IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,329

KINNEY SYSTEM, INC.,

Petitioner,

v.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.
_____/

REPLY BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER, KINNEY SYSTEMS, INC.

On Certified Question from The Fourth District Court of Appeal

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INTRODUCTION

This brief is filed on behalf of Amicus Curiae, The Product Liability Advisory Council ("PLAC"), in reply to the arguments raised by Respondent, THE CONTINENTAL INSURANCE COMPANY; Amicus Curiae, Carnival Corporation; Harris Corporation; Home Shopping Network, Inc.; and IVAX Corporation, ("CARNIVAL") and Amicus Curiae, Academy of Florida Trial Lawyers ("ACADEMY").

ARGUMENT

I.

THIS COURT MAY CONSIDER THE CERTIFIED QUESTION AND RESOLVE IT BY OVERRULING ITS PRIOR DECISION IN HOUSTON.

Respondent and Amici have devoted substantial portions of their briefs to the issue of whether Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978) should be overruled. Notwithstanding their extensive treatment of the issue, they suggest that this issue is not properly before the Court. Respondent contends that the Fourth District assumed Houston's viability and did not "even hint that Houston should be overruled." (Resp. Brief at 21).

In rendering its decision below, the Fourth District specifically acknowledged that "Florida may be in the minority in precluding a court from considering the doctrine when any party is a Florida resident." Continental Ins. Co. v. Kinney System, Inc., 641 So. 2d 195, 197 (Fla. 4th DCA 1994). While the first two certified questions focused on the definition of "corporate residency," the third issue questioned whether the trial court is precluded from dismissing an action on the basis of forum non conveniens where one of the parties is a foreign corporation that has its principal place of business in Florida. Since there is no dispute that a corporation which maintains its principal place of business in Florida is considered a resident for purposes of Houston, the only way in which subsection (c) of the certified question could be answered in the negative would be for this Court to modify Houston. As such, it is apparent that the certified

question on which this Court's jurisdiction is predicated contemplates a ruling as to the continued viability of Houston. Thus, there is no logic to Respondent and Amici's argument on this issue. See Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Lawrence v. Florida E. Coast Ry. Co., 346 So. 2d 1012 (Fla. 1977).

Moreover, while Respondent and Amici suggest that the viability of Houston is not raised by the facts of this case, they fail to consider that this Court can resolve the pending dispute as to the appropriate definition of residency by concluding that there will no longer be a bar to dismissal based solely on residency. As such, the characterization of a particular corporation as a resident or a non-resident would become much less meaningful. Thus, it is appropriate for this Court to consider Amici's alternate theory in support of the Petitioner's position. Keating v. State, 157 So. 2d 567 (Fla. 1st DCA 1963).

Finally, the fact that Petitioner embraced the arguments of its Amici, but chose not to repeat the numerous pages of argument submitted by those entities, does not eliminate the Court's power to address the issue. The issue of whether Houston should be maintained has been crystallized by the filing of multiple briefs on both sides of the issue. This Court can and should avail itself of the first opportunity in 17 years to consider this issue. See Teague v. Lane, 489 U.S. 288, 300 (1989) (proper to address issue which has been raised by Amicus Curiae where it is "not foreign to the parties").

II.

THE HOUSTON RULE SHOULD BE CHANGED IN FAVOR OF A MORE FLEXIBLE APPROACH TO FORUM NON CONVENIENS.

A. Houston is Inconsistent with the Adoption of the Common Law Forum Non Conveniens Doctrine in Florida.

Respondent asserts that Houston does not contradict Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), "it merely applies it." (Resp. Brief at 25). In fact, however, the very section of Gulf Oil cited by Respondent, ("the Doctrine should only be applied in rare cases and only when the balance is **strongly** in favor of the defendant" 330 U.S. at 508), demonstrates that Gulf Oil contemplated a balancing test, not a rigid rule.

