

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

BARRY FINE and RICHARD BARON,

Appellants,

v.

CASE NO: 4D23-1575  
L.T. – 23000084CAAXMX

WENDY FINE,

Appellee.

\_\_\_\_\_ /

\_\_\_\_\_  
APPELLANTS BARRY FINE AND RICHARD BARON'S  
REPLY BRIEF ON VENUE APPEAL  
\_\_\_\_\_

Jerrell Breslin, Esq.  
Florida Bar No. 269573  
Jonathan Noah Schwartz, Esq.  
Florida Bar No. 1014596  
Schwartz | Breslin, Attorneys at Law  
The DuPont Building  
169 East Flagler Street  
Suite 700  
Miami, Fl 33131  
Tel.: 305-577-4626  
Fax.: 305-577-4630

Table of Contents

JURISDICTION.....vi

SYMBOLS AND REFERENCES .....vi

PREFACE ..... 1

RESPONSE TO APPELLEE’S STATEMENTS OF CASE AND  
FACTS..... 1

ARGUMENT IN RESPONSE AND REBUTTAL..... 8

    I.    THE APPELLANTS MET THEIR BURDEN OF PROOF TO  
          TRANSFER VENUE BASED ON INCONVENIENCE AND UNDUE  
          EXPENSE TO PARTIES AND WITNESSES WHICH SHIFTED THE  
          BURDEN TO THE APPELLEE..... 9

        A.    THE APPELLANTS ESTABLISHED ON THE RECORD, THE  
              NECESSITY, RELEVANCY AND SIGNIFICANCE OF THE  
              TESTIMONY AND EVIDENCE TO BE PRESENTED BY THE  
              PROFFERED WITNESSES. .... 9

        B.    THE APPELLANTS ESTABLISHED THAT A TRANSFER OF  
              VENUE TO THE ELEVENTH JUDICIAL CIRCUIT IS IN THE  
              INTEREST OF JUSTICE. .... 13

        C.    THE APPELLEE FAILED TO MEET THEIR BURDEN OF  
              PROOF WHEN THE APPELLANTS SHIFTED THE BURDEN  
              TO THE APPELLEE. .... 17

    II.   THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO  
          TRANSFER VENUE TO THE ELEVENTH JUDICIAL CIRCUIT IN  
          AND FOR MIAMI-DADE COUNTY, FLORIDA. .... 20

        A.    THE TRIAL COURT SPECULATED AS TO WHAT  
              EVIDENCE THE PLAINTIFF COULD PRESENT AND USED  
              THAT SPECULATION TO OVERCOME THE PROOF  
              SUBMITTED BY THE APPELLANTS. .... 20

        B.    TO THE EXTENT THAT THE APPELLANTS DID NOT

ELICIT OR PROVIDE EVIDENCE, THEY WERE  
PRECLUDED FROM DOING SO BY THE OBJECTIONS OF  
THE APPELLEE AND THE RULINGS OF THE COURT. .... 22

CONCLUSION ..... 24

Certificate of Type, Size and Style ..... 26

## TABLE OF AUTHORITIES

### Cases

<i>American Suzuki Motor Corp v. Friese</i> , 956 So. 2d 495 (Fla. 4th DCA 2007) .....	3
<i>C.E. v. Dep't of Children &amp; Families &amp; Gardian Ad Litem Program</i> , 263 So. 3d 202 (Fla. Dist. Ct. App. 2019) .....	21
<i>Cnty. Of Pasco v. Riehl</i> , 635 So. 2d 17, 18 (Fla. 1994).....	23
<i>Eggers v. Eggers</i> , 776 So. 2d 1096 (Fla. 5th DCA 2001).....	12
<i>F.C. v. Dep't of Children &amp; Families</i> , 780 So. 2d 159, 162 (Fla. 2d DCA 2001) .....	21
<i>First Church of Nazarene of Gainesville, Fla., Inc. v. Site Concepts, Inc.</i> , 265 So. 3d 641, 643 (Fla. 4th DCA 2019) .....	17
<i>Florida Gamco, Inc. v. Fontaine</i> , 68 So. 3d 923, 928 (Fla. 4th DCA 2011). .....	17
<i>Graham v. Graham</i> , 648 So. 2d 814, 815-16 (Fla. 4th DCA 2005). 11	
<i>Hall v. Animals.com, L.L.C</i> , 171 So. 3d 216, 219 (Fla. 5th DCA 2015) .....	11
<i>Hayden v. Beese</i> , 596 So. 2d 1207 (Fla. 4th DCA 1992) .....	20
<i>Hu v. Crockett</i> , 426 So. 1275, 1279 (Fla. 1st DCA 1983) .....	14
<i>Hu v. Crockett</i> , 426 So. 2d 1275, 1277 (Fla. 1st DCA 1983) .....	12
<i>Hu</i> , 426 So. 2d at 1279 .....	16
<i>In re C.W.W</i> , 788 So. 2d 1020 (Fla. Dist. Ct. App. 2001; See <i>R.W.W.</i> , 788 So. 2d at 1024.....	21
<i>K.R.L. v. Dep't of Children &amp; Family Servs.</i> , 83 So. 3d 936 (Fla. Dist. Ct. App. 2012).....	21
<i>R.C. Storage One, Inc. v. Strand Realty, Inc.</i> , 714 So.2d 634 (Fla. 4th DCA 1998) .....	12
<i>Vollmer v. Key Dev. Props.</i> , 966 So. 2d 1022 (Fla. 2d DCA 2007)...	23
<i>Water's Edge</i> .....	7
<i>Water's Edge</i> .....	17

