IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-868

Florida Bar No. 184170

WILLIE E. BROWN, and BRENDA BROWN, husband and wife,

Petitioners,

v.)

KIM J. NAGELHOUT, individually) HELENA CHEMICAL CO., INC.,) a foreign corporation, and) CSX TRANSPORTATION, INC.,) a foreign corporation,)

Respondents.)

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENTS ON MERITS
KIM J. NAGELHOUT, and HELENA CHEMICAL CO., INC., a foreign corporation

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POINT ON APPEAL

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FACE OF THE OPINION IN THE PRESENT CASE, AND OTHER APPELLATE DECISIONS IN FLORIDA, BUT ONLY SEPARATE FACTS. THE TRIAL COURT AND THE FOURTH DISTRICT CORRECTLY RULED THAT VENUE SHOULD BE TRANSFERRED TO PASCO COUNTY.

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INTRODUCTION

The Petitioners/Plaintiffs, WILLIE E. BROWN, and BRENDA BROWN, husband and wife, will be referred in the singular as Brown and/or Plaintiff.

The Respondent/Defendant, KIM J. NAGELHOUT, will be referred to as Nagelhout and/or Defendant.

The Respondent/Defendant, HELENA CHEMICAL CO., INC., a foreign corporation, will be referred to as Helena Chemical and/or Defendant.

The Respondent/Defendant, CSX TRANSPORTATION, INC., a foreign corporation, will be referred to as CSX Transportation and/or Defendant.

The Record on Appeal will be designated by the letter "R."

The Hearing on the Motion to Transfer was held on September 1, 2009.

All emphasis in the Brief is that of the writer, unless otherwise indicated.

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STATEMENT OF THE FACTS AND CASE

This action was filed in Broward County, and the Defendants moved to transfer venue to Pasco County. The trial court granted the transfer of venue based on the joint residency rule, since both the individual Defendant Nagelhout had a residence in Pasco County, and two of the corporate Defendants had places of business in Pasco County, and also the accident was in Pasco County.

The Plaintiff/Petitioner filed an appeal to the Fourth District, which affirmed holding the joint residency rule was properly applied.

The Plaintiff then filed this Notice of Invoking Discretionary Jurisdiction of the Supreme Court, which has accepted jurisdiction on the merits.

Opinion of Fourth District

The Opinion of the Fourth District reads as follows:

> The Browns appeal the trial court's order granting Kim J. Nagelhout, Helena Chemical Co., Inc., and CSX Transportation, Inc.'s motion to transfer venue from Broward County to Pasco County, Florida. We affirm.
>
> The Browns filed a complaint in Broward County against Nagelhout, Helena Chemical, and CSX, alleging multiple causes of action for a collision that occurred in Pasco

County. Nagelhout and Helena Chemical subsequently filed a motion to transfer venue from Broward County to Pasco County, and CSX joined in the motion. The trial court granted the motion to transfer venue, relying upon what is now known as the joint residency rule enunciated by the Florida Supreme Court in *Enfinger* v\ *Baxley,* 96 So.2d 53 8 (Fla. 1957). The court concluded that venue lies in Pasco County because Nagelhout and Helena Chemical both reside there. On appeal, the Browns concluded that the joint residency rule does not apply to the facts of this case.

[1] A trial court's order granting a motion to transfer venue based on a plaintiff's erroneous venue selection is subject to de novo review. See *Blackhawk Quarry Co. of Fla., Inc. v. Hewitt Contracting, Co.,* 931 So.2d 197, 199 (Fla. 5th DCA 2006) (citing *PricewaterhouseCoopers LLP v. Cedar Res,, Inc.,* 761 So.2d 1131, 1133 (Fla. 2d DCA 1999)).

[2] Our review requires application of two venue statutes. Section 47.011, Florida Statutes (2009), provides that "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." In cases involving multiple defendants residing in different counties, actions "may be brought in any county in which any defendant resides." See § 47.021, Fla.Stat. (2009). However, the Florida Supreme Court has determined that venue lies in the county where an individual defendant and corporate defendant share a residence, which is also the location where the cause of action accrued. *Enfinger,* 96 So.2d at 53 9-41.

