IN THE SUPREME COURT OF FLORIDA

Case Number SC11-1908

On Petition for Discretionary Review from the
Third District Court of Appeal of Florida Case No. 3D09-3468

SHAHLA M. RABIE CORTEZ,

Petitioner,

v.

PALACE RESORTS, INC., PALACE RESORTS, LLC
& TRADCO LTD., INC.

Respondents.

RESPONDENTS ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This Court has recognized that plaintiffs will often choose to bring suit in Florida, even though, as in this case, Florida has little relation with them or with their claim. The reasons for this are varied, but among them is the belief that it will be easier to earn a larger recovery or local law is more favorable. Due to "[T]he tendency of some plaintiffs to shop for the 'best' jurisdiction in which to bring suit – a concern of special importance in the international context," this Court adopted the *forum non conveniens* doctrine, allowing trial courts to dismiss a suit if it is determined that an available and adequate forum exists, the private and public interest factors weigh in favor of dismissal, and the plaintiff can initiate a lawsuit in the alternate forum without undue inconvenience or prejudice. *Kinney System, Inc. v. Continental Ins.*, 674 So. 2d 86, 93 (Fla. 1996).

Kinney abolished the use of rigid rules to govern *forum non conveniens*. Rather, it set forth a multi-factor set of considerations which allows each case to turn on its unique facts. The factors set forth in *Kinney*, and uniformly applied by Florida courts since 1996, are anchored in U.S. Supreme Court precedent. This Court adopted the doctrine of *forum non conveniens* as a bulwark preventing Florida from becoming a courthouse to the world due to the large number of cases brought by non-residents for tort actions that arose outside of the state.

A trial court has broad discretion in deciding a motion to dismiss based on *forum non conveniens* and substantial deference is given to its determination. *Kinney*, 674 So. 2d at 86; Fla. R. Civ. P. 1.061; see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). ("The *forum non conveniens* determination is committed to the sound discretion of the trial court.") In this case, the trial court had an extensive record before it, the parties argued the *forum non conveniens* issues at length through several legal memoranda and at a hearing, and the trial court, guided by *Kinney*, properly determined that Mexico is an adequate and available forum for petitioner's tort claim, that all of the private and public interest factors weighed in favor of dismissal, and that petitioner could reinstate her tort claim in Mexico without any undue inconvenience or prejudice. The trial court's balancing of the *Kinney* factors was reasonable. Its findings and conclusions in support of dismissal were clearly stated on the record and in its decision. The Third District nonetheless re-examined the *Kinney* factors and affirmed. Under these circumstances, the decisions of the courts below deserve substantial deference. *Kinney*, 674 So. 2d at 86; *Piper Aircraft*, 454 U.S. at 257.

STATEMENT OF THE CASE AND FACTS

Petitioner, a resident of California, purchased a Mexican vacation through Costco, a Washington State corporation. Petitioner alleges that on August 12, 2006, while vacationing at the Moon Palace Golf & Spa Resort in Cancun,

Mexico, she attended a time share presentation. In exchange for her attendance, petitioner was given a voucher for a complimentary massage which she redeemed. *(R. 109-128).* Petitioner alleges that during the massage she was sexually assaulted by the masseuse.

Petitioner alleges that afterwards, resort staff did not assist her. *(R. 109-128).* Resort personnel allegedly discouraged her from filing a police report, allegedly told her that the police would not get to the case, that there was no need to pursue it, and that she should "take a walk" and "look at the moon." *Id.*

The following day, petitioner filed a sexual battery report with the Cancun police and submitted to a medical exam with a Mexican physician. *(R. 109-128).* Petitioner also filed an incident report with Best Day Travel, Costco's agent in Mexico and reported the incident to the U.S. Consulate in Mexico. *Id.*

All of this took place in Mexico.

Based on these allegations, petitioner sued several Mexican corporations on a variety of legal theories: (1) vicarious liability for sexual assault; (2) liability for negligence; (3) breach of implied contract; (4) negligent employee hiring and retention; (5) negligent employee training and supervision; and (6) negligent vacation packaging. *(R. 109-128).* However, only one claim – negligent vacation packaging – was asserted against respondents. This claim is premised on respondent's alleged duty to investigate and warn as to the reliability of the

masseuse in Mexico and to provide safe services to guests at the resort in Mexico. *(R. 199-202).* The other claims were asserted only against the Mexico-based defendants who were voluntarily dismissed by petitioner. *(R. 537-538).* [1]

The Moon Palace Golf & Spa Resort in Cancun, Mexico is owned and operated by Mexican corporations. *(R. 199-202).* Respondent, Palace Resorts, Inc., promotes, sells and markets the Palace Resorts located in Mexico; however, as determined by the Third District, it had "no ownership or management role" in the Mexican resort. *Rabie Cortez v. Palace Holdings, S.A. de C.V.*, 66 So.3d 959, 963-64 (Fla. 3d DCA 2011). Respondent, Palace Resorts, LLC, is a Delaware company that was created for the purpose of purchasing real property in the United States Virgin Islands; however, it has no assets and no employees and as the Third District properly concluded, it "had no role in operating, managing, or hiring" at the resort in Mexico. *Id.* Respondent, Tradco, Ltd., Inc., is a travel agency; however, it was not involved in selling petitioner's vacation. As Rabie-Cortez testified, she purchased her vacation through Costco, a corporation based in Washington State. As the Third District correctly noted, Tradco had "no role in operating, marketing, managing, or recruiting personnel" for the resort in Mexico. *Id.*

[1] Petitioner subsequently filed a second lawsuit against the entities that were voluntarily dismissed, which is currently pending in the United States District Court for the Southern District of Florida.

SUMMARY OF THE ARGUMENT

The *forum non conveniens* doctrine allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute. The U.S. Supreme Court, in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), set forth a two-part analysis. First, an adequate alternative forum must exist. *Id.* at 506-07. If the court finds that an adequate forum does exist, it then must determine, by balancing the private interests of the litigants and the public interest concerns of the court, whether adjudication of the action in the chosen forum would be inconvenient and unjust. *Id.* at 508-09. The *Gilbert* standard was adopted by this Court in *Kinney*, 674 So. 2d at 93.

As the Third District correctly determined, under *Kinney*, an alternate forum is available and adequate when "there is a satisfactory remedy and the defendant is amenable to process." *Rabie Cortez*, 66 So.3d at 962, citing to *Hilton Int'l Co. v. Carillo*, 971 So. 2d 1001 (Fla. 3d DCA 2008).[2] Mexico is an available forum because respondents stipulated to submit to the jurisdiction of a court in Mexico and accept service of process in Mexico. *(R. 50-63).* Mexico is also an adequate forum because it recognizes a cause of action for negligence and vicarious liability and compensates for injuries resulting from negligence. *(R. 167-180).* Furthermore,

[2] *See also, Ciba-Geigy, Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. 4th DCA 1997); *Mursia Invs. Corp. v. Industria Cartonera Dominicana*, 847 So. 2d 1064 (Fla. 3d DCA 2003); Fla. R. Civ. P. 1.061.

Mexico is a democratic nation with a multi-tiered judicial system that provides for appellate review, documentary discovery and interrogatories, and witnesses may be compelled to attend trial by court-order. *Id.* For these reasons the courts below and numerous other federal and state courts have found Mexico to be an adequate alternative forum and have dismissed the tort claims of U.S. citizens on grounds of *forum non conveniens.*

The U.S. Supreme Court in *Gilbert* also established a list of private and public interest factors to be applied flexibly. These factors were adopted in *Kinney* and applied by the courts below. Once it is resolved that Mexico is an adequate alternative forum, *Kinney* requires that the private and public interest considerations be weighed. Under *Kinney* there is a strong presumption against disturbing a plaintiff's choice of forum; however, the presumption is given less deference when the plaintiff is an out-of-state resident with little or no contact with Florida. *Rabie-Cortez,* 66 So.3d at 963, citing to *Kerzner Int'l Resorts, Inc. v. Raines,* 983 So. 2d 750 (Fla. 3d DCA 2008).[3]

With regard to the private interest factors, a significant concern is the relative ease of access to sources of proof. *Rabie-Cortez,* 66 So.3d at 963 ("Of significant consideration is the fact that this incident occurred in Mexico; the witnesses and most of the evidence concerning the tort are all located in Mexico.

[3] *See also, Value Rent-A-Car, Inc. v. Harbert,* 720 So. 2d 552 (Fla. 4th DCA 1998), *rev. denied* 729 So. 2d 391 (Fla. 1999).

The examining doctor and her report are in Mexico, the American Consulate report and the police report are located in Mexico, and the hotel employees associated with the event are all likely to be residents of Mexico."). Here, the sources of proof favor Mexico – where the alleged incident occurred and where the vast majority of liability witnesses are located. The courts below properly determined that the most significant evidence relevant to the liability and damage issues is located in Mexico. Third-party witnesses are located in Mexico. These witnesses, identified by the parties, are beyond the compulsory process of a Florida court; however, their testimony could be procured by a court in Mexico.[4] In addition, the third-party records concerning the incident are all located in Mexico and available to the courts of that country but beyond the compulsory process of a Florida court.

The Third District also properly concluded that respondents' "location in Florida does not provide a general nexus to Florida sufficient to outweigh the other *Kinney* factors. *Rabie-Cortez*, 66 So.3d at 963-64, citing to *Kawasaki Motors Corp. v. Foster,* 899 So. 2d 408 (Fla. 3d DCA), *rev. denied* 915 So. 2d 1196 (Fla.

