

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 68370

due 4-18-86

FILED

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By _____
Chief Deputy Clerk

C. R. McRAE

Petitioner

-vs-

J.D./M.D., INC.

Respondant

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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QUESTION PRESENTED

Can parties to a contract agree therein to submit to the jurisdiction of a chosen forum in the event of subsequent litigation arising out of said contract?

SUMMARY OF THE ARGUMENT

This case involves the issue of the validity and enforceability of jurisdiction selection clauses in contracts. To date, the Florida Supreme Court has not addressed this precise issue. Although several lower appellate courts of the State have ruled upon the instant question, the decisions of these District Courts are in express conflict. It is important that this Court make a definitive pronouncement in this regard and settle the controversies which continue to arise over forum selection clauses in contracts.

A contract provision which attempts to confer jurisdiction upon a particular forum cannot be used as the sole basis for in personam jurisdiction. There must be some other additional independent grounds for jurisdiction such as a long arm statute. In this case, those independent grounds are absent. All material acts and omissions relating to the execution of the contract, the performance of the contract and the breach of the contracts occurred in the State of Mississippi. Florida has no real interest in this action. Consequently, principles of justice and fairness require that the clause be held invalid and unenforceable as to jurisdiction. Traditional principles of due process require that a party have at least minimum contacts with the forum State before he can be required to appear and defend an

action against him in that forum. Where minimum contacts are lacking, the forum lacks personal jurisdiction.

Aside from considerations of due process, the venue provision on the subject contract is ineffectual to confer jurisdiction on the Circuit Court of Palm Beach County. Florida lacked personal jurisdiction over McRae and consequently, no one particular Court in the State could be vested with venue. A Court must have the power to entertain the litigation (jurisdiction) before venue can be determined. Since the prerequisite of jurisdiction over McRae is absent the contractual provision pertaining to venue is superfluous and of no effect.

Finally, in the event that the venue clause is interpreted as conferring both jurisdiction and venue, this Court should adopt the majority view that forum selection clauses are against public policy and unenforceable. This is the traditional view and the one that represents the best approach in determining the validity of contract provisions pertaining to jurisdiction. Under this view, the venue provision of the subject contract would be invalid. Because there is no other jurisdictional basis for this action against McRae, the Trial Court erred in denying McRae's motion to quash service and corresponding motion to dismiss.

STATEMENT OF THE CASE AND FACTS

Petitioner, C. R. McRae, appeals the final order rendered on December 31, 1985 by the Fourth District Court of Appeal affirming a non-final order which denied McRAE'S Motion to Dismiss the complaint against him on the grounds of lack of personal jurisdiction.

On February 6, 1986, the Fourth District Court of Appeal amended its previous opinion to include the following certified question to this Court:

CAN PARTIES TO A CONTRACT AGREE THEREIN TO
SUBMIT TO THE JURISDICTION OF A CHOSEN
FORUM IN THE EVENT OF SUBSEQUENT LITIGATION
ARISING OUT OF SAID CONTRACT.

This Court has discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(V).

This cause of action arises out of a contract dispute between the Petitioner, McRae, and the Respondant, J.D./M.D., Inc. J.D./M.D., Inc. is a Delaware corporation which specializes in procuring expert witnesses for attorneys to assist them in litigation. McRae is a licensed attorney residing and practicing in the State of Mississippi. J.D./M.D. entered into a contract with McRae's client, J.T. Shepard regarding a pending medical

malpractice case in the State of Mississippi. McRae signed his part of the contract and J.D./M.D. agreed to aid in procuring expert witnesses to be used in litigating the malpractice action. In return for these services, Shepard agreed to pay J.D./M.D. seven percent (7%) of the gross proceeds recovered in the action.

On October 19, 1984, J.D./M.D. filed a complaint against J.T. Shepherd and McRae in the Fifteenth Judicial Circuit of Palm Beach County, Florida to enforce the contract. (A-1) The complaint alleged that McRae breached the contract signed by his client, Shepherd. McRae contended that J.D./M.D. did not complete its part of the bargain and retained this law firm to defend against J.D./M.D.'s allegations. Because there was no basis for jurisdiction in Florida McRae filed a motion to quash service of process. In this motion, it was contended that the trial court lacked personal jurisdiction over McRae and therefore the case should be dismissed. In support of the motion, McRae submitted an uncontroverted affidavit which showed that he had no contacts whatsoever with the State of Florida. The affidavit and evidence further showed that all contacts between McRae and J.D./M.D. were through the Summit, New Jersey office of J.D./M.D..