In *Enfinger,* the Florida Supreme Court stated that an individual defendant has a venue privilege in his or her county of residence in those instances in which the residence of the individual defendant and the location where the cause of action accrued are in the same county. *Id.* at 539-40. The court noted that the individual defendant maintains this venue privilege in his or her county of residence when the individual defendant is sued together with a corporate defendant and the corporate defendant resides in the same county *as* the individual defendant. *Id.* at 540-41. Under these circumstances, the court concluded that venue lies in the common county of residence between the individual and the corporate defendant. *Id.; see Lifemark Hosps. of Fla., Inc. v. Roque,* 727 So.2d 1077, 1078 (Fla. 4th DCA 1999). The principle outlined in *Enfinger* ultimately became known as the joint residency rule. See *Lifemark Hosps.,* 727 So.2d at 1076. • '

In this case, the Browns incorrectly argue that the joint residency rule does not apply where all defendants do not share a county of residence. The trial court found that (a) the Browns resided in Broward County; (b) Nagelhout resided in Pasco County; (c) Helena Chemical had a business residence in Pasco County; and (d) CSX's principal place of residence was in Duval County. The Browns' causes of action also accrued in Pasco County. Given these facts, Nagelhout has a venue privilege in Pasco County, and he maintains this venue privilege even though he was sued together with Helena Chemical and CSX. See *Enfinger, 96* So.2d at 539-41. Therefore, under the joint residency rule articulated in *Enfinger,* venue lies in Pasco County, which is the common county of residence between Nagelhout and Helena

Chemical. See *id.* at 540-41; *Lifemark Hosps.*, 727 So.2d at 1078 (holding that the joint residency rule applies "even if one or more codefendants also reside in other counties").

We find no merit to any of the other issues raised by the Browns. Accordingly, we affirm the trial court's order granting the motion to transfer venue from Broward County to Pasco County.

Counties of Residence

This appeal stems from a negligence action involving a train-truck collision, which occurred in Pasco County, Florida. The counties of residence for the parties are as follows:

Accident - Pasco County

Willie Brown & Brenda Brown - Broward County

Helena Chemical Company, agent in Broward County, business residence in Pasco County

Nagelhout - Pasco County

CSX - agent in Leon County; principal place of business in Duval County; does business in several counties, including Broward County, but not Pasco County.

Trial Court Hearing on Motion to Transfer

In the trial court, counsel for Helena Chemical Company moved to Dismiss the case or Transfer the Venue, based upon the

Joint Residency Rule of Enfinger v. Baxley, supra, and the hearing was held on the Motion on September 1, 2009. The movant began arguing the Motion to Dismiss or Transfer for improper venue at (H, 4) and said the case involved a train and truck collision that happened on March 2009 in Pasco County, Florida. Counsel said he represented the driver, Nagelhout, and the company he was employed with, Helena Chemical Co., Inc.. Helena Chemical has a residence in Pasco County, and Kim Nagelhout also is a resident of Pasco County; and the cause of action accrued in Pasco County.

Nagelhout and Helena Chemical argued that the basis of the Motion to Transfer is the joint residency doctrine announced in Enfinger v. Baxley, which holds when an individual defendant and a corporate defendant share a common county of residence, suit must be brought in that venue. Counsel argued in the present situation there were two corporate defendants, and only one of them has a common residence with the individual defendant, so the Enfinger rule applies citing Walden Leasing v. Modacare, infra. If the plaintiff had sued the individual defendant only, he would have had the venue privilege in his own county where the cause of action occurred, and where the property and litigation is located, but since he chose also to file suit against a corporate

defendant he does not.

Counsel continued that the majority of the witnesses are in Pas.co County; the cause of action accrued in Pasco County; and it is in the interest of justice that the case be tried there, especially since the joint residency rule applies. The movant also cited to the Sinclair Fund case, which also applies the joint residency rule.

The plaintiffs, Browns, responded and said that where there are multiple defendants in multiple counties, the plaintiffs can file suit anywhere any of the defendants has an agent or residence (H, 8). He argued that Helena Chemical had a registered agent in Broward County, and therefore venue was proper in Broward, and argued the narrow exception of the joint residency rule did not apply because it only applies where all the defendants are in the same county. Counsel contended the Aladdin case holds that all three defendants must have common residency. Counsel said that in Aladdin, there was no common residency of all three defendants, and therefore, argued the plaintiffs had the privilege to choose where to bring suit. The plaintiffs argued that CSX is a foreign corporation that has facilities throughout Florida but not in Pasco County, and its principal place of business is in Jacksonville (H, 12).

Counsel for the Plaintiff then cited Berdos v. Dowling, 544 So. 2d 1129 (Fla. 4th DCA 198S) contending it stands for the same proposition. The court pointed out that in Berdos the opinion differentiated that situation from the joint residency rule (H, 14). **The court also pointed out that the issue was that joint residency did not apply since there was no joint residency between a foreign corporation and an individual defendant, but only between individual defendants.**

The Plaintiff then cited Padin v. Travis, arguing that the joint residency rule holds that in order for it to apply, all defendants must have the same common residence. The court corrected him by pointing out that in the Padin case the two defendants who did have a common residence were both individuals, but the insurance company which was the corporate defendant did not have a common residence with either one of them, and that was the distinguishing factor (H, 21).

