

10-3
SUPREME COURT OF FLORIDA
CASE NO. 69,412;
69,413

15 ✓
FILED

SEB. A. WHITE

OCT 10 1986

CLERK SUPREME COURT

By _____
Deputy Clerk

RAUL GARCIA GRANADOS QUINONES,

Appellant/Defendant,

v.

SWISS BANK CORPORATION (OVERSEAS),
S.A., a Panamanian banking
institution,

Appellee/Plaintiff.

DCA CASE NOS. 86-298
86-388, 86-389, 86-418

CIRCUIT COURT CASE NO.
85-37053 CA 21

JORGE RAUL GARCIA GRANADOS, etc.,

Petitioner,

vs,

SWISS BANK CORPORATION (OVERSEAS)
S.A., etc., et al.,

Respondents.

**JURISDICTIONAL BRIEF OF
PETITIONER, RAUL GARCIA GRANADOS QUINONES**

KENNY NACHWALTER & SEYMOUR, P.A.
Attorneys for Raul Garcia Granados Quinones
400 Edward Ball Buildin
100 Chopin Plaza
Miami, Florida 33131
Telephone: (305) 358-8151

FILED
NOV 19 1933

OCT 20 1933

TABLE OF CONTENTS

CLEARED FOR INDEXING Page
By _____
Property Clerk

I. Table of Citations and Authorities.....ii

II. Statement Of The Case And Of The Facts..... 1

III. Summary of Argument..... 6

IV. Argument..... 7

(Issues Presented For Review)

A. WHETHER THIS COURT HAS JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL, WHICH DECISION CITES AS CONTROLLING AUTHORITY A DECISION WHICH HAS BEEN QUASHED BY THIS COURT..... 7

B. WHETHER THIS COURT HAS JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND OTHER DISTRICT COURTS ON THE SAME POINT OF LAW; TO WIT: WHETHER CONTRACTUAL CHOICE OF FORUM CLAUSES SHOULD BE UPHELD BY FLORIDA COURTS..... 9

V. Conclusion.....10

I. TABLE OF CITATIONS AND AUTHORITIES

	<u>Page</u>
<i>The Breman v. Zapata Offshore Co.</i> , 407 U.S. 1 (1972).....	8
<i>Datamedic Services Corporation v. Bescosm</i> , 484 So.2d 1351 (Fla. 2d DCA 1986).....	1, 2, 9, 10
<i>Hawes & Garrett General Contractors, Inc.</i> <i>v. Panhandle Custom Decorators & Supply, Inc.</i> , 11 F.L.W. 1971 (Fla. 1st DCA Sept. 16, 1986).....	1, 2, 9 10
<i>Houston v. Caldwell</i> , 359 So.2d 858 (Fla. 1978).....	2
<i>Hu v. Crockett</i> , 426 So.2d 1275, 1281 (Fla. 1st DCA 1983).....	3
<i>Huntley v. Alejandro</i> , 139 So.2d 911 (Fla. 3d DCA), <i>disapproved in part</i> , <i>Manrique v. Fabbri</i> , 11 F.L.W. 430 (Fla. August 21, 1986).....	2, 8
<i>Jollie v. State</i> , 405 So.2d 418, 420 (Fla. 1981).....	7
<i>Manrique v. Fabbri</i> , 474 So.2d 844 (Fla. 3d DCA 1985), <i>quashed</i> , <i>Manrique v. Fabbri</i> , 11 F.L.W. 430 (Fla. August 21, 1986)	1, 2, 3, 6, 7, 8, 9, 10
<i>Maritime Limited Partnership v.</i> <i>Greenman Advertising Associates, Inc.</i> , 455 So.2d 1121 (Fla. 4th DCA 1981).....	1, 2, 8, 9, 10
<i>McRae v. J.D./M.D., Inc.</i> , 481 So.2d 945 (Fla. 4th DCA 1986), <i>review granted</i> , August 21, 1986, Case No. 68-370.....	1, 2, 9, 10

Sausman v. Diversified Investments, Inc. v. Cobb Co., 208 So.2d 873 (Fla. 3d DCA 1968), *disapproved in part, Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986)..... 2, 8

Shelby Mutual Insurance Co. v. Johnson, 408 So.2d 1043 (Fla. 1981), *disapproved in part, Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986)..... 9

