FILED
SID J. WHITE
NOV 21 1994
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: 84,329

KINNEY SYSTEM, INC.,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.

BRIEF OF THE AMICUS CURIAE, THE STATE OF FLORIDA, DEPARTMENT OF COMMERCE

IN SUPPORT OF PETITIONER KINNEY SYSTEMS, INC.
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 93-2854

Robin C. Nystrom
Florida Bar No. 784788
107 West Gaines Street
535 Collins Building
Tallahassee, Florida 32399-2000
(904) 488-9377

<u>TABLE OF CONTENTS</u>

INTRODUCTION 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. FLORIDA'S CURRENT *FORUM NON CONVENIENS* DOCTRINE DISCOURAGES CORPORATIONS FROM DOING BUSINESS IN FLORIDA. 4

II. OTHER STATES HAVE FACED SIMILAR DILEMMAS REGARDING THE EFFECT OF LIMITED *FORUM NON CONVENIENS* DOCTRINES ON THEIR ECONOMY. 7

A. Texas. 7

B. Louisiana. 9

C. Connecticut. 11

III. A RESTRICTIVE *FORUM NON CONVENIENS* DOCTRINE WILL NEGATIVELY AFFECT INTERNATIONAL TRADE AND COMMERCE IN FLORIDA. 12

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

Cases

Armadora Naval Dominicana, S.A. v. Garcia,
478 So. 2d 873 (Fla. 3d DCA 1985) 7

Autin v. Daniel Bruce Marine, Inc.,
862 S.W.2d 208 (Tx. Ct. App. 1993) 9

Carnival Cruise Lines, Inc. v. Oy Wartsila Ab,
159 B.R. 984 (S.D. Fla. 1993) 6

Continental Insurance Co. v. Kinney System, Inc.,
19 Fla. L. Weekly D1792 (Fla. 4th DCA August 24, 1994) 2, 3

Dow Chemical Company v. Alfaro,
786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 671, 112 L. Ed. 2d 663 (1991) 7-9

Houston v. Caldwell,
359 So. 2d 858 (Fla. 1978) 2, 3, 5, 9, 10

Kassapas v. Arkon Shipping Agency, Inc.,
485 So. 2d 565 (La. Ct. App. 1986), *writ denied*, 488 So. 2d 203, *cert. denied* (La. 1986), 479 U.S. 940, 107 S. Ct. 422, 93 L. Ed. 2d 372 (1986) 9

National Rifle Association of America v. Linotype Co.,
591 So. 2d 1021 (Fla. 3d DCA 1991) 3

Picketts v. International Playtex, Inc.,
576 A.2d 518 (Conn. 1990) 11

Statutes

Florida Statutes § 288.03 (1993) 1

Texas Code Annotated § 71.051 (1993) 9

Other Authorities

Albright, Alex W., *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351 (1992) . . 8, 10

DuPlantier, Adrian G., *Louisiana: A Forum Non Conveniens Vel Non*, 48 LA. L. REV. 761 (1988) 10, 11

Goetz, Stacy, Comment, *Picketts v. International Playtex, Inc.: Connecticut's Open Door Policy to Foreign Litigants in Product Liability Actions*, 12 U. BRIDGEPORT L. REV. 845 (1992) 11, 12

Mayfield, Mark C., Note, *Dow Chemical Company v. Alfaro: Aiding the Decline of the Alternative Forum*, 14 HOUS. J. INT'L L. 213 (1991) 5, 8, 9

Priest, George L., *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115 (1991) 10

Reynolds, William L., *The Proper Forum for Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663 (1992) 10

Silberman, Linda J., *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993) 8, 12

Silva, Eugene J., *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479 (1993) 8

Waller, Spencer Weber, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101 (1993) 12

INTRODUCTION

The State of Florida, Department of Commerce ("Department of Commerce"), respectfully submits this brief as Amicus Curiae in support of the expansion of the *forum non conveniens* doctrine in Florida. The interest of the Department of Commerce in this issue arises from its statutory responsibility to "promote the coordinated, efficient, and beneficial development of the state. . . ." § 288.03, FLA. STAT. (1993).

STATEMENT OF THE CASE

In this case, which was brought by Continental Insurance Company ("Continental") against Kinney System, Inc. ("Kinney"), the Fourth District Court of Appeal has certified the following question as one of great public importance:

> Is a trial court precluded from dismissing an action on the basis of forum non conveniens where one of the parties is a foreign corporation that:
>
> (a) is doing business in Florida?
>
> (b) is registered to do business in Florida?
>
> (c) has its principal place of business in Florida?

