

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM  
BEACH, FL 33401

CASE NO.: 4D2024-2443  
(consolidated with 4D2024-2459 and  
4D-2024-2465)

L.T. CASE NO.: 2023-020229

BOB'S BARRICADES, a Florida  
Profit Corporation,

Appellant,

vs.

WADSON SAINT HILAIRE

Plaintiff/Appellee.

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**APPELLEES'/PLAINTIFFS ANSWER BRIEF**

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## INTRODUCTION

This case involves an incident that rendered the Plaintiff/Appellee, Wadson Saint Hilaire, quadriplegic. Mr. Saint Hilaire was driving home from work just before dawn, when his vehicle veered into a longitudinal channelizing device being utilized as a barrier wall to close a lane of travel and to protect a construction site.

The record shows that the Defendant, Bob's Barricades, had failed to select the proper equipment the FDOT required in its contract and related documents. It also failed to install the equipment with the required safety devices designed to ensure the barrier would be secure enough to prevent vehicles from leaving the road.

Bob's Barricades is headquartered in Broward County. As such, it must and *does agree* that Plaintiff properly filed his lawsuit there. Still, it asserts that pursuant to section 47.122, Florida Statutes, Broward is a "substantially inconvenient forum."

Since the venue hearing, the Plaintiff has settled and/or dismissed every other party to this action, **leaving Bob's Barricades as the *only remaining Defendant in the action***. In seeking transfer, Bob's failed to file

a single affidavit or any other sworn proof to support its motion. It also never adopted or joined in the now “**former**” co-defendant’s affidavits.

Based on the lack of any evidence in this record to support Bob’s motion, the trial court refused to transfer the case from Broward County. Bob’s Barricades appeals that ruling.

We will refer to the Plaintiff/Appellee, Wadson Saint Hilaire, as the Plaintiff, or by his proper name. We will refer to the Defendant/Appellant, Bob’s Barricades, as Bob’s Barricades or Bob’s.

As stated above, Broward-based Bob’s Barricades is the only Defendant left in this case. We will refer to **former** Co-Defendant, Elipsis Engineering and Consulting, LLC, as Elipsis, and the **former** Co-Defendant, Creative Management Technology, Inc. as CMTI.

The other former Co-Defendants, Gregori Construction, Inc. and Valtir Rentals, LLC, f/ka Trinity Highway Products LLC, d/b/a Trinity Highway Rentals, **never sought to transfer venue** even before they settled.

Finally, we refer to the Plaintiff’s Appendix as (P.App.\_\_). The Plaintiff has added all emphasis unless otherwise noted.

## **STATEMENT OF THE FACTS**

On or about August 17, 2022, the FDOT issued a “Contract Maintenance Work Document” to Defendant Bob’s Barricades to provide Temporary Traffic Control (TTC) at the site where the FDOT had undertaken two construction projects. (P.App. 9-11). The Contract required Bob’s to furnish, install, and maintain a low profile, longitudinal concrete barrier at the intersection of northbound US 1 and Myers Drive NE, in Palm Bay, in Brevard County. (P.App. 10; 7). The FDOT’s Contract mandated that the barrier would span the entire distance of the TTC. (P.App. 7-9).

The purpose of the TTC zone and the longitudinal concrete barrier was to protect the public from the hazards present in and around the work zone, including the drop off from the slope washout east of US 1 at the site, and to safely re-direct errant traffic back into the inside northbound lane of travel. (P.App. 11).

Bob’s requested that the FDOT permit it to use a water-filled barrier instead of the low profile concrete barrier. (P.App. 21; 130-31). Discovery has revealed that the FDOT granted Bob’s permission to use water filled barrier so long as it followed the appropriate FDOT requirements and specifications. (P.App. 130-31).

Bob's failed to rent or install the equipment from the FDOT's approved product list needed for the erection of the longitudinal concrete barrier. (P.App. 21; 130-31). Instead, Bob's selected and rented from former co-defendant, Valtir, Yodock 2001MB water filled barrier devices to use instead of the low-profile concrete barrier even though it is not listed on the FDOT Approved Products List (P. App. 13-14; 130-31).

According to the manufacturer's published specifications, contractors should only use the Yodock 2001MB as a longitudinal barrier for vehicular traffic control **when used in conjunction with a "steel rail kit."** (P.App. 12). The steel rail kit connects each piece of Yodock 2001MB plastic barrier to the next one **with steel**, to reinforce and enhance the stability and performance of the barrier. (P.App. 12).

Bob's failed to furnish and install the required steel rail kit, which the manufacturer mandates, the FDOT governing documents require, and which Bob's needed to use to ensure that the wrong product complied with the FDOT's contractual standards for barrier use. (P.App. 12-13; 21).