Zurich Insurance Co. v. Allen, 436 So.2d 1094 (Fla. 3d DCA 1983), *disapproved in part, Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986)..... 2, 8

Other Authorities

Art. V, §3(b)(3), Fla. Const. (1980)..... 1

Florida Rules of Appellate Procedure 9.030(a)(2)(A)..... 1

Florida Rules of Appellate Procedure 9.120..... 1

**II. Statement Of The Case
And Of The Facts**

Petitioner, Raul Garcia Granados Quinones ("RGG"), seeks review, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A) and 9.120,¹ of a decision of the Florida Third District Court of Appeal which expressly and directly conflicts with the decision of this Court in *Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986)², and the following decisions of the various District Courts of Appeal: *Hawes & Garrett General Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc.*, 11 F.L.W. 1971 (Fla. 1st DCA Sept. 16, 1986); *Datamedic Services Corporation v. Bescosm*, 484 So.2d 1351 (Fla. 2d DCA 1986); *McRae v. J.D./M.D., Inc.*, 481 So.2d 945 (Fla. 4th DCA 1986); and *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121 (Fla. 4th DCA 1981). The issue on which conflict exists is: Whether contractual choice of forum clauses are enforceable in Florida. This issue is also presently pending before this court in *McRae*. *McRae v. J.D./M.D., Inc.*, 481 So.2d 945 (Fla. 4th DCA), review granted, August 21, 1986, Case No. 68-370.

In *Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986), this Court recently held that contractual choice of forum clauses

¹ This Court has jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution (1980).

² The time for rehearing has expired and no motion for rehearing has been filed.

should be enforced by Florida courts unless the party opposing the choice demonstrates that upholding the choice would be unreasonable or unjust.³ Id. at 431-32. In doing so, this Court quashed the decision of the Third District Court of Appeal in the same case. Id. at 431-32. The Third District's decision in *Manrique* held that contractual choice of forum clauses should not be enforced because such clauses cannot be construed to oust Florida courts of subject matter jurisdiction.⁴ *Manrique v. Fabbri*, 479 So.2d 844 (Fla. 3d DCA 1985); *quashed*, *Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986).

In the instant case, the Third District Court of Appeal, approximately two months before this Court's decision in *Manrique*, held as follows:

PER CURIAM.

Appellants bring these appeals from a non-final order denying their motion to dismiss based on lack of jurisdiction and improper venue. We affirm on authority of *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) (where venue is established because one of the parties is a resident of Florida, the action may not be dismissed on grounds of forum non conveniens); *Manrique v. Fabbri*,

³ The First District in *Hawes & Garrett*, the Second District in *Datamedic* and the Fourth District in *McRae* and *Maritime* have also held that such contractual choice of forum clauses should be enforced by Florida courts. The Third District is the only district court of appeal which has decided the issue to the contrary.

⁴ The Third District's decision in this case and *Manrique* followed a long line of decisions by the Third District, *i.e.*, *Zurich Insurance Co. v. Allen*, 436 So.2d 1094 (Fla. 3d DCA 1983), *rev. denied*, 446 So.2d 100 (Fla. 1984); *Sausman v. Diversified Investments, Inc. v. Cobbs Co.*, 208 So.2d 873 (Fla. 3d DCA 1968); and *Huntley v. Alejandre*, 139 So.2d 911 (Fla. 3d DCA), *cert. denied*, 146 So.2d 750 (Fla. 1962) wherein the Third District held that contractual choice of forum clauses should not be enforced to oust Florida courts of jurisdiction. This Court also specifically disapproved those decisions of the Third District to the extent they were inconsistent with the rule pronounced by this Court in *Manrique*.

474 So.2d 844 (Fla. 3d DCA 1985) (contractual language which reflected an agreement by the parties not to contest the jurisdiction of the Netherlands Antilles courts if suit was brought in that jurisdiction cannot be construed to oust Florida of subject matter jurisdiction); and *Hu v. Crockett*, 426 So.2d 1275, 1281 (Fla. 1st DCA 1983) (determination of venue question is generally left to sound discretion of trial judge and will not be disturbed unless there is a clear showing of abuse of that discretion). (Emphasis added)

Affirmed.

RGG had urged two points on appeal, i.e., (1) that the trial court should have enforced the parties' contractual choice of forum and (2) that the action should have been dismissed by the trial court based upon the doctrine of forum non conveniens. A ruling by the Third District in favor of RGG on either of these points on appeal would warrant a dismissal of the action.