[4] Although the dissent below asserts that witnesses could travel from Mexico to Florida (*Rabie Cortez,* 66 So. 3d at 970-71), these witnesses remain beyond compulsory process of a Florida court and the courts of this State cannot ensure that they would be allowed entry into the United States. *See Affidavit of Larry Rifkin. (R. 209-210).*

2005).[5] This is particularly so where, as here, there are no resorts operating under the Palace Resorts brand name in Florida. Petitioner is not a Florida resident. The injury occurred in Mexico. The conduct causing injury allegedly occurred in Mexico. And respondents have no ownership interest in the Mexican resort, and they have no role in operating, managing, hiring, or recruiting personnel for the resort in Mexico. *Rabie-Cortez*, 66 So.3d at 963-64.

Application of the *forum non conveniens* doctrine is not prohibited by the Privileges and Immunities Clause. *See U.S. Const. art. IV, sec. 2, cl. 1*. Furthermore, the U.S. Supreme Court has expressly recognized that in the context of a *forum non conveniens* dismissal, a distinction based on residency does not violate the Privileges and Immunities Clause. In accordance with U.S. Supreme Court precedent, Florida and the majority of states that have addressed the issue have properly concluded that non-residents can be given less deference in their choice of forum.

ARGUMENT

I. The decisions of the courts below followed the principles of, and were in conformity with, this Court's holding in *Kinney*.

The nucleus of petitioner's negligence claim is Mexico – where the alleged assault occurred. All of the activities leading up to the alleged assault occurred in

[5] *See also, Ciba-Geigy*, 691 So. 2d at 1111; *Tananta v. Cruise Ships Catering & Servs. Int'l, N.V.*, 909 So. 2d 874 (Fla. 3d DCA 2004), *rev. denied* 917 So. 2d 195 (Fla. 2005).

Mexico and all subsequent acts also occurred in Mexico. At its core, petitioner is suing respondents for breach of their alleged duty in connection with selecting the masseuse in Mexico. Yet the Third District made findings of fact that respondents had no ownership interest in the Mexican resort, and they had no role in operating, managing, hiring, or recruiting personnel for the resort in Mexico. *Rabie Cortez*, 66 So. 3d at 963-64.

As the courts below properly concluded, Mexico is an available and adequate forum because respondents agreed to accept service, submit to the jurisdiction, and waive any statute of limitations defense in Mexico. Petitioner can bring a tort-based suit in Mexico and Mexican courts will provide her with a remedy, if negligence is proven. The private and public interest factors weighed in favor of Mexico and dismissal was appropriate, especially where, as here, the gravamen of petitioner's complaint is that respondents, operating in Mexico, breached an alleged duty in connection with selecting the masseuse in Mexico despite the fact that they had no role in operating, managing, or recruiting personnel for the Mexican resort. *Rabie-Cortez*, 66 So.3d at 963-64.

A. Federal common law pertaining to *forum non conveniens* is not binding and does not govern this action.

Petitioner urges that federal common law governs this action; however, "[f]or purposes of Florida's *forum non conveniens* doctrine, opinions of the federal courts that harmonize with the views expressed [by our courts] should be

considered persuasive, *though not necessarily binding*." *Kinney System*, 674 So. 2d at 93 (emphasis added).[6]

B. The trial court's decision cannot be disturbed, as all of the *Kinney* factors weighed in favor of dismissal.

Ignoring the *Kinney* factors, petitioner argues that the trial court's decision was not justified. However, when it decided the motion, the trial court had before it interrogatory answers, document productions, affidavits, and deposition testimony from eleven witnesses,[7] constituting competent evidence upon which to decide a *forum non conveniens* motion. *Ryder System, Inc. v. Davis*, 997 So. 2d 1133 (Fla. 3d DCA 2008). In addition, the parties presented the trial court with numerous legal memoranda, which addressed all of the *Kinney* factors, and the parties argued each of the factors at length during the hearing on the motion to dismiss. This is not a case in which the *Kinney* factors were "at or near equipoise." Contrary to petitioner's assertions, the courts below did not take a "wooden approach" in addressing the dismissal motion. Instead, the trial court, and the Third District in its affirmance, analyzed all of the factors and concluded that they weighed in favor of dismissal. As the Third District noted,

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[6] *See also, Aerolineas Argentinas, S.A. v. Gimenez***,** 807 So. 2d 111, 117 (Fla. 3d DCA 2002) (recognizing that for purposes of Florida's *forum non conveniens* doctrine the opinions of the federal courts which harmonize with Florida law should be considered persuasive).

[7] Contrary to the assertions of the dissent below, this is not a case in which the trial court had only one or two affidavits before it (*Rabie Cortez*, 66 So. 3d at 973); rather, the record is very extensive.

> The trial court had before it the record, the affidavits of the parties and the parties' expert, and all of the steps set forth in *Kinney* were argued at length by both sides at the hearing on the motion to dismiss for *forum non conveniens*. Each of the *Kinney* steps was fully addressed by the trial court in the trial court's Order Granting the Motion to Dismiss on *forum non conveniens*, which is the order before us on appeal. Our review of the complaint and affidavits demonstrates that, based on the test set forth in *Kinney*, Mexico is a more convenient forum to litigate the lawsuit than Florida.

Rabie Cortez, 66 So.3d at 961. In *Kinney*, this Court – rejecting the idea that there could be hard-and-fast solutions to *forum non conveniens* disputes – adopted a flexible approach which takes into account various private and public interest factors. *Kinney*, 674 So. 2d at 93. The *Kinney* factors are well established. To dismiss, the trial court must first find that an adequate alternative forum exists that possesses jurisdiction over the whole case. Next, the trial court must consider all relevant private interest factors, weighing in the balance a strong presumption against disturbing a plaintiff's initial forum choice. If the trial court finds that the balance of private interests is at, or near, equipoise, it must then determine whether public interest factors tip the balance in favor of a trial in another forum. If the trial court decides that the balance favors another forum, it must finally insure that a plaintiff can reinstate suit in the alternative forum without undue inconvenience or prejudice. *Kinney*, 674 So. 2d at 90.

i. The courts below correctly concluded that Mexico is an available and adequate forum.

The first prong of the *forum non conveniens* analysis requires a two-step inquiry: (1) availability, and (2) adequacy. Generally, a forum is available if the defendant is amenable to service of process. *Kinney*, 674 So. 2d at 90. Alternatively, a forum is available if the defendant voluntarily submits to the jurisdiction of a court in the foreign venue and agrees to waive any statute of limitations defense. Such stipulations render the proposed forum "available." *Hilton Int'l.,* 971 So. 2d at 1001.[8]

In this case, respondents stipulated that they would: (1) submit to the jurisdiction of a Mexican court; (2) accept service of process in Mexico; (3) waive any statute of limitations defense; and (4) be bound by any final judgment entered against them by a Mexican court. As such, there was no legal bar to petitioner bringing suit in Mexico, making Mexico an available forum.

The possibility that petitioner might not be able to assert claims identical to those raised in the pleadings does not render Mexico an inadequate forum. It is only if the remedy that could be awarded by the alternative forum (if liability is proven) amounts to no remedy at all would this be a factor to be taken into

[8] See also, *Kerzner Int'l Resorts*, 983 So. 2d at 750; *Kawasaki*, 899 So. 2d at 408 *rev. denied* 915 So. 2d at 1196; *Calvo v. Sol Melia, S.A.,* 761 So. 2d 461 (Fla. 3d DCA 2000); *Pearl Cruises v. Cohon*, 728 So. 2d 1226 (Fla. 3d DCA 1999), *rev. denied* 744 So. 2d 453 (Fla.1999); *Resorts International, Inc. v. Spinola*, 705 So. 2d 629 (Fla. 3d DCA 1998), *rev. denied* 718 So. 2d 170 (Fla. 1998).

consideration. *Kinney*, 674 So. 2d at 91. The standard set forth by this Court in *Kinney* is consistent with U.S. Supreme Court precedent. As the U.S. Supreme Court explained, the fact that the alternative forum's substantive law is decidedly less favorable to petitioner should not be given substantial weight in *forum non conveniens* determinations. *Piper*, 454 U.S. at 247. Rather, where the alternative forum offers a remedy to petitioner the foreign forum is adequate. *Id*. at 255.

