IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No.: SC10-868

Fourth DCA Case No.: 4D09-4140

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.
_____/

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

The Petitioners, Willie E. Brown and Brenda Brown, are husband and wife and are referred to collectively as "the Browns".

Respondent, Kim J. Nagelhout, is referred to as "Mr. Nagelhout".

Respondent, Helena Chemical Co., Inc., is referred to as "Helena Chemical".

Respondent, CSX Transportation, Inc., is referred to as "CSX".

The Respondents collectively are also referred to as "the Defendants" where contextually appropriate.

The Index to Briefs prepared by the Clerk of the Fourth District Court of Appeal is referred to as "(R. ____)".

The Supplemental Record prepared by the Clerk of the Fourth District Court of Appeal is referred to as "(S.R. _____)".

The decision of the Fourth District Court of Appeal that is under review in this proceeding, *Brown v. Nagelhout*, 33 So.3d 83 (Fla. 4th DCA 2010), was inadvertently omitted from the record by the Clerk of the Fourth District, but was attached to the Browns' Brief on Jurisdiction, and is cited herein by its Southern Reporter, Third Series citation.

Unless otherwise noted, all emphasis in quotations is supplied by the undersigned.

STATEMENT OF THE CASE AND FACTS

This proceeding arises from a non-final circuit court order granting a motion to transfer venue from Broward County, Florida to Pasco County, Florida (R. 43-45), which was affirmed by the Fourth District Court of Appeal. *Brown v. Nagelhout*, 33 So.3d 83 (Fla. 4th DCA 2010).

A. Statement of Facts

On March 3, 2009, a semi-tractor truck owned by Helena Chemical and being operated by Mr. Nagelhout pulled in front of a CSX train in which Petitioner, Willie Brown, was riding. The collision occurred at a crossing located in Dade City, Pasco County, Florida. At the time of the accident, Mr. Nagelhout was acting within the course and scope of his employment with Helena Chemical; Willie Brown was acting within the course and scope of his employment with CSX. (R. 48-49)

Petitioner, Willie Brown, sustained serious injuries in the collision, and Petitioner, Brenda Brown, sustained loss of consortium damages as his wife. (R. 48-52)

The Browns are residents of Broward County, Florida. (R. 47) Helena Chemical is a foreign corporation with its registered agent in Broward County and with a "business residence" in Pasco County. (R. 47, 66-67, 72, 78) Mr. Nagelhout

is a Pasco County resident. (R. 48, 66) CSX is a foreign corporation with its registered agent in Leon County, its principal place of business in Duval County, and agents or representatives in numerous counties, including Broward County, but not including Pasco County. (R. 72-73, 81, 82, 96)

B. Procedural History

On June 8, 2009, the Browns filed suit against the Respondents in Broward County, Florida, alleging the Broward County residence of the Petitioners, that Helena Chemical was a foreign corporation whose registered agent was in Broward County, that the accident occurred in Dade City (which is located in Pasco County), and that Mr. Nagelhout was a Pasco County resident. (R. 47-49) The Browns also alleged that CSX was a foreign corporation doing business in the State of Florida, without specific allegation as to where it had agents or representatives, but alleging venue against it was proper in Broward County pursuant to 45 U.S.C. § 56, a section of the Federal Employers' Liability Act (45 U.S.C. § 51, *et seq*.). (R. 48, 53)

The Browns effected service upon Helena Chemical in Broward County via its registered agent, CT Corporation System, at 1200 South Pine Island Road, Plantation, Broward County, Florida. (R. 56) Mr. Nagelhout was served in Zephyrhills, Pasco County, Florida, and CSX was served at its offices in Duval

County, Florida. (R. 57, 58)

Helena Chemical and Mr. Nagelhout filed an Alternative Motion to Dismiss or to Transfer for Improper Venue. (R. 66-69) In their motion, they acknowledged that Helena Chemical's registered agent was located in Plantation, Florida (R. 67), but argued that under the joint residency rule, venue was improper in Broward County and the case should be dismissed or transferred to Pasco County based upon Helena Chemical's and Mr. Nagelhout's residence there, without alleging CSX also shared that residence (or, more correctly, without acknowledging that CSX did not share their Pasco County residence). CSX filed an answer to the complaint admitting that it was a foreign corporation doing business in Florida, but denying all allegations of venue, and raising venue as an affirmative defense. (R. 60-64) CSX did not file any motions relating to venue, but later stated that it supported its co-defendants' motion. (R. 92)

The Browns filed a response in opposition to the alternative motion to dismiss or transfer. (R. 71-83) To their response, the Browns attached documents showing that Helena Chemical was a foreign corporation with its principal place of business in Collierville, Tennessee and with a registered agent in Broward County (R. 78); that CSX had a "CSX Facilit[y]" in Fort Lauderdale, Florida ("TRANSFLO terminals in *Ft. Lauderdale*, Jacksonville, Sanford, and Tampa")

(R. 81); that CSX was a foreign corporation incorporated in Virginia with its principal place of business in Jacksonville, Florida and a registered agent in Leon County, Florida (R. 82);[1] and asserted that venue was proper in Broward County because all three defendants did not share a common residence. (R. 75, 77) *See* § 47.021, Fla. Stat. ("[a]ctions against two or more defendants residing in different counties may be brought in any county in which any defendant resides").

Thus, in their response, the Browns argued that "the Joint Residency Doctrine is a very limited exception to Fla. Stat. § 47.021 and is reserved only for those cases where all defendants share a single county of residence. As that is not the case here, Defendants' Alternative Motion to Dismiss or to Transfer for Improper Venue should be denied." (R. 77) None of the Respondents filed a reply memorandum to the Browns' response.