*Wynn Drywall, Inc. v. Aequicap Program Adm’rs, Inc.*, 953 So. 2d, 30  
(Fla. 4th DCA 2007) ..... 12

Statutes

Fla. Stat. § 736.0204(1) ..... 3  
Fla. Stat. 736.0204 ..... 20  
Section 41.122 ..... 11  
Section 47.122 of the Florida Statutes ..... 2, 3, 25  
Section 736.0204(2) ..... 3

Rules

Fla. R. App. P. 9.130 ..... v  
Fla. R. Gen Prac. Jud. Admin. 2530 ..... 15  
rule 1.061 ..... 3  
Rule 1.061 ..... 17

## JURISDICTION

This is an Appeal of a Nonfinal Order denying a motion to change venue, and is brought pursuant to Fla. R. App. P. 9.130.

## SYMBOLS AND REFERENCES

For the purpose of this the Appellant's Reply Brief on Appeal:

### References to parties and witnesses:

The Appellants will be referred to as the "Appellants"; or as, respectively, "Barry Fine" or "Richard Baron."

The Appellee will be referred to as either the "Appellee" or "Wendy Fine."

That certain J. Frank Fine and Murial Sarah Fine Irrevocable Trust Agreement IIIB dated July 2, 2001 shall be referred to as the "Trust."

The Appellee's Answer Brief shall be referred to as the "Appellee's Brief" followed by the page number.

The Appellants' Verified Motion to Transfer Venue shall be referred to as the "Motion".

Appendix:

All documents referred to in this Reply Brief on Appeal (this “Reply Brief”), along with salient testimony in the form of excerpts of transcripts, are contained in the Appellant’s Corrected Appendix filed of record in this appeal. The Appellant’s Corrected Appendix is sequentially numbered and shall be referred to as “A. App.” followed by the page number.

Hearing Transcript:

References to the hearing transcript of June 12, 2023, which is included in the Appendix as Exhibit I, shall similarly be denoted as “A. App.” followed by the page number.

## PREFACE

This appeal arises from the trial court's June 21, 2023 Order (the trial court's "Order") denying the Appellants' Verified Motion to Transfer Venue ("Motion").

It is suggested that the trial court improperly denied the Appellants' Motion as the Eleventh Judicial Circuit in and for Miami-Dade County, Florida is the only proper venue with primary and significant connections to the instant action, and is the most convenient venue for this action. There is no connection to Martin County, Florida other than the fact that the Appellee currently resides there. Accordingly, the trial court's June 21, 2023 Order declining to transfer venue should be reversed and remanded with instructions that venue be transferred to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

## RESPONSE TO APPELLEE'S STATEMENTS OF CASE AND FACTS

The Appellee's statement of facts in her Answer Brief addresses issues that are not at the core of this appeal and are irrelevant to the issue before this Court – the issue of transferring venue. While the Appellants agree that the Appellee Wendy Fine, is a beneficiary under

the Trust, the procedural filings below other than the evidence submitted as to the *forum non conveniens* Motion, have no relevance. For example, the Appellee filed numerous immaterial filings in her Appendix and included them in the statement of facts such as the request of a full and complete copy of the Trust, an accounting, the terms and conditions of the trust, the Petition to Appoint a Special Fiduciary, etc., all of which have no bearing whatsoever on this appeal. The only relevant facts, as opposed to argument, submitted by the Appellee is the fact that Appellants Barry Fine and Richard Baron, both residents of Miami, Florida, have been acting as Trustees of the Trust since their appointment in 2003, and that the Trust was administered in its entirety in Miami, Florida.

