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' REPLY BRIEF

Lincoln J. Connolly
Fla. Bar No.: 0084719
ROSSMAN BAUMBERGER, REBOSO,
SPIER & CONNOLLY, P.A.
Counsel for the Petitioners,
WILLIE E. BROWN and BRENDA BROWN
44 West Flagler Street, 23rd Floor
Miami, FL 33130-1808
Ph: (305) 373-0708
Fax: (305) 577-4370
ljc@rbrlaw.com

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 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. _____)".

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

TABLE OF CONTENTS

PRELIMINARY STATEMENT ii

TABLE OF CITATIONS iv

ARGUMENT 1

I. THE RESPONDENTS HAVE FAILED TO DISPROVE ERROR IN THE DECISION BELOW 1

II. NO FORUM NON CONVENIENS ARGUMENT WAS MADE BELOW, THUS THE RECORD IS NOT DEVELOPED FOR SUCH AN ALTERNATIVE DISPOSITION, WHICH WOULD VIOLATE THE BROWNS' DUE PROCESS RIGHTS 3

CONCLUSION 5

CERTIFICATE OF SERVICE 6

CERTIFICATE OF COMPLIANCE 7

TABLE OF CITATIONS

Cases

Alladin Ins. Agency, Inc. v. Jones, 687 So.2d 937 (Fla. 3d DCA 1997) 1

Bueno v. Workman, 20 So.3d 993 (Fla. 4th DCA 2009) 5

Brown v. Nagelhout, 33 So.3d 83 (Fla. 4th DCA), *rev. granted*,
48 So.3d 835 (Fla. 2010) 1

Carbone v. Value Added Vacations, Inc., 791 So.2d 1217 (Fla. 5th DCA 2001) 2

Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999) 5

Doonan v. Poole, 114 So.2d 504 (Fla. 2d DCA 1959) 1

Enfinger v. Baxley, 96 So.2d 538 (Fla. 1957) 1

Heartland Organics, Inc. v. MC Developments, LLC, 8 So.3d 1227 (Fla. 1st
DCA 2009) 2

King v. King, 188 So.2d 857 (Fla. 4th DCA 1966) 2

Levy County School Bd. v. Bowdoin, 607 So.2d 479 (Fla. 1st DCA 1992) 2

Mankowitz v. Staub, 553 So.2d 1299 (Fla. 3d DCA 1989) 2

North Broward Hosp. Dist. v. Durham, 991 So.2d 967 (Fla. 4th DCA 2008) 6

Padin v. Travis, 990 So.2d 1255 (Fla. 4th DCA 2008) 1

Parisi v. Broward County, 769 So.2d 359 (Fla. 2000) 6

Passport Leasing Corp. v. Zimmerman, 945 So.2d 660 (Fla. 4th DCA),
rev. dismissed, 954 So.2d 1156 (Fla. 2007) 4

Porter v. Porter, 913 So.2d 691 (Fla. 3d DCA 2005) 5

Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.,
382 So.2d 1287 (Fla. 1st DCA 1980) 1

Robertson v. State, 829 So.2d 901 (Fla. 2002) 5

Sinclair Fund, Inc. v. Burton, 623 So.2d 587 (Fla. 4th DCA 1993) 1

Walden Leasing, Inc. v. Modicamore, 559 So.2d 656 (Fla. 4th DCA 1990) 1

Constitutional Provisions

Amendment 14, Section 1, United States Constitution 6

Article 1, Section 9, Florida Constitution 6

Statutes

Section 47.011, Fla. Stat. 2

Section 47.021, Fla. Stat. 1, 3, 7

Section 47.122, Fla. Stat. 3

Rules

Fla. R. App. P. 9.210(a)(2) 8

ARGUMENT

I. THE RESPONDENTS HAVE FAILED TO DISPROVE ERROR IN THE DECISION BELOW

The Respondents in their answer briefs adhere to their argument that joint residency rule this Court established in *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957), does not mean that all defendants must reside in the same county for it to apply. Instead, they claim that so long as one human defendant and one corporate defendant reside in the same county, the case must be filed there, despite other defendants not residing in the that same county, and regardless of § 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"). The Fourth District is the only district to have (sometimes) adopted this view.[1] The Respondents dismiss those cases cited by the Browns that properly follow *Enfinger*[2] (including one from

---

[1] *See Brown v. Nagelhout*, 33 So.3d 83 (Fla. 4th DCA), *rev. granted*, 48 So.3d 835 (Fla. 2010); *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) (all holding the joint residency rule applies when a human defendant and a corporate defendant share a county of residence, even though the other defendants do not).

