IN THE SUPREME COURT OF FLORIDA

CASE NO: 95,348 (No. 97-2316)

ELENA LAURA PESSINO
GOMEZ DEL CAMPO BACARDI

Petitioner,

v.

ELENA GOMEZ DEL CAMPO BACARDI
DE LINDZON, et al.,

Respondents.

ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF SUPPORTING POSITION OF PETITIONER

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17. Elena Gomez del Campo Bacardi de Lindzon (Defendant in Default)

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25. The Academy of Florida Trial Lawyers (Amicus Curiae)

26. The District Court of Appeal, Third District of Florida

27. Hon. David L. Tobin (Circuit Court Judge)

28. Edwin G. Torres, Esquire (counsel for Defendant, Elena Gomez del Campo Bacardi de Lindzon and Respondent Jerry M. Lindzon)

PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers files this Brief of Amicus Curiae in support of Petitioner, ELENA LAURA PESSINO GOMEZ DEL CAMPO BACARDI.

Petitioner, ELENA LAURA PESSINO GOMEZ DEL CAMPO BACARDI is referred to as Petitioner, Plaintiff or Elena Bacardi.

Respondent, ELENA GOMEZ DEL CAMPO BACARDI DE LINDZON, ET AL., is referred to as Elena Lindzon, Defendant or Respondent.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the Statement of Case and Facts as set forth by Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The Order of the trial court which failed to require the Defendants to establish that a single alternate forum was available with jurisdiction over all the defendants violates this Court's decision in *Kinney v. Continental Insurance Company*, 674 So.2d 86 (Fla. 1996) and Florida Rule of Civil Procedure 1.061. There is nothing in either the letter or the spirit of Rule 1.061 which allows a court to require a plaintiff to file in more than one alternative forum. In this case, the District Court's Order actually required the Plaintiff to proceed in three different fora at the same time, that is, Liechtenstein, the Cayman Islands, and Florida. This requirement violates Rule 1.061(a)(1) & (4) and also seriously implicates Subsection (a)(2) in that it is difficult to square the private interests of the parties with a requirement that three different lawsuits be filed in wildly different jurisdictions. Moreover, Subsection (a)(3) is implicated to the extent that under the District Court opinion in this case, litigation will still continue in Florida against one or more defendants.

The decision below has widespread and devastating implications, in particular, to personal injury plaintiffs who often find it necessary to sue multiple defendants who reside in multiple jurisdictions for causes of action

arising out of a single accident or injury. If the Third District opinion is allowed to stand, a plaintiff in such situations will be faced with the prospect of having to sue a product's manufacturer in one jurisdiction, a component parts manufacturer in another jurisdiction, a repair or maintenance corporation in another jurisdiction while having to sue an individual tortfeasor in yet another jurisdiction.

Although Florida certainly has an interest in reducing litigation, which has no nexus to Florida's interests, that interest should not predominate to such an extent that a Medusa's head of litigation is created wherein a court eliminates litigation in one forum only to see it spring up two fold elsewhere. It cannot be said that the overall judicial interests can be served by such a splintering of cases. Jettisoning particular plaintiffs, particular defendants, particular causes of action, so as to meet the requirement of an alternate forum or fora does not serve the overall purpose of *forum non conveniens* which is convenience. Convenience cannot possibly be served by turning one lawsuit into three lawsuits and requiring plaintiffs and defendants to litigate on different fronts. This simply was not what was contemplated in *Kinney* or provided in Rule 1.061.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED PETITIONER'S ACTION BECAUSE IT FAILED TO ESTABLISH THAT AN ALTERNATE FORUM EXISTS WHICH POSSESSES JURISDICTION OVER THE WHOLE CASE AND DISMISSAL REQUIRES THE PETITIONER TO FILE HER CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION IN DIRECT VIOLATION OF THE FOUR-STEP KINNEY TEST AND FLORIDA'S FORUM NON CONVENIENS DOCTRINE ADOPTED IN FLA. R. CIV. P. 1.061

The decision of the district court in this case has widespread implications for personal injury litigation in the State of Florida. Allowing courts to parse cases so as to place them in a condition where they can be dismissed to various and sundry fora goes too far. It violates Rule 1.061 and it violates the language of *Kinney*. Although this is a case involving alleged misdeeds involving financial interest in certain trusts, it clearly could be applied to any type of litigation wherein there are multiple defendants from different jurisdictions.

The District Court opinion below creates entirely new law which allows dismissal under the doctrine of *forum non conveniens* even where there is no single alternate forum which is available to exercise jurisdiction over the whole case. This, despite the fact that both the language of *Kinney* and Rule 1.061 absolutely require that there be a single alternate

forum which could entertain the whole case. In fact, the Third District Court's opinion creates new law not only on the state level but is also without parallel on the federal level. Amicus is unaware of any federal case where a single plaintiff has suffered a *forum non conveniens* dismissal under the premise that multiple alternate fora satisfied the threshold requirement that there be an available alternate forum which possesses jurisdiction over the whole case.

