IN THE SUPREME COURT OF FLORIDA

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

ELENA LAURA PESSINO
GOMEZ DEL CAMPO BACARDI

Petitioner,

vs.

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

REPLY BRIEF OF PETITIONER

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ISSUES PRESENTED FOR REVIEW

(as framed by the certified question of great public importance)

DOES THE TRIAL COURT ABUSE ITS DISCRETION IF IT DISMISSES AN ACTION ON FORUM NON CONVENIENS GROUNDS UNDER KINNEY SYSTEM, INC. v. CONTINENTAL INS. CO., 674 So.2d 86 (Fla. 1996), WHEN DISMISSAL REQUIRES THE PLAINTIFF TO REFILE THE CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION?

Threshold issues exist which are presumed satisfied and are not stated in the certified question. Therefore, Petitioner restates the certified question as follows:

I. DOES THE TRIAL COURT ABUSE ITS DISCRETION IF IT DISMISSES AN ACTION ON FORUM NON CONVENIENS GROUNDS UNDER KINNEY SYSTEM, INC. v. CONTINENTAL INS. CO., 674 So. 2d 86 (Fla. 1996), WHEN THE COURT *FAILS* TO ESTABLISH THAT *AN ALTERNATIVE FORUM EXISTS* WHICH POSSESSES *JURISDICTION OVER THE WHOLE CASE* AND DISMISSAL REQUIRES THE PLAINTIFF TO REFILE THE CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION?

II. DOES THE TRIAL COURT ABUSE ITS DISCRETION WHEN THE COURT DEVIATES FROM THE KINNEY PROCEDURAL FRAMEWORK AND STANDARD BY FAILING TO ENGAGE IN THE SUBSTANTIVE FOUR-STEP ANALYSIS MANDATED IN KINNEY AND REQUIRED BY FLA. R. CIV. P. 1.061?

III. DOES THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO ALLOW PLAINTIFF TO CONDUCT ANY DISCOVERY IN THE CASE, INCLUDING DISCOVERY RELATED TO JURISDICTIONAL ISSUES RAISED IN RESPONDENTS' MOTIONS TO DISMISS BEFORE A HEARING AND DISMISSAL PURSUANT TO KINNEY AND FLORIDA'S FORUM NON CONVENIENS DOCTRINE?

STATEMENT OF DESIGNATION OF PARTIES

For the sake of brevity and clarity, throughout this brief the following designations will be used to refer to the parties in this action:

"ELENA BACARDI" refers to plaintiff-Petitioner Elena Laura Pessino Gomez Del Campo Bacardi.

"ELENA LINDZON" refers to defaulted defendant-Respondent Elena Gomez Del Campo Bacardi de Lindzon.

"JERRY LINDZON" refers to defendant-Respondent Jerry M. Lindzon.

"MARIANA BACARDI" refers to defendant-Respondent Mariana Pessino Gomez Del Campo Bacardi.

"FIELD" refers to defendant-Respondent Joseph A. Field.

"O'HARA" refers to defendant-Respondent Alfred P. O'Hara.

CERTIFICATE OF TYPE STYLE AND SIZE

Pursuant to the Court's Administrative Order of July 13, 1998, Petitioner's counsel certifies by signing this brief that the type style and size conform with this Court's Order. The type style used is Times Roman (a proportionally spaced font) and the type size is 14 point-type.

REFERENCES TO RECORD AND APPENDICES

The Petitioner will refer first to the pages in the record on appeal submitted by the Clerk of the Court, using the designation "R.___". For the Court's convenience, the Petitioner may also refer to cross-designations to the appendix accompanying the Respondents' Joint Answer Brief as "JA Tab ____ at ____". References to Petitioner's appendix shall be as "A.____" as referred to in ELENA BACARDI's initial brief. Petitioner's appendix was provided to the Court, pursuant to Fla. R. App. P. 9.220. References to Respondents' Answer Brief shall be as "Ans. Brief at __."