In establishing that Mexico is an adequate forum, the parties – petitioner and respondents – filed affidavits from Mexican law experts. The experts were in agreement that petitioner would be able to assert negligence claims based on direct and vicarious liability for the incident described in the complaint, and both agreed that if petitioner were ultimately able to prove negligence, she would be entitled to actual damages and moral damages.[9] Specifically, respondents' expert stated as follows:

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[9] Although the dissent below discussed the alleged inadequacy of a recovery in Mexico (*Rabie Cortez,* 66 So. 3d at 968-69), it should be noted that petitioner's expert witness explained that Mexico requires a plaintiff to prove a permanent total, permanent partial, temporary total, or temporary partial incapacity in order to recover non-economic damages. *App. 1 at ¶ 18.* This would be similar to Florida's permanent injury threshold requirement in automobile accident cases and does not represent the type of limitation that would be foreign to our judicial system. *See, Chapman v. Dillon,* 415 So. 2d 12 (Fla. 1982). In other circumstances Florida does not allow for the recovery of non-economic damages. *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040 (Fla. 2000) (discussing constitutionality of a provision in the wrongful death statute which precludes the recovery of non-economic damages in medical malpractice cases by surviving adult children); *Diaz v. CCHC-Golden Glades, Ltd.*, 696 So. 2d 1346 (Fla. 3d DCA), *rev. denied* 703

> The Plaintiff's claims and theories of liability alleged in the Complaint are recognized and therefore, are regulated by the [Civil Code of Quintana Roo]. Said Civil Code and consequently, the courts of the State of Quintana Roo recognize the concept of negligence against corporate entities. Mexico also recognizes the concept of vicarious liability in employer-employee and principal-agent relationships.
>
> Likewise, and because Subjective Civil Liability refers to both active and passive conduct, *the action of negligence for the injuries that the Plaintiff alleges to have suffered is recognized and will be legally admissible*. Moreover, other actions for negligence are set forth in the [Civil Code of Quintana Roo].
>
> Under the [Civil Code of Quintana Roo], recoverable damages in a civil liability action ("responsabilidad civil") include damages ("daños"), losses ("perjuicios"), and moral damages." (*App. 2 at ¶ 35 – 37).*

In response, petitioner's expert offered the following opinion: "It is true that Mexican Law includes provisions that entitle the victim of an illicit or wrongful act to recover damages from the wrongdoer. However, there are several technical and

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So. 2d 475 (Fla. 1997) (discussing how Florida's wrongful death statute bars recovery of non-economic damages in medical malpractice cases by surviving parents of adult children); *Footstar Corp. v. Doe*, 932 So. 2d 1272, 1275 (Fla. 2d DCA 2006) (discussing how Florida's workers' compensation statutory scheme does not allow injured employees to recover non-economic damages such as pain, suffering, humiliation, and emotional distress). And sometimes Florida places limits on a claimant's recovery. *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), *rev. denied* 75 So. 3d 1245 (Fla. 2011) (discussing statutory cap on non-economic damages in medical malpractice actions); *Gallagher v. Manatee County*, 927 So. 2d 914 (Fla. 2d DCA 2006), *rev. denied* 937 So. 2d 665 (Fla. 2006) (discussing statutory cap on damages in claims against the state and its agencies and subdivisions); *Lynn v. Feldmeth*, 849 So. 2d 481 (Fla. 2d DCA 2003) (discussing statutory cap on damages limiting owner's liability for damages caused by permissive use of automobile).

factual obstacles that make claims of this nature so difficult that they are rarely brought to Court." *(App. 1 at ¶ 13).* In addition, petitioner's expert also acknowledges the availability of moral damages in Mexico. *App. 1 at ¶ 35 – 37.* Based on these statements, we see that petitioner's expert acknowledged that Rabie Cortez can successfully prosecute her negligence claim in Mexico, though it may be difficult, and Mexican law does provide her with a remedy.

Although petitioner's expert addresses what she subjectively believes are deficiencies in Mexico's judicial system, such perceived shortcomings would not make Mexico an inadequate forum. This Court has recognized that "advantageous legal theories, a history of generous or stingy damage awards, or procedural nuances that may affect outcomes but that do not effectively deprive the plaintiff of any remedy" are not to be taken into consideration. *Kinney,* 674 So. 2d at 91.

In addition to the affidavits filed by the respective experts, several courts in the United States have recognized that Mexico is an adequate forum and have dismissed personal injury claims based on forum non conveniens:

- *Saqui v. Pride Cent. America, LLC,* 595 F.3d 206 (5th Cir. 2010). Recognizing that survivors, beneficiaries, and heirs have a remedy under Mexico's civil code for tort claims.
- *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009). Noting that Fifth Circuit case law has "create[d] a nearly airtight presumption that Mexico is an available forum" in tort cases.
- *Beaman v. Maco Caribe, Inc.,* 790 F. Supp. 2d 1371 (S.D. Fla. 2011) (finding that Mexico is an adequate forum in a wrongful death lawsuit

brought by residents of Texas against Florida corporations and the Mexican owners and operators of a resort in Mexico)

- *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656 (9th Cir. 2009) *cert. denied*, 131 S.Ct. 645 (2010). In a wrongful death lawsuit brought by a resident of Washington state against the U.S. based operator of a Mexican resort for a scuba diving accident that occurred in Mexico it was found that Mexico provides an adequate forum.
- *Wozniak v. Wyndham Hotels & Resorts, LLC.*, 2009 WL 901134 (N.D. Ill. 2009). Dismissing Illinois resident's wrongful death claim brought against the U.S. based operator of a Mexican resort, finding that the Quintana Roo Civil Code allows civil liability claims for wrongful death.
- *Taylor v. Tesco Corp.*, 2010 WL 4539394 (E.D. La. 2010). In a negligence claim filed by a Mississippi resident arising from an accident that occurred in Mexican coastal waters, it was held that Mexico provides an adequate forum for tort claims.
- *Buckley v. Starwood Hotels & Resorts Worldwide, Inc*., 2009 WL 3531647 (E.D. Mo. 2009). In a personal injury lawsuit filed by a U.S. citizen against a Maryland corporation for an accident that occurred at a Mexican resort, it was held that Mexico provides an adequate forum.
- *Aldaba v. Michelin North America, Inc.*, 2005 WL 3560587 (N.D. Cal. 2005) In a personal injury/wrongful death claim brought by U.S. residents against a U.S. corporation for an automobile accident that occurred in Mexico, it was held that Mexico is an available and adequate forum.[10]

To have ruled that Mexico would not provide an adequate forum for the resolution of petitioner's negligence claim would have set Florida apart from the

[10] The following courts have also determined that Mexico is an available and adequate forum in lawsuits involving U.S. residents and have dismissed based on *forum non conveniens* . *DB Mexican Franchising LLC v. Cue*, 2012 WL 253189 (S.D. Cal. 2012); *Gallego v. Garcia*, 2010 WL 2354585 (S.D. Cal. 2010); *Vinmar Trade Finance, Ltd. v. Utility Trailers de Mexico, S.A. de C.V.*, 336 S.W.3d 664 (Tex. Ct. App. 2010); *Langsam v. Vallarta Gardens*, 2009 WL 2252612 (S.D.N.Y. 2009); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785 (5th Cir. 2007); *Ryerson v. Deschamps*, 2006 WL 126634 (S.D.Tex. 2006).

courts that have considered the issue. In harmony with the other courts around the United States that have considered the issue, the trial court and the Third District correctly determined that Mexico is an available and adequate forum. The trial court and Third District's decision is not just in accord with the case law, but is well supported by the expert opinion evidence that has been offered by all parties. Both experts acknowledged that petitioner can assert negligence claims, predicated upon direct and vicarious liability, in Mexico. And both experts agreed that if petitioner were able to prove negligence, she will be entitled to recover economic and non-economic damages.

The dissenting opinion below relied on two prior non-tort cases to conclude that Mexico is not an adequate forum. *Rabie Cortez*, 66 So.3d at 968, *citing to*, *Telemundo Network Group v. Azteca Intern. Corp.*, 957 So. 2d 705 (Fla. 3d DCA 2007) and *Jackson v. Grupo Industrial Hotelero*, 2008 WL 4648999 (S.D. Fla. 2008). However, neither of these cases dealt with a personal injury claim. Rather, *Telemundo* was a breach of contract action involving United States broadcast rights, registered in the United States under United States copyright law, as to which the defendants conceded that Mexico did not recognize a cause of action. *Telemundo*, 957 So. 2d at 710. The *Jackson* case involved an intellectual property dispute in which the defendant did not offer any evidence that Mexico was an adequate forum. *Jackson*, 2008 WL 4648999 at 10. Here, however, as the experts

acknowledged (and as the cited cases show), Mexico is an adequate forum for tort claims.

ii. The courts below correctly concluded that the private interest factors weighed in favor of dismissal.

Under *Kinney*, once it has been determined that an available and adequate forum exists, the following private interest factors must be considered: (1) adequate access to evidence and relevant sites; (2) adequate access to witnesses; (3) adequate enforcement of judgments; and (4) the practicalities and expenses associated with litigation. *Kinney*, 674 So. 2d 91.

"Private interests do not involve the consideration of advantageous legal theories, a history of generous or stingy damage awards, or procedural nuances that may affect outcomes but that do not effectively deprive the plaintiff of any remedy. Indeed, it is entirely irrelevant that the alternate forum does not duplicate or approximate the American jury system, so long as a fair mechanism for trial exists in a broad and basic sense." *Kinney*, 674 So. 2d at 91.

Also, the personal injury claim of a U.S. citizen is subject to dismissal when "material injustice is manifest," *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011), as when a defendant would be unable to compel third-party witnesses, or the production of documents from third-party witnesses. *Id*.

Furthermore, with regard to the private interest factors and the location of evidence and witnesses, courts do not deal with absolutes. Rather, "A correct

'private interest' analysis begins with the elements of the plaintiff's causes of action." *Ford v. Brown*, 319 F.3d 1302 (11th Cir. 2003). "The court must then consider the necessary evidence required to prove and disprove each element." *Id*. at 1308. "Lastly, the court should make a *reasoned assessment as to the likely location* of such proof." *Id.* Here, it is manifest that the critical witnesses and evidence necessary for both petitioner to prove her claims and for respondents to defend against them are in Mexico. Thus, dismissal was warranted, to ensure adequate access to documentary evidence, witnesses and relevant sites.