On October 1, 2022, at approximately 6:15 a.m., the Plaintiff was driving home from work through the subject construction site. (P.App. 14). His vehicle veered into the barrier. (P.App. 14). Because Bob's failed to

properly reinforce the plastic barrier with the manufacturer required steel rail kit, instead of protecting Mr. Saint Hilare's vehicle from leaving the road as designed, the impact between his vehicle and the barrier caused the barrier to come apart (P.App. 14).

Without the reinforcement of the steel rail kit that Bob's Barricades failed to use, and the interlocking barrier device coming apart, Mr. Saint Hilare's vehicle was launched airborne, rolling over several times upon landing. (P.App. 15). The impact on landing permanently damaged Mr. Saint Hilare's spinal cord, rendering him quadriplegic. (P.App. 15).

### **STATEMENT OF THE CASE**

Mr. Saint Hilare sued Bob's and the other Defendants in Broward County, where Bob's Barricades maintains its headquarters. (P.App. 5-31). On December 13, 2023, Bob's filed a motion seeking to transfer venue from Broward County to Brevard County. (P.App. 32-65).

**Bob's filed no affidavit or sworn testimony to support its motion.** (P.App. 32-65). It cited solely to the Plaintiff's Complaint to support its motion. (P.App. 39-65).

Former co-defendant, Elipsis, had moved to transfer venue shortly before Bob's did. (P.App. 1). CMTI moved to join Elipsis' and Bob's' motions.

(P.App. 1). They both attached affidavits which the Honorable Carol-Lisa Phillips deemed insufficient. (P.App. 3).

Judge Phillips conducted a hearing on all three motions on May 6, 2024. (P.App. 96-129). Without seeking proposed orders from any of the parties, and with both Elipsis and CMTI still defendants in the case, the Judge authored her own detailed, three-page, single spaced decision on August 22, 2024, **denying** the motion. (P.App. 1-4).

Judge Phillips' Order focused on the requisite showing defendants must make to establish a basis for transfer under section 47.122. (P.App. 2). She noted that "a plaintiff's choice of venue will not be set aside **without a showing of substantial inconvenience to the parties or witnesses**, or that justice requires transfer." (P.App. 2). (Emphasis in original).

Judge Phillips observed: "Upon review, ***Defendant Bob's Barricades has failed to file an affidavit or any evidence*** to show that litigating this case in Broward County would result in substantial inconvenience to it and/or to its witnesses. (P.App. 2). She found "***Bob's Barricades has failed to provide the Court with any evidence to support the arguments*** made in the motion," adding that "[t]he only document attached to Bob's Barricades' Motion is a copy of the Complaint, which on its face shows that Broward

County is a proper forum, and specifically a proper forum for Bob's Barricades." (P.App. 2).

Judge Phillips also ruled that the affidavits of both of the former co-defendants, Elipsis and CMTI, were conclusory and insufficient. In denying the motions to transfer, she admonished:

It is not the job of the Court to infer substantial inconvenience of witnesses and/or parties; rather, the defendants have the burden to show through evidence that the parties or witnesses will suffer *substantial inconvenience* by being required to litigate in the chose forum. Defendants have simply failed to meet their burden. (Emphasis in original).

(P.App. 3).

It is from this Order that Bob's Barricades has appealed.

### **STANDARD OF REVIEW**

This Court reviews an order denying a motion to transfer venue for an abuse of discretion. *Water's Edge Dermatology, LLC v. Christopherson*, 367 So.3d 508, 510 (Fla. 4<sup>th</sup> DCA 2023). *See also, Hughes Supply, Inc. v. Pearl*, 403 So.2d 614, 615 (Fla. 4<sup>th</sup> DCA 1981) (“[a] motion for change of venue pursuant to the statute is addressed to the sound judicial discretion of the trial court and the exercise of that discretion will not be disturbed except upon a clear showing of abuse”).

In *Tomac of Fla., Inc. v. Gunn's Quality Glass & Mirror, Inc.*, 17 So.3d 320, 321 (Fla.App. 4 Dist., 2009), Judge May explained:

We start with the cardinal principle that we review orders denying motions to transfer venue for an abuse of discretion. *Carr v. Stetson*, 741 So.2d 567, 568 (Fla. 4th DCA 1999). This translates to an affirmance where reasonable minds could differ. *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980) (“If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.”).

*Even before Bob’s was the only remaining Defendant in this case,* its failure *to have filed a single shred of evidence* to support its claim that conducting a trial where it is headquartered would result in “substantial inconvenience,” reasonable people could not have differed as to the correctness of Judge Phillips’ ruling refusing to transfer venue from Broward County. The fact that Bob’s Barricades is the remaining Defendant only further buttresses the correctness of the trial judge’s ruling.

