THE SUPREME COURT OF FLORIDA

SHAHLA M. RABIE CORTEZ,

Petitioner,

vs. CASE NO. SC11-1908

PALACE RESORTS, INC.,
PLACE RESORTS, LLC,
AND TRADCO, LTD., INC.

Respondents.

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS' POSITION

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STATEMENT OF INTEREST

This brief is submitted by the Florida Defense Lawyers Association, Inc. ("FDLA").[1] FDLA is a statewide organization, formed in 1967, of defense attorneys and has a membership of over 1,000 members. Among the aims of FDLA and its members are "improve[ing] the adversary system of jurisprudence and . . . the administration of justice".[2] FDLA maintains an active *amicus curiae* program in which FDLA members donate their time and skills to submit briefs in important cases pending in state and federal courts. FDLA screens those cases for their content of significant legal issues which affect the defense bar or the fair administration of justice.[3] This case has the potential to carry statewide impact in light of the far reaching implications associated with Petitioner's request for this Court to change its long-standing *forum non conveniens* analysis set forth in *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

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[1] FDLA recognizes that Florida Rule of Appellate Procedure 9.370(a) provides that an *amicus curiae* may file a brief only by leave of court. FDLA filed its Motion requesting leave to appear as *amicus curiae* on May 10, 2012. FDLA submits its *amicus curiae* brief in support of the Respondents with its Motion pending in light of the period for filing *amicus curiae* briefs provided for in Florida Rule of Civil Procedure 9.370(c).

[2] *See* www.fdla.org/ByLaws.asp.

[3] *See* www.fdla.org/about/amicus.asp.

SUMMARY OF THE ARGUMENT

This Court recognized in *Kinney* that the right to access Florida courts for redress of injuries provided for in Article I, section 21 of the Florida Constitution is not a "limitless warrant to bring the world's litigation" to Florida's doorstep. 674 So. 2d 86, 92-93 ("the obvious purpose underlying Article I, section 21 is to guarantee access to a potential remedy for wrongs, not to provide a forum to the world at large"). Accordingly, the right of access to Florida courts "will not bar dismissal to the degree that such Florida interests are weak and to the degree that remedies are available in convenient alternative fora with better connections to the events complained of." *Id.* (opining that dismissing such cases actually honors the "'remedy requirement' of Article I, section 21"). The doctrine of *forum non conveniens*, which allows a court to decline to exercise jurisdiction over a suit when the suit can be "fairly and more conveniently litigated elsewhere," is consistent with Florida's right to access to courts. *Id.* at 87. The doctrine acknowledges the right; it simply directs the plaintiff to a more convenient forum to obtain relief. *See* Bruce J. Berman, 4. Fla. Prac., *Civil Procedure R. 1.061* (2011-2012 ed.).

The doctrine of *forum non conveniens* was properly applied in this case because Petitioner has an available alternative forum – Mexico – in which to file suit. The facts upon which Petitioner's cause of action against Respondents is based, and the witnesses and evidence needed to prove and/or disprove the

elements of the cause of action are in Mexico. Neither Petitioner nor her cause of action has a genuine connection to Florida. Accordingly, the interests of justice dictated the dismissal of this action based on *forum non conveniens*. This case illustrates how a plaintiff's choice of forum can significantly impede a defendant's ability to defend its interests against the allegations in a complaint. Had the trial court denied Respondents' motion, they would have been significantly prejudiced in their ability to obtain evidence and present their defense to a Florida jury. Accordingly, for the reasons set forth in Respondents' brief and below, FDLA respectfully submits that the trial court's Order should be affirmed.