The complaint did not allege any facts which were sufficient to establish personal jurisdiction against McRae under the Florida Long Arm Statute. As a basis for jurisdiction, J.D./M.D. relied upon a paragraph in the contract which stated

that "the agreement, wherever executed shall be construed in accordance with the laws of the State of Florida and that venue shall be in Palm Beach County, Florida." (Emphasis added)

However, no provision regarding jurisdiction was contained in the contract or any portion of the contract which applied to McRae entitled "Attorney's Agreement and Assent" (A-6).

The issue of jurisdiction was briefed by both parties in legal memoranda filed with the trial court. After oral argument, the trial court on February 6, 1985, entered an order denying McRae's motion to quash service. Subsequent to the rendition of this order, McRae filed a motion for reconsideration which was denied on February 25, 1985. Thereafter, the court vacated its order and entered an order denying McRae's motion to dismiss for lack of personal jurisdiction. (A-23). McRae filed a timely notice of appeal seeking review of the trial court's order denying his motion to dismiss the complaint.

The Fourth District Court of Appeal affirmed the decision of the trial court upon the authority of Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984). The court held that although the Florida Long Arm Statute did not confer personal jurisdiction over McRae, the contract between the parties provided the State of Florida with jurisdiction. (See Petitioner's Appendix.)

On January 15, 1986, McRae filed a motion for rehearing.

Although the Fourth District Court of Appeal denied this motion, the Court amended its opinion to include the above stated certified question to this Court. The Court also granted the appellee attorney's fees and costs despite certifying this instant question.

Petitioner filed a timely notice of appeal seeking to invoke discretionary jurisdiction of this court pursuant to Florida Rule of Appellate procedure 9.030(a)(2)(A)(V).

ARGUMENT

I. PARTIES CANNOT AGREE TO CONFER JURISIDICIION ON A PARTICULAR COURT BY CONTRACT.

The issue in this case is limited to the ability of parties to confer jurisdiction on a Court by contract. This case does not involve the issue of whether parties can consent to venue by agreement.

There is a conflict among the District Courts of this State as to the validity of jursidiction selection clauses in contracts. The Third District Court of Appeal has, since the case of Huntley v. Alejandre, 139 So.2d 911 (Fla. 3rd DCA, 1962), held that parties cannot confer jurisdiction on a particular court by contract. See Zurich Insurance Company v. Allen, 436 So.2d 1094 (Fla. 3rd DCA, 1983); Sausman Diversified Investments, Inc. v. Cobbs Company, 208 So.2d 873 (Fla. 3rd DCA, 1968).

The Fourth District Court of Appeal, on the other hand, has elected to uphold such contractual provisions. See Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA, 1984). There is a considerable amount of case law from other jursidictions which provides support and authority for both positions. See Zurich Insurance Company, supra. at 1095 and authorities cited therein; Annot. 31 A.L.R. 4th

404.

Petitioner contends that the best and most well established view is that a provision in a contract which attempts to confer jurisdiction on a particular court to the exclusion of all other courts is against public policy and legislative mandate.

II. A CONTRACTUAL PROVISION WHICH PURPORTS TO CONFER VENUE UPON A PARTICULAR COURT IS INEFFECTUAL TO CONFER PERSONAL JURISDICTION ON THAT COURT.

The provision of the subject contract pertaining to venue is ineffectual to confer the Courts of the State of Florida with personal jurisdiction over McRae. The contract contained absolutely no provision pertaining to jurisdiction. Instead, the contract attempted to confer venue upon the Circuit Court of Palm Beach County. Absent an independent basis for jurisdiction the Courts of Florida lacked personal jurisdiction over McRae and as a result no Court in this State could be vested with venue to decide the merits of the contractual dispute which arose outside of Florida.

The distinction between venue and jurisdiction is a significant one and a difference which is particularly relevant in the instant case. As the Court in Huntley v. Alejandre, 139 So.2d 911, 912 (Fla. 3 DCA 1962) noted:

There is a clear distinction between

"jurisdiction" and "venue." "Jurisdiction" is the power of the Court to hear and determine the particular cause, while "venue" refers to the geographical area in which the Defendant has the right to be sued or tried. Id at 912 quoting 14 Fla. Law and Practice, Jurisdiction Section 3.

There can be no venue in a court of a particular State unless that State has jurisdiction. In this case, there was no personal jurisdiction in Florida under the Florida Long Arm Statute. The Florida Long Arm Statute, Section 48.193 (1984) provides (insofar as the issues herein involved) as follows:

(1) Any person, whether or not a citizen or resident of this State, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the Courts of this State when a cause of action arising from the doing of any of the following acts;

(a) operating, conducting, engaging in, or carrying on a business or a business venture in the State or having an office or agency in this State.