REPLY ARGUMENT

I. RESPONDENTS' EXTENSIVE RELIANCE ON THE CAYMAN AND LIECHTENSTEIN PROCEEDINGS IS MISPLACED AS CONSIDERATION OF THOSE FOREIGN COURTS' RULINGS WAS EXPRESSLY PRECLUDED BY THE TRIAL COURT

Respondents' recharacterizations of the proceedings and rulings in the Cayman Islands and Liechtenstein are nothing more than a red herring. Indeed the trial court correctly ruled that the foreign proceedings were not pertinent to the *forum non conveniens* hearing. (A.70:5-18) The Respondents ask this Court to affirm the lower court on the basis of what the trial court itself *refused* to consider. (R.1267) Respondents have ignored Petitioner's allegations of an overarching conspiracy and scheme to defraud Petitioner, hatched and carried out in Miami. Respondents also have ignored that the claims against the two most important players in that scheme, JERRY LINDZON and ELENA LINDZON, remain in Florida. None of the Respondents have challenged the decision of the Third District to leave those claims here. Thus, they have conceded that at least part of the case does belong here. Consequently, any dismissal on grounds of *forum non conveniens* cannot comply with Fla. R. Civ. P. 1.061, because no other jurisdiction will ever have jurisdiction over the "whole case." Nevertheless, because of the extensive misinformation given to this Court by the Respondents regarding these foreign proceedings, Petitioner has no choice but to correct and bring clarity to the record so flagrantly distorted by the Respondents.

A. The Cayman Proceedings

The Cayman proceedings were distinctly different than this Florida action, both in form and substance. Unlike the litigation before the trial court, the proceedings in the Cayman Islands were not in the nature of a "lawsuit," (i.e., litigious proceedings between party and party); no facts were in dispute. The judge in the Cayman Islands

explicitly ruled that the matters before that foreign court were different from the issues in this case. Notably, the Cayman proceedings did not adjudicate any cause of action asserted by ELENA BACARDI in this lawsuit. (JA Tab 2 at 163:6-17)

The Respondents' attempt to use the Cayman court rulings to bolster Judge Tobin's dismissal order is, at best, disingenuous. The trial court below explicitly ruled to exclude any evidence, judgments or rulings relating to any proceedings made by a foreign court from its considerations. (R.1267) (A.70:5-18) At the hearing below on *forum non conveniens*, Judge Tobin expressly stated: "The fact that there is something going on there [in a foreign court] will have no impact on my ruling *at all* because my ruling has to be in a *vacuum*." (A.70:5-18) (emphasis added). Indeed, the trial court ruled that it was attaching "*no significance*" to them. (A.82:4-6)

Yet, in spite of the trial court's unequivocal pronouncements, Respondents claim throughout their brief that the lower court somehow relied on the Cayman *litigation*. (Ans. Brief at 7, 8, 9, 11, 13, 38, 46) Certainly such distortion of the facts is evidence only of Respondents' desperate gamesmanship and must be disregarded by this Court. Petitioner has only sued Respondents ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI and their attorneys, agents and advisors (Respondents FIELD and O'HARA) *once* - in this *litigation* in Florida. The *managing trustees* (ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI) of the Cotorro Trust reside in the State of Florida and manage and administer the Cotorro Trust from Florida. (A.19) *They* instigated the Cayman proceedings by causing their agent, the purely "passive" corporate trustee, Coutts & Co., to file Section 45 proceedings against the Petitioner and her children, including Cesar Balmaseda, Jr., a United States citizen. Contrary to the incessant inappropriate references in Respondents' Answer Brief to the *Cayman Litigation*, the Cayman court ruling itself specifically states unequivocally that its own proceedings are *non-contentious* and are

not litigation:

> **They are plainly constructional issues to be decided without regard to any disputed issue of fact. By themselves they involve no allegation of breach of trust or any other hostile allegation . . . raised by her [ELENA BACARDI/Petitioner] in the Florida complaint, against the 1st and 2nd defendants and others [Respondents]. The preliminary issues involve no hostile claim against the Trust, . . .** [t]he proceedings remain contained within the trustee's originating summons and are to be regarded as **non-hostile proceedings**. . . . In the present context of what is deemed **non-litigious proceedings** . . .

(emphasis added) (JA Tab 2 at 163:9-17; 162:25-27; 169:7-8).