The Motion brought by the Appellants under the *forum non conveniens* doctrine codified in Section 47.122 of the Florida Statutes. (A. App. 34-49) and the evidence submitted to the trial court on that issue is the only material evidence that should be considered by this Honorable Court. Although the Appellee is a resident of Martin County, Florida, making venue proper in Martin

County under Section 736.0204(2) <sup>1</sup>, the only convenient forum for the Appellants and witnesses exists in Miami-Dade County, Florida.

Section 47.122 of the Florida Statutes states: “[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.” Although the Appellee incorrectly relies upon *American Suzuki Motor Corp v. Friese*, 956 So. 2d 495 (Fla. 4th DCA 2007), which specifically states that Rule 1.061 does not apply to intrastate transfers. *Id.* at 497. The Appellants have made clear that this appeal is brought solely under Section 47.122 of the Florida Statutes and not Rule 1.061. (A. App. 34-49).

The Appellants’ filed the necessary affidavits required to transfer venue in support of their Motion, which together with the *attempted* testimony of Appellant Barry Fine proffered at the June 12, 2023 hearing (A. App. 34-49) was more than sufficient for the trial court to grant the motion. The Appellants called Appellant Barry Fine to the stand, who was severely restricted on what he was

---

<sup>1</sup> It is noted that Fla. Stat. § 736.0204(1) and (3) would have required that the action be brought in Miami-Dade County, Florida.

permitted to testify to regarding the knowledge and anticipated testimony of the witnesses listed in the Appellants' Motion. This, notwithstanding the fact that that is exactly what the Appellee attempted to do in her Affidavit.<sup>2</sup> (A. App. 101-166).

The Appellee's opposing Affidavit stated: (i) that the Appellee resides in Martin County, that she would testify that she was never provided with an accounting and that Appellant Barry Fine made admissions to her; (ii) that her husband, who resides in Martin County, Florida, would testify as to admissions made by Appellant Barry Fine; (iii) that she believed that witness Ian Brown would testify that the actions of Appellant Barry Fine were despicable; (iv) that she believed that a witness located in New York would testify that Appellant Barry Fine improperly removed funds from the Trust; (v) that she believed that Mike Meister would testify that there were improper investments made by the Trust or improper removal of funds from the Trust; (vi) that she believed that a witness in Palm

---

<sup>2</sup> It seems incongruous that the Appellee's Affidavit could opine to the exact same topics in her Affidavit – the anticipated substance of a particular witness's testimony – but that Appellant Barry Fine could not testify to the same topics, and be subject to cross examination, in open court. But that appeared to be ruling of the trial court.

Beach County, Florida would testify that she never received an accounting; (vii) that she believed that that Jim Bitonti, an out-of-state witness, would testify that Appellant Barry Fine improperly took money from the Trust; (viii) that Defendant Merrill Lynch's representatives resided in Georgia; and (ix) that Delta Airlines flies from Atlanta, Georgia to Palm Beach International Airport and that Palm Beach International Airport is closer to Martin County, Florida than Miami, Florida. (A. App. 52-54).

In response to the assertions in the Appellee's Affidavit, the Appellants filed the Affidavits of James Bitonti, (A. App. 73-74), Michael Meister, (A. App. 79), and Ian Brown, (A. App. 84). Ian Brown's Affidavit stated that Ian Brown never made any such statements to the Appellee and that he had no knowledge of any improper actions of Appellant Barry Fine. (A. App. 84). The Michael Meister Affidavit likewise stated that what the Appellee believed he would testify to was "not true"; and that it was far more convenient for Mr. Meister, who is seriously ill, to travel to Miami, Florida than to Martin County, Florida. (A. App. 79).<sup>3</sup> The James Bitonti Affidavit

---

<sup>3</sup> The trial court rejected this Affidavit outright by stating that the

wholly both rebuts the assertions as to what the Appellee believed James Bitonti would testify to and establishes very clearly on the record that it is more convenient for the out-of-state witnesses, of which there are at least five (5) who will testify in this case, to travel to Miami-Dade County, Florida than it is for them to travel to Martin County, Florida. To that end, James Bitonti stated: “[a]s I would be traveling from out of town, there are far more and less expensive flights to Miami-Dade County, Florida than Palm Beach County. Further, I would not have to travel from the Palm Beach airport to Martin County and once I arrive and there are far more and less expensive hotel options in Miami, Florida.” (A. App. 73-74).