### **SUMMARY OF ARGUMENT**

There is only one Defendant remaining in this case: Broward County-based, Bob’s Barricades. Even before it was the only Defendant, Judge Phillips was well within her discretion to conclude that Bob’s **failed to meet**

**its burden of showing that Broward County was a “substantially inconvenient” venue** for it and its witness, or that justice required transfer.

Bob’s not only maintains its corporate headquarters in Broward County, but it also failed to file a single affidavit or one iota of evidence to support its claim of “substantial inconvenience” as required by law. It did not even attempt to join or adopt the affidavits of its two former co-defendants that also sought transfer, **leaving it with no evidence at all to support its motion** contravening the governing legal standards.

In the face of it offering the court nothing more than mere argument unaccompanied by any evidence, the trial court properly denied Bob’s Barricades’ motion to transfer this case.

### **ARGUMENT**

IN THE FACE OF ITS FAILURE TO SUBMIT ANY “EVIDENCE” TO SUPPORT ITS MOTION TO TRANSFER VENUE, LET ALONE EVIDENCE ESTABLISHING “*SUBSTANTIAL INCONVENIENCE*” TO IT OR THE WITNESSES, JUDGE PHILLIPS PROPERLY DENIED BOB’S BARRICADES’ MOTION TO TRANSFER THE CASE AWAY FROM BROWARD COUNTY WHERE IT MAINTAINS ITS HEADQUARTERS.

The Plaintiffs have alleged that Bob’s Barricades not only failed to use the proper equipment the FDOT mandated for the longitudinal concrete barrier at the subject intersection, but then, once it varied from the Contract’s

specifications, it also failed to utilize the steel rail kit. (P.App. 10-12; 130-31). The manufacturer mandates use of a steel rail kit to reinforce the barrier and provide stability which prevents the barrier from coming apart upon being foreseeably struck by a vehicle proceeding through a construction site. (P.App. 12-13; 15).

Bob's agrees that Mr. Saint Hilare *properly* brought his lawsuit in Broward County, where it maintains its headquarters. (Initial Brief, p. 1-2; 19; 21). It acknowledges that it filed no affidavit or sworn evidence to support its Motion to transfer venue. (Initial Brief, p. 8-9). While Bob's never attempted to "adopt" or "join" the affidavits filed by Elipsis or CMTI, Bob's still cites to those affidavits ***as if*** it did. (Initial Brief, pp. 7-10). However, now, **neither of those defendants are still parties to this case.**

Bob's Initial Brief implicitly urges this Court to forgo "legal standards," and instead repeatedly advocates for the application of "common sense." (Initial Brief, pp. 17; 23; 44). It argues that the trial judge threw "common sense out the window," when she required "that Defendants minutely detail the obvious, that it would be substantially inconvenient for parties and witnesses in Brevard County (or Central Florida) to try a case involving a Brevard County resident in Broward County, approximately 168 miles south."

(Initial Brief, p. 23). However, Bob's cites no authority to support its bold proclamations.

While trying to discount its failure to file any supportive evidence, Bob's tellingly admits that Broward is actually a convenient forum for it. (Initial Brief, p. 21) ("Thus, **while it would obviously be more convenient for Bob's Barricades** officers and directors to litigate the case **in Broward County**, there is no evidence that any critical event involving Bob's Barricades occurred in Broward County or any potential witness is located in Broward County") (emphasis added).

Just as it did below, Bob's wants this Court to ignore the law to focus on its own formulations of standards ("common sense," its invented "critical event" test) for which there is no legal authority. Because there is literally **no support** for Bob's claim that Broward County is a substantially inconvenient forum, this Court should affirm Judge Phillips' refusal to transfer.

A. Florida law allows a defendant to transfer a case to a purportedly more convenient venue, as long as that defendant supports its request with sworn evidence supporting the claim of convenience.

In explaining how courts should apply section 47.122 to assess a request to transfer venue, this Court once wrote:

Section 47.122 provides that “[f]or the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.” **The party seeking a transfer under this section must submit affidavits or other evidence to show that a change of venue is necessary for the convenience of the parties or witnesses or in the interest of justice.** See *Cardelles v. Catholic Health Servs., Inc.*, 14 So.3d 1025, 1027 (Fla. 4th DCA 2009).

*Cohen v. Scarnato*, 270 So.3d 410, 412 (Fla. 4th DCA 2019). (Emphasis added). See also, *Graham v. Graham*, 648 So.2d 814, 815-16 (Fla. 4<sup>th</sup> DCA 1995) (“A transfer of venue based on convenience is improper **where no affidavits or other sworn proof** support the motions.”) (citing *Gallagher v. Smith*, 517 So.2d 744, 747 (Fla. 4<sup>th</sup> DCA 1987)). Without sworn evidence, a party – like Bob’s Barricades – fails to meet its burden of showing the need for transfer.