The Cayman court also distinguished the substance of its proceedings from both adversarial litigious proceedings in general and from the instant litigation:

> [t]he matter came before the court upon the trustee's [the corporate trustee's] originating summons, pursuant to Section 45 of the Trust Law . . . [I]t is the general rule that proceedings against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, are normally to be by writ and not by originating summons . . . claims of invalidity against the Trust as originally constituted and claims of forgery and fraudulent conspiracy against the Management Committee and the trustee; ***no such claims were specifically pleaded by her*** **[ELENA BACARDI/Petitioner]** ***summons*** **of 31st July 1996 filed in these proceedings. On 3rd May 1996, in a written ruling,** ***I expressed reasons why I refused to direct that the proceedings be from then determined in the form of hostile proceedings*** **[litigation],** ***as if begun by writ . . .*** A further development since the ruling of the 3rd May 1996, relevant also in this context, has been the dismissal of the 3rd defendant's summons upon her expressed intention not to take further part in these proceedings . . .

(emphasis added) (JA Tab 2 at 165:10-12; 158:29-32; 159:10-18; 159:31-33)

The Cayman court also ruled that Miami resident members of the Management Committee, namely defendants ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI, had served as "the *managing trustees* of the corpus of the Trust" from the date the Cotorro Trust was originally settled. (emphasis added) (JA

Tab 7 at 459:28-30) Contrary to Respondents' Answer Brief, the Cayman court ruled "that the duties and responsibilities vested by Article 7 [of the Cotorro Trust] upon the Management Committee were intended to be *fiduciary in nature*." (emphasis added) (JA Tab 7 at 459:26-28) The Cayman court, relying on U.S. Supreme Court authority on *American* trust law, recognized "[t]he rule that a fiduciary shall not place himself in a position of conflict of interest." Wormley v. Wormley, 21 U.S. (8 Wheat) 421, 463 (1823). (JA Tab 7 at 466:4-8)[1]

The Grantor clearly intended to give the managing trustees (the Management Committee) the authority to administer and manage the Trust from any location and under any laws. See Article NINETEENTH (B) of the Cotorro Trust. (JA Tab 1 at 89) From the beginning, the Management Committee has administered and managed the trust from Miami, Florida. (A.19) The Cayman court found the powers which are typically vested in a trustee, were vested in the Miami-based Management Committee. The Cayman court held the corporate trustee was "given no residual discretion." (JA Tab 7 at 458:7-10) The Respondent members "were bound by the terms of the Trust not to alienate the 'golden egg' - the capital of the Trust - comprised in the shares of the Special [Bacardi] Companies." (JA Tab 7 at 456:31-34)[2] The Cayman court ruled that the overriding discretionary nature of the Management Committee's function as

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[1] The Cayman court relies on U.S. trust law. It found that because the draftsman of the Cotorro Trust was (as Respondents concede) an American lawyer who advised the Grantor on trust matters the application of U.S. trust law is both relevant and necessary to understanding the Grantor's true intent. (JA Tab 7 at 469:29-32)

[2] Petitioner did not sue Coutts & Co., which maintains an office at 701 Brickell Avenue in Miami, Florida, because the corporate trustee is without power or discretion and, as such, it is not an indispensable party under Fla. R. Civ. P. 1.140 (b)(7). (A.58) Trueman Fertilizer v. Allison, 81 So.2d 734 (Fla. 1955) (a trustee is not an indispensable party if the trustee is merely passive).

the *managing trustees* is evidenced by the fact the corporate trustee, Coutts & Co. (Cayman) Limited, "*may act without inquiry* upon any direction which it receives from the Management Committee, and that the [corporate] Trustee shall incur no liability for actions taken pursuant to the directions of the [Management] Committee." (emphasis added) (JA Tab 7 at 460:1-4) The Cayman court expressly ruled that the Management Committee had a duty of accountability to the Petitioner as a beneficiary of the Cotorro Trust. (JA Tab 7 at 460:7-27) The Cayman court further reasoned that:

> [the] powers given the [Management] Committee, the character of their functions - including the power to direct the [corporate] Trustee with respect to the shares of the Special Companies [the Bacardi shares] - generally indicate that the [Management] Committee is intended to exercise its powers and responsibilities for the advancement of the purposes of the Trust as a whole.