The evidentiary hearing on June 12, 2023 was an opportunity for both parties to present supporting evidence to their affidavits. Appellant Barry Fine appeared and testified, while no witnesses were called by the Appellee. The Appellee, despite bearing the burden as to the venue issue, introduced no evidence and simply made

---

court had personal knowledge that it was easier to travel from St. Petersburg, Florida to Martin County, Florida. In doing so, the trial court did not address the severe illness of the witness when addressing the convenience of his travel. (A. App. 159).

argument.<sup>4</sup> (A. App. 113). At the conclusion of the hearing, the trial court, relying on “common sense,” denied the Appellants’ Motion. On June 21, 2023, the trial court issued its Order denying the Motion, (A. App. 168-169), and incorporated its findings made of record as follows:

THE COURT: Well, I agree with Mr. Ponsoldt. I don't think you-all -- first off, the plaintiff's selection of venue is presumed correct, until it is not. She is a beneficiary under the trust. So this would be an appropriate venue, I think everybody agrees, at least a venue.

I don't believe that the defense has provided the Court sufficient information. I mean, as Mr. Ponsoldt indicated, just now all of a sudden I'm going to go and count witnesses. I listed 15 witnesses. Mr. Ponsoldt listed five. And, therefore, that's how I weigh it? I don't think that's what the structure is. I think I balance the information that's provided to me.

The affidavits, I know you say they are -- not irrefutable but there is no other information to rebut them, but I think judges are allowed to use common sense and their own experience, you know.

I have someone tell me, yeah, it is easier for me to get to Miami than it is to Martin County from Pinellas County, and lived in Pinellas County and lived -- or I went to school in Pinellas County and lived in Miami, and I know the most direct route and that's coming over to the east coast through Martin County to get down to Miami, I think I can use my common sense in doing that and not find that

---

<sup>4</sup> The burden was on the Appellee. *See Water's Edge, infra.*

testimony in the affidavit to be credible.

I don't find the affidavit in the Merrill Lynch employees about, it is easier to fly into Miami than it is to West Palm. There is more -- there is probably more accommodations, but there are sufficient accommodations between West Palm and Martin County, if it is necessary, or Port St. Lucie. And believe me, Miami-Dade is bigger than Martin County or Port St. Lucie, general area.

The other factor is the interest of justice. On the dermatology case that you just cited, that was where the Fourth DCA, you know, came out and said how the dockets in Broward County are so overloaded, and that in the interest of justice, the case could be provided quicker, easier, more efficiently in Indian River County.

So I think I weigh the evidence, and I find in favor of the defense {sic} for those purposes and, therefore, I'm denying the motion at this time.

(A. App. 158-160).

#### ARGUMENT IN RESPONSE AND REBUTTAL

The Appellee's arguments set forth in the Answer Brief erroneously devote a considerable amount of time addressing the Appellants' alleged lack of necessity, relevance, or significance in the evidence to be presented by the witnesses. The trial court erred in failing to appropriately consider the contents of the affidavits of the witnesses submitted by the Appellants, by failing to give the proper weight to the substance of the affidavits and dismissing the affidavits

out of hand. The Appellants met the requisite burden of proof to establish the three statutory factors required to transfer venue by providing adequate affidavits and testimony that established the necessity, relevance and significance of the evidence that would and could be presented by the Appellants' witnesses.

When considering the prima facia case established by the evidence provided the Appellants that Martin County was an inconvenient forum for the witnesses and parties, the lack of any evidence presented by the Appellee, the Appellants affidavits directly opposing Appellee Wendy Fine's Affidavit which shifted the burden of proof to the Appellee to overcome, there could be no outcome under existing precedent other than granting the motion to transfer.

In sum, the trial court abused its discretion in failing to transfer venue to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

- I. THE APPELLANTS MET THEIR BURDEN OF PROOF TO TRANSFER VENUE BASED ON INCONVENIENCE AND UNDUE EXPENSE TO PARTIES AND WITNESSES WHICH SHIFTED THE BURDEN TO THE APPELLEE.
  - A. THE APPELLANTS ESTABLISHED ON THE RECORD, THE NECESSITY, RELEVANCY AND SIGNIFICANCE OF THE TESTIMONY AND EVIDENCE TO BE PRESENTED BY THE PROFFERED WITNESSES.

The affidavits of James Bitoni and Ian Brown were given little to no weight in regard to their substance in determining the convenience of the witnesses and the relevance to case at hand. (A. App. 101-166). The Appellee filed her Affidavit which contained no admissible, or compelling, evidence whatsoever on the venue issue. To the extent that the Appellee stated that she *believed* that certain witnesses would testify in her favor, those witnesses filed counter-Affidavits stating that her *belief* simply was not true.