Counsel for the Plaintiffs, Browns, then argued that if the joint residency rule turned upon whether or not an individual was joined with a foreign corporation, the Aladdin court would never have had the discussion it had because all of the defendants were corporate defendants (H, 26-27).

The trial court responded that the dissent in Berdos

supported the defendants' argument. Counsel for the defense then made the point that the dissent by Judge Anstead was the majority opinion one year later in the Walden case (H, 29).

Ultimately, the court granted the Motion to Transfer Venue (A 1), and an appeal was taken to the Fourth District, which issued a written Opinion, holding the joint residency rule was properly applied, and that venue was properly transferred to Pasco County.

A Notice of Invoking Discretionary Jurisdiction was filed, and this Honorable Court has accepted jurisdiction.

SUMMARY OF ARGUMENT

There is no express and direct conflict on the face of the Opinion with other Opinions, but only different facts.

The Petitioner also seeks to create express and direct conflict jurisdiction in this case between other cases and the face of the Opinion by implying there are other facts outside the face of the Opinion.

There is no express and direct conflict with the facts as noted on the face of the Petition.

Under the Florida Constitution and Appellate Rules, the jurisdiction of the Florida Supreme Court is limited to cases where there is conflict with the facts on the face of the opinion and the holdings of other cases. Therefore, a Petitioner is required to limit the facts and argument to the facts on the face of the Petition.

To the contrary in the present case, the Petitioners imply there are other facts the Fourth District did not put in the Opinion, and if it had put those facts in this would have created express and direct conflict jurisdiction with different cases. In fact, those other cases also have different facts.

It underscores the lack of jurisdiction of the Florida Supreme Court when the Petitioner finds it necessary to go

outside the face of the Petition.

The facts as reflected in the Opinion are as follows:

> The Browns appeal the trial court's order granting Kim J. Nagelhout, Helena Chemical Co., Inc., and CSX Transportation, Inc.'s motion to transfer venue from Broward County to Pasco County, Florida. We affirm.
>
> The Browns filed a complaint in Broward County against Nagelhout, Helena Chemical, and CSX, alleging multiple causes or action for a collision that occurred in Pasco County. Nagelhout and Helena Chemical subsequently filed a motion to transfer venue from Broward County to Pasco County, and CSX joined in the motion. The trial court granted the motion to transfer venue, relying upon what is now known as the joint residency rule enunciated by the Florida Supreme Court in *Enfinger v. Baxley,* 96 So.2d 538 (Fla. 1957) . The court concluded that venue lies in Pasco County because Nagelhout and Helena Chemical both reside there. On appeal, the Browns contend that the joint residency rule does not apply to the facts of this case.

The joint residency rule is set forth by the Florida Supreme Court in the case of Enfinqer v. Baxlev, infra. In Enfinger. the Florida Supreme Court established the rule and held that where an individual defendant and a corporate defendant have a common county of residence, suit against them may only be brought in that county, even if the corporate defendant has places of business or residency in other counties in the state as well.

Numerous appellate cases have applied this rule of law, and have held even where there are more than two defendants and only one corporate defendant and one individual defendant share a common county of residency, suit against them can only be brought in that county.

The Plaintiff contends that Enfinger does not apply, and alleges the joint residency rule holds that because there are three Defendants in the present case, and there is no one county where all three have a residence, the joint residence rule does not apply. However, appellate cases have held that it does apply to this situation.

Alternatively, if this Honorable Court holds that there is not technical compliance with Enfinger, it is respectfully submitted that the holding of the Fourth District is the better rule, when applied to this set of facts where the individual defendant resides in the same county where the accident happened, and one of the corporate defendants also has a residence there.

Forma Non Conveniens

Additionally, it should be pointed out that even if the Enfinger rule did not apply, the ruling of the trial court transferring venue to Pasco County was proper under the Doctrine

of Forum Non-Conveniens, which was also argued to the trial court. This doctrine holds that a trial court may transfer venue based on the interest of justice to another county. In the present case, the action occurred in Pasco County, the individual Defendant lives in Pasco County, one of the corporate Defendants has a place of residency in Pasco County, and most of the witnesses are located in Pasco County. Therefore, the interest of justice also provides that the case should be transferred to Pasco County.

