

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners,

CASE NO.: SC10-868

FOURTH DCA CASE NO.: 4D09-4140

v.

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

Respondents.

RESPONDENT CSX TRANSPORTATION, INC.'S

BRIEF ON JURISDICTION

DANIEL J. FLEMING

FB# 0871222

djf@mfglaw.com

JOSE A. GUTIERREZ

FB# 0964042

jag@mfglaw.com

MELKUS, FLEMING & GUTIERREZ

800 W. De Leon Street

Tampa, Florida 33606

(813) 623-2747

(813) 620-4669 fax

Attorneys for Respondent CSXT

TABLE OF CONTENTS

Table of Authorities.....	iii
Preliminary Statement.....	1
Statement of the Case.....	1
Summary of the Argument.....	1
Argument.....	2
I. The Fourth District’s decision below does not expressly and directly conflict with this Court’s holding in <u>Enfinger</u>	2
II. The Fourth District’s decision below does not expressly and directly conflict with decisions of other District Courts of Appeal.....	6
Conclusion.....	8
Certificate of Service.....	9
Certificate of Compliance.....	9

TABLE OF AUTHORITIES

Florida Constitution

Art. V, § 3(b)(3), Fla. Const.	8
-------------------------------------	---

Florida Statutes

Fla. Stat. § 46.01.....	4
Fla. Stat. § 46.02.....	4
Fla. Stat. § 46.04.....	4
Fla. Stat. § 47.021.....	4, 6

Florida Rules of Appellate Procedure

Fla. R. App. P. 9.100(1).....	9
Fla. R. App. P. 9.210(a)(2)	9

Florida Cases

Aladdin Ins. Agency, Inc. v. Jones

687 So.2d 937 (Fla. 3d DCA 1997)	7
--	---

A-Ryan Staffing Solutions Inc. v. Ace Staffing Mgmt. Unlimited, Inc.

917 So.2d 1000 (Fla. 5th DCA 2005)	8
--	---

Doonan v. Poole

114 So.2d 504 (Fla. 2d DCA 1959)	7
--	---

Enfinger v. Baxley

96 So.2d 538 (Fla. 1957).....	2, 3, 5
-------------------------------	---------

Inter-Medic Health Centers, Inc. v. Murphy

400 So.2d 206 (Fla. 1st DCA 1981)	2
---	---

Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.

382 So.2d 1287 (Fla. 1st DCA 1980)	6
--	---

Walden Leasing, Inc. v. Modicamore

559 So.2d 656 (Fla. 4th DCA 1990)	2, 5
---	------

Other State Cases

Brady v. Times Mirror Co.

106 Cal. 56 (Cal. 1895)..... 4

PRELIMINARY STATEMENT

In this brief, Willie E. Brown and Brenda Brown, the Plaintiffs below and Petitioners here, will be referred to as “Petitioners” or “Plaintiffs,” as appropriate. CSX Transportation, Inc., the Defendant below and Respondent here, will be referred to as “Respondent” or “CSXT.” Helena Chemical Co., Inc., Co-Defendant below, will be referred to as “Helena Chemical.” Kim Nagelhout, Co-Defendant below, will be referred to as “Mr. Nagelhout.”

STATEMENT OF THE CASE

Petitioners’ statement of the case is generally accepted where not argumentative. For clarification, CSXT orally joined in Helena Chemical’s Motion to Transfer Venue from Broward County to Pasco County, as the Order granting same reflects.

SUMMARY OF ARGUMENT

Both the trial court and the Fourth District Court of Appeal properly applied the joint residency rule to the case at hand finding that venue is proper only in Pasco County, where Co-Defendant Helena Chemical and its employee, Mr. Nagelhout, reside¹. The unique facts of this case differ from that in Enfinger and

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. While it does not have an office or agent in Pasco

the other cases cited by Petitioners such that there is no conflict. Enfinger v. Baxley, 96 So.2d 538, 540-41 (Fla. 1957); Walden Leasing v. Modicamore, 559 So.2d 656, 657 (Fla. 4th DCA 1990)(citing Inter-Medic Health Centers v. Murphy, Inc., 400 So.2d 206 (Fla. 1st DCA 1981)). Therefore, this case does not provide a basis for the exercise of discretionary jurisdiction by this Court.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S HOLDING IN ENFINGER.