In response to the assertions in the Appellee's Affidavit, the Appellants filed the Affidavits of Ian Brown, (A. App. 84), and James Bitonti, (A. App. 73-74). Ian Brown's Affidavit stated that Ian Brown never made any such statements to the Appellee, and that he has no personal knowledge of any improper actions on the part of Barry Fine as Trustee on the Trust. (A. App. 84). The James Bitonti affidavit, as to what he would testify to, establishes very clearly on the record that he "do[es] not believe Barry Fine has taken any funds from the Trust improperly." (A. App. 69-74). In opposition to the Appellee's claim, these affidavits directly debunked the Appellee's Affidavit by providing detail as to what these witnesses would testify to and is on

point to the relevance of the case as required by the standard set out in *Hall v. Animals.com, L.L.C*, 171 So. 3d 216, 219 (Fla. 5th DCA 2015).

Additionally, in the June 12, 2023 evidentiary hearing, the testimony of Appellant Barry Fine supplemented the necessity, relevance, and significance of what each of the Co-Trustee Appellants' material witnesses would testify to. The affidavits stating the convenience of each witness, combined with the affidavits of Barry Fine and Richard Baron attached to the Motion which listed approximately twenty witnesses who were far from Martin County, together with Appellant Barry Fine's testimony provided more than sufficient detail to allow the trial court to transfer venue. Section 41.122 requires sworn proof, but that proof is not limited to affidavits. *Graham v. Graham*, 648 So. 2d 814, 815-16 (Fla. 4th DCA 2005).

Appellant Barry Fine, severely limited by the trial court in the depth of his testimony, testified to personal knowledge of how each witness is material and necessary to the co-Trustee Appellants' defense in disclaiming the Appellee's allegations. (A. App. 101-166).

Courts have agreed that “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” may be used to reflect the need for transfer of venue. See *Wynn Drywall, Inc. v. Aequicap Program Adm’rs, Inc.*, 953 So. 2d 28, 30 (Fla. 4th DCA 2007) (quoting *Eggers v. Eggers*, 776 So. 2d 1096 (Fla. 5th DCA 2001); see also *Hu v. Crockett*, 426 So. 2d 1275, 1277 (Fla. 1st DCA 1983) (holding that deposition testimony, interrogatory answers, and *witness lists identifying the location of witnesses* were sufficient to warrant a transfer of venue on a *Forum Non Conveniens* challenge).

The Appellee’s claim that these affidavits are just a “laundry list” as described in *R.C. Storage One, Inc. v. Strand Realty, Inc.*, 714 So.2d 634 (Fla. 4th DCA 1998). However, similar to both the evidence presented and attempted to be presented here, the court in *Eggers v. Eggers*, 776 So. 2d 1096 (Fla. 5th DCA 2001), held that showing a “gist” of relevant knowledge of witnesses is sufficient to support a motion to transfer venue.

The Appellants more that made a showing of a “gist” of the evidence to be presented by the Appellants and the witnesses

notwithstanding the handcuffing of Barry Fine on the witness stand.

B. THE APPELLANTS ESTABLISHED THAT A TRANSFER OF VENUE TO THE ELEVENTH JUDICIAL CIRCUIT IS IN THE INTEREST OF JUSTICE.

The Appellee argues that in the interest of justice, a transfer of venue to the Eleventh Judicial Circuit would deplete the funds of the trust as the Appellants are using the trust funds to defend the case. This is a wholly disingenuous argument and was not raised before the trial court and not considered by the trial court in its ruling. To the extent that trust funds would be used by the Appellants to defend the case,<sup>5</sup> the whole thrust of the Motion and this appeal is that it would be far less expensive to litigate the case in Miami-Dade County, Florida. Here, the administration of the Trust, virtually all necessary witnesses, and the Co-Trustee Appellants are located in the Eleventh Judicial Circuit. Therefore, transferring venue to the Eleventh Judicial Circuit would have the opposite effect of what the Appellee is claiming and the interests of justice would be served by the transfer

---

<sup>5</sup> The issue of whether trust funds were appropriately used to pay a portion of the Appellants fees, or are to be clawed back as requested by the Appellee on July 20, 2023, placing the Appellants in the position of paying their own fees, is yet to be determined by the trial court.

requested by the Appellants.