[2] *See Padin v. Travis*, 990 So.2d 1255 (Fla. 4th DCA 2008); *Reliable Elec. Distrib. Co., Inc. v. Walter E. Heller & Co. of La., Inc.*, 382 So.2d 1287 (Fla. 1st DCA 1980); *Alladin Ins. Agency, Inc. v. Jones*, 687 So.2d 937 (Fla. 3d DCA 1997); *Doonan v. Poole*, 114 So.2d 504 (Fla. 2d DCA 1959) (all holding the joint residency does not apply where all defendants are not shown to share one county

the Fourth District) without logical basis for doing so, and they cite a number of cases as allegedly supporting their view, but none of them even arguably do.[3] Yet

---

of residence).

[3]None of the cases cited by the Respondents in their answer briefs (other than the wayward Fourth District decisions cited in footnote 1, *supra*) apply the joint residency rule where a human defendant and a corporate defendant, but not all defendants, reside in the same county. To the extent that these cases relied upon by the Respondents were not already cited or discussed in our Initial Brief, we distinguish them as follows:

—*Heartland Organics, Inc. v. MC Developments, LLC*, 8 So.3d 1227 (Fla. 1st DCA 2009), involved a suit filed in the county in which the cause of action accrued, a proper venue regardless of any defendant's residency, and rejected the application of the joint residency rule as not being an exception to § 47.011, Fla. Stat.

—*Carbone v. Value Added Vacations, Inc.*, 791 So.2d 1217 (Fla. 5th DCA 2001), involved the proper application of the joint residency rule where all three defendants were resident in Dade County.

—*Levy County School Bd. v. Bowdoin*, 607 So.2d 479 (Fla. 1st DCA 1992), involved the denial of a motion to transfer venue. The First District reversed and remanded for consideration of whether the home venue privilege should apply because the school board was a defendant, and whether all defendants resided in Levy County, in which case the joint residency rule (there called the joint-corporate defendant rule for unknown reasons) should apply.

—*Mankowitz v. Staub*, 553 So.2d 1299 (Fla. 3d DCA 1989), involved a suit filed in Dade County in which all defendants shared a residence in Monroe County; therefore the Third District properly applied the joint residency rule by requiring a transfer to Monroe County.

—*King v. King*, 188 So.2d 857 (Fla. 4th DCA 1966), involved only two

the Respondents never explain why the magical combination of one human defendant and one corporate defendant residing in the same county would matter in Florida's venue jurisprudence in the face of § 47.021, when one or more other defendants (whether human or corporate) do not reside in the same county. We submit that the absence of any justification in their answer briefs for so bizarre a rule of venue is itself a confession of its invalidity.

Unless this Court believes that the avowed magical formula of one human and one corporate defendant residing in one county (no matter that other defendants do not reside there as well) can, does, and for some reason should matter and control Florida venue law, it is clear that the decision below and the order appealed must be reversed as being in violation of the Browns' rights under § 47.021, and that this case should be returned to its original (and proper) Broward County venue, where Helena Chemical and CSX both reside.

II. NO FORUM NON CONVENIENS ARGUMENT WAS MADE BELOW, THUS THE RECORD IS NOT DEVELOPED FOR SUCH AN ALTERNATIVE DISPOSITION, WHICH WOULD VIOLATE THE BROWNS' DUE PROCESS RIGHTS

---

defendants, and either both shared Pinellas County as a residence and the joint residency rule was properly applied by the Fourth District on appeal, or the district court completely misapplied the rule in the absence of any "joint" residence at all.

Respondents, Helena Chemical and Mr. Nagelhout, devote a significant amount of their answer brief to arguing that this Court should alternatively uphold the rulings below under § 47.122, Fla. Stat., which permits a trial court to transfer a case under the doctrine of forum non conveniens. *See* Brief of Respondents [Helena Chemical and Mr. Nagelhout] on the Merits, at 23-32. But their motion to dismiss or transfer was not based upon this statute, did not cite it, and did not seek transfer on this ground, seeking transfer only on the basis of their magical formula take on the joint residency rule. (S.R. 66-69). The Respondents likewise did not move *ore tenus* on this basis, make this argument, or cite this statute orally at hearing before the trial court (R. 85-115), and the record is presently silent on the number or residence of any non-party witnesses.[4] Although obviously some liability witnesses will be residents of Pasco County, obviously other liability