While this case involves claims of "negligent vacation packaging" – a hitherto unrecognized theory of liability in our state – against respondents, this Court should note that petitioner's statement of facts, as well as the pleadings, clearly establish that the claims are predicated upon the events in Mexico.[11]

Petitioner argues that "the record is devoid of a single piece of competent evidence" as to the location of documentary evidence. But she herself testified that, while in Mexico, she wrote a statement about the incident to Julio Montezuma of Best Day Travel (Costco's representative in Mexico). *(App. 3, p. 25, lines 15-22; p. 26, lines 3-18; p. 33, lines 23-25; p. 34, lines 1-3*). She also wrote statements to the Office of Tourism in Cancun and to the Mexican police, and the Cancun Sex Crimes Unit prepared their own report. *(App. 3, p. 33, lines 4-11; p. 34, lines 4-13;*

[11] Petitioner did not purchase her vacation through respondents and never had any dealings with them before, during, or after her trip to Mexico. *App. 3.*

p. 35, lines 1-14). She underwent a physical examination in Mexico, and a report was prepared. *(App. 3 p. 37, lines 9-19; p. 38, lines 3-10).*

As petitioner's deposition testimony makes evident, there is critical documentary evidence in the possession of third-parties in Mexico. These documents are beyond the compulsory process of a Florida court. Even if petitioner were to produce them, respondents would be unable to authenticate the third-party investigative and medical examination reports, or conduct any examination of the individuals identified therein. Also, standing alone, these documents consist of inadmissible hearsay.[12] Requiring respondents to proceed to trial in Florida without being able to access documentary evidence that is in the possession of third parties in Mexico will place them at a significant disadvantage. Dismissal was the only way to ensure adequate access to documentary evidence.[13]

Dismissal was also warranted in order to ensure adequate access to liability and damage witnesses. It should be noted that discovery failed to reveal the existence of any witnesses witness in Florida with personal knowledge of the

[12] The dissenting opinion below states that the hearsay statement of the masseuse to the police in Mexico would be admissible in Florida. *Rabie Cortez,* 66 So. 3d at 968. If true, this highlights the inappropriateness of a Florida forum. While petitioner would be able to rely on the police reports, respondents would be prejudiced, unable to question anyone associated with their preparation or the purported admissions contained therein.

[13] The dissent below focused on respondents' ability to obtain documents from the resort, ignoring the more critical factor – the inability to compel production of documents in the possession of third parties. *Rabie Cortez,* 66 So. 3d at 971.

incident. This would be due to the fact that petitioner never dealt with respondents prior to her vacation. *(App. 3, p. 12, lines 11-17; p. 12, lines 19-24; p. 13, lines 2-5).* Rather, she arranged for her vacation through a third party, Costco. *(App. 3, p. 14, lines 14-19).* Moreover, while she was in Mexico she never communicated with respondents about the incident. *(App. 3, p. 16, lines 11-16).* After she returned home petitioner never communicated – orally or in writing – with respondents about the incident. *(App. 3, p. 48, lines 22-25; p. 49, lines 1-4).* In support of the claim of negligent vacation packaging, petitioner relies on events that occurred *solely* in Mexico. All of the liability witnesses with direct personal knowledge reside in Mexico, with the exception of petitioner, who is a California resident.

There is no way that petitioner's claim of negligent vacation packaging could be tried in Florida, in a vacuum, stripped of the events that are alleged to have occurred in Mexico. In contrast, the case can be tried very simply in Mexico – the issue being, Was petitioner sexually assaulted by a masseuse as a result of negligence of the resort staff? It cannot be fairly tried in Florida because the liability witnesses (other than petitioner herself) are in Mexico. The witnesses who would be needed to educate the jury about the operations of the Moon Palace Golf & Spa Resort are in Mexico. The witnesses to the screening, hiring, and training of the masseuse are in Mexico. And those who could testify as to the resort's compliance with applicable laws and ordinances are in Mexico.

While petitioner asserts that the record is "devoid of a single piece of competent evidence" establishing the location of witnesses, petitioner herself identified numerous witnesses at the resort: Carlos Alberto Galvan Terrazas (concierge); Julio Cesar Mendoza Lara (manager); Melina F. Licona Ortiz (former spa receptionist); Amilcar J. Pech Cruz (former director of security); and Julio Montezuma of Best Day Travel (Costco's representative in Mexico). *(App. 3, p. 20, lines 15-20; p. 21, lines 16-18; p. 23, lines 1-3; p. 25, lines 15-22; p. 26, lines 3-18; p. 27, lines 1-15; p. 28, line 1; p. 32, lines 7-25; p. 33, lines 23-25; p. 34, lines 1-3*). She reported the incident to the Cancun police *(App. 3, p. 34, lines 4-13; p. 35, lines 1-14),* and underwent a physical exam in Mexico, and the examiner solicited information from her about the incident. *(App. 3 p. 37, lines 9-19; p. 38, lines 3-10).*

Respondents also identified the following current and former Moon Palace employees – all located in Cancun – who have first-hand knowledge of the incident: (1) Anibal Martinez (former masseuse, and alleged assailant); (2) Victor Hugo Pimentel Ruiz (former spa supervisor); (3) Antonio Herrera (former security agent); (4) Jose Garduza Arias (former security supervisor); (5) Arturo Rosales Delgado (security manager); (6) Gino Autiero (former operations directors); and (7) Ena Cecilia Bolio Rosado (public relations manager) *(App. 4).*

Aside from current and former employees, respondents further identified as witnesses the following non-parties, all located in Cancun: (1) Isidro de la Cruz (investigating police officer); (2) Marcia Ruiz Ortega (public defender's office); (3) Ernesto Hernandez Sanchez (judicial police commander); (4) Lynnette Bell (U.S. Consulate); and (5) Dr. Monica Franco Munoz (examining physician in Mexico). *(App. 4).*

A reasoned assessment as to the most likely location of relevant witnesses would conclude with Mexico. Therefore, the courts below correctly held dismissal to be warranted. *Ford*, 319 F.3d at 1302. None of the third-party witnesses are subject to compulsory process of a Florida court and "[T]o fix the place of trial at a point where litigants cannot compel personal attendance [of witnesses] and may be forced to try their cases on depositions, is to create a condition not satisfactory to court, jury, or most litigants." *Gilbert*, 330 U.S. at 511.

Over several months petitioner obtained the depositions of individuals in the United States, but their lack of knowledge of facts germane to liability and damages further highlights that Florida is an inconvenient forum indeed. When deciding the motion, the issue is not whether there exist *any* witnesses in Florida; what is required is for the trial court to "evaluate the relevancy and materiality of the potential testimony that a listed witness may bring to the issues." *A.D.M. Productions, Inc. v. Solomon*, 837 So. 2d 259 (Fla. 3d DCA 2002). Here, there

were only two individuals in Florida who might be called "witnesses" – Ana Paradela and Dayanara Ortiz – but they only had sparse, second-hand information.

Ana Paradala, who was the senior sales manager for Palace Resorts, Inc. in Florida, testified that while a complaint was received from Costco (petitioner's travel agent) she did not do an independent investigation. *(App. 5 at p. 20).* She never spoke with petitioner, her husband, or the alleged assailant. *(App. 5 at p. 64).* She did not receive any communications from the resort in Mexico regarding their investigation and had no knowledge of any reports. *(App. 5 at p. 56).*

Dayanara Ortiz was a customer service agent for Palace Resorts, Inc. in Florida. *(App. 6 at pp. 7 and 8).* She also confirmed that while a complaint had been received from Costco, she never spoke with petitioner, her husband, or the alleged assailant. *(App. 6 at pp. 47 and 48).* All customer complaints that came into Palace Resorts, Inc. involving physical injuries or accidents at the Moon Palace were forwarded to the resort in Mexico. *(App. 6 at p. 25).* She never received any reports from Mexico regarding the investigation of the incident, and did not know the outcome of the investigation. *(App. 6 at p. 28; p. 38).*

The other individuals deposed by petitioner had no relevant information regarding either liability or damages. It is respectfully submitted that if this Court were to evaluate the testimony offered by these individuals it will conclude, as did the courts below, that dismissal is warranted. *Van Cauwenberghe v. Biard*, 486

U.S. 517, 528 (1988) ("To examine the relative ease of access to proof, and availability of witnesses, the district court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiffs' causes of action and to any potential defenses to the actions.") Here, the witnesses in the United States employed by Palace Resorts, Inc. have no information germane to the liability or damages issues, having offered the following testimony:[14]

- **Roberto Chapur, President of Palace Resorts, Inc.**: He first learned of the incident about two months before his deposition, some three years after it occurred, and never investigated. *App. 7 at pp. 34, 35, 43, 48. and 49.*

- **Lourdes Rodriguez, former Chief Operating Officer for Palace Resorts, Inc.**: She first learned of the incident in 2008 when she was served with the summons and complaint. She did not investigate; rather, she turned the complaint over to defense counsel and to the legal department of the resort in Mexico. *App. 8 at pp. 32, 34, 149 – 152.*

- **Julie Vieto, Sales Manager for Palace Resorts, Inc.**: She had no personal knowledge of the incident. She had received an e-mail from Peg Curran, a Costco customer service representative. She turned it over to the customer service department, and took no further action. *App. 9 at pp. 35; 40 – 44; 47 – 48; 51 – 56.*

[14] As the Third District correctly concluded, Palace Resorts, Inc., a Delaware corporation based in Florida is the U.S. marketing arm for an international hotel company based in Cancun, Mexico and it had no ownership or management role in the Mexican resort. *Rabie Cortez,* 66 So. 3d at 963.

