IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

Case No. 84,329

KINNEY SYSTEM, INC,

Petitioner,

v.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER KINNEY SYSTEM, INC.

ON REVIEW OF A CERTIFIED QUESTION OF
GREAT PUBLIC IMPORTANCE
FROM THE FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION

The conflicting decisions of the Fourth and Third Districts that prompted this certification to the Court reflect differing policy approaches to an interpretation of the commandment in *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), that a trial court shall not entertain consideration of the doctrine of *forum non conveniens* when either of the parties is a "resident" of Florida. The Third District has interpreted "resident" in regard to foreign corporations as connoting the principal place of business or corporate headquarters of the corporation (hereafter, for convenience referenced only as the principal place of business),[1/] while the Fourth District has interpreted the term "resident" to encompass a qualification to do business in this state by either of the entities irrespective of the principal place of business.[2/] The *Houston* decision simply did not address this point, having involved a plaintiff and a defendant who were both *individuals*, not corporate entities.

In opposing the Third District's view that *forum non conveniens* can even be considered by a trial court if neither the corporate plaintiff nor the corporate defendant has its principal place of business in Florida, the Continental Insurance Company (Continental) first relies on the notion that a corporation's qualification to conduct business in Florida, under the statutes which provide that privilege to foreign entities, is automatically an establishment of "residence" *for purposes of the commandment of*

1/ *National Rifle Ass'n of America v. Linotype Co.*, 591 So. 2d 1021 (Fla. 3d DCA 1992).

2/ *National Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th DCA 1986), followed in *Continental Ins. Co. v. Kinney System, Inc.*, 641 So. 2d 195 (Fla. 4th DCA 1994).

Houston v. Caldwell. *Houston*, of course, never said that, and the Florida statutes that allow the registration of foreign corporations do not say that.

In the same vein, Continental argues for the result it seeks from Florida's venue and service of process statutes. Neither of these, either, express an equivalence of residency for *forum non conveniens* purposes or find expression in *Houston v. Caldwell*.

The decision of the Court in this case, determining for the first time in Florida what connotation should be placed on the term "resident" for foreign corporations for purposes of *forum non conveniens*, is most aptly made by reference to the policy reasons which prompted the adoption of *Houston's* prophylactic rule for "supervening venue,"[3/] and by consideration of the reasons which have been offered by the Third District in its *National Rifle Ass'n* decision. An analysis of these policy reasons will provide ready answers to the three questions certified in this case.

ARGUMENT

The only plaintiff in this lawsuit, Continental, and the only defendant in this lawsuit, Kinney, are both out-of-state corporations which have their principal place of business *outside* this state. (R. 1, 56). Continental argues for the prophylactic rule of *Houston v. Caldwell*, which bars a trial court from even entertaining consideration of the doctrine of *forum non conveniens*, when either of the corporate parties has qualified to do business in Florida by registering under the foreign corporation qualification statute of the state. It is worth pausing to consider what exactly this would mean if adopted, in

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3/ *American Dredging Co. v. Miller*, ___ U.S.___, 114 S. Ct. 981, 988 (1994).

light of what the conflicting precedents of *National Aircraft* and *National Rifle Ass'n* present.

The *National Aircraft* decision involved two Delaware corporations licensed to do business in Florida. 489 So. 2d at 39. The Fourth District's abbreviated holding was simply that, in that situation, a foreign corporation "cannot be prevented from pursuing a cause of action in Florida courts based on the doctrine of forum non convenience [sic]." (*Id.*). Unquestionably, the court was considering the matter from the perspective of the *plaintiff* in the lawsuit. The *National Rifle Ass'n* decision also involved a defendant which was a foreign corporation qualified to do business in the state and a non-resident plaintiff (with no indication, however, as to whether it too was qualified to do business in Florida). Focusing on the *defendant* in the lawsuit, the Third District held that qualification under the corporate qualification statute "does not make the defendant a resident of Florida for *forum non conveniens* purposes where, as here, the defendant's principal place of business or corporate headquarters is not in Florida." 591 So. 2d at 1022.

Although these two decisions considered the *forum non conveniens* question from opposite perspectives, the Court here will want to decide this case by taking into account both perspectives. From the foreign corporate *defendant's* perspective, there is little to commend the thought that a qualification to do business in Florida, away from its corporate headquarters or principal place of business, had any rationale relationship (let alone automatic equivalency) to a knowing relinquishment of the right to argue in the Florida courts that any particular lawsuit brought against it by another non-Florida corporation -- whether it also happens to have qualified to do business in the state *or*

not -- is so unrelated to Florida that it would be inconvenient to the court and the parties to litigate the controversy here.