Therefore, even in addition to the joint residency rule of Enfinger, the "tipsy coachman" doctrine should apply such that the ruling of the trial court should be affirmed; or jurisdiction denied as being improvidently granted.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FACE OF THE OPINION IN THE PRESENT CASE, AND OTHER APPELLATE DECISIONS IN FLORIDA, BUT ONLY SEPARATE FACTS. THE TRIAL COURT AND THE FOURTH DISTRICT CORRECTLY RULED THAT VENUE SHOULD BE TRANSFERRED TO PASCO COUNTY.

Standard of Review

This is a Notice of Invoking Discretionary Jurisdiction, and the Standard of Review is whether there is express and direct conflict with the holding on the face of the Opinion in the present case, and other cases. Ramirez v. McCravy, 37 So. 2d 240 (Fla. 2010).

The Law

In order to have reversal based on discretionary jurisdiction, the Petitioner needs to show that there is express and direct conflict with the facts and holding on the face of the Opinion, and the holding of other cases. In the present case, the Petitioner implies there are other facts outside the face of the Opinion which make the Opinion of the Fourth District in express and direct conflict with other cases.

In the Jurisdictional Brief, there is no crisp discussion of issues of law which are in express and direct conflict with other

cases as is necessary for discretionary review, and therefore it is submitted there is no jurisdiction of discretionary review in this case.

In other words, this is not a case where the Fourth District certified conflict, but is here on discretionary jurisdiction.

The jurisdiction of the Supreme Court derives from Art. 5 § 3(b)(3) of the Florida Constitution, which states that the Supreme Court:

> "May review any decision of a district court of appeal... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law..." (Emphasis supplied).

The function of the Supreme Court in regard to conflict jurisdiction has long been to resolve conflicting points of law, and not to function as a second appeal on the merits. Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Karlin v. City of Miami, 113 So. 2d 551 (Fla. 1959); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Joint Residency Rule

The joint residency rule was set out by the Florida Supreme Court in the case of Enfinger v. Baxlev, 96 So. 2d 538 (Fla. 1957). In Enfinqer, the facts were that the defendants were an

individual and his employer, Atlantic Coastline. The individual's county residence was Polk County, and Atlantic Coastline had an agent and did business in both Polk County and Duval County. In Enfinger, the suit was filed by the plaintiffs in Duval County and the defendants contended suit should have been filed in Polk County and filed a Motion to Dismiss for improper venue.

The Florida Supreme Court handed down the Enfinger rule, and held that since both the individual defendant and the corporate defendant shared a joint county of residence, suit must be brought in that county:

> ...The applicability of the statute is clear where the venue privileges of the defendants are coequal and not coexistent in the same county. Here, however both defendants 'reside' in Polk County, even though the corporate defendant may also be said to 'reside' in Duval County. If sued alone, the defendant corporation would have no greater right, under Section 4 6.04, to be sued in Duval County than in Polk County since it has an agent in both counties; but the individual defendant if sued alone would have the privilege, under Section 46.01, of being sued in Polk County. In this situation, we do not think Section 46.02 should be applied to give to a plaintiff the right to choose the forum in which to bring his suit. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must

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> bring himself within the terms of the exception.' *Brady* v. *Times-Mirror Co.,* 106 CAL. 56, 39 P. 209, 210.
>
> Enfinger, 540.

Therefore, there is no express and direct conflict with Enfinger.

Additionally, the Petitioner contended there was express and direct conflict with the case of Doonan v. Poole, 114 So. 2d 504 (Fla. 2d DCA 1959). Once again, there is no express and direct conflict with Doonan, because in that case all three defendants were individuals and two resided in St. Lucie County, and one resided in Broward. Therefore, suit could be brought by the plaintiffs against the defendants in either Broward or St. Lucie under that case.

The Petitioners also relied in their Jurisdictional Brief on the case of Reliable Electric Distrib. Co., Inc. v. Walter E. Heller & Co. of La.. Inc., 382 So. 2d 1287 (Fla. 1st DCA 1980) . The holding in Reliable was that where two different individuals share the same county of residence, but a corporation is not a resident of that county, a lawsuit against the defendants may be brought in any county in which all defendants reside.

Another case which is on point with the present one and holds the joint residency rule requires that when there is a

common residence of an individual defendant and a corporate defendant, the suit must be filed in the county of common residence, is Walden Leasing, Inc. v. Modicamore, 559 So. 2d 656 (Fla. 4th DCA 1990) . In Walden, the lawsuit had been filed against several defendants, including two corporations and one individual in Broward County. The individual and the corporation were both residents of Palm Beach County, and the defendants moved to transfer venue to Palm Beach County. The trial court denied the motion and the case went on appeal, and the Court of Appeal reversed holding that the suit should have been brought in Broward County, where the individual and corporate defendant shared their residence, because this was required under the joint residency rule.