The Department of Commerce, in support of Kinney, respectfully submits that this Court should expand the *forum non conveniens* doctrine in Florida by answering all three parts of the certified question in the negative.

STATEMENT OF THE FACTS

Continental is a New Hampshire corporation which does business in Florida and maintains its principal place of business in New Jersey. Continental provides workers' compensation and employers' liability insurance to Kinney. Kinney is a Delaware corporation which does business in Florida and maintains its principal place of business in New York. (R.1, 56.)

Kinney disputed Continental's payment of certain workers' compensation claims and resulting adjustments to premiums due. (R.57.) After attempts to resolve the dispute in New York failed, Continental sued Kinney in Broward County, Florida. (R.1-4.) Continental did not allege or demonstrate any Florida connection with the cause of action. (R.1-4.) For that reason, Kinney moved to dismiss the lawsuit on the grounds of *forum non conveniens*, and the motion was granted. (R.52-55, 122-23, T.1-30.) Continental appealed to the Fourth District Court of Appeal. (R.125-26.)

The Fourth District reversed the trial court's dismissal. *Continental Insurance Co. v. Kinney System, Inc.*, 19 Fla. L. Weekly D1792 (Fla. 4th DCA August 24, 1994). The court found that the cause of action accrued outside of Florida, but that a *forum non conveniens* dismissal was precluded by this Court's decision in *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), because Continental, and arguably Kinney, were "residents" of Florida for *forum non conveniens* purposes. In *Houston v.*

Caldwell, this Court held that *forum non conveniens* applies only to cases where "both parties to the action are non-residents of Florida and the cause of action arose outside of Florida." *Id.* at 861.

In its reversal opinion, the Fourth District noted the decision of the Third District Court of Appeal in *National Rifle Association of America v. Linotype Co.*, 591 So. 2d 1021 (Fla. 3d DCA 1991), where the court determined that a foreign corporation must have its principal place of business or headquarters in Florida in order to be considered a "resident" to avoid application of the *forum* doctrine. *Id.* at 1022. Acknowledging the conflict between the Districts, the Fourth District Court of Appeal certified the above-referenced question to this Court as one of great public importance.

SUMMARY OF ARGUMENT

The purpose of the *forum non conveniens* doctrine is to determine the forum for resolution of a dispute that best serves the convenience of the parties and the ends of justice. Currently, Florida courts are prevented from applying the doctrine in any action where a party is a Florida "resident," regardless of its lack of connection to Florida. The experience in other states that previously restricted the doctrine in similar fashion demonstrates that this rigid bar to the application of this doctrine discourages economic development in this state because corporations which do business in Florida assume the risk of being sued in Florida

for claims which arise or accrue outside the state, or the United States, regardless of the relationship between the claim and the State of Florida. Accordingly, it is the position of the Department of Commerce that it will foster Florida's economic development and level the playing field among the different states vying for business activity and investment if this Court answers all three portions of the certified question in the negative, thereby removing the non-residency requirement from Florida's *forum non conveniens* doctrine.[1]

ARGUMENT

I. FLORIDA'S CURRENT *FORUM NON CONVENIENS* DOCTRINE DISCOURAGES CORPORATIONS FROM DOING BUSINESS IN FLORIDA.

The Department of Commerce is charged with overseeing the business environment in Florida and encouraging business development within this state. This becomes increasingly difficult as the competition to draw new business increases among the states. The current Florida *forum non conveniens* doctrine weighs against the Department of Commerce's defined goals. The current doctrine discourages corporations from doing business in Florida because corporations are afraid they will be sued in Florida for actions which accrue not only outside the state, but also outside the country.

[1]The Department of Commerce does not address the jurisprudential basis of the *forum non conveniens* doctrine as this would duplicate discussion by Kinney and other amici in their briefs to this Court.

