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 BRIEF ON JURISDICTION

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TABLE OF CONTENTS

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TABLE OF CITATIONS

Cases

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Statutes

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SUMMARY OF FACTS

In August, 2006, while on vacation at a resort in Mexico, Petitioner was undergoing a massage when she was allegedly sexually assaulted by the resort's masseuse. Following the incident, Petitioner reported the alleged assault to resort employees, to her travel agent in Mexico, to the United States Consulate in Mexico, as well as the Office of Tourism in Mexico and the local authorities. Petitioner also gave a statement to the local police and she was physically examined by a medical examiner in Mexico, and the local authorities conducted an investigation of the alleged incident. At no time prior to or during her vacation did Petitioner have any communication with Respondents.

Subsequently, Petitioner filed a Complaint against Respondents for negligent vacation packaging. Respondents filed a timely motion to dismiss based on *forum non conveniens*. Prior to ruling on the dismissal motion, the trial court took evidence from the parties and their experts and heard argument from counsel. In a detailed written order, in which all of the *forum non convenien* factors were addressed at length, Respondents' motion to dismiss was granted.

Petitioner then filed a timely appeal from the trial court's order dismissing her lawsuit based on *forum non conveniens*. In a split decision the appellate panel agreed with the trial court that the Respondents had met their burden of proof as to

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all of the *forum non conveniens* factors. Petitioner's subsequent motion for re-hearing, re-hearing en banc, and certification of questions of great public importance were denied. Petitioner now seeks review pursuant to the Court's conflict jurisdiction under Article V § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

In affirming the trial court's order of dismissal, the majority's decision in *Rabie Cortez v. Palace Holding, S.A. de C.V.*, 66 So.3d 959 (Fla. 3d DCA 2011) was also guided by and applied all of the factors set forth in *Kinney Systems, Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996). Despite Petitioner's allegations of conflict jurisdiction, there is no direct and express conflict within the four corners of the majority's decision in *Rabie* and this Court's decision in *Kinney*. As such, the Supreme Court does not have conflict jurisdiction.

Furthermore, contrary to Petitioner's assertions, *Kinney* does not stand for the proposition that a plaintiff's forum choice is absolute and Petitioner's choice of forum is not dispositive simply because she is a U.S. citizen. Rather, pursuant to *Kinney*, it was proper for the Third District to consider the fact that Petitioner is not a Florida resident and the Third District also recognized that all of the *Kinney* factors weighed in favor of dismissal.

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STANDARD OF REVIEW

This Court's conflict jurisdiction under Article V § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(iv) is very narrow and limited. There must be presented on the four corners of the majority decision a direct and express conflict. *Dept. of Health & Rehab. Services v. National Adoption Coun. Svc., Inc.*, 498 So.2d 888, 889 (Fla. 1986).

ARGUMENT

I. The Third District's decision was guided by and applied all of the factors set forth in *Kinney* and conflict jurisdiction does not exist.

Petitioner asserts conflict jurisdiction between the Third District's decision in *Rabie Cortez* and *Kinney*. However, there is no conflict because the trial court complied with the *Kinney* mandate. *Rabie Cortez*, 66 So.3d at 961 ("Each of the *Kinney* steps were 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.").

Similarly, the Third District in conducting its own appellate review was also governed by the *Kinney* standard. *Rabie Cortez*, 66 So.3d at 962. ("In reviewing the order on appeal we necessarily follow the *Kinney* guidelines."). Furthermore,

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the Third District adhered to the abuse of discretion standard mandated by *Kinney*. *Id*. at 961.

In compliance with *Kinney*, the Third District first reviewed and agreed with the trial court's determination that Mexico is an adequate and available forum. *Rabie Cortez*, 66 So.3d at 962 ("We note that, although procedures and remedies available in Mexico may be different from or offer a less favorable outcome than our courts, this is not enough to render Mexico an inadequate forum under *Kinney*.).