The facts in the present case are similar because in Walden only one of the corporations had a common residence with the individual, but the Court of Appeal held the joint residency rule applied.

Another case on point which holds that the Fourth District ruled correctly in the present case is Sinclair Fund, Inc. v. Burton, 623 So. 2d 587 (Fla. 4th DCA 1993). In this case suit was brought in Martin County against two individual defendants and a corporate defendant. One of the individuals and one

corporate defendant were residents of Broward County, but the plaintiff filed suit in Martin County since there was a breach of contract case and the payments under the contract were to be made in Martin County. The defendant filed a Motion for Change of Venue and the trial court denied it, and the defendant appealed.

The Court of Appeal reversed, and held that since the individual defendant and a corporate defendant resided in Broward County suit should have been brought by the plaintiff in Broward County:

> When a foreign corporation has an office in Florida, it is deemed to reside in the county in which the office is located for venue purposes. *L.B. McLeod Const. Co. v. State,* 106 Fla. 805, 143 So. 594 (Fla. 1932). Although generally an action against multiple defendants residing in different counties may be brought in any county in which a defendant resides, section 47.021, Florida Statutes (1992), where a corporate defendant resides in the same county as an individual defendant, venue is only proper in that county of joint residence. *Enfinger v. Baxley,* 96 So. 2d 538 (Fla. 1957); *Walden Leasing, Inc. v. Modicamore,* 559 So.2d 656 (Fla. 4th DCA 1990) ; *Inter-Medic Health Centers, Inc. v. Murphy,* 400 So.2d 206 (Fla. 1st DCA 1981) .
>
> Sinclair, 588.

A case from the First. District which applied the joint residency rule was Levy County School Board v. Bowdoin, 607 So.

2d 479 (Fla. 1st DCA 1992) . Two corporate defendants in Levy transacted business in every county in Florida, but the School Board which was also sued resided in one county.

The Court of Appeal held that venue was only proper in the county where the School Board resided. The trial court denied the Motion to Dismiss by the Levy County School Board, but the Court of Appeal held that the test was not whether the corporation conducted business in Columbia County, but whether they had a residence in Columbia County. The Court of Appeal stated that even if the corporations did reside in other counties, the common residency rule required that suit be brought in Levy County where the Levy County School Board was located and ordered venue transferred:

> Moreover, even if it is shown that the corporate defendants do, in fact, reside in the counties where they conduct business, the joint-corporate-defendant rule would still require venue to lie in Levy County. Under that rule, when a corporate defendant resides in the same county as an individual defendant, even though the corporate defendant resides in other counties, too, venue is proper only in the county of joint residence. *Inter-Medic Health Ctrs. Inc. v. Murphy,* 400 So.2d 206, (Fla. 1st DCA 1981) . Appellees represent that PESC and FBMC transact business in every county in Florida. If they also reside in every county, including Levy County, where the individual defendant School Board resides, then venue

> would be proper only in Levy County, the county of joint residence.
>
> Bowdoin, 481-482.

A case handled by the undersigned which again applied the joint residency rule to transfer venue from Broward to Dade County is Lifemark Hospitals of Florida, Inc. v. Rogue. 727 So. 2d 1077 (Fla. 4th DCA 1999) . In Lifemark, a corporate defendant had offices in several counties in the state and shared residence with one defendant in Dade County. Suit was brought against the hospital, against two doctors, and against the doctors' corporation in Broward County. The defendant moved for change of venue in Dade County on the basis that the individual doctors lived in Dade County, and the doctors had offices at both Dade and Broward County. The trial court denied the Motion to Transfer but the Court of Appeal reversed, holding that the joint residency rule required suit be brought in Dade County because the individuals had a common county of residence with the corporate defendant hospital:

> Section 47.021 permits an action to be brought in a county in which any defendant resides when the defendants reside in different counties. However, the "joint residency" rule first announced in *Enfinger* v. *Baxley,* 96 So.2d 538 (Fla. 1957), provides that where multiple defendants have a common county of residence, venue is proper only in

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> that county, **even if one or more codefendants also reside in other counties.** *Sinclair Fund, Inc. v. Burton,* 623 So.2d 587 (Fla. 4th DCA 1993); *Twigg* v. *Watt,* 558 So.2d 194 (Fla. 4th DCA 1990) . Accord Inter-Medic *Health Ctrs., Inc. v. Murphy,* 400 So.2d 206 (Fla. 1st DCA 1981) .
>
> Lifemark Hospitals. 1078.