To the contrary, federal case law, which under *Kinney* is persuasive, holds that unless the defendants demonstrate that they all are subject to jurisdiction in a single alternate forum, there can be no dismissal under *forum non conveniens*. For example, *In re: Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1168-1169 (5th Cir. 1987), vacated on other grds. Sub nom., 490 U.S.1032 (mem.), op. Reinstated, 883 F.2d 17 (5th Cir. 1989), the Fifth Circuit found that Pan American had failed to prove that there was an adequate alternate forum because it was unable to establish that the United States would consent to the jurisdiction of the foreign forum. As stated by the Fifth Circuit:

> Plaintiffs sought recovery from Pan American and the United States, not one or the other. Plaintiffs in fact recovered a judgment against both Pan American and the United States. Furthermore, Pan American's stipulation to submit to the jurisdiction of

> a foreign forum cannot act as a stipulation by the United States to consent to the jurisdiction of a foreign forum. Pan American's assurances of payment and jurisdiction are not joined in by the United States nor does the record indicate that they should be attributed to the United States. Pan American's conditional promises simply fail to make all defendants available to plaintiffs in a Uruguayan forum. This is the initial burden Pan American bore in seeking a dismissal for *forum non conveniens,* and it failed to carry it.

Under the Third District opinion, the plaintiffs in *In re: Air Crash Disaster* would have been forced to litigate against Pan American in Uruguay for its negligence in causing the air crash and against the United States government in the United States for its negligence in the crash.

Again in *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354 (6th Cir. 1985), the Sixth Circuit reversed a decision of the district court where the district court failed to require that all the defendants be available in a single alternate forum. The district court had simply unilaterally discounted certain of the Plaintiffs claims against some of the defendants and severed and dismissed them. In finding that this was inappropriate, the Sixth Circuit stated as follows:

> This court is reluctant to adopt the above analysis to support dismissal of these actions in their entirety pursuant to the *forum non conveniens* doctrine, as it essentially abolishes the critical requirement of the

> threshold showing, as mandated by the Supreme Court and articulated in Dowling, that the individual defendants be subject to jurisdiction in an alternate forum prior to the trial court's undertaking of a balance of interests. See, e.g., Calavo Growers of California v. Generali Belgium, 632 F.2d 963, 968 (2nd Cir. 1980), (observing that *forum non conveniens* dismissal should have been conditioned on the agreement of all defendants consenting to service in the alternate forum); 15 Federal Practices and Procedure, Wright, Miller & Cooper, Sec. 3828 at 179 (dismissal predicated on *forum non conveniens* requires availability of alternate forum possessing jurisdiction as to all parties). Stated differently, the decision of the court below represents an impermissible intermingling of the threshold criteria with the subsequent balancing test.

In Watson, 769 F.2d 357 (Emphasis in original). Under the Third District's opinion, the plaintiffs would have had to sue Merrell Dow in the United Kingdom while continuing to litigate against the individual tortfeasors in Ohio. The Sixth Circuit clearly found this to be an unacceptable result.

Again, in Madanes v. Madanes, 981 F.Supp 241 (S.D.N.Y. 1997), a single plaintiff brought RICO claims together with fraud and breach of fiduciary duty claims against certain family members arising out of the family members' alleged mishandling of family assets. (Facts not unsimilar to those herein). The defendants sought dismissal on *forum non conveniens* grounds to Argentina and Switzerland, but as noted by the

district court, the defendants failed to establish the threshold requirement that there be an alternate forum which had jurisdiction over all the defendants. As stated by the district court:

> At the outset, the Defendants' position is flawed due to their failure to establish that an adequate alternate forum exists. "Ordinarily, a foreign forum will be adequate when the defendant is subject to the jurisdiction of that forum." *R. Maganlal & Company v. M.G. Chemical Company*, 942 F.2d 164, 167 (2nd Cir. 1991). This requirement refers to all defendants, not just the "primary" ones. *Watson v. Merrill Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985) (finding that district court erred in characterizing corporate defendants as primary defendants and thus dismissing litigation against other named defendants, who were subject to jurisdiction of alternate forum, due to their "lesser" status). Here, the Plaintiff claims that an Argentine court would be unable to assert personal jurisdiction over any Defendants other than the Madanes brothers. The Defendants dispute this assertion, and both sides have submitted affidavits purporting to demonstrate the veracity of their respective positions. Given the ramifications of this dispute, the Court concludes that it would be improper to dismiss the case absent a proper proffer by all of the Defendants that they would be willing to consent to the jurisdiction of the Argentine court, as well as agree to satisfy any judgment reached by that court.