ARGUMENT

Depending upon the facts of the case and the cause of action alleged, a plaintiff's choice of forum can significantly impair the defendant's ability to defend against the allegations and impose significant hardship on the forum selected. The doctrine of *forum non conveniens* is intended to address the inequities that arise in such situations where "a local court technically has jurisdiction over a suit but the cause of action may be fairly and more conveniently litigated elsewhere." *Kinney*, 674 So. 2d at 87 (Emphasis supplied); *see also* Bruce J. Berman, 4. Fla. Prac., *Civil Procedure R. 1.061* (2011-12 ed.) ("The purpose of the doctrine is to create a method for selecting the relatively best forum that will optimally balance the private and public interests involved."). For, "[o]nly when all relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished." *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (quoting *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980).)[4]

In *Kinney*, this Court promulgated a four-part analysis for circuit courts to follow when ruling on motions to dismiss for *forum non conveniens*.[5] Adopting the federal *forum non conveniens* standard, the *Kinney* test requires circuit courts to balance the private (fairness to the parties) and public (fairness to the jurisdiction)

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[4] Were it otherwise, Florida could face an overwhelming burden of lawsuits involving plaintiffs with literally no connection to Florida.

[5] This four-part analysis will be referred to herein as the "*Kinney* test".

interests involved. *See id.* at 89-93; *see also Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill. 2d 158, 169, 298 Ill. Dec. 499, 507, 840 N.E. 2d 269, 277 (Ill. 2005) ("*Forum non conveniens* is a flexible doctrine requiring evaluation of the total circumstances rather than consideration of any single factor."). The *Kinney* test, however, must be applied within the jurisdictional boundaries of Florida courts.

Amicus in support of Petitioner incorrectly contends that the proper application of the *Kinney* test requires Florida courts to evaluate a plaintiff's contacts with the United States as opposed to the plaintiff's contacts only with Florida. This Court, however, did not expand the jurisdictional boundaries of state courts in Florida when it adopted the federal *forum non conveniens* standard in *Kinney*. State courts do not have the authority to consider a plaintiff's contacts with any state other than Florida.[6] The Third District recognized in *Kerzner* that:

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[6] The position advanced by Petitioner's *amicus* was argued – and rejected - in *Pearl Cruises v. Cohon*, 728 So. 2d 1226, 1228 (Fla. 3d DCA 1999):

> Relying on federal authority, plaintiffs contend that in deciding whether to grant a forum non conveniens motion, a Florida court must aggregate all of the plaintiffs' United States contacts in deciding whether to grant the motion. *See Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 & n. 5 (8th Cir. 1991). That argument is without merit. The federal courts are a unitary system having nationwide jurisdiction. If there is another more convenient forum in the United States, then the remedy is to transfer the case under 28 U.S.C. §1404, rather than dismiss for forum non conveniens. *See* 933 F.2d at 1394 n. 5.

> Florida courts, unlike federal courts, are permitted to consider only the contacts that a lawsuit has with the State of Florida, not with the United States as a whole, given that 'Florida courts' territorial jurisdiction is confined to the state boundaries.'

Kerzner Intern. Resorts, Inc. v. Raines, 983 So. 2d 750, 752 (Fla. 3d DCA 2008) (Emphasis supplied); *see also Pearl Cruises*, 728 So. 2d at 1228 ("Florida courts' territorial jurisdiction is confined to the state boundaries."). Accordingly, Petitioner's contacts outside of Florida are irrelevant and could not be considered by the trial court when ruling on Respondents' motion to dismiss. *See, e.g.*, Fla. R. Civ. P. 1.061 (requiring Florida courts to determine, *inter alia*, "whether a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida").

Petitioner's *amicus* contends that the plaintiff's choice of forum should control, particularly when the defendant is physically located in the chosen forum.

> As the text of Florida Rule of Civil Procedure 1.061 clearly states, however, the inquiry for the Florida courts is whether 'a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida . . . .' Since the Florida courts' territorial jurisdiction is confined to the state boundaries, dismissal under the forum non conveniens doctrine is appropriate where the trial court concludes, after consideration of the relevant factors, that the more convenient forum is elsewhere in the United States, or abroad.

Id. (emphasis supplied).