Bob’s’ would have this Court believe that the law allows the transfer of cases to purportedly “more convenient” venues based on argument alone. (Initial Brief, pp. 13-15). That is not accurate. As clearly set forth above, **the law imposes an evidentiary burden** on defendants seeking transfer, and Bob’s failure to meet that burden is precisely why Judge Phillips denied its motion.

B. The record evidence simply does not support transfer from Broward County.

One of the most revealing sentences found in Bob's' Initial Brief, is its acknowledgment that "**it would obviously be more convenient for Bob's Barricades officers and directors to litigate this case in Broward County...**". (Initial Brief, p. 21). Bob's follows that telling concession with what appears to be its own invented legal theory that **irrespective of evidence**, venue should be where a "critical event involving Bob's Barricades" took place, and then its assertion also unsupported by evidence, that no "potential trial witness is located in Broward County." (Initial Brief, p. 21).

While Bob's wants to argue that the "record" demonstrates that this case belongs in Brevard County (Initial Brief, p. 15), the **actual record of evidence** (and not argument, allegations or sweeping assertions) demonstrates to the contrary. Bob's also completely ignores -- as it did below -- **its burden** to show that it would be "substantially more inconvenient" to litigate this case in Broward County, as the law interpreting section 47.122, Florida Statutes, requires.

Conspicuously absent from Bob's Barricades' Initial Brief is one of Florida's more recent pronouncements of its burden, articulated in *MRI*

*Associates of Brandon, LLC. v. GEICO General Ins. Co.*, 384 So.3d 309, 310 (Fla. 5<sup>th</sup> DCA 2024), and quoted by Judge Phillips in her Order where she admonished:

Where venue is proper in more than one county, ‘a plaintiff’s choice of venue *will not be set aside* **without a showing of substantial inconvenience to the parties or witnesses, or that justice requires transfer**. *Id.* (citation omitted) (emphasis added). ‘A party seeking a change of venue under section 47.122 must ‘*submit affidavits or other evidence* that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice.’ *Id.* 310-11. ‘The court must know who the witnesses are and the significance of their testimony in order to determine whether such testimony is material.’ *Id.* at 311.

(P.App. 2) (italicized emphasis added; underlined and bold-faced emphasis in original).

After setting forth each of the Defendants’ arguments, Judge Phillips properly stated that she had to view those “arguments” within the standards dictated by law, writing “[a]fter careful consideration, **and keeping the above standard in mind**, the instant motions must be denied.” (P.App. 2). At the outset she noted:

Upon review, Defendant **Bob’s Barricades has failed to file an affidavit or any evidence** to show that litigating this case in Broward County would result in a substantial inconvenience to it and/or to its witnesses. Defendant makes the argument that because Plaintiff’s cause of action accrued in Brevard County, Plaintiff lives in Brevard County,

and all potential witnesses—including first responders and medical treaters—are located in Brevard County, Brevard County is the proper venue for this case. Defendant further argues that because convenience of witnesses is the single most important consideration, Brevard County would be the most convenient forum for the witnesses. **However, these are simply arguments not supported by proper affidavit or evidence. Bob's Barricades has failed to provide the Court with any evidence to support the arguments made in the motion.** The only document attached to Bob Barricades' Motion is a copy of the Complaint, which on its face shows that Broward County is a proper forum, and specifically a proper forum for Bob's Barricades. (P.App. 2).

Again, not only did Bob's fail to file a single affidavit or a piece of sworn evidence to support its position, **it also never even filed a notice of "adoption" or "joinder" to enable it to attempt to rely on one of the affidavits** (albeit insufficient ones) filed by the other two now former co-defendants that sought transfer, Elipsis and CMTI. Now, **with those parties gone from the case** (and arguably even if they were still parties) that failure is fatal, because Bob's truly has no support for its motion whatsoever. Judge Phillips properly ruled that she refused "to infer *substantial inconvenience* of witnesses and/or parties" through the Defendants' arguments and filings, concluding that Bob's failed to meet its evidentiary burden. (P.App. 3).

Even if Bob's Barricades, a corporation headquartered in Broward County, could rely on the affidavits filed by its former co-defendants, Judge

Phillips properly concluded that both affidavits **were legally insufficient** anyway. (P.App. 3). In assessing Judge Phillips’ “insufficiency of the affidavits” ruling, this Court must look to the caselaw to understand what makes for a “sufficient” affidavit in the first place; a level of detail that exceeds mere assertions of inconvenience that will befall hypothetical unnamed witnesses who will give unspecified testimony that may or may not be material (like those submitted by Elipsis and CMTI here).

