IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-166

MIJARES HOLDING COMPANY, LLC,

Petitioner,

v.

AMERICAN SAFETY CASUALTY INSURANCE COMPANY, ODYSSEY AMERICA REINSURANCE CORPORATION, DONALD LESLIE CLEVELAND, and MPR-FINTRA, INC.,

Respondents.

RESPONSIVE BRIEF ON JURISDICTION OF RESPONDENT, AMERICAN SAFETY CASUALTY INSURANCE COMPANY

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STATEMENT OF THE CASE AND FACTS

This case involves the enforcement of mandatory forum selection clauses. (Slip op. at 2.) Petitioner, Mijares Holdings Company, LLC. ("Mijares"), purchased commercial motor vehicle liability insurance from American Safety Casualty Insurance Company ("American"), beginning in 2004. (Id.) During the 2007-2008 coverage period, one of Mijares's insured trucks was involved in an accident. (Id.) Nevertheless, at the end of the coverage period, Mijares executed a release affirming that it had not reported any claims during the 2007-2008 policy period. (Id.)

Subsequently, Mijares submitted a claim for the July 2007 accident. (Slip op. at 3.) Mijares asserted that it had settled with the party injured in the motor vehicle accident with American's knowledge and consent. (Slip op. at 2.) Thus, Mijares sought reimbursement from American. (Slip op. at 3.)

American rejected Mijares's claim and Mijares brought suit on the policy. (Slip op. at 3.) Mijares also sued another insurer under a separate insurance contract, alleging separate causes of action against Odyssey American Reinsurance Corporation. (Slip op. at 2-3.) American filed a motion to dismiss on the basis of improper venue. (Id.) Pursuant to section III of the 2007-2008

Coverage Form, Mijares agreed that the Superior Court of Cobb County, Georgia "shall have jurisdiction and venue for purposes of determining all rights and obligations under this agreement." (Slip op. at 3, 5.) In addition, Mijares conceded that the forum selection clause in the 2008 release was clear and mandatory. (Slip op. at 5.)

The trial court refused to enforce the forum selection clause and denied American's motion to dismiss. (Slip op. at 2.) American appealed. (Id.)

On appeal, the Third District Court of Appeal found the forum selection clauses clear and unambiguous. (Slip op. at 5.) As for Mijares's assertion that litigation in Georgia might produce inconsistent results with the continuing case against Odyssey, the appellate court found that the hypothetical risk of an inconsistent outcome in a separate case against a different defendant based upon another insurance contract did not override the presumption in favor of enforcing the mandatory forum selection clause. (Slip op. at 5-6.)

Further, the Third District found that no causes of action would be split since all the claims against American were covered by the forum selection clause and should be brought in Georgia. (Slip op. at 6.)

> Mijares concedes, however, that the clauses apply to the third claim, breach of contract, because they govern all

> suits seeking to enforce or interpret the contracts. These other two claims relate to the validity of the entire contract, and thus must be submitted to the forum chosen by the parties in the contract.

(Slip op. at 6.) Thus, the appellate court reversed and remanded with directions to the lower tribunal to dismiss American from the action because the forum selection clause expressly stipulates that jurisdiction be had in Cobb County, Georgia. (Slip op. at 7.)

SUMMARY OF THE ARGUMENT

None of the cases cited by Mijares for conflict jurisdiction in fact conflict with the Third District's ruling in this case. The prevailing rule is that mandatory forum selection clauses will be enforced under Florida law. As the cases cited by Mijares illustrate, the narrow exception designed to protect against inconsistent litigation outcomes in different venues was created to prevent the splitting of causes of action against multiple parties arising from legally intertwined claims where separate litigation could produce inconsistent results. The exception is not intended to invalidate a forum selection provision where plaintiff's potential success against one defendant does not depend on the outcome of a claim against

another defendant. Likewise, the exception does not seek to mandate joinder of multiple defendants with separate contractual obligations in a single litigation. The Third District properly applied the rule that mandatory forum selection clauses will be enforced where there is no splitting of causes of action and no risk of actual inconsistent results in different courts.

ARGUMENT

THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH ANY OTHER DISTRICT COURT OF APPEAL DECISION ADDRESSING THE APPLICABILITY OF THE NARROW EXCEPTION TO ENFORCEMENT OF A MANDATORY FORUM SELECTION PROVISION.

This Court lacks jurisdiction under Art. V, §3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) to consider this matter because the necessary "express and direct" conflict does not exist. Conflict review is limited to direct conflicts in the law out of concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976). The necessary

conflict "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Moreover, where there is a factual difference between allegedly conflicting cases, jurisdiction will not lie. Department of Revenue v. Johnston, 442 So. 2d 950, 950 (Fla. 1983). This provision has been interpreted restrictively to limit the Court's jurisdiction to those cases where the conflict is express and not implied. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

Contrary to Mijares' assertion, the Third District's decision does not announce any conflicting rule of law or, by application, wrongly apply an existing rule of law. In the absence of an applicable exception, a forum selection provision will be enforced. Corsec, S.L. v. VMC Intern. Franchising, LLC, 909 So. 2d 945, 947 (Fla. 3d DCA 2005). In seeking to avoid enforcement of the mandatory forum selection provision, Mijares relies upon what has been identified as a "narrow" exception. The cases applying this exception, rely upon a three-part test. A mandatory forum selection provision may be disregarded if enforcement of the provision will lead to: (1) multiple lawsuits, (2) a splitting of the causes of action, and (3) the potential for conflicting results in different courts. See McWane, Inc. v. Water Management Services, Inc., 967 So. 2d 1006, 1007 (Fla. 1st DCA 2007).