From the foreign corporate *plaintiff's* perspective, there is little to commend the notion that registering to do business in the state automatically entitles the corporation to shut off any consideration of the inconvenience of a Florida forum, other than the "tidiness" for which Continental argues, irrespective of the concentration of relative forum-defining factors in another jurisdiction where either or both have a corporate headquarters or principal place of business. The tidiness factor, as explained by Continental, means simply that the messiness of adjudicating threshold *forum non conveniens* issues should be avoided in favor of the simplicity of knowing from mere corporate qualification that litigation will ensue in the courts of Florida. Continental finds no compensating disadvantage in the messiness of using the Florida courts to conduct full-blown trials of matters unrelated to Florida in any way, and inconvenient to the parties, witnesses and the courts.[4/]

4/ The prophylactic rule for which Continental argues would allow suit in Florida against any corporate defendant which has qualified to do business in the state, irrespective of the status of the corporate plaintiff in Florida. Thus, the Florida courts would be obligated to entertain a contract dispute brought by one foreign corporation *not* qualified to do business in Florida against another which was so qualified, even though the two entities have their corporate headquarters on the same floor in the same building in New York, or Texas or Missouri or Illinois, and the dispute involves exclusively documents and personnel situated at these headquarter facilities.

1. The policy underlying the residency determinant in *Houston v. Caldwell* compels the conclusion that a corporation's principal place of business is the appropriate determinant of its residency for *forum non conveniens* purposes.

The doctrine of *forum non conveniens* is a court-crafted, common law tool for determining whether litigation unrelated to the state in which suit has been brought should be maintained in that forum. It is applied, or not, in the discretion of a trial court, based on circumstances unique to the particular suit in the light of factors which have been identified over the years as pertinent to such an inquiry. In *Houston v. Caldwell*, the Court was faced with a policy choice as to whether, in the context of a suit between two individuals one of whom was a resident of the state, a trial court should be prohibited from considering a dismissal-for-inconvenience of the local lawsuit. Prior precedent had applied the prophylactic rule of "no *forum non* dismissal" where a Georgia citizen had sued *a Florida corporation* which had its principal place of business in this state. *Adams v. Seaboard Coast Line RR Co.*, 224 So. 2d 797 (Fla. 1st DCA 1969).[5/]

The Fourth District in this case simply adhered to its decision in *National Aircraft*, "that foreign corporations licensed to do business in Florida, with a place of business in Florida cannot be prevented from pursuing a cause of action in Florida courts based upon the doctrine of forum non convenience." 489 So. 2d at 39. No rationale, except for a citation to *Houston v. Caldwell*, was offered in the decision. On the other hand, in *National Rifle Ass'n* the Third District rejected the central thesis of Continental's position: that section 607.1505, Florida Statutes (1993), bars an application of the *forum non conveniens* doctrine to foreign corporations authorized to do business in Florida.

[5/] The identical situation was presented in *Seaboard Coast Line RR Co. v. Swain*, 362 So. 2d 17 (Fla. 1978), where the Court followed the *Adams* rationale.

The rationale for this decision was that to equate "doing business" with corporate residency

> would force our courts to retain causes of action arising elsewhere, having no connection whatsoever with the state of Florida, and would encourage potential plaintiffs to use the Florida courts to sue any sizeable corporation doing some business in Florida even though the cause of action has nothing to do with the state.

591 So. 2d at 1022.[6/]

In *Houston*, the Court opted for a residency rule to ensure "certainty" in the resolution of disputes which involve Floridians, because the state has a "fundamental interest in resolving controversies involving its citizens." 359 So. 2d at 861. That policy is certainly present, as well, with respect to corporations having their principal place of business in the state. The commitment of those entities to Florida is the equivalent of corporate citizenship. Such is not the case of every corporation which qualifies in Florida to do business here, often simply for the jurisdictional reason of being able to use the courts of the state to enforce contracts. Similarly, the policy reasons expressed in the *National Rifle Ass'n* decision with respect to burdening our courts with lawsuits unrelated to anything pertinent to activities or personnel in the state dovetail neatly (i) with allowing a *forum non* inquiry when the only venue determinant is a corporate qualification to do business, and (ii) with barring a *forum non* inquiry when a corporate defendant is *domiciled* here.