(JA Tab 7 at 459:34-38)

The Cayman court's rulings relating to the absolute power of the Management Committee to control and direct the corporate trustees' actions in the Cotorro Trust help to explain why the Cayman proceedings were a sham from the very beginning. Those proceedings were entirely controlled and directed by the Respondents acting through their agent, the "puppet" corporate trustee. Throughout those proceedings, the corporate trustee deliberately acted against ELENA BACARDI's interests at the express direction of the true trustees of the Cotorro Trust, Respondents ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI. Although the corporate trustee in theory stands neutral in Cayman Section 45 proceedings, the corporate trustee's characterization of Petitioner's "allegations," were framed and set forth to the Cayman court by the Management Committee. (JA Tab 2 at 165:6-20)

Contrary to Respondents' Answer Brief, the Respondents, and not Petitioner, caused the corporate trustee to initiate these Cayman proceedings. (Ans. Brief at 9) Respondents have argued that Petitioner should be deprived of access to her chosen

forum because *Respondents* instituted proceedings in a different forum, which did not, and could not, address the fraud, breaches of fiduciary duty and trust, conspiracy, unjust enrichment and legal malpractice that Petitioner alleges here. No case we are aware of has sanctioned defensive filings in another jurisdiction to prevent access to a plaintiff's chosen forum. Compare, Chiquita Int'l Ltd. v. Fresh Del Monte Produce, 690 So.2d 698, 699-700 (Fla. 3rd DCA 1997).[3]

Cayman is certainly Defendants' preferred forum.[4] (A.23 ¶37; 27-29; 40 ¶88) (JA Tab 7 at 546-555, 515-545) Respondents concede their rank forum-shopping by arguing, "Indeed, respondent O'Hara accepted the jurisdiction of the Cayman courts even though his supporting affidavit clearly attested that he had never had any involvement in the first place with the Cotorro trust." (Ans. Brief at 15)

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[3] At the insistence of the corporate trustee and the Respondents, Petitioner was refused access to the original trust documents executed by the Grantor on U.S. soil, despite the fact that she is a beneficiary. (JA Tab 2 at 46:23-28; 47:2-11; 48:1-4) Instead, the Cayman court, at the request of the puppet trustee and the Respondents, required that Petitioner and her husband who was then attempting to represent Petitioner's son, Cesar Balmaseda, Jr., a U.S. citizen, execute a draconian "Deed of Acknowledgment" prior to any review of evidence filed by the corporate trustee and the Respondents and prior to any substantive participation in those proceedings. (JA Tab 7 at 510-514) (A.24-28) The Deed of Acknowledgement, sanctioned by the Cayman court, was intended by the Respondents and the puppet trustee to provide Respondents with a complete release and indemnity for any and all tortious and fraudulent conduct committed by them against the Grantor, the Petitioner and any other beneficiaries claiming through her, including the Grantor's American born great-grandson, Cesar Balmaseda, Jr., prior to any adjudication of the merits of such claims. Rather than waive her rights and release Respondents from liability for their tortious conduct, ELENA BACARDI withdrew from those proceedings. (A.29 ¶13)

[4] MARIANA BACARDI joined the Cayman proceedings only after being served in this lawsuit in an obvious attempt to *forum shop* and to give the appearance to the Florida tribunal of the existence of an identity of similar parties in Cayman.

B. Litigation Against Luis Bacardi Relating to the Corniche Trust

ELENA BACARDI has never sued *any* of the Respondents in Liechtenstein. Contrary to Respondents' distortions of the record, Respondents conspired in Florida to persuade the Petitioner and her sisters to engage attorney FIELD (ELENA LINDZON and JERRY LINDZON's lawyer) to bring litigation against ELENA LINDZON's brother, Luis Bacardi (who is not party to this action), in Liechtenstein and Switzerland to challenge his invasion of the corpus of the Corniche Trust. (A.31, 37, 41 ¶90; 42 ¶91; 45 ¶100) All along, the Respondents knew the litigation against Luis Bacardi was baseless. *Respondents* instigated these lawsuits, not Petitioner. (JA Tab 7 at 595) It was the *Respondents*, and not Petitioner, who engaged counsel in Liechtenstein. (JA Tab 7 at 615, 621, 634) Although JERRY LINDZON and ELENA LINDZON are not beneficiaries under the Corniche Trust, they conspired to, and did in fact, deceive Petitioner, who was not represented by independent counsel and was then being manipulated by Respondents in furtherance of their fraudulent scheme. From the outset, Respondents knew that from the date the Corniche Trust was settled, Luis Bacardi was authorized by the Grantor to invade its corpus. <u>See</u>, *Letter from Respondent O'HARA [ELENA BACARDI's and Luis Bacardi's fiduciary] to Respondent FIELD [the LINDZONS' attorney] which confesses Respondents' knowledge, conspiracy and deceit dated August 3, 1982.* (A.160)