The motion was heard by the trial court on September 1, 2009, former Circuit Judge Ana Gardiner then presiding. (R. 85-115) Counsel for Helena Chemical and Mr. Nagelhout argued, as in their motion, that because both shared a residence in Pasco County, under the joint residency rule, venue was only proper in

[1]These documents were from the Florida Department of State's "Sunbiz.org" website for corporate information (R. 78, 82) and CSX's website. (R. 72-73, 81) They were filed in the record and submitted to the trial court without objection by any party. (R. 93)

that county (R. 88-92), without regard to the effect of CSX's non-residence in Pasco County.

Counsel for the Browns and CSX represented to the Court, without objection from or dispute by Helena Chemical's and Mr. Nagelhout's counsel, that CSX "ha[s] facilities throughout Florida, not in Pasco County [though]." (R. 96) The Browns' counsel again argued that the joint residency rule "requir[ed that] . . . *all* of the defendants share a joint residency" for it to apply (R. 118), citing cases in support throughout.

Ultimately, the trial court granted the motion and ordered the case transferred to Pasco County, ruling, *inter alia*:

> Plaintiffs filed suit in Broward County and argue that pursuant to F.S. §47.021, when there are multiple defendants residing in different counties, venue "may be brought in any county in which any defendant resides." This provision does not apply, however, in a situation, such as in the instant case, where a corporate defendant resides in the same county as an individual defendant, even if the corporate defendant may have residences in other counties. In these situations, pursuant to F.S. § 47.011, venue is proper only in the county of "joint residence." Enfinger v. Baxley, 96 So.2d 538 (Fla. 1957); Berdos v. Dowling, 544 So. 2d 1129 (Fla. 4th DCA 1989); Sinclair Fund, Inc. v. Burton, 623 So.2d 587 (Fla. 4th DCA 1993); and Walden Leasing, Inc. v. Modicamore, 559 [So.2d] 656 (Fla. 4th DCA 1990).
>
> In that the individual Defendant, Kim Nagelhout, and the corporate Defendant, Helena Chemical Co., have joint residence in Pasco County, the proper place of venue is Pasco County.

(R. 44)

The Browns timely appealed to the Fourth District Court of Appeal on October 9, 2009. (S.R. 1-6) On that same date, the Browns filed a Motion for Stay Pending Review of Transfer Order with the trial court (S.R. 31), which Judge Gardiner denied after hearing on October 27, 2009. (S.R. 21) The Browns then filed a Motion for Review of Order Denying Stay Pending Review of Transfer Order with the Fourth District on October 28, 2009 (S.R. 7-16), which the Fourth District denied on November 13, 2009. (S.R. 74) The case has since been transferred to Pasco County for further proceedings, where it remains pending.

In their briefs before the Fourth District, the Browns argued that because all three Defendants did not share one county of residence, § 47.021, Fla. Stat., applied and allowed the Browns their choice of venue from among any Defendant's residence. (*e,g,*, R.13, 14, 18) They further argued that the joint residency rule established in *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), did not apply because all three Defendants did not share a residence (*e.g.*, R. 24, 228-29), and that the Fourth District had previously erred in holding otherwise in *Walden Leasing, Inc. v. Modicamore*, 559 So.2d 656 (Fla. 4th DCA 1990), and *Sinclair Fund, Inc. v. Burton*, 623 So.2d 587 (Fla. 4th DCA 1993), in conflict with *Enfinger* and decisions of three other district courts of appeal. *See Alladin Ins. Agency, Inc.*

v. Jones, 687 So.2d 937 (Fla. 3d DCA 1997); *Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.*, 382 So.2d 1287 (Fla. 1st DCA 1980); *Doonan v. Poole*, 114 So.2d 504 (Fla. 2d DCA 1959) (all of which hold that the joint residency rule does not apply where all defendants do not share one county of residence). (R. 31-36) The Browns further pointed out that *Padin v. Travis*, 990 So.2d 1255 (Fla. 4th DCA 2008), a later Fourth District decision, properly applied *Enfinger* but conflicted with *Walden Leasing* and *Sinclair Fund* without distinguishing or even acknowledging those decisions. (R. 34)

The Respondents (appellees there) argued that *Enfinger*'s joint residency rule does not require all defendants to share a county of residence to apply, but instead requires that in any action in which a human defendant and a corporate defendant share a residence, venue is proper only in that county, regardless of the differing residence of every other defendant and regardless of a plaintiff's statutory rights under § 47.021, Fla. Stat.[2] (*e.g.*, R. 124-25, 193)

The Fourth District affirmed the trial court on April 7, 2010, holding:

> 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)

[2]We note that the Respondents argued likewise in their jurisdictional briefing before this Court.

> 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.* [*of Fla., Inc. v. Roque*, 727 So.2d 1077, 1078 (Fla. 4th DCA 1999)] (holding that the joint residency rule applies "even if one or more codefendants also reside in other counties").

Brown, 33 So.3d at 84. The Fourth District did not cite to or acknowledge its earlier decisions in *Walden Leasing* and *Sinclair Fund*, nor its later conflicting decision in *Padin*, nor did it cite to or acknowledge the conflicting decisions of other district courts in *Alladin Ins. Agency*, *Reliable Elec. Distrib. Co.*, or *Doonan*, evidently dismissing the Browns' reference to such conflicts as meritless. *See Brown*, 33 So.3d at 84 ("[w]e find no merit to any of the other issues raised by the Browns").