Any use of Trust funds for litigation fees and expenses, if any are ultimately permitted to be used by the trial court (see footnote 5), in defending the claim brought by the Appellee are far more preserved by litigating in the location where the action accrued, and where the witnesses and Co-Trustee Appellants reside. Litigating in the Eleventh Judicial Circuit would not only be convenient for the vast majority of material witnesses and parties, but the use of Trust funds in the defense of this litigation would be better preserved than litigating in Martin County. The Appellee's argument that the Appellants are using trust funds to defend this case – which, again, was not before the trial court and not part of the trial court's rationale for its ruling - speculates that Trust funds are being used to pay attorney's fees in the litigation of this case. Assuming that ultimately is the case, it would be in the interest of justice to reduce attorneys' fees and costs. Furthermore, "the convenience of the parties' attorneys is given little, if any, weight, in deciding the propriety of a transfer of venue." *Hu v. Crockett*, 426 So. 1275, 1279 (Fla. 1st DCA 1983).

The Appellee also argues that it would be an inconvenience for Appellee Wendy Fine to travel to the Eleventh Judicial Circuit. While this may be true, it defies logic and reason that the interest of justice would be served for all material witnesses and the co-trustee Appellants to travel to Martin County versus only requiring one (1) party and their one (1) witness to travel to Miami-Dade County.

As such, the Appellee cannot, in good faith, suggest that the interest of justice favors keeping venue in Martin County.

The Appellee also states that in terms of convenience, interested witnesses and parties may appear through zoom should the trial court allow it pursuant to Fla. R. Gen Prac. Jud. Admin. 2530. To the extent that Rule eliminates a litigant's ability to have an in person trial and have in person testimony, which is far more compelling than a Zoom appearance, then Fla. R. Gen Prac. Jud. Admin. 2530 would appear to moot the entire body of law on forum *non conveniens*.

However, that said, today's technological advances have often proven that appearing through Zoom may result in technological difficulties such as lost or bad connections and a Zoom witness cannot view any physical evidence or documents other than a

picture-in-picture presented on a screen. The witnesses' ability to meaningfully view evidence by Zoom is determined by the witnesses' access to computers and high resolution screens. Witnesses often appear on their phones meaningfully review any documents of evidence. There is less risk, and it is far better for the finder of fact, in holding an in-person trial with all parties and necessary witnesses present rather than depending on computer screens or telephone screens to testify and review relevant evidence.

As established by the affidavits and evidence presented, it is more convenient for virtually all of the witnesses to appear in Miami-Dade County, which will reduce the risk of these parties and witnesses encountering potential unforeseen forces that can delay the litigation in Martin County.

As previously argued throughout this Appeal, “[t]he convenience of the witnesses is probably the single most important consideration of the three statutory factors . . . [and] this is based on the perception that material witnesses should be located near the courtroom to permit live testimony.” *Hu*, 426 So. 2d at 1279. Again, other than the Appellee, none of the evidence or witnesses' material to the contended

issues to be presented in this action are located in Martin County, Florida.

Lastly, the Court Commentary to Rule 1.061 states that the Court should consider the access to evidence and relevant sites, access to witnesses, adequate enforcement of judgements, and practicalities and expenses associated with the litigation. These factors clearly suggest transferring the case to Miami-Dade County, Florida.

C. THE APPELLEE FAILED TO MEET THEIR BURDEN OF PROOF WHEN THE APPELLANTS SHIFTED THE BURDEN TO THE APPELLEE.

This Court has explained that:

[a] plaintiff may select the venue and that selection will not be disturbed as long as the selection is one of the alternatives in the venue statute. *Florida Gamco, Inc. v. Fontaine*, 68 So. 3d 923, 928 (Fla. 4th DCA 2011). A defendant contesting a plaintiff's facially proper venue selection has the burden of proving the selection is improper and must establish where venue actually lies. *Id.* Once a defendant has challenged venue with an affidavit controverting a plaintiff's venue allegation, the burden shifts to the plaintiff to prove the venue selection is proper. *Id.*

*Water's Edge, supra* (citing *First Church of Nazarene of Gainesville, Fla., Inc. v. Site Concepts, Inc.*, 265 So. 3d 641, 643 (Fla. 4th DCA 2019)).

Here, the Appellants filed their Motion, which included the Appellants' sworn statements that there were over fifteen (15) relevant witnesses that either resided in Miami-Dade County, Florida or that would find testifying in Miami-Dade County, Florida more convenient than doing so in Martin County, Florida. *See id.*

In response, the Appellee filed her Affidavit which contained no admissible, or even remotely compelling, evidence whatsoever on the venue issue. To the extent that the Appellee stated that she *believed* that certain witnesses would testify in her favor, she was wrong and proven wrong. Those witnesses who the Appellee identified filed counter-Affidavits stating that her *belief* simply was not true; and further stating that Miami-Dade County, Florida would be a more convenient forum for each of them.

