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' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

This proceeding arises from a trial court order granting a motion to transfer venue from Broward County to Pasco County. That order was affirmed by the Fourth District Court of Appeal, in a decision that is in express and direct conflict both with a decision of this Court, and with decisions of three other district courts of appeal.

The Petitioners in this case, Willie E. Brown and Brenda Brown ("the Browns"), filed suit in Broward County against the Respondents, Helena Chemical Company, Inc. ("Helena Chemical Co."), CSX Transportation, Inc. ("CSX"), and Kim Nagelhout ("Nagelhout"), due to a collision that occurred in Pasco County. (A. 1) Nagelhout resided in Pasco County and Helena Chemical Co. had a business residence in that county. (A. 2) But CSX did not share Pasco County as a residence, and had its principal place of business in Duval County. (A. 2) The Respondents filed a motion to transfer venue to Pasco County based upon the joint residency rule established in *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), which motion the Browns opposed because "the joint residency rule does not apply where all defendants do not share a county of residence." (A. 2) The trial court granted a transfer of the case to Pasco County and was affirmed by the Fourth District on appeal, citing *Enfinger*. (A. 1-2) As stated by the district court, "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."[1] (A. 2 (citing *Enfinger*, 96 So.2d at 540-41; *Lifemark Hosps. of Fla., Inc. v. Roque*, 727 So.2d 1077, 1078 (Fla. 4th DCA 1999))

The district court's decision was rendered on April 7, 2010 and the Browns' notice of invoking this Court's discretionary jurisdiction was timely filed on May 3, 2010. Thus, this case is properly before this Court. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The district court cited two venue statutes below. (A.2) Section 47.011, Fla. Stat., provides, *inter alia*, that suit may be filed where the defendant resides, and §

[1]Because the opinion below does not discuss the ties of any Defendant/ Respondent to Broward County, we resist the temptation to explain why suit was filed there at this time. So this Court does not assume otherwise, however, we note that the opinion below does *not* suggest that none of the Defendants/Respondents also have a residence in Broward County for purposes of venue under Florida law. This Court's jurisdiction is dependent upon the district court's erroneous affirmance of a transfer to a county which all three Defendants do not share as a common residence, which decision is in express and direct conflict both with this Court's decision in *Enfinger* and with the decisions of three other district courts of appeal which properly abide *Enfinger*. Because the opinion below does not suggest that the transfer was due to any impropriety in the Browns filing suit in Broward County to begin with, however, its failure to mention or comment upon the Browns' basis for filing suit in Broward County is not a matter which affects this Court's jurisdiction.

47.021, Fla. Stat., provides, *inter alia*, that where all defendants do not reside in the same county, suit may be filed in any county in which any defendant is resident.

In *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), this Court established the joint residency rule, holding that where all defendants share one county of residence, suit must be filed in that county, even if a corporate defendant (which can have multiple residences) also resides in another county. The court below held that because two of the three defendants share Pasco County as a residence, the joint residency rule applies under *Enfinger*. (A. 1, 2) That holding expressly and directly conflicts with *Enfinger*, because all three defendants are not residents of Pasco County.

The decision below also expressly and directly conflicts with decisions of the courts of appeal of the First, Second, and Third districts, all of which have properly applied *Enfinger* to hold that where all defendants do not share one county of residence, the joint residency rule does not apply and the plaintiff may sue them in any county in which one of them has residence under § 47.021, Fla. Stat.

This Court should exercise its jurisdiction to correct the conflict between the decision below and the decisions of this Court and of three other district courts.

ARGUMENT

I. FLORIDA'S VENUE STATUTES

There are two venue statutes relied upon by the district court below in this case. Section 47.011, Fla. Stat., provides in relevant part that "[a]ctions shall be brought only in the county where the defendant resides...." (A. 2) But because CSX does not share Pasco County as a residence with Nagelhout and Helena Chemical Co., the district court also referenced section 47.021, Fla. Stat., which provides in relevant part that "[a]ctions against two or more defendants residing in different counties may be brought in any county in which any defendant resides." *Id*. (A. 2)

II. THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S HOLDING IN *ENFINGER*

In *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), this Court established the joint residency rule, which holds that where a corporate defendant has multiple counties of residence for purposes of venue (due to its fictional status as a corporation, which enables it to be resident in multiple places), but all defendants have at least one residence in common, venue must be laid in that county of shared, or joint, residence. *Id*. There were only two defendants in *Enfinger*, a human (Enfinger) who resided in Polk County, and his corporate employer (Atlantic), who was resident in both Polk County and Duval County. *Id*. at 539. Because one of

Atlantic's residences was different than Enfinger's, the plaintiff (Baxley) argued that venue was proper in Duval County under § 46.02, Fla. Stat. (the predecessor to § 47.021, Fla. Stat.),[2] because both defendants had "different" counties of residence. This Court decided otherwise. "Here, [Atlantic] '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.

> Section [47.021] . . . 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 . . . 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.... *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. (emphasis added) (citation omitted). Contrary to the district court's conclusion below, the joint residency rule as established in *Enfinger* only disables a plaintiff's right under § 47.021 to sue in any county in which any defendant is resident where

[2]Substantively, the statutes are the same for our purposes here, as § 46.01, Fla. Stat., is to its current version, § 47.011, Fla. Stat. We hereafter take the liberty of substituting the current versions' citations in brackets in their predecessors'

all defendants share a common residence–if they do not *all* share a residence, § 47.021 applies and venue is proper in any county in which any defendant resides. *Enfinger*, 96 So.2d at 540. Again, as stated by this Court, "[t]he applicability of the statute [47.021, allowing venue to be laid in any county in which any defendant is resident] is *clear* where the venue privileges of the defendants are coequal *and not co-existent in the same county*." *Id*. (emphasis added).