The Browns timely filed their Notice of Invoking Discretionary Jurisdiction of the Florida Supreme Court on May 3, 2010, and this Court accepted jurisdiction on October 20, 2010, based upon the decision below being in express and direct conflict with *Enfinger*, *Alladin Ins. Agency*, *Reliable Elec. Distrib. Co.*, and *Doonan*. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

Chapter 47 of the Florida Statutes provides that a plaintiff may file an action, *inter alia*, where the defendant resides which, in the case of a corporation, includes where it has an agent or offices. Section 47.021 provides that where the defendants reside in different counties, the action "may be brought in any county in which any defendant resides." In this case, Mr. Nagelhout resides in Pasco County, Helena Chemical resides in Pasco County and Broward County, and CSX resides in Duval County, Broward County, and several other counties, but does not reside in Pasco County. Accordingly, under § 47.021, the Browns properly elected to sue the Respondents in Broward County, where Helena Chemical and CSX both maintain a residence. The choice among permissible venues is the plaintiff's to make, and the courts may only disturb that election where the defendants carry their burden of demonstrating it to be invalid. The Respondents did not and could not do so here.

The only exception to a plaintiff's right to elect among multiple counties of defendants' residence is the joint residency rule established in *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), which holds that where two defendants share one county of residence, suit must be filed in that county, even if one of the defendants is a corporation with additional residences in other counties. This rule makes logical

sense–where all defendants share one county as a residence, they should all be sued there–and has been properly applied in the decades since by multiple district court of appeal decisions, including by the Fourth District in 2008.

In this case, the trial court improperly applied *Enfinger*'s joint residency rule to require venue to be transferred to Pasco County, despite one defendant, CSX, not having a residence there, relying upon two earlier Fourth District decisions misconstruing *Enfinger*. The Fourth District then erroneously affirmed that order, reaffirming its misunderstanding of *Enfinger*. As a result, the decision below (as well as the two earlier Fourth District decisions) conflict with *Enfinger* and multiple decisions of other district courts of appeal (as well as with the Fourth District's intervening 2008 decision).

The decision below improperly nullifies the Browns' statutory right to elect a venue from among the Defendants' differing counties of residence and should be disapproved so that venue may be properly returned to Broward County, where Helena Chemical and CSX both share a residence.

ARGUMENT

I. STANDARD OF REVIEW

Because the parties' various counties of residence are undisputed, the standard of review in this proceeding is *de novo*. *Weinberg v. Weinberg*, 936

So.2d 707, 708 (Fla. 4th DCA 2006) ("where there are no disputed facts and the venue order turns on a question of law, there is no judicial discretion to be exercised and appellate review is de novo") (citations omitted), *rev. denied*, 949 So.2d 200 (Fla. 2007). *See also Brown*, 33 So.3d at 84 ("[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") (citations omitted).

II. FLORIDA'S VENUE STATUTES

This proceeding presents a simple issue of venue in a case arising out of injuries suffered in a collision at a railroad crossing. The Florida Constitution gives the Browns the right to sue Helena Chemical and Mr. Nagelhout, Art. I, § 21, Fla. Const., and federal law gives Mr. Brown the right to sue his employer, CSX. 45 U.S.C. § 51, *et seq*. The question presented in this appeal is where the Browns have the right to file their suit against the Defendants. That issue is controlled by Florida's venue statutes as set forth in Chapter 47. Three of them are relevant to this appeal.

Section 47.011, Fla. Stat., 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. This section shall not apply to actions against nonresidents."

Section 47.051, Fla. Stat., provides that

> [a]ctions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located.

And section 47.021, Fla. Stat., provides that "[a]ctions against two or more defendants residing in different counties may be brought in any county in which any defendant resides."

Under these statutes, the Browns could have filed their lawsuit where the accident occurred (Pasco County), or in any county in which any of the Respondents resided (Pasco County, Broward County, or any other county in which Helena Chemical or CSX had agents or representatives). The Browns fairly and properly elected to file their suit in Broward County, where Helena Chemical chose to locate its registered agent, and where CSX had agents. The trial court and the Fourth District erred in holding this to be improper under the venue statutes.

Based upon residence, because Mr. Nagelhout resides in Pasco County (R. 44), if he were sued alone, venue would be proper as to him only there under section 47.011. But because Helena Chemical and CSX are non-resident, foreign

corporations (R. 44, 78, 82), that section does not apply to them. *See id*. ("[t]his section shall not apply to actions against nonresidents."). Under section 47.051, Helena Chemical and CSX may be sued in any county in which they have offices, agents, or representatives. *See, e.g., Alladin Ins. Agency, Inc. v. Jones*, 687 So.2d 937, 939 (Fla. 3d DCA 1997) ("Allstate is a foreign corporation with agents in numerous counties, including Leon, Manatee, and Dade.... Since Allstate resides in Dade County, venue is proper in Dade County"). Accordingly, under section 47.051, venue would be proper as to Helena Chemical, if sued alone, in Broward County, Florida because its registered agent is located there, *see, e.g., Vellanti v. Piper Aircraft Corp.*, 394 So.2d 1063 (Fla. 3d DCA 1981) (citation omitted), and Pasco County, because it has an office there. *See, e.g., Sinclair Fund, Inc. v. Burton*, 623 So.2d 587, 588 (Fla. 4th DCA 1993) ("[w]hen 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") (citation omitted).[3] And under this section, again as

[3]No party alleged that Helena Chemical, a foreign corporation, had an agent or representative in Pasco County. Helena Chemical alleged in its motion that its "business residence" was in Pasco County (R. 66-67), and the trial court so ruled. (R. 43) It appears that the Fourth District in *Sinclair*, *supra*, and others have recognized that where a foreign corporation maintains an office, it necessarily also has agents or representatives. As stated by the Third District,

> Section 46.04 [now 47.051] . . . makes only one distinction between

to residence, venue would be proper as to CSX, if sued alone, in Leon County, where it has its registered agent, in Duval County, where it has its principal place of business and other facilities, and in numerous other counties where it has rail yards, terminals, and facilities, including Orange, Palm Beach, Miami-Dade, and Broward counties. (R. 72-73, 81, 82, 96) But it is undisputed that CSX would not be subject to venue in Pasco County based upon residence if sued alone, for it lacks one in that county.[4]

Because all three Respondents did not share Pasco County as a residence, section 47.021 was triggered, and the Browns had the right to sue them in any county in which any of them resided. They did so in Broward County, where both Helena Chemical and CSX shared a residence.