Next, in reviewing the private interest factors, the Third District also agreed with the trial court's determination that they weighed in favor of dismissal. *Rabie Cortez*, 66 So.3d at 963, fn 7 ("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. The examining doctor and his 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.").

Although the Third District agreed that the private interest factors weighed strongly in favor of Mexico, it also reviewed the public interests factors and found that because Respondents did not own and had no role in operating, managing,

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recruiting, or hiring for the Moon Palace Resort in Mexico, then their location in Florida did not provide a general nexus to Florida sufficient to outweigh the *Kinney* factors. *Rabie Cortez,* 66 So.3d at 963. In summary, the Third District correctly concluded that Respondents had met their burden of proof of demonstrating *forum non conveniens* pursuant to all of the *Kinney* factors. *Id.* at 960.

When determining conflict jurisdiction, the Supreme Court must focus only on the "four corners" of the majority decision to determine the existence of an "express and direct" conflict. *Dept. of Health*, 498 So.2d at 889. Here, there is no conflict between the majority decision in *Rabie Cortez* and this Court's decision in *Kinney*. The majority decision in *Rabie Cortez* recognized and applied the *Kinney* factors and properly concluded that there was no abuse of discretion in dismissing the action for *forum non conveniens*. *Rabie Cortez,* 66 So.3d at 964. Therefore, *certiorari* review based on conflict jurisdiction should be denied.

II. The deference given Petitioner's forum choice was consistent with *Kinney* and there was no violation of the Privileges and Immunities Clause.

Petitioner also asserts that because the Third District took into consideration her lack of a Florida residency and her *de minimus* contacts with Florida in balancing the private interest factors, then there is a direct conflict with *Kinney*

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because presumably *Kinney* mandates that only U.S. citizenship be considered when ruling on a *forum non conveniens* motion. Furthermore, Petitioner asserts that taking into consideration her lack of a Florida residency violates the Privileges and Immunities Clause of the United States Constitution.[1]

First, it needs to be emphasized that Petitioner's constitutional argument was never raised at the trial court and it was never argued in the appellate briefs. Rather, this argument was raised for the first time at the District Court on a motion for rehearing. Accordingly, Petitioner failed to preserve this issue for appeal.[2]

In addition to the fact that Petitioner's constitutional issues were never preserved for appeal, the deference given to a citizen's choice of forum does not dispose of a *forum non conveniens* motion. Rather, it is only one of several private interest factors to be considered collectively. In the case at bar, the trial court determined and Third District agreed that Mexico is an available and adequate

[1] Art. IV, § 2, cl. 1, U.S. Const.

[2] *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).

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forum and that all of the private and public interest factors weighed in favor of dismissal.[3]

In seeking *certiorari* review, Petitioner argues that *Kinney* entitles her to "great deference" in her choice of forum due to her status as a U.S. citizen who has filed a lawsuit in her home forum. In other words, Petitioner argues conflict with *Kinney* because the Third District took into account her California residency. However, there is no conflict because at its core *Kinney* involved a determination of the role that residency plays in a *forum non conveniens* analysis. *Kinney,* 674 So.2d at 93 and 93, fn. 7 ("First, under our holding today it is now immaterial how 'corporate residency' is determined, because a corporation's various connections with Florida – if any – will only be factors to be weighed in the balance of coveniences, as outlined above . . . Likewise, the fact that one of the parties is a Florida 'resident' (however that term is defined) is but one factor to be considered in the balance of conveniences.").

[3] At the hearing on defendants' motion, the trial court took evidence in the form of affidavits from both parties and their experts and heard argument from counsel. The trial court granted the motion and dismissed the case, finding in a detailed written order that the defendants had met their burden of proof of demonstrating *forum non conveniens* pursuant to all of the factors set forth in *Kinney Systems, Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996). We agree. *Rabie Cortez*, 66 So.3d at 960.