As the Florida *forum non conveniens* doctrine currently exists, trial courts are prevented from even addressing the issue if one of the parties is a "resident" of Florida. *Houston v. Caldwell*, 358 So. 2d at 861. And, if the decision of the Fourth District is upheld, a Florida court will be precluded from applying the doctrine if a party merely does business in Florida. By removing the non-residency requirement, an unrestricted *forum non conveniens* doctrine will be created -- one that weighs Florida residency as a relevant factor, but does not allow Florida residency to frustrate a *forum non conveniens* dismissal where it makes judicial sense. An unrestricted *forum non conveniens* doctrine, similar to the federal doctrine and the doctrine as it is applied in almost every state, will foster economic growth, increase commercial activity and encourage corporations to do business in Florida. *See* Mark C. Mayfield, Note, *Dow Chemical Company v. Alfaro: Aiding the Decline of the Alternative Forum*, 14 HOUS. J. INT'L L. 213, 254 n.310 (1991).

A simple example illustrates why corporations are discouraged from doing business in Florida as a result of Florida's current *forum non conveniens* doctrine. Suppose a dispute arises from a contract entered into and performed in Australia by Corporation A and Corporation B, both of which are incorporated in foreign countries but do business in Florida. Further assume that Corporation A has its principal

place of business in Florida and that all witnesses and documents are located in Australia and suit is filed in Florida state court. Under the current Florida *forum non conveniens* doctrine, this contract dispute will be litigated in Florida state court, even if Australia is arguably the more convenient location to adjudicate the dispute. Because of Florida's restrictive interpretation of the doctrine, a Florida trial court is prevented from addressing the *forum non conveniens* issue because Corporation A has its principal place of business in Florida.[2] And, under the Fourth District's interpretation, application of the doctrine would be precluded even if Corporation A merely does business in Florida.

The threat that any claim brought against Corporation B arising anywhere in the world might be litigated in Florida obviously discourages Corporation B from doing business in Florida. For this reason, it is not surprising that the vast majority of states have adopted the federal version of the *forum non conveniens* doctrine, pursuant to which this commercially unreasonable result would be avoided. Therefore, in order to encourage corporations similarly situated to Corporation B to engage in business in Florida, the Department of Commerce respectfully requests this Court dispose of the

---

[2]A "real world" example of this conundrum is depicted in *Carnival Cruise Lines, Inc. v. Oy Wartsila Ab*, 159 B.R. 984 (S.D. Fla. 1993). There District Judge Marcus noted the restrictive *forum non conveniens* doctrine in Florida while dismissing a complex case brought by Carnival Cruise Lines, Inc. which has its principal place of business in Florida, in favor of Finland where the dispute arose.

current non-residency requirement to the *forum non conveniens* doctrine in all cases, regardless of whether a party is doing business in Florida, registered to do business in Florida, or has its principal place of business in Florida. By abandoning the non-residency requirement, Florida courts will be able to follow the federal *forum non conveniens* balancing test in all cases. *See Armadora Naval Dominicana, S.A. v. Garcia*, 478 So. 2d 873, 876 (Fla. 3d DCA 1985).

II. OTHER STATES HAVE FACED SIMILAR DILEMMAS REGARDING THE EFFECT OF LIMITED *FORUM NON CONVENIENS* DOCTRINES ON THEIR ECONOMY.

The chilling effect of a limited doctrine of *forum non conveniens* is well recognized. Indeed, judges and commentators alike have criticized limited *forum non conveniens* doctrines in three states -- Texas, Louisiana, and Connecticut. In those states, the restricted or non-existent *forum non conveniens* doctrines have generated considerable concern about the negative effects on the business climate.

A. Texas.

In 1990, the Texas Supreme Court held that Texas' *forum non conveniens* doctrine did not apply to personal injury or wrongful death actions. *Dow Chemical Company v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 671, 112 L. Ed. 2d 663 (1991). The *Alfaro* decision created a situation similar to that which exists in Florida today, in that trial courts were prevented from applying the

forum non conveniens doctrine in many situations, no matter where the most convenient forum was located.

In one of the four dissenting opinions filed in *Alfaro*, Justice Hecht expressed serious concerns about the ability of Texas to provide the necessary environment for continued economic growth and the attraction of new businesses in light of the court's decision. *Alfaro*, 786 S.W.2d at 707 (Hecht, J., dissenting). Justice Hecht ominously questioned whether the *Alfaro* decision would "deter prospective employers from moving to the state or people to do business here or even anyone to visit." *Id.*

Concerned by the negative economic impact of a limited *forum non conveniens* doctrine, several commentators criticized the *Alfaro* decision. *See generally* Mayfield, *supra*; Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351 (1992); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993); Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479 (1993). At the same time prominent business and political leaders predicted severe economic repercussions should Texas continue to ignore the *forum non conveniens* doctrine. Mayfield, *supra*, at 254 n.310 (citing U.S. Rep. Parker

McCullough as predicting that "the lack of forum non conveniens will have a 'very, very chilling effect on the business community primarily on future economic development in' [Texas]"; and quoting George Tompkin, senior partner with Condon Forsythe in Washington, D.C., that the message sent by the *Alfaro* case to big businesses is, "Get out of Texas. Stay out of Texas. And don't ever go back.").

