IN THE SUPREME COURT OF FLORIDA

C. R. McRAE

Petitioner,

vs.

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

Respondent.

CASE NO. 68,370

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

This is a certified question of great public importance from the District Court of Appeal, Fourth District. The petitioner, C. R. McRae, appealed a non-final order entered by the Honorable R. William Rutter, Jr. which denied a motion to dismiss for lack of jurisdiction over the person. The petitioner, C. R. McRae, was a defendant before the trial court. The respondent, J.D./M.D., Inc., was the plaintiff before the trial court and the appellee before the Fourth District Court of Appeal. In this brief the parties will be referred to by name or as plaintiff and defendant.

The symbol (A. _____) will be used to refer to appellant's appendix which was filed in the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

James T. Shepherd employed C. R. McRae, an attorney licensed to practice law in Mississippi, to prosecute a medical malpractice action against the United States of America. Shepherd is a resident of Mississippi. (A.1)

J.D./M.D. is a Delaware corporation, registered to do business in Florida. Its offices in Florida are located in Palm Beach County, Florida. (A.14) J.D./M.D. assists attorneys in litigating cases. It provides technical, medical and legal consultation and research, and helps procure expert witnesses. (A.5; 14)

J.D./M.D., Attorney McRae, and James Shepherd entered into an agreement whereby J.D./M.D. agreed to provide expert consultation services in Shepherd's legal action against the United States of America for a fee based upon the number of hours of research and the number of experts obtained by J.D./M.D., plus 7% of the gross recovery. (A. 5-6) The agreement did not state where payment of the fee was to be made.

As to the applicable law and the venue for the disposition of disputes, the agreement provided that Florida law applied and that venue would be in Palm Beach County:

> It is agreed that this Agreement, wherever executed, shall be construed in accordance with the laws of the state of Florida and venue shall be in Palm Beach County, Florida. (A. 6)

J.D./M.D. performed the agreement, but defendants failed to pay the fee. (A. 1-2) Thereafter, J.D./M.D., through its

attorney, Bruce Zeidel, made demand for payment. The demand letter stated that J.D./M.D. had designated the attorney's office as the place for payment. Zeidel's office is located in Palm Beach County, Florida. (A. 33)

The defendants still failed to make payment. J.D./M.D. instituted this suit in the circuit court for Palm Beach County, Florida, effecting service under the Florida long-arm statute. The defendant moved to quash service of process. Both parties submitted affidavits. (A.9; 32-33) The trial court denied McRae's motion. (A. 19) The court later vacated the order and entered an order denying McRae's motion to dismiss for lack of jurisdiction of the person. (A. 23)

McRae filed a notice of appeal seeking review of that second order. (A. 34) The Fourth District Court of Appeal affirmed the order denying the motion to dismiss. Thereafter the petitioner filed a motion for rehearing and/or clarification in the Fourth District Court of Appeal and further asked the court to certify the case to this court as a question of great public importance.[1] The Fourth District Court of Appeal granted the motion to certify and certified the following 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?

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1 That motion was not served on respondent's appellate counsel, as required by the appellate rules. Consequently respondent did not have the opportunity to reply to the motion.

Thereafter the petitioner filed a notice to invoke the discretionary jurisdiction of this court. This court's jurisdiction was invoked solely on the basis of a certified question of great public importance.

QUESTIONS PRESENTED

I.

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?

II.

WHETHER A CONTRACT PROVISION FOR VENUE SELECTION IS EFFECTIVE TO CONFER PERSONAL JURISDICTION.

SUMMARY OF THE ARGUMENT

The certified question should be answered yes. The Florida courts had jurisdiction of defendant McRae for two reasons. First, McRae breached the contract by failing to perform acts under the contract which were required to be performed in Florida. Second, the contract contained a forum selection clause which specified venue would lie in Palm Beach County and that Florida law would apply. This court should follow the decision of the United States Supreme Court in M/S Bremen v. Zapata Offshore Co. 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) and uphold the validity of such clauses.