On the same issue, Respondent asserts that Houston reflects this Court's conclusion that the balance will rarely, if ever, favor the defendant "strongly" when one party resides in Florida. In fact, Houston does not exclude the "rare" case from its reach. Houston provides that there will never be a balancing of factors as long as there is a resident party. Thus, it is readily apparent that there is an inconsistency between Florida's adoption of the common law forum non conveniens doctrine as applied to cases involving non residents and the rule adopted in Houston for cases involving residents.[1] Gulf Oil depended upon flexibility to achieve

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[1]While Amicus, CARNIVAL, argues that Florida need not adopt the federal rule on forum non conveniens, in fact, Florida has already adopted Gulf Oil. See Armadora Naval Dominicana, S.A. v. Garcia, 478 So. 2d 873 (Fla. 3d DCA 1985).

an appropriate result. (See PLAC's Initial Brief at 14-16). Houston, on the other hand, depends upon rigid definitions.

The Houston result is wrong and Respondent has recognized it as such. After arguing vociferously that the Houston rule which provides certainty of results must be maintained, Respondent then concedes that there may be circumstances wherein the rigid rule set forth in Houston should be modified. (Resp. Brief at 31). While PLAC would certainly agree with the Respondent that a suit by foreign nationals injured abroad should be exempted from Houston's application, such a limited exception does not resolve the problem. Indeed, it only serves to underscore the flaw in Houston.

There can be any number of circumstances for which the Houston rule provides a wrong result, but there is presently no mechanism by which to identify those cases. The answer is not to attempt to categorize and enumerate particular exceptions or limitations. Rather, what is more logical and manageable is to allow the trial court to evaluate and measure on a case-by-case basis to decide when dismissal is warranted. This is precisely what is provided for in Gulf Oil.[2]

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[2]Respondent also takes issue with the assertion that Florida's position is inconsistent with other states on this issue. Respondent cannot cite to a single jurisdiction which, like Florida has embraced Gulf Oil and then imposed a strict rule of non residency on all parties. Both South Carolina and Colorado only limit the applicability of the doctrine where there is a resident plaintiff, and even in that instance, the rule is not without exception. See, e.g., McDonnell Douglas Corp. v. Lohn, 557 P.2d 373 (Colo. 1976). Other states have made defendant's burden of obtaining dismissal a difficult one where there is a resident party, but those courts have not imposed a blanket restriction on dismissal. See, e.g., Crowson v. Sealaska Corp., 705 P.2d 905, 907 (Alaska 1985); Burrington v. Ashland Oil

B. The Houston Approach Fails to Account for Significant Practical and Policy Considerations.

Respondent and Amici argue that Houston's goal of ensuring certainty of resolution of the controversy outweighs any of the considerations which favor a less inflexible rule. (Resp. Brief at 25). Yet, their cursory analysis fails to place the appropriate emphasis on those factors cited by Petitioner and its Amici.

Respondent suggests that a rigid rule is better than spending a court's time to conduct a balancing test. In essence, what Respondent proposes is that the court be alleviated of the burden of balancing factors, while the party faces the potential burden of a trial without discovery, without witnesses, and without the proper parties.[3] Moreover, this analysis ignores the burden on Florida courts which result from Houston's strict construction. These include the burden of resolving controversies in which there is no local interest and the burden of resolving a case under the laws of a foreign country or state.

Respondent also suggests that PLAC and others' concern with overburdening the courts has not been substantiated. This Court

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Co., 134 Vt. 211, 216, 356 A.2d 506, 510 (1976).

Moreover, while Respondent cites several commentators for the proposition that the doctrine is surrounded by controversy, they cannot dispute the fact that an increasing number of states have embraced the doctrine in some form.