At the evidentiary hearing, only Appellant Barry Fine took the stand, and readopted his Affidavit and testified that Maria Gonzalez, (A. App. 119-21); Martha Durand, (A. App. 121); Paul Cummings, (A. App. 121-23); Abbie Salt, (A. App. 123-24); Fernando Birbragher, (A. App. 125); Mercy Rodriguez, (A. App. 126); Jeff Pledger, (A. App. 126-27); James Pledger, (A. App. 126-27); Tom Sawyer, (A. App. 127-28);

Ian Brown, (A. App. 128-29); Merrill Lynch employees Brooks Arnold and Jody Watson who reside in Georgia (A. App. 129-30); Michael Meister, (A. App. 79); and James Bitonti, (A. App. 73), all have personal and material knowledge regarding the Trust and Appellant Barry Fine's acts as trustee (the gravamen of the operative Complaint) and that all would be inconvenienced by litigation in Martin County, Florida. As such, Appellant Barry Fine's testimony which reviewed the multiple witnesses listed in the Appellant's Motion (A. App. 34-49), and the additional three (3) affidavits of James Bitoni, (A. App. 73), Michael Meister, (A. App. 79), and Ian Brown, (A. App. 128-29) when viewed together, clearly shifted the burden to the Appellee to rebut the assertions.

As stated in the Appellants' Initial Brief, although the burden clearly shifted to the Appellee, that burden was wholly ignored by both the Appellee and the trial court. The trial court held:

The affidavits, I know you say they are -- not irrefutable but there is no other information to rebut them, but I think judges are allowed to use common sense and their own experience, you know.

Therefore, the trial court acknowledged that the Appellants' case was un rebutted and that the Appellee did not carry her burden

of proof but nonetheless denied the motion. Balancing the evidence submitted, which suggests that the case should be transferred, when juxtaposed against the lack of evidence submitted by the Appellee, it is suggested that the Appellants carried their burden, and once shifted, the Appellee did not even attempt to meet her burden to prove that the venue selection was proper.

For that reason alone, transfer of venue is appropriate.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO TRANSFER VENUE TO THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

A. THE TRIAL COURT SPECULATED AS TO WHAT EVIDENCE THE PLAINTIFF COULD PRESENT AND USED THAT SPECULATION TO OVERCOME THE PROOF SUBMITTED BY THE APPELLANTS.

The Appellee argues that Martin County is the sole proper venue based on the Appellee's residence pursuant to Section 736.0204 Of the Florida Statutes, and that specific venue statutes control over general ones. However, forum *non conveniens* is a common law doctrine that is procedural in nature. It is the law that if there is a conflict between a statute and a rule relating to a procedural point, the statute must give way to the rule. *See Hayden v. Beese*, 596 So. 2d 1207 (Fla. 4th DCA 1992). The trial court failed to recognize this

distinction when it based its decision solely on speculation.

In denying the Appellants' Motion, the trial court speculated as to what the Appellee's lawyer *could have done*, which was wholly improper and denied the Appellants of fundamental due process and fundamental fairness.

Here, the trial court ruled:

THE COURT: Well, I think you can – I don't know that you've proved enough. I mean, if I go -- I don't even know the case. I don't know that the case has moved along enough in order to determine who a witness is. I mean, I'm sure Mr. Ponsoldt could go and file a witness list of 15 or 20 people. You can go and say, well, here's 25 people. And we're going back and forth. I don't -- I'll go ahead, I'll deny it without prejudice, but I don't know, you know, how it's going to turn out going forward.

(A. App. 156) (emphasis added).

It has long been the rule of law in Florida that a trial court cannot base a ruling on speculation. *See, e.g., C.E. v. Dep't of Children & Families & Gardian Ad Litem Program*, 263 So. 3d 202 (Fla. Dist. Ct. App. 2019); *K.R.L. v. Dep't of Children & Family Servs.*, 83 So. 3d 936 (Fla. Dist. Ct. App. 2012); *In re C.W.W.*, 788 So. 2d 1020 (Fla. Dist. Ct. App. 2001); *R.W.W.*, 788 So. 2d at 1024 (citing *F.C. v. Dep't of Children & Families*, 780 So. 2d 159, 162 (Fla. 2d DCA 2001)).

It is respectfully suggested that this finding by the trial court was wholly "arbitrary, fanciful, or unreasonable" by definition, and therefore an abuse of discretion as it was this analysis that led, in primary part, to the Order denying the Motion on appeal.

B. TO THE EXTENT THAT THE APPELLANTS DID NOT ELICIT OR PROVIDE EVIDENCE, THEY WERE PRECLUDED FROM DOING SO BY THE OBJECTIONS OF THE APPELLEE AND THE RULINGS OF THE COURT.

