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 JURISDICTION

KIM J. NAGELHOUT, and HELENA CHEMICAL CO., INC. a foreign corporation

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(With Appendix)

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TABLE OF CITATIONS

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TABLE OF CITATIONS (Continued)

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POINT ON APPEAL

THERE IS NO EXPRESS AND DIRECT CONFLICT AS IS NECESSARY FOR DISCRETIONARY JURISDICTION; THE PETITIONERS ARE SIMPLY SEEKING A SECOND APPEAL ON THE MERITS.

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STATEMENT OF THE FACTS AND CASE

As we indicate later in the Brief, there is no express and direct conflict with other Opinions, but only different facts.

In an attempt to create express and direct conflict jurisdiction when there is none, Petitioners are required by the appellate rules and Florida Construction to limit the facts and the argument, to the facts as outlined in the Opinion, and the holdings of other cases. Instead, the Petitioners imply there are other facts the court did not put in the Opinion which would create express and direct conflict jurisdiction with different cases, which themselves have different facts.

However, by needing to go outside the face of the Opinion, and the holdings on the face of the existing caselaw, the Petitioners have underscored that there is no express and direct conflict, but simply different facts.

The facts in the present case were that a Complaint was filed in Broward County against Nagelhout, Helena Chemical, and CSX, which is based on multiple causes of action, and arose out of a collision which occurred in Pasco County. The trial court ruled that based on the facts, the venue was proper in Pasco County, and the Fourth District Court of Appeal agreed by written Opinion.

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As indicated in the Opinion, the trial court found that the Browns resided in Broward County, Nagelhout resided in Pasco County, Helena Chemical had a business office in Pasco County, and CSX's principal place of business was in Duval County, and therefore the trial court and the Fourth District correctly ruled that based on these set of facts, the venue was proper in Pasco County.

Therefore, there is no express and direct conflict, but simply different facts then the cases the plaintiffs cite.

The facts as given 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.

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SUMMARY OF ARGUMENT

There is no express and direct conflict as is necessary for the extraordinary remedy of discretionary review. There are only different facts, which can not yield discretionary review.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT AS IS NECESSARY FOR DISCRETIONARY JURISDICTION; THE PETITIONERS ARE SIMPLY SEEKING A SECOND APPEAL ON THE MERITS.

The Petitioners go into a discussion of the facts which were favorable to them, and additionally they ignore the facts which were unfavorable to them, and even **imply that there are other facts outside the face of the Opinion** which would make the decision by the trial judge and the Fourth District incorrect.

Nowhere is there a crisp discussion of issues of law which are in express and direct conflict with another case, which is necessary for discretionary review. It is therefore apparent that the Petitioners are simply seeking a second appeal on the merits, which the Florida Supreme Court has repeatedly said it will not do.

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).

The decision of the Fourth District in the present case does not create a rule of law which is in conflict with the rule of law in other cases,- it merely holds that in this factual situation, the ruling of the trial court was correct. There is no "express and direct conflict."

It is therefore apparent that the Petitioners are just aggrieved because they lost in the trial court, and also in the Fourth District. There is no "express" conflict. The Petitioners' Brief is merely an attempt to reargue the facts, and to reargue the same points raised in the Fourth District. It is therefore apparent that what the Petitioners are really seeking

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is a second appeal on the merits. The Petition for Certiorari must be denied.

The facts in Enfinger v. Baxley, 96 So. 2d 538 (Fla. 1957) were that the defendants were an individual, and his employer, Atlantic Coastline, and the individual's county residence was Polk County, and Atlantic had an agent who did business in both Polk and Duval. Suit was filed by the plaintiffs in Duval County and the defendant moved to dismiss for improper venue, saying it should have been filed in Polk County.

The Florida Supreme Court held that since both share a county of residence, suit must be in that county of residence:

> ...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 46.04, 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. [x]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, but only different facts than the present Opinion. Further, the Petitioners implying there are other facts outside of the face of the Complaint which may make the decision wrong if the facts were known, is not accurate and is improper. There simply is no express and direct conflict as is necessary for the extraordinary remedy of discretionary review, and it is clear that the Petitioners are simply seeking a second appeal on the merits.