Petitioners contend that the Order Transferring Venue to Pasco County where Helena Chemical, a corporation, and Kim Nagelhout, an individual, reside is in express and direct conflict with Enfinger because they believe that the joint residency rule established in Enfinger only applies when all defendants share a common residence. However, Petitioners misapprehend the holding in Enfinger as requiring all defendants to share a common county of residence for the joint residency rule to apply. Instead, Enfinger establishes that when a case involves an individual defendant and a corporate defendant who share a common county of residence, venue is proper only in that county of shared residence. Enfinger did not involve a third defendant, which is a corporate defendant, such as the case

County, its tracks and trains operate throughout Pasco County, and that is where the subject accident occurred.

below. However, the fact that an additional corporate defendant does not share the same county of residence as the other corporate defendant and its employee does not alter the reasoning behind this principle. As the facts herein are different than in Enfinger, there is no conflict and, therefore, this case does not provide a basis for this Court to exercise its discretionary jurisdiction.

In Enfinger, this Court set out the joint residency rule requiring that when a natural person/individual is sued along with a corporate defendant and there is a county in which they both reside, venue is proper only in that county of joint residence. Enfinger at 540-41. In Enfinger, the plaintiff sued Enfinger, an individual, and Atlantic Coast Line Railroad Co., Enfinger's employer, was joined as a party defendant. Enfinger at 539. Enfinger's county of residence was Polk County. Id. His employer, Atlantic Coast Line Railroad Co., had an agent and did business in both Polk County and Duval County. Id. The plaintiffs brought suit in Duval County and the defendant moved to dismiss for improper venue arguing that it should have been brought in Polk County. Id. The trial court denied the motion and the defendants appealed. Id. The Supreme Court, after reviewing the Florida Statutes pertaining to venue, determined that in the situation such as this where there is an individual defendant and a corporate defendant, and both share a county of residence, suit must be in that common county of residence.

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, § 46.02 cannot be applied to defeat the individual defendant's venue privilege granted by § 46.01.

Id. at 540-41. The Court went on to explain that if sued alone, the defendant corporation would have no greater right under § 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 § 46.01 of being sued in Polk County. Id. at 540. Thus, the Court did not believe that § 46.02 should be applied to give the plaintiff a right to choose the forum in which to bring his suit. Id. The right of a plaintiff to have an action tried in a county other than that in which the defendant has his residence is exceptional and if the plaintiff would claim such a right, he must bring himself within the terms of the exception. Id. (quoting Brady v. Times Mirror Co., 106 Cal. 56 (Cal. 1895)).

Petitioners argue that Broward County is their proper choice of venue because Helena Chemical and CSXT do not share a residence, thus Florida Statute § 47.021 becomes operational. Florida Statute § 47.021 states, “[a]ctions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.” However, the joint residency rule is an exception to this statute and trumps their choice of venue. Since Helena Chemical, as the corporate defendant, and Mr. Nagelhout, as the individual defendant, both reside in Pasco County, Pasco County is the only proper venue for this case.

Enfinger at 540-41; Walden Leasing at 657. As Co-Respondents Helena Chemical and Mr. Nagelhout have previously stated, the joint residency rule was fulfilled by Helena Chemical and Mr. Nagelhout having joint residence in Pasco County, regardless of where CSXT resides. Walden Leasing at 657.

Cases that have the same factual scenario as our case, i.e., where an individual defendant and a corporate defendant share a common county of residence but a second corporate defendant does not, have applied Enfinger's joint residency rule and held that venue is proper only in that county of shared residence between the one corporate and individual defendant. The Walden Leasing case is directly on point as it involved multiple corporate defendants and an individual defendant. Walden Leasing at 657. The court held that where a corporate defendant resides in the same county as the individual defendant, venue is proper only in that county of joint residency even though the other corporate defendant resided in a different county. Id. This same reasoning was correctly applied by the trial and appellate court in our case.

Accordingly, venue is proper only in Pasco County, the shared residence of Mr. Nagelhout, an individual, and Helena Chemical, a corporation. As the decision of the Fourth District Court of Appeal does not expressly and directly conflict with this Court's opinion in Enfinger, this Court does not have jurisdiction to review same.