[4]Counsel for Helena Chemical and Mr. Nagelhout did make a passing reference to the location of some witnesses at hearing, without any factual support or specificity: "The majority of the witnesses are in Pasco County. The cause of action accrued in Pasco County. And that's where the case should be tried in the interest of justice and based on the joint residency rule being satisfied." (R. 91-92). Of course, "unsworn allegations of counsel are not evidence," *Passport Leasing Corp. v. Zimmerman*, 945 So.2d 660, 662 (Fla. 4th DCA), *rev. dismissed*, 954 So.2d 1156 (Fla. 2007), and thus this passing reference is not something the Respondents can rely upon as record evidence here. *See* Brief of Respondents [Helena Chemical and Mr. Nagelhout] on the Merits, at 31 ("though the exact identity and number of witnesses is not yet clear, *it has been argued* that many of the witnesses to the accident are in Pasco County").

witnesses will be residents of other counties, such as Broward County and Duval County (as to other CSX personnel on the train, or management and corporate officers responsible for maintaining the subject crossing and overseeing the requirements for operation and maintenance), and presumably the record will be developed to show damages witnesses (medical witnesses, economic loss and employment witnesses, and before and after and loss of consortium witnesses) are residents of Broward County where the Browns reside, or will live in the surrounding counties.

While the "tipsy coachman" rule allows an appellate court to affirm a trial court judgment that was right for the wrong reason, it can do so only where the alternative ground is supported by the record. *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999) ("if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment *in the record*"). *See also Robertson v. State*, 829 So.2d 901, 906-08 (Fla. 2002). There is nothing in this record to support a finding that the Respondents are right for *any* reason. Here the record is silent as to the location of almost all witnesses (other than the parties themselves) and evidence, as well as the convenience of the parties and the interests of justice, and the trial court certainly made no findings in this regard. As such, the tipsy coachman rule is inapplicable

here.[5]

Furthermore, because this statute or basis for transfer was never raised by the Respondents in the trial court, and because none of the parties filed any witness lists or affidavits, called any witnesses, or marshaled any evidence at hearing to litigate it below, allowing the Respondents to succeed for this alternate reason raised for the first time in the Fourth District[6] would be a violation of the Browns' procedural due process rights, because they were given no notice about, opportunity to be heard on, or ability to develop a record on this issue before the trial court below. *See, e.g., North Broward Hosp. Dist. v. Durham*, 991 So.2d 967 (Fla. 4th DCA 2008); Amend. XIV, § 1, U.S. Const.; Art. I, § 9, Fla. Const. As such, this Court should decline Helena Chemical's and Mr. Nagelhout's request that it decide this issue in the first instance now by speculation about a nonexistent

---

[5] *See, e.g., Bueno v. Workman*, 20 So.3d 993, 998 (Fla. 4th DCA 2009) ("an appellate court *cannot* employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so") (citation omitted); *Porter v. Porter*, 913 So.2d 691, 694 (Fla. 3d DCA 2005) ("[i]n the absence of support in the trial court record, the 'tipsy coachman' doctrine does not apply").

[6] Helena Chemical and Mr. Nagelhout did try to entice the Fourth District to affirm on this premature basis (R. 210-19), which the Browns opposed on the same grounds as here (R. 229-31), but the Fourth District did not reach the merits of this issue or the impact of its absence from the record below, yet another reason this Court should not reach it now. *See, e.g., Parisi v. Broward County*, 769 So.2d 359, 367 (Fla. 2000) ("we decline to reach this issue because it was not decided by the

record.

CONCLUSION

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

Respectfully submitted,

ROSSMAN, BAUMBERGER, REBOSO
SPIER & CONNOLLY, P.A.
Counsel for the Petitioners,
Willie E. Brown and Brenda Brown
44 West Flagler Street
Courthouse Tower, 23rd Floor
Miami, FL 33130
Tel: (305) 373-0708
Fax: (305) 577-4370
ljc@rbrlaw.com

By:
Lincoln J. Connolly
Florida Bar No. 0084719

Fourth District in this case").

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on March 14, 2011 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.

____
Lincoln J. Connolly
Fla. Bar No. 0084719

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).

____
Lincoln J. Connolly
Fla. Bar No. 0084719