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Accordingly, the Third District's distinction between a Florida resident's choice of a Florida forum and Petitioner's selection of a Florida forum is fully justified. Since *Kinney* expressly recognized that residency should be taken into account in a *forum non conveniens* analysis as part of the "balance of conveniences" approach, then *Kinney* further supports the Third District's conclusion that the presumption against disturbing Petitioner's choice of forum is "given less deference when, as here, the plaintiff is an out-of-state resident with very little, if any, contact with Florida." *Rabie Cortez*, 66 So.3d at 963.

In conformance with *Kinney*, Florida courts have recognized that non-residency is a factor which weighs against Petitioner's choice of a Florida forum. *Kerzner Int'l Resorts v. Raines*, 983 So.2d 750, 752 (Fla. 3d DCA 2008) ("In evaluating the private interest factors, we recognize that there is a strong presumption against disturbing the plaintiffs' choice of forum. However, that presumption is given less deference when the plaintiffs are out-of-state residents."); *R.J. Reynolds Tobacco Co. v. Carter*, 951 So.2d 105 (Fla. 3d DCA 2007) (giving less deference to a Tennessee resident who chose to litigate in Florida); *Value Rent-A-Car, Inc. v. Harbert*, 720 So.2d 552, 555 (Fla. 4th DCA 1998) ("Although the federal doctrine of *forum non conveniens* adopted in *Kinney*, and rule 1.061(a)(2) provide that there is a "strong presumption against disturbing

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plaintiffs' initial forum choice,' that presumption is inapplicable where a plaintiff has selected a foreign forum which is not convenient to the plaintiff.").[4]

Lastly, in the context of the Privileges and Immunities Clause, Petitioner argues that this provision of the United States Constitution requires Florida to provide her with the same right of access to Florida courts as Florida accords to its own citizens. Petitioner cites *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907) for the proposition that "any law by which privileges **to begin actions** in the courts are given to its own citizens and withheld from other citizens of other states is void." *Petitioner's Brief on Jurisdiction at p. 9* (emphasis added).

[4] Similarly, federal courts also recognize that a U.S. citizen's choice of forum is not conclusive and that Petitioner's status as a U.S. citizen does not entitle her to an absolute right to sue in an American court under all circumstances. *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1980) (holding that American citizenship does not justify a special rule for a decision as to *forum non conveniens* when the incident precipitating the action occurred in a foreign country); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n. 23 (1981) ("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."); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011) (notwithstanding heightened deference given to U.S. citizen, affirming dismissal of tort claim in favor of Brazil based on doctrine of *forum non conveniens*); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 2007 WL 3054986 (S.D. Fla. 2007) aff'd 578 F.3d 1283 (11th Cir. 2009) (dismissing on *forum non conveniens* tort claims by U.S. residents); *Morse v. Sun Int'l Hotel, Ltd.*, 2001 WL 34874967 (S.D. Fla. 2001) aff'd 277 F.3d 1379 (11th Cir. 2001) ("Yet, the mere fact that a plaintiff is a United States citizen does not, in and of itself, conclusively establish the convenience of a United States forum.").

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Here, Petitioner has not been treated as a second-class citizen in her ability to have access to the courts of this state or to begin an action in Florida. Rather, Petitioner has been given access to Florida's courts. However, the ability to begin a lawsuit in Florida does not mean that Petitioner also gets to determine the outcome. Ultimately, by choosing to file a lawsuit in Florida Petitioner is bound by Florida law. Simply stated, Petitioner has never been denied access to Florida's courts.

CONCLUSION

This Court does not have jurisdiction because there is no direct and express conflict between the majority decision in *Rabie Cortez* and *Kinney*. Furthermore, *Kinney* expressly recognizes that residency should be considered as part of the "balance of conveniences" approach and the degree of deference afforded Petitioner's choice of a Florida forum was proper. Lastly, notwithstanding Petitioner's failure to preserve the constitutional issue for appeal, there has not been a violation of the Privileges and Immunities Clause because Petitioner has always had access to Florida's courts.

WHEREFORE, the Court must dismiss for lack of jurisdiction.

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CERTIFICATE OF COMPLIANCE

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

BY: _____
RONNIE GUILLEN
Fla. Bar No. 842001

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 17th day of October, 2011 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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