- **Jose Rodriguez, the Human Resources and Payroll Manager for Palace Resorts, Inc.**: He first heard of the incident a month before his deposition, some three years after it occurred, and never spoke with anyone in Miami or Mexico about it. *App. 10 at pp. 78 -78; App. 11, pp. 4 – 9.*

- **Ginny Davito, Vice President of Group & Incentive Sales for Palace Resorts, Inc.**: As with all other witnesses before her, she had no first-hand knowledge. *App. 12 at p. 26.*

- **Donna Hyde (Costco representative):** Deposed in Washington State, she testified that she had spoken once on the telephone with petitioner, but could not recall the substance of the conversation. *App. 13 at pp. 14 – 18; 24 – 25.*

- **Angela Marie Ward (Costco representative)**: Deposed in Washington State, she testified that she did not deal directly with petitioner, the resort in Mexico, or respondents herein. Her testimony established her lack of knowledge of the incident. *App. 14 at pp. 13, 15, 18, and 19.*

- **Margaret Curran (Costco representative)**: Deposed in Washington State, she testified that she had three limited conversations with petitioner, and could not recall details of the first two. As to the third, she recalled that petitioner advised that she had retained an attorney. *App. 15 at pp. 10, 11, 14, 16, 17, and 19.*

The trial court's dismissal order was completely justified because it was evident that the witnesses with relevant and material information are located in Mexico, and none of the witnesses in Florida have material information. The inability of respondents to compel the testimony of percipient witnesses and material documents is a critical factor in the analysis, weighing heavily in favor of dismissal. *Tazoe*, 631 F.3d at 1321 (dismissing claim of U.S. citizen in favor of Brazil because the inability to compel third-party witnesses or the production of

documents from those witnesses was found to be unusually extreme and materially unjust).[15]

While the dissent below found that the foreign witnesses could be deposed (assuming that to be the case), the presentation of key liability witnesses by deposition would severely prejudice respondents. *Gilbert*, 330 U.S. at 511. The jury would *see* petitioner herself, but would only *hear* respondents' witnesses' deposition testimony read back to them, giving the impression to the jury that the defendants did not care enough to bring live witnesses to the trial. This factor weighed heavily in favor of dismissal.

With regard to enforcement of judgments, this issue was never raised by petitioner and never addressed by the courts below; however, discovery revealed that respondents are wholly owned subsidiaries of Mexico-based holding companies, and they exist solely to serve the Mexican resorts. The parent company is legally organized and based in Mexico. The properties are all located in Mexico. The services offered by Palace Resorts, Inc. in Miami are limited to marketing and sales; however, marketing and sales is also done in Mexico. Palace

[15] *See also*, *Satz v. McDonnell Douglas Corp*., 244 F.3d 1279 (11th Cir. 2001) (affirming dismissal of claim of U.S. citizen in favor of litigation in Argentina, where the relevant evidence was located); *Perez-Lang v. Corporacion de Hoteles, S.A.*, 575 F.Supp.2d 1345 (S.D. Fla. 2008), *aff'd* 325 Fed.Appx. 900 (11th Cir. 2009) (dismissing claim of U.S. resident who was injured in an accident in the Dominican Republic on the basis that third-party documents and witnesses were located in the alternate forum).

Resorts brand hotels are located throughout Mexico and the Caribbean and there are no properties in Florida or the United States. Respondents' Florida assets are minimal, consisting primarily of leased office space and respondents have no liability insurance for the loss described in the complaint, they are not profitable, and their funding is entirely dependent on monies paid to the Mexican parent corporation. Therefore, this factor weighs in favor dismissal.[16]

The practicalities and expenses associated with litigation in Florida also favored dismissal. Petitioner, a California resident, has never lived in Florida, and failed to present any compelling reason why she needs the protections of Florida law. These additional factors supported dismissal. *Hilton Int'l,* 971 So. 2d at 1001; *Kerzner Int'l*, 983 So. 2d at 750; *Kawasaki*, 899 So. 2d at 408; *Calvo,* 761 So. 2d at 461; *Pearl Cruises*, 728 So. 2d at 1226; *Resorts Int'l*, 705 So. 2d at 629.

This lawsuit also revolves around the customs, practices, laws and ordinances of Mexico as to the control and regulation of hotels and resorts in that country, as well as labor laws and the licensing of masseuses. Under choice of law principles, Mexican law would be applied to the substantive issues of liability in this case. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980).

[16] Also, as the *Kinney* Court recognized, "[The] dismissing court's order also may retain jurisdiction over assets located within Florida where those assets are at issue in the dismissed case." *Kinney*, 674 So. 2d at 92.

And finally, the following additional factors also weighed in favor of dismissal:[17] First, the language barrier that will exist between the lay and expert witnesses from Mexico who will be called to testify at trial. Second, the added expense associated with translation of key witness testimony and documents. Petitioner testified that all of her communications with the third-party witnesses in Mexico were in Spanish, a language that she can speak, read, and write. (*App. 3).* Clearly, these practicalities weighed heavily in favor of trying the case in Mexico. Third, the third-party witnesses are beyond the compulsory process of a Florida court and the parties will have to spend significant effort and expense in trying to convince third-party witnesses to agree to make the arrangements necessary to travel to Florida in order to testify. Fourth, assuming the third-party witnesses agree to travel to Florida, then the parties will incur the costs of transportation and lodging. And fifth, the entrance of these third-party witnesses into the United States will have to be approved by the U.S. Consulate Office in Mexico and the U.S. Department of Homeland Security in the U.S., so their attendance cannot be assured.[18]

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[17] See generally *Hilton Int'l*, 971 So. 2d at 1001; *Kerzner Int'l*, 983 So. 2d at 750; *Kawasaki*, 899 So. 2d at 408; *Calvo*, 761 So. 2d at 461; *Pearl Cruises*, 728 So. 2d at 1226; *Resorts Int'l*, 705 So. 2d at 629; see also *Perez-Lang* 575 F.Supp.2d at 1345, *aff'd* 325 Fed.Appx. 900.

[18] The dissent below stated that witnesses could be brought from Mexico *Rabie Cortez*, 66 So. 3d at 970-71), ignoring the difficulties of bringing them into the United States. *See Rifkin Affidavit. (R. 209-210).*

Petitioner's expense of traveling to Mexico, rather than to Florida, is minimal compared to the hardships that would be faced by respondents if forced to defend this claim in Florida – away from vital evidence and witnesses, and without the ability to compel the attendance of third-party witnesses or documents. Under these circumstances, dismissal was appropriate.[19]

iii. The courts below correctly concluded that the public interest factors weighed in favor of dismissal.

Both the trial court and Third District determined that the private interest factors weighed in favor of Mexico as the convenient and equitable forum in which to resolve this matter. The private interest factors were not "at or near equipoise" but instead weighed heavily in favor of dismissal. Nonetheless, the courts below addressed the public interest factors and correctly concluded that they showed that a Mexican forum is a far more convenient and appropriate forum.

The relevant public interest factors to be considered include: (1) protecting court dockets from cases that lack significant connection to the jurisdiction; (2) the desirability of having controversies decided in the localities where they arise; and (3) the difficulties attendant to resolving conflict-of-laws problems and applying

[19] With regard to the private interest factors, the dissent below felt that the inability to retain an attorney on a contingency fee basis weighs against dismissal. *Rabie Cortez*, 66 So. 3d at 970). But the inability to retain an attorney on a contingency fee basis does not make the alternate forum inadequate; this factor is generally not given *any* consideration. *Resorts Int'l.*, 705 So. 2d at 629, *rev. denied* 718 So. 2d at 170, citing *Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2d Cir. 1996). In any event, respondents' expert confirmed that contingency fee agreements are allowed in Mexico (*App. 17 at pp. 87-88),* which petitioner's expert did not deny.

foreign law. *Kinney*, 674 So. 2d at 91 (issue is whether there is a sufficient nexus to the forum which would justify the commitment of judicial time and resources).

Here, dismissal was warranted in order to protect Florida's court dockets from litigation that has no nexus to the forum. It is clear that this lawsuit has little, if any, connection with Florida. Petitioner, a citizen of California, traveled to Mexico for a vacation. While in Mexico she was allegedly sexually assaulted by a Moon Palace employee. Mexican police officials investigated the incident and her initial examination was rendered in Mexico. Subsequent medical care was rendered in California. Petitioner's claim is based on respondents' alleged role with regard to the selection of the masseuse in Mexico and the breach of an alleged duty to warn guests of the resort in Mexico about the Mexican masseuse. Yet the Third District made findings of fact that respondents had no ownership interest in the Mexican resort, and they had no role in operating, managing, hiring, or recruiting personnel for the resort in Mexico. *Rabie Cortez,* 66 So. 3d at 963-64.

The only connection to Florida is that respondents conduct marketing operations in the United States on behalf of their Mexican parent companies. But that respondents do business in Florida or are registered to do business in Florida does not preclude dismissal. *Kinney*, 674 So. 2d at 93. Also irrelevant is whether

respondents own or lease property in Florida or conduct operations on behalf of their Mexican parent companies or a Mexican resort.[20]

A further consideration that warranted dismissal is that the retention of jurisdiction would have involved Florida jurors in a dispute that has no significant connection with this forum. Florida jurors should not be used to adjudicate controversies that have no substantial connection with Florida – especially when a practical alternative forum exists.[21] While the dissent below states that the actions of respondents will be the focus of petitioner's lawsuit, it should be noted that more specifically, based on the allegations in the amended complaint, it will be the breach of an alleged duty with regard to the selection of the masseuse in Mexico that will be the focus of the lawsuit.[22]

The desirability of having controversies decided in the locale where the controversy arose also weighed in favor of dismissal. Mexico has a significant interest in punishing wrongdoers within its jurisdiction and of ensuring the safety of resort visitors. Mexico has a government agency that regulates tourism. Florida does not share this interest, especially since petitioner is not a Floridian, the resort

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[20] See generally *Kerzner Int'l*, 983 So. 2d at 750; *Kawasaki Motors*, 899 So. 2d at 408; *Calvo*, 761 So. 2d at 461; *Pearl Cruises*, 728 So. 2d at 1226; *Resorts Int'l*, 705 So. 2d at 629; *Perez-Lang*, 575 F.Supp.2d at 1345, *aff'd* 325 Fed.Appx. 900.