> domestic and foreign corporations, and that is that the domestic corporation may be sued where the corporation has or [usually] keeps an office for the transaction of customary business, while on the other hand, a foreign corporation doing business within the state may be sued where it has an agent or other representative. This distinction . . . appears to be without a real difference....

Greyhound Corp. v. Rosart, 124 So.2d 708, 710 (Fla. 3d DCA 1960).

[4]*See also* Respondent CSX Transportation, Inc.'s Brief on Jurisdiction, at 1-2 n.1 ("CSX Transportation, Inc., has an agent in Leon County, its principal place of business in Duval County, and several other places of business throughout Florida, including Broward County[, but] . . . it does not have an office or agent in Pasco County....").

Importantly, so long as a plaintiff elects a venue from one of the several allowed under these statutes, a court cannot overrule it. "[Section 47.021, Fla. Stat.] clearly provides that the action may be brought in any county in which any defendant resides. *The right to select one of such counties belongs to the plaintiff*." *Equipment Co. of Amer. v. Davis*, 223 So.2d 94 (Fla. 3d DCA 1969). Thus, "[i]t is plaintiff's prerogative to select venue and if it is proper, it will not be disturbed."[5] *Piper Aircraft Corp. v. Schwendemann*, 564 So.2d 546, 547 (Fla. 3d DCA 1990), *rev. denied*, 577 So.2d 1328 (Fla. 1991). "To hold otherwise would be to nullify the venue statute which gives the plaintiff the right to file his action in a particular place under certain specified conditions." *Greyhound Corp.*, 124 So.2d at 712.

III. *ENFINGER* AND THE JOINT RESIDENCY RULE

There is one narrow limitation on a plaintiff's choice of venue under § 47.021, Fla. Stat., however, but only where all defendants share a common county of residence. Called the "joint residency rule," this limitation, born of sound logic interpreting prior similar venue statutes, was fashioned by this Court over fifty

[5]Because it is the plaintiff's right to select venue, it is the burden of a defendant challenging venue to prove that the plaintiff's election is invalid. *See, e.g., Padin v. Travis*, 990 So.2d 1255, 1256 (Fla. 4th DCA 2008) ("[t]o change venue, the defendant has the burden of showing that the venue selected by the plaintiff is improper") (citations omitted); *Breed Technologies, Inc. v. AlliedSignal Inc.*, 861 So.2d 1227, 1230 (Fla. 2d DCA 2003) (citations omitted).

years ago in *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957). Because all Defendants in this case do not share one common county of residence, however, the joint residency rule does not apply, and the courts below erred in respectively invoking it to require and affirm a transfer of venue to Pasco County.

In *Enfinger*, a Polk County plaintiff sued Enfinger, a Polk County resident, and his employer, Atlantic Coast Line Railroad Company (which had agents in Polk and Duval counties), in Duval County, arising out of a Polk County accident. *Id*. at 539. Because one of Atlantic Coast Line's residences was different than Enfinger's, the plaintiff argued that venue was proper in Duval County under § 46.02, Fla. Stat. (the predecessor to § 47.021, Fla. Stat.),[6] because both defendants had "different" counties of residence. This Court decided otherwise. "Here, the Railroad company 'resides' in Polk County as well as in Duval County. *So the question here is whether the individual defendant and the corporate defendant reside 'in different counties' within the meaning of Section [47.021]*. We have concluded that they do not." *Enfinger*, 96 So.2d at 540.

As explained by this Court,

[6]Substantively, the statutes are the same for our purposes here, as are §§ 46.01 & 46.04, Fla. Stat., to their current versions, §§ 47.011 & 47.051, Fla. Stat., respectively. We have taken the liberty of substituting the current versions' citations in brackets in their predecessors' stead in *Enfinger* and its older progeny

> Section [47.021] places a qualification upon the venue privilege granted to an individual defendant by Section [47.011] and to a corporate defendant by Section [47.051]. It gives a plaintiff the right to make the final choice of the forum in which his suit will be tried as between the conflicting interests of defendants whose venue privileges, as granted by Section [47.011] and/or Section [47.051], do not fall within the same county. *The applicability of the statute [47.021] is clear where the venue privileges of the defendants are coequal and not co-existent 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 [47.051], 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 [47.011], of being sued in Polk County. In this situation, we do not think Section [47.021] should be applied to give a plaintiff the right to choose the forum in which to bring his suit.

Id. (citation omitted).

In short, the *Enfinger* Court held, where one of a corporate defendant's counties of residence is the same as the other defendant's county of residence, the defendants shall be treated as having a residence in the same county, requiring them to be sued in that venue and disabling a plaintiff's rights under § 47.021, Fla. Stat. Or, restated, "[w]e hold, therefore, that where an individual defendant is joined as a party defendant with a foreign corporation defendant, and the corporate defendant has an agent in the county in which the individual defendant resides,

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which cite to the prior versions.

Section [47.021] cannot be applied to defeat the individual defendant's venue privilege granted by Section [§ 47.011]." *Enfinger*, 96 So.2d at 540-41.

The joint residency rule makes perfect sense. Where all defendants share one common residence, they should be sued there, for they do not truly "resid[e] in different counties" under section 47.021. *They do reside in the same county*, and one of them just possibly also resides in other locations due to the necessary legal fiction that is the corporate form. Therefore, "based on *Enfinger*, a corporate defendant and an individual defendant cannot be found to 'reside' in different counties for the purposes of section 47.021 if they share a common county of residence." *A-Ryan Staffing Solutions, Inc. v. Ace Staffing Mgm't Unlimited, Inc.*, 917 So.2d 1000, 1004 (Fla. 5th DCA 2005) (footnote omitted).