Of the several cases cited by Mijares for conflict jurisdiction, only one actually applies the narrow exception to a mandatory forum selection clause.

In McWane, Inc., the plaintiff brought breach of contract and breach of warranty claims against multiple defendants from multiple states seeking recovery for a single incident, to wit: the structural failure of a line of pipe carrying potable water to St. George Island. Id. at 1007. Each defendant was responsible for a particular stage in the manufacture, preparation, transportation, and installation of the pipe. Id. McWane, Inc., sought to dismiss the plaintiff's claim and a cross-claim against it based on a forum selection provision in its contract with the plaintiff. Id. The First District upheld the trial court's refusal to enforce the forum selection clause because all three elements of the exception were satisfied.

> The circumstances involved in this case, legally and factually interrelated claims and cross-claims alleging structural damage to a single line of pipe by multiple defendants from multiple states, demonstrate enforcement of the forum selection provisions would be unjust and unreasonable.

Id. at 1007-08.

In the instant case, the Third District cited to McWane, Inc., expressly

recognizing that the risk of inconsistent outcomes in legally interrelated claims brought in multiple suits can be a valid reason for not enforcing a forum selection provision. (Slip op. at 5.) In distinguishing McWane, Inc., the Third District pointed out that this case does not involve more than a hypothetical risk of inconsistent outcomes because it does not involve legally interrelated claims. Rather, the instant case deals with two insurance contracts against two different insurance companies. These separate breach of contract claims are not legally interrelated and the outcome of litigation does not depend on a consideration of the same conduct.

Turning to the other cases cited by Mijares to assert the existence of conflict jurisdiction, they likewise fail to support Mijares' position. The companion cases of Dore v. Roten, 911 So. 2d 218 (Fla. 2d DCA 2005) and American Boxing & Athletic Ass'n, Inc. v. Young, 911 So. 2d 862 (Fla. 2d DCA 2005), discuss the basic three-pronged test for invalidating a mandatory forum selection clause in dicta, but the decisions find the forum selection clauses at issue to be permissive rather than mandatory and inapplicable to the pending tort actions. 911 So. 2d at 220-21; 911 So. 2d at 866 n. 3. Likewise, the case of Keybank USA, National Ass'n v. Bergen, 949 So. 2d 1071 (Fla. 5th DCA 2007), which opinion is merely a PCA with citation to Dore, 911 So. 2d at 218, does not create conflict jurisdiction.

Finally, Mijares cites to two cases that involve causes of action involving breach of construction contracts and enforcement of payment bonds. The courts in Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., 837 So. 2d 1182 (Fla. 4th DCA 2003) and Carlson-Southeast Corp. v. Geolithic, Inc., 530 So. 2d 1069 (Fla. 1st DCA 1988), found that the claims against the payment bonds and the contracts for which they were posted were factually and legally intertwined such that multiple suits in different venues would split the action and open the door to conflicting results based on the same conduct. 837 So. 2d at 1184; 530 So. 2d at 1072. By their very nature, the contract and performance bond actions were legally intertwined. The very damages sought in the breach of contract actions were secured by the bonds such that any difference in outcome in the two causes of action would be an inconsistent result.

These cases illustrate that when considering the risk of conflicting results, the focus is on whether a determination by the finder of fact with respect to a definite fact will be material to both of the plaintiff's claims such that a judgment in favor of one defendant will require a judgment in favor of the other. In the instant case, despite the same underlying automobile accident, Mijares has separate and independent contractual rights against American and Odyssey. The breach of contract findings will be based on the specific facts surrounding each separate contract.

Mijares fails to acknowledge the case of Ware Else, Inc. v Ofstein, 856 So. 2d 1079 (Fla.

5th DCA 2003), which involved a suit arising from two contracts, one containing a mandatory forum selection clause and the other with no clause. The court found that the mere inconvenience caused by requiring the plaintiff to litigate her two causes of action in two different courts was an insufficient basis for ignoring the contractual forum selection clause. Id. at 1083 ("Although both actions were related to plaintiff's employment, her causes of action stemmed from different contracts, they were based on different theories, and they sought different forms of relief.").

Where parties agree by contract to a specific forum, such agreements will be enforced in the absence of the objecting party establishing the conditions that satisfy the narrowly-defined exception. McWane, Inc., 967 So. 2d at 1007. All three prongs of the exception must be established to warrant invalidating the mandatory forum selection clause. Id. Mijares does not even attempt to argue in its Jurisdictional Brief that the facts in this case satisfy the second prong - - a splitting of causes of action - - or that the Third District erroneously concluded that no causes of action are being split in this case. Mijares simply cannot because the causes of action against American and Odyssey are separate and independent breach of contract claims and the multiple counts against American are all governed by the forum selection provision.

Likewise, while the two actions are factually related in that Mijares made claims against both its primary and excess insurers based on the same automobile accident, they involve different facts and law as concerns the breach of contract question. Thus, Mijares is unable to satisfy the third prong - - the potential for conflicting results in different courts. Each defendant either breached its separate contract with Mijares or it did not. Because neither the second or third prong is satisfied, the circumstances of this case do not present a basis for refusing to enforce the mandatary forum selection provision.

This case is unlike any of the cases cited by Mijares as creating conflict jurisdiction. In the face of a factual difference between allegedly conflicting cases, conflict jurisdiction will not lie. The Third District's decision does not expressly or directly conflict with any other case and the court correctly applied existing law to the facts of this case.

CONCLUSION

Based upon the foregoing facts and legal authorities, the challenged decision neither expressly nor directly conflicts with any appellate decision. Accordingly, the Court lacks jurisdiction for discretionary review of the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this _____ day of March, 2012, to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Respondent certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

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