In response to overwhelming criticism, the Texas Legislature enacted TEX. CODE ANN. § 71.051 in 1993, reversing the *Alfaro* holding, and creating a statutory *forum non conveniens* doctrine, which applies a federal-type balancing test to personal injury and wrongful death cases. *See Autin v. Daniel Bruce Marine, Inc.*, 862 S.W.2d 208, 209 n.1 (Tx. Ct. App. 1993). Unlike Texas, Florida's *forum non conveniens* doctrine is case-made law, not statutory law. Therefore, this Court has the power, as it did in *Houston v. Caldwell*, to recast Florida's *forum non conveniens* doctrine.

B. Louisiana.

It has been held in Louisiana that a state court which has proper jurisdiction over a case may not dismiss for *forum non conveniens* since there is no clear statutory authority specifically granting the courts that power. *See Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. Ct. App. 1986), *writ denied*, 488 So. 2d 203, *cert. denied* (La. 1986), 479 U.S. 940, 107 S. Ct. 422, 93 L. Ed. 2d 372 (1986). In *Louisiana: A Forum Non Conveniens Vel Non*, 48 LA. L. REV. 761

(1988), the author comments on the harmful effects of *Kassapas* and suggests that where the doors of the courts swing freely open to anyone that can satisfy the lenient jurisdictional requirements in Louisiana, and no liberal and flexible *forum non conveniens* doctrine exists,[3] Louisiana's effort at business development will be severely hampered:

> In most jurisdictions in the United States the doctrine of forum non conveniens provides courts with the tool needed to prevent serious inequities to defendants, especially business entities which conduct world-wide operations and which therefore are subject to suit almost everywhere. The concern is that unless Louisiana courts are provided with the same forum non conveniens tool, Louisiana will become the dumping ground for suits of citizens of other states and nations. One result will be that business interests, which already tend to shun the state because of its litigation climate, will continue to avoid Louisiana.

Adrian G. DuPlantier, *Louisiana: A Forum Non Conveniens Vel Non*, 48 LA. L. REV. 761, 780-781 (1988)(footnotes omitted).

---

[3]This same problem exists in Florida. Since this Court imposed the non-residency requirement in *Houston v. Caldwell*, the scope of personal jurisdiction has greatly expanded in Florida. Without a countervailing expansion of the application of the *forum non conveniens* doctrine, countless cases with no connection to Florida will be required to be heard in Florida courts. *See* William L. Reynolds, *The Proper Forum for Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1704 (1992) (*forum non conveniens* dismissals used to resist expanded scope of personal jurisdiction); *see also* Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 385-386 (1992) (*forum non conveniens* doctrine used to avoid unfair exercises of personal jurisdiction); George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115 (1991) (*forum non conveniens* doctrine limits expansive personal jurisdiction).

C. Connecticut.

Connecticut courts have the power to dismiss cases on *forum non conveniens* grounds. However, a recent state supreme court case has severely limited the discretion of trial courts in applying the doctrine and has been criticized for its adverse economic impact. In a products liability action brought by foreign plaintiffs against a foreign manufacturer and its American parent corporation, the Connecticut Supreme Court held that the trial court abused its discretion in granting a motion to dismiss on *forum non conveniens* grounds by "wrongly shifting the burden of persuasion onto the plaintiffs." *Picketts v. International Playtex, Inc.*, 576 A.2d 518, 530 (Conn. 1990). In a dissenting opinion, Justice Shea suggested that the court failed to give due weight to the discretion of the trial court to determine where trial will best serve the convenience of the parties and the ends of justice. *Picketts*, 576 A.2d at 530 (Shea, J., dissenting).

