *Acquadro v. Bergeron*, 778 So. 2d 1034 (Fla. 4th DCA 2001). *See Reaves*, 485 So. 2d at 830 n.3.

The Petitioners' Statement of the Facts omits the most important facts in the decision below:

> Defendants filed affidavits in support of their motion to dismiss for lack of personal jurisdiction, in which they denied making the statements which were the basis of the tort claims, but did not deny their involvement in the telephone conversations with persons in Florida.
>
> Defendants [Petitioners here] argue that plaintiff[']s[] failure to refute their affidavits denying the tortious conduct required the trial court to grant their motion to dismiss for lack of personal jurisdiction. We disagree. The purpose of affidavits in these circumstances is "to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts." *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Where the affidavits are in conflict, the trial court holds a "limited evidentiary hearing in order to determine the jurisdiction issue." *Id.* at 503.
>
> In the present case the trial court did hold an evidentiary hearing, but the purpose was not, as the court correctly recognized, to resolve whether the defendants had committed the torts. That would

> have required a full-blown trial, not the limited evidentiary hearing contemplated by *Venetian Salami*.
>
> Because the defendants' affidavits did not deny that the telephone communication, which was the basis of personal jurisdiction, had occurred, the trial court correctly denied the motion to dismiss. *Carida v. Holy Cross Hosp., Inc.*, 424 So. 2d 849 (Fla. 4th DCA 1982) (committing defamation by telephone call into Florida constituted the commission of a tort in Florida and subjected defendant to personal jurisdiction); *Silver v. Levinson*, 648 So.2d 240 (Fla. 4th DCA 1994) (same). Affirmed.

Acquadro, 778 So. 2d at 1035. Thus, the fourth district found that Petitioners' affidavits were countered by the evidence taken at the evidentiary hearing, leaving the ultimate issue of liability to be tried. The fourth district did not find, as the Petitioners argue, that the Petitioners "had not met their burden to contest jurisdiction by a legally sufficient affidavit and thus that the burden had not returned to [Respondent] to refute the proof in the Acquadros' affidavits." Petitioners' Jurisdictional Brief at 5.

Elsewhere, the Petitioners' Jurisdictional Brief states that the Respondent, Janet Bergeron, "did not file any affidavit to refute the proof in the Acquadros' affidavits," and, in a footnote to that sentence, added: "The fourth district's reference in its opinion to 'conflicting affidavits' might lead to the mistaken impression that Bergeron actually filed an affidavit in this case. No such affidavit was ever filed." Petitioners' Jurisdictional Brief at 2. These "facts" are not found

within the four corners of the decision below, and should be disregarded.[1] In fact, the fourth district made no reference to "conflicting affidavits."

SUMMARY OF THE ARGUMENT

The decision below is not in conflict with any other decision of this Court or of any district court of appeal. In order to identify a conflict, the Petitioners first construct a faulty syllogism to identify what, in their opinion, the fourth district "effectively held" in this case. But their contention as to what the fourth district "effectively held" is without merit, and so the stated "conflict of decisions" is not a conflict at all. It is, at best, an implied conflict, which is insufficient to support review in this Court.

In their second argument, the Petitioners get two distinct issues mixed up. This case involves torts allegedly committed in Florida. The Petitioners attempt to establish conflict by mistakenly placing this case within 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. The latter fact pattern has nothing to do with the

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[1]. The fourth district probably glossed over this point because it did not make any difference, in context. The plaintiff below skipped the step of offering an affidavit, choosing instead to refute the defendants' affidavits at an evidentiary hearing; at that hearing, the defendants clearly waived any objection to this procedure. By making no reference to this, the fourth district avoided going down a trail to nowhere.

holding of the fourth district in this case.

ARGUMENT

I. THE ALLEGED "CONFLICT OF DECISIONS" CITED BY THE PETITIONERS IS BASED SOLELY ON ERRONEOUS STATEMENTS AS TO WHAT THE FOURTH DISTRICT HELD IN THIS CASE.

The decision below is not in conflict with any other decision of this Court or of any district court of appeal. The decision below cites to the *Venetian Salami* case and follows it. The Petitioners' argument is based entirely on the Petitioners' erroneous statements as to what the fourth district said in its decision at *Acquadro*, 778 So. 2d at 1034.

In constructing their argument, the Petitioners start by omitting the fact that an evidentiary hearing was held. Given that omission, and therefore finding nothing *else* in the record to refute their affidavits, the Petitioners conclude that the fourth district must have meant to say that the Petitioners "had not met their burden to contest jurisdiction by a legally sufficient affidavit," which in turn must have meant "that the burden had not returned to [Respondent] to refute the proof in the Acquadros' affidavits." Petitioners' Jurisdictional Brief at 5. Of course, the fourth district never made either of those statements.

By this specious reasoning the Petitioners conclude that the fourth district

had "effectively held that a telephone call is not merely a conduit through which a tortious act may be directed toward Florida, but is in and of itself sufficient for personal jurisdiction over a nonresident." Petitioners' Jurisdictional Brief at 2 (emphasis in original). Only with that statement do the Petitioners find case law that they say is in conflict.