[21] *See* cases cited *supra* note 17.

[22] Respondents' position is reinforced by the fact that the single claim asserted against them was also made against Mexican corporations; this claim was based on the same operative events, which occurred entirely in Mexico.

is in Mexico, the masseuse is in Mexico, all third-party witnesses are in Mexico, the owners and operators of the resort are Mexican corporations, the alleged misconduct occurred in Mexico, and the injuries occurred in Mexico. Florida also does not have an interest in this controversy because respondents have no ownership interest in the Mexican resort, and they have no role in operating, managing, hiring, or recruiting personnel for the resort in Mexico. *Rabie-Cortez*, 66 So.3d at 963-64.[23]

The difficulties attendant to resolving conflict-of-laws problems and applying foreign law also weighed in favor of dismissal. If tried in Florida, the trial court would have to apply Mexican law, as Florida applies the significant-relationships test in tort cases. That is, all substantive issues are determined in accordance with the law of the state having the most significant relationship to the occurrence and the parties. *Bishop*, 389 So. 2d at 1001. Under this test, the trial court must evaluate each forum's relationship to the issues, including: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.

However, in the case of a personal injury claim, not all contacts are deemed

[23] *See* cases cited *supra* note 17.

equal, because "[t]he state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law." *Bishop,* 389 So. 2d at 1001.[24]

Here, Mexico is the forum with the most significant contacts. The alleged assault occurred in Mexico. If there was a breach of an alleged duty with respect to the selection of the masseuse in Mexico, duty to warn guests of the resort in Mexico about its masseuses, or with respect to the screening, hiring, training, supervision, and/or retention of the masseuse in Mexico then all acts germane thereto occurred in Mexico. Yet the Third District made findings of fact that respondents had no ownership interest in the Mexican resort, and they had no role in operating, managing, hiring, or recruiting personnel for the resort in Mexico. *Rabie Cortez,* 66 So. 3d at 963-64. The injury and the injury-causing conduct, as alleged, occurred in Mexico, and in personal injury cases, the place of the injury takes precedence over other contacts absent a showing of other significant interests. *Mezroub v. Capella,* 702 So. 2d 562, 565 (Fla. 2d DCA 1997).

iv. The courts below ensured that petitioner could reinstate her action in Mexico without any undue inconvenience or prejudice.

Lastly, the courts below properly determined that petitioner could file a negligence action in Mexico without any undue inconvenience or prejudice.

[24] *See also, Mezroub v. Capella*, 702 So. 2d 562, 565 (Fla. 2d DCA 1997) ("In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless ... some other state has a more significant relationship.")

Respondents stipulated that the action would be treated in the Mexican forum as though it had been filed there on the date it was filed in Florida, with service of process accepted as of that date; furthermore, respondents stipulated to waive any statute of limitations defenses. Under such circumstances, dismissal was appropriate. *Kinney*, 674 So. 2d 92.[25]

C. The other issues raised by petitioner do not favor a Florida forum.

Trying to side-step the *Kinney* factors, petitioner asserts that her theory of negligent vacation packaging is not cognizable in Mexico. However, as explained above, Mexico recognizes negligence claims based on direct and vicarious liability, and if petitioner is able to prove negligence she will be entitled to recover economic and non-economic damages. Moreover, it is well settled that a court may dismiss on *forum non conveniens* grounds even though the foreign forum does not provide relief in accordance with the same legal theories or the same range of remedies, so long as the alternative forum provides an avenue for redress. *Kinney*, at 91.[26]

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[25] Even the dissent below acknowledged that there would be no undue inconvenience or prejudice to petitioner in re-filing her negligence claim in Mexico. *Rabie Cortez*, 66 So. 3d at 973.

[26] *See also Hilton Int'l*, 971 So. 2d at 1005 ("A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court."); *accord, Piper Aircraft*, 454 U.S. at 255 (holding that a forum is "adequate" when "the parties will not be deprived of all remedies or treated unfairly" even though they may not enjoy the same benefits they might receive in an American court.).

Petitioner asserts that Mexico is unavailable because the standard of proof in a case involving a *criminal* sexual assault in Mexico is high. Yet she fails to indicate what provision of Mexican law she is relying on for this proposition, and fails to show that it has any bearing on civil actions. However, the opinions offered by her own expert witness establish that petitioner can rely on the testimony of other witnesses – including current and former resort employees, third-party witnesses, and investigating police officers – in order to establish her claims in Mexico.[27]

As for the argument that Mexico is not an adequate forum because respondents are not domiciled there (notwithstanding petitioner's allegation that respondents operate and manage resorts in Mexico) petitioner presents no case law in support of this position, and the courts that have considered the argument have rejected it. For example, in the *Bridgestone/Firestone* multi-district litigation, it was found that domicile can be waived or extended thereby avoiding the

[27] This burden of proof was also a concern of the dissent below. *Rabie Cortez*, 66 So. 3d at 968. However, as petitioner's expert acknowledged, "To prove a fact, normally will require the testimony of two witnesses. In the case like the one of Mrs. Shahla M. Rabie Cortez, the alleged sexual assault occurred when she was alone with the masseuse, so unless she can find and make the masseuse confess in front of the Court, **she will be required to gather other testimony** to even have a chance of getting a Judge to conclude that the attack has been fully proved (*prueba plena*)." (emphasis added) *(App. 1 at ¶ 15).*

requirement of domicile. *In re Bridgestone/Firestone, Inc.*, 470 F.Supp.2d 917 (S.D. Ind. 2006).[28]

Since petitioner repeatedly asserts that respondents operate and manage resorts under the Palace Resorts brand name throughout Mexico,[29] then there is no legal or logical basis to conclude that a Mexican court would be unable to exercise jurisdiction over entities that allegedly employ and supervise thousands of individuals in Mexico, and that otherwise have extensive contacts with Mexico. As respondents' expert's unchallenged sworn statement indicates: "The Courts of the State of Quintana Roo have personal jurisdiction over entities that own or operate businesses located in the State of Quintana Roo, as well as over any entity that does business within the State or that agrees to submit to the jurisdiction of the courts of said State." *App. 2 at ¶ 31.*[30]

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[28] *See also*, *Snaza v. Howard Johnson Franchise Systems, Inc.*, 2008 WL 5383155 (N.D. Tex 2008) (in a wrongful death claim by residents of South Dakota against a U.S.-based corporate defendant for fatal injuries sustained in a resort in Mexico, it was held that Mexico provides an adequate alternate forum even if defendant is not domiciled in Mexico); *Juanes v. Continental Tire North America, Inc.*, 2005 WL 2347218 (S.D. Ill. 2005) (rejecting argument that Mexican courts would not exercise jurisdiction over United States corporations who were not domiciled in Mexico); *Hahn v. Diaz-Barba*, 125 Cal.Rptr.3d 242 (Cal. 2011) (recognizing that the courts of Mexico would exercise jurisdiction over the defendants who were residents of the United States and that domicile did not pose an impediment to a *forum non conveniens* dismissal).

[29] It should be noted that there are no hotels in the United States operating under the Palace Resorts brand name.

[30] As respondent's expert further explained, "Mexican law governs all persons living in or on their way through Mexico and all acts undertaken and all events

Petitioner also emphasizes that respondents regularly conduct business in Florida, arguing that it is "puzzling and strange" that they would want to litigate in Mexico (while simultaneously maintaining that respondents operate and manage resorts under the Palace Resorts brand name throughout Mexico).[31] However, the fact that a defendant does business in Florida is not dispositive. *Kinney*, 674 So. 2d at 93.[32]

Of course, there is nothing puzzling or strange about respondents wishing to defend in Mexico. First, at the time that the motion to dismiss was granted, there were several Mexican corporations involved in this lawsuit as defendants. These Mexican corporations are the owners and operators of the Moon Palace Golf & Spa Resort in Mexico and other Palace Resort properties in Mexico, as well as

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occurring within the territory or jurisdiction of Mexico, as well as any persons who voluntarily submit to the laws of Mexico. (Federal Civil Code, Art. 12) Furthermore, as per article 2 of the Civil Code for the State of Quintana Roo ("CCQ") 'the state statutes are applicable to all inhabitants of Quintana Roo without distinction with respect to people's sex, nationality, or whether they are domiciled in the State or just visiting'." *(App. 2 at ¶ 28).*

[31] The dissent below similarly ignored the allegations that respondents do business in Mexico and that they are being sued for their alleged negligent acts which occurred entirely in Mexico. *Rabie Cortez,* 66 So. 3d at 969.