[6/] The Texas courts have been willing to accept this burden. *E.g., Dow Chemical Company v. Castro Alfaro*, 786 S.W.2d 674, 678 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). The court in *"21" International Holdings, Inc. v. Westinghouse Electric Corporation*, 856 S.W.2d 479 (Tex. App. 1993) felt obligated to shoulder it, despite the court's frank acknowledgement "that the unavailability of *forum non conveniens* as a tool for Texas judges has a negative potential," because of the legislature's presumptive adoption of well-aged precedent. 856 S.W.2d at 484.

a. Merely "doing business" or being registered to do business in Florida is not an adequate measure for corporate *forum non conveniens*.

The gravamen of Continental's legal argument on this point is that the Florida corporations statute, as well as jurisdictional and venue statutes, suggest that an authorized foreign corporation should be granted access to the Florida courts to the same extent as a Florida corporation, and should be required to defend actions to that same extent without resort to a *forum non* inquiry. This contention is nothing less than a demand that the Court find that the cited statutory provisions have abrogated *forum non conveniens* insofar as foreign corporations qualified to do business in Florida are concerned.

No statute so provides. The Court will find no directive for that result in sections 47.051, 48.081 or 607.1505(2), Florida Statutes (1993), on which Continental relies. The relevant question is whether these scattered statutory provisions have usurped the common-law doctrine of *forum non conveniens*, so as to bar application of that doctrine on behalf of a foreign corporation sued in a Florida court. They have not.

Continental would have the Court believe that these statutes circumscribe the doctrine's application because the laws requiring registration of foreign corporations "existed 19 years *before* Florida recognized the [d]octrine in 1936."[7/] Continental's historical perspective is distorted. When this Court decided *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936), the corporate registration statutes did not include the provision, now found in section 607.1505, on which Continental expressly relies. Originally promulgated as Chapter 5717, Laws of Florida (1907), the statute provided merely for the registration

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7/ Answer brief at pp. 18-19.

of foreign corporations with the Secretary of State and the issuance of permits to do business. It did not grant the rights and privileges set forth in the current statute.[8/] The version of the statute that was in effect in 1936, when *Hagen v. Viney* was decided, Ch. 13640, Laws of Fla. (1929), was similarly silent on that subject.

It was not until 1945, after the statute had been codified as section 613.02, Florida Statutes (1941), that the legislature added language that accorded foreign corporations "the same rights, powers and privileges as like corporations organized under the laws of this State." Ch. 22653, § 1, Laws of Fla. (1945).[9/] While the 1945 enactment provided that it was "declaratory of existing law since the passage of legislation in this state authorizing foreign corporations to do business therein," Ch. 22653, § 2, Laws of Fla. (1945), that announcement of non-amendatory legislative intent[10/] is of no assistance in

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[8/] Prior to the enactment of Chapter 5717, the rule in Florida was that

> when a corporation has been organized under the laws of a sister state for the transaction of any business, it may, by comity existing between the states, transact business in this state, provided it be not in contravention of our laws or public policy.

Hogue v. D.N. Morrison Const. Co., 115 Fla. 293, 156 So. 377, 382 (1933). Chapter 5717 "interpose[d] a complete bar to any foreign corporation transacting business, or owning or disposing of property, in this state, without a permit to do so." *Id.* The more draconian aspects of the act, which included a provision that contracts entered into by corporations that had not secured a proper permit would be void *ab initio*, were ameliorated in 1915 when the legislature amended the statute to provide that a failure to comply with the statute would not affect the validity of contracts. Ch. 6876, Laws of Fla. (1915).

[9/] The statute was amended and recodified as section 607.1505 in Chapter 89-154, § 140, Laws of Florida.

[10/] *State v. Lanier*, 464 So. 2d 1192, 1193 (Fla. 1985). Addressing a similar "retroactive" declaration of legislative intent, this Court stated:

(continued...)

discerning the scope of the *forum non conveniens* doctrine when it was adopted by this Court *nine years earlier.*

Moreover, *Hagen v. Viney* did not involve corporate parties, so that the Court would have had no occasion to look to the corporate registration statute in declaring the parameters of the *forum non* doctrine. That dispute arose from an action for specific performance on a separation agreement, where both husband and wife were New Jersey residents "but, at the time the suit for specific performance of the separation agreement was brought, they were sojourners in the state of Florida." 169 So. at 392. The Court's "adoption" of *forum non conveniens* took this form:

> It is settled law that courts of one state are not required to assume jurisdiction of causes between nonresidents arising in other jurisdictions, though by the rule of comity rather than that of strict right they generally do so. After all is said, the question of jurisdiction in transitory actions between nonresidents is one of discretion on the part of the court assuming it, and no rule has yet been promulgated to guide that discretion. . . .