In fact, however, nowhere did the fourth district say that, or hold, as the Petitioners' brief argues, that a telephone call into Florida need not be tortious to support personal jurisdiction under Florida Statutes section 48.193(1)(b). Instead, the fourth district applied the rule of law that "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." *Silver*, 648 So. 2d at 242. *See also Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So. 2d 716, 718-19 (Fla. 4th DCA 1998) (same); *Carida*, 424 So. 2d at 849 (same).

If the decision below were in conflict with any decision of this Court or a district court of appeal, one would think the Petitioners would identify that conflicting case in their "Summary of the Argument." But they do not. In their brief, the Petitioners cite to a number of cases on personal jurisdiction, but never identify a case in conflict with *Acquadro* until after they have spent three pages (4 through 6) constructing the syllogism that leads them to their implausible

conclusion as to what the fourth district "effectively held."

This Court should not find that the fourth district's decision "expressly and directly conflicts" with a decision of another district court or of this Court, Art. V. § 3(b)(3), Fla. Const., based on a statement not made "expressly." Even if the fourth district's decision in this case were arguably to contain the "effective" holding that the Petitioners ascribe to it, this Court does not exercise conflict jurisdiction to review district court decisions based on "inherent or so called 'implied' conflict." *Department of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986). Therefore, review should be denied.

II. IN THEIR SECOND ARGUMENT, THE PETITIONERS HAVE MIXED UP THE ISSUE OF A TORT BEING COMMITTED IN FLORIDA WITH THE ISSUE OF A TORT BEING COMMITTED ELSEWHERE AND A RESULTING INJURY BEING FELT IN FLORIDA.

In this case, no tort exists but for certain telephone calls made into Florida, and the torts therefore took place in Florida, where the communications were received. In their second argument, section 2 of the Petitioners' Jurisdictional Brief, the Petitioners have mixed up this issue with a distinctly different issue in search of a conflict. The Petitioners have mistakenly placed this case within the line of cases in which a tort is committed entirely outside of Florida, but some

"resulting injury" is felt in Florida. *See, e.g., Thomas Jefferson University v. Romer*, 710 So. 2d 67, 70-71 (Fla. 4th DCA 1998) (Farmer, J., concurring and dissenting, and discussing the "conflicting decisions from Florida courts" on whether section 48.193(1)(b) "applies to conduct outside of Florida where resulting injury occurs within this state," or whether the statute requires that the "defendant's conduct or act take place within this state.").

The issue in this case, *Silver* and *Carida* is distinct from the issue raised in the entire line of cases Judge Farmer discussed in his concurring and dissenting opinion in *Romer*, as he himself noted. *See Romer*, 710 So. 2d 70 n.3. The fourth district's decision in this case 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.* 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 cases cited by the Petitioners in section 2 of their Jurisdictional Brief are not in conflict with this rule of law.

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),[2] the defendant was in Texas when he committed his 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"). Only the injury landed in Florida, with no tortious conduct by Thompson personally in Florida. *Id.* In contrast, in this case, and other cases where a libel is transmitted intentionally into Florida, no tort happened absent the publication in Florida. *E.g.*, *Silver*, 648 So. 2d at 242 ("Until that time, no tort had been 'committed'," and as of that time, it was actually committed in Florida).

The issue raised in *Thompson* underlies the other cases cited in the

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[2] *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 misidentified *Carida* and wrongly certified *Carida* as being in conflict. *Carida* was a case in which the torts were committed via telephone calls into Florida, and so the torts were 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; *Romer*, 710 So. 2d at 70 n.3 (Farmer, J., concurring and dissenting); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 257 n.2 (11th Cir. 1996); *Groome v. Feyh*, 651 F. Supp. 249, 251 (S.D. Fla. 1986). In *Doe*, this Court "disapprove[d]" *Carida*, but only to the extent *Carida* was "in conflict with this opinion," which is not at all.

Petitioners' Jurisdictional Brief as being in conflict with this case. They are about torts 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); *Intercontinental Corp. v. Orlando Regional Medical Center, Inc.*, 586 So. 2d 1191, 1195 (Fla. 5th DCA 1991) (same); *Phillips v. Orange Co., Inc.*, 522 So. 2d 64, 66 (Fla. 2d DCA 1988) ("Although the fact that an injury occurs in Florida is crucial to a determination of when a cause of action accrued, the occurrence of injury alone in the forum state does not satisfy the statutory test of section 48.193(1)(b).").

In *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir. 1999), the case quoted at length on page 9 of the Petitioners' Jurisdictional Brief, the eleventh circuit identifies the same issue as Judge Farmer identified in his opinion in *Romer*, quotes from his opinion, and concurs with him that "the courts are deeply divided on the issue of whether a tortious act committed outside the state resulting in injury inside the state subjects the actor to jurisdiction in Florida under subsection [48.193](b)(1)." *Posner*, 178 F.3d at 1216. The Petitioners here are trying to transport that conflict into this case, where it has no place.