Faced with the Plaintiff’s “presumptively correct” choice of venue, Judge Phillips analyzed the record evidence to see whether the moving Defendants met their burden of **demonstrating** “substantial inconvenience” in the Plaintiff’s chosen forum, as required by section 47.122, Florida Statutes.

In an opinion recently released at the end of October, *Imperial Paving, LLC v. Trujillo*, 2024 WL 4610302 \*1, -- So.3d -- (Fla. 3d DCA Oct. 30, 2024), the Third District affirmed a similarly consolidated appeal (although here, since these appeals were filed, only Bob’s remains as a Defendant in this case), arising out of the trial court’s denial of several defendants’ motions to transfer venue. In this most recent pronouncement of law on this issue, that Court reiterated that:

‘A plaintiff’s forum selection is presumptively correct, and in order to successfully challenge that selection, **the burden is upon the defendant** to show either **substantial** inconvenience or that **undue expense** requires a change for the convenience of the parties or witnesses.’ This requires the defendant to come forward with record evidence to support a transfer. *Id.* (**Emphasis in original**; citations omitted).

The emphasis on the **defendant bearing the burden**, of showing “**substantial**” inconvenience or “**undue expense**” again buttresses the correctness of Judge Phillips’ ruling, and the cases Bob’s Barricades cites do not help it to show otherwise.

In *Water’s Edge Dermatology, LLC, supra., v. Christopherson*, 367 So.3d at 510, for example, the Defendant doctor in a medical malpractice case **filed a detailed affidavit** seeking transfer from Broward to Indian River County, attesting that Broward was inconvenient because neither he, *nor any of the staff involved in the patient plaintiff’s treatment*, resided in or practiced in Broward. The affidavit noted that the patient was treated in Vero, and that it would be *substantially more convenient for the **material** witnesses* if the court transferred the case. Shortly thereafter, the defendant doctor unexpectedly passed away, and **his widow filed an affidavit** that said she and her young daughter lived in Martin County, and it would pose a

substantial hardship to her as a single parent to have to defend the case in Broward.

*Botta v. Ciklin, Lubitz & O'Connell*, 222 So.3d 605 (Fla. 4<sup>th</sup> DCA 2017) involved a probate matter turned into a legal malpractice counterclaim. **The parties' affidavits supporting the transfer** of venue identified various witnesses, including witnesses who would testify to their deceased mother's capacity to have executed the subject power of attorney, the executive director of the living facility where the mother was living, the adult children of one of the daughters, and the neurological medical staff who treated the mother before and after she executed the power of attorney. All these specific witnesses resided in or near Seminole county, and all of whom said it would be extremely inconvenient for them to travel to Broward. *Id.* at 609.

In *Pep Boys v. Montilla*, 62 So.3d 1162, 1164-65 (Fla. 4<sup>th</sup> DCA 2011), the record contained **affidavits from two eyewitnesses, three investigating FHP officers, the EMT, and the paramedic**, who all explained how *expensive and greatly inconvenient it would be for them to travel to Broward County from Sarasota*. In *Cooper Tire & Rubber Co. v. Estate of Chavez ex rel. Hernandez*, 8 So.3d 1157, 1159 (Fla. 3<sup>rd</sup> DCA 2009), *several of the witnesses from the plaintiff's witness list submitted affidavits*

averring that it would be inconvenient, expensive, and disruptive to their professional and personal lives to travel to Miami-Dade County for the proceedings.

Bob's failed to file ANY affidavit or record evidence. It failed to "adopt" or "join" the affidavits of its former co-defendants that Judge Phillips found were legally insufficient. On this record, without any evidence of "substantial inconvenience" or "undue expense," Bob's has no basis to even claim that Judge Phillips abused her discretion in denying the motion to transfer away from the county of Bob's headquarters. *See, Imperial Paving, LLC v. Trujillo; MRI Associates of Brandon, supra.*

Even if this Court looks at the former co-defendants' generalizing, non-specific, conclusory affidavits which Bob's never even sought to rely on, they simply fail to support "substantial inconvenience" or "undue expense" for Bob's Barricades or any of its witnesses. Any argument about convenience for the first responders and medical providers is just that: argument, because there is no evidence at all in this record about the convenience of those witnesses.

Unlike *Pep Boys*, where the defendant filed affidavits from the **two eyewitnesses, the three investigating FHP officers, the EMT and the**

**paramedic**, here the record is silent as to the names, locations and statements of inconvenience as to the various first responders and medical professionals. Simply because these first responders **work** in Brevard County, without any affidavits or other sworn evidence, we have no idea about where they live (as many first responders live in one county and work in another), or about what would be convenient for them. As Judge Phillips wrote, “it is not the job of the Court to infer substantial inconvenience of witnesses and/or parties.” (P.App. 3).