Enfinger's joint residency rule has been properly understood and applied in numerous reported venue decisions through the decades. *See, e.g.*, *Padin*, 990 So.2d at 1255; *Perez v. Ferrell*, 932 So.2d 388 (Fla. 2d DCA 2006); *Lifemark Hosp. of Fla., Inc. v. Roque*, 727 So.2d 1077 (Fla. 4th DCA 1999); *Alladin Ins. Agency, Inc. v. Jones*, 687 So.2d 937 (Fla. 3d DCA 1997); *Goodyear Tire & Rubber Co. v. McCrone*, 655 So.2d 1319 (Fla. 3d DCA 1995); *Valjean Corp., Inc. v. Heininger*, 559 So.2d 677 (Fla. 3d DCA 1990); *Twigg v. Watt*, 558 So.2d 194 (Fla. 4th DCA 1990); *Horn v. Conway*, 511 So.2d 730 (Fla. 4th DCA 1987); *Inter-*

Medic Health Ctrs., Inc. v. Murphy, 400 So.2d 206 (Fla. 1st DCA 1981); *Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.*, 382 So.2d 1287 (Fla. 1st DCA 1980); *Cadillac Fairview Corp., Ltd. v. SWD Invests., Inc.*, 343 So.2d 933 (Fla. 3d DCA 1977); *Walt Disney World Co. v. Leff*, 323 So.2d 602 (Fla. 4th DCA 1975); *Commercial Carrier Corp. v. Mercer*, 226 So.2d 270 (Fla. 2d DCA 1969); *Doonan v. Poole*, 114 So.2d 504 (Fla. 2d DCA 1959).

Although *Enfinger* involved an individual defendant and a corporate defendant, the joint residency rule is not premised upon the rights of a human defendant, for it applies whenever all defendants share a common county of residence, even if they are all corporations. *See Goodyear Tire & Rubber Co.*, 655 So.2d at 1319; *Valjean Corp., Inc.*, 559 So.2d at 677; *Cadillac Fairview Corp., Ltd., Inc.*, 343 So.2d at 933; *Leff*, 323 So.2d at 602; *Commercial Carrier Corp.*, 226 So.2d at 270 (all applying the joint residency rule where all of the defendants were corporations).

But where all defendants do not share a common residence, as here, *Enfinger*'s joint residency rule does not apply, and a plaintiff's right to select a venue from among the defendants' *different* residences under § 47.021, Fla. Stat., remains unrestricted. *See Enfinger*, 96 So.2d at 540 ("[t]he applicability of . . . [47.021] is clear where the venue privileges of the defendants are . . . not co-

existent in the same county").

For example, in *Reliable Elec. Distrib. Co., Inc.*, 382 So.2d at 1287, a plaintiff sued a corporate defendant, REDCO, and two individuals in Bay County. REDCO was not a resident of Bay County, but "[t]here is no contention that the individual defendants are not residents of and properly sued in Bay County." *Id*. The First District affirmed the denial of a motion to change venue for failure to sue in REDCO's county of residence, holding "[t]his question was answered by the Florida Supreme Court in *Enfinger* . . ., wherein the court held that [§] 47.021 prevails over, and is a qualification of, the venue privilege afforded under [§] 47.051...." *Id*. at 1288.

The Fourth District properly followed this analysis of the joint residency rule two years ago in *Padin*, 990 So.2d at 1255, reversing an order transferring venue from Broward County to Saint John's County. The court did so despite two of the three defendants having a joint residency in Saint John's County, where they failed to show that the third defendant, Geico, shared their county of residence (as here).

> A suit against a foreign corporation such as Geico, a defendant below, "shall be brought in a county where such corporation has an agent or other representative, where the action accrued, or where the property in litigation is located." § 47.051, Fla. Stat. (2007). Geico's co-defendants, residents of St. Johns County, sought to transfer venue, relying on section 47.051. *See Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957).

> "To change venue, the defendant has the burden of showing that the venue selected by the plaintiff is improper." *Pier Point Devs., LLC v. Whitelaw*, 912 So.2d 18, 19 (Fla. 2005). The plaintiff has the prerogative "to select the venue and as long as that selection is one of the alternatives provided by statute, the plaintiff's selection will not be disturbed." *Premier Cruise Lines, Ltd., Inc. v. Gavrilis*, 554 So.2d 659, 660 (Fla. 3d DCA 1990). Here, the appellee defendants produced no competent evidence that Geico had "an agent or other representative" in St. John's County....

990 So.2d at 1256.

Likewise, the Third District in *Alladin Ins. Agency, Inc.*, *supra*, held that the joint residency rule does not apply where all defendants do not share one county as a common residence, and affirmed the denial of a motion to transfer venue to Manatee County. The court wrote, "Alladin is a Florida corporation with its office in Manatee County while Premium is a Florida corporation with its office in Leon County. Allstate is a foreign corporation with agents in numerous counties, including Leon, Manatee, and Dade." 687 So.2d at 939. "There is no county of residence which is common to all three defendants. Under *Enfinger*, this means that section 47.021 becomes operative, and the plaintiff had the privilege of bringing suit in any county in which any defendant resides. Since Allstate resides in Dade County, venue is proper in Dade County." *Id.* The Third District was logically sound and forthright in its conclusion on this issue:

> *Where, as here, there is no common county of residence the plaintiff is allowed to make the venue selection*. As the Florida Supreme Court has said, the plaintiff "has the right to make the final choice of the forum in which its suit will be tried as between . . . defendants whose venue privileges . . . do not fall within the same county."
>
> The trial court correctly ruled that because there is no county of common residence, Dade County is a permissible venue.