Id. at 392-93. One would be hard-pressed to read into this early foray an adoption of a bar to the doctrine pertinent only to foreign corporate entities.[11/]

[10/](...continued)

> [W]e are not bound by statements of legislative intent uttered subsequent to . . . the enactment of a statute . . . . However, we will show great deference to such statements, especially in a case such as this, when the enactment of an amendment to a statute is passed merely to clarify existing law. . . .

Id. at 1193 (citation omitted).

[11/] Continental recommends that foreign corporations that have not registered under the qualification statute, but are nonetheless "doing business" in the state, should also be barred from raising *forum non* considerations when sued in Florida. Should the Court decide to address this issue raised inferentially by the first certified question (but not factually present in this case), a new dimension of difficulty is introduced. No "bright line" rule on *forum non* would be established by defining (continued...)

b. The venue statute provides no basis to restrict an application of *forum non conveniens* by reason of the qualification of a foreign corporation.

Forum non conveniens had its first full exposition from the Supreme Court of the United States in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), where the Court noted the absence of any federal statutory authority to transfer a cause if venue had been properly laid but ascertained that "both in England and in this country the common law worked out techniques and criteria" for effectuating the doctrine. *Id.* at 507.[12/] In this analysis, the nature of the doctrine was plainly stated:

> The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. . . .

Id. at 507. By its very definition then, *forum non conveniens* does not come into play if there is a question as to jurisdiction or venue. *Id.* at 504 ("the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue").

[11/](...continued)
"residents" in *Houston v. Caldwell* as including the mere doing of business in Florida without registering for that purpose. The threshold mini-trial Continental finds so troublesome when *forum non* is a tolerated inquiry will be ever-present (irrespective of a *forum non* controversy) in this category of the Fourth District's certified question, as the courts struggle to evaluate if the corporate defendant is indeed "doing business" in the state. The concern which Continental expresses for threshold factual determinations is not nearly so daunting as Continental suggests, in any event. In this case, for example, the *forum non* controversy was addressed with affidavits, a routine procedure.

The lack of uniformity that troubles Continental is a phantom argument, as well. Differing results in *forum non* determinations are the result of different factual considerations in each case, just as trials lack uniform outcomes because no two legal disputes present exactly identical facts for resolution.

[12/] Within a year after the *Gulf Oil* decision, the Congress adopted 28 U.S.C. § 1404(a), an inter-district *forum non conveniens* statute, leaving the common-law doctrine applicable to transnational matters.

Circular reasoning underlies Continental's insistent reliance on the venue statute, for if the amenability of a foreign corporation to suit in a Florida court ended the inquiry the same factor would also bring an end to the doctrine in actions against corporate entities in Florida. *American Dredging Co. v. Miller*, 114 S. Ct. at 988, illustrates the distinction between venue and *forum non conveniens*:

> At bottom, the doctrine of forum non conveniens is nothing more or less than a supervening venue provision, *permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined*. . . . (Emphasis supplied).

c. The common law doctrine of *forum non conveniens* cannot be shown to have been abrogated by the statutes on which Continental relies.

"Jurisdiction and venue requirements are often easily satisfied," *after* which *forum non conveniens* is properly raised and addressed. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981). Continental, therefore, cannot avoid the tremendous burden imposed by this Court's jurisprudence for setting aside the common law in the face of non-explicit statutory enactments:

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. *Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist*, the statute will not be held to have changed the common law.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted; emphasis supplied). Section 607.1505 does not satisfy this formidable burden. The rights and privileges of which the statute speaks are plainly those set forth *within the chapter*, and do not so plainly infringe on the Court's right to establish common law as to amend the *forum non conveniens* doctrine.

Similarly, the venue statute offers no comfort to Continental. In fact, the decision in *Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977), cited in Kinney's brief but ignored by Continental, is an apt answer to Continental's argument. That case involved the venue provision of the Florida sovereign immunity statute, under which the state and its agencies are "liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5), Fla. Stat. (1993). The common law, prior to the 1973 enactment of the statute, was that "venue in civil actions brought against the state . . . absent waiver or exception, properly lies in the county where the state, agency, or subdivision maintains its principal headquarters." 354 So. 2d at 363-64. Rejecting the argument that this principle had been rejected implicitly in the sovereign immunity statute, the Court applied the rule of statutory construction quoted above and cautioned that "[i]nference and implication cannot be substituted for clear expression." *Id.* at 364.