Similarly, in Inter-medic Health Centers, Inc. v. Murphy, 400 So. 2d 2 06 (Fla. 1st DCA 1981) the Court of Appeal held that venue of the lawsuit was only proper in St. Johns County where the doctor resided and where the hospital/defendant was located, even though the hospital had other locations in the state:

> ...However, this provision is inapplicable where a corporate defendant resides in the same county as an individual defendant, even though the corporate defendant may have other residences; in such circumstances venue is proper, pursuant to § 47.011, Florida Statutes, only in the county of "joint residence." See *Enfinger v. Baxley,* 96 So.2d 53 8 (Fla. 1957); *Maloney* v. *Fleishaker,* 23 8 So.2d 496 (Fla. 2nd DCA 1970).
>
> Inter-medic Health, 206.

In accord with this rule of law see, Carbone v. Value Added Vacations, Inc. , 791 So. 2d 1217 (Fla. 5th DCA 2001) :

> Since the cause of action in Count I accrued in Miami-Dade County, the Carbones reside in Miami-Dade County, and ACC has its office in Miami-Dade County, under a joint residence analysis, venue of the claims is proper not

> in Orange County, but in Miami-Dade County. As enunciated in *Enfinger,* this joint residency rule is predicated upon the fact that if the natural person defendant was sued alone, said defendant would have the privilege of being sued in the county of its residence. 96 So.2d at 549. The joinder of the corporate defendant who has a place of business in the codefendant's county of residence should not defeat the latter's venue privilege. Id. See *Also Sinclair Fund, Inc. v. Burton,* 623 So.2d 587 (Fla. 4th DCA 1993) .
>
> Carbone. 1220.

See also: Twiqq v. Watt, 558 So. 2d 194 (Fla. 4th DCA 1990)(holding venue is only proper where the corporate defendant and individual defendant have a common county of residence despite the corporations' presence in other counties as well); Walt Disnev World Co. v. Leff. 323 So. 2d 602 (Fla. 4th DCA 1975)(holding that where all defendants to an action enjoy mutual residence within one county, venue was only appropriate in that county); Mankowitz v. Staub, 553 So. 2d 1299 (Fla. 3rd DCA 1989)(holding that the plaintiff could not use § 47.021 to defeat the individual defendant's right to be sued and its sole county of residence was where the corporate defendant had residence in multiple counties, but the individual defendant shared common residency in one of them); Commercial Carrier Corporation v. Mercer, 226 So. 2d 270 (Fla. 2nd DCA 1969) (holding that when all

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defendants to an action enjoy mutual residence within one county, § 4 7.021 does not apply even though the corporate defendant may also reside in other counties).

The Doctrine of Forum Non-Conveniens Supported the Change of Venue

While it is submitted that the trial court correctly granted the Motion to Transfer Venue based on the joint residency exception, an equally applicable and suitable reason for the change is the Doctrine of Forum Non-Conveniens under Florida Statute § 47.011 and § 47.021. The plaintiffs in this case filed suit against three defendants in Broward County, on the basis that one of the defendants, Helena Chemical Company, had a residence in Broward County.

It is important to remember that the intent of the venue provision in the Florida statutes is to require that litigation be instituted in that forum which will cause the least amount of inconvenience and expense to the parties required to answer and defend the action, in this case all the Pasco County Defendants. Premier Cruise Lines, Ltd., Inc. v. Gavrilis, 554 So. 2d 659 (Fla. 3d DCA 1990); Kilpatrick v. Bovnton, 374 So. 2d 557 (Fla. 4th DCA 1979); Gaboury v. Flaqler Hospital, Inc., 316 So. 2d 642 (Fla. 4th DCA 1975) ; Goodvear Tire and Rubber Company v. Mann,

285 So. 2d 681 (Fla. 3d DCA 1973), reversed on other grounds, 300 So. 2d 666 (Fla. 1974); Allen v. Summers, 273 So. 2d 13 (Fla. 3d DCA 1973); England v. Cook, 256 So. 2d 403 (Fla. 3d DCA 1972); Polar Ice Cream & Creamery Company v. Andrews, 146 So. 2d 609 (Fla. 1st DCA 1962). Venue statutes have often been characterized as statutes of convenience. Gaboury, 645.