Because Judge Phillips did not abuse her discretion in concluding that **this record fails to show** that Broward County is a substantially inconvenient forum for either of the two now **former** co-Defendants, and certainly not for the only remaining Defendant, Bob’s -- this Court should respectfully affirm her ruling.

*C. The case law supports the transfer of cases when the record contains **evidence** to support the “substantial inconvenience” claimed (which indisputably does not exist here).*

In urging the Court to reverse Judge Phillips, Bob’s argues that the “law” supports transfer. Yet it again refuses to acknowledge that its own failure to create a record compelled Judge Phillips to deny its motion. Bob’s cites cases where defendants **had filed evidence to support transfer**; not

where a defendant made unsubstantiated assertions to the trial court as Bob's did here.

Bob's asserts that the facts of *Water's Edge Dermatology, LLC, supra*. are like ours. (Initial Brief, p. 23). But a review of the **sworn affidavits filed in *that*** case wholly belies Bob's assertion.

In *Water's Edge*, the defendant doctor submitted a **detailed affidavit** in support of the motion to transfer, stating under oath that Broward County was inconvenient because neither the doctor, nor any of the Provider's staff involved in treating the Patient, resided in or practiced there, the patient had received treatment in the Vero Beach office, and that it was substantially more convenient for the material witnesses if the trial court transferred the case to Indian River County. *Id.* at 509. Before the trial court ruled on the motion, the physician defendant unexpectedly died, and his widow filed an **additional affidavit** supporting transfer, advising that as a recent single mother with a small child living in Martin County, trying the case in Broward would present substantial hardship to her. *Id.* at 510.

This Court did conclude there was an "attenuated" connection between the *Water's Edge* case facts and Broward County, concluding that the interests of justice favored the transfer. However, the affidavits the

defendants filed there, **unlike the complete absence of them for Bob's here**, carried the day.

In *Eagle Transport Corp. of North Carolina v. Roch-Hernandez*, 324 So.3d 521 (Fla. 4<sup>th</sup> DCA 2021), the only connection to Broward County was not even a corporate headquarters like we have here with Bob's, but simply a "registered agent" and a "fueling hub." *Id.* at 522. Also, the defendant Eagle Transport was a North Carolina company, and the truck driver lived in Duval County. *Id.* This Court detailed the evidence before it, *i.e.*, that law enforcement officers, the medical examiner and a toxicology expert were all in Alachua County where the accident had occurred, and that the driver was closer to Alachua County than to Broward County.

Not only did that record contain evidence to support that Alachua County was substantially more convenient, a registered agent and a fuel hub are a far cry the corporate headquarters Bob's has in the county where the Plaintiff filed his action. The same applied in *Avis Rent A Car System, Inc. v. Broughton*, 672 So.2d 656 (Fla. 4<sup>th</sup> DCA 1996) and *Braun v. Stafford*, 529 So.2d 735 (Fla. 4<sup>th</sup> DCA 1988), both cited by Bob's, where this Court ruled that where the defendants merely had an "agent" or a "corporate office," were venues that were substantially more inconvenient than the locations where

the respective accidents occurred. Here again, Bob's Barricades maintains its **headquarters** in Broward County; a connection much greater than simply having an agent to accept service.

Bob's also relies on *Gaboury v. Flagler Hospital, Inc.*, 316 So.2d 642, 645 (Fla. 4<sup>th</sup> DCA 1975), where this Court affirmed the trial court's ruling to transfer a case to a forum that would cause the least amount of inconvenience and expense **to the parties** required to answer and defend the action. *Id.* at 645. The irony of Bob's reliance on *Gaboury* should NOT be lost on this Court, considering its admission that "it would obviously **be more convenient for Bob's Barricades** officers and directors **to litigate this case in Broward County...**". (Initial Brief, p. 21). Additionally, as this Court noted in *Gaboury*:

The trial judge had for his consideration the allegations of the complaint, **the affidavits filed**, and the allegations contained in the motions to dismiss and transfer, the applicable venue statutes and the fact that the acts and conduct complained of were allegedly committed in the transferee forum. *Id.* at 645.

Clearly, in *Gaboury*, this Court gave primary consideration to the allegations of the complaint **and the affidavits filed** before determining that the trial court did not "*palpably abuse or utilize a grossly improvident exercise of discretion,*" in ruling to transfer venue. *Id.* at 645.

Bob's reliance on *SMA Behavioral Health Services, Inc. v. Loewinger*, 355 So.3d 988 (Fla. 3d DCA 2023) is also misplaced because unlike Bob's, the defendants there "filed motions, *supported by affidavits* of some of the defendants and witnesses...". *Id.* at 989. The **affidavits** allowed the appellate court there to balance the convenience with record evidence before ruling to allow the transfer.