In *Houston v. Caldwell* the Court discussed judicial overrides of the general venue statute, and rejected a direct comparison to the *forum non conveniens* "supervening venue" process because the latter does not guarantee a plaintiff's ability to maintain the suit elsewhere. 359 So. 2d at 860-61. The adoption of a principal place of business test does not pose the same concern. A foreign corporation suing another in the state of its corporate headquarters or principal place of business will not lack a guaranteed opportunity to pursue its claim.

Continental's newly-presented theories for extending to foreign corporations the *Houston* doctrine that residency bars a *forum non* inquiry offer no valid policy basis for denying the courts of Florida a look at the connecting links between any particular

litigation and this state. Opting for a simple and easy to apply "bright line" is not a logical reason to forestall the type of threshold inquiry, using traditional common law trial techniques, which the courts of Florida have found important for ferreting out forum shopping since 1936.[13/]

2. In this case, the circuit court exercised proper discretion in dismissing the case for inappropriate forum.

Attempting to sidestep the governing principle -- that a cause of action for breach of contract accrues where the defendant is obligated to make the payments,[14/] Continental asserts that the issues in the case "concern not the formation of and performance under the contracts, but Continental's handling of . . . four claims," two of which arose in Florida, because "the treating physicians, therapists, and witnesses to the accidents all reside in Florida."[15/] From reading this argument, one might be led to believe that this is a personal injury or workers' compensation matter, in which redress is sought for injuries that occurred in Florida. It is not.

This is an action brought by Continental against Kinney for *breach of contract.* (R. 1-4). Continental's claim is simply that Kinney failed to pay monies (additional premiums) allegedly due under the policy. The documents of Continental on which its

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13/ The trial court in this case had evidence from Kinney that Continental selected Florida for this suit precisely on the ground of "forum shopping" (although the court also had contrary evidence from Continental). Whatever evidence motivated the court to conclude that the interests of justice commend dismissal in Florida for maintenance of the suit in New York, it was clear from the facts of record that Continental had any of *seven* potential states in which it could have lodged its allegation that Kinney breached a contract by not paying premiums.

14/ Continental's answer brief at pp. 28-32.

15/ *Id.* at pp. 34-35.

claims rest were examined by Kinney's experts *in New York* (R. 58 at ¶ 9), and Continental's claims stem in part from two states *other* than Florida.[16/]

The trial court made a discretionary determination that this breach of contract action accrued in New York, and that "the interests of justice would be better served by litigating this matter in New York, *where Defendant is amenable to service of process*." (R. 123) (emphasis added). The policy concerns of the Court expressed in *Houston v. Caldwell* -- that "the question of amenability of the defendant to process in another state may often times be quite complicated, and its resolution may involve great expenditure of judicial labor" (359 So. 2d at 861) -- offer no impediment to an affirmance of the court's *forum non* inquiry in this case. The trial court's determination has not been shown to be an abuse of its discretion.

CONCLUSION

Continental urges the Court to prohibit foreign corporate defendants from raising *forum non conveniens* both when they are doing business in the state or have registered to do business in the state, as a "bright line" rule which will relieve our courts of *forum non* adjudications. Kinney respectfully suggests that diminished workloads will not be the consequence of so ruling. Florida is now the fourth largest state in the nation, adding 900 new residents to its population every day. Corporations from all over the world *will* do business in Florida, in ever-increasing numbers. By removing *forum non conveniens* --

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16/ In conceding the involvement of two other states, Continental states: "The remaining two claims arose from two other states, but not where either party is incorporated or has its principal place of business." Respondent's Brief at 35-36. Of course, neither party is incorporated or has its principal place of business in Florida, either. Thus, Continental has put those claims on precisely the same footing as its claims against Kinney.

the screening mechanism for lawsuits having no logical relationship to the state -- Florida is likely to become the "forum *of* convenience," where suits can go forward with no questions asked. Kinney suggests that the probable consequence of such a policy will be that Florida courts will have to conduct more *trials*, as the price of foreswearing *pre-trial* inquiries.

Kinney respectfully suggests that the questions certified by the Fourth District should be answered as follows:

1. A trial court is **not** precluded from dismissing an action on the basis of *forum non conveniens* where one of the parties is a foreign corporation that is doing business in Florida.

2. A trial court is **not** precluded from dismissing an action on the basis of *forum non conveniens* where one of the parties is a foreign corporation that is registered to do business in Florida.

3. A trial court **is** precluded from dismissing an action on the basis of *forum non conveniens* where one of the parties has its principal place of business in Florida.

Thereafter, the Court should vacate the Fourth District's decision, and remand with directions to reinstate the trial court's order of dismissal without prejudice.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this reply brief was mailed on March 24, 1995 to:

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