Madanes, 981 F.Supp 265-266.

Again, in *E.S.I., Inc. v. Coastal Power Production Company*, 995 F.Supp. 419 (S.D.N.Y. 1998) the district court noted that the defendants

had failed to establish the threshold requirement that an alternate forum existed because they failed to prove that one of the defendants would be subject to jurisdiction in El Salvador. Finally, in companion cases *United States Fidelity & Guarantee Company v. Braspetro Oil Services Company*, 1999 W.L. 307666 (S.D.N.Y. May 17, 1999) and *United States Fidelity & Guarantee Company v. Petroleo Brasileirosa-Petrobras*, 1999 W.L. 307642 (S.D.N.Y. May 17, 1999), the Southern District of New York refused dismissal on *forum non conveniens* grounds where the defendants failed to establish that all the defendants would be subject to a jurisdiction in Brazil.

In all these cases, the underlying principle is that the available alternate forum requirement is just that: a single alternate available forum which can entertain jurisdiction over the whole case. The fact that *Kinney* and the Rule specifically refer to "an adequate alternate forum" which possesses jurisdiction "over the whole case" is not happenstance. All the federal case law which informed the Supreme Court's decision in *Kinney* uniformly required that defendants establish that a single forum could exercise jurisdiction over an entire case brought by a single plaintiff.

Not only does the district court's decision clearly violate the requirement of 1.061(a)(1), but it also violates the letter and intent of 1.061(a)(4) which requires that the trial judge ensure that the plaintiffs "can

reinstate their suit in the alternate forum without undue convenience or prejudice." Clearly, requiring plaintiff herein to file suit not only in Liechtenstein and The Cayman Islands, but to continue to litigate her lawsuits against defendants Jerry Lindzon and Elena Lindzon in Dade County, Florida, is clearly unduly inconvenient when the same could be done in a single lawsuit in Dade County. Now plaintiffs must retain counsel not only in Dade County, but also in the Cayman Islands and in Liechtenstein. Defendant, Jerry Lindzon must also defend the lawsuits in three different jurisdictions since only the legal malpractice claim against him remains in Dade County while the remaining counts against him will be filed in the Cayman Islands and Liechtenstein. In fact, according to Petitioner, all the Defendants will have to defend in at least two different fora since the Cayman Islands and Liechtenstein claims are not separate and distinct. Very similar situations will result in personal injury litigation because seldom are claims entirely separate and distinct. *Moreover*, there are usually counterclaims or crossclaims among tortfeasors which will be greatly affected by requiring litigation against different defendants in different fora.

Moreover, it is difficult to conceive how the private interest factors are satisfied by the court's ruling. In fact, the trial court's ruling turns the private

interest factors on their head by allowing the defendants to "vex," "harrass," and "oppress" the plaintiff by inflicting upon her the expense and trouble of bringing her suit in three separate fora when that is not necessary to her right to pursue her claims and remedies.

In order for the district court to comply with the requirements of *Kinney* and 1.061, it would be need to require that all the defendants make themselves available to the jurisdiction of either the Cayman Islands or Liechtenstein. If all the defendants were to go to either the Cayman Islands or Liechtenstein, there would necessarily be a tradeoff as between those two fora with regard to the relative ease of access to sources of proof, the availability of compulsory process for the attendance of witnesses and all the other practical problems that make a trial of a case easy, expeditious and inexpensive. In other words, at the end of the day, you would simply be trading the conveniences and relative inconveniences of Lichtenstein for the Cayman Islands with no particular forum being more or less convenient. However, the Rule and the case law clearly state that in order for a plaintiff's choice of forum to be disturbed, there must not be a mere trading of private interests factors, but instead, that the balance of private interest factors must be strongly in favor of the alternate forum.

Finally, much of the public interest considerations are also not advanced by the splitting of litigation into three distinct forums especially when Florida retains jurisdiction over portions of the litigation. The docket clearing concerns espoused in *Kinney* are not addressed to any great extent where, as here, litigation continues in Florida against one or more of the defendants. The decision also effects the public interest to the extent that Florida courts are made to appear willing to go to any extreme to dismiss foreign litigants to foreign fora without regard to the effects such decisions will have on said litigants or fora.

In summary, it is an abuse of discretion under *Kinney* and Rule 1.061 to require the plaintiff to file lawsuits in multiple alternate fora. Neither *Kinney* , Rule 1.061 or existing federal case law supports such a decision and the district court should be reversed.

CONCLUSION

For all the foregoing reasons, the certified question as stated by the Third Disctrict and as restated by Petitioner should be answered in the affirmative and the trial court's dismissal order should be reversed and the entire case remanded for trial in Florida.

Dated: June 16, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via U.S. mail this 16th day of June, 1999, to all local counsel of record for Respondent/Defendants and all out of state counsel as appear on the attached service list.

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