The Appellee has gone to great lengths to argue that the Appellants have failed to carry their burden. First, as explained above, it was the Appellee's burden; and second, more critically, the Appellants were precluded from offering the exact evidence that the Appellee argues the record is lacking. The Appellee consistently objected to Appellant Barry Fine's testimony based on hearsay. The Appellant argued the following before the court:

Mr. Breslin: Judge, I believe that I need to establish on the record the relevance of the testimony of the witnesses, and I'm attempting to do that.

Mr. Ponsoldt's argument is that I need to do that in the form of an affidavit. I find . . . that that is a little bit unusual when I have live testimony and he can cross examine.

(A. App. 119)

This Court has previously held that "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” may be used to reflect evidence in support to transfer venue. *Wynn Drywall, Inc. v. Aequicap Program Adm’rs, Inc.*, 953 So. 2d 28, 30 (Fla. 4th DCA 2007). The attempt to introduce this material and relevant evidence by way of testimony is a method that should have been allowed by the trial court.

The trial court erred in sustaining the Appellee’s objections as this limitation in testimony goes as far as creating a due process violation. The Appellants were precluded from being afforded a full and fair opportunity to be heard and provide evidence. *See Cnty. Of Pasco v. Riehl*, 635 So. 2d 17, 18 (Fla. 1994) (stating that due process requires that each litigant be given a full and fair opportunity to be heard); *see also Vollmer v. Key Dev. Props.*, 966 So. 2d 1022 (Fla. 2d DCA 2007) (holding that due process rights were violated when the trial court failed to provide the mortgagor with an opportunity to testify, cross-examine witnesses, or argue his position).

The trial court therefore abused its discretion in making findings of fact unsupported by the record, ignoring the Appellee’s

burden, speculating as to evidence, and rejecting the only evidence that was relevant to the forum *non conveniens* analysis.

### CONCLUSION

In sum, as detailed above, the Appellee fails to give an accurate representation of the statement of the facts and case on appeal by arguing details that were not before the trial court and are not at issue in this appeal regarding a transfer of venue. The Appellants properly sought a venue transfer for the convenience of the majority of parties and witnesses. The trial court erred in ruling on pure unsupported speculation as to what the Appellee could do without any basis in fact whatsoever and without considering the substantial evidence presented by the Appellants in the form of witness affidavits and the testimony of Appellant Barry Fine.

The parties, aside from the Appellee, and material witnesses, aside from the Appellee's husband, all either reside in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, or it would be more convenient for them to travel to Miami-Dade County, Florida than to Martin County, Florida.

The Appellants will be prejudiced and the material witnesses

will be substantially inconvenienced, as well as exposed to undue expense, if venue continues in Martin County, Florida.

In consideration of the three (3) statutory factors set forth by Section 47.122 of the Florida Statutes, a transfer of venue of this action to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida is both warranted and proper.

WHEREFORE, based on all of the foregoing arguments and legal authorities, Appellants Barry Fine and Richard Baron respectfully request that this Court reverse the trial court's June 21, 2023 Order denying the Appellants' Verified Motion to Transfer Venue, and remand this matter with instructions that venue be transferred to the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida, as well as render any and all further relief deemed just and proper.

#### Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed with the Clerk of the Courts and served via email through the Florida Courts eFiling Portal in accordance with Rule 2.516 of the Florida Rules of Judicial Administration upon all counsel of record.

On September 22, 2023.

Respectfully submitted,

**Schwartz | Breslin PLLC**

**s/ Jerrell Breslin**

Jerrell Breslin Esq.  
Fla. Bar # 269573

**s/ Jonathan Noah Schwartz**

Jonathan Noah Schwartz, Esq.  
Florida Bar No. 1014596

Emails: [JB@JSJB.Law](mailto:JB@JSJB.Law)  
[JS@JSJB.Law](mailto:JS@JSJB.Law)  
[EService@JSJB.Law](mailto:EService@JSJB.Law)

Schwartz | Breslin  
Attorneys at Law  
The DuPont Building  
169 East Flagler Street  
Suite 700  
Miami, Fl 33131  
Tel.: 305-577-4626  
Fax.: 305-577-4630

Certificate of Type, Size and Style

I HEREBY CERTIFY that the brief of Appellant is submitted in 14 point proportionately spaced Bookman Old Style font and the electronic version in which this brief is submitted has been scanned to be free of viruses, by McAfee Anti-Virus for Windows.

**s/ Jerrell Breslin**