Because the litigation should be instituted in the forum which causes the least inconvenience to the Defendants, Nagelhout and Helena Chemical Company moved to change venue, which CSX supported, from Broward County to Pasco County based upon the joint residence exception. It is contended that Forum Non-Conveniens is an equally applicable reason to support the change. Under Florida Statute §47.122:

> **47.122. Change of venue; convenience of parties or witnesses or in the interest of justice.**
>
> For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.

There is no dispute that it is the Plaintiffs' prerogative to select venue, but it is also well established that the Plaintiffs' choice of venue can be changed, due to the interest

of justice and for the convenience of the parties or witnesses. Again, it is important to remember that the venue statutes are for matters of convenience and the selected forum should be the one causing the least inconvenience to the parties required to answer and defend, in this case Nagelhout, Helena, and CSX, the Defendants.

In a case on point, this Court, in reversing a trial court's refusal to change venue from Dade County to Polk County, held that the purpose of the statutes was for lawsuits to be tried in the area where the cause of action arose, "whenever consonant with the residence and convenience of the parties." Further, while the trial court has discretion regarding change of venue, the court could not disregard well established principles and guidelines set forth by law for making its ultimate decision. Peterson. Howell & Heather v. O'Neill, 314 So.2d 808 (Fla. 3d DCA 1975) .

In Peterson, the plaintiffs were the wife and minor children of the decedent, who was killed in a vehicle collision in Polk County. The plaintiffs were residents of Pennsylvania. They sued a Maryland corporation, which was the owner of the vehicle. They also sued Brookline corporation, a Delaware and Tennessee corporation who was the licensee of the vehicle, as well as the

defendant driver, Green, who was a resident of Georgia and employee of the Brookline corporation. Peterson. 809. The plaintiffs filed their lawsuits in Dade County, and apparently at least one defendant was a resident of Dade County for the suit to be brought there to start with under Florida Statute §47.011.

The defendants moved for change of venue under Florida Statutes §47.122 to have the lawsuit transferred to Polk County. Peterson, 809. The accident occurred in Polk County. Mr. O'Neal, the decedent, was an employee of Disney World in Orlando, Orange County, and lived in Lakeland, Polk County. He was taken to Lakeland General Hospital in Polk County. The accident was investigated by patrolmen assigned to the Polk County office of the Florida Highway Patrol. Two witnesses to the accident resided in Orange County and in Seminole County. Polk County, Orange County, and Seminole County are in close geographic proximity to each other, with Seminole being adjacent to Orange County, and Orange County being adjacent to Polk County. Peterson, 810.

In opposition to the Motion to Transfer to Polk County, the plaintiffs argued that the practicalities of trying the lawsuit would involve transportation of the parties and their representatives and witnesses to and from Florida, and therefore

Dade County had more adequate facilities than Polk County and the convenience of the parties would be aided by having their lawsuit tried in a metropolitan area. Peterson, 810. This Court rejected the plaintiffs' argument that it would be more convenient to have their lawsuit tried in a large metropolitan area of Dade County, relying on the principles that the lawsuit should be tried in the area where the cause of action arose, **the site of the accident.** Peterson, 810. Based on all the contacts with Polk County, this Court held that the action must be transferred from Dade County to Polk County and that it was a gross abuse of judicial discretion for the trial court to refuse the transfer. Peterson, 810. For the exact same reasons, the trial court correctly ruled that the case should be transferred to Pasco County.

Another case on point is the First District's decision in Hu v. Crockett, 426 So.2d 1275 (Fla. 1st DCA 1983), which stands for the proposition that the plaintiff's choice of venue is presumptively correct and that the party challenging the selection must clearly demonstrate the impropriety of it. Hu, 1278. Equally important are the other legal principles announced in Hu, which led to affirmance of the court's change of venue from the plaintiff's forum to the defendant's forum in that case.

To begin with, in Hu **the court pointed out that the plaintiffs' selection of forum is not "the" paramount consideration.** The fact that a change of venue requires the court to consider the convenience of the parties, the witnesses, and in the interest of justice, factors which are not contingent on the plaintiff's choice of forum, leads to the conclusion that these factors lessen the significance of the Plaintiffs' selection as a factor of overriding importance. Hu, 1278.

The First District also noted that there are three considerations listed in Florida Statute §47.122 for change of venue and because they are in the disjunctive, in special circumstances change of venue could be based on any one of those criteria. Hu, 1277. In addition, the First District in a footnote pointed out that it did not confront the issue of whether a single one of the three basis under the forum non conveniens statute could support change of venue and did not foreclose future argument on that basis. Hu, 1277. Therefore, any one basis could support a change of venue.