Amicus's attempt to simplify the *Kinney* test in this regard is unavailing. The *Kinney* test would be unnecessary if the court's inquiry ended after determining the plaintiff's residency and/or the defendant's location. *See Pearl Cruise*, 728 So. 2d at 1227 (Fla. 3d DCA 1999) (concluding that the defendants' connection to Florida did not preclude dismissal based on *forum non conveniens*); *WEG Industrias, S.A. v. Compania De Seguros Generales Granai*, 937 So. 2d 248, 254-55 (Fla. 3d DCA 2006) (defendant's presence in Florida was "insufficient to tip the private interest factor in" plaintiff's favor); *Tananta v. Cruise Ships Catering & Servs. Int'l, N.V.*, 909 So. 2d 874, 886 (Fla. 3d DCA 2004), *review denied*, 917 So. 2d 195 (Fla. 2005) (concluding that presence of foreign cruise line's agent in Florida was not a private interest factor justifying retention of case in Florida because "a marketing arm for passengers has nothing whatsoever to do with personal injuries suffered by a crewmember").

A foreign plaintiff's choice of forum is not entitled to significant deference. *See Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1118 (Fla. 4th DCA 1997) ("Of great significance is the fact that *Kinney* adopted the formulation of the federal test from *Pain*, and in *Pain* the court concluded that no special weight should have been given to a foreign plaintiff's choice of forum."); *Kerzner Intern. Resorts, Inc.*, 983 So. 2d at 752 ("The only nexus that the State of Florida has to this action is that Ms. Raines' treating physician and attorney are located in

Florida, and the companies which provide marketing services for the Bahamian resort are located in Florida. These factors do not constitute a sufficient nexus to justify jurisdiction in Florida, particularly where the plaintiffs are out-of-state residents, and all other aspects of the case . . . are located in the Bahamas.").[7] Petitioner, a California resident, does not contest the fact that she has no connection to Florida. Her decision to file suit in Florida is not entitled to the same degree of deference that would be afforded to a Florida resident. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Value Rent-A-Car, Inc. v. Harbert*, 720 So. 2d 552, 554-55 (Fla. 4th DCA 1998).

Furthermore, as this Court recognized in *Kinney*, the fact that Respondents may be physically located in Florida does not render Florida the more convenient forum to litigate this matter. *See Kinney*, 674 So. 2d at 93-94 ("[A] corporation's various connections with Florida – if any – will only be factors to be weighed in the balance of conveniences . . . Even the fact that a corporation has its principal place of business in Florida does not necessarily preclude application of the

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[7] *See also In re: Vioxx Litigation*, 395 N.J. Super. 358, 928 A.2d 935 (App. Div. 2007) (less deference entitled to foreign plaintiff); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) ("a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum,' but '[w]hen the plaintiff is foreign . . . this assumption is much less reasonable,' so that 'a foreign plaintiff's choice deserves less deference.'" quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256, 102 S.Ct. 252, 266, 70 L. Ed. 2d 419 (1981)).

doctrine of *forum non conveniens.* Instead, the trial court should gauge the situation using the 'balance of conveniences' approach."). Rather, it is necessary to look at the "practical concerns" of litigating the case in Florida's state courts, "weigh[ing] [the] relative advantages and obstacles to [a] fair trial" which include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action. . . .

Kinney, at 89, 91 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L. Ed. 1055 (1946).).

The private interest factors in this case weigh heavily in favor of Mexico. Petitioner's claim against Respondents is based upon events that occurred in Mexico and the evidence and witnesses with knowledge of the events giving rise to the cause of action are in Mexico. *See, e.g., Value Rent-A-Car, Inc. v. Harbert*, 720 So. 2d 552, 554-55 (Fla. 4th DCA 1998) (opining that the "four broad 'practical' concerns" which must be considered when weighing the private interests favored Georgia because, *inter alia*, the accident occurred in Georgia and the plaintiff received treatment in Georgia, making Georgia the state "where the physical evidence involving the accident is located, as well as where witnesses as to negligence and damages are located").[8] Even if the witnesses in Mexico were