ARGUMENT

I.
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 certified question of great public importance should be answered in the affirmative. This court should adopt the rationale of the United States Supreme Court in M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) and uphold the validity of the contractually agreed upon forum selection clause.

In Bremen, a German corporation, Unterweser, agreed to tow the off-shore drilling rig of an American corporation, Zapata, from Louisiana to the Adriatic Sea. The contract provided that "any dispute arising must be treated before the London Court of Justice." The rig was seriously damaged in a severe storm, and was towed to Tampa, Florida.

Zapata ignored its promise to litigate any dispute in English courts and sued Unterweser and Unterweser's vessel in the United States District Court for the Middle District of Florida, alleging negligent towage and breach of contract. Unterweser moved to dismiss or stay the suit and sued Zapata in the High Court of Justice in London. When the 6-month period for filing a limitation-of-liability action was about to expire, Zapata filed such an action in the same Federal District Court. Zapata then refiled its initial claim in the limitation action.

The district court denied Unterweser's motion to stay the limitation action pending determination of the London suit,

and enjoined Unterweser from prosecuting the London suit. 296 F.Supp. 733 The United States Court of Appeals for the Fifth Circuit affirmed and declined to enforce the forum selection clause. 428 F.2d 888 On petition for rehearing en banc, the Fifth Circuit adopted the panel's judgment. 445 F.2d 907

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals. The United States Supreme Court held that (1) the forum selection clause should be specifically enforced unless Zapata could clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching; (2) there was nothing in the record which would support a refusal to enforce the forum clause; (3) Unterweser's filing its limitation complaint did not preclude it from relying on the forum clause; (4) the clause provided for an exclusive forum, and included in rem actions.

In Bremen the United States Supreme Court rejected the argument that such clauses are contrary to public policy. This court should also reject that argument and should follow the decision of the United States Supreme court in Bremen and the decision of the Fourth District Court of Appeal in this case and in Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984).[2] There a Florida corporation (plaintiff) signed an agreement in South

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2 That case was certified by the Fourth District Court of Appeal to this court; however neither party invoked the jurisdiction of this court.

Carolina with a South Carolina corporation (defendant). The contract provided that jurisdiction for any litigation arising under the contract would lie within the appropriate court in Broward County, Florida. Personal service was effected under the Florida long-arm statute. The trial court dismissed the complaint for lack of in personam jurisdiction. The Fourth District Court of Appeal reversed. It adopted the reasoning of the Supreme Court of the United States in M/S Bremen v. Zapata Off-shore Co., and held that in personam jurisdiction can be conferred by consent, providing that:

> 1. The forum was not chosen because of overwhelming bargaining power on the part of one party which would constitute overreaching at the other's expense.
>
> 2. Enforcement would not contravene a strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought or the forum from which the suit has been excluded.
>
> 3. The purpose was not to transfer an essentially local dispute to a remote and alien forum in order to seriously inconvenience one or both of the parties. (455 So.2d at 1123).

In this case in personam jurisdiction was conferred by consent of the parties in entering into the forum selection agreement. The parties had equal bargaining power, as shown by the circumstance that the defendants modified certain provisions of the printed agreement. (A. 5-6) The agreement is not lengthy, and the "Disputes" clause is clearly marked. (A.6) The defendant is a law firm which expressly acknowledged in the agreement that its terms had been explained to the client. (A.6) The enforcement of the agreement will not controvert Florida public policy.

As the Fourth District Court of Appeal recognized in Maritime Limited Partnership, supra, in these days of jet travel and satellite communication, interstate contracts between corporations are commonplace. If contracts are entered into at arms length with equal bargaining power there is no public policy reason against the parties designating a home state of one of the parties as the forum for ensuing litigation. It is well accepted that contracting parties can agree on what state law is to apply without doing violence to public policy. If one can choose the law of the forum, choice of the forum is a "distinction without a difference."

Here the parties voluntarily choose to apply Florida law. They also chose Florida as a the forum for resolution of any ensuing litigation. Their contractual choice of forum ought to be enforced.

II.

WHETHER A CONTRACT PROVISION FOR VENUE SELECTION IS EFFECTIVE TO CONFER PERSONAL JURISDICTION.