What happened in the Hu case was that Mr. Chen was a passenger in a car owned by Mr. Hor of Kansas and driven by Mr. Sing, also of Kansas. They had an accident in Defuniac Springs in Walton County. The defendant was Tom Crockett of Kissimmee,

who was driving a truck owned by a corporation which leased it from the Hertz Corporation, and was insured by Travelers, whose principle office for the investigation of the accident was Escambia County. The Florida Highway Patrol troopers and the Walton County Sheriff detectives arrived at the scene of the accident, rendered first aid, and prepared the accident reports. All of these officers resided in either Okaloosa or Walton County. Chen was killed in the accident and his autopsy was conducted in either Okaloosa or Walton County, while Sing, the driver, and another passenger, Hor, were hospitalized in Escambia County. The car was towed by a Walton County wrecker operator to his business in Defuniac Springs. Hu, 1276-1277.

Stephen Hu brought a wrongful death action as representative of Chen's estate in his resident county of Escambia. The individual tortfeasor, Crockett, his employer, Hertz and Travelers, all moved for change of venue under the forum non conveniens statute from Escambia to Walton County, the site of the accident. In opposition, the plaintiff submitted documents revealing that he was going to call a Pensacola (Escambia County) accident investigator and a corporate representative of the truck owner who was a resident of Alabama. In addition, all the attorneys for all of the parties were located in Escambia County.

The First District noted that under § 47.122, venue could be changed for the convenience of the parties, the witnesses or in the interest of justice and that routinely courts would scrutinize each of these factors, but that evidence supporting each factor may not be necessary in order to support a change of venue. Hu, 1277-1278. The court noted that the plaintiff's selection of a forum, which was his own home community, bolstered his position that venue should be in Escambia County. Hu, 1279. Since Escambia County was the home county of the plaintiff, the court found that the convenience of the parties would be served by maintaining the suit in Escambia County. Hu, 1279.

In discussing the convenience of the witnesses, the appellate court found that Walton County was the more appropriate forum. The court pointed out that the convenience of the witnesses was "probably the single most important consideration of the three statutory factors." Hu, 1279. This was especially true based on the perception that material witnesses should be located near the courtroom to permit live testimony. Hu, supra. In addition, the court should consider not only who the witnesses are, but also the significance of their testimony. In the present case, it is submitted, as was argued at the hearing on the motion, that most of the witnesses are residents of Pasco

County. The accident occurred there, and the active tortfeasor resides there as well. The plaintiffs also alleged in the Complaint that certain defective conditions at the site of the accident contributed to it, such as overgrown vegetation and negligently constructed/maintained railroad grade crossings and right-of-ways. Since this property is located in Pasco County, it would serve the interests of justice to have the case in Pasco County.

In finding that the trial court properly transferred the action in Hu from the plaintiff's forum County of Escambia to the sight of the accident in Walton County, the First District noted that the defendants had six witnesses who were present at the accident scene immediately following the accident, and that these witnesses would present testimony, which would be critical to the issue of liability, the key issue in the case. Hu, 1279.

Here, though the exact identity and number of witnesses is not yet clear, it has been argued that many of the witnesses to the accident are in Pasco County. Therefore, under well established Florida law throughout the state it is clear that where the majority of material witnesses, the cause of action, and the claim for liability all arise in a single county, venue should be changed to that county, and the failure to do so is a

gross abuse of judicial discretion. Hu, infra; Braun v. Stafford, 529 So. 2d 735 (Fla. 4th DCA 1988); Inter-American Sunbelt Corporation v. Borozny, 512 So. 2d 287 (Fla. 3d DCA 1987); Levy v. Hawk[1]s Cav, Inc., 505 So. 2d 24 (Fla. 3d DCA 1987); Whitehead v. National Crane Corporation, 466 So. 2d 412 (Fla. 3d DCA 1985).

It is respectfully submitted that the trial court below correctly granted the Motion to Change Venue both for the stated reason, as well as because of the Doctrine of Forum Non-Conveniens.

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CONCLUSION

The decision is the present case is not in express and direct conflict with Florida law.

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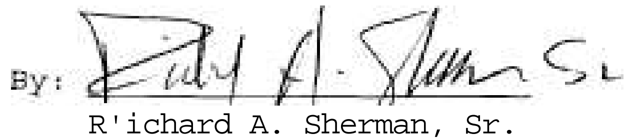

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of February 2011 to:

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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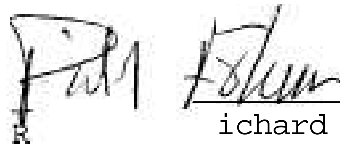
By: 
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