Similarly, the Petitioners contend there is express and direct conflict between the decision in the present case and the case of Doonan v. Poole, 114 So. 2d 504 (Fla. 2nd DCA 1959). However, there is no express and direct conflict with Doonan, because that case held that where all three defendants were individuals, and two resided in St. Lucie County, and one resided in Broward, suit could be brought by the plaintiffs against the defendants in either Broward or St. Lucie County.

Therefore, once again, there is no express and direct conflict with Doonan, since in Doonan there was not a corporate defendant which is required under Florida law to trigger the

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Enfinqer v. Baxley residency exception. Once again, it is apparent there is no express and direct conflict, and the Petitioners are simply seeking second appeal on the merits.

The Petitioners also rely on Reliable Electrical Distribution Company, Inc. v. Walter Heller and Company of Louisiana, Inc., 382 So. 2d 1287 (Fla. 1st DCA 1980), but once again there is no express and direct conflict, but only different facts. The holding in Reliable was that where two individual defendants share a common county residence, but a corporation is not a resident of that same county, a lawsuit may be brought in any county in which all defendants reside. Both of the individuals undisputedly resided in Dade County, and since in Reliable the two individual defendants shared a common county of residence, these are different facts than the present case. Once again, there is no express and direct conflict.

It is important also to bear in mind that the purpose of the Florida Statutes relating to proper venue and change of venue are to have actions brought in the forum that will cause the least amount of inconvenience and expense to the parties, which in this case is clearly Pasco County. Premier Cruise Lines, Ltd., Inc. v. Gavrilis, 554 So. 2d 659 (Fla. 3d DCA 1990); Kilpatrick v. Boynton, 374 So. 2d 557 (Fla. 4th DCA 1979); Gaboury v. Flacrler

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Hospital, Inc., 316 So. 2d 642 (Fla. 4th DCA 1975); Goodvear Tire and Rubber Company v. Mann, 285 So. 2d 681 (Fla. 3rd DCA 1973), reversed on other grounds, 300 So. 2d 666 (Fla. 1974) ,- Allen v. Summers, 273 So. 2d 13 (Fla. 3rd DCA 1973); England v. Cook, 256 So. 2d 403 (Fla. 3rd DCA 1972); Polar Ice Cream & Creamery Company v. Andrews, 146 So. 2d 609 (Fla. 1st DCA 1962) .

The plaintiff relies on the case of Alladin Insurance Agency, Inc. v. Jones, 687 So. 2d 937 (Fla. 3rd DCA 1997), but once again that case does not create express and direct conflict because there were simply different facts. Alladin holds that where all defendants in a case have a common county of residence, the suit is only appropriate in that county. Therefore, there is no express and direct conflict with the decision in the present case, since in Alladin there was no individual defendant, but rather three corporations.

Once again, it is apparent there is no express and direct conflict, but only different facts.

In summary, it is clear there is no express and direct conflict and the Petitioners are simply aggrieved that the trial court correctly applied the law to the change of venue question, and the three-judge appellate panel of the Fourth District Court of Appeal also correctly applied the law.

Therefore, there is no express and direct conflict as is necessary for discretionary review, but only different facts, and therefore the Petition for Discretionary Review must be denied.

CONCLUSION

There is no express and direct conflict as is necessary for discretionary review, but only different facts, and therefore the Petition for Discretionary Review must be denied.

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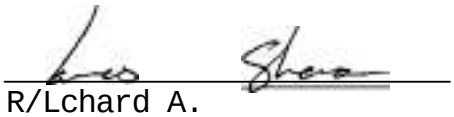
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of May 2010 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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RAS/mn

INDEX TO RESPONDENT'S APPENDIX

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

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

Appellants,

v.

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

No. 4D09-4140 .[April 7, 2010] DAMOORGIAN, J.

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 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.

A trial court's order granting a motion to transfer venue based on a plaintiffs 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)).

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 539-41.

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 1078.

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.

HAZOURI and MAY, JJ., concur.

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ana I. Gardiner, Judge; L.T. Case No. 09-32878 (11).

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Not final until disposition of timely filed motion for rehearing.