[32] *See also, Tananta,* 909 So. 2d at 884, *rev. denied* 917 So. 2d at 195 (holding that even if the defendant was doing business in Florida, this would be only one factor to consider in determining whether the case may be fairly and more conveniently litigated elsewhere); *Hilton Int'l*, 971 So. 2d at 1001; *Kerzner Int'l*, 983 So. 2d at 750; *Kawasaki*, 899 So. 2d at 408; *Calvo,* 761 So. 2d at 461; *Pearl Cruises,* 728 So. 2d at 1226; *Resorts Int'l*, 705 So. 2d at 629.

respondents' parent company.[33] Second, petitioner was asserting six different causes of action against the now-dismissed Mexican defendants, based on theories of direct negligence and vicarious liability. However, only one theory – negligent vacation packaging – was asserted against respondents and this theory of liability is based on respondents' breach of alleged duties in Mexico, not Florida. Of significance, the negligent vacation packaging claim was also asserted against the Mexican entities for their breach of an alleged duty in Mexico, not Florida.[34] Third, all of the material witnesses and documents are in Mexico. Lastly, this is not a case where respondents have little or no contact with the proposed forum. Rather, respondents are wholly-owned subsidiaries of a Mexican parent company (which was a party to the suit at the time that the dismissal motion was granted), who exist to serve the resorts in Mexico and their connections with Mexico are extensive and significant.

Petitioner also argues that there should have been a full-blown evidentiary hearing below. However, petitioner failed to request an evidentiary hearing, and no Florida court has ever held that an evidentiary hearing is required when addressing

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[33] These Mexico-based defendants were subsequently dismissed by petitioner shortly before the scheduled hearing on their motion to dismiss based on *forum non conveniens*.

[34] Because the Mexican based entities have not been voluntarily dismissed, it may be true that respondent's actions may be the focus of petitioner's lawsuit; however, it will be respondent's actions in Mexico – not Florida – that will be at issue. *Rabie Cortez*, 66 So. 3d at 972-73.

a *forum non conveniens* motion. Rather, it is well recognized that a trial court's ruling can be based solely on affidavits. *Ryder System,* 997 So. 2d at 1133. Furthermore, it was respondents who asked for the opportunity to present the live testimony of Lourdes Rodriguez in order to respond to the allegations of perjury, which was refused by the trial court.

D. The pre-deposition retractions of incorrect statements undermine petitioner's allegations of perjury.

A common theme throughout petitioner's brief is that Lourdes Rodriguez filed perjured affidavits. *(App. 16).* However, three months before her deposition, Lourdes Rodriguez amended her original affidavit as follows:

- Paragraph 13 of the original affidavit was removed, which had read as follows: "Neither Palace Resorts Travel, Inc. d/b/a Palace Resorts, Inc. nor Palace Resorts LLC ever received any funds of any kind as a result of Plaintiff's stay at the Moon Palace Golf & Spa Resort."
- Paragraph 19 of the original affidavit was amended as follows: "All bookings and reservations for the Palace Resorts Hotels in Mexico – including the Moon Palace Hotel – ~~are done~~ [are processed] in Mexico through the "General Reservation Center" located at the time at the Moon Palace, Cancun, Mexico. The reservations ~~are booked~~ [are processed] by Palace Resorts Reservations, S.A. de C.V."

It is these two changes to the affidavit that constitute the alleged perjured testimony of which petitioner complains. However, when Lourdes Rodriguez's deposition is read in its entirety a different picture emerges. Lourdes Rodriguez explained that under the contract between Palace Resorts, Inc. and Palace Resorts Reservations, S.A. de C.V., a fixed percentage of the revenue generated by all

room reservations is received by Palace Resorts, Inc. for marketing purposes. *(App. 8 at pp. 127 – 130).* In this case, petitioner booked her vacation through Costco (and Costco had a contract with Palace Resorts Reservations, S.A. de C.V. of Mexico); therefore, Palace Resorts, Inc. did not receive any funds directly from petitioner; however, it would have received a small percentage indirectly through Mexico based on its contract with the resort operator.

Lourdes Rodriguez also explained that generally Palace Premier Vacation Club members (of which petitioner is not a member) book their reservations through Palace Resorts, Inc., but ultimately all of the reservations have to be processed in Mexico where the computer servers are maintained. *(App. 8 at pp. 112 -116).* Therefore, the revised statement was simply a more accurate reflection of the resorts' business practices. Lourdes Rodriguez explained that she had realized her mistake and unilaterally changed her affidavit months before the deposition.

When respondents' counsel started to cross-examine Lourdes Rodriguez at deposition, petitioner's counsel within minutes stated that it was time to "shut down" the deposition after only a few questions. The court reporter also refused to proceed based on the instructions of petitioner's counsel. As a result of respondents' counsel's inability to cross-examine the witness at deposition, Lourdes Rodriguez was before the trial court during the September 30, 2009

hearing on the motion to dismiss. Respondents' counsel requested an opportunity to question Lourdes Rodriguez regarding the allegations of perjury; however, the trial court declined. Petitioner never requested an opportunity to question Lourdes Rodriguez (or any other witness) during the hearing.

These issues were fully briefed to the trial court and there is no indication that they were not taken into consideration. The Third District's decision not to revisit these issues is reasonable because the fact that Palace Resorts, Inc. received funds from the resort in Mexico or that the resort in Mexico processed the reservations are simply not germane to the *forum non conveniens* analysis.

II. The deference shown to petitioner was consistent with the doctrine of *forum non conveniens.*

Petitioner argues that, as a U.S. citizen, she is entitled to "great deference" in her choice of a U.S. forum, including a Florida forum, even though she is a resident of California and has no contacts with Florida. *Rabie Cortez,* 66 So.3d at 963. However, the deference due to a U.S. citizen is far from absolute and distinctions based on residency in the context of *forum non conveniens* do not violate the Privileges and Immunities Clause. *See U.S. Const. art. IV, sec. 2, cl. 1*; *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929); *Missouri ex. Rel. Southern Railway v. Mayfield,* 340 U.S. 1 (1950).

Second, ever since this Court's ruling in *Kinney*, adopting the federal *forum non conveniens* doctrine, it has been recognized that residency is only one factor to

be taken into consideration. Accordingly, Florida's appellate courts have properly determined that non-residents are entitled to less deference; however, less deference has never been interpreted as *no* deference at all. *Wood v. Bluestone*, 9 So.3d 671 (Fla. 4th DCA 2009) (In a lawsuit between a New York plaintiff and a Florida defendant, the court recognized that when a plaintiff is a non-resident, his or her choice of forum is entitled to *less* deference). Myriad cases could be cited for this proposition, some of which are set forth in the margin.[35] Thus, the trial court and Third District's conclusion that petitioner was "not entitled to a strong presumption in favor of Florida as her initial forum choice" is well supported by Florida law. *Rabie Cortez,* 66 So. 3d at 963.[36] Ever since *Kinney* it has been accepted that a plaintiff's choice of forum is not dispositive, and a court may decline to exercise jurisdiction when, as here, petitioner is a non-resident, the cause of action did not arise in the forum state, and the private and public factors all

[35] Since *Kinney,* Florida courts have recognized that residency is a factor to be considered in a *forum non conveniens* analysis and that the presumption against disturbing a plaintiff's choice of forum is given less deference when the plaintiff is an out-of-state resident. *Kerzner Int'l,* 983 So. 2d at 750; *Hilton Int'l.*, 971 So. 2d at 1001; *R.J. Reynolds Tobacco Co. v. Carter,* 951 So. 2d 105 (Fla. 3d DCA 2007); *Charles v. McMahon*, 916 So. 2d 1013 (Fla. 4th DCA 2006); *DeLuca v. Hislop*, 868 So. 2d 1254 (Fla.4th DCA 2004); *Value Rent-A-Car,* 720 So. 2d at 555.

[36] Citing to, *Kerzner Int'l*, 983 So. 2d at 750; and *Value Rent-A-Car*, 720 So. 2d 552.

weigh in favor of dismissal. *Kinney*, 674 So. 2d at 93. Needless to say, as the cases set forth in the margin show, Florida's approach is not unique.[37]

Under federal law the relevant inquiry is not whether a plaintiff is a resident of the chosen forum, but rather whether a plaintiff is an American citizen. However, even under the federal courts' approach, American citizens do not have the absolute right to sue in an American court, and citizenship is but one factor among many to be taken into consideration. *Piper Aircraft*, 454 U.S. at 256 ("Citizens or residents *deserve somewhat more deference* than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that the trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.") (emphasis added).[38]

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[37] Like Florida, the majority of states that have addressed the issue have also recognized that residency is a factor to be taken into consideration and that a non-resident's choice of forum is afforded less deference in a *forum non conveniens* analysis. *Quixtar Inc. v. Signature Management Team, LLC.*, 315 S.W.3d 28 (Tex. 2010); *Peterson v. Feldmann*, 784 N.W.2d 493 (S.D. 2010); *Berbig v. Sears Roebuck & Co.*, 882 N.E.2d 601 (Ill. App. Ct. 2007); *Gianocostas v. Riu Hotels*, 797 N.E.2d 937 (Mass. App. Ct. 2003); *Durkin v. Intevac, Inc.*, 782 A.2d 103 (Conn. 2001); *Wentzel v. Allen Machinery, Inc.*, 277 A.D. 2d 446, 447 (N.Y. App. Ct. 2000); *D'Agostino v. Johnson & Johnson, Inc.*, 542 A.2d 44 (N.J. App. Ct. 1988); *Celotex Corp. v. American Insurance Co.*, 199 Cal. App. 3d 678) (Cal. App. Ct. 1987); *Lowe v. Norfolk & Western R.R. Co.*, 463 N.E.2d 792 (Ill. 1984) *rev. denied* 467 N.E.2d 582 (1984); *Cray v. General Motors Corp.*, 207 N.W.2d 393 (Mich. 1973).