After the Third District issued its decision, RGG timely filed a motion for rehearing and rehearing en banc seeking review of the panel's opinion.⁵ (App. 280-304). While that motion was pending, this Court decided *Manrique*. RGG promptly filed a notice of supplemental authority with the Third District directing that Court's attention to this Court's decision in *Manrique*. (App. 4). Inexplicably however, the Third District ignored RGG's notice of supplemental authority, denied RGG's motion for rehearing, and let stand its decision which relied on its earlier decision in *Manrique* as controlling authority for rejecting RGG's point on appeal that the parties' choice of forum

⁵ References to the Appendix, filed concurrently herewith, will be designated (App. ____) with citation to the appropriate page number(s).

clause in the relevant agreements should be enforced in this case.

This case involves a dispute which arose over the alleged breach of a series of promissory notes and agreements between Banque National de Paris (Bank of Paris) and various Guatemala corporations, primarily Administracion Central Industrial Y Apropecuria, S.A. (ACIA) wherein Bank of Paris issued ACIA various letters of credit. (App. 22-23). Swiss Bank, an alleged assignee of a portion of the interest of Bank of Paris, (App. 26), filed suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, alleging, inter alia, breach of the agreements, promissory notes and guarantees.⁶ (App. 10-46). RGG was an alleged guarantor of certain of the notes. (App. 22-23).⁷

It is undisputed in this action that: (1) all documents and agreements relating to the matter were executed in and to be performed in Guatemala; (2) Swiss Bank, the alleged assignee of the Bank of Paris, is organized under the laws of Panama; (3) Bank of Paris is organized under the laws of France; (4) all of the alleged guarantees and other documents were executed in

⁶ The amended complaint contained eight counts. Counts II through VII pertain to the promissory notes alleged to be in default (the "note counts"). Count I and Count VIII pertain to alleged fraudulent transfers and writs of attachment and garnishment (the "non-note counts"). The non-note counts are entirely dependent upon Swiss Bank prevailing at trial on the note counts. Absent an enforceable debt owed to Swiss Bank by the alleged guarantors, there is no basis for garnishment, attachment or any fraudulent transfer.

⁷ RGG has contested his liability as a guarantor.

Guatemala by citizens and residents of Guatemala or various other Latin American countries; (5) no United States citizen participated in the subject transactions; (6) all relevant documents relating to the matter are in Spanish; and (7) most, if not all, witnesses are citizens and residents of Guatemala, Panama or various other Latin American countries. (App. 305-06).

RGG moved to dismiss the complaint, among other reasons, on the basis of a valid and enforceable contractual choice of forum clause which had been agreed to by the parties in the governing agreement(s). (App. 48-52). The last contract between the parties, entered in December 1980, and which ratified and superseded all other agreements, contained a clause (Clause 17) which provided that any disputes arising between the parties would be litigated in either Guatemala or Panama to the exclusion of all other jurisdictions.⁸ (App. 161, 206). All the agreements were in Spanish. (App. 305-06). Rather than create an issue concerning the accuracy of any translation from one language to another, RGG submitted to the trial court affidavits of experts on Guatemala law concerning the interpretation, meaning and legal effect of the choice of forum clause. The experts stated that Clause 17:

[Is] valid, enforceable and mandatory under
the laws of Guatemala. The language used in

⁸ The clause further provided that if the suit were brought in Guatemala, Guatemala law would apply; if the suit were brought in Panama, the law of Panama would apply.

Clause Seventeen is effective to preclude, by agreement of the parties, the bringing of any action by the Creditor [Bank of Paris] (or any Assignee) in any jurisdiction other than Guatemala or Panama. (App. 76).

Swiss Bank did not file anything to rebut the sworn statements of RGG's experts and apparently decided not to contest the meaning and legal effect given to Clause 17 by RGG's experts.⁹ Nevertheless, the trial court denied the motion to dismiss. (App. 307).