II. THE FOURTH DISTRICT'S DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

Petitioners cite the cases of Reliable Elec., Doonan, and Aladdin, for their position that there is a conflict between the Fourth District Court of Appeal's decision and the decisions of the First, Second, and Third District Courts of Appeal applying Enfinger. However, as these cases are clearly distinguishable from the facts in our case, no express or direct conflict exists between the subject Order Transferring Venue and the holding in these district courts of appeal. Therefore, this case does not provide a basis for the exercise of this Court's jurisdiction.

In Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc., 382 So.2d 1287 (Fla. 1st DCA 1980), the action was taken in Bay County against three defendants, two of whom were individuals and the other a corporation. Both of the individuals undisputedly resided in Bay County, but the corporation claimed it did not. Id. The court of appeal accepted this contention and held that the suit could be brought in any of the counties in which any of the defendants resided. Id. at 1287-88. This is a different situation than the one at hand and therefore inapplicable to our facts. The issue in Reliable Elec. was whether the right of a corporation to be sued in the county where it does business controls over the right of a plaintiff under Florida Statute § 47.021 to bring suit in any county where one of the multiple defendants resides. Id. at 1288. It did not involve a factual

scenario such as ours with a corporation and an individual sharing residence while another corporation does not reside in that shared residence. Id. The court held that where two individual defendants share a common county of residence but the corporate defendant does not reside in that county, suit may be brought in any county in which any of the defendants reside. Id.

In Doonan v. Poole, 114 So.2d 504, 505 (Fla. 2d DCA 1959), all three of the defendants were individuals, with no corporate party whatsoever; two resided in St. Lucie County and one resided in Broward. The court held that suit could be brought against the defendants in either Broward or St. Lucie County. Id. at 506. Doonan did not involve a corporate defendant and an individual defendant which was why the Enfinger joint residency exception was not triggered. In fact, in Doonan, the court even recognized that Enfinger was a distinguishable case and specifically stated that the rule of law in Enfinger was not determinative of that situation. Id.

In Aladdin Ins. Agency, Inc. v. Jones, 687 So.2d 937, 938-39 (Fla. 3d DCA 1997), there were three different corporate defendants but no individual defendant involved, which makes it completely different from the facts at hand. The Aladdin holding simply applies the rule that where all of the defendants in a case have a common county of residence, the suit is only appropriate in that county. Id. at 939. Therefore, since Reliable Elec., Doonan, and Aladdin are distinguishable from the

Fourth District's opinion below, there is no express or direct conflict and this court has no jurisdiction to exercise discretionary review.

Lastly, the Fourth District's opinion below is actually consistent with other district court cases involving facts similar to ours. The Fifth District Court of Appeal has held that where a foreign corporation and an individual are properly joined as defendants, and the corporate defendant has an agent in the county in which the individual defendant resides, the venue statute governing actions against defendants residing in different counties cannot be applied to defeat the individual defendant's venue privilege granted by the general venue statute. A-Ryan Staffing Solutions Inc. v. Ace Staffing Mgmt. Unlimited, Inc., 917 So.2d 1000 (Fla. 5th DCA 2005).

CONCLUSION

For the reasons stated herein, Respondent respectfully submits that this Court can not exercise its jurisdiction to review the decision below under Article V, Section 3(b)(3) of the Florida Constitution, as no direct and express conflict exists to provide a basis for review.

DANIEL J. FLEMING
FB#0871222
JOSE A. GUTIERREZ
FB#0964042
MELKUS, FLEMING & GUTIERREZ

800 W. De Leon Street
Tampa, Florida 33606
(813) 623-2747
(813) 620-4669 fax
Attorneys for Respondent CSXT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail and e-mail to Howard A. Spier/Lincoln Connolly, Esq., ROSSMAN, BAUMBERGER, REBOSO & SPIER, 44 W. Flagler Street, 23rd Floor, Miami, FL 33130 (counsel for Plaintiff); David B. Goulfine, Esq., HIGHTOWER & PARTNERS, 7380 Sand Lake Road, Suite 395, Orlando, Florida 32819 (counsel for Nagelhout & Helena Chemical); and, Richard A. Sherman Sr., Esq., RICHARD A. SHERMAN P.A., Suite 302, 1777 South Andrews Avenue, Fort Lauderdale, FL 33316 (Co-Counsel for Nagelhout & Helena Chemical) on June 2, 2010.

JOSE A. GUTIERREZ

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the foregoing Brief on Jurisdiction satisfies the requirements of Rules 9.100(1) and 9.210(a)(2), Florida Rules of Appellate Procedure.

JOSE A. GUTIERREZ