[8] *See also Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011) (private interest weighs in favor of dismissal based on *forum non conveniens* when

willing to voluntarily travel to Florida for depositions and trial, there is no guarantee that they would be able to secure Visas to travel to America.[9] *See Hilton Intern'l Co. v. Carrillo*, 971 So. 2d 1001 (Fla. 3d DCA 2008) (private interest factors weighed in favor of dismissal based on *forum non conveniens* as only two plaintiffs had a tenuous (at best) connection to Florida, substantially all of the evidence was located in Egypt, and defendant would unable to compel testimony of Egyptian witnesses and production of Egyptian documents if case tried in the United States).

As stated above, the *Kinney* test also recognizes the public interests implicated when lawsuits with no genuine connection to Florida are filed in Florida's state courts. *See Kinney,* 674 So. 2d 86, 88 (opining that lawsuits with no genuine connection to Florida place additional burdens on "Florida's trial courts over and above those caused by disputes with substantial connection to state interests"). To minimize the impact on Florida's judiciary and the taxpayers, the public interests "inquiry focuses on 'whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources

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defendant is unable to compel third-party witnesses and/or the production of documents; *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003) (courts should consider the evidence needed to prove and disprove each element of the cause of action when evaluating the private interest factors).

[9] In addition to the hurdles set out in Respondents' brief, the parties would need to retain attorneys licensed to practice law in Mexico to depose any witnesses in Mexico and/or obtain non-party discovery pursuant to a subpoena.

to it.'" *Id.* at 91-92 (quoting *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981)). The *Kinney* Court explained:

> While Florida courts sometimes may properly concern themselves with a suit essentially arising out-of-state, they nevertheless must take into account the impact such practices will have if not properly policed-an impact with substantial effect on the taxpayers of this state and on the appropriation of public monies at both the state and local level to pay for the costs of judicial operations.
>
> We must rightly question expenditures of this type where the underlying lawsuit has no genuine connection to the state. Florida's judicial interests are at their zenith, and the expenditure of tax-funded judicial resources most clearly justified, when the issues involve matters with a strong nexus to Florida's interests.[10]

[10] More than 15 years after *Kinney*, Florida's judicial resources continue to be strained. "Florida's courts get less than 1% of the state's total budget." Approximately .7% of the state's total budget was allocated to Florida's court system in 2010 and 2011. See *Florida State Courts Annual Report 2010 -2011*m available at: _http://www.flcourts.org/gen_public/pubs/bin/annual_report1011.pdf #xml=http://199.242.69.43/texis/search/pdfhi.txt?query=annual+report+2011&pr= Florida+Supreme+Court&prox=page&rorder=1000&rprox=1000&rdfreq=500&rw freq=500&rlead=1000&rdepth=0&sufs=2&order=r&cq=&id=4f3431bc13. Despite shortfalls, the budget allocation for 2012-2013 for Florida's courts was further reduced to .6% of the state's total budget. See *State of Florida's Budge Fiscal Year 2012-2013*, available at: http://www.flcourts.org/gen_public/funding/bin/Current CourtFunding/FY%2012-13/(IntERnet-2)FY%2012-13%20Budget%20Pie%20 Chart%20State%20of%20Florida.pdf. In addition to cash flow problems, Florida's judiciary in 2010–2011 was faced with close to four million civil and circuit court filings, almost one million of those filings in the Eleventh Circuit alone which were being handled by 123 circuit and civil court judges. See *Trial Court Statistical Reference Guide*, available at: http://www.flcourts.org/gen_public/stats/ReferenceGuide10-11/Ch2.pdf. As a

Id.