As noted, RGG sought review in the Third District Court of Appeal. RGG raised two points on appeal: (1) that the trial court should have honored the parties' contractual choice of forum and dismissed the case; and (2) that the trial court should have dismissed the matter pursuant to the doctrine of forum non conveniens.¹⁰ (App. 247-279). The Third District Court of Appeal affirmed the trial court's order refusing to honor the parties' contractual choice of forum citing as controlling authority its decision in *Manrique*, (App. 1-2), and denied RGG's

⁹ Swiss Bank did file, as an exhibit to the Complaint, an English translation of the December 1980 agreement, done by a French translator. The key sentence, according to the translation, reads: "the creditor [Bank of Paris] may choose to bring the legal proceedings to the courts in the . . . Republic of Guatemala or to the . . . Republic of Panama." Swiss Bank argued that the choice of forum was thus permissive and not mandatory. Swiss Bank submitted nothing, in the way of expert opinion as to the meaning and legal effect of the clause.

¹⁰ Should this Court accept jurisdiction, RGG intends to argue the merits of this issue, as well as the contractual choice of forum issue.

motion for rehearing and rehearing en banc. (App. 3).

III. Summary of Argument

This Court has jurisdiction in that the decision of the Third District in this case cites as controlling authority its own decision in *Manrique v. Fabbri*, 474 So.2d 844 (Fla. 3d DCA 1985), a decision which has been quashed by this Court.

This Court also has jurisdiction in that the holding of the Third District, in this case, that a contractual choice of forum clause cannot be construed to oust Florida Courts of jurisdiction, is in express and direct conflict with decisions of the First, Second and Fourth District Courts of Appeal that contractual choice of forum clauses should be enforced unless it would be unreasonable or unjust to do so.

IV. Argument

A. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT IN THAT THE THIRD DISTRICT'S DECISION CITES AS CONTROLLING AUTHORITY A DECISION WHICH HAS BEEN QUASHED BY THIS COURT

In *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981), this Court held:

[A] district court of appeal per curiam opinion which cites as controlling authority a decision that . . . has been reversed by this Court . . . [constitutes] prima facie express conflict and allows this Court to exercise its jurisdiction.

There can be no doubt that prima facie express conflict exists in this case. In *Manrique*, this Court quashed the

decision of the Third District Court of Appeal and held that contractual choice of forum clauses should be enforced. *Manrique*, 11 F.L.W. at 431-32. In the case at bar, the Third District relied on its *Manrique* decision, holding that contractual choice of forum clauses should not be enforced. (App. 1-2). The Third District's reliance on and citing of *Manrique* in its decision in this case clearly demonstrates that the Third District considered *Manrique* as controlling authority on this issue. This Court has held that the Third District's ruling in *Manrique* was incorrect. In *Manrique*, this Court held

We reject the position espoused by the Third District [in *Manrique*] and adopt the view enunciated in [*The Breman v. Zapata [Off-Shore Co.*, 407 U.S. 1 (1972)] and *Maritime [Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121 (Fla. 4th DCA 1984)]. * * * * We hold that forum selection clauses should be enforced in the absence of a showing enforcement would be unreasonable or unjust. [footnote omitted]. Accordingly, we quash the decision of the district court below and, to the extent they conflict with our decision herein, disapprove *Zurich Insurance Co. v. Allen*, 436 So.2d 1094 (Fla. 3d DCA 1983), review denied, 446 So.2d 100 (Fla. 1984); *Sausman Diversified Investment, Inc. v. Cobb Co.*, 208 So.2d 873 (Fla. 3d DCA 1968); and *Huntley v. Alejandre*, 139 So.2d 911 (Fla. 3d DCA), cert. denied, 146 So.2d 750 (Fla. 1962).

Id. at 431-32.

As such, this Court has unequivocally held that contractual choice of forum clauses should be enforced in the absence of a showing enforcement would be unreasonable or unjust. Despite the clear and unambiguous holding of this Court, the Third District

has once again held that contractual choice of forum clauses should not be enforced. Because of this direct conflict, this Court should exercise its discretion and accept jurisdiction over this matter.