The contract provision which provides that the agreement shall be construed in accordance with the laws of the State of Florida and that venue shall be in Palm Beach County, Florida is a forum selection provision which is sufficient to confer personal jurisdiction. The fact that the word "venue" is used rather than jurisdiction does not mean that this provision is not a forum selection provision. An agreement which states where suit must be brought is a forum selection clause. Use of

the term "venue" does not mean that it is not a forum selection clause.

The clause in this instance is similar to that in Public Water Supply district Number One v. American Insurance Company, 471 F.Supp. 1071 (W.D. Mo. 1979). There the contract provided that the selection of venue would be Mercer County, Georgia. The court treated that provision as a forum selection clause. Similarly in M/S Bremen v. Zapata Offshore Co., supra, the contract provided that disputes under the contract must be treated before the London Court of Justice. That provision is the same as the provision in this case which states where venue will lie. In Hauenstein and Bermeister, Inc. v. Met-Fab Industries, Inc., 320 N.W.2d 886 (Minn. 1982), the contract contained a stipulation that venue of any actions which arose under the contract was to be in the State of Florida. The court upheld that venue provision and treated it as a forum selection provision.

The forum selection provision was sufficient to subject McRae to jurisdiction of the Florida courts for breach of the contract. In Maritime Limited Partnership the court specified that in personam jurisdiction can be conferred by consent when one agrees to a forum selection clause.

In this case the parties did not by contract confer jurisdiction on a court which would not otherwise have had jurisdiction. The Florida court has jurisdiction for two reasons. First, the defendant breached the contract by failing to perform acts under the contract which were required to be

performed in Florida. Second, the parties to the contract agreed to litigate the dispute in Palm Beach County.

Florida Statute § 48.193(1)(g) provides that a person submits himself to jurisdiction of the Florida courts when he breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida. The courts have consistently construed this statute to authorize service on a nonresident where the contract is silent as to the place of payment and the plaintiff maintains a place of business in Florida. The presumption is that payment is required at the creditor's place of business.

In Kane v. American Bank of Merritt Island, 449 So.2d 974 (Fla. 5th DCA 1984) the court explained that the legal presumption that a debt is to be paid at the creditor's place of business, in the absence of an express designation of place of payment, is sufficient to satisfy the language of the long arm provision that refers to contractual acts "required" to be performed in Florida. Similarly, in Madax International Corporation v. Delcher Intercontinental Moving Services, Inc., 342 So.2d 1082 (Fla. 2nd DCA 1977) the court stated that where there is an express promise to pay and no place of payment is stipulated, the debtor must seek the creditor and the cause of action accrues where the default occurred. Likewise, in First National Bank of Kissimmee v. Dunham, 342 So.2d 1021 (Fla. 4th DCA 1977) this court stated that Florida had jurisdiction under section 48.193(1)(g) over a nonresident who failed to make a payment due in Florida on a note. See also Engineered Storage

Systems, Inc. v. National Partitions and Interiors, Inc., 415 So.2d 114 (Fla. 3rd DCA 1982).

In this case the complaint alleges that the plaintiff has offices in Palm Beach, Florida. (A.1). The contract is silent as to the place of payment. The complaint alleges that the defendant McRae breached the contract by paying a settlement to Shepherd, where there was a dispute as to the amount due J.D./M.D. and that McRae failed and refused to honor the demand by J.D./M.D. for payment. (A.3).

The affidavit of J. D. Lake and the allegations of the original complaint were sufficient to substantiate the jurisdictional allegations. See Newton v. Bryan, 433 So.2d 577 (Fla. 5th DCA 1983); Sims v. Sutton, 451 So.2d 931 (Fla. 3rd DCA 1984). Lake's affidavit not only confirms the allegations of the complaint that plaintiff has offices in Palm Beach, but also confirms that plaintiff made demand on defendant for payment in Palm Beach.