Similarly, in *Morrill v. Lytle*, 893 So.2d 671 (Fla. 1<sup>st</sup> DCA 2005) cited by Bob's, the court found that "**affidavits in the record** reflect that numerous witnesses are located in or near Alachua County, including the investigating Florida Highway Patrol officer," which led it to conclude that transfer to Alachua was proper. *Id.* at 673.

While several of the short opinions Bob's cites to support the "interest of justice" prong from the 1980's and 1990's and don't mention record evidence one way or the other, *E.I. DuPont De Nemours & Co. v. Fuzzell*, 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) made clear that courts do need **sworn record evidence** before ruling on motions to transfer under section 47.122, Florida Statutes. ("**By sworn affidavit**, the appellants established that the majority of the witnesses resided in Lake County, along with the appellees)." Also, the Third District's very recent decision in *Imperial Paving*,

LLC, *supra*. also reiterates that it is the **defendant's burden** to come forward with **record evidence** to support substantial inconvenience or undue burden.

The law will frequently support a transfer of venue, but only when the requesting defendant (**unlike Bob's**), **files an affidavit to** support the statutory factors under section 47.122, Florida Statutes. Here, without an affidavit or any sworn proof at all, Bob's simply cannot come close to showing that litigating the case in the County where it maintains its headquarters that it has admitted **is** convenient, is not.

*D. The cases Judge Phillips relied on clearly support her refusal to transfer venue in light of the record that lacks any sworn evidence.*

The final section of Bob's Barricades' Initial Brief asserts that Judge Phillips relied on cases that do not support her ultimate ruling; *i.e.*, that Bob's filed **no evidence** and the other two Defendants filed **insufficient evidence** to support the transfer. (Initial Brief, pp. 37-44).

In footnote 2 on page three of Judge Phillips' Order, she cited several cases underlying her conclusion that "Defendants have simply failed to meet their burden" to show **substantial inconvenience** of having to try the case in Broward County, to support a transfer of venue. (P.App. 3). Bob's argues

that none of the cases Judge Phillips cited, *Taylor v. Dasilva*, 401 So.2d 1161, 1162 (Fla. 3d DCA 1981), *Government Employees Ins. Co. v. Burns*, 672 So.2d 834 (Fla. 3d DCA 1996) or *MGA Ins. Co, Inc. v. New Vista Diagnostic Imaging Services, LLC*, 352 So.3d 1290 (Fla. 3d DCA 2023) (citing *R.C. Storage One, Inc. v. Strand Realty, Inc.*, 714 So.2d 634-635 (Fla. 4<sup>th</sup> DCA 1998) are persuasive or helpful to support her ruling. (Initial Brief, p. 39; 40; 41).

Yet, this assertion comes from a **Broward County Defendant** who opted ***not to file an affidavit or a single piece of sworn evidence***, and ***did not even attempt to “join” or “adopt”*** its former co-defendants’ affidavits. Contrary to Bob’s attempt to discount the authoritativeness of these cases, all of them support Judge Phillips’ conclusion that when a plaintiff’s forum selection is presumptively correct, the **“defendant seeking a change of venue bears the burden of proving that substantial inconvenience or undue expense to the parties would result from trial in the forum chosen by the plaintiff and that a change is therefore required for the convenience of the parties or witnesses.”** See, e.g., *Taylor*, at 1162. See also, *R.C. Storage One, Inc. v. Strand Realty*, 714 So.2d 634 (Fla. 4<sup>th</sup> DCA 1998) (affirming the denial of a motion to transfer venue based on section 47.122 because the

**“defendant bears the burden to prove that a trial in the county in which the action was filed would work a substantial inconvenience to it, and to witnesses,”** and going on to observe that the affidavits in support of [defendant’s] motion to transfer venue were little more than a laundry list of witnesses, their places of residence and the conclusory statement that it would be inconvenient for them to travel to Palm Beach County); *Eggers v. Eggers*, 776 So.2d 1096, 1098 (Fla. 5th DCA 2001) (“[W]hen a *forum non conveniens* challenge is raised, it is incumbent upon the parties to submit affidavits or other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice”).

Bob’s spends many pages trying to distinguish *R.C. Storage One, Inc.*, *supra.*, where this Honorable Court affirmed a trial judge’s denial of a motion to transfer venue based on section 47.122, Florida Statutes. (Initial Brief, pp. 41-44). In addressing and affirming the denial, this Court reminded us (the common theme in the case law punctuated by the Third District’s October 2024 *Imperial Paving*, ruling) that

[t]he plaintiff’s venue choice is presumptively correct, and a **defendant bears the burden to prove that a trial in the county in which the action was filed would work a substantial inconvenience to it, and to witnesses.** See *Houchins v. Florida E. Coast Ry. Co.*, 388 So.2d 1287, 1290 (Fla. 3d DCA 1980).