Id. at 939 (quoting *Enfinger*, 96 So.2d at 539) (other citation omitted).

Finally on this point is a Second District decision handed down only two years after *Enfinger* in 1959, *Doonan*, *supra*. In that case, the plaintiff sued two Saint Lucie County residents and a Broward County resident in Broward County for an accident that occurred in Saint Lucie County. The trial court dismissed the case as to the Saint Lucie County resident defendants for improper venue. 114 So.2d at 505. The plaintiff appealed and the Second District reversed, ordering the action to proceed in Broward County as to all three defendants. *Id*. at 506.

Although *Doonan* involved two defendants who shared a common county of residence, and a third which did not, the Second District properly held that the joint residency rule did not apply, as all three defendants did not share a common residence and thus *Enfinger* "is not determinative of the present issue." *Id*.

> Irrespective of whether it would better serve the purpose of judicial administration to try this case in St. Lucie County, Section [47.021] gives the plaintiff the right to elect between St. Lucie County and Broward County, and having elected to bring his suit in Broward

> County, the inconvenience of so doing cannot be used as a vehicle upon which to negate the plaintiff's choice.
>
> Reversed.

Id.

In sum, *Enfinger* stands for the unremarkable proposition that where all defendants share a common county of residence, venue based upon residence is only proper in that county, even if some of them also have residency in other counties. But if they do not share one county of residence, the choice among them is the plaintiff's. *See Enfinger*, 96 So.2d at 540 ("[t]he applicability of . . . [47.021] is clear where the venue privileges of the defendants are . . . not co-existent in the same county"). *Reliable Elec. Distrib. Co.*, *Padin*, *Alladin Ins. Agency*, and *Doonan*, all immediately *supra*, properly follow *Enfinger* and teach that venue is not a matter of counting heads decided by majority rule. All properly hold that *Enfinger*'s joint residency rule only applies where *all* defendants share the same residence, not where some but not all do. As demonstrated below, the Fourth District's decision in this case conflicts with *Enfinger* and each of the aforecited district court decisions, and should be disapproved, with venue in this case properly restored to Broward County.

IV. THE DECISION BELOW

As noted *supra*, the Fourth District held below that

> 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.* [*of Fla., Inc. v. Roque*, 727 So.2d 1077, 1078 (Fla. 4th DCA 1999)] (holding that the joint residency rule applies "even if one or more codefendants also reside in other counties").

Brown v. Nagelhout, 33 So.2d 83, 84 (Fla. 4th DCA 2010).

Respectfully, the Fourth District's analysis is fatally flawed, because it denies plaintiffs their right to elect venue under § 47.021, Fla. Stat., where all defendants do not share a common county of residence. The Fourth District misconstrued *Enfinger*'s holding as being premised upon the presence of a human defendant and not simply a human defendant sharing an overlapping residence with a corporate defendant of multiple residences, and thereby overlooked *Enfinger*'s acknowledgment that the joint residency rule will not apply where "defendants['] . . . venue privileges, as granted by Section [47.011] and/or Section [47.051], do not fall within the same county." 96 So.2d at 540. This Court in *Enfinger* was concerned with whether the corporate defendant's shared residence with the human defendant could be ignored, not with the human defendant having

some venue trump card to play.[7] Indeed, this Court framed the following as the question presented and its resolution: "[T]he question here is whether the individual defendant and the corporate defendant reside 'in different counties' within the meaning of Section [47.021]. We have concluded that they do not." *Enfinger*, 96 So.2d at 540. "We hold, therefore, that where an individual defendant is joined as a party defendant with a foreign corporation defendant, and the corporate defendant has an agent in the county in which the individual defendant resides, Section [47.021] cannot be applied to defeat the individual defendant's venue privilege granted by Section [47.011]." *Id*. at 540-41.

The Fourth District's decision relied only upon its erroneous reading of *Enfinger*, and another Fourth District decision, *Lifemark Hosps. of Fla., Inc. v. Roque*, 727 So.2d 1077 (Fla. 4th DCA 1999). *See Brown*, 33 So.3d at 84 (citing *id*. at 1078 ("holding that the joint residency rule applies 'even if one or more codefendants also reside in other counties'")). *Lifemark Hosps*. properly applied

[7]Indeed, if the Fourth District's decision below was based upon the venue to which the majority of defendants could claim residence, the result would be a tie and the trial court still should have been reversed. For while two Respondents claim Pasco County as a residence (Mr. Nagelhout and Helena Chemical), two Respondents also claim Broward County as a residence (Helena Chemical and CSX). Thus it is clear that the Fourth District for some unexplained reason attaches great significance to Mr. Nagelhout's humanity, while disregarding the plaintiffs' similar human existence and their statutory privilege to elect venue from

Enfinger, however, because there all defendants shared Dade County as a residence.

In that medical malpractice case, Roque sued a Dade County hospital (Lifemark Hospitals of Florida, Inc. d/b/a Palmetto General Hospital), two physicians who resided in Dade County (Drs. Gordo and Cardella), and their employer which had offices in Dade County and Broward County (Alvaro Gordo, M.D., P.A.). *Lifemark Hosps.*, 727 So.2d at 1078. The Broward County circuit court denied a motion to transfer venue to Dade County. *Id*. The Fourth District reversed, explaining:

> 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 that county, even if one or more codefendants also reside in other counties.

Id. (citing *Sinclair Fund, Inc. v. Burton*, 623 So.2d 587 (Fla. 4th DCA 1993); *Twigg v. Watt*, 558 So.2d 194 (Fla. 4th DCA 1990)).