(g) breaching a contract in this State by failing to perform acts required by the contract to be performed in this State.

This statute must be strictly construed and the party seeking to invoke jurisdiction thereunder has the burden of proving that the elements of the statute are met. Sausman Diversified Investments, Inc. v. The Cobbs Company, 208 So.2d 873

(Fla. 3rd DCA, 1968). The Florida Long Arm Statute requires more activities or contacts to sustain personal jurisdiction than is required under the United States Constitution. Mallard v. Aluminum Company of Canada Limited CA, 634 F.2d 236 (5th Cir. 1981). Furthermore, in order to invoke the Florida Long Arm Statute, "a party must allege in his complaint all requisite jurisdictional facts which have a bearing on the application of said statute." Joyce Brothers Storage and Van Co. v. Piechalak, 343 So.2d 97 (Fla. 3rd DCA, 1977); Henschel & Stinan Company v. Harry Schorr, Inc., 302 So.2d 198 (Fla. 4th DCA, 1974).

In the present case, J.D./M.D. has failed to allege a cause of action against McRae which arises from any of the acts or omissions enumerated by the Florida Long Arm Statute. McRae does not and has not operated, contracted, engaged in or carried on business in this State, nor does he have an office or agency in this state. The subject contract was entered into in the State of Mississippi and New Jersey. No acts required by the contract were to be performed in the State of Florida. The contract was breached in the State of Mississippi by J.D./M.D. through its failure to use its best efforts to procure the services of an expert with the highest professional and academic qualification. J.D./M.D., a Delaware corporation now claims damages. Under these facts there is no basis for personal jurisdiction under the Florida Long Arm Statute over McRae in Florida courts.

Furthermore, there is no indication whatsoever that McRae has purposely availed himself of the privilege of conducting business in this State nor has he in turn enjoyed the benefits and protections of the laws of Florida.

To require that McRae be subject to the jurisdiction of the courts of this State would violate the due process requirement of minimum contacts and offend traditional notions of justice and fair play. Hansen v. Denckla, 357 U.S. 235 (1958); International Shoe Company v. Washington, 326 U.S. 310 (1945).

Since there is no basis for personal jurisdiction under the Long Arm Statute and because the contractual provision pertaining to venue does not confer jurisdiction, the Circuit Court of Palm Beach County lacked personal jurisdiction over McRAE. As a result, the Trial Court erred in denying McRae's Motion to Dismiss the Complaint against him.

III A FORUM SELECTION CLAUSE CANNOT BE USED AS
 THE SOLE BASIS FOR PERSONAL JURISDICTION.

Generally, where Courts have determined the validity of forum selection clauses, the Court already had acquired jurisdiction over the parties through some independent basis such as a long arm statute. In such cases, the contract merely decided which state, among several that already possessed jurisdiction,

would be the State where the action should be brought. See generally Annot., 31 A.L.R. 4th 404(19). An entirely different situation is presented in the instant case. Here, J.D./M.D. seeks to use the contract's venue provision alone to form the basis for jurisdiction when there is no other ground for in personum jurisdiction. This is impermissible under the due process clause of the United States Constitution which requires Defendant have some minimum contact with the forum state so as to make it fair and reasonable to require him to defend the action in the forum state. See International Shoe Co. v. Washington, 326 U.S. 310, 316, 55 S. Ct. 154, 158, 90 L.Ed 95 (1945). The Court must first have a legislative or statutory basis for jurisdiction before it can honor contractual forum selection clauses.

CONCLUSION

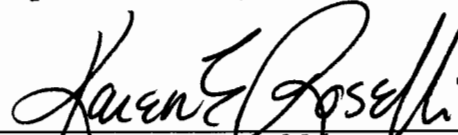
Based upon the foregoing, the Petitioner respectfully requests that this Court answer the certified question in the negative and hold that parties cannot confer jurisdiction upon a particular Court by contract. Petitioner also requests that this Court reverse the holdings of the lower Courts. Additionally, the award of attorneys to the Appellee by the Fourth District Court of Appeal should be carefully scrutinized in light of the novel issue presented in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Petitioner and Petitioner's Appendix was mailed to Bruce Zeidel, Esquire, COHEN, SCHERER and COHN, P.A., 701 U. S. Highway One, North Palm Beach, Florida 33408 this 24th day of March, 1986.

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