[3]ATLA argues that pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), all responsible parties will be on the verdict form anyway. This ignores the practical fact that placing a nonparty on the verdict form does not resolve the issues between a defendant and potential third-party defendant. Thus, a separate suit may still be necessary.

need not look to statistics of case filings to determine whether the Houston rule results in overburdening the courts and forum shopping; this Court need only look to the cases cited by the various Amici to know that the system is being abused. See Piper Aircraft Corp. v. Schwendemann, 578 So. 2d 319 (Fla. 3d DCA 1991) (corporation with its principal place of business in Florida was precluded from dismissal of claim brought on behalf of German citizens killed or injured in an airplane accident in Germany); Murdoch v. A.P. Green Indus., Inc., 603 So. 2d 655 (Fla. 3d DCA 1992) (suit by nonresident plaintiffs may not be dismissed because one of the numerous defendants is a Florida resident);[4] Transportes Aeros Mercantiles Pan Americanas (Tampa) v. Calderon, 489 So. 2d 125 (Fla. 3d DCA 1985) (Schwartz C.J. specially concurring) (forum non conveniens does not apply to this case only because one of the two defendants was a Florida corporation). See and compare Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985); and Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, on other grounds, 883 F.2d 1553 (11th Cir. 1989); with Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991). See also PLAC brief at 29-31; Florida Chamber of Commerce Brief at 9-15.

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[4]While other courts are congested with asbestos cases, this does not respond to the fact that there are asbestos cases pending in Florida solely because of Houston.

C. The Access to Courts Provision Does Not Preclude a Modification of Houston.

Respondent and Amici assert that there would be a denial of access to courts pursuant to Article 1, Section 21 of the Florida Constitution if this Court were to allow a dismissal when a resident party were involved.

Florida's Constitution does not, however, provide an unconditional guarantee of access to courts. Rather, access to courts may be subject to reasonable restrictions. Thus, in Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992), this court held that access to the court may be restricted where: (1) there is a reasonable alternative remedy or commensurate benefit, or (2) there is a showing of an overpowering public necessity for abolishing the right and a finding that there is no alternative method of meeting the necessity.

These tests are readily satisfied. Because this Court can condition dismissal or the alternative forum's exercise of jurisdiction over the controversy, there is an assurance of an alternative forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). While a Florida court cannot force another court to exercise jurisdiction, a conditional dismissal assures the parties that Florida will maintain the suit if the other forum refuses. As to public necessity and the absence of alternative means to meet that necessity, this burden is met in light of all of the public policy and private interest concerns described in the Amici briefs filed on behalf of Petitioners.

The doctrine of forum non conveniens as enunciated in Gulf Oil and Reyno is entirely consonant with Article 1, Section 21 of the Florida Constitution and thus Amici's arguments should not be rejected on that basis.

CONCLUSION

Based on the foregoing, Amicus Curiae submits that this Court should eliminate the nonresident prerequisite to application of forum non conveniens. At a minimum, the definition of "resident" should be restricted to the corporation's principal place of business.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 24th day of March, 1995, to ARTHUR J. ENGLAND, JR., ESQUIRE, Greenberg & Traurig, 1221 Brickell Avenue, 22nd Floor, Miami, Florida 33128, Attorneys for Kinney Systems, Inc.; RAOUL G. CANTERO, III, ESQUIRE, Adorno & Zeder, P.A., 2601 South Bayshore Drive, Suite 1600, Miami, Florida 33133, Attorneys for Continental Insurance Co.; LEONARD K. SAMUELS, ESQ., Berger & Shapiro, 100 SE 3 Avenue, Suite 400, Ft. Lauderdale, FL 33301-1155, Attorneys for the Amicus, Florida Chamber of Commerce; BARRY R. DAVIDSON, ESQ., Coll, Davidson & Carter, 201 So. Biscayne Blvd, Suite 3200, Miami, FL 33131, Attorneys for Amicus, Florida Department of Commerce; MARK A. COHEN, ESQ., Mark A. Cohen & Associates, P.A., Capital Bank Building, 1221 Brickell Avenue, Suite 1780, Miami, FL 33131, Attorneys for Amicus, AT&T Corp.; and JOEL S. PERWIN, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, 25 W. Flagler St., Suite 800, Miami, FL 33130, Attorneys for The Academy of Florida Trial Lawyers; JEFFREY B. CROCKETT, ESQ., Aragon, Martin, Burlingon & Crockett, P.A., Offices in the Grove, 2699 S. Bayshore Drive, Penthouse, Miami, FL 33133, Attorneys for Amici, CARNIVAL.

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