> Dear Joe [Joseph A. Field, Esq.]:
>
> Enclosed are copies of [Corniche Trust] documents I received today. As I see it all that has been done is to invade for one year amounting to 10%. Perhaps he [Luis Bacardi] is unaware that he could do it each year for five years. **Let's not enlighten him.**
>
> /s/ Alfred P. O'Hara

Respondents' conspiracy and fraudulent scheme have engendered Luis Bacardi's ill will resulting in certain disinheritance of Petitioner and significant monetary damages.

II. RESPONDENTS' FLAWED ATTEMPT TO MISCONSTRUE KINNEY AND THE RECORD CANNOT CURE THE ABSENCE OF FINDINGS BELOW AND DOES NOT SUPPORT THE TRIAL COURT'S DISMISSAL ORDER

A. Standard of Review: Abuse of Discretion

Respondents distort the standard of review. Respondents concede that JERRY LINDZON should be tried in Florida for legal malpractice, that neither Cayman nor Liechtenstein is an adequate forum for the "whole case" and that all of Petitioner's claims as to defaulting Defendant ELENA LINDZON remain in the Florida lawsuit. At the same time, they also contend that this Court would exceed the scope of appellate review if it disturbed the trial court's factual findings, relying on Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). (Ans. Brief at 23) However, as this Court recently held in Farrior v. Farrior, 1999 WL 419332, *2 (Fla. 1999), an appellate court may reverse *as a matter of law* if the trial court failed to properly apply a statute, rule or other principle of law. In Farrior, this Court stated that "the discretion accorded trial courts under Canakaris should not prevent the recognition of [a] clearly understood equitable and predictable principle of law." Id. *2.

The procedural framework adopted by Kinney and Rule 1.061 was designed to expressly guide Florida's trial courts' decision-making process on *forum non conveniens*. See, Farrior at *4. As Justice Pariente wrote in the concurring opinion in Farrior, "Flexibility in the name of discretion has often led to uncertain outcomes -- both of which may be "reasonable." Justice Pariente also noted that:

> The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Farrior, at *3 quoting Canakaris, 382 So.2d at 1203.

Respondents' arbitrary and vague "substantial flexibility" concept undermines the clear and express mandate and rule of law contained in Fla. R. Civ. P. 1.061 adopted by this Court in Kinney to harmonize Florida trial courts' analysis of *forum non conveniens* motions. Therefore, the trial court and the Third District's clear deviation from Kinney and Rule 1.061 was an abuse of discretion as a matter of law. See, Kinney, 674 So.2d at 88; Air Crash, 821 F.2d at 1147, 1165 (5th Cir. 1987); Pain v. United Technologies Corp., 637 F.2d 775, 784-85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981) (cited with approval in C.A. La Seguridad v. Transytur Line, 707 F.2d 1304 (11th Cir. 1983); Piper Aircraft Co. v. Reyno, 435 U.S. 235 (1981).

B. Impact of Trial Judge's Disqualification and Ex Parte Communication

In their Joint Answer Brief, Respondents argue that this Court should not disturb the trial court findings, but deliberately fail to apprise this Court that Judge Tobin had granted Petitioner's motion to disqualify him for prejudice pursuant to Fla. Stat. § 38.10. On July 30, 1999, at a hearing preceding the service of their Joint Answer Brief in this cause, the trial court judge granted Petitioner's disqualification motion after admitting that he had entertained Respondents' improper *ex parte* arguments during an *ex parte* hearing on the merits of Petitioner's original motions to disqualify the trial judge. (R.1208-1221, 1423-1439, 1446-1482) The dismissal order and any findings of the trial court in the matter are clearly suspect.[5]