McRae had sufficient contacts with the state of Florida to fall within its jurisdiction. The Florida cases appear to conflict on the question whether section 48.193(1)(g) is unconstitutional if it is interpreted to subject a nonresident to jurisdiction of Florida for a breach of contract in Florida without a showing of other minimum contracts. See Engineered Storage Systems, Inc. v. National Partitions and Interiors, Inc., 415 So.2d 114 (Fla. 3d DCA 1982) and Rosenberg v. Coqui, Inc., 464 So.2d 701 (Fla. 2d DCA 1985). We urge this court to follow the Engineered Storage decision; however, if this court finds

Rosenberg is controlling, the Florida courts still have jurisdiction under the Rosenberg rationale.

In footnote 3 of Engineered Storage, the court rejected defendant's argument that if section 48.193(1)(g) is interpreted to subject a nonresident to Florida's jurisdiction without a showing of other minimum contacts it might be unconstitutional. The court explained that a reading of section 48.193(1)(g) to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained. The court commented that the federal courts have observed that Florida's long-arm jurisdiction statutes, generally, satisfy constitutional requirements.

The Second District Court of Appeal appears to disagree with the Third District's conclusion in Engineered Storage. A. recent decision addressing this issue is Rosenberg v. Coqui, Inc., 464 So.2d 701 (Fla. 2d DCA 1985). There a nonresident defendant appealed an order determining that the Florida courts had jurisdiction over him under the provisions of section 48.193(1)(g). An issue in that case was whether the defendant had sufficient minimal contacts with the state of Florida so that a Florida court could constitutionally obtain personal jurisdiction over him. The court explained that in answering that question the most important factor to be considered is whether the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. In Rosenberg the court found nothing which showed the defendant could have reasonably anticipated being sued in Florida for breach of his contract with the plaintiff.

That is not true in this case. The record supports the conclusion that defendant could have reasonably anticipated being sued in Florida for breach of the contract with the plaintiff. Under the provisions of paragraph 32, which provided that the contract was to be construed in accordance with Florida law and that venue would be in Palm Beach County, the defendant could and should have reasonably anticipated being sued in Florida for breach of the contract. Furthermore the defendant breached the contract by failing to make the payments due in Florida. Thus, the state of Florida constitutionally obtained personal jurisdiction over the defendant McRae.

Florida has a special interest in exercising jurisdiction over defendant McRae. In Marathon Metallic Building Co. v. Mountain Empire Construction Co., 653 F.2d 921 (5th Cir. 1981) the court determined that the defendant had purposefully availed himself of the benefits and protections of Texas' laws when he entered into a contract that specifically provided that it would be governed by the laws of the forum state. The court recognized that the forum state has a special interest in exercising jurisdiction when the contract in dispute calls for the application of the forum state's laws. Similarly in Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974) the court explained at page 498 that the forum has an interest when its laws will be of some relevance in resolving the suit. In this case since Florida law applies, the Florida courts have a special interest in exercising jurisdiction.

In Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174, 84 L.Ed.2d 528 (1985) the Supreme Court found that exercise of Florida's long-arm jurisdiction under Section 48.193(1)(g) over a Michigan defendant did not offend due process. At footnote 14 of that opinion the court noted that the personal jurisdiction requirement is a waiveable right and that there are a variety of legal arrangements by which a party may give express or implied consent to the personal jurisdiction of the court. An example of legal waiver given by the court is forum selection agreements in the commercial context. The court explained that where forum selection provisions are freely negotiated and the agreements are not unreasonable and unjust, their enforcement does not offend due process. In this case the defendants gave express or implied consent to jurisdiction of the Florida court when he entered into the forum selection agreement. Due process requirements are not offended by the agreement.

CONCLUSION

The certified question should be answered "yes" and the decision of the Fourth District Court of Appeal should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular United States mail to: KAREN E. ROSELLI, ESQUIRE, Krupnick, Campbell, Malone & Roselli, P.A., Suite #100, Courthouse Law Plaza, 700 Southeast Third Avenue, Fort Lauderdale, Florida, 33316 and BRUCE ZEIDEL, Post Office Box 13146, North Palm Beach, Florida, 33408, this 28th day of April, 1986.

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