The detrimental effect of the *Picketts* decision on the climate for commercial development in Connecticut is discussed in *Picketts v. International Playtex, Inc.: Connecticut's Open Door Policy to Foreign Litigants in Product Liability Actions*, 12 U. BRIDGEPORT L. REV. 845 (1992). Echoing the concerns expressed by writers in Texas, the author posits that corporate residents of Connecticut looking to the state courts for fair resolution of claims brought against them and any corporations potentially looking to do business in the state

will re-evaluate their position in light of this decision. Stacy Goetz, Comment, *Picketts v. International Playtex, Inc.: Connecticut's Open Door Policy to Foreign Litigants in Product Liability Actions*, 12 U. BRIDGEPORT L. REV. 845, 870 (1992).

III. A RESTRICTIVE *FORUM NON CONVENIENS* DOCTRINE WILL NEGATIVELY AFFECT INTERNATIONAL TRADE AND COMMERCE IN FLORIDA.

The importance of international business to Florida is manifest. A restricted *forum non conveniens* doctrine unmistakably chills the climate for such business.

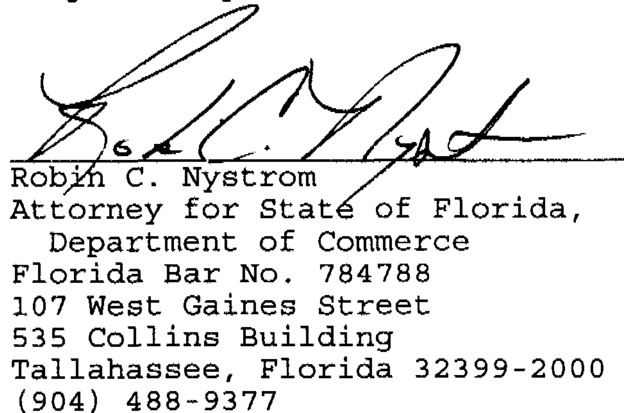
Although states normally enjoy a certain amount of leeway in developing court access doctrines, this parochial approach should give way to a federal standard in the transnational arena. Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 123 (1993). The transnational nature of commerce common in today's world calls for a uniform application of the *forum non conveniens* doctrine. Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 523-25 (1993). This desired uniformity can only be achieved in Florida by elimination of the current residency restrictions on the availability of the *forum non conveniens* doctrine.

CONCLUSION

To encourage business activity in Florida and to avoid judicial roadblocks to the continued growth of Florida as an

economic center for national and international trade, the Department of Commerce respectfully requests that this Court remove the non-residency requirement from the *forum non conveniens* doctrine. By allowing Florida trial courts to balance the convenience factors in all cases, regardless of the place of incorporation or residency of the parties, Florida will be placed on equal footing with other states competing for precious business investment and activity, not only from around the nation, but also from around the world. Therefore, the Department of Commerce requests that this Court answer each subpart of the certified question in the negative.

Respectfully submitted,



Robin C. Nystrom
Attorney for State of Florida,
Department of Commerce
Florida Bar No. 784788
107 West Gaines Street
535 Collins Building
Tallahassee, Florida 32399-2000
(904) 488-9377

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 21st day of November, 1994, to:

Arthur J. England, Esq.
Charles Auslander, Esq.
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131

Raoul G. Cantero, III, Esq.
Adorno & Zeder
Attorneys for Respondent
2601 S. Bayshore Drive
Suite 1600
Miami, Florida 33133

Fred O. Goldberg, Esq.
Mark A. Cohen & Associates, P.A.
Attorneys for Amici Curiae
AT&T Corp., et al.
1221 Brickell Avenue
Suite 1780
Miami, Florida 33131

Wendy F. Lumish, Esq.
Popham Haik Schnobrich & Kaufman
Attorneys for Amicus Curiae
Product Liability Advisory Council
100 S.E. 2nd Street
Suite 4000
Miami, Florida 33131

Joel S. Perwin, Esq.
Podhurst Orseck Josefsberg
Eaton Meadow Olin & Perwin
Attorneys for Amicus Curiae
The Academy of Florida Trial
Lawyers
25 W. Flagler Street
Suite 800
Miami, Florida 33130

Mitchell W. Berger, Esq.
Leonard K. Samuels, Esq.
Berger, Shapiro & Davis, P.A.
Attorneys for Amicus Curiae
The Florida Chamber of Commerce
100 N.E. 3rd Avenue
Suite 400
Fort Lauderdale, Florida 33301

Robin C. Nystrom

65508