The public interest factors implicated in this case also weigh in favor of dismissal based on forum non conveniens. Petitioner, a California resident, seeks to hold Respondents liable for allegedly breaching a duty to investigate the masseuse and provide appropriate safety measures at the Mexican resort. After evaluating the voluminous evidence before it, the circuit court found that none of the Respondents had any ownership or management role in the Mexican resort where the alleged assault occurred. The Third District agreed with the circuit court's determination. *See Rabie Cortez v. Palace Holdings, S.A. de C.V.*, 66 So. 3d 959, 963-64 (Fla. 3d DCA 2011). "The use of Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created. Florida courts exist to judge matters with significant impact upon Florida's interests, especially in light of the fact that the taxpayers of this state pay for the operation of its judiciary. Nothing in our law establishes a policy that

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result of the increased workload, in 2010 this Court determined that "For our trial courts, fewer resources and no new judgeships for the last three fiscal years have slowed case processing times and negatively impacted clearance rates." 90 new judges were requested. See *In re Certification of Need for Additional Judges*, available at http://www.floridasupremecourt.org/pub_info/documents/certification2009.pdf. The Legislature provided zero. In a civil justice system defined by the right to a jury tialonly .2% of cases are disposed by a jury. See *Florida Office of the State Courts Administrator FY 2010-11 Statistical Reference Guide*, available at: http://ww.flcourts.org/gen_public/stats/ReferenceGuide10-11/ch4.pdf.

Florida must be a courthouse for the world, nor that the taxpayers of the state must pay to resolve disputes utterly unconnected with this state's interests."[11] *Kinney*, 674 So. 2d at 88.

Finally, it must be noted that Orders granting motion to dismiss based on forum non conveniens are reviewed by appellate courts for abuse of discretion. *See* Fla. R. Civ. P. 1.061; *Kinney*, 674 So. 2d at 86. This Court has defined the test for reviewing a trial court's discretionary power as follows:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (quoting *Delno v. Market St. R.R. Co.*, 124 F.2d 965, 967 (9th Cir. 1942)).[12] As detailed in Respondents' brief, the trial court was presented with voluminous discovery, memoranda of law and heard argument of counsel. (*See, e.g.*, Resp't Brief pp. 10,

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[11] *See Pearl Cruises*, 728 So. 2d at 1227-28 (dismissal based on *forum non conveniens* appropriate as plaintiffs' cause of action had no meaningful connection to Florida and plaintiffs "were free to refile their claim in Italy or any other jurisdiction which will entertain the cases").

[12] The abuse of discretion/*de novo* standard of review utilized by the dissent below has only been applied by the Third District and only when the trial court did not make findings of fact with respect to the factors delineated in the *Kinney* test. *See WEG Industrias, S.A. v. Compania De Seguros Generales Granai*, 937 So.2d 248, 253 (Fla. 3d DCA 2006).

19-20, 27, 45.) The trial court memorialized its findings in the Order granting Respondents' motion to dismiss. The trial court's decision is supported by voluminous case law in Florida and outside of Florida. (*See, e.g.*, Resp't Brief pp. 13-16, 27, 29-30, 32, 34-35, 37-38, 42-50.) Simply stated, it cannot be asserted in good faith that "no reasonable man would take the view adopted by the trial." (*See supra,* p. 12.) As such, FDLA respectfully submits that the trial court's Order dismissing Petitioner's Complaint based on *forum non conveniens* should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus Brief of the Florida Defense Lawyers Association* has been furnished to **Joel S. Perwin, Esq.**, Joel S. Perwin, P.A., 169 East Flagler Street, Suite 1422, Miami, FL 33131; **Michael Diaz, Jr., Esq., Carlos F. Gonzalez, Esq., and Gary E. Davidson, Esq.**, Diaz Reus & Targ, LLP, 2600 Miami Tower, 100 Southeast Second Street, Miami, FL 33131; and **Ricardo J. Cata, Esq. and Ronnie Guillen, Esq.**, Wilson Elser Moskowitz Edelman & Dicker, LLP, 3800 Miami Tower, 100 Southeast Second Street, Miami, FL 33131; by regular U. S. Mail this _____ day of May, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Amicus Brief of the Florida Defense Legal Association was prepared in Times New Roman 14-Point font and fully complies with all of the other requirements of Fla. R. App. P. 9.210.

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Attorney