B. THE DECISION OF THE THIRD DISTRICT
COURT OF APPEAL IN THIS CASE EXPRESSLY
AND DIRECTLY CONFLICTS WITH DECISIONS
OF OTHER DISTRICT COURTS OF APPEAL

In *Hawes & Garrett General Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc.*, *McRae v. J.D./M.D., Inc.*,¹¹ *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.* and *Datamedic Services Corp. v. Bescosm*, the First, Second and Fourth District Courts of Appeal held that contractual choice of forum clauses should be enforced by Florida courts. In the case sub judice, the Third District specifically held that such clauses should not be enforced because such clauses oust Florida courts of jurisdiction. The Third District relied on *Manrique* as the controlling authority on this issue. The Third District's decision in this case thus expressly and directly conflicts with

¹¹ Presently pending before this Court is McRae v. J.D./M.D., Inc. The issue certified for review, and accepted by this Court, is:

Can Parties To A Contract Agree Therein To Submit To The
Jurisdiction Of A Choice Forum In The Event Of Subsequent Litigation
Arising Out Of Said Contract.

This is the precise issue decided by the Third District in this case. This Court has the authority to accept jurisdiction, for review, a decision wherein review of the same rule of law is already pending before this Court. See Shelby Mutual Insurance Co. v. Johnson, 408 So.2d 1043 (Fla. 1981). In Shelby, this Court accepted jurisdiction of a "citation PCA" decision wherein the case cited was pending for review in this court. Obviously, the rule established in Shelby is that if the same issue is already pending in this court, the court has jurisdiction to review a subsequent case presenting that same issue.

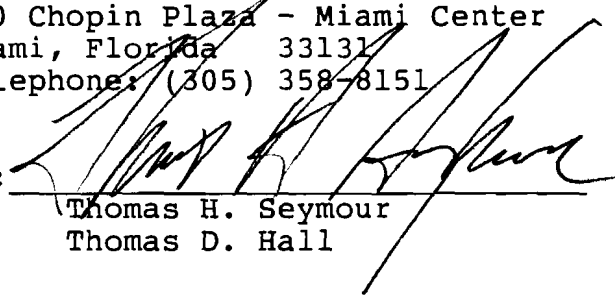
*Hawes & Garrett, McRae, Maritime*¹² and *Datamedic*. This Court should exercise its discretion, accept jurisdiction and resolve the conflict.

V. Conclusion

For the reasons set forth above this Court should exercise its discretion and accept jurisdiction of this case to resolve the conflict in accordance with this Court's holding in *Manrique v. Fabbri*, 11 F.L.W. 430 (Fla. August 21, 1986) and the holdings of the First, Second and Fourth District Courts of Appeal in *Hawes & Garrett General Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc.*, 11 F.L.W. 1971 (Fla. 1st DCA Sept. 16, 1986); *Datamedic Services Corporation v. Bescosm*, 484 So.2d 1351 (Fla. 2d DCA 1986); *McRae v. J.D./M.D., Inc.*, 481 So.2d 945 (Fla. 4th DCA 1986); and *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121 (Fla. 4th DCA 1981).

Respectfully submitted,

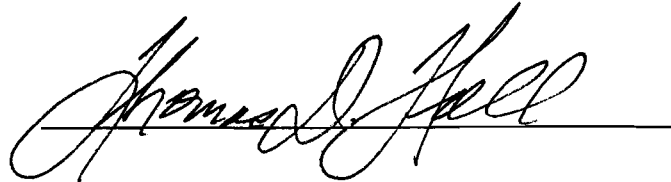
KENNY NACHWALTER & SEYMOUR, P.A.
Attorneys for Petitioner
400 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131
Telephone: (305) 358-8151

By: 
Thomas H. Seymour
Thomas D. Hall

¹² The basis of accepting jurisdiction in Manrique was a conflict between Manrique and Maritime. 11 F.L.W. at 430. That fact alone should establish conflict in this case where the Third District cited Manrique as controlling authority on the issue presented; the instant case obviously conflicts with the decision in Maritime.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the counsel on the list set forth below this 9th day of October, 1986.

A handwritten signature in cursive script, appearing to read "Thomas J. Kelly", is written over a horizontal line.

William L. Richey, Esq.
Richey & Munroe, P.A.
Suite 331
717 Ponce de Leon Boulevard
Coral Gables, Florida 33134

L. Van Stillman, Esq.
Suite 307
2200 West Commercial Boulevard
Fort Lauderdale, Florida 33309

George Volsky, Esq.
Suite 420
444 Brickell Avenue
Miami, Florida 33131

Michael F. Kelley, Esq.
1481 N.W. North River Drive
Miami, Florida 33125

Michael J. Fingar, Esquire
Suite 205
19501 N.E. 10th Avenue
Miami, Florida 33179