Lifemark Hosps. was correctly decided under *Enfinger* because there all defendants shared Dade County as a residence. Because CSX does not share Pasco County as a residence in this case, it lends no support to the Fourth District's

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among the defendants' conflicting residences under § 47.021, Fla. Stat.

decision below.

The trial court below did not rely upon *Lifemark Hosps.* for its ruling, but instead cited (in addition to *Enfinger*) three other Fourth District decisions, *Berdos v. Dowling*, 544 So.2d 1129 (Fla. 4th DCA 1989), *Sinclair Fund, Inc. v. Burton*, 623 So.2d 587 (Fla. 4th DCA 1993), and *Walden Leasing, Inc. v. Modicamore*, 559 So.2d 656 (Fla. 4th DCA 1990), in its order transferring venue. (R. 44) We discuss each in turn.

Berdos, 544 So.2d at 1129, reversed a transfer of venue from Broward County, and was not even a joint residency rule case, and thus does not support the order appealed or the Fourth District's erroneous affirmance of it.[8]

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[8]Berdos was injured in an accident in caused by a drunk driver. The individual defendants were from Bradford County, as was the liquor store defendant. The final defendant, Pizza Hut, was a foreign corporation with registered agent in Broward County. Berdos sued in Broward County. 544 So.2d at 1129. The Bradford County defendants moved to transfer venue to *Alachua County, where accident occurred*, and alleged in their briefs that Pizza Hut had agents in Broward, Alachua, and Bradford counties. Although all defendants allegedly shared a common residence in Bradford County, because they did not seek a transfer to that county, the appeal did not involve the joint residency rule, and the trial court's transfer of the action to Alachua County was held improper under § 47.021, Fla. Stat. *Berdos*, 544 So.2d at 1130.

> While we believe the place where the accident occurred may be a better place for the action, we do not believe the plaintiff erred in his initial choice of Broward County. *A plaintiff's venue selection will not be disturbed as long as his selection is one of the alternatives*

We take up the other two cases, *Sinclair Fund* and *Walden Leasing*, in order of vintage, starting with the elder, *Walden Leasing*. In that case, the Fourth District reversed an order denying a motion to transfer venue where

> the individual defendant reside[d] in Palm Beach County and *one of the corporate defendants* ha[d] an office in Palm Beach County. Although an action against multiple defendants residing in different counties may be brought in any county in which any defendant resides, an exception has been carved out where a corporate defendant resides in the same county as the individual defendant. In such event, venue is only proper in the county of the joint residency.

559 So.2d at 657 (citing *Inter-Medic Health Ctrs., Inc. v. Murphy*, 400 So.2d 206 (Fla. 1st DCA 1981)).[9] By its choice of the words italicized by us, the Fourth District implied that the other corporate defendants did not reside in Palm Beach County for venue purposes (without saying so) and thereby implied that *Enfinger*'s joint residency rule applies to all actions in which any individual defendant shares a common residence with any other defendant, even if other defendants do not

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> *provided by the statute governing venue. Where there are multiple defendants, venue lies in the county where any one of the defendants reside*. § 47.021, Fla. Stat. (1987).

Id.

[9]*Inter-Medic Health Ctrs.* involved only two defendants, a doctor and a hospital. As in *Enfinger*, one of the hospital's counties of residence was the same as the defendant doctor's residence. Thus, that case lends no support to applying the joint residency rule to actions in which some but not all defendants share a

share that residence.

Finally, in *Sinclair Fund*, the Fourth District reversed an order denying a motion to change venue because "*one of the individual defendants is a resident of Broward County* and defendant Sinclair Fund, Inc., a New Jersey corporation, has an office in Broward County," 623 So.2d at 587, 588, and held:

> 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.

Id. at 588 (citing *Enfinger*, *Walden Leasing*, and *Inter-Medic*).

Again here, as in *Walden Leasing*, the Fourth District stated that an individual and a corporate defendant shared a common residence, Broward County, then implied by its chosen words (italicized above by us) that other individual defendants were resident elsewhere, without saying so. And again the Fourth District thereby implied that *Enfinger*'s joint residency rule applies to all actions in which any individual defendant shares a common residence with any other defendant, even if other defendants do not share that residence. But the court also did not explicitly say that either.

So in both *Walden Leasing* and *Sinclair Fund*, the Fourth District implicitly

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common residence, contrary to its citation in *Walden Leasing*.

departed from the *Enfinger* joint residency rule requiring all defendants to share a common county of residence, but without signaling conflict with the earlier decisions of other district courts in *Reliable Elec. Distrib. Co.* and *Doonan*, both *supra*, which previously held that *Enfinger* only applies to disable § 47.021, Fla. Stat., where all defendants share one common residence. And both *Walden Leasing* and *Sinclair Fund* conflict with the Third District's subsequent decision in *Alladin Ins. Agency, supra*, and also conflict with *Padin*, discussed *supra* and decided by the Fourth District thereafter, which held that the joint residence of two defendants was insufficient to trigger the joint residency rule, where they failed to prove the third defendant shared their county of residence. Neither *Walden Leasing* nor *Sinclair Fund* are mentioned in *Padin*, and none of these conflicting decisions, *Doonan, Reliable Elec. Distrib. Co., Walden Leasing, Sinclair Fund, Alladin Ins. Agency*, or *Padin* are discussed at all in the opinion below, *Brown v. Nagelhout*, 33 So.3d 83 (Fla. 4th DCA 2010), despite their conflicting existence being briefed and debated by the parties below. (*e.g.*, R. 23-32, 196-199, 204-211)