*Id.* at 635. This Court went to observe that

the affidavits in support of [defendant's] motion to transfer venue were **little more than a laundry list of witnesses, their places of residence and the conclusory statement that it would be inconvenient for them to travel to Palm Beach County.** The affidavits failed to disclose any information as to the necessity, relevance or significance of the evidence to be presented by the witnesses. *Id.*

This Court then cited *Foster Marine Contractors, Inc. v. Southern Bell Tel. & Tell. Co.*, 541 So.2d 114 (Fla. 4<sup>th</sup> DCA 1989), where it affirmed the trial court's denial of a motion to transfer venue under section 47.122, due to the **defendant's failure to meet its burden of demonstrating inconvenience.**

*Id.* at 635-36. This Court went on to compare its earlier decision in *Foster Marine* to the *R.C. Storage* case it was addressing, and then advised:

There, as here, the movant failed to disclose the subject matter of the various witnesses' testimony. The court stated:

Notwithstanding appellant's affidavit **which purports to show a great number of witnesses who reside in St. Lucie County**, the county to which appellant sought transfer, **the record fails to disclose that appellant met the burden in the lower court by showing the subject matter of the various witnesses' testimony** (to wit: the *quality* of the testimony versus the *quantity* of the testimony).

*Id.* at 635-36.

In its 2019 ruling in *Progressive Express Ins. Co. v. Belidor*, 276 So.3d 841, 841 (Fla. 4<sup>th</sup> DCA 2019) this Court again cited *R.C Storage* in a parenthetical supporting its affirmance of a denial of motion to transfer venue below, writing:

[N]oting that '[t]he plaintiff's venue choice is presumptively correct, and a **defendant bears the burden to prove that a trial in the county in which the action was filed would work a substantial inconvenience to it, and to witnesses**' and affirming a venue determination where the defendant's 'affidavits failed to disclose any information as to the necessity, relevance or significance of the evidence to be presented by these witnesses.').

As recently as last year, the court in *MGA Ins. Co. v. New Vista Diagnostic Imaging Services, LLC*, 352 So.3d 1290, 1290 (Fla. 3<sup>rd</sup> DCA 2023) cited this Court's opinion in *R.C. Storage* in support of its affirmance of a denial of venue transfer, describing the ruling in its parenthetical as:

([N]oting affidavits in support of appellant's motion to transfer venue were insufficient as they were 'little more than a laundry list of witnesses, their places of residence and the conclusory statement that it would be inconvenient for them to travel to [another county]').

Bob's urges this Court to disregard *R.C. Storage* based on its distinguishable facts. It argues that this case has multiple defendants in multiple counties (and *R.C. Storage* only involved one defendant). Notably,

**this is no longer the case, as Bob's is now the only remaining Defendant.**

Bob's urges that Mr. Saint Hilare resides in the county to where transfer is sought, and that HIPPA and other legal protections somehow prohibited it from listing addresses of law enforcement officers or medical professionals or obtaining affidavits from them. (Bob's Initial Brief, pp. 42-43). It asserts that the affidavits that it did not adopt submitted by its now **former co-Defendants**, Elipsis and CMTI, support inconvenience for all of those Defendants' un-named and un-identified employee witnesses, and thus, this Court should reject the applicability of *R.C. Storage* altogether. (Initial Brief, p. 44).

This Court may wonder, as the Plaintiff does, how Bob's, can complain about a case that simply describes the form and substance of a "sufficient" affidavit, when it failed to file even a single affidavit itself, and failed to even try to "latch on" to its former co-defendants' affidavits? Bob's waived any arguments about the "sufficiency" of the evidence required to support transfer, when it chose not to file a single shred of sworn proof to demonstrate inconvenience or show a requirement of justice.

## **CONCLUSION**

In the face of Bob's Barricades' decision to refrain from filing any sworn proof to support its request for transfer of venue, the trial judge was well within her discretion to deny its motion seeking to move this case to Brevard County pursuant to section 47.122. This Honorable Court should respectfully affirm that ruling.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that on this 3<sup>rd</sup> day of December 2024, a true and correct copy of the foregoing was filed with the Clerk of the Fourth District Court of Appeal, by using the Florida Courts e-Filing Portal, which will send an automatic e-service e-mail to the following parties registered with the e-Filing Portal system:

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**CERTIFICATE OF COMPLIANCE**

The Plaintiff's/Appellee's Answer Brief complies with the font and word count requirements of Rules 9.045 and 9.210, Fla. R. App. P. Counsel has used the 14-point Arial font, and it does not exceed 13,000 words.

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