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[5] The trial court dismissal order was drafted and submitted by Respondents to the trial court after Petitioner's original motions to disqualify had been served on all Respondents and the trial judge. The trial judge considered and signed Respondents' *ex parte* order (which contains the language theoretically relied on by the Third District to "implicitly sever" the case to two different fora, which is clearly inconsistent with the ruling made by the trial judge at the hearing). These *ex parte* hearings and orders are not new to the case. After deceitfully obtaining Petitioner's consent to an enlargement of time in which to respond to ELENA BACARDI's complaint in this matter, Respondents sought and obtained an unenforceable anti-suit injunction against ELENA BACARDI from the Cayman court, which injunction was

Because Judge Tobin has recused himself in this cause, the trial court's dismissal order is arguably voidable upon a petition for reconsideration pursuant to Fla. Stat. § 38.07. However, as the Third District has made law in Bacardi and issued its mandate precluding review by the new trial judge, this Court should review the trial court's order in light of the trial judge's recently confessed bias. The Third District had no opportunity to do as the trial judge granted Petitioner's disqualification motion only after reasserting jurisdiction in furtherance of the Third District's mandate in Bacardi v. Lindzon, 728 So.2d 309 (Fla. 3rd DCA 1999). The trial court's disqualification is relevant to this Court's review of the certified question and certainly deserved mention in Respondents' subjective restatement of the case and facts.

C. No Alternative Forum Exists for the "Whole Case"

A threshold issue to any dismissal under the doctrine of *forum non conveniens* is the existence of an alternative forum where ELENA BACARDI can litigate all of her claims against all of the Respondents, as is the case in the Florida forum. See, e.g., Gilbert, 330 U.S. 501 (1947). The existence of *one* suitable and identifiable alternative forum under the Kinney analysis is dispositive. Kinney, 674 So.2d at 90.

In direct conflict with Kinney, federal and other Florida precedent, in Bacardi, the Third District affirmed the trial court's dismissal of *one* plaintiff's claims in favor of *multiple* alternative foreign jurisdictions. See e.g., Sanwa Bank v. Kato, 734 So.2d 557, 560 (Fla. 5th DCA 1999); Madanes v. Madanes, 981 F.Supp 241, 265 (S.D.N.Y. 1997); Herbstein v. Bruetman, 743 F.Supp. 184 (S.D.N.Y. 1990). Notwithstanding Respondents' claims to the contrary, Kinney does not support dismissal in this case.

First, ELENA BACARDI's case involves one conspiracy and a cohesive

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solely premised on Respondents and Respondents' counsel self-serving *ex parte* affidavits and pleadings.

nucleus of operative facts which the trial court did not and could not sever. As Respondents concede with respect to the legal malpractice claims against JERRY LINDZON, any part which might be severed to be tried in a Cayman or Liechtenstein court would also have to be litigated simultaneously as part of whatever claims and parties remained before the Florida trial court.[6] (Ans. Brief at 46) Further, as Respondents apparently concede, many of Petitioner's claims *do not even pertain to either the Cotorro or Corniche Trust*. Some do not pertain to trusts at all and some pertain to other family trusts altogether. (See Initial Brief at 12-15, 33)

Second, there is no existing case law to support the proposition that a case may be trifurcated and dismissed in favor of several alternative fora. The only case cited by Respondents permitting dismissal in favor of multiple alternative fora was Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980). However, that case involved *multiple* foreign *plaintiffs* from different foreign countries who sued an American defendant in multiple wrongful death actions resulting from a plane crash arising on foreign soil. Easily distinguished, the Pain court dismissed the action, but only after requiring the defendant to stipulate and agree to proceed on the issue of damages without contesting liability for the accident. The Pain court further conditioned the dismissal on other stipulations from the defendant to eliminate the plaintiffs' expense of litigating the jurisdictional, statute of limitations and liability issues, and to ensure that each plaintiff would not be unduly prejudiced or

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[6] Because it is settled law that before a court may consider a *forum non conveniens* motion it must have subject-matter jurisdiction over the case, personal jurisdiction over the parties, and proper venue, despite Respondents' outrageous claim to the contrary, the application of the Florida *forum non conveniens* doctrine presupposes that the trial court must have first presumed that it in fact had the right to adjudicate ELENA BACARDI's claims against defendants here in Florida. See, Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 504, 67 S.Ct. 839, 841 (1947); Allstate Life Insurance Co., v. Linter Group, Ltd., 782 F. Supp. 215, 219 (S.D. N.Y. 1992).

inconvenienced. Id. at 780. Believing that a trial exclusively on damages in their own home countries would further benefit each of the plaintiffs, the Pain court allowed each plaintiff, not defendants, to select the most convenient alternative foreign jurisdictions to facilitate the recovery of damages in each of their respective cases. Id. at 780. Therefore, contrary to the assertions in Respondents' Answer Brief, Pain does not support the dismissal of the complaint in this case.