What the Fourth District held implicitly in *Walden Leasing* and *Sinclair Fund* it has now held explicitly in this case: *Enfinger*'s joint residency rule applies not where all defendants share a residence, but instead where a magical

combination of a human defendant and a corporate defendant share a residence,[10] even though the other defendants do not. The Browns ascribe no ill-intent to the judges of the Fourth District in departing from *Enfinger* in this and earlier cases– that Court has simply developed a mistaken view of *Enfinger*'s holding and has overlooked its limitation to cases in which *all defendants* share a common county of residence, which properly preserves plaintiffs' rights to elect a forum among competing venue privileges under section 47.021, Fla. Stat. The First District in *Reliable Elec. Distrib. Co.*, the Second District in *Doonan*, the Third District in *Alladin Ins. Agency*, and even an intervening Fourth District panel in *Padin* have all properly understood and refused to apply *Enfinger*'s joint residency rule where

[10]*Enfinger* is factually coincidental in that the defendants in that case were of that combination: one human and one corporation. But there is no legal magic to be found in that mixture of defendants. We submit that had Mr. Enfinger residing in Polk County instead been Enfinger, Inc. with offices in Polk County and Broward County, this Court would have ruled the same: because Enfinger, Inc. (residing in Polk County and Broward County) and Atlantic Coast Line Railroad Company (residing in Polk County and Duval County) shared Polk County as a residence, section 47.021 was disabled, Baxley must sue them in Polk County, and he could not elect to sue them in Duval County or Broward County instead. *See Goodyear Tire & Rubber Co. v. McCrone*, 655 So.2d 1319 (Fla. 3d DCA 1995); *Valjean Corp., Inc. v. Heininger*, 559 So.2d 677 (Fla. 3d DCA 1990); *Cadillac Fairview Corp., Ltd. v. SWD Invests., Inc.*, 343 So.2d 933 (Fla. 3d DCA 1977); *Walt Disney World Co. v. Leff*, 323 So.2d 602 (Fla. 4th DCA 1975); *Commercial Carrier Corp. v. Mercer*, 226 So.2d 270 (Fla. 2d DCA 1969) (all applying the joint residency rule where all of the defendants were corporations and none were humans, including the Fourth DCA in *Leff*).

all defendants did not share one county of residence. This Court should here restore the joint residency rule to its proper place and application in the Fourth District.[11]

CONCLUSION

In conclusion, section 47.021, Fla. Stat., gives plaintiffs the right to select venue for their lawsuit from among the varied counties of residence of multiple defendants where the defendants do not all share one common residence. *Enfinger* only requires otherwise where there is that solitary shared residence among *all* defendants, and there is none here. Under § 47.021, the Browns were entitled to

[11]Below and here in their jurisdictional briefs, the Respondents did not argue that the joint residency rule should be modified to provide that wherever a human defendant and a corporate defendant share a residence, venue must be laid in that county of residence even though other defendants do not share that residence; they simply argued that that is what the joint residency rule already was, as perceived by the Fourth District. Thus, the Browns to do not expect them to argue in their Answer Briefs that this Court should modify the rule to fit the holding below. But should they do so, the Browns would preemptively note that such a rule giving a human defendant a venue privilege that trumps all others finds no basis in the Florida Statutes, would render § 47.021 a nullity, and would likely lead to confusing, disjointed application in future cases involving two or more human and two or more corporate defendants sharing multiple counties of residence. But the joint residency rule as explained in *Enfinger*, and properly followed in the other district court cases discussed above, is simple to understand and apply. If all defendants share one county of residence, even if some have other residences as well, venue based upon residence must be laid in that shared county of residence. If they do not, the plaintiff may elect venue in any county in which any reside, as provided by § 47.021.

sue the Respondents in Pasco County, where Mr. Nagelhout and Helena Chemical share a residence; in Broward County, where Helena Chemical and CSX share a residence; or Leon, Duval, Orange, Palm Beach, or the many other counties in which CSX has a residence. The Browns made a proper election to sue them in Broward County, the Respondents failed to clearly demonstrate otherwise as was their burden, *see, e.g.*, *Padin*, 990 So.2d at 1256, and the trial court and Fourth District erred in holding to the contrary.

Accordingly, the Petitioners, Willie E. Brown and Brenda Brown, respectfully request that this Court disapprove the decision below[12] and remand with instructions for the Fourth District to reverse the trial court's order transferring venue, to instruct the trial court to deny the Mr. Nagelhout's and Helena Chemical's motion, and to require this action to return to Broward County, where it was properly filed under section 47.021, Florida Statutes.

[12]Likewise, the Court should approve the decisions in *Padin v. Travis*, 990 So.2d 1255 (Fla. 4th DCA 2008), *Alladin Ins. Agency, Inc. v. Jones*, 687 So.2d 937 (Fla. 3d DCA 1997), *Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.*, 382 So.2d 1287 (Fla. 1st DCA 1980), and *Doonan v. Poole*, 114 So.2d 504 (Fla. 2d DCA 1959), as properly abiding *Enfinger*, and disapprove *Sinclair Fund, Inc. v. Burton*, 623 So.2d 587 (Fla. 4th DCA 1993), and *Walden Leasing, Inc. v. Modicamore*, 559 So.2d 656 (Fla. 4th DCA 1990), as erroneously interpreting and applying the *Enfinger* rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail and email on December 30, 2010 on David B. Goulfine, Esq., Hightower & Partners, counsel for Respondents, NAGELHOUT and HELENA CHEMICAL, 7380 Sand Lake Road, Suite 395, Orlando, Florida 32819, Richard A. Sherman, Esq., co-counsel for the Respondents, NAGELHOUT and HELENA CHEMICAL, 1777 South Andrews Avenue, Suite 302, Fort Lauderdale, FL 33316, and Daniel J. Fleming, Esq., Melkus, Fleming & Gutierrez, counsel for Respondent, CSX, 800 W. De Leon Street, Tampa, Florida 33606.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing was printed in 14-point Times New Roman and thus complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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