Despite this clear holding in *Enfinger*, and despite the fact that the Respondents' venue privileges in this case are not "co-existent in the same county" because only two of the Respondents have a Pasco County residence, the district court below held that:

> [i]n 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.... 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*.

(A. 2 (citing *Enfinger*, 96 So.2d at 540-41; *Lifemark Hosps. of Fla., Inc. v. Roque*,

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stead.

727 So.2d 1077, 1078 (Fla. 4th DCA 1999) (emphasis added))

By holding that the joint residency rule applies when some–but not all–defendants share a county of residence, the decision below expressly and directly conflicts with this Court's decision in *Enfinger* by announcing a contrary rule of law where a human defendant and one, but not all, corporate defendants share a county of residence,[3] *see, e.g, Wallace v. Dean*, 3 So.3d 1035, 1039 & n.4 (Fla. 2009); *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981), or by misapplying *Enfinger*'s joint residency rule where all defendants do not share a county of residence. *See, e.g.*, *Wallace*, 3 So.3d at 1040 & n.6. Accordingly, the Browns respectfully submit that this Court should exercise jurisdiction due to this clear express and direct conflict with *Enfinger* to correct the law in this state as to the joint residency rule where all defendants do not share one common county of

[3]That is, the district court appears to have concluded that it is not the fact that *all defendants* shared a residence that mattered in *Enfinger*, but instead that the magical combination of one human and one corporation sharing a residence was what mattered, regardless of the uncommon residence of the third defendant, CSX, in this case. (A. 2) Such a "one human/one corporation" rationale has no basis in *Enfinger* (other than the coincidence that *Enfinger* only involved two defendants, one of each type), and therefore the decision below announces a rule of law in express and direct conflict with *Enfinger*'s holding. *See also Sinclair Fund, Inc. v. Burton*, 623 So.2d 587 (Fla. 4th DCA 1993); *Walden Leasing, Inc. v. Modicamore*, 559 So.2d 656 (Fla. 4th DCA 1990) (two earlier Fourth District decisions also appearing to apply this "one human/one corporation" rule in conflict with *Enfinger*).

residence.

III. THE FOURTH DISTRICT'S DECISION ALSO EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

As noted, below the Fourth District interpreted *Enfinger*'s joint residency rule to require that this case be transferred to Pasco County even though one of the defendants, CSX, did not have a residence in that county. Not only does that ruling expressly and directly conflict with *Enfinger*, but it also expressly and directly conflicts with decisions of the First, Second, and Third district courts of appeal.

First, in *Doonan v. Poole*, 114 So.2d 504 (Fla. 2d DCA 1959), the plaintiff sued two Saint Lucie County residents and a Broward County resident in Broward County. The trial court dismissed the case as to the Saint Lucie County resident defendants for improper venue. 114 So.2d at 505. The Second District reversed, ordering the action to proceed in Broward County as to all three defendants because "Section [47.021] gives the plaintiff the right to elect between St. Lucie County and Broward County," *id*. at 506, and holding that because all three defendants did not share a common residence, *Enfinger*'s joint residency rule "is not determinative of the present issue." *Id*.

Next, in *Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.*, 382 So.2d 1287 (Fla. 1st DCA 1980), 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 [providing venue for suits against corporations in counties where they have offices, agents, or representatives]...." *Id*. at 1288.

Finally, the Third District in *Alladin Ins. Agency, Inc. v. Jones*, 687 So.2d 937 (Fla. 3d DCA 1997), 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*.

> *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. (emphasis added) (quoting *Enfinger*, 96 So.2d at 539) (other citation omitted).

Enfinger holds 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 under § 47.021, Fla. Stat. 96 So.2d at 540. The decisions of the First, Second, and Third district courts of appeal cited *supra* correctly follow *Enfinger*, accurately conclude that venue is not a matter of counting heads decided by majority rule, and properly hold that *Enfinger*'s joint residency rule only applies where *all* defendants share the same residence, not where some but not all do. By affirming a transfer to Pasco County

under the joint residency rule despite CSX not being a resident of that county, the decision below expressly and directly conflicts with the decisions of these three other districts, and affords this Court not only the jurisdictional basis to review the decision below, *see, e.g.*, *Wallace*, 3 So.3d at 1039-40, but also furnishes this Court with the prudential impetus to correct the lack of uniformity which has developed among the district courts of appeal in this state on the issues of venue and the proper application of the joint residency rule.

CONCLUSION

For the foregoing reasons, the Browns respectfully submit that this Court has and should exercise jurisdiction to review the decision below under Article 5, section 3(b)(3) of the Florida Constitution.

[Signature on following page.]

Respectfully submitted,

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By:_____
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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 May 13, 2010 on David B. Goulfine, Esq., Hightower & Partners, counsel for Appellees, NAGELHOUT and HELENA CHEMICAL, 7380 Sand Lake Road, Suite 395, Orlando, Florida 32819, Richard A. Sherman, Esq., co-counsel for the Appellees, NAGELHOUT and HELENA CHEMICAL, 1777 South Andrews Avenue, Suite 302, Fort Lauderdale, FL 33316, and Daniel J. Fleming, Esq., Melkus, Fleming & Gutierrez, counsel for Appellee, CSX, 800 W. De Leon Street, Tampa, Florida 33606.

_____

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

WE HEREBY CERTIFY that the herein Petitioners' Brief on Jurisdiction

was printed in 14-point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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