Third, at the *forum non conveniens* hearing, Judge Tobin discarded Liechtenstein as an alternate forum *altogether*, finding that: "They [Petitioner and her counsel] don't have an alternate forum if the suit goes to Liechtenstein." (A. 56:12-13) In fact, at the hearing, Respondents' counsel conceded "I can find no case anywhere, Your Honor, that says Lichtenstein [sic] is adequate . . ." (A.53:1-2)[7]

D. Choice of Law

The Respondents' argument regarding choice of law is flawed as well. Respondents claim that choice of law is governed by the location where the tort had its impact and caused damage to the Plaintiff. (Ans. Brief at 33) Although that may apply to torts involving physical injuries such as automobile accidents, the law is clear that where the tort involves fraud and breaches of fiduciary duties, as here, the

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[7] Respondents concede that with regard to availability, "[a] foreign forum is available when the *entire case* and *all parties* can come within the jurisdiction of that forum." Air Crash, 821 F.2d at 1165 (emphasis added); Phoenix Canada Oil Co. Ltd. v. Texaco, 78 F.R.D. 445 (Del. 1978). (Ans. Brief at 30) Therefore, Respondents must agree that it is factually and legally impossible for *all of the parties* to come within the jurisdiction of any other alternative forum when none of ELENA BACARDI's claims against defaulted Defendant ELENA LINDZON have been dismissed. Moreover, as the Third District has already recognized, the trial court could not even rely upon any stipulations made by defaulted Defendant ELENA LINDZON in her motion as she was not properly before that court. Bacardi, 728 at 314. By definition, therefore, *all parties* in this case were *not available* in the alternative fora. E.g., Air Crash, 821 F.2d at 1165.

principal focus for choice of law is where the conduct occurred. Restatement (Second) of Conflict of Laws, § 145 and § 148 (1971).

Respondents counter Petitioner's Brief regarding "substantive" choice of law questions with "flood gates" hyperbole by misquoting the dicta in Kinney.[8] Florida decides substantive choice of law questions pursuant to the "significant relationship" test. See, Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1001 (Fla. 1980). This Court recently rejected such "flood gates" rhetoric stating as follows:

> The fear that the "significant relationship" test would expose Florida courts to unnecessary litigation that would detrimentally tax our court system is unpersuasive. Application of the "significant relationship" test . . . [to] choice of law questions should not greatly increase the work load of Florida courts. Thus, the limited class of cases that Florida would entertain is where the case arose outside of Florida, Florida's statute of limitation is shorter than the foreign jurisdiction's, and the foreign jurisdiction is found to have the most significant relationship to the litigation. This does not amount to an opening of "flood gates." To the extent Florida courts will entertain some additional cases, we find that this expense is counterbalanced by this Court's policy of providing litigants with a forum to seek redress for wrongs that have been suffered for which relief is provided by law.

Merkle v. Robinson, 1999 WL 506972, *3 (Fla. 1999).

E. Other Distortions of the Record

Respondents' restatement of the facts is based largely on the unsubstantiated self-serving legal argument. Some glaring examples of this are as follows:

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[8] To bolster their preposterous argument that Kinney itself supports dismissal in favor of more than one forum, Respondents deliberately exclude the passage "Put another way if a potential remedy exists in *the alternative forum*" [one singular alternative forum] then the "remedy requirement of Article I, Section 21 actually is being honored. Id. at 93 (emphasis added) (Compare, JA Brief at 22 and Kinney at 93). Indeed, the Cayman court looked to U.S. law to interpret the Cotorro Trust. (See, Reply Brief at 4)