[38] The following federal courts have also recognized that a U.S. citizen's forum choice is entitled to "somewhat more deference" and the mere fact that a plaintiff

Since this Court's decision in *Kinney*, residency has been only one factor to be considered. If this Court were to once again adopt rigid rules as to residency, then the doctrine "would lose much of the very flexibility that makes it so valuable." *Piper Aircraft*, 454 U.S. at 250. The record shows that the courts below did not disregard petitioner's residency. Rather, consistent with Florida and federal law, petitioner was given the deference accorded to a non-resident who has chosen to sue in a Florida forum for a cause of action that arose in a foreign country.

III. Under Florida law, a trial court's decision on *forum non conveniens* is reviewed for abuse of discretion, which is the standard previously acknowledged by petitioner and applied by the Third District.

Petitioner argues that the majority applied the incorrect standard of review. Specifically, rather than an abuse-of-discretion standard, she asserts that the Third District should have applied an "abuse of discretion/de novo" standard.[39] However,

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is a United States citizen does not, in and of itself, conclusively establish the convenience of a United States forum, and the presence of American plaintiffs is not in and of itself sufficient to bar dismissal on the ground of *forum non conveniens*. *Tazoe,* 631 F.3d at 1321; *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 2007 WL 3054986 (S.D. Fla. 2007), *aff'd* 578 F.3d 1283 (11th Cir. 2009); *Morse v. Sun Int'l Hotel, Ltd.*, 2001 WL 34874967 (S.D. Fla. 2001), *aff'd* 277 F.3d 1379 (11th Cir. 2001); *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147 (2nd Cir. 1978) (en banc), *cert. denied* 449 U.S. 890 (1980); *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983), *cert. denied* 464 U.S. 1017 (1983); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. 1980), *cert. denied* 454 U.S. 1128 (1981).

[39] Only the Third District recognizes a very limited exception to the abuse-of-discretion standard, applied when the trial court fails to address one or more of the *Kinney* factors. *Ryder System*, 997 So. 2d at 1133. However, in this case the majority determined that all of the *Kinney* factors were addressed at length in the legal memoranda filed by the parties at the trial level and at the hearing on the

it was petitioner who previously asserted before the Third District that "Orders granting dismissal for *forum non conveniens* are reviewed for abuse of discretion." She now complains that the Third District applied the standard of review that she initially advocated. It was only when requesting rehearing that petitioner asked that the Third District apply an "abuse of discretion/de novo" standard.[40]

Here, the Third District recognized and applied the correct standard of review. In the Third District, abuse of discretion has been the applicable standard of review in *forum non conveniens* cases for fifty years. *Southern Ry. Co. v. Bowling*, 129 So. 2d 433, 434 (Fla. 3d DCA 1961). All other appellate courts in Florida apply the same standard.[41] Most importantly however, the Third District's application of an abuse of discretion standard herein was done pursuant to the mandate of this Court. *Kinney*, 674 So. 2d at 86; see also, Fla. R. Civ. P. 1.061(4) ("The decision to grant or deny the motion for dismissal rests in the sound discretion of the trial court, subject to review for abuse of discretion.")

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motion, that the trial court had a sufficient record before it, and that the trial court addressed all the factors at the hearing and in its order. *Rabie Cortez,* 66 So. 3d at 961.

[40] The dissent below also asserted that an "abuse of discretion/de novo" standard of review should have been employed; however, such an approach would have been contrary to the mandate of this Court in *Kinney* and Fla. R. Civ. P. 1.061.

[41] See *Corinthian Colleges, Inc. v. Philadelphia Indem. Ins. Co.*, 922 So. 2d 1077 (Fla. 4th DCA 2006); *State Farm Fire and Cas. Co. v. Sosnowski*, 836 So. 2d 1099 (Fla. 5th DCA 2003); *Darby v. Atlanta Cas. Ins. Co.*, 752 So. 2d 102 (Fla. 2d DCA 2000); *Atlantic Coast Line R. Co. v. Cameron*, 190 So. 2d 34 (Fla. 1st DCA 1966).

Petitioner's assertion that the trial court failed to make specific findings with respect to each of the *Kinney* factors is unfounded. Rather, the trial court, in a thorough order, discussed the factual background of this lawsuit and addressed the *Kinney* factors. Then, the Third District addressed the relevant facts and also revisited the *Kinney* factors, applying the abuse-of-discretion standard of review mandated by this Court, *and requested by petitioner*. Considering the extensive record, as well as this Court's decision in *Kinney* and precedent from the Third District, there was nothing "arbitrary, fanciful, or unreasonable" about the trial court's decision and it should not be disturbed on appeal. *Canakaris v. Canakaris*, 382 S0.2d 1197, 1203 (Fla. 1980) ("The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness").

IV. Distinctions based upon residency do not violate the Privileges and Immunities Clause.

Petitioner never argued before the trial court that under the Privileges and Immunities Clause (*U.S. Const. art. IV, sec. 2, cl. 1)*, Florida's courts are required to give her a heightened level of deference in her choice of forum. This issue was not even raised during the initial briefing or oral arguments before the Third District. Rather, petitioner first raised this argument in her motion for rehearing before the Third District. Her failure to raise this issue at the trial court, and in her legal briefs, and at oral argument before the Third District should constitute a

forfeiture of her right to raise it before this Court. *Brown v. Nagelhout*, SC10-868 (Fla. 2012) (declining to address on appeal a defendant's *forum non conveniens* arguments that were not raised before the trial court).[42]

In any event, petitioner has failed to cite a single case to support her argument. The reason for her failure is obvious – the law does not support her position. It is well established that a distinction *can* be made between residents and non-residents in the context of a *forum non conveniens* analysis without violating the Privileges and Immunities Clause. *U.S. Const. art. IV, sec. 2, cl. 1; Douglas,* 279 U.S. at 377; *Mayfield,* 340 U.S. at 1.

In *Douglas*, the U.S. Supreme Court – addressing a *forum non conveniens* statute that allowed a New York court to dismiss the claim of an non-resident plaintiff but which would not have allowed dismissal of an action brought by a New York resident – recognized that making a distinction between residents and non-residents does not violate the clause: "A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence .... There are

[42] *See also, Ayer v. Bush*, 775 So. 2d 368, 370 (Fla. 4th DCA 2000) ("It is a rather fundamental principle of appellate practice and procedure that matters not argued in the briefs may not be raised for the first time on a motion for rehearing."); *Thompson v. Napotnik*, 923 So. 2d 537 (Fla. 5th DCA 2006) (holding that constitutional issues which are not raised at the trial court cannot be raised for the first time on appeal); *Reese v. State Department of Transportation*, 743 So. 2d 1227 (Fla. 4th DCA 1999) (holding that constitutional issues not raised at trial cannot be argued on appeal).

manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned." *Douglas*, 279 U.S. at 387.

In the subsequent *Mayfield* case, the U.S. Supreme Court, again addressing a Privileges and Immunities Clause argument in the context of *forum non conveniens*, held that, "[if] a state chooses to prefer residents in access to often overcrowded courts, and to deny access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control." *Mayfield*, 340 U.S. at 4. In a concurring opinion, Justice Jackson recognized that the clause does not impose on state courts an obligation to provide a non-resident with a forum to litigate actions that occurred outside the state.[43] *Id*. at 5.

In summary, the courts below did not violate the Privileges and Immunities Clause by giving less deference to petitioner's choice of forum, since she is an out-of-state resident with little or no contact with Florida. *Rabie Cortez*, 66 So.3d at 963. The courts below did not ignore petitioner's residency but rather they gave it

[43] And state courts that have addressed the same issue have thus ruled accordingly. See *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), *cert. denied* 528 U.S. 1005 (1999); *Loftus v. Lee*, 308 S.W.2d 654, 657 (Mo. 1958); *Elliott v. Johnston*, 292 S.W.2d 589, 595 (Mo. 1956); *Johnson v. Chicago, Burlington & Quinney R.R. Co.*, 66 N.W. 2d 763 (Minn. 1954); *St. Louis-San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773 (Okla. 1954); *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J. 1954) *cert. denied* 348 U.S. 861 (1954); *Price v. Atchison T. & S.F. R.R.*, 268 P.2d 457 (Cal. 1954) *cert. denied* 348 U.S. 839 (1954); *Mooney v. Denver & Rio Grande W. R.R.*, 221 P.2d 628 (Utah 1950); *Whitney v. Madden*, 79 N.E.2d 593 (Ill. 1948) *cert. denied* 335 U.S. 828 (1948).

lesser deference, which is well recognized to be appropriate. *Id*. "Less" deference is not tantamount to "no" deference. Petitioner was given the deference to which she was entitled.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully requests that this Court affirm the trial court's order dismissing Petitioner's Complaint pursuant to the doctrine of *forum non conveniens* .

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Answer Brief on the Merits complies with the font requirements of Fla. R. App. P. 9.210.

By: */s/ Ricardo Cata*
RICARDO J. CATA
Fla. Bar No. 208809

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing document was filed with the Clerk of the above styled Court and that a true and correct copy was furnished by mail this 03rd day of May, 2012 to: **Michael Diaz, Jr. Esq., Carlos F. Gonzalez**, Esq., and **Gary E. Davidson, Esq.** of Diaz, Reus & Targ, LLP, Bank of America Tower, Suite 2600, 100 Southeast Second Street, Miami, Florida 33131.

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