Respondents' arguments relating to Fla. Stat. § 737.201 were deliberately excluded by the trial court. (R.1231:8-10)[9] At the hearing on *forum non conveniens*, Judge Tobin reiterated this point reminding the Respondents that their other pending motions, including their motion to dismiss for improper venue under Fla. Stat. § 737.201 et al., were not relevant to *forum non conveniens* and expressly discarded such arguments, saying bluntly: "We are strictly testing on Kinney, *not anything else*." (A.57:11-12) (emphasis added).[10] See, Bacardi, 728 So. 2d at 311 (FN. 1) (Compare Ans. Brief at 1, 18, 41-44, 46)

Respondents deliberately distort the record by arguing that "[w]hen these trusts were settled in 1979, no defendant was a resident of Florida and no events relating to either trust took place in Florida." (Ans. Brief at 15) However, the trial court expressly found that "four of the five Defendants live here [Miami, Florida], or have

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[9] It is well settled that where the trial court has not considered an issue below, and the matter is not raised in the appeal, such contentions will not be considered by the appellate court. St. Paul Fire & Marine Insurance Co. v. Hodor, 200 So.2d. 205 (Fla. 3rd DCA 1967), see also A-1 Racing Specialties v. K & S Imports, 576 So.2d 421 (Fla. 4th DCA 1991) (striking matters in answer brief which went beyond the Petitioner's initial brief); McGurn v. Scott, 596 So.2d 1042 (Fla. 1992) (issue not ruled on by trial court would not be addressed on appeal), Sierra v. Public Health Trust of Dade County, 661 So.2d 1296 (Fla. 3rd DCA 1995) (appellate courts may not decide issues that were not ruled on by the trial court in the first instance).

[10] Plaintiff has sued Defendants for damages and relief arising from a conspiracy and torts committed in Florida. The general venue statute, Fla. Stat. § 47.011 is the applicable venue statute which governs such causes of action. Plaintiff is not suing under Fla. Stat. § 737.201. Therefore, Fla. Stat. § 737.203 does not apply. Although irrelevant, Respondents' arguments regarding Fla. Stat. § 737.203 are additionally flawed. In this case, pursuant to Fla. Stat. § 737.203 the principal place of administration of this trust is Miami, Florida. Therefore, had she chosen to, Plaintiff could have filed part of this action in Dade Circuit Court under Fla. Stat. § 737.201.

sufficient contact [to Florida]." (A.1:8-9) The record is clear that JERRY LINDZON, an active member of the Florida Bar residing in Florida and the other Respondent Management Committee members have consistently discharged their duties as members of such committee from their homes and offices in Florida. (A.19)

Likewise, Respondents' *ad hominem* arguments regarding ELENA BACARDI's "Cuban born" and other "Spanish-language plaintiff" references in their Brief are not supported anywhere in the record. (Ans. Brief at 1, 6, 40)

The record is also clear that ELENA LINDZON does own property in the United States, has engaged in tortious conduct in Florida and from time to time resides in Florida. (R.1193) (A.32-39) (JA Tab 7 at 574-608) (Ans. Brief at 15)

Respondents' *reverse* forum shopping in this case is transparent.[11] They argue that simply because all Respondents consented to both the Cayman Island and Liechtenstein fora, each of those foreign sovereigns has jurisdiction over the case. (Ans. Brief at 26, 30) Such gamesmanship would allow Florida courts to dismiss virtually all cases to multiple exotic foreign jurisdictions simply on the basis of a defendant's unverified motion (presumably containing the automatic stipulations pursuant to Fla. R. Civ. P. 1.061), allowing most sophisticated Florida defendants to disregard Kinney and its strong presumption in favor of plaintiff's choice of forum and to evade accountability for their tortious conduct in Florida.

CONCLUSION

For all the foregoing reasons, the certified question as stated by the Third

[11] Respondents argue that it is more convenient for MARIANA BACARDI -- an active Florida resident who is being sued in Miami, where she and her family live, for multiple torts committed by her against her sister in and from Florida -- to attend and participate in three separate trials, two in foreign jurisdictions, rather than just one in Florida. Kinney prohibits such rank forum shopping, 674 So.2d at 92.

District 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.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail this 27th day of August, 1999 to all counsel of record as appear on the attached service list.

Respectfully submitted,

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